THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 577
[Record No. 2020 232 JR]

BETWEEN

DIARMIUD KEANE

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Mr. Justice Heslin delivered on the 30th day of July, 2021.

Introduction

1. The applicant was involved in an incident on 15 April 2017 which gave rise to an investigation and a disciplinary process pursuant to the Garda Síochána (Discipline) Regulations 2007 (S.I. no. 2014 of 2007) (referred to in this judgment as "the 2007 Regulations" or "the Regulations"). The disciplinary process commenced in 2017 with the appointment of a garda superintendent to investigate potential breaches of Garda discipline on the part of the applicant. The process included, thereafter, the establishment, by the respondent, of a 2 - person Board of Inquiry in June 2018, which Board conducted an oral hearing in February 2019. At all material times the applicant admitted his guilt in respect of the charges proffered against him. The aforesaid Board made findings in respect of breach of discipline and, as per its function under the 2007 Regulations, the Board recommended a penalty. The specific penalty recommended by the Board was the deduction of a week's pay.

2. The respondent is not obliged, under the 2007 Regulations, to accept the penalty recommended by the Board and he did not do so. Instead, and in accordance with the 2007 Regulations, the respondent, in March 2019, gave notice of his proposal to impose a far more severe sanction, namely to require the applicant to resign from An Garda Síochána as an alternative to his dismissal. The applicant made submissions against the foregoing course of action and, in June 2019, the respondent gave notice that he had decided to impose the disciplinary sanction which he had previously proposed, namely, to require the applicant to resign as an alternative to being dismissed.

3. In accordance with the 2007 Regulations, the applicant appealed against the foregoing decision and an Appeal Board was established by the respondent, pursuant to the Regulations, to hear that appeal. This 3-person Appeal Board (comprising of a Senior Counsel selected by the respondent to act as "Chair", a Garda Assistant Commissioner, also selected by the respondent, and a member of the Garda Representative Association), heard an appeal over two days, i.e. 25 November 2019 and 09 December 2019.

4. The Appeal Board did not uphold the respondent's decision that the applicant be required to resign as an alternative to dismissal. Instead, the unanimous determination of the Appeal Board was to substitute, in lieu of the requirement to resign as an alternative to dismissal, a total of 9–weeks reduction in pay and a reprimand. The Appeal Board's decision was communicated to the applicant and to the respondent and the latter was,

pursuant to the Regulations, required to implement the appeal board's decision within seven days.

5. Rather than accepting the Appeal Board's decision which had been made pursuant to the 2007 Regulations, that the applicant's dismissal was not appropriate, the respondent invoked, on the seventh day following the Appeal Board's decision, the provisions of s. 14 of the Garda Síochána Act 2005 ("the 2005 Act"). That section confers, on the respondent, powers in respect of the summary dismissal of members of An Garda Síochána.

6. At the heart of this case is the applicant's assertion that the respondent is not entitled to invoke s. 14 of the 2005 Act in the relevant circumstances. In particular, the applicant argues that, in all the circumstances of the present case, it was inconsistent with fair procedures and constitutional justice for the respondent to invoke s. 14 of the 2005 Act. The applicant also asserts that there is no rational basis for the respondent now determining that the applicant should be dismissed.

7. The applicant argues that the decision made by the Appeal Board to impose a significant financial sanction and a reprimand, instead of the requirement that the applicant resign or be dismissed, represents the decision which is legally binding on all parties.

The proceedings

8. On 16 March 2020, this Court (Meenan J.) made an order granting leave to the applicant to seek judicial review in respect of the reliefs set out at para. "(d)" of the applicant's Statement of the same date, on the grounds set out at para. "(e)". Furthermore, a stay was granted in relation to any further processes or procedures in respect of the applicant's proposed dismissal, pending the determination of the within proceedings. Other than the question of a stay etc., the relevant relief sought by the applicant at (d) is as follows:-

> *"1. An order of certiorari quashing the proposal of the Garda Commissioner dated 12th day of March, 2020, to dismiss the applicant from An Garda Síochána;*
>
> *2 An order of mandamus requiring the respondent to restore the applicant to duty . . .".*

9. With regard to para. (e) of the applicant's statement of grounds, it is fair to say that it comprises both a setting out, in chronological order, of facts relied on insofar as the sequence of events said by the applicant to be relevant is concerned, followed by pleas of a legal character. As a result of a careful consideration of the entirety of the pleadings comprising all affidavits and exhibits, it is possible to set out, in some detail, facts which are not in dispute, insofar as the chronology of relevant events is concerned and later in this judgment, I will do so. As to the pleas of a legal nature contained in the statement of grounds, the contents of paras. 4 – 14 of the statement of grounds include pleas to the following effect: -

- Having initiated a disciplinary process provided for in the Regulations, the respondent is obliged to adhere to the requirements ordained by the Regulations;

- Whilst s. 14 of the 2005 Act may be a "stand – alone" provision, it is of material significance that the respondent chose to invoke Part 3 of the Regulations in the applicant's case (reference being made to the Supreme Court's decision in *McEnery v. Garda Commissioner* [2016] IESC 66 which noted that Part 3 of the Regulations provides for a comprehensive process for dealing with an alleged serious breach of discipline);

- Although the respondent invoked the Regulations, he did not deem it appropriate to invoke the power of summary dismissal available under Regulation 39. Instead, he decided to hold a Regulation 23 inquiry and, in the circumstances, the respondent is obliged to respect the outcome of that process;

- The mere existence of an alternative power under s. 14 of the 2005 Act is not a sufficient lawful basis to erase the fact and result of an entire disciplinary process already deployed and concluded, just because the respondent is not happy with the result;

- In the circumstances, the respondent was not within his rights to ignore the disciplinary process deployed and concluded under the Regulations, by invoking s. 14 of the 2005 Act;

- Part 3 of the Regulations was not only invoked, it was fully deployed and ultimately resulted in the Appeal Board overturning the respondent's decision that the applicant resign or otherwise be dismissed. In these circumstances, it is contrary to the intention, purpose and spirit of the Regulations, and the 2005 Act from which they derive, that the respondent should ignore the Appeal Board's determination and invoke s. 14;

- The applicant remained a serving member of An Garda Síochána during the relevant period and performed a range of duties without adverse issue and many positive testimonials from his immediate superiors;

- The applicant had been suspended in the aftermath of the allegations but had been restored to full operational duties in December 2017 and the applicant was a fully serving member of An Garda Síochána at the time the Board of Inquiry recommended that a fine was the appropriate sanction;

- There is no evidence to suggest that public confidence was undermined and there is nothing to support the respondent's rationale for the applicant's dismissal;

- The applicant's suspension is invalid and he should be restored to duty;

- There is no rational basis for the respondent now determining that the applicant should be dismissed when, following the recommendation of the Board of Inquiry,

with which he disagreed, the respondent determined that the appropriate sanction was the applicant's resignation as an alternative to dismissal;

- The upgrade in the sanction can only rationally be explained in the context of the respondent seeking impermissibly to pigeonhole the disciplinary breach within the ambit of s. 14 of the 2005 Act;

- The respondent relies on the guilty finding in the disciplinary proceedings and has grounded his proposal to dismiss the applicant on the basis of his conduct on 15 April 2017;

- The proposal for s. 14 dismissal was only triggered by the decision of the Appeal Board to overturn the penalty decided upon by the respondent and to substitute a substantial fine;

- It is fundamentally unfair on the part of the respondent to initiate a process and, whilst ignoring or otherwise declining to implement the results thereof, notwithstanding that he is so mandated by statute, to "cherry pick" aspects from that regulatory disciplinary process, for the purposes of grounding a dismissal under an alternative statutory provision;

- Without prejudice to the foregoing, the Board of Inquiry unanimously held that a fine was the appropriate sanction for the applicant's disciplinary breaches. Furthermore, there were numerous positive testimonials from Garda colleagues, including supervisors, that indicated their confidence and willingness to work with the applicant. In the circumstances, the decision of the respondent flies in the face of reason and common sense and is otherwise not supported by the facts;

- The decision of the respondent does not comply with natural and constitutional justice;

- The respondent had regard to irrelevant matters and he failed to have regard to relevant circumstances and the respondent's ultimate decision reflects a pre – judgment.

10. It is fair to say that the present proceedings involve the interplay between the provisions in the 2007 Regulations and the provisions in the 2005 Act, in particular, s. 14. That being so, it is appropriate at this juncture to look at the relevant provisions, as follows.

S. 123 of the Garda Síochána Act 2005

11. S. 123 of the 2005 Act is entitled *"Disciplinary regulations"* and it begins as follows:-

> *"123. — (1) The Minister may, after consulting with the Garda Commissioner and with the approval of the Government, make regulations concerning the maintenance of discipline in the Garda Síochána, including, but not limited to, regulations relating to the matters provided for in subsections (2) to (5)".*

12. Sub-section (2) of s. 123 goes on to state that the Regulations may specify the acts or omissions that may be the subject of disciplinary action and then goes on to include a list of certain matters. Sub-section (3) makes clear that the Regulations may also provide for the procedures to be followed if it appears or is alleged that an act has been done, or an omission made, that may be the subject of disciplinary action or if a complaint is referred to the Garda Commissioner or if the Ombudsman Commission, in a report, makes a certain recommendation. Sub-section (4) states that Regulations relating to the procedures to be followed in the circumstances referred to in subs. (3) may include certain matters and it goes on to specify an investigation and the manner in which same is to be conducted; the making of recommendations or reports following an investigation; hearings by a board to determine whether an act or omission was done or made; the taking of disciplinary action; and an appeal from a determination.

13. Sub-section (5) makes clear that the Regulations may also provide for the establishment of a board; specify the powers of a board; specify the persons entitled to attend hearings before a board and the sub-section goes on to refer to the powers in respect of a board which the Regulations may provide for, as well as making clear that the Regulations may also provide for the establishment of a body to hear appeals and specify the powers of the appeals body.

14. There is no doubt about the fact that the 2007 Regulations were made by the relevant Minister in exercise of the powers conferred on him by s. 123 of the 2005 Act. Before looking at the wording of s. 14 of the 2005 Act, it is appropriate to turn to the 2007 Regulations in order to see what they provide.

Garda Síochána (Discipline) Regulations 2007

15. The 2007 Regulations comprise Parts 1 – 6, followed by a schedule which details acts or conduct constituting breaches of discipline. Part 1 is entitled "Preliminary" and, among other things, it makes clear that *"Commissioner"* means (a) the respondent; (b) a deputy or assistant commissioner when performing the functions of the respondent in accordance with an authorisation in that behalf under s. 32, or (c) a member of An Garda Síochána not below the rank of chief superintendent, when performing any of the Commissioner's functions under these regulations that have been duly delegated to him or her.

16. Section 10 of Part 1 (i.e. Regulation 10) is entitled *"Informal resolution of minor breaches"* and it is uncontroversial to say that this is the first option available in the context of dealing with what are regarded as minor breaches of discipline and dealing informally with same might be by way of *"advice, caution or warning as the circumstances may require"*.

17. What might be considered to be a second option in terms of breaches is set out in Part 2 which, from Regulation 14 onwards under the heading *"Less serious breaches of discipline"*. That section goes on to deal with the appointment of a *"deciding officer"* and specifies, inter alia, the disciplinary actions available, namely: -

"(a) reduction in pay not exceeding 2 weeks' pay,

(b) reprimand;

(c) warning;

(d) caution, or

(e) advice".

Part 2 sets out a procedure to be followed, including where the breach of discipline is admitted by the member concerned addresses issues such as the conduct of interview with the deciding officer, the report of the interview, the review of the deciding officer's decision and the conduct of a review.

Moving up the scale in terms of seriousness, Part 3 is entitled *"Serious breaches of discipline"* and the provisions of Part 3 (from Regulation 22 onwards) are of particular relevance in the present case. Part 3 of the 2007 Regulations runs from internal page 24 to 46, inclusive, of S.I. no. 214 of 2007. It is not necessary to set it out, in full, in this judgment. A number of matters are, however, worth referring to.

18. Regulation 22 identifies what is meant by *"serious breach of discipline"* as well as specifying four different types of disciplinary action, beginning with the most serious. A *verbatim* quote is as follows: -

22. In this Part –

. . .

"serious breach of discipline" means a breach of discipline which, in the opinion of the Commissioner, may be subject to one of the following disciplinary actions:

(a) dismissal;

(b) requirement to retire or resign as an alternative to dismissal;

(c) reduction in rank;

(d) reduction in pay not exceeding 4 weeks' pay.

19. In the manner which will be explained in detail in this judgment, it was the action specified at (b) the respondent chose in the present case. At this juncture, I want to make clear that, in my view, there is a material distinction between each of the four disciplinary actions referred to in Regulation 22. This seems to me to be of particular significance in the present case. To the extent that it is argued that there is no meaningful distinction between, on the one hand, being *dismissed*, and the other hand being *required to resign as an alternative to dismissal*, I take an entirely different view. If a former member can, with honesty, inform a potential new employer that they resigned from their previous role, they are in a wholly different position to a someone who must tell a prospective employer that they were dismissed from their previous position. Quite

apart from the way in which that distinction manifests itself in the context of the job market, if one has, as a matter of fact, resigned as opposed to having been dismissed, there is an obvious material difference insofar as bidding farewell to colleagues, encountering former colleagues in the future, conveying the information to family and friends and dealing, on a personal level, with the severing of the relationship between the Force and the member. The foregoing is true, it seems to me, regardless of the nature of the employment but all the more true, in my view, given the particular nature of the organisation in question, the importance of the work done and the consequences of having on one's record the fact of *"dismissal"* as opposed to *"resignation"*, having regard to issues such as the enormous trust reposed in members of An Garda Síochána and the likely adverse reaction of people, be they potential employers, family, strangers or anyone else to the fact of a member's dismissal.

20. Regulation 23 is entitled *"Action by Commissioner on alleged serious breach"* and sub-section (1) of Regulation 23 states: -

> *"(1) Where it appears that a member may be in breach of discipline and subject to one of the disciplinary actions specified in Regulation 22, the Commissioner shall appoint a member (in this Part referred to as the "investigating officer") to investigate the alleged breach."*

21. Such an investigation officer was appointed under the foregoing Regulation in the present case. Regulation 24 is concerned with the *"Conduct of investigation"* and it provides, inter alia, that the investigating officer must inform the member concerned of the grounds said to constitute the alleged breach of discipline and that they have been appointed to carry out an investigation, which the investigating officer shall carry out alone or with the assistance of other members, with the approval of the respondent. As well as specifying the rank of relevant members in the context of an investigation and referring to the obligation on the investigating officer to inform the member under investigation that they may seek advice from their representative association and may be accompanied at interview, sub-section (5) of Regulation 24 requires the investigating officer to submit a written report to the respondent. The foregoing occurred in the present case.

22. Regulation 25 is entitled *"Establishment of board of inquiry"* and states as follows:-

> *(1) If it appears from the report of the investigation that the member concerned may have committed a serious breach of discipline, the Commissioner shall establish a board of inquiry -*
>
> *(a) to determine whether such a breach has been committed by the member concerned, and*
>
> *(b) if so, to **recommend** to the Commissioner the disciplinary action to be taken in relation to the member,*
>
> *and shall notify the member accordingly.*

(2) The board shall consist of 3 persons appointed by the Commissioner.

(3) A person who has been involved in any capacity in relation to an earlier aspect of the case may not be so appointed.

(4) One member of the board (who shall preside and is referred to in this Part as the "presiding officer") shall be a person selected by the Commissioner from a panel nominated by the Minister.

(5) Each person on the panel shall be a judge of the District Court or a practising barrister, or practising solicitor, of not less than 10 years' standing.

(6) One of the other members of the board shall be a member of a rank not below that of chief superintendent and the other a member of a rank not below that of superintendent. (emphasis added)

23. It is not in dispute that, in the present case, the respondent appointed a Garda superintendent to investigate, nor is it in dispute that, at all material times, the applicant cooperated with the investigation. It is also a fact that, in accordance with the provisions of Regulation 25 (1), the respondent established a board of inquiry. I have underlined the word *"recommend"* which is used in Regulation 25 (1) (b) in order to highlight the fact that, under Regulation 25, the board of inquiry does not have the power to impose binding sanctions. Rather, their role, in addition to determining whether a breach of discipline occurred, is to *"recommend"* to the respondent the disciplinary action to be taken. As will be seen when the focus turns to the facts of this case, such a recommendation was made, which recommendation the respondent declined to follow, giving rise to further steps, all of which were taken pursuant to the 2007 Regulations.

24. Before looking at further provisions in the Regulations, it is appropriate to note that the composition of the board of inquiry has been laid down by Regulation 25 (4) (5) and (6) and there is no question in the present case of the board of inquiry being other than properly comprised of three persons of appropriate seniority and qualification.

25. Regulation 26 is entitled *"Objection to board member"* and no such issue arises in the present case. Regulation 27 deals with *"Pre – hearing procedure"*, whereas Regulation 28 concerns *"Requirement to give information etc. to board"*. No issue arises as regards the foregoing. Regulation 29 concerns *"Procedure at hearing"* and subsection (8) of Regulation 29 specifies that:- *"An inquiry shall be held in private"*. As to the latter issue, reference will be made later in this decision to certain media coverage, including articles which appeared "online" at various points giving rise to an inference that details may well have been "leaked" as regards the disciplinary process against the applicant which process was conducted pursuant to the 2007 Regulations. There is no evidence before this Court, nor is the suggestion made, that the applicant ever "leaked" what occurred at the board of inquiry, or at the later appeal board hearing.

26. Regulation 30 provides that, within 21 days of the conclusion of the inquiry, the presiding officer of the board of inquiry shall submit a written report to the respondent and that was done in the present case. Sub-section (2) of Regulation 30 specifies what that report shall include. Its contents must include, in addition to statements/any admission made by the member concerned, any other documents provided to the board, the verbatim record of the proceedings and the determination as to whether the member is in breach of discipline and: *"(c) Its recommendation as to any disciplinary action to be taken in respect of the breach"*

27. Regulation 31 concerns *"Action by Commissioner on report"* and inter alia requires the respondent, within 14 days after the receipt of the report, to decide on the appropriate disciplinary action, which decision must be communicated to the member within 7 days after the respondent decides on the disciplinary action to be taken or the recommendation to be made. This was done in the present case. Sub-section (5) of Regulation 31 makes clear that Regulation 31 is subject to Regulation 32.

28. Regulation 32 is entitled *"Procedure where Commissioner proposes to impose or recommend a more severe disciplinary action than that recommended"*. Regulation 32(1) makes clear that if the respondent proposes to impose or recommend a disciplinary action which is more severe than that recommended by the board of inquiry, he is required to notify the relevant member of the proposal, as soon as practicable, and to request the member *"…to submit to the Commissioner any comments that he or she may wish to make in relation to the proposal within 10 days after the date of the notification."* As will be seen when the facts are analysed, this also occurred in the present case. Sub-section (2) of Regulation 32 requires the respondent to decide on the disciplinary action to be imposed or recommended, after the expiration of the period allowed for comments by the member and after the respondent has considered any comments made, whereas Regulation 33 is entitled *"Appeal by member concerned"*. There was an appeal in the present case.

29. Regulation 33 makes clear that, within 7 days of receiving notification of the respondent's decision as regards disciplinary action to be taken or recommended, the member concerned may give notice of an appeal to the respondent against either, or both of, the board of inquiry's determination under Regulation 30(2)(b) (as to whether the member is in breach of discipline) *or* the disciplinary action decided on or to be recommended by the respondent. In the present case the applicant appealed against the disciplinary action only. Sub-section (2) of Regulation 33 deals with the form of the notice of appeal, whereas subsection (3) makes clear that the appeal may be based on one or more of the grounds specified (at (a) to (e), inclusive, of that sub-section).

30. Regulation 34 is entitled *"Appeal Board"* and begins as follows: -

    (1) The Commissioner shall, as soon as practicable after receiving notice of appeal from the member concerned, establish a board (in these regulations referred to as an "Appeal Board" to hear and determine the appeal and shall transmit the notice of appeal to it.

(2) An Appeal Board consists of 3 persons.

(3) The chairperson of an Appeal Board shall be selected by the Commissioner from a panel nominated by the Minister.

(4) Each member of the panel shall be a judge of the District Court or a practising barrister, or practising solicitor, of not less than 10 years' standing.

(5) The other members of an Appeal Board shall be -

(a) either the Commissioner or a member selected by him or her from a panel consisting of the deputy commissioners and assistant commissioners, and

(b) either –

(i) a member selected by the representative association of which the member concerned is a member from a panel consisting of the members of the central executive committee of that association or

(ii) where the member concerned is not a member of a representative association, a member selected by the Commissioner.

(6) A member referred to in paragraph (5) shall not be appointed as a member of an Appeal Board to consider a case referred to it if he or she has been involved in any capacity in relation to an earlier aspect of the case.

(7) Subject to these regulations an Appeal Board shall determine its own procedure."

31. It is clear from the foregoing that the composition of an Appeal Board is mandated by legislation. There is no dispute as to the fact that the Commissioner established such an Appeal Board in circumstances where the applicant appealed the respondent's decision that he should resign from An Garda Síochána or face dismissal.

32. Regulation 35 concerns *"Procedure before hearing of appeal"* and a process is outlined as regards the calling for submissions, the notification of the time date and place of the hearing of the appeal and the power of the Appeal Board to refuse to consider an appeal where notice was not given on time or where the grounds of appeal are considered by the members of the Appeal Board to be frivolous vexatious or without substance or foundation. Regulation 35 also requires the Appeal Board to inform the respondent of a decision to refuse to consider an appeal as well as dealing with the withdrawal of an appeal by a member prior to the appeal being heard and the consequences of same insofar as the respondent's power to proceed to implement or recommend the disciplinary action decided on by the respondent. No issue arises in the present case insofar as Regulation 35 is concerned, in that there was compliance with the relevant requirements.

33. Regulation 36 is entitled *"Proceedings at Appeal Board"*, wherein, *inter alia*, the powers of the Appeal Board are set out insofar as the hearing of evidence is concerned, as well as the entitlement of the member to be represented at the appeal and to make oral submissions, in person or through an official, member, barrister or solicitor. Regulation

36 also specifies who may be present and sub-section (4) of Regulation 36 makes clear that *"The chairperson of an Appeal Board may administer an oath or take an affirmation".*

34. Regulation 37 concerns the *"Decision of Appeal Board"* and sub-section (1) outlines the Appeal Board's powers both in respect of an appeal against a determination of a board of inquiry (dealt with in subs. (1) of Regulation 37) or an appeal against a decision of the respondent concerning disciplinary action. Regulation 37(2) states as follows: -

> *(2) Where an appeal is against a decision of the Commissioner in relation to disciplinary action, an Appeal Board may –*
>
> *(a) affirm the decision, or*
>
> *(b)* ***substitute another specified disciplinary action of a less serious nature.***
>
> *(3) An Appeal Board shall communicate its decision on the appeal and the reasons for it to the Commissioner and the member concerned within 7 days after the conclusion of the hearing.*
>
> *(4) Where the decision of an Appeal Board is not unanimous, only the decision of the majority of its members shall be communicated under para. (3).*
>
> *(5) The Commissioner shall implement the decision of the Appeal Board within 7 days after that decision is communicated to him or her…". (emphasis added)*

35. I have underlined certain provisions given their relevance. As will be seen when the facts are set out in more detail later in this judgment, the Appeal Board did what it was entitled to do pursuant to Regulation 37(2)(b). It substituted specified disciplinary action of a less serious nature (deduction of 9-weeks' pay and a reprimand) in place of the respondent's decision (that the applicant be required to resign as an alternative to dismissal). It is appropriate to observe that the mandatory term *"shall"* is used in Regulation 37(5). In the present case the respondent did not implement the decision of the Appeal Board within 7 days after that decision was communicated to him, nor did he do so at any other time. Nine weeks' pay *was* deduced from the applicant but, plainly, this does not constitute the implementation, in full, of the Appeal Board's decision, in circumstances where the respondent has decided to dismiss the applicant summarily relying on s. 14 of the 2005 Act, which he invoked on the seventh day after the Appeal Board's decision.

