THE COURT OF APPEAL

Appeal No. 2014/29CA & 1400

[Article 64 transfer]

Ryan P.
Finlay Geoghegan J.
Hogan J.

GARDA REPRESENTATIVE ASSOCIATION

AND

AMY BOURKE

Appellants/Applicants

– AND -

MINISTER FOR PUBLIC EXPENDITURE AND REFORM

Respondent/Respondent

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 2nd day of February 2016

1. Where a Minister promulgates generally applicable rules by way of statutory instrument is he or she obliged to consult in advance with the representative association of the group of individuals directly affected thereby? This is essentially the issue which arises in the present appeal from the decision of Kearns P. in the High Court: *Garda Representative Association and Bourke v. Minister for Public Expenditure and Reform* [2014] IEHC 457. It arises in the following way.

2. The first applicant Garda Representative Association ("GRA") is the representative body for the rank and file members of An Garda Síochána and the second applicant is a member of the Force. In these proceedings the applicants seek to challenge the validity of the Public Service Management (Sick Leave) Regulations 2014 (S.I. No. 124 of 2014) ("the 2014 Regulations") on several grounds which are principally related to the manner in which the 2014 Regulations were adopted. It is not disputed that the 2014 Regulations significantly curtail the pre-existing entitlements of Garda members to sick pay remuneration. The cost of sick pay provision within the public service has been a matter of concern to the Government for some time. These concerns have become especially acute within the last number of years given the very difficult economic circumstances and the range of many unpopular and painful measures which the Government and the Oireachtas have felt obliged to adopt in order to bring the public finances back into a state of equilibrium. The Government had estimated that the sick pay costs within the wider public service were in the order of some €500m., of which some €27m. relates to sick pay within An Garda Síochána. The Government considered that measures were urgently required to reduce these costs. It is only fair to record that these estimates have been disputed, not least by the GRA. It also complained that the Government's concerns failed to have sufficient regard to the unique nature of police work, as distinct from other sectors of the public service. The GRA also pointed out that this estimated figure includes payments in relation to occupational injuries, which in the nature of things are likely to be higher for members of An Garda Síochána.

3. A formal review of the costs of sick pay within the public service was initiated by the Government in May 2012. This was obviously a matter of concern to the first applicant, the Garda Representative Association ("the GRA") which is the representative body for the rank and file members of An Garda Siochána. It is clear that any changes to this sick pay regime would have implication for the terms and conditions of members of the Force and it is a matter in which the GRA could appropriately take a keen interest.

4. The GRA was, of course, fully aware of the nature of the review that was being undertaken at that time, but it was precluded by the terms of the Garda Siochána Acts from participating in that review. There were, however, detailed negotiations with the Irish Congress of Trade Unions which had involved two references to the Labour Court.

5. So far as An Garda Siochána were considered, a briefing was held at the Department of Justice and Equality on 14th May 2012 with representatives of the first named applicant, the respondent, and the other Garda staff associations (namely the Association of Garda Sergeants and Inspectors, the Association of Garda Superintendents and the Association of Garda Chief Superintendents) in attendance. This meeting was said to be part of a consultative process with all staff associations in the public service in relation to proposals to change sick leave arrangements in the public sector.

6. The General Secretary of the GRA, Mr. Stone, stated that Mr. Eugene Banks, an officer in the Department of Justice and Equality assigned to the Garda Human Relations division, said at that meeting that this encounter was simply the start of the negotiation process with the Garda organisation and that the matter would likely be dealt with through the 'Conciliation and Arbitration Scheme'. This formal non-statutory scheme was established on the 30th March, 2004 for the determination of claims and proposals relating to conditions of service of members of all ranks of An Garda Síochána. Part II of the scheme allows for the establishment of a Conciliation Council and sets out the matters appropriate for discussion by it. Mr. Banks accepts in his affidavit that he stated at the 14th May meeting that this was but the start of the negotiation process, but he also insisted that he made clear to all the Associations that the proposed changes would apply across the public sector generally. A senior official in the respondent Minister's Department, Ms. McGirr, also stated in her evidence that it was made clear at this meeting that any derogation for a particular sector would have to be justified by objective reasons and that it was ultimately a decision for the respondent Minister.

