

**BETWEEN**

**RAYMOND HEGARTY**

**APPLICANT**

**AND**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**RESPONDENT**

**JUDGMENT of Mr. Justice Ferriter delivered on the 30th day of March, 2022**

**Introduction**

1. These judicial review proceedings involve a challenge by the applicant, who is a member of An Garda Síochána, to the invocation by the respondent (“the Commissioner”) of section 14 of the Garda Síochána Act, 2005, as amended, (“s.14”). S.14 confers a power of summary dismissal on the Commissioner. The applicant contends that it is unlawful for the Commissioner to seek his dismissal pursuant to s.14 arising from the applicant’s conduct in circumstances where the applicant has already been subject to a disciplinary process for the same conduct and where the Commissioner had sought his removal from the force pursuant to that disciplinary process but where an independent appeal board had imposed instead the reduced sanction of a monetary penalty.

**The Disciplinary Process**

2. The applicant was the subject of a complaint from a member of the public arising from an incident which occurred in Lismore Garda Station on 15th March, 2017. On foot of that complaint, a disciplinary process was commenced under Part 3 of the Garda Síochána (Discipline) Regulations, 2007 (S.I. 214 of 2007) (“the 2007 Regulations”). Part 3 of the 2007 Regulations deals with “serious breaches of discipline”. Under regulation 22 of the 2007 Regulations, a “serious breach of discipline” is defined as meaning “*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*”.
3. Pursuant to regulation 23, the Commissioner appointed Superintendent Christopher Delaney as investigating officer to investigate the alleged breaches of discipline by the applicant. Superintendent Delaney conducted an investigation in the course of which the complainant and the applicant were interviewed. He compiled a statement of facts relating to the incident. Superintendent Delaney completed his investigation report and submitted that to the Commissioner, recommending that a Board of Inquiry be established to deal with the matter.
4. A Board of Inquiry was then established pursuant to regulation 25 of the 2007 Regulations. The role of a Board of Inquiry is to determine whether the alleged breaches of discipline have been committed by the member concerned and, if so, to recommend to the Commissioner the disciplinary action to be taken in relation to the member. The applicant was advised of the particulars of breaches of discipline alleged against him, pursuant to regulation 27 of the 2007 Regulations, as follows:

*"[i]. Discreditable Conduct, that is to say you, Garda Raymond Hegarty...did conduct yourself in a manner which you knew or ought to have known would be reasonably likely to bring discredit on the Garda Síochána, in that you did on the 15th March 2017 engage in a sexual act with [complainant] at Lismore Garda Station, while on duty and during the course of taking a statement of evidence from her relating to the arrest of her sister on 14th March 2017.*

*[ii] Neglect of Duty, that is to say you, Garda Raymond Hegarty...on 15th March 2017 at Lismore Garda Station, did fail to record a statement of evidence from [complainant] relating to the arrest of her sister on 14th March 2017, in accordance with proper procedure, which was your duty to do so."*

5. When the Board of Inquiry met to hear the allegations, in September 2018, the applicant admitted the alleged breaches of discipline and the facts as alleged in Superintendent Delaney's statement of facts on the matter. Following the conclusion of its hearing, the Board of Inquiry delivered its report in which, in respect of the first breach, it recommended to the Commissioner that the applicant be required to retire or resign as an alternative to dismissal and, in respect of the second breach, it recommended that the applicant be subjected to two weeks' reduction in pay.
6. The Commissioner decided to accept the recommendations of the Board of Inquiry. Accordingly, pursuant to regulation 31, the Commissioner issued his decision to the applicant on 25th October 2018 in which it was stated that the Commissioner had decided: *"in respect of the breach of discipline number 1 as attached, I hereby require that you [the applicant] resign from an Garda Síochána as an alternative to dismissal on or before midnight on the 16th day of November 2018 and in the event of your failure to so resign I order that you be dismissed from an Garda Síochána with effect from midnight on that date."*
7. In respect of the second breach of discipline, the Commissioner ordered that the applicant "receive a temporary reduction in pay of two weeks' pay".
8. The applicant availed of his right to appeal the decision of the Board of Inquiry to an independent Appeal Board, pursuant to regulation 33 of the 2007 Regulations. The applicant was suspended from duty pending the outcome of the appeal, as is the norm with such appeals.
9. An Appeal Board was then established with Ms. Caroline Biggs S.C. (as she then was) as chairperson. Written submissions were made on behalf of the applicant. The appeal opened on 23rd September, 2019 and was adjourned to facilitate further submissions. Following such further submissions, the Appeal Board convened again.
10. The Appeal Board then delivered a written decision on 16th January, 2020 in which it held, unanimously, in relation to the first breach that the penalty imposed at first instance was disproportionate and substituted instead, a penalty of a reduction in pay of four weeks. The penalty in relation to the second breach, being a deduction in pay of two

weeks, remained unchanged. In arriving at its view, the Appeal Board considered the circumstances of commission of the breach, the applicant's previous unblemished record and various other mitigating factors. The Appeal Board, while noting that the applicant was deeply remorseful for his actions, stated that "public confidence mandates that these breaches be severely punished". In that regard, the Appeal Board noted that the applicant had been suspended from work since 25th September 2018; was transferred prior to that to another station pending investigation; that he had now been fined the maximum allowed for on a first breach; that he had suffered reputational damage within his community and his work; that his personal life had been severely affected including that his father had not spoken to him in 14 months; that he was the father of three very young children with a mortgage and a family to provide for and that "taking away his right to work as a member of An Garda Síochána, would affect his ability to support his family greatly".