36. For completeness, Regulation 38 is the last of the Regulations which appear in Part 3 and it refers to *"Absence of member concerned"*, being of no relevance in the present case.

37. Part 4 of the 2007 Regulations is entitled *"Summary Dismissal"* and it is appropriate to quote the beginning of Regulation 39, which appears in the following terms: -

> *"Summary Dismissal of Member*

(1) Notwithstanding anything in these regulations and without prejudice to section 14(2), the Commissioner may, subject to this regulation, dismiss from the Garda Síochána any member (not being above the rank of inspector) whom he or she considers unfit for retention in the Garda Síochána.

(2) The power of dismissal conferred by this regulation shall not be exercised except where –

(a) the Commissioner is not in any doubt as to the material facts and the relevant breach of discipline is of such gravity that the Commissioner has decided that the facts and the breach merit dismissal and that the holding of an inquiry under these regulations could not affect his or her decision in the matter,

(b) subject to paragraph (3), disclosure of the facts relating to the breach would, in the opinion of the Commissioner, be liable to affect the security of the State or to constitute a serious and unjustifiable infringement of the rights of another person, or

(c) the member concerned has failed to attend for duty over such a period and in such circumstances that it can be presumed that his or her intention has been to abandon his or her membership of the Garda Síochána.

(3) In a case referred to in para. (2)(b), the Commissioner shall consider whether, in the interests of the member concerned, some special inquiry can be held into the relevant breach of discipline which would not affect the security of the State or constitute a serious and unjustifiable infringement of the rights of another person.

(4) The power of dismissal conferred by this Regulation shall not be exercised –

(a) where the member concerned has completed his or her period of probation, without the consent of the Minister,

(b) where paragraph 2(a) applies, without the member concerned being informed of the material facts and the relevant breach of discipline, and

(c) except where para. 2(c) applies or where, despite reasonable efforts to do so, the whereabouts of the member concerned have not been established, without the member being given an opportunity of submitted to the Commissioner reasons against the proposed dismissal."

38. It is uncontroversial to say that the *"Summary dismissal"* power conferred on the respondent by Regulation 39 of Part 4 of the 2007 Regulations is a power the respondent chose not to invoke. Rather, at all material times, prior to 16 December 2019, the matter was dealt with pursuant to the powers conferred on the respondent by Part 3 of the 2007 Regulations, including, in particular, Regulations 23 (appointment by the respondent of an *investigating officer*), Regulation 25 (establishment by the respondent of *board of*

inquiry), Regulation 30 (*Report of board* submitted to the respondent), Regulation 31 (*Action by Commissioner on report*), Regulation 32 (*Procedure where Commissioner proposes to impose or recommend a more severe disciplinary action than that recommended*), Regulation 33 (*Appeal* by member concerned), Regulation 34 (*Appeal board*) and Regulation 37 (*Decision of Appeal Board*).

39. Counsel for the respondent emphasises the reference in Regulation 39 to s.14(2) of the 2005 Act and submits that this affirms the legislative intent that the respondent's powers pursuant to the disciplinary Regulations and the respondent's powers pursuant to s.14 of the 2005 Act are distinct. In my view, there could be no issue taken with that principle. It does not, however, dispose of the issue which is before this Court having regard to the pleaded case. Having looked closely at the 2007 Regulations in respect of a disciplinary process which in the present case was conducted up to and including a conclusion, binding on the respondent, but one which he did not implement, it is now appropriate to turn to the provisions of s.14 of the 2005 Act.

Section 14 of the Garda Síochána Act 2005

40. Given its relevance to the present proceedings it is appropriate to set out in full s.14 of the 2005 Act, which provides as follows: -

"14. – (1) The Garda Commissioner may appoint, subject to and in accordance with the regulations, such numbers of persons as he or she sees fit to the ranks of Garda, Sergeant and Inspector in the Garda Síochána.

(2) Notwithstanding anything in this Act or the regulations, the Garda Commissioner may dismiss from the Garda Síochána a member not above the rank of Inspector if –

(a) the Commissioner is of the opinion that –

(i) by reason of the member's conduct (which includes any act or omission), his or her continued membership would undermine public confidence in the Garda Síochána, and

(ii) the dismissal of the member is necessary to maintain that confidence,

(b) the member has been informed of the basis for the Commissioner's opinion and has been given an opportunity to respond to the stated basis for that opinion and to advance reasons against the member's dismissal,

(c) the Commissioner has considered any response by the member and any reasons advanced by the member, but the Commissioner remains of his or her opinion and

(d) the Government consents to the member's dismissal.

(3) Subsection (2) is not to be taken to limit the power to make or amend Disciplinary Regulations."

The pleadings

41. Mr. Dan Murphy is the applicant's solicitor and, on 15 March 2020 he swore an affidavit in which he averred that, so much of the statement of grounds as relates to his acts and deeds is true and so much of it as relates to the acts and deeds of others, he believes to be true. He goes on to give an account of the sequence of events, in the context of acting for the applicant. Mr. Murphy exhibits a number of documents to which I will refer later in this judgment. He also swore a supplemental affidavit on 19 March, 2020 in which he exhibited a complete copy of the transcript concerning the hearing before the Board of Inquiry on 28 February, 2019.

42. On 15 March, 2020, the applicant swore a short affidavit in which he averred that, having read the statement of grounds, so much of same as relates to his acts and deeds is true and so much of it as relates to acts and deeds of other persons, he believes to be true.

43. The Statement of Opposition is dated 02 September, 2020. As well as making certain admissions insofar as the factual narrative detailed in the applicant's statement of grounds, it contains numerous "denials" in respect of the contents of the applicant's statement of grounds. It is fair to say that the statement of opposition takes issue with the legal case made by the applicant even though, in the manner I will presently explain, much of the facts are not in dispute. As to the legal position adopted by the respondent in the statement of opposition, pleas of particular relevance include the following: -

- *"…it is denied that having initiated the disciplinary process provided for in the Regulations, that the Respondent is thereby bound to accept the outcome of the disciplinary process" (para. 10);*

- *"…the holding of a disciplinary enquiry does not and cannot have the effect of displacing or precluding the exercise of the power conferred on the Respondent by Section 14 of the 2005 Act" (para. 11);*

- *"The Respondent at no time, made any representation to the applicant that he would not invoke the powers vested in him by Section 14 of the 2005 Act, nor would it have been proper to give such a representation" (para. 13);*

- *"…it is denied that there is no basis or no rational basis for the Respondent to determine that the applicant should be dismissed" (para. 16);*

- *"…the decision of the Respondent was based on the conduct of the Applicant and its impact on public confidence in An Garda Síochána" (para. 17);*

- *"It is denied that the ultimate decision of the [Respondent] reflects a prejudgment such as to vitiate the decision of the Respondent or otherwise…" (para. 20);*

- *"…the Respondent has lawfully invoked powers conferred upon him by Section 14(2) of the 2005 Act, as amended. The proposal of the respondent is lawful having regard to the breaches of discipline committed by the [Applicant] which breaches are not denied by the [Applicant]. The Respondent is of the opinion that*

by reason of such breaches of discipline by the Applicant would undermine public confidence in An Garda Síochána" (para. 23).

44. On 02 September, 2020 Chief Superintendent Margaret Nugent swore a short affidavit in which she averred, at para. 2, that she read the Statement of Opposition and so much of same as relates to her own acts and deeds is true and so much of same as relates to the acts and deeds of others, she believes to be true.

45. At this juncture it seems appropriate to point out that there would not appear to be anything in the statement of opposition or in the statement of grounds which relates to any acts on the part of Chief Superintendent Nugent. It is also appropriate to point out that the respondent chose not to swear any affidavit. Among the submissions made on behalf of the applicant is that, in addition to the "denials" contained in the statement of opposition being inappropriate and inconsistent with the obligations imposed on the respondent pursuant to O.84, r.22(5), to the extent that facts are asserted or matters are put forward in the statement of opposition, upon which the respondent seeks to rely, these are not verified by affidavit in accordance with O.84, r.22(4).

46. In particular, it is submitted by the applicant that Chief Superintendent Nugent does not verify facts with reference to her own knowledge and it is submitted that her *belief*, as referenced in para. 2 of her affidavit, does not constitute admissible evidence in respect of the facts and matters she purports to verify. It will be recalled that the statement of opposition states, at para. 23, with regard to breaches of discipline on the part of the applicant that: *"The respondent is of the opinion that by reason of such breaches of discipline the continued membership of the applicant would undermine public confidence in An Garda Síochána"*. The respondent has not sworn any affidavit. It seems to me that the respondent is the only person who can aver as to what opinion they hold. There is no suggestion whatsoever that Chief Superintendent Nugent is acting other than in good faith, but it seems to me that she cannot possibly verify, by affidavit, what opinion the respondent holds.

47. Order 84, r.22(4) and (5) states as follows:-

"(4) Any respondent who intends to oppose the application for judicial review by way of motion on notice shall within three weeks of service of the notice on the respondent concerned or such other period as the Court may direct file in the Central Office a statement setting out the grounds for such opposition and, if any facts are relied on therein, an affidavit, in form no. 14 in appendix T, verifying such facts, and serve a copy of that statement and affidavit (if any) on all parties. The statement shall include the name and registered place of business of the respondent's solicitor (if any).

(5) It shall not be sufficient for a respondent in his statement of opposition to deny generally the grounds alleged by the statement grounding the application, but the respondent should state precisely each ground of opposition, giving particulars where appropriate, identify in respect of each such ground the facts or matters

relied upon as supporting that ground, and deal specifically with each fact or matter relied upon in the statement grounding the application of which he does not admit the truth (accept damages, where claimed).”

48. In submissions, counsel for the applicant also placed reliance on the decision of the Chief Justice delivered on 5 February, 2019 in *RAS Medical Limited v. Royal College of Surgeons in Ireland* [2019] IESC 4. In that decision the Chief Justice set out an analysis with regard to the status of discovered documents, beginning with a restatement of first principles including that factual issues in all proceedings are determined on the basis of evidence properly before the court. It is fair to say that the decision in *RAS Medical Limited* makes clear that the mere fact that a document is exhibited does not constitute proof of the contents of same in the context of the rule against hearsay which rule applies in substantive judicial review proceedings.

49. It is also fair to say, however, that the vast majority of the documents which are said to be relevant in the present proceedings comprised documents which were exhibited by Mr. Murphy, solicitor for the applicant and there is no dispute as to the fact that these documents were generated and sent by the relevant authors or produced by the relevant bodies. There are a limited number of documents exhibited by Chief Superintendent Nugent, namely, a suspension order dated 17 December, 2019; a suspension order dated 01 February, 2020; a 12 March, 2020 letter from the respondent to the Policing Authority seeking the latter’s consent in respect of the applicant’s dismissal; a 19 March, 2020 letter from the Policing Authority to the respondent and a brief letter from Assistant Commissioner David Sheahan to the policing authority, dated 27 March, 2020.

50. I do not understand the applicant to be making the submission that the documents exhibited by Chief Superintendent Nugent are inadmissible or, for that matter, that any documents which the applicant’s solicitor has exhibited are inadmissible. I am however, conscious of what O.84, r.22 provides and it is a matter of fact that the respondent has not sworn any affidavit verifying the contents of the statement of opposition. I want to make clear at this juncture that the decision this court has reached does not hinge on the absence of an affidavit on the part of the respondent or my view that Chief Superintendent Nugent cannot give evidence of an opinion held by someone else. Nor, for that matter, does this court’s decision turn on the admissibility of evidence.

51. As to what Chief Superintendent Nugent has averred, I note the contents of paras. 3 to 6, inclusive. Paragraph 3 relates to what occurred before the Board of Inquiry and, in circumstances where there is a transcript and no issue whatsoever has been raised in respect of the accuracy of that transcript, I propose to look at the contents of same on the basis that it reflects what occurred. At para. 4, Chief Superintendent Nugent avers that the current suspension of the applicant does not relate to the outcome of the disciplinary process before the Appeal Board and she avers that a “new” suspension order was issued on 17 December, 2019, which she exhibits. She avers at para. 5 that the suspension order dated 17 December, 2019, which ran until 01 February, 2020, was the subject of a further suspension order covering the period 01 February, 2020 to 01 May,

2020 and she exhibits a February 2020 suspension order in that regard. At para. 6, Chief Superintendent Nugent avers that the respondent sought the consent of the Policing Authority to dismiss the applicant pursuant to s.14(2)(d) of the 2005 Act and she exhibits the relevant correspondence. The fact that the respondent did seek the consent of the Policing Authority and the fact that the latter advised that the matter would not be placed before the Policing Authority until such time as the present proceedings had been determined does not appear to be at all in dispute.

52. Having referred to the statement of grounds, the statement of opposition and the various affidavits sworn, I now propose to set out in some detail, the facts which emerge from an analysis of the entirety of the pleadings before this Court, in particular the affidavits and the documents exhibited thereto. As will become clear, much of the facts are not at all in dispute.

The facts in this case

53. The respondent joined An Garda Síochána on 11 September, 2009. In March 2012, he was appointed to the Garda Divisional Drug Unit. An incident occurred in County Cork on 15 April, 2017. The application before this Court does not involve a merits-based analysis and, therefore, it is unnecessary to go into the detail of the incident itself. A video of the activity in question subsequently appeared "online".

54. On 16 April, 2017 the applicant admitted his misbehaviour to garda authorities. Arising from the incident, the respondent appointed a garda superintendent, pursuant to the 2007 Regulations (which Regulations were made pursuant to s.123 of the 2005 Act) to investigate potential breaches of garda discipline on the part of the applicant. Earlier in this judgment I looked in some detail at the 2007 Regulations and it is not in dispute that a garda superintendent was appointed to investigate pursuant to Regulation 23(1). On 21 April, 2017 the applicant was suspended from duty.

55. On 25 September, 2017 the applicant voluntarily attended for interview with the garda superintendent who had been appointed as the *'investigating officer'* pursuant to Regulation 23(1). The applicant promptly admitted to his role in the events in question. The applicant willingly provided a statement and at all material times cooperated with the investigation. The applicant engaged in treatment, both residential and aftercare, following the incident in question.

56. On 21 December, 2017 the applicant's suspension was reviewed by the respondent and was lifted as provided for in Regulation 7 of the 2007 Regulations (which deal with *"suspension of member"*).

57. As of 25 December, 2017 the applicant was restored to full operational duties which he commenced at Cobh Garda Station. Thereafter, the applicant performed his duties as a member of An Garda Síochána without restriction.

58. By notice dated 25 June, 2019 entitled *"Establishment of Board of Inquiry, Regulation 25, Garda Síochána (Discipline) Regulations 2007 as amended"*, the respondent, following

receipt of the investigating officer's report, established a Board of Inquiry in order to determine whether the applicant had committed a disciplinary breach and, if so, to recommend the disciplinary action to be taken by the respondent in relation to same. The said notice dated 25 June, 2018 was signed by an assistant commissioner acting for and on behalf of the respondent.

59. It will be recalled that, earlier in this judgment, I made reference to Regulation 25 of the 2007 Regulations which provides for the establishment of a Board of Inquiry if it appears from the investigating officer's report that the member concerned may have committed a serious breach of discipline. Regulation 25 is specific as to the membership of the Board of Inquiry and this is clear from Regulation 25(4), (5), and (6). The 25 June, 2018 notice identified the three individuals whom the respondent appointed to the Board of Inquiry namely Mr. John Hussey, Solicitor (to act as "Presiding Officer"); Chief Superintendent Dominic Hayes, Kilkenny ("Board member 1"); and Superintendent David Nolan, Nenagh ("Board member 2"). It is uncontroversial to say that the decision taken by the respondent to establish the Board of Inquiry constituted a step taken by him under a statutory process which, at that juncture, the respondent had determined to be the appropriate process to employ being one which, on any analysis, would have legal implications for those involved in it.

60. In the wake of the incident, it was the subject of articles which appeared on a particular date in 2017 in the "Irish Independent", "Irish Daily Star" and the "Herald". On another date in 2017, shortly thereafter, the incident was the subject of further coverage in "The Irish Sun" and on the same date, received coverage on a website entitled "Extra.ie". In early 2018, the incident received coverage on a website entitled "Buzz.ie". Within days of that, the incident was the subject of coverage in early 2018 in the "Irish Mirror". There is no evidence before this Court that the applicant was ever identified by name.

61. On 28 February, 2019 an oral hearing took place before the Board of Inquiry, sitting at Cobh Garda Station. A transcript by Gwen Malone Stenography Services of that hearing by the Board of Inquiry has been exhibited by the applicant's solicitor. As that transcript makes clear, the hearing was presided over by Mr. Hussey in his role as presiding officer, with Chief Superintendent Hayes and Superintendent Nolan making up the other members of the 3-person Board of Inquiry. The investigating officer, Superintendent Eamon O'Neill, gave evidence and was questioned by the applicant's solicitor, Mr. Murphy. Evidence was also given by a Dr. Eugene Morgan to whom Mr. Murphy put questions as did members of the Board of Inquiry. Evidence was then given by the applicant who was questioned by Mr. Murphy and by members of the board. Inspector Michael Corbett also gave evidence as did Sergeant Donnacha Riordan who was questioned by Mr. Murphy and by members of the board. Submissions were then made by Mr. Murphy, with submissions also made by the investigating officer, following which the board gave its decision. It is clear that there were 4 charges of *"discreditable conduct"* alleged to constitute a *"breach of discipline"* within the meaning of Regulation 5 of the 2007 Regulations.

62. It is clear from the transcript, that at the very outset, the applicant stated *"I am admitting the breaches. I am guilty to all of them, the four counts"* (transcript p.7, line 7-8). As well as admitting his guilt at the outset, it is not disputed that the applicant neither anticipated nor agreed that a video of the incident might be uploaded and appear online. The foregoing is also reflected in the board of inquiry's decision which can be found between pp. 80 and 83, inclusive, of the relevant transcript and it is appropriate to set it out as follows: -

> *"DECISION OF THE BOARD*
>
> *PRESIDING OFFICER: Now, the Board have considered everything regarding these breaches, Garda Keane and the first thing to say is that you have acknowledged by your admissions in respect of the four breaches the lapse that happened. Your career started in 2009, so you are coming up to 10 years now. This incident happened in April, I think 2017.*
>
> *GARDA KEANE: That is correct.*
>
> *PRESIDING OFFICER: So you had quite a number of years of blameless service in the force.*
>
> *GARDA KEANE: That is correct.*
>
> *PRESIDING OFFICER: Certain things were happening in your life at the time and you made a bad error of judgment and you know that. You don't need me to tell you that because you are living with the consequences of it, right. You engaged with welfare services they were of great support I believe, the statements indicate that and the Board would hope that you would continue to engage with them.*
>
> *GARDA KEANE: I intend to.*
>
> *PRESIDING OFFICER: We have considered everything that was given in evidence today from Dr. Morgan, whom you saw on a number of occasions and your own evidence in which you confirmed that you attended the Rutland Centre voluntarily and that's also to your credit in facing up to the situation you are in. And you have also attended the sessions in St. Francis's Church there in Cork behind the Courthouse in Washington Street.*
>
> *You have had very impressive testimony given today by Inspector Corbett and by your Sergeant. You are clearly an effective member of An Garda Síochána and that has been acknowledged and that is to your credit.*
>
> *Your domestic situation seems to be more stable now that you are with your parents. You have got, obviously you are a father of three children and you are in regular contact with your children, which is great for them, great for you. It gives you that grounding.*

We have considered the submissions made by your Solicitor, Mr. Murphy and taking everything into account our view is that this was, it was a blip on a career. It was a bad lapse of judgment.

Unfortunately, that video is still out there and there is nothing you can do about that but, you know, the people you got involved with, they are not concerned about ethics, or morals, or correcting the record.

As I say you don't need me to preach to you. You know better than anyone.

May I just say you haven't lost everything at all. You have family; you have got your parents and you have got your three children. Your relationship with your partner is over. And you have got your career.

Coming to the issue of penalty, by the way I am speaking as Presiding Officer, but obviously on behalf of two Senior Officers here, the decision we have reached regarding penalty is we think it's appropriate we take the most lenient view. You have got, your financial situation is tight. You have got maintenance payments in respect of your children and I know you are paying back a liability to the Revenue. But there has to be a sanction because there were breaches and you freely admitted them. You didn't have to. As your solicitor said, we didn't have to go to the trouble of calling in twenty witnesses to prove the matter. You acknowledged it yourself and that's also to your credit.

The sanction, and it is only a recommendation on our behalf to the Commissioner, but it's a recommendation we hope he will accept, it is essentially a reduction in wages of one-week. That is in respect of the entirety of the breaches. It is not a reduction in wages for one-week in respect of each. That is the global penalty, if you follow me and I think that one week's wages is €956.04. That is our recommendation. Personally speaking I wish you well in the future".

63. I would emphasise, once more, that this Court is not engaging in a merits-based analysis, insofar as the issue which this Court has to decide. It is, however, important to look at the facts in terms of the chronology of relevant events in order to understand the factual context in which the present claim is brought. It is plain from the ruling of the Board of Inquiry that the Board took the view that a financial penalty was the appropriate one and this is what the Board of Inquiry recommended. As explained earlier, a recommendation by the Board of Inquiry is not binding on the respondent, the Board of Inquiry's function being two-fold, i.e. firstly to determine whether the member is in breach of discipline and, if so, the conduct constituting the breach and, secondly, to make its recommendation as to any disciplinary action to be taken in respect of the breach. It is a matter of fact that, at all material times, the applicant admitted his involvement in the incident and, at the outset of the hearing before the Board of Inquiry he acknowledged his guilt in respect of all four charges of discreditable conduct as the transcript records. Thus, once the Board of Inquiry completed its work, there was no doubt about the fact of the breach of discipline or the nature of same. All relevant information in respect of what had occurred

on 15 April, 2017 was known and had been admitted to and a recommendation as to an appropriate penalty was made in light of that.

64. It is appropriate to note that no new evidence has emerged since 28 February 2019 in respect of any act or omission on the part of the applicant concerning the events of 15 April 2017. There was media coverage in 2017 with additional in 2018 referring back to the incident in question. Plainly all such coverage was a matter of fact, known to all relevant parties, long before the Board of Inquiry sat and gave its decision. In other words, the media coverage of 2017 and or 2018 was not something new which emerged after 28 February 2019. There is no evidence whatsoever that the applicant engaged in any way with the media or caused the coverage in question to appear.