7. The cost of the Garda sick pay scheme was made the subject of a Working Group which had been established by the Minister for Justice and Equality in July 2012. Following a series of elaborate consultations and meetings, matters came to a head in November and December 2013.

8. By November 2013 the enabling legislation, the Public Service Management (Recruitment and Appointments) (Amendment) Bill, 2013, was going through the legislative stages in Dáil Éireann. The Conciliation Council met again on the 7th November, 2013 and was

informed that a report from the Working Group of An Garda Síochána in relation to the proposed alteration to sick leave arrangements was due to be finalised the following day, the 8th November, 2013. Mr. Banks states that at this meeting on the 7th November he stated that the Minister for Justice and Equality had no difficulty in supporting a request for a derogation from the new arrangements for An Garda Síochána, but that he also made clear that it was ultimately a decision for the respondent. The Working Group report was subsequently finalised and sent to the Minister for Justice and Equality by Assistant Commissioner Fanning, with the Commissioner's approval, on the 11th November, 2013. This report made a number of submissions as to why it was believed that An Garda Síochána should receive a derogation from the proposed arrangements. The concluding recommendation of the report was that "a derogation from the provisions of the legislation be made for An Garda Síochána pending a full review of the current sickness absence arrangements within An Garda Síochána under the terms of the Haddington Road Agreement." (The Haddington Road Agreement is an agreement between the Government and the public sector trade unions whereby, in broad outline, existing pay and conditions of service will be maintained in return for industrial peace and labour flexibilities and efficiencies.)

9. The Working Group report also referred to what was described as the "dangerous and unpredictable nature of the daily duties engaged in by all members of An Garda Síochána" and highlighted that in the period 2010 to the date of the report some "648 members were forced into sickness absence due to the violent and confrontational nature of the policing duties performed".

10. On the 3rd December, 2013 an email was sent to the applicant and the other Garda Staff Associations by Sergeant Shane O'Carroll of Garda Human Relations. The email indicated that the respondent Minister had decided that An Garda Síochána would not be included in the first instance in the new sick leave regulations. The information from the respondent Minister had been forwarded to Garda Management by the Department of Justice and Equality. The email continued thus:-

> "In relation to the submission on the application of the revised sick leave measures to members of the Garda Síochána, we have been advised by the Department of public Expenditure and Reform that the regulations that will be drafted on foot of the enabling legislation will allow the Minister the flexibility to include any public sector organisation in the new Public Service Sick Leave Scheme. AGS [An Garda Siochána] will not be included in the first instance. However, any proposed amended sick leave scheme for AGS must demonstrate the potential for significant savings to be achieved in the cost of sick leave. In the absence of such potential being demonstrated the Minister will bring AGS under the terms of the new scheme by amending the regulations.
>
> In stressing the last sentence in the previous paragraph, the Department of Public Expenditure and Reform are very firmly of the view that the proposed amended sick leave scheme for An Garda Síochána *must be developed, approved and implemented as a matter of urgency and certainly by the end of the first quarter of 2014."* [Emphasis in original]

11. Mr. Banks maintained that An Garda Síochána were initially excluded on the strict condition that they, as a matter of urgency, develop their own new sick leave scheme with potential for significant savings. It is nevertheless common case that by early December 2013 the respondent Minister had agreed to the exclusion of the Gardaí from the terms of the 2013 Bill in the expectation that further discussions would take place in the early part of 2014. It was anticipated that the GRA would be given the opportunity to advance fresh cost saving proposals which would take account – as the GRA saw it – of the special position of the members of An Garda Siochána with regard to sick pay. In effect, the GRA took the view that Gardai were exposed to occupational hazards in the course of their employment which made them a special case from a sick pay point of view.

12. It is not now in dispute but that on 3rd December 2013 the respondent Minister suddenly changed his mind and decided that both the new legislation and the regulations to be made there under would apply to the Gardai with immediate effect. While the GRA were unaware of this at the time, it subsequently emerged from the discovery documentation furnished by the respondent Minister in these proceedings that the real reason for this *volte face* was that the General Secretary of the public sector trade union IMPACT, Mr. Shay Cody, rang the respondent Minister's office on 3rd December 2013 in order to make it clear that the public sector trade unions could not accept a special exemption or derogation for the Gardai and that if such arrangement were to persist, he would have to consider balloting his members for industrial action. It is clear – and not disputed for the purposes of this appeal – that from that point onwards the die was cast and the respondent Minister had determined that the 2014 Regulations would apply from the outset to An Garda Siochána as well as to other members of the public sector.