11. The Appeal Board concluded by stating: "*the Board took the view that these were very grave breaches indeed. The Board sought further documentation and adjourned proceedings to be fully informed. The Board discussed this matter at length and on a unanimous basis took the view that... the penalty of resignation and/or retirement was disproportionate in all of the circumstances*". The Appeal Board accordingly reduced the penalty for the first breach to one of a reduction in pay of four weeks.
12. Pursuant to regulation 37(5) of the 2007 Regulations, the Commissioner is obliged to implement the decision of an Appeal Board within seven days after that decision is communicated to him.
13. The Commissioner contends that the Appeal Board's decision was implemented, as the necessary deduction of pay was effected and the applicant remained on as a member (albeit that, as we shall see, he was suspended very shortly after the Appeal Board decision, to enable consideration of the s.14 process).
14. The issues in this case relate to what happened after the Appeal Board's decision.

**Suspension of the applicant subsequent to conclusion of the disciplinary process**

15. On 24th January, 2020 (i.e. just after the 7 days specified in regulation 37(5) for implementation of the Appeal Board's decision had elapsed), the applicant received a notice from Assistant Commissioner Diarmuid Sheahan notifying him that he was suspended from 24th January, 2020 to 1st February, 2020. The stated reason for the suspension was "consideration by the Garda Commissioner of the position of [the applicant] pursuant to s. 14 of the Garda Síochána Act, 2005 as amended".
16. It is appropriate, at this juncture, to set out the terms of s.14:

*"Appointment of members to other ranks and summary dismissal of such members.*

*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 Authority consents to the member’s dismissal.*
- (3) *Subsection (2) is not to be taken to limit the power to make or amend Disciplinary Regulations.”*

17. By notice dated 28th January, 2020, the applicant received further notice from Assistant Commissioner Sheahan that he was suspended from 1st February, 2020 to 1st May, 2020. The stated reason for this suspension was that:

*“The decision of the Commissioner to require [the applicant] to resign from An Garda Síochána as an alternative to dismissal on or before midnight on 16 November 2018.”*

18. It has been averred on behalf of the Commissioner that the stated reason for suspension in the 28th January, 2020 notice was erroneously expressed. No point is now being taken by the applicant in relation to that error and it is accepted that the reason remained that of consideration being given by the Commissioner pursuant to s.14.
19. It appears that the applicant’s suspension has been extended from time to time on the basis that the Commissioner is considering the position of the applicant pursuant to s.14.
20. The applicant’s solicitor wrote to the Commissioner by letter of 6th February, 2020, asserting that he had failed to comply with the 2007 Regulations and that his actions were unlawful as a result. The letter pointed out that the decision of the Commissioner at first instance in the disciplinary process had been overturned on appeal. The letter called on the Commissioner to re-instate the applicant to duty.

**Leave to apply for judicial review granted**

21. On 30th March, 2020 the applicant sought and obtained leave to apply for judicial review of the January 2020 decisions to suspend him. The gravamen of his complaint was that the Commissioner had acted *ultra vires*, irrationally, in abuse of process and in breach of natural and constitutional justice in respect of the suspensions as the suspensions effectively flew in the face of the Appeal Board's determination of 16th January, 2020.

**The Section 14 Letter**

22. Prior to service of the proceedings and order granting leave, the Commissioner wrote to the applicant by letter dated 31st March, 2020 (received by the applicant on 2nd April, 2020) ("the s.14 letter"). This letter stated that having "*considered the decision of the Disciplinary Appeal Board and, notwithstanding same*" the Commissioner was of the opinion that by reason of the applicant's behaviour and conduct between 14th and 17th March, 2017 inclusive, including inappropriate sexual conduct at Lismore Garda Station on 15th March, 2017, the applicant's continued membership of An Garda Síochána would undermine public confidence in the Garda Síochána and the applicant's dismissal pursuant to s. 14 was necessary to maintain that confidence. The letter, thereafter, detailed the basis of that opinion.
23. The letter noted that the applicant's "*actions were such that, in my opinion, it is not appropriate for you to continue to serve as a member of An Garda Síochána*". It asserted that the applicant breached the rights of the vulnerable female who attended at Lismore Garda Station on 15th March, 2017 "*by interfering with her bodily integrity by engaging in inappropriate sexual activity with her in a Garda Station, being a place of work, safety and refuge*". Article 3 of the European Convention on Human Rights and related case law was cited. The Commissioner then stated:

*"I am firmly of the view that you are aware and had knowledge that the female who attended at Lismore Garda Station was vulnerable and you were on duty in a position of authority as a member of An Garda Síochána in a Garda Station alone with this female and your conduct should not have occurred."*

24. The letter then stated:

*"Taking all matters into consideration, I am of the opinion that your behaviour and conduct between the 14 and 17 March 2017 and, in particular, on 15 March 2017, at Lismore Garda Station, 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 my knowledge is such that I believe it seriously undermines your professionalism, honesty and integrity and compromises your ability to serve as a member of An Garda Síochána."*

25. The letter concluded by asserting that the applicant's continued membership would undermine public confidence in An Garda Síochána and that the Commissioner was of the opinion that the applicant's dismissal was necessary to maintain that confidence.