65. On 15 March, 2019 Mr. Hussey, performing his role as *"Presiding Officer"*, furnished a 4-page report to the respondent in accordance with Regulation 30 of the 2007 Regulations (which Regulation is entitled *"Report of Board"*). The said report referred *inter alia*, to the hearing which took place on 28 February, 2019 and it summarised the evidence given in respect of the 4 breaches of discipline which had been read into record and to which the applicant pleaded guilty. Reference was made *inter alia*, to the applicant having cooperated fully with the investigating officer's investigation and to evidence given by Dr. Eugene Morgan as to the steps taken by the applicant to deal with his addictive problems and his admission to a residential care centre for therapy for a period of five weeks. Reference was also made to evidence in respect of the applicant's stress resulting from domestic circumstances and financial distress with evidence also given in respect of how the applicant responded well to treatment for drink and gambling problems. The report summarised other evidence including in respect of the applicant's career, the support he had received from the Garda Welfare Officer as well as the evidence given by Inspector Michael Corbett who confirmed that the applicant was an effective garda particularly in the Drugs Unit in Mallow and who also confirmed that there were no complaints against the applicant either by the public or by anybody else. Reference was also made in the report to evidence given by Sergeant O'Riordan who confirmed that the applicant had returned to full duty on 25 December, 2017 at Cobh Garda Station and who also confirmed that the applicant was an effective member of the force. Reference was also made in the report to evidence given by Sergeant O'Riordan in respect of the applicant's involvement in particular cases which impressed him as well as a testimonial which was entered into the record from the applicant's previous sergeant in Mallow, a Sergeant Toomey.

66. The *"Reasons for the decision as to Penalty"* were set out in the following terms on the final page of the Presiding Officer's report to the respondent: -

> *"The Board carefully considered the sanctions available as detailed in Section 22 of the 2007 Regulations and considered, on balance that the recommendation of a financial sanction in the amount of one week's wages namely, €950.04 (nine-hundred and fifty Euro and four cents) was appropriate in the circumstances.*

It was clearly evidence in the course of the hearing that the entire incident had a salutary effect on Garda Keane and he was deeply embarrassed and remorseful about the incident which happened in 2017. Garda Keane apologised to the Board for the necessity of being before the Board on the day."

67. Given the provisions of the Regulations which I examined earlier in this decision, it will be recalled that the respondent was not obliged to accept the Board of Inquiry's recommendation as regards the appropriate penalty and the respondent did not accept the recommendation. Instead, on 26 March, 2019, the respondent expressly invoked Regulation 32(1) of the 2007 Regulations, notifying the applicant of the respondent's proposal to impose a much more severe sanction than that which the Board of Inquiry had recommended.

68. It is a fact that, once the Board of Inquiry's report and the transcript of its hearing was furnished to the respondent, he had all relevant information in respect of the breaches of discipline on the part of the applicant and, by that stage, there was also available to him all material information concerning the consequences of same, including media coverage. Beyond that point, nothing truly *new* arose.

The Commissioner's 26 March 2019 letter

69. It is appropriate to set out, *verbatim*, what the respondent stated in his letter dated 26 March, 2019 which was addressed to the respondent at Mallow Garda Station: -

"Re: Garda Síochána (Discipline) Regulations, 2007, recommendation of a Board of Inquiry to the Commissioner.

Garda Dermot Keane, 35119K, Mallow Garda Station

I, Jeremy Andrew Harris, Garda Commissioner, in accordance with Regulation 32(1) of the Garda Síochána (Discipline) Regulations, 2007, hereby give you notice that I propose to impose a disciplinary action namely:

Requirement to resign as an alternative to dismissal,

in respect of breaches number one, two, three and four attached which is more severe than that disciplinary action recommended by the Board of Inquiry in its report dated 15th March, 2019.

I have received the report of the Board of Inquiry from Mr. John Hussey, Solicitor, Presiding Officer, in accordance with Regulation 30 of the Garda Síochána (Discipline) Regulations 2007, as amended. The Board of Inquiry has recommended that a total temporary reduction in pay of one week wages be imposed in respect of the four breaches of discipline. Having considered the report of the Board of Inquiry I propose to impose a disciplinary action which is more

severe than that recommended by the Board of Inquiry namely requirement to resign as an alternative to dismissal in respect of the four breaches of discipline.

The reasons for my proposal are outlined as follows;

- *policing is an honourable profession of which the public expect members to act with honesty and integrity and adhere to the highest standards of conduct and practice. I am of the opinion, that your conduct, which you have admitted to, has impacted your integrity and has seriously undermined your credibility as a member of An Garda Síochána.*

- *I do not feel, having carefully examined the report of the Board together with the transcripts of proceedings, the Board sufficiently considered the reputational damage that your actions have had on An Garda Síochána.*

- *While I appreciate your remorse for your actions and I commend you for getting treatment for your issues, I am of the opinion that your continued membership in An Garda Síochána would undermine public confidence, and that your position as a Garda is untenable.*

- *I consider wholly inappropriate that a member of An Garda Síochána who has committed such serious breaches of discipline should continue to serve as a member of An Garda Síochána.*

In accordance with the provisions Regulation 32(1) of the Garda Síochána (Discipline) Regulations 2007, as amended, I hereby give you an opportunity of advancing to me within 10 days of the date of signature below any comments that you may wish to make in relation to my proposal to impose a disciplinary action more severe than that recommended by the Board of Inquiry.

After the expiration of the period specified above and having considered any comments made by you I will decide on the disciplinary action to be imposed.

_____

J.A. Harris

COMMISSIONER OF AN GARDA SÍOCHÁNA

Dated at Garda Headquarters this 26th day of March, 2019.

70. Commissioner Harris had not yet taken up his current role when the incident in question occurred on 15 April, 2017 and when the respondent's predecessor appointed a garda superintendent, in accordance with Regulation 23(1) of the 2007 Regulations. It is very clear, however, that Commissioner Harris held the relevant position when he sent the 26 March, 2019 letter giving notice to the applicant in accordance with Regulation 32(1) of the 2007 Regulations. A number of things can fairly be said in relation to this 26 March,

2019 notice (a copy of which comprises exhibit *DM3* to Mr. Murphy's affidavit). Firstly, it will be recalled that *"serious breach of discipline"* means a breach which, in the opinion of the respondent, may attract one of four specified *"disciplinary actions"* which are set out in the following terms in Regulation 22 namely:

"(a) dismissal;

(b) requirement to retire or resign as an alternative to dismissal;

(c) reduction in rank;

(d) reduction in pay not exceeding four weeks' pay."

71. It is perfectly clear that the respondent had a choice to make once he considered the Board of Inquiry's report. He could decide that it was appropriate to accept the penalty recommended by the Board of Inquiry or he could decide that the recommendations should be rejected and, instead, to propose a more severe disciplinary action. Plainly, he decided that the latter was the appropriate course and it cannot be disputed that he enjoyed that power pursuant to Regulation 32(1). Once he decided to propose a more severe disciplinary action, it is uncontroversial to say that the respondent had another choice to make.

72. I have already referred to the 4 alternative *"disciplinary actions"* which are set out in Regulation 22 and which may be imposed in cases of *"serious breach of discipline"*. Regulation 22 is clear as to the fact that a member of An Garda Síochána may be subject to *"one"* of the 4 disciplinary actions which are set out (a), (b), (c) and (d), beginning with the most severe (option (a) being *dismissal*). I am entitled to hold that, when presented with 4 alternatives available to him, the respondent chose the one which was appropriate and did not chose those which were not appropriate. The respondent, in fact, chose option (b) which is the next most severe (i.e. *requirement to retire or resign as an alternative to dismissal*). For the reasons explained in this judgment, I am satisfied that there is a material difference between each of the 4 alternatives which were available to the respondent under Regulation 22.

73. Given what the respondent proposed in his 26 March 2019 letter, I am entitled to hold that the respondent took the view that it was *not* appropriate to propose a *lesser* penalty than the one he opted for. Given that the applicant was, and is, a member but does not hold a higher rank than Garda, this court assumes that the lesser penalty of *"(c) reduction in rank"* may not have been relevant. The lesser sanction of *"(d) reduction in pay not exceeding four weeks' pay"* was, however, undoubtedly a sanction available to the respondent. Indeed, had he felt this lesser sanction of a reduction in pay to be appropriate, the respondent could have proposed to increase the penalty recommend by the board of inquiry four-fold. He did not do so, plainly taking the view that such lesser disciplinary action was not appropriate.

74. Similarly, I am entitled to hold that the respondent made a decision that the *greater* penalty of *"(a) dismissal"* was not appropriate. Had the respondent regarded it as appropriate, in all the circumstances, to propose dismissal, it is beyond doubt that it was within his power to propose same under the 2007 Regulations. He did not do so. Thus, it is fair to conclude that, in fact, by opting for the*"(b) requirement to resign as an alternative to dismissal"*, the respondent decided that any lesser or greater sanction was not appropriate. Had he regarded either of (d) or (a) as the appropriate sanctions, he could have proposed them, but he did not do so.

75. Thus, it is a matter of fact that the respondent did not propose *"dismissal"*, simpliciter, in the context of the proposal which he made pursuant to Regulation 32(1), nor did the respondent invoke the powers available to him pursuant to Regulation 39 (entitled *"Summary Dismissal"*). This is supportive of a finding of fact that, in deciding the disciplinary action which the respondent regarded as appropriate, he also ruled out the inappropriate and took the view, conveyed by his proposal of option (b), that options (a), (c) and (d) were not appropriate.

76. It is a matter of fact that, as of 26 March 2019, there were a trinity of ways the respondent could have pursued the applicant's dismissal had he regarded it as appropriate and my finding of fact that he did not so regard it is supported by the undoubted fact that the respondent did not, at that stage pursue any of those three. The three comprised (i) proposing dismissal, simpliciter, under Regulation 32(2); (ii) invoking Regulation 39 in Part 4 of the 2007 Regulations; or (iii) invoking s.14(2) of the 2005 Act. All were routes to the dismissal of the applicant. None were taken at that stage (March 2019) and, considering this alongside what the respondent, in fact, decided to pursue, fortifies me in the view that he decided that dismissal was not appropriate. Another observation on the factual position seems appropriate to make i.e., as of March 2019, when the respondent decided to pursue what, I am entitled to hold, he regarded as the one and only appropriate disciplinary action, the respondent was not subject to any *binding* decision by any board (a Board of Inquiry's Regulation 30(2)(c) recommendation is not binding on the respondent). He plainly knew, however, that if he exercised his entitlement pursuant to Regulation 32(1) he was setting in train a procedure which could lead to a decision binding on him (i.e. an Appeal Board's decision as per Regulation 37(5)). Despite knowing this, as must have been the case, the respondent did not invoke Regulation 39, nor did he invoke s.14 of the 2005 Act. Those, of course, deal only with the sanction of summary dismissal and that was plainly a sanction the respondent regarded as inappropriate. Otherwise he would have pursued same, be that under Regulation 39, or pursuant to s.14 of the 2005 Act or by proposing (a), instead of (b), when invoking his powers under Regulation 32(1).

77. As will be recalled, reliance on s.14(2) requires the respondent to be of the opinion that, by reason of the member's conduct, the member's continued membership would undermine public confidence in the Garda Síochána and the *"dismissal"* of the member in question is necessary to maintain that confidence. The fact that the respondent neither

invoked Regulation 39, nor s.14(2) of the 2005 Act is, I am satisfied, entirely consistent with the respondent deciding that dismissal was not appropriate in the circumstances.

78. It is an important fact, in my view, that the respondent regarded as the appropriate sanction, that the applicant be required to resign as an alternative to dismissal and I am entitled to hold that for the respondent to clearly state such a view was also to state, with equal clarity, that lesser and greater penalties were not appropriate. It is also a matter of fact that the respondent's 26 March, 2019 notice was made in the wake of a consideration by the respondent of all relevant information as regards the applicant's admitted involvement in the events of 15 April, 2017. In other words, it is a matter of fact that the respondent did not lack any relevant information touching on any act or omission on the part of the applicant. Furthermore, it is appropriate to point out at this juncture that there has never been any revelation, post 26 March, 2019, that the applicant was guilty of any act or omission which was unknown to the respondent as of 26 March, 2019. In other words the fact of what had occurred, constituting the breach of discipline as well as and the applicant's prompt admission of his guilt and, indeed, the fact of an online video and media coverage, were all known quantities. Nothing "new" emerged thereafter.

79. It is also appropriate to note the reasons which the respondent set out clearly in his 26 March 2019 letter, in respect of the disciplinary action he was proposing. It is fair to say that they relate to the applicant's *"conduct"* which, in the respondent's opinion had seriously undermined the applicant's *"credibility as a member of An Garda Síochána"*. Furthermore, the respondent's reasons included that the applicant's continued member of An Garda Síochána *"would undermine public confidence"* and the respondent expressed the view that the Board of Inquiry had not sufficiently considered *"the reputational damage"* that the applicant's *"actions have had on An Garda Síochána"*. It is important to note two things. Firstly, the reasons proffered by the respondent in the 26 March, 2019 letter echo the provisions of s.14(2)(a)(i) and (ii). Indeed, it is fair to say that the very same language could just as easily be used in the context of a notice by the respondent as to the opinion he had formed in the context of s.14(2). Importantly, however, these reasons are most certainly not proffered on the basis that the respondent has formed the relevant opinion referred to in s.14(2)(a) of the 2005 Act. Rather, the reasons are deployed in support of what was *not* a decision to propose dismissal, but in support of proposing a very different sanction and one which was, to a material extent, a lesser sanction to dismissal. I am entitled to hold that if the respondent regarded the more serious penalty of dismissal as being the appropriate one, he could, and would have said so. He did not do so even though he had all relevant material available to him insofar as the admitted acts and omissions on the part of the applicant was concerned, and even though the reasons which he deployed in support of the penalty which he proposed reflect what is provided for in s.4(2)(a) as regards the respondent's opinion in the context of dismissal to maintain public confidence in An Garda Síochána, having regard to the statutory power in the said section. If the respondent believed that it was appropriate to propose dismissal, there was no impediment whatsoever to proposing it. That being so, I am entitled to hold that the respondent took the view that dismissal was not appropriate

and, for this reason, he did not propose it. Rather, he proposed what he regarded as the appropriate sanction, namely, the *"requirement to resign as an alternative to dismissal"*.

80. There is no doubt whatsoever about the fact that the respondent knew very well what the breaches of discipline were. Indeed, all four breaches are set out, verbatim, as an enclosure to the respondent's 26 March, 2019 letter and after each breach, it is stated, in bold text that *"The said discreditable conduct is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007…"*.

81. It is uncontroversial to say that, by serving the 26 March, 2019 notice, explicitly invoking Regulation 32(1) and deciding on the appropriate one of the four penalties specified in Regulation 22, the respondent took a significant step in a statutory process which process had legal implications for those involved in it and which could lead to a binding decision. Moreover, in doing so, the respondent did not, in fact, identify dismissal as the appropriate penalty to be proposed. He chose a very different penalty. The ultimate outcome, it is fair to say, would be the same, namely, the end of the applicant's service as a member of An Garda Síochána. The methodology or route by which that would be achieved, however, was materially different to dismissal and the sanction was also materially different in terms of the lesser effect on the member and their reputation. The respondent invited comments in relation to the one, and only, penalty which the respondent proposed as being appropriate, namely, the requirement to resign as an alternative to dismissal.

Re-suspension of the applicant

82. On 01 April, 2019, the applicant was re-suspended from duty. It will be recalled that his initial suspension commenced on 21 April, 2017 and ended on 25 December, 2017 after which point the applicant resumed his duties in full and there is no evidence that he was other than an effective member of An Garda Síochána during the period from 25 December 2017 up to the point at which he was suspended again. It is also a fact that this re-suspension was not as a result of the revelation of any new information. Nothing changed in terms of what was known insofar as the incident in question. The relevant suspension order or notice of the suspension comprises exhibit "DM4" to Mr. Murphy's affidavit. It is a notice dated 01 April, 2019 signed by Assistant Commissioner David J. Sheahan and confirms that the suspension from duty takes effect from 10.45am on 01 April, 2019 and runs to 6am on 01 May, 2019. The second page of the notice states that *"the suspension from duty arises as a result of: - the proposal of the Commissioner to impose a disciplinary sanction which is more severe than that recommended by the Board of Inquiry, namely: to require Garda Keane to resign from An Garda Síochána as an alternative to dismissal.*

83. Shortly after the applicant's re-suspension in April 2019, an article appeared in *"The Irish Times"*, the final paragraph of which stated inter alia, that *"The Irish Times has learned that Garda Commissioner Drew Harris has the option of not implementing the disciplinary review recommendation but can instead exercise a requirement to resign or face dismissal, and it is understood that this is what has been ordered to the officer by his superiors"*. There is no evidence that the applicant "leaked" any information concerning

the disciplinary process to which he was subject. On the same day, an article appeared in the *"Irish Daily Star"* wherein it was reported that the respondent *"…has told a member of the force…quit or be sacked"*. It is appropriate to observe that the media coverage on 04 April, 2019 post-dated the respondent's notice dated 26 March, 2019 in which the respondent made clear the disciplinary action which he regarded as appropriate, for stated reasons, and which he proposed pursuant to Regulation 32(1) of the 2007 Regulations.

10 April 2019 letter by applicant's solicitors

84. By letter dated 10 April, 2019 (a copy of which comprises part of exhibit "DM3" to Mr. Murphy's affidavit) the applicant's solicitors objected to the disciplinary action proposed by the respondent in a letter which stated *inter alia*, as follows: -

> *"It is noted that you propose to require him to retire from An Garda Síochána, as an alternative to his dismissal by you. That proposed sanction is much more severe than what was recommended to you by the independent Board of Inquiry that was appointed by you or on your behalf to hear and determine the case.*
>
> *That Board heard and assessed the witnesses and their evidence and in a reasoned judgment ultimately proposed a fine of one weeks' salary, namely, €950.04. In all of the circumstances that pertained, it is respectfully submitted that was just and proportionate and that your determination and proposal is not justified having regard to the evidence heard by the Board; that, all relevant facts were not considered by you; or were not so considered in a reasonable manner and/or that the disciplinary action you have decided to take or recommend is not proportionate in all of the circumstances.*
>
> *As outlined in the Presiding Officer's report, the Board carefully considered all of the sanctions available and the sanction it ultimately proposed was proportionate, having regard to the personal circumstances of Garda Keane, including his previous record and conduct, his approach to the investigation and Inquiry, the nature of the breaches admitted by him and their ongoing effect on him.*
>
> *With the utmost respect, it bears noting that your proposed sanction is unduly weighted by your own personal view of the incident and it fails to properly appreciate and/or address the precise circumstances of the breaches and/or it has insufficient regard to the open, transparent and honest manner in which Garda Keane dealt with matters. It was submitted that your views as outlined in your proposal, run contrary to the viva voce evidence that was before the Board.*
>
> *Without prejudice to the generality of the foregoing, the Board had the benefit of evidence from a clinical psychologist and from Garda Keane's immediate supervisors. The Board also had the benefit of two experienced Garda officers who had a unique opportunity to carefully assess these witnesses and their testimony and to question them at first hand. The Board, of its own motion, expressly*

considered any possible reputational damage to An Garda Síochána and it made its determination in light of all the evidence.

Garda Keane has taken all appropriate steps to address the underline causative factors and his difficulties and the Board was satisfied of that and that a fine was the appropriate penalty for his aberration.

In all the circumstances Garda Keane respectfully requests that you reconsider your proposal, and that you afford him the opportunity to make the positive contribution to An Garda Síochána and thereby to society, that he wishes to make and will make going forward."

The respondent's 18 June 2019 letter

85. On 18 June, 2019 the respondent wrote to the applicant which begins in following terms:

"Re: Garda Síochána (Discipline) Regulations, 2007, recommendation of a Board of Inquiry to the Commissioner.

Garda Dermot Keane, 35119K, Mallow Garda Station

With reference to my letter dated 28th March, 2019, and submissions received from your solicitor dated 10th April, 2019, I, Jeremy Andrew Harris, Garda Commissioner, in accordance with Regulation 32(2) of the Garda Síochána (Discipline) Regulations, 2007, have decided that the following disciplinary action should be taken in relation to you, the member concerned namely:

Requirement to resign as an alternative to dismissal,

in respect of breaches number one, two, three and four attached which is more severe than that disciplinary action recommended by the Board of Inquiry in its report dated 15th March, 2019.

The reasons for my proposal are outlined as follows;

- *policing is an honourable profession of which the public expect members to act with honesty and integrity and adhere to the highest standards of conduct and practice. I am of the opinion, that your conduct, which you have admitted to, has impacted your integrity and has seriously undermined your credibility as a member of An Garda Síochána.*
- *I do not feel, having carefully examined the report of the Board together with the transcripts of proceedings, the Board sufficiently considered the reputational damage that your actions have on An Garda Síochána.*
- *While I appreciate your remorse for your actions and I commend you for getting treatment for your issues, I am of the opinion that your continued*

membership in An Garda Síochána would undermine public confidence, and that your position as a Garda is untenable.

- *I consider wholly inappropriate that a member of An Garda Síochána who has committed such serious breaches of discipline should continue to serve as a member of An Garda Síochána.*

Having the submissions made on your behalf by your solicitor dated 10th April, 2019 (Tab 1) I am not prepared to alter my decision to increase the disciplinary action recommended by the Board of Inquiry in respect of the breaches of discipline numbered one, two, three and four as attached.

I have considered the submissions made on your behalf and make the following points…"

The respondent's letter goes on to make a number of points including in respect of an answer given by the applicant to the Board of Inquiry having regard to a separate Board of Inquiry on 21 February, 2019 in relation to a different disciplinary issue. The respondent's letter also referred to the applicant receiving a temporary reduction in pay of €809.78 in relation to a breach of the discipline code in respect of drink driving on 28 February, 2016 and issue was taken by the respondent with comments by the Board to the effect that "it was clearly evidenced in the course of the hearing that the entire incident had a salutary effect on Garda Keane and he was deeply embarrassed and remorseful…". The respondent also stated inter alia, that: -

"…I am of the opinion that your actions have brought discredit on An Garda Síochána…;

" …in considering mitigation I have to also take into account the negative impact your behaviour will undoubtedly have in the trust and confidence the public can have in An Garda Síochána;"

"I have considered the mitigation and I am of the view that it does not sufficiently counter balance the imperative to maintain amongst members of the public trust and confidence in An Garda Síochána";

"…having carefully examined the report of the Board, together with the transcripts of the proceedings, I have taken all this evidence into consideration and I view your continued membership in An Garda Síochána would undermine public confidence, and your position as a Garda is now untenable";

"I therefore have decided to proceed with my decision and in respect of the breach of discipline numbered one, two, three and four, as attached, I hereby order that you, Garda Dermot Keane, 35119K, be required to resign from An Garda Síochána as an alternative to dismissal with effect from midnight on the 16th day of July, 2019 and in the event of your failure to so resign I order that you be dismissed by An Garda Síochána with effect from midnight on that date."