13. On the 12th December 2013 the respondent Minister participated in a public debate on the regulations in Dáil Éireann and stated that An Garda Síochána would be included. On the 18th December similar remarks were made by the respondent when addressing Seanad Éireann. All public sector departments, including Department of Justice, were advised by email dated the 17th December that the scheme would not commence as planned on the 1st January, 2014 but would likely commence in early March, 2014.

14. It is not clear when exactly the GRA were ever told in terms of this Ministerial change of heart, although An Garda Síochána were informed of this by letter from the respondent Minister on 19th December 2013 and it seems that the Working Group (on which the GRA were represented) were informed of this on the following day, 20th December 2013 It seems obvious, however, that they were not informed of the real reason for this *volte face* until that emerged from the discovery document furnished by the respondent Minister in the course of these proceedings.

15. Ms. McGirr states that a number of emails in January and February 2014 from the respondent Minister to the Department of Justice indicated that the draft regulations which had been circulated to all public sector departments were well advanced and that An Garda Síochána would be included. She says that this position was "crystal clear" when the applicant met with the Consultative Council in February 2014.

16. For his part Mr. Stone stated that the Working Group continued to meet throughout January 2014 and the GRA itself prepared a position paper dated the 4th February, 2014 highlighting a number of inaccuracies and peculiarities in relation to the position of sick leave for Gardaí *vis-à-vis* other public service workers. The Working Group continued to meet and to correspond with the Garda Commissioner in relation to concerns that the Gardaí would be included in the new Regulations. All of this took place in circumstances where the participants were apparently unaware of the decision which had had been taken or, for that matter, the Minister's comments in both the Dáil and Seanad just a few weeks earlier.

17. It appears that the 28th February, 2014 a meeting chaired by Mr. Kieran Mulvey, the Chairman of the Labour Relations Commission, between the Garda Associations and Department of Justice officials took place at the Labour Relations Commission as part of the Haddington Road review. After this meeting the Garda Associations sought a meeting with officials in the Department of Justice in relation to the new public service regulations and the inappropriateness of An Garda Síochána being included in these Regulations. A meeting was subsequently arranged for the 7th March, 2014 with officials from the respondent Minister's office also being present. Mr. Stone says that moments after this meeting commenced an official from the respondent Minister's office informed those present that the respondent Minister had already signed the 2014 Regulations and An Garda Síochána had been included within

their scope. He maintained that this development came as a great surprise to the GRA. The present proceedings were commenced shortly thereafter.

Legislative Framework

18. The 2014 Regulations came into force on the 31st March, 2014. They were made by the respondent Minister in the exercise of the powers conferred on him by the Public Service Management (Recruitment and Appointments) Act 2004 ("the 2004 Act") as inserted by s. 7 of the 2013 Act.

19. Part 7 of the 2013 Act deals with sick leave remuneration and inserts sections 58A, 58B and 58C into the 2004 Act. Section 58A defines the term "public service body" as including, *inter alia*, the Civil Service, the Health Service Executive, and An Garda Síochána. Section 58B confers a power on the Minister to make regulations in relation to sick pay.

20. Section 58B (4) sets out the matters the Minister shall have regard to in making regulations as follows:

> "(4) In making regulations under subsection (1), the Minister shall have regard to—
>
> (a) the need to limit the circumstances in which the public service bodies can undertake the commitment of financial resources in making payments in cases in which they are unable to receive the benefit of the services of their public servants,
>
> (b) the resources available, for the time being, to the Exchequer to pay the remuneration of public servants,
>
> (c) without prejudice to paragraph (b), the obligations of the State under the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union done at Brussels on 2 March 2012,
>
> (d) with respect to the specification of conditions for an entitlement to be paid remuneration during a period of sick leave, the desirability of having in place a satisfactory means of verifying that the public servant concerned is unable to attend to his or her duties due to illness or injury, and
>
> (e) the need to protect the health of public servants, whilst taking account of the desirability of there being a measure of provision, as appears to the Minister to be appropriate and just, for making payments to public servants who are unable to attend to their duties due to illness or injury."