26. The letter then stated:

*"You are hereby given the opportunity, pursuant to section 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."*

**Statement of Grounds amended to challenge s.14 "determination"**

27. The applicant's solicitors wrote, in response to the Commissioner's letter of 31st March 2020, by letter of 8th April 2020. This letter stated: *"Your decision to subvert the decision of the Appeal Board undermines its lawful determination, is ultra vires, an unlawful abuse of process and entirely improper. You are obliged to comply with the decision of the Appeal Board pursuant to the Regulations and your decision to invoke section 14 is unlawful"*. The letter called on the Commissioner to withdraw the notice. The Commissioner did not interpret that letter as a "representations" letter pursuant to s.14(2)(b). The applicant contends that in substance it can and should be treated as such.

28. The applicant then applied to amend his statement of grounds to challenge the Commissioner's "determination" pursuant to s.14 as embodied in the 31st March 2020 letter. In the amended statement of grounds, he contended that the alleged determination subverted the determination of the Appeal Board and was, therefore, *ultra vires*, irrational, an abuse of process, in breach of natural and constitutional justice and a decision that could not properly be made. It was contended that the Commissioner had unlawfully failed to implement the decision of the Appeal Board, in breach of regulation 37(5) of the 2007 Regulations. It was also contended that the Commissioner had acted in breach of the applicant's rights to fair procedures by failing to conduct an inquiry into whether his continued membership would undermine public confidence in An Garda Síochána prior to the issue of the 31st March 2020 letter.

29. There was a subsequent amendment permitted to the amended statements of grounds which added *"double jeopardy"* grounds to the effect that the invocation of s.14 by the Commissioner unlawfully involved him imposing two disciplinary actions in respect of one set of breaches of discipline. This was claimed to be in breach of natural and constitutional justice, *ultra vires* and in breach of the principle against double jeopardy.

**Statement of Opposition**

30. The Commissioner's statement of opposition raises a preliminary objection to the effect that the application for judicial review is premature in circumstances where a final determination has not yet been reached pursuant to s.14 and that the letter of 31st March 2020 was, in substance, a proposal to dismiss the applicant, a proposal on which he had been invited to make submissions. It is pleaded that, *"upon consideration of all matters including the applicant's submissions a final determination will be made in due course, which said determination is conditional upon the approval of another body"* (statement of opposition, paragraph 2). The reference to *"another body"* is to the police authority, pursuant to s.14(2)(d). The nub of the Commissioner's defence thereafter in the statement of opposition is that s.14 is a self-standing statutory process, which can be

invoked separately from, and without regard to, any disciplinary process which may have gone before it, even if that disciplinary process addresses substantively the same conduct which is the subject of the s.14 process.

#### **Other interlocutory steps**

31. There were a number of interlocutory applications in these proceedings, including an application for discovery which resulted in an order for discovery against the Commissioner of documentation in relation to the two decisions to suspend the applicant (of 24th January, 2020 and 28th January, 2020), documentation concerning the implementation of the disciplinary action substituted by the Appeal Board and *“all documentation concerning the decision to consider the position of the applicant pursuant to section 14”*.
32. The applicant’s solicitor swore a supplemental affidavit, following completion of the Commissioner’s discovery and a review of same, in which it was asserted that it was clear from a review of the discovered documents that the Commissioner had not given any real consideration as to whether he was entitled to initiate s.14 where an Appeal Board had overturned his earlier determination to require the applicant to resign from An Garda Síochána. The discovery documentation suggested that the proposal that the Commissioner invoke s.14 against the applicant originated from Chief Superintendent Margaret Nugent and had the support of Assistant Commissioner Sheahan.
33. The applicant also obtained an order from the High Court giving liberty to cross-examine Chief Superintendent Nugent, who swore the principal replying affidavit in support of the Commissioner’s opposition in this judicial review. The applicant was anxious, in particular, to be able to cross-examine on the link between the s.14 letter and the disciplinary process and the extent to which regard was properly had, in initiating the s.14 process, to the prior disciplinary process addressing the same conduct. This order was overturned by the Court of Appeal, in a judgment delivered by Noonan J. on 7th December, 2021. In his judgment, Noonan J. noted that:-

*“At the end of the day, the trial court is faced with determining whether as a matter of law, the Commissioner was entitled to invoke s.14 for the purpose of bringing about a result diametrically opposed to that arrived at by the Appeal Board. This court was told that this issue is novel and there is no doubt that the interaction between s.14 and the Regulations is front and centre in this application. It is, however, clearly an issue of pure law.” (at paragraph 46)*

34. I should also note for completeness that an application for a stay on the s.14 process brought by the applicant was compromised on the undertaking of the Commissioner not to communicate any decision under s.14 to the policing authority (pursuant to s.14(2)(d)) pending the outcome of these judicial review proceedings.