86. The 18 June, 2019 letter concluded with confirmation that, in accordance with Regulation 33 of the 2007 Regulations, the applicant was entitled to give notice of appeal no later than seven days from receipt of the notice in question. Certain comments I made earlier in this decision, with regard to the respondent's 26 March 2019 notice of the disciplinary action he proposed, apply equally in respect of the respondent's 18 June 2019 decision to impose same. It is perfectly clear that, in circumstances where there were four alternatives open to the respondent, insofar as disciplinary actions were concerned, the respondent proposed one in March, namely, the *"requirement to resign as an alternative to dismissal"*. I am entitled to take the view that, in *deciding*, in June, that this disciplinary action should be taken, the respondent was deciding that none of the other three alternatives available to him were appropriate. In other words, when the respondent told the applicant that the respondent decided that he be required to resign as an alternative to dismissal, the respondent was also telling the applicant that neither the lesser disciplinary actions (of reduction in rank and/or reduction in pay not exceeding four weeks') nor the more serious sanction (of outright *"dismissal"*) were appropriate.

87. Earlier in this decision I explained why I am entirely satisfied that there is a very real difference between the most serious sanction of dismissal (which the respondent plainly decided was not appropriate) and the less serious sanction that the respondent be required to resign as an alternative to dismissal (which the respondent clearly decided was the appropriate penalty). The ultimate outcome is the same in that the applicant would cease to be a member of An Garda Síochána but the methodology by which that would be achieved and, thus, the effect on the member (including his on his reputation, on his family, friends etc) is materially different insofar as the two distinct disciplinary actions are concerned. In other words, this is not a distinction without a difference. On the contrary, it is a very real distinction. Indeed, it seems wholly uncontroversial to say that the material difference between the two penalties is recognised by the fact that they are identified separately and distinctly in Regulation 22.

88. It is also appropriate to note that the respondent's 18 June, 2019 decision is explicitly stated by the respondent to have been made after a careful examination of the report of the Board of Inquiry together with the transcript of proceedings and the respondent makes clear that he has taken all this evidence into consideration. Thus, I am entitled to hold that the respondent came to the view, after careful consideration of all relevant evidence with regard to the applicant's acts and omissions, that the one and only disciplinary action which was appropriate, from the respondent's perspective, was the requirement that the applicant resign as an alternative to dismissal. In other words the respondent decided on the basis of a consideration of all relevant evidence that dismissal, simpliciter, was not appropriate, just as he decided that reduction in rank and reduction in pay were not appropriate.

89. It is also a fact that the respondent did not, on 18 June 2019, invoke s.14(2) of the 2005 Act. That he did not do so is entirely consistent with my finding of fact that the respondent took the view that outright dismissal was not the appropriate sanction. As I say, dismissal was a potential sanction open to the respondent to propose (as of 28 March

2019) but he did *not* propose it then. Nor did he *decide* (as of 18 June, 2019) that dismissal was appropriate.

90. It is also fair to say that the reasons given by the respondent in his 18 June, 2019 letter and certain of the points made in the said letter could just have easily have been deployed in the context of explaining that the respondent had formed an opinion pursuant to s.14(2)(a), had the respondent formed such an opinion. The fact is that the respondent did *not* form such an opinion. Rather, he deployed the relevant reasons and made the various points in support of a decision which was *not* to recommend dismissal, but in support of the respondent's decision that the applicant be required to resign as an alternative to dismissal.

Appeal by the applicant

91. The respondent's 18 June, 2019 decision gave rise to an appeal, as was the respondent's right under Regulation 33 of Part 3, a right of which the respondent was doubtless aware. The relevant notice of appeal is dated 19 June, 2019 and comprises exhibit *"DM6"* to Mr. Murphy's affidavit. The appeal was followed by six pages of written submissions which were made on behalf of the applicant, in accordance with Regulation 33(3) of the 2007 Regulations. These submissions were *inter alia*, to the effect that all relevant facts were not considered or were not considered in a reasonable manner by the respondent and it was also submitted that the applicant was not given a reasonable opportunity to be heard and to respond to matters raised. Furthermore, the submission was made that the disciplinary action which the respondent decided to take was disproportionate in respect of the breach of discipline concerned. It was also submitted, *inter alia*, that the respondent applied a fixed policy and thereby fettered his discretion and it was submitted that the respondent fundamentally erred in failing to have any or any adequate regard to the considered views and conclusions of long-serving senior garda officers and the Board of Inquiry chairperson. It was also submitted that the respondent had taken into account extraneous considerations and had erred in failing to accord or apply mitigation. Emphasis was also laid on the very positive testimonials from colleagues and garda management.

Appeal Board established by the Commissioner

92. The respondent established a three-person Appeal Board and he did so pursuant to Regulation 34 of the 2007 Regulations. It is uncontroversial to say that this was a significant step in the disciplinary process which, as the respondent was aware, would produce a decision binding on him. Notwithstanding this, he did not seek to invoke s. 14 of the 2005 Act at this juncture when he was not, in fact, subject to any binding decision. By letter dated 24 September 2019 Mr. David Conlan Smyth, senior counsel, wrote to the applicant to inform him that he had been appointed by the respondent to act as chairperson of the Appeal Board and to identify the two other members of the Appeal Board, namely assistant commissioner Finbarr O'Brien (northern region, Sligo garda station) and Garda Paul Crowley (Ennis garda station, GRA representative). That letter attached a completed "Form IA 53", comprising a request from the Appeal Board under Regulation 35 of the 2007 Regulations, pursuant to which request the applicant was called on to supply the Appeal Board with a written statement of the grounds of the appeal and

any other written submissions and to do so by 16 October, 2019. The applicant complied with the Appeal Board's request; his appeal was deemed admissible; and, thereafter, it proceeded to oral hearing in accordance with Regulation 36. The Appeal Board sat at Garda Headquarters, Phoenix Park, Dublin and the appeal was heard over two days, namely on 25 November, 2019 and 09 December, 2019.

The Appeal Board's 9 December 2019 decision

93. Exhibit "DM7" to Mr. Murphy's affidavit comprises a transcript prepared by Gwen Malone Stenography Services in respect of the decision delivered by the Appeal Board at the Officer's Club of An Garda Síochána Headquarters on Monday 09 December 2019. The decision of the Appeal Board can be seen from internal page 18 of the transcript and begins as follows:

> *"THE DECISION OF THE APPEAL BOARD.*
>
> *By way of introduction, the appeal board views the conduct of Garda Keane on 25th April, 2017 as clearly amounting to a serious breach of discipline, which self-evidently has resulted in the bringing of discredit on the Garda Síochána as a whole. There can be no doubt but that the Garda Síochána suffered reputational damage as a result of the actions of Garda Keane on the evening concerned. it is, therefore, difficult to see how the decision of the Garda Commissioner could be criticised for finding that there was a reputational loss when that is self-evident. Indeed, when asked, Mr. Kelly confirmed that there was reputational damage involved. Furthermore, Garda Keane himself accepted that it had been the subject of publicity in the tabloid press for several days after the incident and indeed, that a Google search would reveal his connection with the incident.*
>
> *The meaning of the "discreditable conduct" as specified in the schedule to the 2007 Regulations is conduct that brings discredit on the Garda Síochána where the member knows or ought to know that this is the case. The question of reputational damage is clearly of significant importance in this context, given that the definition of discreditable conduct contained in Regulation 5 (1) in the schedule to the 2007 Regulations refers to conduct that is, 'reasonably likely to bring discredit on the Garda Síochána'.*
>
> *The Appeal Board, therefore, wholly endorses the view of the Commissioner that Garda Keane's conduct has impacted his integrity and has seriously undermined his credibility as a member of An Garda Síochána. There is no doubt that his agreement to engage in .. acts whilst on duty, whilst in uniform and whilst using official garda equipment, including an identifiable garda vehicle, or at a time when being videoed with his consent, fall lamentably short of the standards of conduct and practice, which the Garda Síochána strife (sic) for and which the public expects, and legitimately so, of the force.*

There is also no doubt that the conduct concerned served to undermine public confidence, given the entirely justifiable expectation that An Garda Síochána is a serious and professional organisation.

The Appeal Board, therefore, entirely endorses the substantial concerns expressed in this regard by the Commissioner. At the same time, the Appeal Board is cognisant of the fact that the act concerned resulting in the breaches of discipline did not involve the commission of any criminal act, was entirely consensual, the act was a single event and there was no evidence adduced of any complaint or situation that could not be addressed or attended to as a result of Garda Keane's absence for the period concerned. Whilst the breach of discipline involved a sordid episode, the Appeal Board is, on balance, satisfied that the sanction of a requirement to resign as an alternative to dismissal is not appropriate to the breaches involved in the case. That being said, the Appeal Board is also of the view that the conduct concerned warrants significant sanctions, which are at the same time proportionate to the serious breaches involved in this case."

94. The Appeal Board then looked at the first charge of discreditable conduct and considered that, due to the serious nature of the matter, the appropriate sanction for the conduct concerned was a reduction in pay for four weeks, being the maximum available financial sanction. It will be recalled that this sanction represents the penalty specified at para. (d) of Regulation 22.

14 mitigating circumstances

95. The Appeal Board went on to state that it considered it necessary to look at the mitigating circumstances which it itemised in 14 numbered paragraphs. In summary, those 14 matters which the Appeal Board took account of by way of mitigating circumstances comprised the following:

(1) It was a single incident which only occurred after the applicant was satisfied that his colleagues no longer required his immediate assistance;

(2) The applicant had no part in the uploading of the video to any website and contacted the website quickly to have the video taken down successfully albeit the video, through no fault of the applicant, reappeared on other sites;

(3) The applicant admitted the breaches of discipline almost immediately;

(4) The applicant cooperated fully with the investigation from the very beginning and with the Board of Inquiry and the Appeal Board;

(5) The applicant appeared to suffer from addictive problems, with the applicant's psychiatrist, Dr. Morgan and Dr. Rurock referring to alcohol problems;

(6) The applicant voluntarily admitted himself to the Rutland Centre a few days after the incident and remained there on a residential basis for five weeks;

(7) The applicant attended on a weekly basis for a year at a support group for alcohol dependency and continued to attend AA meetings;

(8) Evidence from a Dr. Eugene Morgan to the effect that he could detect no abnormal drives in the applicant that would give rise to caution;

(9) An explanation was provided in respect of the other complaints arising at the time;

10) The Appeal Board noted the very positive references and testimonials from the applicant's superiors including the evidence of Inspector Michael Corbett to the Board of Inquiry as to the effectiveness of the applicant in the Drugs Unit in Mallow as well as the evidence given to the Board of Inquiry by Sergeant Donnacha O'Riordan in Cobh garda station and also the written testimonial of Sergeant Hugh Toomey. The Appeal Board also noted that the applicant was permitted to return to work on 25th December, 2017 following the incident and advised the Appeal Board that he had not been the subject of any adverse commentary including from work colleagues or members of the public since that date;

(11) The applicant expressed and continued to express his remorse and embarrassment;

(12) The applicant suffered very significant domestic stress resulting directly from the incident;

(13) The applicant was under a considerable financial strain; and

(14) The applicant's misconduct remains and will remain something available on a permanent basis for those who go looking for it.

96. Having referred to the foregoing 14 mitigating factors the Appeal Board decided to apply a reduction of one week in respect of the financial penalty imposed. Thus, it decided that the appropriate sanction was a reduction in pay of three weeks in respect of the first breach of discipline.

97. As regards the second breach of discipline, the Appeal Board noted what it described as the significant degree of similarity and overlap between breach no. 1 and breach no. 2 and it decided to substitute the sanction of a reprimand, as provided for in Regulation 14 (3) (b) of the 2007 Regulations.

98. With regard to the third and fourth breaches of discipline, the Appeal Board decided that the appropriate sanction in respect of each breach was a reduction in pay of four weeks. It proceeded to refer to the 14 mitigating factors in respect of each breach and, decided that it was appropriate to reduce the financial sanction to three weeks in respect of each.

99. The "Conclusion" reached by the Appeal Board appears from page 32 onwards of the transcript. There, the Appeal Board states clearly that it *"…has decided to substitute a disciplinary action of a less serious nature in accordance with Regulation 37 (2) (b) to that decided by the Commissioner."* The Appeal Board went on to list, once more, each of the

breaches and each of the sanctions decided upon by the Appeal Board, namely, a reduction in pay of three weeks in respect of the first breach; a reprimand in respect of the second breach; a reduction in pay of three weeks in respect of the third breach; and a reduction in pay of three weeks in respect of the fourth breach. The chairperson also stated inter alia that *"…this is the unanimous decision of the Appeal Board"*.

100. It will be recalled that, pursuant to the 2007 Regulations, the respondent was obliged to implement the decision of the Appeal Board, in that Regulation 37 (5) states that *"The Commissioner shall implement the decision of the Appeal Board within 7 days after that decision is communicated to him or her."* Instead of complying with Regulation 37 (5) the respondent invoked s. 14 of the 2005 Act and it is this which is at the heart of the present proceedings. The applicant argues that this was impermissible, whereas the respondent asserts that it was entirely within his power to proceed in that manner. It is also appropriate to note that the nine weeks' deduction in pay decided upon by the Appeal Board appears to have been made. Thus, there was, in fact, partial compliance by the respondent with the Appeal Board's decision but, crucially, matters did not end there, given the contents of a letter dated 16 December 2019.

The Commissioner's letter of 16 December 2019 invoking s.14 of the 2005 Act

101. The respondent wrote to the applicant on 16 December 2019 invoking s.14 of the 2005 Act in a letter which stated:

> *"Re: consideration by the Garda Commissioner of the position of Garda Diarmuid Keane, 35119K pursuant to s. 14 of the Garda Síochána Act, 2005*
>
> *I, Jeremy Andrew Harris, Garda Commissioner, am of the opinion that, by reason of information now in the public domain regarding your conduct, examples of which are appended herein, Appendix 1, your continued membership of An Garda Síochána would undermine public confidence in the Garda Síochána, and your dismissal, pursuant to s. 14 of the Garda Síochána Act, 2005, is necessary to maintain that confidence. When considering if your continued membership of An Garda Síochána would undermine public confidence in the Garda Síochána I have noted the following: Section 7 of the Garda Síochána Act, 2005, as amended outlines that the function of the Garda Síochána is to provide policing and security services for the State with the objective of:*
>
> *(a) preserving peace and public order,*
>
> *(b) protecting life and property,*
>
> *(c) vindicating the human rights of each individual,*
>
> *(d) protecting the security of the State,*
>
> *(e) preventing crime,*

(f) bringing criminals to justice, including by detecting and investigating crime, and

(g) regulating and controlling road traffic and improving road safety.

In order to carry out the functions as outlined above, An Garda Síochána must have the confidence of the public which it serves. To gain and maintain that confidence, members of An Garda Síochána are expected to demonstrate the highest level of personal and professional standards of behaviour.

Members of An Garda Síochána are given extraordinary powers and therefore public confidence in members is crucial in a system that rests on the principle of policing by consent. Public confidence in the Garda Síochána depends on members demonstrating the highest level of personal and professional standards of behaviour.

The information now in the public domain resulting from your conduct and the media reporting of same, as evidenced in Appendix 1, is not acceptable and undermines public confidence in An Garda Síochána.

The rank of Garda in An Garda Síochána carries not only significant responsibilities but enormous powers, and members are expected to have personal strength of character to make sound judgments under pressure and in the face of an ethical dilemma. The behaviour of members when they are not under direct supervision or scrutiny is just as important as when they are. They are also expected to ensure they do not behave in a manner which may compromise not only themselves but also compromise An Garda Síochána. The information now in the public domain resulting from your conduct on the 15th April, 2017 and the subsequent media reporting of same is not that which the public, your colleagues or I expect concerning a member of An Garda Síochána.

Policing is an honourable profession of which the public expect members of An Garda Síochána to act with honesty and integrity and adhere to the highest standards of conduct and practice. Honesty and integrity in the conduct of members of An Garda Síochána are fundamental to the proper workings of the criminal justice system. The public should be able unquestionably to accept the honesty and integrity of a member of An Garda Síochána. The information in the public domain resulting from your conduct on the 15th April, 2017 and the media reporting of same have tarnished the reputation of An Garda Síochána and undermines the public's expectation of high standards.

In order to provide a good policing service, it is essential that the public and your garda colleagues have trust in you. The information now in the public domain as a result of your conduct on the 15th April, 2017 and the media reporting of same, undermines the trust your colleagues have in you and also adversely affects public confidence in An Garda Síochána.

A member of An Garda Síochána whose behaviour was recorded on a mobile phone, uploaded to a … website and subject to adverse media reporting and public commentary, is such, that, in my opinion, it is not appropriate for you to continue to serve as a member of An Garda Síochána.

Taking all matters into consideration, I am of the opinion that the information now in the public domain and the media reporting as a result of your conduct of 15th April, 2017 is incompatible with membership of An Garda Síochána. I am of the opinion that your continued membership is untenable given the requirement for the maintenance of public confidence and trust in An Garda Síochána. The information now in the public domain and the media reporting resulting from your conduct on the 15th April, 2017 seriously undermines your integrity and compromises your ability to serve as a member of An Garda Síochána.

Furthermore, I do not believe that you could ever again become an effective or efficient member of An Garda Síochána due to a lack of trust. For example, the nature of your conduct and the extent of the publicity resulting from your conduct means that you would be extremely limited in the range of duties you would be able to undertake including being precluded from contact with certain members of the public including vulnerable persons, victims of certain types of crimes and upholding the Human Rights of individuals.

Your continued membership would therefore undermine public confidence in An Garda Síochána were you to remain a member. Therefore, I am of the opinion that your dismissal is necessary to maintain that confidence.

You are hereby given the opportunity pursuant to s. 14 (2) (b) of the Garda Síochána Act, 2005, to put forward any representations or responses you wish to make, including any reasons why I should not dismiss you upon the basis stated above.

I now invite you to make a response to the foregoing, together with any representations which you wish to make on your behalf on, or before the 15th day of January, 2020. Please note that I would consider any response provided by you in advance of arriving at my decision. In the event that no response is received from you by the above stated date, it will be taken that you do not intend to respond.

I will consider, after that date, whether I am still of the opinion as outlined above and whether I should seek the consent of the policing authority for your dismissal from An Garda Síochána. At that stage I will inform you of my decision which will include my rationale.

_____

J. A. HARRIS

Commissioner of An Garda Síochána

Dated at Garda Headquarters this 16th day of December, 2019"

102. A number of comments can be made in relation to the foregoing. This is the very first time that reference is made to or reliance is placed by the respondent on his powers pursuant to s. 14 of the 2005 Act. In other words, at all material times, the events of 15 April 2017 were addressed using the disciplinary process provided for in the 2007 Regulations and that remained the position throughout the period of two years and eight months commencing on 17 April 2017 (when the respondent appointed a garda superintendent to act as "investigating officer" pursuant to Regulation 23 (1) of the 2007 Regulations) up to the delivery by the Appeal Board of its 09 December 2019 decision (which the respondent was obliged to implement by 16 December 2019, having regard to Regulation 37 (5)).

103. Earlier in this judgment I looked at the respondent's 28 March 2019 letter in which he gave notice that he proposed to impose a very specific disciplinary action namely the *"requirement to resign as an alternative to dismissal"*. The reasons for this proposal, as outlined in the 28th March 2019 letter are, to a material extent, the very same reasons as the respondent refers to in his 16 December 2019 letter. The latter is a longer document but the reasons referred to in both are essentially the same. Both letters state that *"policing is an honourable profession of which the public expect members … to act with honesty and integrity and adhere to the highest standards of conduct and practice"*. Both letters express the view that the applicant's *"continued membership"* would *"undermine public confidence"* in An Garda Síochána. Both letters make clear the respondent's view that the applicant's conduct and the consequences of same has caused reputational damage to An Garda Síochána. Crucially, however, as of 28 March 2019 the respondent was very clear that the appropriate sanction was resignation as an alternative to dismissal. Thus, the respondent was equally clear that other sanctions, be they lessor or greater, were not appropriate. It is a matter of fact that in the intervening period between 28 March 2019 and 16 December 2019 there was no new revelation in respect of any act or omission on the part of the applicant which constituted the breaches of discipline. In other words, the landscape insofar as relevant facts were concerned did not change at all. There was, of course, an appeal which took place by the Appeal Board which the respondent had appointed, but there was no revelation at the appeal insofar as fresh evidence was concerned. Rather, the relevant facts had long been established. Indeed, the applicant, as the Appeal Board noted, admitted his guilt almost immediately.

104. Thus, the acts and omissions constituting the admitted breaches of discipline on the part of the applicant and the consequences of same were precisely the same as of 28 March 2019 *and* 16 December 2019. Despite this, on the former date the respondent was very clear that he proposed one very specific form of disciplinary action, whereas on the latter date, despite no change in the state of knowledge as regards the applicant's admitted breaches of discipline, the respondent, for the very first time proposed a penalty of a materially *different* type i.e. dismissal.

105. Reference is made in the 16 December 2019 letter to "Appendix 1". This comprises some 48 pages of media coverage from various dates. Earlier in this judgment, I referred to much of it and I did so where the press and media reports appeared in the chronology of events. The very first page of Appendix 1 comprises a copy of an "Irish Independent" article dating from a certain date in 2017. Pages 2 – 4, inclusive, of Appendix 1 comprise copies of articles which also appeared on the same date in 2017, but in the "Irish Daily Star". The 5th page of Appendix 1 comprises a copy of an article, also from the same date in April 2017, which appeared in "The Herald". Before commenting further on the contents of Appendix 1, it is worth observing that these were articles which had appeared in the media three and a half years earlier. Thus, the media coverage in question was, as a matter of fact, already known to the respondent and known to him *prior* to the respondent proposing, and later deciding, that the one and only disciplinary action which was appropriate was the requirement to resign as an alternative to dismissal, being a decision the respondent made in the context of the disciplinary process under the 2007 Regulations.

106. There can be no doubt about the fact that, during the course of the disciplinary process governed by the 2007 Regulations, a process with which the respondent fully engaged, the respondent was well aware of both a video having appeared on a website as well as the media coverage, including in national newspapers. I say this in circumstances where, in the respondent's letter dated 28 March 2019, he confirmed, inter alia, that he *"carefully examined the report of the Board together with the transcripts of proceedings"*. The foregoing reference was, of course, to the Board of Inquiry. A copy of the transcript of the hearing which was held before the Board of Inquiry at Cobh garda station on Thursday 28 February 2019 makes explicit reference *inter alia* to *"the publication of the video"* on a *"website and subsequent publishing of articles on the national newspapers"*. Thus, the respondent was well aware of the fact of media coverage and, indeed, very much alive to the issue of reputational damage to An Garda Síochána, flowing from the applicant's actions when the respondent participated fully in the disciplinary procedure governed by the 2007 Regulations.

107. It will be recalled that in the respondent's 18 June 2019 letter he stated *inter alia* that *"I do not believe, having carefully examined the report of the Board together with the transcripts of proceedings, the Board sufficiently considered the reputational damage that your actions have on An Garda Síochána"*. At the risk of stating the obvious, reputational damage cannot conceivably occur unless the events in question are reported upon. In other words, there can be no question of an undermining of *"public confidence"*, if the public never learned of the events which constituted the breaches of discipline in question. When, in the context of the disciplinary procedure under the 2007 Regulations, the respondent emphasised *"the reputational damage"* to An Garda Síochána, resulting from the applicant's actions, he was plainly referring to such damage as a consequence of press and media coverage as well as the availability of material "online". That being so, although the respondent used the phrase *"information now in the public domain"* (emphasis added), more than once in his 16 December 2019 letter, the reality is that the relevant information had already been in the public domain for two and a half years.