21. Section 58B (7) provides for transitional arrangements as follows -

> "Where, before the commencement of section 7 of the Public Service Management (Recruitment and Appointments) (Amendment) Act 2013, a period of sick leave, on a relevant person's part, has begun and continues after the commencement of that section, the arrangements that were in existence before the commencement of that section in respect of the payment of remuneration to that person during his or her sick leave shall continue to apply in respect of so much of that period of sick leave as falls after that commencement and regulations under this section shall not apply to that person until such time as he or she is able again to attend to his or her duties."

22. Section 58C also provides:

> "This Part has effect notwithstanding:-
>
> (a) any provision made by or under:-
> (i) any other Act,
>
> (ii) any statute or other document to like effect of a university or other third level institution,
>
> (iii) any circular or instrument or other document,
>
> (iv) any written agreement or contractual arrangement,
>
> or
>
> (b) any verbal agreement, arrangement or understanding or any expectation."

23. Part 3 of the 2014 Regulations includes Articles 7-10 and deals with "Sick Leave Remuneration Generally". Article 9 sets out the amounts and rates of sick leave remuneration and provides as follows-

> "9(1) This Regulation is subject to Regulation 10.
> (2) Sick leave remuneration at the full rate may be paid in a given instance if, in the 12 months preceding the first day of the relevant person's current period of sick leave (the "12 month reference period"), the period of sick leave, remunerated at the full rate, has not exceeded 92 days.
>
> (3) Subject to paragraph (4), sick leave remuneration at the half rate may be paid in respect of any period of sick leave, in the 12 month reference period, following on, or occurring after, the period of 92 days sick leave referred to in paragraph (2).
>
> (4) Payment of sick leave remuneration at the half rate shall be limited to 91 days of sick leave.
>
> (5) Save as provided in the preceding paragraphs (and unless a decision to grant temporary rehabilitation remuneration is made or Part 4 or 6 applies), no sick leave remuneration shall be paid in the 12 month reference period."

24. Article 10 sets out the maximum period of paid sick leave with a four year "look back" period:

> "10. Notwithstanding anything in Regulation 9, but subject to Parts 4, 5 and 6, if, in the period of 4 years preceding the first day of the relevant person's current period of sick leave, there has occurred a period of sick leave that is in excess

> of 183 days (being a period of 183 days in respect of which remuneration at the full rate or the half rate has been paid) no sick leave remuneration shall be paid in respect of that part of that sick leave that exceeds 183 days."

25. At the heart of the GRA's case is that the 2014 Regulations were *ultra vires* the respondent Minister insofar as he made the decision to include An Garda Siochána in the new sick pay regime while the promised consultations were still outstanding. It is perhaps important to record that no challenge to the constitutionality of the Regulations or, for that matter, to the 2013 Act was raised.

26. In the High Court Kearns P. rejected all the arguments which had been advanced by the applicants. Dealing with the issue of legitimate expectations, Kearns P. found that no formal promise of consultation had been made to the applicants either expressly or by reference to a sequence of events:-

> "The applicants were informed as far back as May 2012 of the respondent's intentions to adopt a sick pay scheme across the public sector which would include members of An Garda Síochána. I am satisfied that the email of the 3rd December, 2013 at most gave an indication that there might be some postponement in relation to the reform of An Garda Síochána sick pay until the end of March. However, within two days the Minister had confirmed his intention to include An Garda Síochána in any reform and that such reform would take effect by the end of March. This was communicated to the Garda Commissioner on the 19th December, 2013 and also in statements made in the Dáil and Seanad by the Minister at that time when it was specifically indicated that An Garda Síochána would be included in the application of the Regulations. The communication of December 19th was subsequently read out at a meeting of the Working Group, the report of which, it should be noted, lodged as it was with the respondent on the 22nd November, 2013, contained no reference to any representation that An Garda Síochána would be excluded from the Regulations. Thereafter the Regulations were circulated to all the Garda associations in January 2014, so that, apart from the single email of the 3rd December, 2013 the applicant's contentions are singularly lacking in support from the narrative of contemporaneous events. Still less can the applicants point to any documentation or meeting where a particular form of consultation was promised by or on behalf of the respondent. Nor can the applicants point to any detriment suffered by them or any action taken by them on foot of some supposed representation."