#### **The parties’ positions**

35. In summary, the applicant’s position on this judicial review application was as follows. Firstly, he contended that as a matter of statutory interpretation, s.14 could only be invoked where there had been no prior invocation of the 2007 Regulations i.e. it was a

self-standing provision which could be used in the alternative, to but not in addition, to a disciplinary process under the Regulations. Secondly, he contended that, in any event, s.14 could not be validly invoked where a prior process had occurred under the 2007 Regulations in relation to the conduct said to be the subject of s.14 and where the effect of invoking s.14 would be to thwart the outcome of the prior process under the Regulations. Thirdly, it was said that s.14 was unlawfully invoked here in circumstances where the Commissioner had failed to engage with or seek the representations of the applicant prior to forming his opinion under s.14(2)(a). Finally, it was contended that the s.14(2)(a) opinion was irrational in circumstances where the Commissioner had ordered a lesser form of sanction than dismissal (being the sanction of resignation in lieu of dismissal) under the earlier process and where he could not now rationally seek a higher sanction for the same conduct.

36. The Commissioner, for his part, contended that the qualifying words "*Notwithstanding anything in this Act or the regulations*" at the commencement of s.14(2)(a) make clear that s.14 was a self-standing provision which could be invoked notwithstanding that an earlier process under the 2007 Regulations had occurred in relation to the same conduct. It was a provision giving power to the Commissioner in furtherance of his overall duty to manage and direct the force. Accordingly, it was said, the power had a different focus to the powers available under the Regulations. The Commissioner contended that the applicant was premature in his challenge to the invocation of the s.14 process because the Commissioner at this stage had only formed an initial or preliminary opinion as to the necessity for the applicant's dismissal; the applicant had a full right to make representations on that preliminary opinion and any challenge could only legitimately occur if and when the Commissioner arrived at a final opinion that the applicant should be dismissed on the basis set out in s.14. Given that the applicant would be afforded fair procedures rights at a later stage of the process, the Commissioner submitted that the applicant had no right to be consulted prior to the formation by the Commissioner of his provisional opinion. It was submitted that the applicant's challenge was misconceived in the circumstances.

#### **Two recent judgments relating to s.14**

37. Various aspects of the powers conferred by s.14 were considered by Heslin J. in two separate judicial review actions last year, being *Ivers v Commissioner of An Garda Síochána* [2021] IEHC 574 ("*Ivers*") and *Keane v. Commissioner of An Garda Síochána* [2021] IEHC 577 ("*Keane*"). I will shortly return to salient aspects of the judgments of Heslin J. in these two cases when discussing the issues in this case. However, for present purposes, it is useful to briefly summarise the outcome of those cases.
38. In *Ivers*, Heslin J. held that it was premature of the applicant Garda to seek judicial review of an alleged "determination" of the Commissioner under s.14(2)(a) in circumstances where the Commissioner had sent an initiating letter pursuant to s.14 (which constituted his "first stage" opinion) but where the Commissioner had not yet considered representations or made any final opinion ("the second stage" or "operative" opinion) under the provision. Heslin J. held that the process under s.14 involved a

number of different stages and that the *audi alteram partem* stage was addressed in s.14(2)(b), in between the first stage and second stage opinions, at which point any necessary facts could be determined and the applicant would have a full right to make representations. It is important to note that in *Ivers*, while there had been a criminal investigation and a GSOC investigation, there had been no prior decision under a disciplinary process pursuant to the 2007 Regulations before s.14 was invoked by the Commissioner.

39. The decision of Heslin J. in *Ivers* is under appeal.
40. In *Keane*, the applicant member had been subjected to a disciplinary process under Part 3 of the 2007 Regulations for serious breaches of discipline. The Board of Inquiry in that case recommended a financial penalty. The Commissioner invoked his powers under regulation 32 not to accept the Board of Inquiry's recommendation but rather (having invited submissions from the member and considered those submissions) imposed a sanction that the member resign as an alternative to dismissal. Garda Keane appealed that sanction to an Appeal Board which overturned the sanction and substituted a monetary penalty instead. As with this case, Garda Keane admitted the facts forming the basis of the disciplinary breaches.
41. Following the Appeal Board's determination in *Keane*, the Commissioner issued a letter pursuant to s.14(2)(a) setting out his opinion pursuant to the provision. The opinion relied on the very same conduct which had been the subject of the disciplinary process. Garda Keane then made submissions pursuant to s.14(2)(b) including a submission to the effect that the Commissioner in invoking s.14 was failing to respect the outcome of the Appeal Board's determination. The Commissioner proceeded to remain of the opinion, pursuant to s.14(2)(c) that Garda Keane should be dismissed and Garda Keane's judicial review challenge was brought at that stage of the process i.e. after the Commissioner had decided that he remained of the opinion that Garda Keane needed to be dismissed, a stage later than the stage at which we are at on the facts here.
42. In *Keane*, Heslin J. quashed the final decision made pursuant to s.14(2) holding that the invocation of s.14 was unlawful (and in particular, a breach of the applicant's rights to constitutional justice) where the applicant had been through a disciplinary process under the Regulations, where the Commissioner had directed the resignation of the applicant in lieu of dismissal and where an Appeal Board had overturned the Commissioner's decision and substituted instead a lesser sanction of a financial penalty. In *Keane*, while the applicant challenged a final decision under s.14(2) and not the initial decision under s.14(2)(a), Heslin J. took the view, on the facts, that the Commissioner, by *invoking* s.14 immediately after the Appeal Board's overturning of his resignation order, was in effect seeking to set the Appeal Board's determination at naught.
43. Heslin J.'s judgment in *Keane* was not appealed.