Despite this, the respondent had made an active choice to invoke a process under the 2007 Regulations and to participate in that process fully and, during that process, was crystal clear as to what disciplinary action he regarded as appropriate (i.e. the requirement to resign as an alternative to dismissal), the corollary being that he regarded other disciplinary action as inappropriate (reduction in rank / reduction in pay not exceeding four weeks / dismissal).

108. Leaving aside the fact that in his 16 December 2019 letter, the respondent, for the very first time, seeks to rely on a statutory power pursuant to s. 14 of the 2005 Act in order to secure the applicant's dismissal, of fundamental importance is that the 16 December 2019 letter constitutes the very first time when the respondent expresses the view that *dismissal* of the applicant is appropriate. In my view this is wholly inconsistent with the actions taken on behalf of the respondent at all material times up to that point. A change in facts or circumstances cannot explain this inconsistency. It will be recalled that Regulation 22 (a) of the process with which the respondent fully engaged specifies *"dismissal"* as one of the disciplinary actions available to the respondent if he was of the opinion that this was merited. The reality is that, by his actions and decisions, the respondent made clear that dismissal was not merited. Why? Because he opted for the materially different, albeit still very serious, disciplinary action specified at Regulation 22 (b) namely *"requirement to retire or resign as an alternative to dismissal"*.

109. Returning to an examination of *"Appendix 1"*, pages 6 – 9, inclusive comprise a copy of press coverage dating from a particular date in 2017 from *"The Irish Sun"*. On the bottom-right-hand corner of each of these pages appears the details of the website from which the copy of the article was downloaded and this is followed by a date which clearly indicates the date when the article was downloaded. The date which appears is "13/12/2019". The same date appears on the bottom-right-hand corner of each and every one of the 43 remaining pages comprising Appendix 1.

110. The respondent chose not to swear any affidavit in these proceedings. Thus, it is not known whether the respondent personally downloaded copies of the articles in question, or whether he instructed someone to do so. It is clear, however, that the bulk of Appendix 1 comprises media coverage downloaded on a single day, namely 13 December 2019, the vast majority of which coverage dated from shortly after the incident in question or referred back to same.

111. Pages 14 to 30, inclusive, of Appendix 1 comprises a copy of "Buzz.ie" articles, beginning with one from a date in 2018. This was well over a year *before* the respondent proposed, in his 28 March 2019 notice, the disciplinary action of resignation as an alternative to dismissal. Pages 31 to 34, inclusive, of Appendix 1 comprises a copy of a piece in "The Irish Sun" dating from 2018. Pages 35 to 42, inclusive, comprises a 2018 article from the "Irish Mirror". Like all the aforementioned articles making up Appendix 1, it long pre-dates the respondent's 28 March 2019 proposal and the respondent's 18 June, 2019 decision to impose the disciplinary action of *"requirement to resign as an alternative to dismissal"*.

112. Pages 43 and 44 of Appendix 1 comprises a copy of an article from "The Journal.ie" pre-dating by some months the respondent's decision of 18 June 2019 which was made pursuant to the 2007 Regulations. The article in question reports that, following a disciplinary hearing, a fine was recommended and it goes on to state: *"However, Commissioner Harris has refused to accept the findings of the disciplinary tribunal. Sources have told the journal.ie that the Commissioner has instructed the Garda that he can resign from the force or face dismissal. It is understood that the garda in question has ten days to respond to a letter from the Commissioner informing him of these instructions. It is also open to him to appeal the matter. A spokesman from An Garda Síochána said they cannot comment on individual cases."* Page 45 of Appendix 1 comprises an article which appeared in "The Irish Times" in 2019, again months before the respondent's June 2019 decision. Earlier in this judgment I referred to this article in the context of the chronology of events, being an article which reported that the respondent had the option of not implementing the disciplinary review recommendation but, instead, could exercise a requirement that the member resign or face dismissal.

113. Page 46 of Appendix 1 comprised a third article dating from the same month in 2019, being one from the "Irish Daily Star". Whilst much of the text appears illegible, it is plain that the article reports that the respondent has informed a member of the Force: *"Quit or be sacked"*. In terms of the chronology, this article appeared after the respondent's 28 March 2019 letter proposing to impose the relevant disciplinary action and before the respondent's 18 June 2019 letter in which he confirmed his decision to require the applicant to resign as an alternative to dismissal.

114. Page 47 of Appendix 1 comprises an article from the "Irish Daily Star" from a date in 2019. This article reported that a garda had been successful in his appeal. Page 48 which comprises the very last page of Appendix 1 is a copy of an "Irish Daily Star" article from a date in 2019 which, *inter alia*, reports on the appeal by a serving garda. It is worth re-emphasising that there is no evidence whatsoever that the applicant, who is not identified by name in any of the articles comprised in Appendix 1, every "leaked" information to the media.

115. It is clear from the contents of the respondent's 16 December, 2019 letter that, considerable reliance was placed by him on what he described as the *"information now in the public domain"* regarding the applicant's conduct, examples of which comprised Appendix 1. It is equally clear, however, that the information was already well in the public domain long beforehand and certainly in advance of the respondent proposing, in March 2019, and deciding, in June 2019, that the requirement to resign as an alternative to dismissal was the one, and only, appropriate disciplinary action in the circumstances. Those circumstances had not changed in any material respect, including as to what information was in the public domain. On the contrary, it is equally clear from the respondent's March and June 2019 letters that his proposal of and later decision to impose the requirement to resign as an alternative to dismissal was based to a material extent on what the respondent considered the reputational damage to An Garda Síochána flowing from the applicant's actions and the respondent's opinion that the applicant's

continued membership in An Garda Síochána would undermine public confidence. Such considerations self-evidently require that the public was, by then, already aware of the applicant's actions and it seems uncontroversial to say that the only way the public can become so aware is through press and media coverage, the fact of which is explicitly referenced, including in the transcript of the Board of Inquiry's proceedings, which the respondent confirmed that he had carefully considered.

116. Insofar as reference is made in the respondent's 16 December, 2019 letter to an undermining of trust in the applicant on the part of his colleagues, it is fair to say that no evidence is proffered by the respondent in that regard. Similarly, insofar as the respondent states in this letter that the nature of the applicant's conduct and the attendant publicity means that he *"would be extremely limited in the range of duties"* which he would *"be able to undertake including being precluded from contact with certain members of the public including vulnerable persons, victims of certain types of crimes and upholding the Human Rights of individuals"*, the foregoing does not sit easily with the fact that the respondent's initial suspension was removed and the applicant was restored by the respondent to full duties, which he performed as and from 25 December 2017 for well over a year, without any evidence of any restriction in terms of contact with any members of the public.

117. It is also fair to say that the contents of the respondent's 16 December 2019 letter does not engage with the evidence which had been given to the Board of Inquiry to the effect that the applicant was an efficient and effective member of An Garda Síochána (being the evidence of Inspector Corbett, from internal p.54 of the Board of Inquiry Transcript as well as the evidence of Sergeant Riordan from p.62 of the same transcript and the testimonial provided by Detective Sergeant Twomey which was read into the record from p.64 of that transcript).

118. Even though I am satisfied that there had been no change in any material fact or circumstance between, say, the respondent's 18 June 2019 letter (imposing the requirement to resign as an alternative to dismissal, pursuant to the 2007 Regulations) and the respondent's 16 December 2019 letter (proposing to dismiss the applicant pursuant to s.14 of the 2005 Act), the information available to the respondent as regards the applicant's conduct self-evidently came from the disciplinary procedure conducted under the 2007 Regulations. In other words, it seems clear that, although the respondent was, as of 16 December 2019, not prepared to give effect to the Appeal Board's 09 December 2019 decision (which he was mandated to implement pursuant to Regulation 37(5)) insofar as adverse findings were made concerning the applicant's conduct, all such findings flowed from a disciplinary process which had been conducted pursuant to the 2007 Regulations.

The applicant's 14 January 2010 response

119. In circumstances where the applicant was given the opportunity to respond, a letter was sent by the applicant's solicitors on 14 January, 2020 in the following terms:-

> *"Dear Commissioner,*

We refer to the above matter and, strictly without prejudice, we also refer to your letter dated 16th December, 2019 reflecting your purported consideration of the position of Garda Keane pursuant to s.14 of the Garda Síochána Act, 2005.

We enclose herewith a 'without prejudice' submission on behalf of Garda Keane.

You will note that it is our fundamental submission that you cannot properly utilise s.14 of the Garda Síochána Act, 2005 in the circumstances that pertain, and, that you are presently in default of your obligation under the Garda Síochána (Discipline) Regulations to restore Garda Keane to duty. We now call upon you to comply with that requirement.

In any event, entirely apart from your legal obligations, we trust that, if and when you have due regard to the considered views of all the members of An Garda Síochána and/or the other professionals who gave evidence and/or made recommendations and/or determinations in the case, it can only lead you to the proper conclusion that Garda Keane deserves another opportunity to honour and serve An Garda Síochána and the community. He wants to do that, and it is our respectful contention that, going forward, he will fully vindicate such faith placed in him."

120. The said 14 January, 2020 letter enclosed a 9-page written submission, both of which comprise "Exhibit DM9" to Mr. Murphy's affidavit. Among other things the said submission referred to the following:-

- That the applicant was restored to full operational duties and had a full proactive interaction with the public from 25 December, 2017 until he was suspended again on 01 April, 2019;

- that the applicant worked efficiently and effectively and impressed colleagues and superiors, as evident from sworn testimony adduced before the hearing on 28 February, 2019;

- that the applicant readily admitted his role in the event in question which was described as an aberration at a time when the applicant was at a very low ebb in his personal life;

- that at a very early juncture the Garda authorities were aware of the underlying facts and attendant circumstances and also aware of the applicant's full admission as to his involvement;

- that the applicant cooperated fully at all material times;

- reference was made to specific evidence given including that of Dr. Eugene Morgan and Dr. Areka Ruigrok; that expert evidence adduced before the Board of Inquiry classified the applicant as naïve to accept the invitation which lead to the relevant events and that he had not anticipated that a video would be uploaded and

published online and the applicant used his best endeavours to have the video taken down;

- that as the applicant does not appear to be identified in newspaper clippings it is difficult to see how his position in An Garda Síochána can be deemed untenable as a consequence of those articles in the manner suggested by the respondent's letter;

- reference was made to particular extracts from the hearing before the Board of Inquiry including the testimonials from then Inspector (subsequently Superintendent Corbett) who had been the applicant's detective sergeant in Mallow Garda Station with reference also made to the evidence by Sergeant Riordan and the testimonial by Sergeant (Detective Sergeant) Twomey;

- reference was made to the submission by Mr. Murphy on the applicant's behalf and to the determination of the Board of Inquiry including the statement by the Chairperson of the Board, Mr. Hussey to the applicant which included the words: *"and you have got your career"* (transcript p.82, line 6);

- reference was made to the penalty made by the Board of Inquiry and to the proposal made by the respondent on 28 March, 2019 of a more severe sanction, being a proposal pursuant to Regulation 32(1);

- it was also submitted that the view expressed by the respondent to the effect that, because of the disciplinary breaches, it would be inappropriate for the applicant to continue to serve in An Garda Síochána is a view difficult to reconcile with the fact that, since Christmas Day 2017, the applicant had been restored to full operational duties and it was submitted that all evidence suggested that he was working very well and had no adverse issues either with colleagues or the public;

- reference was made to the respondent's 18 June, 2019 decision and to the subsequent appeal which was conducted before an Appeal Board established by the respondent pursuant to Regulation 34. It was submitted *inter alia*, that the respondent cannot lawfully ignore the determination of the Appeal Board which he established under the 2007 Regulations and it was submitted that, in the circumstances that pertained, the respondent was legally precluded from employing s.14 of the 2005 Act in the manner which the respondent purported to, or at all, as regards the disciplinary breaches committed by the applicant on 15th April, 2017.

The Decision challenged in the present proceedings

121. By letter dated 28 February, 2020 the applicant's solicitors sent a follow-up letter to the respondent and, by letter dated 12 March 2020, the respondent communicated the decision which has given rise to the present proceedings and in respect of which the applicant seeks an order of certiorari. The respondent's 12 March, 2020 letter states as follows:-

"Re: Consideration by the Commissioner of the position of Garda Diarmuid Keane, 35119K, Mallow Garda Station, pursuant to s.14 of the Garda Síochána Act 2005, as amended.

I am to advise that I, Jeremy Andrew Harris, Garda Commissioner, in accordance with s.14 of the Garda Síochána Act 2005, as amended, hereby give you notice that I propose, subject to the consent of the policing authority, to dismiss you from An Garda Síochána on the grounds that, by reason of information now in the public domain, regarding your conduct, your continued membership of An Garda Síochána would undermine public confidence in An Garda Síochána and your dismissal is necessary to maintain that confidence.

You were given, by letter dated 16th December, 2019, (Tab A), the opportunity pursuant to s.14(2)(b) of the Garda Síochána Act, 2005, as amended, to put forward any representations or responses you wished to make, including any reasons why you should not be dismissed from An Garda Síochána. Submissions were received on your behalf from Kerry Murphy & Partners Solicitors, dated 14th January, 2020 (Tab B).

Firstly, I wish to address the reference made in your submission that I cannot properly utilise Section 14 of the Garda Síochána Act 2005 in the circumstances that pertain and that I am presently in default of my obligation under Garda Síochána (Discipline) Regulations to restore you, Garda Keane to duty.

Section 14 of the Garda Síochána 2005 states that 'notwithstanding anything in this Act or the regulations the Garda Commissioner may dismiss from the Garda Síochána a member not above the rank of Inspector if:

(a) the Commissioner is of the opinion that –

(i) by reason of member's conduct (which includes any act or omission), his or her continued membership would undermine public confidence in the Garda Síochána, and

(ii) the dismissal of the member is necessary to maintain that confidence,

(b) the member has been informed of the basis for the Commissioner's opinion and has been given an opportunity to respond to the stated basis for that opinion and to advance reasons against the member's dismissal,

(c) the Commissioner has considered any response by the member and any reasons advanced by the member, but the Commissioner remains of his or her opinion, and

(d) the authority consents to the member's dismissal.'

I therefore maintain that it is within my rights, notwithstanding any other discipline process that has been implemented in this case to dismiss you, Garda Keane, subject to the consent of the policing authority and following careful consideration of your submissions. I reject the submission made that I am presently in default of my obligation under the Garda Síochána (Discipline) Regulations to restore you, Garda Keane to duty.

In your submission, your solicitors have outlined the process that has taken place to date, including the Board of Inquiry, my decision to increase the decision of the Board of Inquiry and the determination of the Appeal Board, including the favourable comments made by a number of supervisors, line managers and medical professionals on your behalf. However, these matters have been dealt with to a conclusion and have not formed part of my consideration in implementing the provisions of Section 14 of the Garda Síochána 2005. As previously outlined, Section 14 is a standalone provision and I feel it necessary to consider it to ensure public confidence in An Garda Síochána.

Nothing contained within your submission has altered my view that your continued membership in An Garda Síochána would undermine public confidence in An Garda Síochána and that your dismissal is necessary to maintain that confidence specified in my letter of 16th December, 2019 (Tab A).

While I commend you for seeking help in relation to your alcohol addiction and it appears you are continuing with this treatment and support, the fact still remains as outlined in my letter of 16th December, 2019, that owing to your conduct on 15th April, 2017, the public are fully aware of this incident and it is my opinion that your continued membership is untenable giving the requirement for the maintenance of public confidence and trust in An Garda Síochána.

I note your solicitor states at point 9 that 'Garda Keane had not anticipated that a video of the events would be uploaded and published online…he certainly did not put the matter in the 'public domain'. Furthermore, as Garda Keane does not appear to be identified in the newspaper clippings, it is difficult to see how his position in An Garda Síochána can be deemed to be untenable as a consequence of those articles'. In addition, at point 25 in the submission your solicitor states that 'he did not cause or agree to the uploading of the footage and he was not the cause of the publicity that appears to be the main source of concern'. I accept that you state you may not have anticipated what consequence your actions on 15th April, 2017 would have, however, by engaging in behaviour of a type which brings the organisation into disrepute, using official garda equipment, while on duty and allowing yourself to be videoed, by a person known to you, you Garda Keane were reckless as to the consequences and as a result your position as a member of An Garda Síochána is now untenable.

In order to provide a good policing service, it is essential that the public and your garda colleagues have trust in you. Your garda colleagues are fully aware of this

incident and that it was you, Garda Keane, that was referred to in the press articles.

I have carefully considered the submission made on your behalf, however, for the reasons set out in my letter of 16th December, 2019 (Tab A) I remain of the opinion that your continued membership of An Garda Síochána would undermine public confidence in the Garda Síochána, and your dismissal is necessary to maintain that confidence.

While I have considered your personal circumstances in detail and have also considered favourable comments by a number of supervisors, I must be conscious of my wider duties to the public and in particular of my duty to maintain public confidence in the Garda Síochána.

Accordingly, on today's date I have sought the consent of the policing authority, under Section 14 of the Garda Síochána Act 2005, as amended, to dismiss you from you An Garda Síochána.

JA Harris

COMMISSIONER

An Garda Síochána

12th March, 2020".

122. Several comments can be made in relation to the foregoing. The very first paragraph of the letter makes clear that the respondent's proposal (subject to policing authority consent) to *dismiss* the applicant is *"on the grounds that, by reason of information now in the public domain"* regarding the applicant's conduct, his *"continued membership of An Garda Síochána would undermine public confidence"* in the force, necessitating the applicant's dismissal to maintain that confidence. It is plain, however, that this information had long been in the public domain. Indeed, it was in the public domain within days of the events of April 2017 i.e. well over two and a half years earlier. It is a matter of fact that nothing *new* came into the public domain as regards the applicant's conduct *after* the respondent, by letter dated 28 March, 2019, made clear what disciplinary action he proposed to impose, namely *"requirement to resign as an alternative to dismissal"*.

123. The reasons referred to in the respondent's 12 March, 2020 notice reflect closely and are materially the same as the reasons relied upon by the respondent in his 16 December, 2019 notice wherein he proposed to dismiss the applicant. Similar comments can fairly be made in respect of the respondent's 18 June, 2019 decision (under the 2007 Regulations) and the respondent's 12 March, 2020 decision (under s.14 of the 2005 Act). In other words, the reasons underpinning both decisions (i.e. under the Regulations and under the 2005 Act) are essentially the same, namely, that the applicant's conduct and the consequences of same has impacted adversely on the reputation of An Garda

Síochána and the applicant's continued membership of the force *"would undermine public confidence"* in An Garda Síochána, yet, what are essentially the same reasons are relied upon by the respondent (in the disciplinary process under the 2007 Regulations) as appropriate to justify the requirement that the applicant resign as an alternative to dismissal, *not* that the appropriate penalty is for the applicant to be dismissed. The latter disciplinary action was at all material times available to the respondent but he made an active choice not to impose dismissal, plainly indicating that it was not appropriate. In the manner examined earlier, I am entitled to hold that when the commissioner had a range of penalties available to him under the Regulations and could pick any one of these, I am entitled to infer that, by the choice he made, the respondent chose the appropriate and rejected the inappropriate. Thus, it is a fact that he rejected the lesser penalty of a financial sanction and rejected the greater penalty of dismissal, deciding that these, although undoubtedly available to him under the Regulations, were not appropriate and that the appropriate penalty was for the applicant to be required to resign as an alternative to dismissal.

124. Despite the foregoing, and without any material change in any facts or circumstances, what are, in effect, the self-same reasons are deployed as the grounds for *dismissing* the applicant, something the respondent self-evidently regarded as not the appropriate disciplinary action at all material times up to the point at which, on 09 December, 2019, the Appeal Board decided that a lesser sanction should be imposed than that chosen by the respondent under the Regulations.

125. It will be recalled that the 7th day after the Appeal Board's decision was the deadline by which the respondent was required, pursuant to Regulation 35(5), to implement the Appeal Board's decision. Instead, on that very day, the respondent sent his 16 December 2019 letter invoking s.14 of the 2005 Act. In light of the evidence, I am entitled to take the view that the respondent invoked s.14 by reason of the fact that the Appeal Board did not agree with him. In submissions, counsel for the applicant posed the question whether the respondent would have invoked s.14 of the 2005 Act had the Appeal Board decided to *uphold* his 18 June, 2019 decision that the respondent be required to resign as an alternative to dismissal. By way of an answer to this rhetorical question, counsel for the applicant submitted that it was *"fanciful"* to suggest that the respondent would have invoked s.14 of the 2005 Act had the Appeal Board agreed with him. In light of the facts, I am in full agreement with that submission.

126. It is clear from the respondent's 12 March 2020 letter that he maintains that the power conferred upon by s.14 of the 2005 Act is one exercisable by him, in the present circumstances, notwithstanding the process which was conducted, pursuant to the 2007 Regulations, up to and including a conclusion. That, of course, is the question which is central to the present dispute.

127. According to the respondent's notice pursuant to the 2005 Act, the conclusion reached in the process which was conducted under the 2007 Regulations, including the evidence given to and the determination of the Board of Inquiry, as well as the determination of

the Appeal Board, and all evidence given on behalf of the applicant in the said process, did *not* form part of the respondent's consideration in implementing his powers under s.14 of the 2005 Act. The relevant paragraph of the respondent's letter states as follows:-

> *"In your submissions, your solicitors have outlined the process that has taken place to date, including the Board of Inquiry, my decision to increase the decision of the Board of Inquiry and the determination of the Appeal Board, including the favourable comments made by a number of supervisors, line managers and medical professionals on your behalf.* ***However, these matters have been dealt with to a conclusion and have not formed part of my consideration in implementing the provisions of s.14 of the Garda Síochána 2005.*** *As previously outlined, s.14 is a standalone provision and I feel it necessary to consider it to ensure public confidence in An Garda Síochána."* (emphasis added).

128. In skilled submissions made on behalf of the respondent, counsel describes the sentence which I have highlighted as being *"infelicitous"*. He went on to submit that if one reads the respondent's letter as a whole, it is plain that the respondent did, in fact, consider all relevant matters and material which emerged as a result of the disciplinary process conducted pursuant to the 2007 Regulations. In this regard counsel for the respondent drew particular attention to the penultimate paragraph of the 12 March, 2020 letter wherein the respondent states that:

> *"While I have considered your personal circumstances in detail and* ***have also considered favourable comments by a number of supervisors*** *I must be conscious of my wider duties to the public and in particular my duty to maintain public confidence in the Garda Síochána.* (emphasis added).