## **Discussion**

44. Before considering the other issues in the case, it is necessary to address the applicant's argument that as a matter of statutory interpretation, s.14 cannot be invoked by the Commissioner where a prior process relating to the same conduct has occurred under the 2007 Regulations.

**Proper interpretation of s.14 – no application if prior process under the Regulations?**

45. The applicant submits that the phrase "*notwithstanding anything in this Act or the Regulations*" at the start of s.14 could not be read as meaning, in effect, that anything done under the 2007 Regulations could be disregarded when it came to an invocation of s.14. He submitted, rather, that s. 14(2) is an empowering provision; it could only, therefore, be invoked either where the disciplinary provisions of the Regulations had resulted in a recommendation that a member was to be dismissed, and the Commissioner then formally used his power under s.14(2) to give effect to that recommendation or where there was admitted or incontrovertible conduct which merited the invocation of s.14(2) without the need to go through any disciplinary process under the Regulations (e.g. where a member had been convicted of a serious crime). It was submitted that once the Commissioner has initiated a disciplinary process under the Regulations, particularly one in which the Commissioner agitated for the effective removal of a member from the force on account of their conduct, s.14(2) could not, thereafter, be invoked in effective disregard of the outcome of the disciplinary process under the Regulations. While these arguments were invoked on the facts, the applicant also contended that these conclusions followed as a matter of the correct interpretation of s.14.
46. There was some debate before me as to whether s.14 contained the only power under the legislative scheme pursuant to which the Commissioner could dismiss a member at the rank of inspector or below. This is clearly not so where regulation 39 (which invests a power under the 2007 Regulations in the Commissioner to summarily dismiss a member) is invoked; indeed, regulation 39 is expressed to be "without prejudice to s.14(2)". It would also appear from regulation 32 that the Commissioner could impose the sanction of dismissal as being a more severe sanction than that recommended by the Board of Inquiry in a given case. Counsel for the Commissioner also pointed out that s.123 of the 2015 Act empowered the making of Regulations which could address *inter alia* the taking of different forms of disciplinary action against members including dismissal. Ultimately, it does not seem to me that I need to resolve that issue on this application. The more material question is whether s.14 can be invoked in principle even where a prior process has applied under the Regulations. For the reasons set out below, I am satisfied that, in principle, it can.
47. A central plank of the submissions made on behalf of the Commissioner was that s.14 was a self-standing statutory provision which could be invoked by the Commissioner irrespective of the fact that a process concerning the same member of An Garda Síochána had already been followed to completion pursuant to the 2007 Regulations. That precise issue was considered in *Keane* where Heslin J. considered substantively the same arguments on the issue as were addressed to me.

48. In *Keane*, Heslin J. found that s.14 is a standalone power which *prima facie* can be exercised without reference to what may or may not have occurred pursuant to the Regulations. Heslin J. held (at para. 156):

*"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 covered by the 2007 Regulations, I am entitled to take the view that the Oireachtas would have said so in the legislation. They did not."*

49. In view of the *Worldport* principles (*Hughes v Worldport Communications Inc.* [2005] IEHC 467), I see no reason to depart from a decision of a High Court colleague arrived at in a recent, fully considered, judgment, based on the same substantive arguments as were addressed to me on the issue.
50. Quite apart from the fact that the plain words of s.14(2) would not permit the importation of words to the effect *"Notwithstanding anything in this Act or the Regulations (save where a decision was previously taken under the Regulations in relation to the same matter)..."* (added words underlined), or some other such formulation, it can readily be seen that the Commissioner could have valid grounds to seek the dismissal of a member pursuant to s.14(2) where a decision relating to that member had previously been taken under the Regulations e.g. where the matter the subject of the prior decision, coupled with some new matters, led to the Commissioner forming the necessary opinion under s.14(2) or, perhaps, where a series of adverse decisions had been taken against the member, each of which fell short of warranting the sanction of dismissal, but which taken together might validly ground the formation of the necessary opinion under s.14.
51. Accordingly, in my view, it is appropriate to characterise s.14 as a self-standing provision in the sense that, as a matter of statutory interpretation, it is in principle capable of being invoked notwithstanding anything contained in the Regulations. However, just as Heslin J. took the view that that was not the end of the matter on the facts of *Keane*, it seems to me that that is not the end of the matter on the facts of this case. That is because it is common case that the invocation of s.14 must itself comply with constitutional justice. In particular, as I shall come on to discuss, it might well be contrary to constitutional justice for the Commissioner to invoke s.14 where to do so would unfairly put a member at peril of the sanction of dismissal for the very same conduct in respect of which the Commissioner had previously invoked a disciplinary procedure under the Regulations and where the Commissioner had contended for the removal of the member from the force but where an independent appeal board had taken the view that such sanction was disproportionate.

### **Invocation of s.14 premature?**

52. A core argument advanced on behalf of the Commissioner was that the applicant was premature in seeking to challenge the invocation of s.14 where the Commissioner had not yet made a final, operative decision under s.14 but rather, in his 31st March 2021 letter, had merely made a proposal to the effect that the applicant should be dismissed. The Commissioner relied in this regard on the analysis of Heslin J. in *Ivers*.
53. While I accept that no final determination has been made by the Commissioner under s.14(2), that seems to me not to answer the fundamental objection to the invocation of the s.14 process here which is that for precisely the same conduct which was the subject of the disciplinary process instituted by the Commissioner, the Commissioner now seeks the removal of the applicant from the force by different means, so that the applicant is now in peril of a second (and very grave) sanction for the same conduct.
54. While the applicant seeks to contend that the decision in *Ivers* was wrong, it does not seem to me that I have to take a view on that contention as *Ivers* was decided in a very different context. The critical distinction between the facts in *Ivers*, and the facts before me, is that in *Ivers* the member in question had not been the subject of any disciplinary process under the Regulations which culminated in a decision of the Appeal Board (he had been the subject of a criminal investigation and a GSOC investigation but neither of those matters were disciplinary processes instigated by the Commissioner under the Regulations). The Commissioner succeeded in *Ivers* on the basis that the applicant's challenge was premature as the Commissioner had not yet made a final determination under s.14(2) and there was no evidence of an irremediable error in the process, in the sense explained by Clarke J. in *Rowland v. An Post* [2017] 1 IR 355, such as to warrant striking down the s.14 process before it had reached a conclusion. The facts are very different here where there was a disciplinary process for the very same conduct running to ultimate conclusion under the 2007 Regulations prior to the invocation of s.14.
55. I do not believe it can be said the applicant's challenge is premature where the applicant, by virtue of the Commissioner's invocation of s.14 and his commencement of the s.14 process, is exposed to the peril of being removed from the force when he has already successfully faced down that peril in a prior process which the Commissioner instigated and in which the Commissioner fully participated. Indeed, the applicant has already faced the prejudice of being suspended from the force, notwithstanding the conclusion of the disciplinary process under the Regulations, while the s.14 process proceeds. While I accept that there has not yet been a final determination by the Commissioner under s.14, the Commissioner has formed and expressed an opinion, pursuant to s.14, that the applicant should be dismissed and the Commissioner is the person with the ultimate decision under s.14 as to whether the applicant will be dismissed; there is no appeal or role for any third-party input into the final decision. On any view, the commencement of the s.14 process puts the applicant in peril of the ultimate sanction of dismissal. In my view, it is not premature of the applicant to seek to challenge the invocation of s.14 in circumstances where he maintains that exposure to such a peril is of itself unlawful.

### **Invocation of s.14 in breach of applicant's right to constitutional justice?**

56. The applicant says that, by his actions in invoking s.14 on the very same conduct which the Appeal Board determined merited a four-week reduction in pay, the Commissioner is unlawfully seeking to set the entire disciplinary process, and the Appeal Board's determination, at naught. He also submits that the invocation of s.14 amounts to the imposition of a double penalty on the applicant, as he has already suffered the financial sanction imposed on him for the same conduct arising out of the disciplinary process. While double jeopardy is of course a concept that more properly arises in the criminal field, it is argued that, as a matter of fair procedures, it is in breach of the applicant's right to constitutional justice and fair procedures to subject him a second time to a process designed to effect his removal from An Garda Síochána when an independent Appeal Board took the view that that was a disproportionate sanction for the very same conduct.
57. Notwithstanding the factual differences between the matters, in my view, the judgment of Heslin J. in *Keane* is of assistance to the resolution of this issue in the case before me.
58. In *Keane*, Heslin J. concluded that, notwithstanding that the Commissioner had the power in principle to invoke s.14 in that case, his invocation of s.14 was in breach of Garda Keane's rights to natural and constitutional justice. Heslin J. took the view that at all times throughout the disciplinary process, the applicant there
- "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 naught 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 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."* (At para. 182).
59. In my view, these *dicta* are applicable on the facts of this case to the Commissioner's decision to commence the s.14 process notwithstanding that the process has not yet reached a conclusion; the Commissioner here *"wishes to start a different process despite the fact that there has been no change in any facts or circumstances whatsoever."*
60. In arriving at his decision in *Keane*, Heslin J. laid emphasis on the Supreme Court decision in *Eviston v. DPP* [2002] 3 IR 260 ("*Eviston*"). In that decision, the Supreme Court considered whether it was a breach of the applicant's rights to fair procedures for the DPP to change its previous decision not to prosecute the applicant and to proceed to prosecute

the applicant notwithstanding that no new evidence had come to light in respect of the alleged offences. The Supreme Court took the view on the facts of that case that such a change of mind was in breach of the applicant's right to fair procedures. Heslin J. applied *Eviston* by analogy to the situation before him in holding that it was in breach of Garda Keane's rights to fair procedures for the Commissioner to effectively seek to pursue s.14 when it was inherent in the Commissioner's decision to pursue the result of removal of the applicant from the force by deploying the procedure pursuant to the 2007 Regulations that he would not thereafter invoke s.14.