129. Reading this letter as a whole and with care, I still find it impossible to reconcile the contents of both of the paragraphs to which I have referred. In the penultimate paragraph, the respondent is explicit that he has *"also considered favourable comments by a number of supervisors"*. This statement is, however, utterly at odds with the respondent's previous statement. Furthermore, even if one is to take from the letter that the respondent did, in fact, consider favourable comments made by a number of supervisors, that addresses only one particular aspect of the process conducted under the 2007 Regulations. In other words, favourable comments constitutes item number 10 out of a list of no less than 14 *"mitigating circumstances"* which the Appeal Board referred to in its decision delivered on 09 December, 2019. Even if one was to take from the respondent's letter that the respondent had regard to this particular mitigating circumstance or factor, the respondent has stated in the plainest of terms elsewhere in his letter that the process which had taken place, including the Board of Inquiry, his decision to increase the decision of the Board of Inquiry and the determination of the Appeal Board constituted matters which had *"been dealt with to a conclusion"* and which had *"not formed part of the respondent's consideration in implementing the provisions of s.14 of the Garda Síochána Act 2005"*.

130. Statements made by the respondent in his 12 March 2020 letter may well be 'infelicitous' in the sense of being unfortunate or inappropriate but, taken as a whole, the letter makes clear that, with the exception of *"favourable comments made by a number of supervisors"*, the respondent did not consider any other matters derived from the disciplinary process which had been carried out pursuant to the 2007 Regulations, in the context of implementing s.14 of the 2005 Act. Even if I am wrong in interpreting the letter, read as a whole, in the foregoing manner, it is entirely uncontroversial to say that the letter contains unexplained inconsistencies, in that it is far from clear what the respondent did or did not consider or, for that matter, what the respondent *says* he did or did not consider.

131. It is a matter of fact that evidence was proffered in the context of the disciplinary process under the 2007 Regulations to the effect that the applicant was an efficient and effective member of An Garda Síochána. Insofar as the respondent expresses a different opinion in the context of relying on s. 14 of the 2005 Act, the basis for that opinion is not at all clear (other than for the respondent to express the view that these matters did *not* form part of his consideration when implementing section 14). It has to be said, however, that if such matters did not form part of the respondent's consideration in the context of invoking s. 14, it is difficult to understand the respondent's statement to the effect that he considered favourable comments made by a number of supervisors in respect of the applicant. Regardless of what the respondent did or did not consider, the basis for views expressed in his 12th March, 2020 letter is far from clear and certain views expressed run *contrary* to evidence given in the disciplinary process pursuant to the 2007 Regulations, including as to the effectiveness of the applicant as a member of the Garda.

132. Furthermore, at the heart of the respondent's reason for his 12 March 2020 decision <u>to</u> dismiss the applicant, simpliciter, is precisely the same issue which was at the heart of the respondent's 18 June 2019 decision, which was <u>not</u> to dismiss him outright. That fundamental reason which clearly underpins both decisions is to ensure and maintain public confidence in An Garda Síochána (something both letters explicitly referenced). In other words, something which was not appropriate, in the respondent's view, at any point prior to the Appeal Board delivering its decision on 09 December 2019, became appropriate, in the respondent's opinion, immediately thereafter, despite no material change in any relevant fact or circumstances.

133. A constant theme running through the disciplinary process conducted under the 2007 Regulations, in particular from 28 March 2019 onwards, was that the applicant's conduct, and the consequences thereof, including reputational damage, undermined public confidence in An Garda Síochána. This principle is, of course, at the very heart of s. 14 (2) (a) of the 2005 Act insofar as the respondent's opinion is concerned. It is plain that when engaging in a very fulsome manner with the disciplinary process pursuant to the 2007 Regulations, the respondent expressed in clear terms the very opinion which is referred to in s. 14 (2) (a) of the 2005 Act, but the respondent was equally clear as to what was, and was not, the appropriate penalty to impose on the respondent as a consequence of that opinion. It was never dismissal simpliciter. It was always to require

the respondent to resign as an alternative to dismissal. When the Appeal Board did not agree with the respondent, in terms of the appropriate disciplinary action, that which was previously not appropriate by way of penalty suddenly became appropriate, without any change whatsoever in the underlying facts or circumstances and without any change in any material respect as regards the opinion of the respondent to the effect that the applicant's conduct had caused reputational damage to An Garda Síochána and that his continued membership would undermine public confidence. The only change, which was that the Appeal Board disagreed with the respondent, resulted in a previously inappropriate penalty was now said by the respondent to be appropriate.

134. At a level of principle it is not difficult to imagine why the respondent might well take the view that, although a member's career with An Garda Síochána must be brought to an end, outright dismissal was not appropriate by way of a penalty, whereas the lesser sanction of the member being required to resign, as an alternative to dismissal, was the appropriate sanction. Factors influencing such a decision could well include a wide range of what might be considered mitigating circumstances. It could hardly be suggested that the respondent could not legitimately take into account, when distinguishing between these two different disciplinary actions (specified at (a) as opposed to (b) of Regulation 22), factors such as cooperation with an investigation; the promptness with which guilt was accepted; contrition on the part of the member; testimonials in relation to their previous record; the extent to which the disciplinary breach was considered by the member's superiors to be out of character; relevant personal circumstances, be they medical, financial, family or otherwise; as well as a potentially large range of other factors.

135. In the manner explained in this judgment, I am entirely satisfied that there is a very material difference between the position of someone who, in fact, gets to *resign* as opposed to someone who is *dismissed*. Given the undisputed fact that, at all material times prior to the Appeal Board's 09 December 2019 decision, the respondent regarded the disciplinary action specified at Regulation 22 (b) as the one and only appropriate sanction, it can be presumed that what might be called mitigating factors played a part in the respondent's decision as to what disciplinary action was, and was not, appropriate.

136. It is fair to say that each and every issue raised by the respondent in his 12 March 2020 letter had already been raised and dealt with up to and including a final and binding decision, under the disciplinary process pursuant to the 2007 Regulations. Fairly considered, there is no new issue raised in the 12 March 2020 letter which had not previously been raised in the context of the disciplinary process pursuant to the 2007 Regulations. Nor are there any new disciplinary charges proffered in the context of an invocation by the respondent of his powers pursuant to s. 14 of the 2005 Act. In other words, everything had already been investigated and, indeed, adjudicated upon with finality, in the disciplinary process pursuant to the 2007 Regulations.

137. Insofar as the respondent states in his 12 March 2020 letter to the respondent that *"…owing to your conduct on 15th April, 2007, the public are fully aware of this incident*

and it is my opinion that your continued membership is untenable given the requirement for the maintenance of public confidence and trust in An Garda Síochána", it is a matter fact that the public had long been aware of the incident, having regard to the media coverage and the dates of same. In other words, this was nothing new and, in the manner previously analysed, the respondent *knew* that this was nothing new (media coverage having been referred to, explicitly, by the Board of Inquiry as the transcript confirms, being a transcript which the respondent carefully considered prior to proposing specific disciplinary action in the context of the disciplinary process conducted pursuant to the 2007 Regulations).

138. The statement in the respondent's 12 March 2020 letter that *"I remain of the opinion that your continued membership of An Garda Síochána would undermine public confidence in the Garda Síochána, and your dismissal is necessary to maintain that confidence* is plainly an attempt to bring the situation within the ambit of s. 14, having regard to the provisions of s. 14 (2) (a) (i) and (ii). Mirroring this, is para. 23 of statement of opposition in which it is pleaded that:

> *"The respondent has lawfully invoked powers conferred upon him by s. 14 (2) of the 2005 Act, as amended. The proposal of the Respondent is lawful having regard to the breaches of discipline committed by [the Applicant], which breaches are not denied by the [Applicant].* ***The Respondent is of the opinion that by reason of such breaches of discipline the continued membership by the applicant would undermine public confidence in An Garda Síochána.*** *Further the Respondent has fully complied with the statutory obligations set out under s. 14 (2) of the 2005 Act."* (emphasis added).

139. Earlier in this judgment I noted that, in circumstances where the respondent has not sworn any affidavit, I do not regard it as possible for Chief Superintendent Nugent to verify, by means of an averment as to her belief, the opinion held by the respondent. Even if one leaves that issue aside, it is fair to say that nowhere in the respondent's 12 March 2020 letter is any explanation proffered as to why, at all material times up to the delivery by the Appeal Board of its 09 December 2019 decision, the respondent regarded a very specific penalty as being the one and only appropriate penalty, yet in the immediate aftermath of the Appeal Board's decision, the respondent regarded a materially *different* penalty as being the appropriate one, despite no material change in any facts or circumstances. Having looked in some detail at the facts which emerge from an examination of the evidence and inferences which can reasonably be drawn from those facts, I want to make specific mention of the comprehensive submissions made on behalf of both parties.

Discussion and decision

140. I want to express my thanks to counsel, and to their instructing solicitors, who provided detailed written submissions which were supplemented by means of oral submissions made with sophistication and skill during the hearing which took place on 17 and 18 June 2021. I have very carefully considered all submissions. Among other things, it is argued on behalf of the respondent that s. 14 of the 2005 Act cannot properly be characterised

as a disciplinary procedure. It is characterised as a stand-alone power which is vested in the respondent notwithstanding anything in the 2014 Act or the Regulations. It is also emphasised that s. 14 is a statutory power and that Regulations do not prevail over statute. The submission is made that the plain meaning in the disciplinary procedure prescribed by the 2007 Regulations does not limit or constrain the power vested in the respondent pursuant to s. 14 in any way. On behalf of the respondent it is also submitted that it is impermissible to imply, into s. 14, either the words *"save insofar as a disciplinary process under the Regulations has been initiated"* or *"save insofar as the disciplinary process has been completed"*. It is submitted that there is no provision in the 2005 Act or in the Regulations to preclude the exercise by the respondent of his power pursuant to s. 14, by reason of the institution or, for that matter, the completion, of a disciplinary process pursuant to the 2007 Regulations. Let me say at this juncture that I have no difficulty whatsoever with the foregoing submissions as a matter of general principle. Section 14 is plainly a stand-alone power which is *prima facia* exercisable by the respondent without reference to what may or may not have occurred pursuant to the Regulations. The foregoing submissions made on behalf of the Respondent do not, however, seem to me to engage with the fundamental issue in the case before this court, namely, whether on the specific facts and circumstances of this particular case, the exercise by the respondent of his statutory powers pursuant to s. 14 of the 2005 Act was inconsistent with fair procedures and constitutional justice.

141. It is argued on behalf of the respondent that, in circumstances where there is no provision which precludes the exercise by the respondent of his s. 14 power, there is no element of surprise, nor any prejudice to the applicant. On behalf of the respondent, it is not accepted that the obligation upon him, pursuant to the 2007 Regulations, to implement the decision of the Appeal Board precludes the exercise by the respondent of his powers under s. 14 of the 2005 Act. With regard to the applicant's case that the respondent's decision is vitiated by irrationality or unreasonableness, this is wholly disputed. It is submitted that the applicant, under the heading of *"reasonableness"* is inviting this court to do what is impermissible, namely to put itself in the position of the respondent and to substitute this court's determination in place of the respondent's exercise of his statutory discretion pursuant to s. 14.

142. Let me say at this juncture that this court is most certainly not doing anything of the sort. I have considered it appropriate to set out, in some detail, and in chronological order, facts which emerge from the evidence before this court and I have referred to certain inferences which can reasonably be drawn from the facts. Nothing in this judgment, however, constitutes a merits-based analysis of any matter, nor is this court's decision based on any consideration of merits, as opposed to the analysis of the exercise or purported exercise of powers in light of the interplay between the 2007 Regulations and the 2005 Act, having regard to principles of constitutional fairness against the backdrop of very specific facts and circumstances.

143. The submission is also made by the respondent that, nowhere in the 2005 Act, is it provided that the existence of disciplinary proceedings pursuant to the 2007 Regulations

serves as any bar to the invocation of s. 14 of the Act. It is further submitted that, having regard to the criteria for dismissal set forth in s. 14 (2), the decision to dismiss the applicant cannot be impugned on rationality or reasonableness grounds, having regard to the statutory obligation on the respondent to uphold and maintain public confidence in An Garda Síochána.

144. Among the oral submissions made on behalf of the respondent was that no rationality or reasonableness grounds were in the pleaded case as per the statement of grounds, (it is appropriate to say that the statement of grounds does make a plea of irrationality and I am satisfied that this issue constitutes an element of the pleaded case). It was also submitted that what was characterised as the applicant's criticisms of the absence of an affidavit from the respondent, were misplaced given what the case was about. It was submitted that the respondent has maintained silence, as he is perfectly entitled to maintain, in respect of matters which are not before the court and which it was not necessary for the respondent to comment upon, having regard to the leave granted in the context of the case made.

145. The case was characterised by the respondent's counsel as exclusively a legal one, essentially about whether the respondent is entitled to have recourse to s. 14 of the 2005 Act, post the invocation of a disciplinary process under the 2007 Regulations. On behalf of the respondent, it was submitted that the applicant was operating in the mistaken belief that he should be in a position to cross-examine the respondent. It was submitted that there are no facts in controversy and only issues of law in dispute. The submission was made that, even if there was a valid "hearsay" point, it is of no relevance to the legal issues which this court has to decide. It was submitted that there has been no failure to comply with O.84 r.20 and that the crux of the case concerns a statutory power pursuant to s. 14 of the 2005 Act which, it was submitted on behalf of the respondent, was exercisable in the present circumstances. It is acknowledged that the exercise of the power pursuant to s. 14 of the 2005 Act has the potential to lead to the dismissal of the applicant and that, notwithstanding the foregoing, counsel for the respondent emphasised that it was not a disciplinary procedure. The submission was made that, when one looks at s. 14 of the 2005 Act, relative to the contents of the disciplinary regulations, s. 14 relates to the *"opinion"* of the respondent and this, submits counsel for the respondent, speaks to the wide discretion vested in the respondent by the Oireachtas in the discharge of his functions.

146. It was acknowledged on behalf of the respondent that the opinion formed pursuant to s. 14 cannot be *"arbitrary"* and that such an opinion must be reached in accordance with the terms of s. 14 and the principles of natural justice. It was stressed, however, that the Oireachtas has given the respondent a very wide discretion and that the process is not of the same nature as the disciplinary process pursuant to the 2007 Regulations. On behalf of the respondent it was submitted that it may or may not be correct, as a proposition, that, depending on the given facts in a particular case, the respondent would be obliged to engage in a separate fact-finding exercise under s. 14, but it was submitted that this does not arise in the present case where, it was submitted, the facts are not in dispute.

This submission was made on behalf of the respondent that s. 14 does not, in itself, prescribe a fact-finding mechanism and that this is because one is concerned with the judgment or opinion of the Commissioner. It is also submitted that, to be subject to s. 14 of the 2005 Act, represented an incident of service as a member of An Garda Síochána which provision has no comparator in the wider public sector or in the private sector. In this regard, emphasis was laid on the decision of O'Hanlon J. in *The State (Jordan) v. Commissioner of An Garda Síochána* [1987] ILRM 107 wherein the learned judge stated:

> *"I am of opinion that special considerations apply in relation to the power of the State to dispense with the services of members of the armed forces, of the Garda Síochána, and of the prison service because it is of vital concern to the community as a whole that the members of these services should be completely trustworthy. For this reason, I take the view that it was permissible to confer on the Commissioner of the Garda Síochána the exceptional powers contained in Reg. 34 of the Discipline Regulations, 1971, but I also accept the contention of counsel for the prosecutor that the scope for making use of these powers must be very limited in character. Presumably, if the Commissioner were to witness a grave breach of discipline committed in his presence he would be justified in dispensing with the holding of an inquiry. Similarly, as was accepted by counsel for the prosecutor, if the member against whom it was proposed to exercise the power of dismissal, admitted that he was guilty of a serious breach of discipline, the Commissioner could lawfully act upon the faith of such admission without resorting to the time-consuming process of the inquiry machinery which is outlined in the regulations.*
>
> *In such circumstances there could not said to be a denial of natural or constitutional justice, since the member concerned has an opportunity to deal with the facts which are regarded as constituting a grave breach of discipline and makes it clear, by his own admissions that these facts do, indeed, apply to his case."*

147. Counsel for the respondent submitted that the foregoing is a significant comment and constitutes a judicial recognition of the provisions in respect of summary dismissal which are now contained in Regulation 39 of the 2007 Regulations (the successor to Regulation 34 of the 1971 Regulations referenced in the judgment). On behalf of the respondent, it is submitted that the reasoning in *Jordan* is capable of being extended to the respondent's powers pursuant to s. 14 of the 2005 Act.

148. With reference to extracts from *"Statutory Interpretation in Ireland"* (First Edn., Bloomsbury Professional, Dodd & Cush) it was submitted on behalf of the respondent that, *per* the maxim *ut res magis valeat quam pereat* (translating as "it is better for a thing to have effect than to be void"), it is presumed that the legislature does not create void provisions. As regards the use of the term *"notwithstanding"* it was submitted that it renders the provisions of s. 14 of the 2005 Act as having overriding authority. In *"Statutory Interpretation in Ireland"* the learned authors refer (at 4.84) to the decision in *Sheedy v Information Commissioner* [2005] 2 IR 272 which considered s. 53 of the Education Act, 1998 which commenced *"notwithstanding any other enactment"*. The

authors go on to explain that Kearns J., with whom Denham J. agreed, emphasised the importance of the expression *"notwithstanding"* in resolving the relationship between certain sections of the Freedom of Information Act, 1997 and s. 53 of the 1998 Act, and the authors cite a passage from the decision in *Sheedy* as regards the use of *"notwithstanding"* which concludes as follows: *"The word 'notwithstanding' is in this instance a prepositional sentence – starter which unequivocally means, and can only mean, 'despite' or 'in spite of' any other enactment. It underlies in the clearest possible manner the free-standing nature of the provision."*

149. Counsel for the respondent also emphasised the use of the term *"notwithstanding"* in Regulation 39, subsection (1) of which begins *"Notwithstanding anything in these regulations and without prejudice to section 14(2), the Commissioner may, subject to this regulation, dismiss from the Garda Síochána any member (not being above the rank of Inspector) whom he or she considers unfit for retention in the Garda Siochána."* On behalf of the respondent it was submitted that this use by the legislature of the term *"notwithstanding"* in both the 2005 Act and in the 2007 Regulations is fatal to the proposition that, in electing to initiate the disciplinary process pursuant to the 2007 Regulations, the respondent divested himself of the entitlement to invoke s. 14 of the 2005 Act. Insofar as authorities relied upon by the applicant, it was submitted on behalf of the respondent that those authorities concerned a review by the superior courts of the use of what was the same power, whereas in the present situation the respondent is employing a different and distinct statutory power to the one employed by him in the context of the disciplinary process conducted under the 2007 Regulations.

150. It was also submitted that there had been no representation made by the respondent to the effect that he would not invoke his power under s. 14 of the 2005 Act. It was further submitted that no member of an Garda Siochána can conclude that, when he or she is subject to a disciplinary procedure, pursuant to the 2007 Regulations, up to and including the outcome of same, that the member is no longer subject to the respondent's power pursuant to s. 14 of the 2005 Act. The submission was also made that principles derived from *East Donegal Co-Op Marts Limited v A.G.* [1970] IR 317 are of no relevance and that, if there was any unfairness, *East Donegal* principles did not extend to the present circumstances. It was also submitted that the applicant had not challenged the constitutionality of s. 14 of the 2005 Act and had not made the case that the co-existence of s. 14, alongside the 2007 Regulations, is unfair in any way. The submission was made on behalf of the respondent that it was not clear whether the applicant was arguing unreasonableness or irrationality, but neither arose. It was emphasised, on behalf of the respondent, that s. 14 of the 2005 Act does not prescribe any fact-finding exercise in circumstances where the section turns on the opinion of the respondent, the stated basis for which the applicant has an opportunity to respond to. It was submitted that the respondent, for the purposes of s. 14 of the 2005 Act, takes the factual situation as he finds it and the submission was made that, in the present case, there were no facts in dispute. Again, it was stressed that the legal issue at the heart of the present dispute is whether, after the initiation of the disciplinary process pursuant to the 2007 Regulations, and even though, in this particular case, that process came to a conclusion, the

respondent is precluded from invoking s. 14 and it was submitted on behalf of the respondent that there is no bar whatsoever to the respondent invoking his power under s. 14 in the present case or in any circumstances.

151. It was submitted on behalf of the respondent that it was patent that the events of 15 April 2017 were calculated to, and did in fact, attract a considerable degree of public notoriety and that this could not be disputed. With regard to the applicant not being identified by name in media coverage, the submission was made that it is 'nonsense' to suggest that the respondent was obliged, in the circumstances which pertained, to go out and elicit opinion in relation to an erosion of public confidence (As regards the foregoing, the fact that the applicant would not appear to have been identified in media coverage is something which was raised in written submissions made by the applicant's solicitor on 14 January 2020 in the context of a submission that it was difficult to see how the applicant's position in an Garda Siochána could be deemed to be untenable as a consequence of that media coverage which did not identify him). As well as submitting that there was no question of irrationality on the part of the respondent, it was submitted that s. 14 was intended by the legislature to revolve around the opinion of the respondent and, on the facts of the case, neither a challenge on the grounds of unreasonableness nor irrationality was tenable.

152. Counsel for the respondent also submitted that there is no material distinction between the sanction of *resignation in lieu of dismissal* and *dismissal*. In the manner explained in this judgment I cannot agree. I do agree that, in either eventuality, the applicant would cease to be a member of An Garda Síochána, but I cannot agree that the two sanctions involve a distinction without a material difference. The different effect on one's reputation of the two sanctions is obvious, that the two sanctions would have a different effect on the member subject to same can be presumed. The material difference between the two sanctions is explicitly recognised by virtue of Regulation 22 of the 2007 Regulations which identifies them as separate and distinct *"disciplinary actions"* in a hierarchy of four separate and distinct disciplinary actions, only <u>one</u> of which a member of An Garda Síochána may be subject to.

153. Counsel for the applicant lays considerable emphasis on the fact that the respondent did not swear any affidavit in the present proceedings, pointing to the decision of Barrett J. in *Murtagh v. Kilraine* [2017] IEHC 384, wherein the learned judge referred, inter alia to the decision of Keane C.J. in *O'Neill v. Gov. of Castlerea Prison* [2004] 1 IR 298 in which, (at 316) the then – Chief Justice stated: -

> *"The argument on behalf of the applicants, that in judicial review proceedings a respondent should disclose to the court all the materials in its possession which were relevant to the decision sought to be impugned, is well-founded, although it would doubtless not require the respondents to disclose material in respect of which in a discovery process they would be entitled to claim privilege".*

154. The decision which this Court makes does not, it seems to me, hinge on the principles which were derived from the *O'Neill* decision or, for that matter, revolve around the fact

that the respondent has chosen not to swear any affidavit. It seems to me that undisputed facts allow this Court to make a decision having regard to relevant principles which emerge from the authorities and to which I will refer in due course.