61. Counsel for the applicant contended that Heslin J. was in error in his reliance on *Eviston*, as the Supreme Court had subsequently considerably narrowed the scope of *Eviston* in its decision in *Carlin v. DPP* [2010] 3 IR 547 ("*Carlin*"). In *Carlin*, the Supreme Court held that, in the absence of *mala fides*, the DPP was entitled to review and reverse an earlier decision not to prosecute even in the absence of new evidence and the mere fact that the subsequent change in decision to prosecute exposed an accused person to stress could not be a ground for halting the prosecution. A breach of fair procedures could only result where a reversal of a previous decision not to prosecute had resulted in a degree of stress and anxiety to which an accused person was subjected being exacerbated, resulting in the accused person being subjected to a further and entirely unnecessary layer of anxiety and stress. It was submitted on behalf of the Commissioner that the applicant here could not satisfy that more stringent test and that, had Heslin J. been made aware of the decision in *Carlin*, his decision would likely have been different in *Keane*.
62. While I accept that *Carlin* qualified the principle set down in *Eviston*, I do not accept that it necessarily follows that Heslin J. would have arrived at a different decision in *Keane* if he had been made aware of *Carlin*. I say this because Heslin J. himself noted (at paragraph 184) that the facts in *Keane* were graver than those involved in *Eviston* because "*in Eviston, the applicant was only in peril on one occasion. On the facts of 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 concluded outcome, in the previous procedure and with no question of any change of material facts or circumstances*".
63. Indeed, Heslin J. touches on the issue of "double jeopardy" in other parts of his analysis, including at paragraph 178 where he says "*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.*"
64. In any event, it seems to me that the analogy with *Eviston* and *Carlin* only takes the Commissioner so far. In *Eviston* and *Carlin*, the applicants were only being faced with one prosecution and the issue was whether it was fair to proceed with a prosecution in circumstances where they had previously been informed that no prosecution would be

forthcoming. Here, the potential injustice is of a much more serious order. The applicant has already been pursued once for misconduct and has had a penalty imposed for his conduct. The Commissioner instigated that prior process and contended for the applicant's removal from the force; an independent appeal board determined that such sanction was disproportionate, but imposed a penalty nonetheless. The applicant having paid that penalty, is now being subject to a second process for the same conduct where there has been no change in the underlying facts and circumstances. In my view, that fundamentally offends principles of constitutional justice.

65. While I accept that the analogy with double jeopardy in a criminal context is imperfect, as the disciplinary process and s.14 do not involve criminal charges, both processes nonetheless involve exposure to the very serious potential sanction of being dismissed from the force and losing one's career as a garda. The concept of not being pursued twice by the same party (or its privies) in respect of substantively the same issues is captured in the latin maxim *nemo debet bis vexari pro una et eadem causa*, which is explained in the Oxford Reference Dictionary as meaning, in English, "no man ought to be twice vexed for one and the same reason". This hallowed concept finds expression in a criminal law context in the doctrines of double jeopardy and *autrefois convict*. It is equally recognised in various civil law contexts, including in the concepts of *res judicata* (both cause of action estoppel and issue estoppel) and the abuse of process rule in *Henderson v Henderson*. It embodies the universal concept that it is fundamentally unfair to be subject to potential sanction a second time for conduct for which one has already been sanctioned.
66. Whatever about the proper characterisation, for the purposes of *res judicata* and the rule in *Henderson v Henderson*, of the process under the disciplinary regulations culminating in the adjudication of an independent appeal board, I do not see that a decision of the Commissioner under s.14 can be regarded as a decision in a process akin to *inter partes* litigation such that the principles of *res judicata* or the rule in *Henderson v Henderson* are engaged.
67. However, I do not think that that is the end of the matter. In a public law context, it seems to me that the applicable doctrine is that of a party's right to constitutional justice; this was the principle which underpinned the Supreme Court's approach to the question before it in *Eviston* and *Carlin*. In my view, the concept of constitutional justice is sufficiently flexible, as demonstrated by the approach of the Supreme Court in *Eviston* and *Carlin*, to allow a party to contend that it is in breach of his or her rights to constitutional justice to be subjected to a statutory dismissal process at the instigation of another party for specified conduct where that other party had sought the effective dismissal of the party in a prior statutory process based on precisely the same conduct but failed, and where the party has suffered a sanction in the earlier process. In my view, the actions of the Commissioner in seeking to invoke s.14 can be fairly said to involve vexing the applicant twice in the same matter. This renders the s.14 process in fundamental breach of constitutional justice; it is not merely procedurally unfair, but substantively unfair, that the applicant be exposed to the peril of dismissal for the very conduct which he has already suffered a penalty for, at the hands of the Commissioner.

68. Counsel for the Commissioner made the point that s.14 (2) was not, in terms, concerned with disciplinary matters but rather had a different focus i.e. that of scenarios where a member's continued membership would undermine public confidence in the Garda Síochána, by virtue of the conduct of the member, and where the dismissal of the member is necessary to maintain that confidence. While that may be so, it is difficult to conceive of circumstances where conduct which would be sufficient to merit the exercise of the exceptional power of dismissing a member would not also be conduct which would equally constitute conduct capable of being disciplined pursuant to the Regulations. It also seems fair to observe, that, at least in broad terms, the machinery existing for disciplining members of An Garda Síochána under the disciplinary regulations is to ensure the maintenance of public confidence in the Garda Síochána. I note in that regard that Laffoy J. in *McEnery v. Commissioner* [2016] IESC 66 at 53 stated that "*While the maintenance of discipline is important in its own terms, it is also crucial for maintaining public confidence in An Garda Síochána*" (at para. 53).
69. In my view, s.14 on the facts here can be regarded as involving substantially the same potential sanction as the earlier disciplinary process (being removal from the force by dismissal or resignation in lieu of dismissal), for precisely the same conduct and involves the same protagonists (the Commissioner v the applicant). The applicant is, accordingly, in a classic sense, sought to be "vexed twice" in relation to the same matter. It is worth noting, in this regard, that the applicant had been in jeopardy of being dismissed as part of the first process. While the Board of Inquiry recommended, and the Commissioner directed, that the applicant be required to resign in lieu of dismissal under the first process, counsel for the Commissioner did accept that the Commissioner's position had been consistent as between the two processes in taking the view (albeit still only a preliminary view in the s.14(2) process) that the applicant's conduct warranted removal from the force.
70. I have considered whether it would be more appropriate to allow the s.14 process to conclude before entertaining any judicial review application (assuming that the process was to conclude in the Commissioner remaining of the opinion that the applicant should be dismissed under s.14(2)). However, this is not a case where the conduct which forms the basis of the s.14(2) opinion is only partly accounted for by the conduct which was the basis of the earlier disciplinary process. It is one and the same conduct. The Commissioner points to no new evidence.
71. On any view, dismissal from An Garda Síochána represents a devastating penalty for a member of the force; his chosen career is terminally removed from him. There is no reference whatsoever in the Commissioner's 31st March 2020 letter to the applicant's rights or otherwise to the implications for the applicant of him being dismissed. Indeed, the only reference in the s.14 letter to the disciplinary process at all is a passing reference at the outset of the letter (the letter commences "having considered the decision of the disciplinary Appeal Board and, notwithstanding same, ..."). The Commissioner appears to take the view that the prior process and its outcome is legally irrelevant. I do not believe that is correct as it disregards entirely the applicant's rights in the matter.

72. While the Commissioner of course has the obligation in accordance with s.26(1) "to direct and control the Garda Síochána", this is expressly "subject to this Act and the Regulations". It is also subject to the rights of members of the force. The Regulations provide an elaborate and delicately worked out set of checks and balances to ensure that a fair process, with independent oversight, is in place to have allegations of breach of discipline fairly determined and punished. This is not just in the public interest, but also in the interests of members of An Garda Síochána who are subject to allegations of misconduct.

73. The power of summary dismissal in s.14(2) is clearly an exceptional one. As pointed out in by Kelly J. in *McEnery v Commissioner of An Garda Síochána* [2015] IECA 57 (in the context of the Commissioner's power to dismiss summarily under regulation 39 of the 2007 Regulations), at paragraph 36:

*"Given the very limited recourse which is available to a Garda who is subject to a summary dismissal under Regulation 39, the exceptional nature of the power given to the Commissioner and the very limited scope for the exercise of that power, the courts on judicial review ought to be astute to ensure that the power is exercised properly and in accordance with law."*

74. In my view, the Commissioner's exceptional powers under s.14 have been invoked in breach of the applicant's rights to constitutional justice on the facts of this case.

#### **Nature of process under s.14**

75. The parties addressed a number of arguments as to the nature of the s.14 process.

76. The applicant submitted that it was incorrect to characterise s.14(2) as involving a "process". He submitted that the Commissioner was given no investigative or fact-finding powers under the provision and that there was no provision for *audi alteram partem* rights for the member in the opinion-forming stage. Accordingly, the applicant contended that s.14(2) could not be invoked without a prior opportunity for the applicant to make representations as to whether or not it was appropriate for the Commissioner to form the opinion in s.14(2)(a). This is a proposition which was rejected by Heslin J. in *Ivers* (at paragraphs 59 and 65). Heslin J. rejected this argument as, in his view, s.14(2) involved a multi-stage process and the opinion formed by the Commissioner under s.14(2)(a) was in the nature of a preliminary or initial opinion which was arrived at before hearing any representations (including, as appropriate, representations as to the underlying facts) on behalf of the member.

77. I am conscious that the decision of Heslin J in *Ivers* is under appeal. In light of the conclusions which I have reached in the previous section of this judgment, it is not necessary for me to reach any conclusion on the arguments related to the scope of the process under s.14 which will be matters likely addressed by the Court of Appeal in *Ivers* in due course.

#### **Suspension**

78. The applicant challenged his suspension on 28th January 2020 on the basis that Assistant Commissioner Sheahan was not empowered under regulation 7(4) of the 2007 Regulations to effect a suspension of longer than ten days. However, an amendment to regulation 7(4) was introduced by S.I. 620 of 2011 which had the effect that the confinement of the power of suspension to no longer than ten days only applied where the Commissioner had delegated the function of suspending a member to a Chief Superintendent. That limitation did not apply to Assistant Commissioner Sheahan in this case.
79. The applicant's other, more fundamental, complaint in relation to the suspension is that it followed from his arguments in relation to the unlawfulness of the substantive invocation of s.14 that his suspension for the purposes of the s.14 process was also unlawful.
80. In circumstances where I have found that the Commissioner acted unlawfully in invoking s.14 on the facts of this case, it follows that the Commissioner did not have a valid basis to suspend the applicant in connection with the invocation of the s.14 process.

**Conclusion**

81. I will hear the parties as to the appropriate form of order in light of this judgment. My provisional view is that it would be appropriate to make an order of certiorari quashing the decision of the Commissioner to invoke s.14 in respect of the applicant's conduct between 14th and 17th March 2017 where that conduct had already been the subject of a determination and sanction by the Commissioner and, on appeal, an Appeal Board pursuant to the 2007 Regulations.