155. On behalf of the applicant it is submitted that s.14(2) could not be interpreted to mean that, notwithstanding any *"decision"* taken under the Regulations, the respondent may dismiss a member pursuant to s.14(2) in all circumstances. The submission is made on the applicant's behalf that the invocation by the respondent of s.14 does not insulate him against arguments based on constitutional justice. The submission is made that s.14 cannot be invoked against the backdrop of the relevant facts in this case. On behalf of the applicant it is submitted that there are circumstances where it would be contrary to fair procedures and constitutional justice to permit the invocation of an otherwise available statutory power. On behalf of the respondent, it is argued that the respondent's power pursuant to s.14 of the 2005 Act exists entirely apart from his powers pursuant to the 2007 disciplinary regulations. It is acknowledged on behalf of the respondent that the invocation of s.14 has the potential to lead to the dismissal of a member but counsel for the respondent argues that the s.14 procedure is not a disciplinary procedure, his submission being that the nature of the power is fundamentally different to that enjoyed by the respondent under the regulations. It is submitted on behalf of the respondent that, for the respondent to have elected to initiate a disciplinary process under the regulations and for the respondent to have participated in that process up to and including an outcome does not at all, or in any circumstances, divest the respondent of the entitlement to invoke s.14. Counsel for the respondent characterises the fundamental issue before this Court as being whether, after the initiation of a disciplinary procedure pursuant to the 2007 Regulations (even though, in the present case, such a procedure came to a conclusion) the respondent is precluded from invoking s.14. With sophistication and skill, counsel for the respondent argues that the answer to the foregoing question is in the negative, *i.e.* the powers are so distinct and so explicitly divorced from each other that, in the present case, regardless of the undoubted participation by the respondent in the disciplinary process pursuant to the regulations and regardless of the outcome of that process, the respondent's power pursuant to s.14 is available to him to invoke and is not fettered in any way, regardless of the facts and circumstances in the present case.

156. In my view, this Court could not properly import into s.14(2) the term *"decision"* in the manner urged on the court with such skill by counsel for the applicant. In other words, the plain meaning of the words which the Oireachtas chose to use was to indicate that the power available to the respondent pursuant to s.14 was exercisable without reference to the 2007 Regulations. By that I mean, there could conceivably be situations where a *decision* is reached at the conclusion of a process which has been conducted pursuant to the 2007 Regulations, yet the powers of the respondent pursuant to s.14(2) would still be available. If the Oireachtas intended that the respondent be deprived of the power to rely on s.14(2) in circumstances where a *decision* had been reached under a process governed by the 2007 Regulations, I am entitled to take the view that the Oireachtas would have said so in the legislation. They did not. That does not, however, dispose of the issue before this Court. I say this because, although accepting as a general proposition that

s.14, in the terms conferred upon the respondent, is a very wide power and one involving what might be considered a primacy over the respondent's alternative powers in the 2007 Regulations, I cannot accept a submission that the respondent is entirely 'at large' as regards the exercise of his power pursuant to s.14. Implicit, indeed explicit, in the submissions made on behalf of the respondent, is the proposition that given the "stand-alone" power enjoyed by the respondent pursuant to s.14 of the 2005 Act, it could *never* be operated in a manner which was contrary to fairness and constitutional justice. To the extent that such a submission is made, it is not one I can accept. It seems to me that the question before this Court does not revolve around the "stand-alone" nature of the respondent's power pursuant to s.14, or the undoubted primacy or independence of that power insofar as the respondent's alternative powers pursuant to the 2007 Regulations is concerned. Rather, the question seems to me to be whether, on the very specific and particular facts in the present case, the invocation by the respondent, on 16 December 2019, of his powers pursuant to s.14 of the 2005 Act did, or did not, involve a breach of principles of constitutional justice.

157. In submissions, counsel for the applicant argued that if the respondent is correct when arguing that s.14 of the 2005 Act, being a "stand-alone" power, can be invoked under all circumstances - and regardless of whether a disciplinary process under the Regulations has been commenced, is in train, or has been concluded, - it means that the respondent could sit on an Appeal Board (by virtue of Regulation 34(5)(a)) and, *qua* Appeal Board member, come to the view that, in a given case, dismissal was not warranted but, immediately afterwards, the respondent could invoke s.14 of the 2005 Act and form an utterly different opinion. These are not, of course, the factual circumstances in the present case, in that the respondent did not personally sit as a member of the Appeal Board. Nevertheless, it seems to me to be a submission of some force and it speaks to the proposition that the respondent's reliance on the undoubted powers conferred on him by virtue of s.14 does not mean that the respondent is, in each and every circumstance, entirely 'at large'. In particular, the exercise of the respondent's power pursuant to s.14 is an exercise which must conform with principles of constitutional justice and fairness, being the central issue in this case.

158. Among the submissions made on behalf of the applicant is to point to the explicit statement made in the respondent's 12 March 2020 decision, wherein he makes clear that *"because these matters have been dealt with to a conclusion"*, the decision of the Board of Inquiry, the determination of the Appeal Board and any favourable comments about the applicant made by supervisors, line managers and medical professionals, did *not* form part of his determination to implement s. 14 of the 2005 Act. With regard to the foregoing, the applicant submits that the respondent has failed to have regard to relevant matters. This is a submission which, it seems to me, is supported by the evidence in this case. It is also submitted that the respondent set in train a statutory disciplinary process pursuant to the 2007 Regulations but was ultimately prepared to accept the outcome of that statutory disciplinary process which he himself initiated, only if the outcome accorded with what was characterised on behalf of the applicant as the respondent's *"pre-ordained views"*. Again, that seems to me to be a submission which is supported by the evidence

in this case in that, at all material times prior to 09 December 2017, the respondent engaged fully with the statutory disciplinary process which he initiated and that remained the case until, in the wake of the Appeal Board's 09 December 2019 decision, (which did not accord with the disciplinary action proposed by the respondent as of 28 March 2019 and decided upon by the respondent as of 18 June 2019) the respondent, instead of implementing the Appeal Board's decision, proposed a materially *different* penalty and invoked s. 14 of the 2005 Act in that regard.

159. It was also submitted on behalf of the applicant that the Commissioner's 12 March 2020 decision was predicated on the applicant's conduct as of 15 April 2017 and the *sequelae* flowing therefrom, whereas precisely the same issue was investigated by the duly appointed Garda Superintendent; being the same issue which was considered and determined by the Board of Inquiry; being the same issue which became the subject of the respondent's March 2019 proposal and June 2019 decision; and which was, thereafter, reviewed and conclusively decided by the Appeal Board. Once more, the evidence supports the foregoing submission and also supports the submission made on behalf of the applicant that the respondent has thereby purported to entirely ignore all of the intervening statutory processes and procedures which he himself instigated, presumably lawfully, from the outset.

160. It is also emphasised on behalf of the applicant that it was not claimed that any new facts came to light as a result of the disciplinary process, or otherwise. Once more, this submission is supported by the evidence. It is pointed out that the respondent took office in September 2017 and that no argument is raised on his behalf to the effect that his predecessor acted at any stage unlawfully, inappropriately, or without full knowledge of the underlying facts. It is submitted that the respondent's predecessor commenced the relevant disciplinary process pursuant to the 2007 Regulations and that Commissioner Harris, following his appointment, took a full part in same. The foregoing is undoubtedly borne out by the evidence before this court.

161. The submission is made that the respondent is obliged to accept and to adhere to the outcome of the process conducted pursuant to the 2007 Regulations and it is submitted that the Commissioner's failure to do so undermines the rule of law and the public trust and confidence that the Regulations are designed to protect. Insofar as the provisions of s. 14 of the 2005 Act are concerned, it is submitted that the meaning of *"notwithstanding anything in this Act or the Regulations"* is that the respondent may, in the limited circumstances provided for in s. 14, invoke that section *rather than* instigating proceedings pursuant to the Garda (Disciplinary) Regulations. That is not an interpretation I agree with. It seems to me to be too restrictive, having regard to the wording used and the analysis of the use of the term *"notwithstanding"*, per *Sheedy*. In my view, s. 14 is undoubtedly a stand-alone power and, that being so, it does not seem to me that it is necessarily impermissible for the respondent to invoke his power pursuant to s. 14 *and* to instigate proceeding pursuant to the 2007 Regulations. At a level of principle, one could certainly conceive of a situation where the respondent invoked his undoubted statutory power pursuant to s. 14 and expressed an opinion consistent with

the terms of s. 4(2)(a)(i) and (ii) and, thereafter, *also* deciding to instigate proceedings pursuant to the 2007 Regulations if, for example, the relevant member having advanced reasons against his dismissal in the manner envisaged by s. 14(2)(b), the respondent regarded it appropriate to employ the undoubted fact-finding mechanisms in the 2007 Regulations.

162. That is not for a moment to suggest that the foregoing scenario is the *only* one in which the respondent could invoke both s. 14 and the 2007 Regulations. My point is simply to illustrate that the interpretation contended for by the applicant is, in my view, too narrow. Saying this does not, however, determine the issue which is at the heart of the present case and in a submission which speaks to that issue, the applicant contends that a constitutional interpretation of s. 14 would not allow the respondent to instigate a disciplinary process under the 2007 Regulations, culminating in a decision of an independent Tribunal whose decision was binding, take an active role in that process at all material times and then ignore the outcome as something he did not agree with. In this regard reliance is placed on the decision in East Donegal wherein Mr. Justice Walsh stated (at 341): *"… the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice."*

163. In the alternative, it is submitted on behalf of the applicant that, if s. 14 of the 2005 Act could, in principle, permit the respondent to dismiss a garda under that section, who had gone through the disciplinary process provided for by way of the 2007 Regulations, such could, constitutionally, only occur in compliance with fair procedures. It is submitted that such fair procedures would include a consideration as to whether the respondent could fairly change his mind on the basis of, for example, new evidence, whereas it is emphasised in the present case that there was, and is, no new evidence. For the respondent, it is submitted that it is not open to the applicant to argue that a power prescribed by the Oireachtas, in terms which make clear that it is unaffected by the 2007 Regulations, is a power which is not exercisable. On behalf of the respondent, it is submitted that what the applicant contends for goes far beyond the frontiers of the principles derived from *East Donegal*.

164. I take a different view in circumstances where, instead of deciding to invoke s. 14, the respondent took the decision to go down the route of a disciplinary process pursuant to the 2007 Regulations and, on any analysis, he played a full and active part in that statutory process, the outcome of which, as the respondent must have known, had the potential to result in a range of disciplinary actions, being those specified in Regulation 22, the most serious of which was dismissal itself. At all material times during his participation in the disciplinary process pursuant to the 2007 Regulations, the respondent did <u>not</u> regard dismissal as the appropriate penalty. This is perfectly clear from the evidence examined in this case, the respondent having proposed, and later decided upon, <u>not</u> dismissal, but resignation as an alternative to dismissal. The *only* sanction available

pursuant to s. 14 of the 2005 Act is dismissal. The facts which emerge from the evidence before this court demonstrate that at all material times up to 09 December, 2019, the respondent neither regarded dismissal as the appropriate sanction, nor s. 14 of the 2005 Act as the appropriate route. That changed, but it only changed in the immediate aftermath of and by reason of a decision by the Appeal Board with which the respondent did not agree. Nothing else changed.

165. In these very particular circumstances, I am satisfied that the principles derived from *East Donegal* are of relevance and I take the view that the invocation of s. 14 of the 2005 Act, which was after, and by reason of, the Appeal Board delivering a decision the respondent was unhappy with, offended principles of constitutional justice, having regard to the specific facts in the present case which I have examined earlier in this judgment. As the Supreme Court made clear in *McCormack v Garda Siochána Complaints Board* [1997] 2 IR 489:

> *"30. It is now established as part of our constitutional and administrative law that the constitutional presumption that a statute enacted by the Oireachtas intended that proceedings, procedures discretions and adjudications permitted, provided for, or prescribed by Acts of the Oireachtas are to be conducted in accordance with the principles of constitutional justice (see East Donegal Co-Operative Livestock Mart Ltd v. Attorney General [1970] I.R. 317, 341). It follows therefore that an administrative decision taken in breach of the principles of constitutional justice will be an ultra vires one and may be the subject of an order of certiorari. Constitutional justice imposes a constitutional duty on a decision-making authority to apply fair procedures in the exercise of its statutory powers and functions."*

166. The foregoing statement by Costello P. in *McCormack* (at p. 499) seems to me to underline, for present purposes, that the case before this court does not fall to be determined with reference to principles of statutory construction. In other words, there is no doubt, in my view, that the respondent has a wide and stand-alone power pursuant to s. 14. That, however, is not the end of the analysis. Rather, the exercise of that very wide stand-alone power falls to be examined, having regard to the particular facts in the present case, in light of principles of constitutional justice. When that analysis is conducted it seems to me to lead to the inevitable result that there is a failure on the part of the respondent insofar as his duty to apply fair procedures in the exercise of powers conferred upon him by the Oireachtas.

167. The point is a very simple one. I reject the proposition that, because the respondent's power is plainly free-standing and can be exercised by him despite or in spite of any other power he enjoys pursuant to the 2007 Regulations, that this means it is impossible for the respondent to exercise his power pursuant to s. 14 of the 2005 Act unfairly and in a manner inconsistent with the principles of constitutional justice.

168. In my view, nothing turns on the fact that the power (including the power to dismiss) which is available to the respondent pursuant to the 2007 Regulations is in the context of a disciplinary procedure, whereas a separate and distinct power to dismiss is conferred on

the respondent pursuant to s. 14 of the 2005 Act which does not contain or mandate a similar disciplinary process. The ultimate sanction of dismissal is the same, but, crucially for present purposes, the respondent never regarded that ultimate sanction as appropriate until after the Appeal Board disagreed with his decision to impose a materially lesser sanction. In my view, the invocation by the respondent of his power under s. 14 of the 2005 Act is, on the facts in the present case, can fairly be said to be specifically with a view to setting at naught, and thwarting entirely, the key outcome of the process which was conducted pursuant to the 2007 Regulations and which ran from 17 April 2017 until 09 December 2019, with the full involvement of the respondent and his predecessor.

169. It will be recalled that the Board of Inquiry held its hearing on 28th February, 2019 and a full transcript was provided by the Board of Inquiry to the respondent who also received a report, dated 15th March 2019, by Mr. Hussey, the presiding officer of the Board of Inquiry. It will also be recalled that in his 28th March, 2019 letter, the respondent confirmed that he had carefully examined both. Had the respondent, at that point in time (i.e. after considering the Board of Inquiry's report and transcript) invoked s. 14 of the 2005 Act on the basis of a view formed by him in accordance with s. 14 (2) (a), it is difficult to see any impediment to the respondent pursuing a course of action in accordance with s. 14 thereafter (subject, of course, to complying in full with all the requirements of that section as well as the overarching principles of natural justice).

170. In other words, although it is not what in fact occurred in the present case, it seems perfectly possible to envisage a scenario where, despite having commenced a process under the 2007 Regulations, the respondent's subsequent invocation of his powers pursuant to s. 14 of the 2005 Act would have been legitimate.

171. It seems to me, however, that the 28th March, 2019 was a significant inflection point insofar as the present case is concerned. Some points seem to me to be relevant by way of a summary:

(1) The respondent chose to pursue a process which he envisaged could lead to the end of the applicant's service as a member of An Garda Síochána and the process he chose was that under the 2007 Regulations;

(2) The respondent was, according to his 28th March 2019 letter, of the opinion, at that stage, that the applicant's continued membership in An Garda Síochána would undermine public confidence;

(3) The foregoing opinion is precisely the same opinion which is specified in s. 14 (2) (a) (i) of the 2005 Act;

(4) Despite holding this opinion, the respondent both chose to address matters via the disciplinary procedure laid down in 2007 Regulations and he chose a materially different penalty to that of dismissal, simpliciter, even though dismissal was available as a potential sanction both under s. 14 of the 2005 Act and pursuant to Regulation 22 (a) of the 2007 Regulations.

(5) As and from 28th March, 2019 the respondent chose to pursue a course of action full in the knowledge that the applicant had the right to appeal his decision to an Appeal Board and that, pursuant to Regulation 37 (5), the respondent would be obliged to implement the Appeal Board's decision.

172. In light of the foregoing it seems to me that once the applicant received the respondent's 28th March 2019 letter, the applicant was entitled to believe that the respondent would not be invoking s. 14 at any stage thereafter. Things might be otherwise in a theoretical scenario where, for example, new evidence emerged thereafter concerning acts or omissions constituting serious breaches of discipline on the part of the applicant. Equally, in a purely theoretical scenario, if, for example the member, at a later point, was responsible for publicity adverse to An Garda Síochána, or adverse publicity emerged for the first time concerning the index event, that would be another change in circumstances. In the present case, there is no question of that. Nothing changed and there was nothing truly new, post 28th March 2019.

173. The entitlement on the part of the applicant to believe that the respondent would never invoke s. 14 was copper-fastened, in my view when, by letter of 18th June 2019 the respondent gave notice of his decision, in accordance with Regulation 32 (2), that the disciplinary action which should be taken in relation to the applicant was the requirement to resign as an alternative to dismissal. According to the contents of the respondent's 18th June, 2019 letter, he was of the opinion that the applicant's conduct had *inter alia* caused reputational damage to An Garda Síochána and that, by reason of the applicant's conduct, his continued membership in An Garda Síochána would undermine public confidence. This is precisely the opinion specified in s. 14 (2) (a) (i) but it was deployed by the respondent, *not* in the context of any invocation of s. 14 of the 2005 Act, but to underpin a decision to impose a materially different penalty than that specified in s. 14, albeit one which would secure a similar result in terms of ending the applicant's service as a member of An Garda Síochána, and the respondent's opinion was deployed in the context of a different statutory process which he chose to proceed with.

174. Counsel for the applicant also drew this court's attention to the Supreme Court's decision in *McGrath v. Commisisoner of An Garda Síochána* [1991] 1 I.R. 69. In that case the applicant, who was a member of An Garda Síochána, was charged before the District Court with embezzlement, contrary to provisions of the 1916 Larceny Act. The charges concerned three sums of money paid to him on foot of court orders imposing fines. The applicant admitted that he had not issued official receipts in respect of any of those payments, as a result of which the orders had been returned to the District Court as unexecuted and those who had paid fines had been in peril of being imprisoned on foot of the relevant orders. The applicant was acquitted in the Circuit Court on all three charges, but subsequently received notification that he was to be charged with breaches of garda discipline, including three charges of corrupt or improper practice. The particulars of the charges alleged failure to account for the sums of money received by him in the course of his duty. The applicant applied by way of judicial review seeking an order prohibiting the respondent Commissioner from holding an inquiry into the alleged breaches of discipline.

The High Court made such an order in relation to certain of the charges, but in relation to the charges of 'corrupt or improper' practice, the court ordered that the inquiry could proceed, provided that the breaches of discipline alleged were confined to charges of merely 'improper', rather than 'corrupt or improper', practice. The Commissioner appealed and, in dismissing the appeal, the Supreme Court held that to re-open an allegation of dishonesty which had been clearly determined by a jury verdict given on the merits, for the purposes of re-exposing the applicant to the possibility of punishment, amounted to an unfair and oppressive procedure which should be restrained by the court.

175. Counsel for the respondent submits that the decision in *McGrath* is not of particular relevance to the issues before this court, also submitting that the authorities, since 1991, have not followed a clear or consistent line as regards the significance of a criminal acquittal in the context of disciplinary investigations in the employment sphere. Counsel for the respondent also submits that it is not obvious that, in a criminal acquittal where the test is beyond reasonable doubt, that it renders it impermissible for the issue to be addressed in a disciplinary process with a different standard of proof.

176. It is clear from the Supreme Court's decision that there was a rejection of the proposition that acquittal on a criminal charge necessarily precludes a disciplinary investigation into the facts arising out of which a criminal charge was brought (per McCarthy J. at p. 75). The disciplinary inquiry which the Commissioner sought to hold in that case was pursuant to the Garda Síochána (Discipline) Regulations, 1971, alleging that the applicant in the case had been in breach of discipline within the meaning of Regulation 6 of the 1971 Regulations in that he had engaged in a *"corrupt or improper"* practice by failing to account for the sums of money received in the course of his duty. It is appropriate in my view to quote the final section of Mr. Justice Hederman's decision, as follows:

> *"20. The object of the disciplinary proceedings is to establish that he was guilty of the same acts as those in respect of which he was acquitted.*
>
> *21. Paragraph 4 of the said Discipline Form 30 B is as follows:*
>
> > *'(4) Corrupt or improper practice; That is to say at Mountrath Garda Station, County Laois, on the 24th January you failed to account for a sum of money to the amount of £100 received by you in the course of your duty from one Eamon Hanlon of Roundwood, Mountrath, County Laois, in respect of a warrant for £5.97 against Mr. Eamon Hanlon.*
> >
> > *The said corrupt or improper practice is a breach of discipline within the meaning of Regulation 6 of the Garda Síochána (Discipline) Regulations 1971 and is described at Reference No. 7 in the Schedule to the said Regulations.'*
>
> *22. If such an allegation is made out at the disciplinary hearing he is again exposed to punishment. Thus he is in effect being retried on issues already determined and he is, once again, exposed to the possibility of punishment. This cannot be done without seeking to set at nought the result of the verdict of the jury. I make a*

distinction between the consequences that might flow from any purely civil action and the disciplinary hearing procedure. The disciplinary hearing is more serious in its consequences than a mere civil action.

23. The learned High court judge in his judgment said that the disciplinary hearing could proceed on an allegation that would read as follows:-

'(4) Improper Practice; That is to say at Mountrath Garda Station, County Laois on the 24th January 1984 you failed to account for a sum of money to the amount of £100 received by you in the course of your duty from one Eamon Hanlon of Roundwood, Mountrath, County Laois in respect of a warrant for £145.97 against Mr. Eamon Hanlon. The said improper practice is a breach of discipline within the meaning of Regulation 6 of the Garda Síochána (Discipline) Regulations 1971 and is described at Reference No. 7 in the Schedule to the said Regulations.'

24. Such an allegation relates to matters of internal discipline in the Garda Síochána and is not in any way to be equated with the criminal charges of which the respondent has already been acquitted.

25. For this member of the garda to be tried again before a disciplinary tribunal on identical 'charges' to which he has been acquitted by a jury, having regard to the narrow purview within which the inquiry must be held, would involve a form of unfair and oppressive procedures which calls for the intervention of the Court."

177. It is clear from the decision in *McGrath* that the respondent Commissioner had the ostensible power to pursue a disciplinary process in relation to what was alleged to be a *corrupt* or *improper* practice but he was restrained in the manner explained by Hederman J., having regard to the criminal acquittal. The facts and context in which *McGrath* was decided are different to those in the present case but in my view there are certain relevant parallels. In the present case a statutory process has taken place from beginning to end and has resulted in a final outcome, namely, the decision of the Appeal Board. In the context of that process which was conducted with the respondent's full participation, pursuant to the 2007 Regulations, the respondent made clear his opinion that, by reason of the applicant's conduct, his continued membership would undermine public confidence in An Garda Síochána and this is one of the issues which was considered by the Appeal Board in the context of the decision it ultimately reached. It is beyond doubt that the applicant was exposed to punishment in the context of the disciplinary process conducted under the 2007 Regulations. Until the Appeal Board's decision was delivered on 09 December 2019, the applicant was in peril of being required to resign as an alternative to dismissal and, as is clear from the Appeal Board's decision which rejected the foregoing disciplinary action as inappropriate, the Appeal Board's decision was to impose a very substantial fine. On the facts of the case before this court, I am entitled to take the view that, had the Appeal Board agreed with the respondent's 28th March 2019 proposal and 18th June 2019 decision, there would have been no indication of s. 14 of the 2005 Act. It seems to me that s. 14 of the 2005 Act was invoked to set at nought the result of the

disciplinary process which had been conducted pursuant to the 2007 Regulations, thereby exposing the applicant, again, to punishment in respect of the self- same breaches of discipline, without any material change in any fact or circumstance, and the very issue arising pursuant to a s. 14 process having already arisen and having already been addressed in the disciplinary process pursuant to the 2007 Regulations, as is clear from the transcript of the Appeal Board's decision.

178. In my view, on the very specific facts of the present case, it would offend principles of constitutional justice and it would be unfair and oppressive for the applicant to be exposed to punishment a second time, i.e. pursuant to the s. 14 process, given that, in reality, all relevant issues have already been considered and determined to a final outcome which is binding on the respondent in the disciplinary process pursuant to the 2007 Regulations.

179. I take the foregoing view fully conscious of the decision of O'Hanlon J. in *Jordan* to which I referred earlier in this judgment. *Jordan*, of course, concerned the respondent's power of summary dismissal as provided for in Regulation 39 of the 2007 Regulations (being the successor to Regulation 34 of the 1971 Regulations). This is not, of course, a power the respondent invoked in the present case (he could have done so under the Regulations but actively chose to pursue a materially lesser sanction) but it is perfectly clear that he enjoys that power, just as he enjoys the powers under the relevant Regulations which he decided to invoke in the present case, leading to a final outcome. The undoubted availability to the respondent of the powers specified in s.14 of the 2005 Act does not, however, mean that such power can be invoked in a manner wholly inconsistent with constitutional justice.

180. *In Eviston v. DPP* [2002] 3 IR 260, the applicant was involved in a road traffic accident in which a third party was killed. The respondent decided that no prosecution should be initiated and this decision was notified to the solicitor for the applicant. After this decision, the father of the deceased third party wrote a letter to the respondent asking the respondent to reconsider the decision. The respondent reviewed the decision not to prosecute and decided to charge the applicant pursuant to s.53(1) and (2)(a) of the 1961 Road Traffic Act. The applicant was notified of this decision, at which point the applicant's solicitor sought an explanation for the reversal of the DPP's decision, which explanation was refused. The applicant sought an order prohibiting her prosecution by the respondent who acknowledged, in the proceedings, that no new facts or evidential materials had become available between the making of the first decision and the subsequent decision. The sole change of circumstances had been the receipt of the letter from the deceased's party's father. The applicant obtained relief in the High Court and, on appeal to the Appeal Court, Keane CJ, having analysed previous authorities, stated the following (from p.294): -

> *"Neither the High Court, nor this court, however, were directly concerned in those cases with the question as to whether the respondent can be restrained from continuing with a prosecution where he has previously intimated to the putative*

defendant that he did not propose to institute a prosecution and where, in the result, in the absence of any established change of circumstances, the reversal of his earlier decision could be regarded as a breach of the fair procedures which, as it is urged, he is obliged to observe in the discharge of his constitutional and legal functions.

It cannot be said, in my view, that to treat the respondent as being subject to such an obligation is to disregard the fact that, in carrying out the duties of his office, he is not acting in a quasi-judicial capacity and that, in particular, the classic maxims of audi alterm partem and nemo iudex in causa sua do not apply to him. The modern jurisprudence of this court has established beyond argument that the requirements of natural justice in particular cases may extend beyond the observance of those traditional criteria.

Thus, in The State (O'Callaghan) v. O'hUadhaigh, [1977] I.R. 42 the Central Criminal Court had ruled that, in the case of an indictment containing ten counts, only one count was properly before the court. The respondent thereupon entered a nolle prosequi in regard to all the counts. The prosecutor was then re-arrested and charged in the District Court with the same offences. In making absolute conditional orders of prohibition to prevent the District Court proceeding with the renewed charges, Finlay P said at p.53 that: -

> *'If the contention of the respondent is correct, the prosecutor, having undergone that form of trial (and remand awaiting trial) and having succeeded in confining the issues to be tried, would be deprived of all that advantage by the simple operation of a statutory power on the part of the Director of Public Prosecution. In this way, the prosecutor would have the entire of his remand awaiting trial set at nought and he would have to start afresh to face a criminal prosecution in which the prosecution, by adopting different procedures, could avoid the consequences of the learned trial judge's view of the law. No such right exists in the accused; if the trial judge makes decisions adverse to the interests of the accused, the latter cannot obtain relief from them otherwise than by appeal from the Central Criminal Court, or by appeal or review in the case of an inferior court.'*

It seems to me that so to interpret the provisions of s.12 of [The Criminal Justice (Administration) Act, 1924] as to create such an extraordinary imbalance between the rights and powers of the prosecution and those of the accused respectively, and to give the Director such a relative independence from the decision of the court in any trial, would be to concur in a proposition of law which signally failed to import fairness and fair procedure.

I am satisfied that the decision of the Finlay P in that case - that the respondent is not exempt in the performance of his statutory functions from the general constitutional requirements of fairness and fair procedures - was correct in point of law. It also seems to me to follow inexorably from that proposition that where, as

here, the respondent avails of his undoubted right not to give any reasons for a decision by him to reverse a previous decision not to prosecute, but concedes that there has been no change of circumstances, his decision is, as a matter of law, prima facie reviewable on the grounds that there has been a breach of fair procedures. Whether such a breach has been established must, of course, depend entirely on the circumstances of the particular case."

181. On behalf of the respondent, it is submitted that *Eviston* was decided on narrow grounds, in circumstances where the DPP was not obliged to give reasons and the submission is made that *Eviston* is not of relevance in the present case. For the respondent, it is emphasised that the DPP in *Eviston*, was re-exercising the same power or reviewing an early exercise of power made under the same legislative provision. It is emphasised on behalf of the respondent that in the present case the power under s.14 is separate and distinct from the disciplinary process under the 2007 Regulations and it is also pointed out that the final determination, under the process conducted pursuant to the 2007 Regulations, is that of the Appeal Board, rather than the respondent.

182. Despite the skill with which such submissions are made, I cannot accept that the principles derived from *Eviston* are not of relevance in the present case. It is beyond doubt that the respondent enjoys distinct powers pursuant to the 2007 Regulations as opposed to s.14 of the 2005 Act. However, in the present case, the respondent made a decision to deal with matters - including his opinion that the conduct of the applicant had brought discredit on An Garda Síochána and had damaged the reputation of the force and that, by reason of the applicant's conduct, his continued membership of the force would undermine public confidence in An Garda Síochána - pursuant to the disciplinary process laid down by the 2007 Regulations. In that process under the 2007 Regulations it was open to the respondent to urge the very most serious of sanctions, having regard to his opinion, i.e. *dismissal*, simpliciter. The respondent decided that a materially different ,although still extremely serious, sanction was appropriate. At all material times throughout the process, the applicant was in peril of being required to terminate his career as a member of An Garda Síochána by resigning. The forum which the respondent chose for dealing with all issues (i.e. the breaches of discipline and the consequences of same) was the disciplinary process pursuant to the 2007 Regulations and that process was conducted to an ultimate outcome. It is clear that the respondent wishes to set at nought that outcome (being that resignation as an alternative to *dismissal* is not the appropriate disciplinary action). It is clear that the respondent wishes to start a different process despite the fact that there has been no change in any facts or circumstances whatsoever. The respondent wishes to do so, despite all issues having already been raised and determined in decisions which concluded with the Appeal Board's 09 December, 2019 decision. In short, the respondent wishes to invoke a different procedure and apply it to the self-same issues already determined in the previous procedure, because he wishes to obtain a different result, despite no change in circumstances. That offends natural and constitutional justice in my view.

183. Counsel for the respondent submits that, in *Eviston*, the DPP informed the applicant that no prosecution would be brought and later reversed that decision, whereas in the present case, it was submitted that there was no representation that s. 14, which represents a different power available to the respondent, would not be invoked. In my view, this submission does not entitle this court to disregard the fundamental principles derived from *Eviston*. It is true that the respondent never wrote to the applicant to state in explicit terms that he would not be invoking s. 14. Nor did he or anyone acting at his direction say so. That is not, however, the end of the analysis, having regard to what the respondent stated in the clearest of terms. In his correspondence of 28 March 2019 and again on 18 June 2019 he made clear his opinion that, as a consequence of the applicant's conduct, his continued membership of an Garda Siochána would undermine public confidence. This is the very opinion referenced in s. 14(2)(a)(i) but it was an opinion deployed *not* in the context of seeking summary dismissal, but in the context of proposing, and later deciding, that a most serious disciplinary action was warranted in the context of the process which, self-evidently, the respondent decided to follow, namely the disciplinary procedure pursuant to the 2007 Regulations. Moreover, although a most serious sanction to which the applicant was, from 28 March 2019 onwards exposed, it was a materially different sanction to the one and only one provided for in s. 14 of the 2005 Act, albeit one with the same outcome. In these circumstances, the respondent most certainly sought to bring about the end of the applicant's membership of an Garda Siochána and he self-evidently made a decision to pursue that result deploying the procedure pursuant to the 2007 Regulations, not the s. 14 process. In these circumstances, the notifications given by the respondent to the applicant, in conjunction with the actions taken by the respondent by means of fulsome participation in the process pursuant to the 2007 Regulations, in the manner explained in this judgment, gave the applicant to understand that the self-same issues would not be pursued via a s. 14 process.

184. Two further comments seem to me appropriate to make. Firstly, at no stage throughout the respondent's fulsome engagement with the process pursuant to the 2007 Regulations did he ever state or intimate that if he was dissatisfied with the outcome, he would invoke s. 14 of the 2005 Act in order to try and achieve a *different* result in a second procedure, even though all relevant issues had been canvassed in the first procedure. Secondly, it is fair to say that in *Eviston*, the applicant was only in peril on one occasion. On the facts in the present case, the situation facing the applicant appears to me to be even more grave in that, were this court not to intervene, the applicant would be in peril for a second time, despite all facts and issues having been raised and determined, to a concluded outcome, in the previous procedure and with no question of any change in material facts or circumstances.

185. The judgment of McGuinness J. in *Eviston* cited with approval the decision of Finlay P. (as he then was) in *The State (O'Callaghan) v O'hUadhargh* [1977] I.R. 42 as follows:

> *"In his judgment at pp. 52 and 53 Finlay P. stated .. –*

> *'In the course of his judgment in the State (Healy) v. Donoghue [1976] I.R. 325 the Chief Justice said at p. 348 of the report.. –*
>
> > *"In the first place the concept of justice, which is specifically referred to in the preamble in relation to the freedom and dignity of the individual, appears again in the provisions of Article 34 which deal with the Courts. It is justice which is to be administered in the Courts and this concept of justice must import not only fairness, and fair procedures, but also regard to the dignity of the individual. No Court under the Constitution has jurisdiction to act contrary to justice. Mr. Justice Gannon in his judgment in this matter in the High Court said.. –*
> >
> > 'Before dealing with the submissions on the grounds on which the conditional orders were made, I think I should say at the outset that it appears to me that the determination of the question of whether or not a Court of local and limited jurisdiction is acting within its jurisdiction is not confined to an examination of the statutory limits of jurisdiction imposed on the Court. It appears to me that this question involves also an examination of whether or not the court is performing the basic function for which it is established – the administration of justice. Even if all the formalities of the statutory limitation of the Court be complied with and if the Court procedures are formally satisfied, it is my opinion that the court in such instant is not acting within its jurisdiction if, at the same time, the person accused is deprived of any of his basic rights of justice at a criminal trial.'
>
> *I agree with these views"*

> *If this statement of principle (which, of course, I unreservedly accept) applies to the proceedings of a Court in trying a criminal case, it appears to me that the same or analogous principles must apply, a fortiori, to the exercise by the Director of Public Prosecutions of his statutory powers, and to the interpretation by me of those statutory powers in any particular circumstance…'"*

The learned judge went on to cite that portion from the decision of Finlay P. in *The State (O'Callaghan)* which Keane C.J. referred to in his judgment in *Eviston*. Thereafter, McGuinness J. stated (at. p. 320):

> *"The dictum of Finlay P. 'it appears to me that the same or analogous principles must apply, a fortiori, to the exercise by the respondent of his statutory powers' would appear to establish that the requirement of fair procedures does indeed apply to the Director of Public Prosecutions, at least in 'particular circumstances', in the exercise of his statutory functions."*

I am satisfied that the respondent in the present case is required to comply with fair procedures and constitutional justice in the exercise of his statutory powers and that, on the particular facts of the case before this court, it was a breach of the applicant's right to

fair procedures for the respondent to invoke a process pursuant to s. 14 immediately after a final decision, binding on the respondent, had been delivered by the Appeal Board as a result of a process which considered all facts and issues including the opinion of the respondent, there having been no material change in any facts or circumstances.

186. In *G.E. v DPP* [2008] IESC 61, [2009] 1 I.R. 801, the applicant had been charged with an offence contrary to s. 2(2) of the Criminal Law (Amendment) Act, 1935. A professional officer in the office of the DPP had determined that a charge of rape should not be proffered and directed that the s. 2(2) matter be dealt with in a summary manner, should the applicant decide to plead guilty. The applicant was put on his election in the District Court and opted for trial on indictment. A Book of Evidence was served and the case was adjourned from time to time pending the outcome of a challenge as to the consistency with the Constitution of a related offence, brought by a third party which challenge was ultimately successful (*C.Z. v Ireland* [2006] IESC 33). The respondent directed that a *nolle prosequi* be entered in respect of the s. 2(2) charge as the relevant section contained a similar provision to that declared inconsistent with the Constitution. The applicant was then re-arrested and charged with rape. The applicant sought to prohibit his prosecution on the charge of rape and argued *inter alia* that the respondent was in breach of his own guidelines and that this breach constituted a breach of the applicant's entitlement to fair procedures. The High Court ruled that the relevant test was whether there was a real or serious risk of an unfair trial and refused the relief sought. In granting relief, Kearns J. on behalf of the Supreme Court acknowledged that it was appropriate for the DPP to have reviewed the case but he went on, (at p. 812) to state:

> *"[35] Fundamentally it is the magnitude of the quantum leap from the original charge to that now preferred which persuades me that the prosecution of the applicant on a charge of rape should be restrained on the basis that fair procedures require that any alternative charge brought should not be one which, notwithstanding the absence of new or additional evidence, is grossly different and disproportionate from the original charge. The substitution in the instant case was akin to the withdrawal of a Road Traffic Act prosecution for driving through a red light and the substitution instead of a charge of dangerous driving causing death. In current parlance, the 'disconnect' between the original charge and the substituted charge is of such an order as to put the applicant in a far worse position than he was under the original charge."*

187. In the present case, it can fairly be said in my view that there is a *"quantum leap"* from the decision made by the Appeal Board (that a financial penalty, albeit a significant one, was the appropriate disciplinary action to impose, having regard to all facts and issues) to dismissal (which is what the respondent now contends to be the only appropriate sanction arising from the self-same facts and circumstances). It is also fair to say that, if not a quantum leap, there is a major 'disconnect' between the position adopted by the respondent as of 28 March 2019, and as of 16 December 2019, despite the absence of any changed facts or circumstances in the intervening period. As of 28 March 2019, the respondent made clear what his opinion was and made equally clear his intention to

pursue the end of the applicant's career with an Garda Siochána via a very specific disciplinary action which he proposed, and later decided upon, in the context of a statutory procedure, the outcome of which would ultimately be decided by an Appeal Board. As of 16 December 2019, despite no change in facts or circumstances or, for that matter, in the fundamental opinion expressed by the respondent, dismissal is merited (something not merited in March 2019 when that option was available to the respondent to urge).

188. In reality, the only change which occurred after 28 March 2019 was that the Appeal Board did not agree with the sanction argued for by the respondent, so he sought to thwart the binding outcome of the disciplinary procedure pursuant to the 2007 Regulations, by pursuing a materially different penalty, against the backdrop of no change in facts or circumstances whatsoever, albeit a penalty which would, if secured, ensure the end of the applicant's career as a serving member of an Garda Siochána but in a materially different manner.

189. In reality, the very particular facts in the case before this court involve what can fairly be characterised as an attempt by the respondent to revisit his decision to invoke, and to contend therein for a very specific penalty, and to pursue to a conclusion, the disciplinary process pursuant to the 2007 Regulations which ultimately produced a result with which he disagrees. I am satisfied that this amounts to a breach of fair procedures contrary to the principles derived from *Eviston*.

190. The consequences for the applicant if this court were not to intervene could hardly be more serious in that, having been in peril of being required to resign as an alternative to being dismissed from his membership of an Garda Siochána and having had a three-person Appeal Board conclude that this would not be at all appropriate, the applicant would face, for a second time, and on the basis of the same facts and issues as had already been determined by the Appeal Board, the loss of his career.

191. Were matters limited to the interpretation of statutory provisions and their interplay with Regulations, this case might well be far more straightforward as there can be no doubting the free-standing nature of the respondent's powers under s. 14. Such power must, however, be exercised in accordance with principles of fundamental fairness and constitutional justice. The respondent's purported reliance on s. 14 on the very particular facts and circumstances which arise in the present case, offends those principles.

192. In addition to the foregoing, a reading of the respondent's 16 December 2019 and 12 March 2020 letters suggests that the respondent has based his decision to dismiss the applicant upon findings made in the disciplinary procedure conducted pursuant to the 2007 Regulations. Despite this, the respondent's 12 March 2020 decision is also explicit about the fact that *"…the process that has taken place to date, including the Board of Inquiry, my decision to increase the decision of the Board of Inquiry and the determination of the Appeal Board, including the favourable comments made by a number of supervisors, line managers and medical professionals…"* on the applicant's behalf are matters which *"… have been dealt with to a conclusion and have not formed part of my*

consideration in implementing the provisions of s. 14 of the Garda Siochána Act, 2005". As examined earlier in this judgment, the respondent goes on, in the penultimate paragraph of his 12 March 2020 letter, to say that he has considered the applicant's *"personal circumstances"* and *"also considerable favourable comments by a number of supervisors"*. There is, therefore, a clear inconsistency as between the two statements. Even if one is to take from the letter that the respondent did consider the respondent's personal circumstances and the favourable comments made regarding him, it still seems from the explicit statement made by the respondent that no other matters which were dealt with in the previous procedure pursuant to the 2007 Regulations were considered by him at all. IN the manner previously examined, it is impossible to understand with clarity what the respondent did or did not consider or what he means to convey in his notice as to what he did or did not in fact consider.

193. Furthermore, it is a fact that the applicant remained a serving member of an Garda Siochána after the 15 April 2017 incidents, having been restored to duty as and from 25 December 2017 and, thereafter, the respondent performed a full range of his duties as a serving member of an Garda Siochána until he was re-suspended on 01 April 2019. I stress again that this court is not engaging in a merits-based analysis of the appropriateness of any sanction but it is appropriate to say that there is no evidence whatsoever that, during the fifteen months between 25 December 2017 and 01 April 2019, the applicant was limited in any way in the range of duties he was able to undertake or that he was precluded from contact with any categories of members of the public. In the manner previously referred to, evidence was given by a number of superiors to the effect that the applicant was an effective and efficient member of an Garda Siochána. Furthermore, there was no evidence proffered that colleagues no longer trusted the applicant. Despite the foregoing, and without engaging with the relevant evidence which was given in the context of the disciplinary process pursuant to the 2007 Regulations, the respondent's 16 December 2019 letter refers to the respondent's belief that the applicant could never again become an effective or efficient member of an Garda Siochána due to a lack of trust and, despite the fact that the applicant carried out full duties after the conduct in question, the respondent goes on to state that the applicant would be *"extremely limited in the range of duties 'he would be able to undertake including being precluded from contact with certain members of the public…'"*. In my view, in addition to breaching principles of constitutional justice, the respondent's decision involves irrationality in the sense in which that term is understood in judicial review.

194. At all material times, during the respondent's act of participation in the disciplinary process pursuant to the 2007 Regulations, the respondent was very clear that the appropriate penalty was for the applicant to resign as an alternative to dismissal (being the pen-ultimate sanction in the hierarchy of disciplinary actions available pursuant to Regulation 22). Despite this, immediately after the Appeal Board delivered its decision (to the effect that this sanction was too severe and substituting, for it, a reduction in pay) the respondent initially deemed that dismissal was the appropriate sanction. Earlier in this decision I explained why in my view there is a material difference between what are the penultimate and ultimate sanctions in the hierarchy specified in the 2007 Regulations,

the ultimate sanction of dismissal being, of course, precisely the same sanction as that in s. 14 of the 2005 Act. There is undoubtedly an "upgrade" in the sanction contended for by the respondent and that upgrade occurs immediately after the respondent learns of the decision of the Appeal Board, which is binding on him, but with which he disagrees. The basis for this upgrade is not at all clear and, in my view, can only be explained in the context of the respondent seeking, impermissibly, to say that what he regarded as the appropriate sanction (at all material times prior to 09 December 2019) is not the appropriate sanction, in the context of an impermissible invocation of s. 14 where the only sanction provided for is dismissal. This irrationality and impermissibility is against the backdrop of no change whatsoever insofar as the acts or omissions on the part of the applicant which were a known quantity at an early stage in the disciplinary procedure conduced, at the behest of the respondent, pursuant to the 2007 Regulations. In short, the applicant's behaviour did not change in nature between the moment in time when the respondent formed the view that the applicant should *resign* as an alternative to dismissal and the subsequent point in time when the respondent formed the view that the applicant should be *dismissed*.

195. Even if I am entirely wrong that the respondent's 12 March 2020 decision is irrational and even if, bearing in mind that, per Finlay C.J. in *O'Keefe v. An Bord Pleanala* [1993] 1 IR 39, p 71: "*. . . the circumstances under which the court can intervene on the basis of irrationality with the decision – maker involved in an administrative function are limited and rare"*, I am entirely satisfied that the applicant is still entitled to relief on the basis that the respondent's decision does not comply with natural and constitutional justice. In other words, quite apart from any challenge on irrationality grounds, the case pleaded by the applicant - and which, it is fair to say, was the focus of the bulk of submissions made at the hearing, to the effect that, on the particular circumstances of this case, constitutional justice requires that the respondent be restrained in their purported exercise of an otherwise ostensible statutory power - is a case which is made out on the evidence before this Court. It is perfectly true, as counsel for the respondent submits, that nowhere in the 2005 Act is it provided that the existence of disciplinary proceedings pursuant to the 2007 Regulations serves as any bar to the invocation of s. 14 of the Act, but statutory power, even of a free–standing and widely drafted type, cannot be exercised, contrary to justice and in my view it would be a denial of justice were this Court not to intervene by granting the relief sought.

196. The Appeal Board came to a decision, binding on the respondent, that the applicant should be the subject of a significant financial sanction and a reprimand instead of being required to resign as an alternative to a dismissal. That decision should be implemented. Given the stand-alone nature of the respondent's powers pursuant to s. 14 of the 2005 Act, there may well be circumstances in which, having invoked the disciplinary processes provided for by the 2007 Regulations, it remains open to the respondent to invoke s. 14 of the 2005 Act. However, in light of the particular facts and circumstances in the present case, the invocation by the respondent of s. 14 of the 2005 Act was inconsistent with fair procedures and constitutional justice and, for the reasons outlined in this judgment, the

applicant is entitled to the relief at para. 1 and 2 of the notice of motion dated 19 March 2020.

197. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."* Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs which should be made. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office within 14 days.