27. Kearns P. further considered that even if he was wrong on point, he concluded nonetheless that "any expectation harboured by the applicants was liable to be disappointed in the public interest in view of the financial circumstances of the State, a backdrop against which all of these negotiations were taking place." He also noted that, in any event, any expectation which the applicants may have had was expressly excluded by Part 7A of the Act of 2013 whereby s.58C expressly provides that that part of the Act: "… has effect notwithstanding … any verbal agreement, arrangement or understanding or any expectation."

28. So far as the fair procedures argument was concerned, Kearns P. stressed that the legislation was perfectly general in its terms. The consultation obligations which might well apply to "in the context of a targeted decision which affects a relatively small category of persons" did not apply in the case of generally applicable legislation:-

> "Were that to be the case, a Minister or government, confronted with a national financial emergency, would in effect be tied hand and foot when trying to legislate in circumstances where disparate demands from different groups within the public service were being pursued - perhaps endlessly and without speedy conclusion - creating the kind of nightmare scenario which would have left the Government powerless to take the remedial action which the Government and its external masters of that time, the Troika, believed were necessary."

29. Nor did Kearns P. consider that the situation was altered by the fact that a consultation process was already in train at the time the decision was taken:-

> "Nonetheless, does the fact that a consultation process was actually in train alter the situation in this case? The case advanced on behalf of the applicants has shifted and has now resolved itself into a contention that, once there was a process in being, as undoubtedly was the situation in the instant case, the applicants were entitled to expect that that process would continue to a conclusion, presumably one satisfactory to their members, before the Minister was free to introduce the regulations in question. I cannot accept this proposition when the views of the applicants had been articulated through various mediation and conciliation mechanisms from the summer of 2012 onwards and when the report of the Working Group dealing with the issue had been submitted to the respondent at the end of November, 2013. As already indicated, the report in itself was a means of consultation and communication and the evidence before the Court is that the Minister was briefed on its contents. If the applicants' submissions were to be correct, a process of consultation, which might have had the effect of unravelling the process across the entire public service, should have continued until the demands of the applicants, either to be altogether excluded from the process, or to receive special differentiated treatment, were realised. Such a fetter on the power of the Minister in the particular context and circumstances cannot, in the Court's view, be justified. Any such conclusion would be tantamount to fettering the Minister's power and duty to legislate in particularly difficult circumstances and could further be seen as a breach of the principles of separation of powers enumerated in Article 6 of the Constitution"

30. The President also rejected the argument that the Minister acted on the basis of irrelevant considerations by having regard to the intervention made by Mr. Shay Cody who made it clear to the Minister that the entire process of negotiating the sick pay scheme across the public sector would "unravel" if An Garda Síochána were treated as a special case. Kearns P. noted that:-

> "The Court is satisfied that in any democracy it is to be expected that a person such as Mr. Cody, charged as he is with obligations to represent the interests of his members, will communicate his concerns at a political level and the respondent is certainly entitled to take them into account, particularly if one consequence of treating An Garda Síochána differently would have been to unravel the entire process. Even if that *was* the most significant element going to the Minister's decision, the Court would still be of the view that any derogation or 'special treatment plan' which could have collapsed the negotiation process across the public unions was a very relevant and proper matter for the Minister to take into account. One can readily imagine the consequences if he had ignored these communications and ploughed on regardless when other public service groups were seeking similar preferential treatment."

31. The President further rejected arguments based on the supposed incoherence of the Regulations. The applicants have now appealed to this Court against the entirety of the President's judgment and order (save for the order as to costs)

The basis for the GRA's objections

32. In its own way this appeal brings into sharp focus the difference between the judicial function and that the rather different roles performed by the two branches of government which are democratically accountable, namely, the Oireachtas and the Government.

The GRA's case rests in large part on the fact that the Minister had given the impression that An Garda Síochána would not be initially included within the new sick pay regime which was about to be applied to other members of the public service. While these negotiations were on-going, the Minister's office was contacted by Mr. Shay Cody, the General Secretary of the IMPACT trade union who informed the Minister's advisers that his members would not be prepared to accept an adverse change in their sick pay entitlements if a special exemption was granted – even on a temporary basis – to An Garda Síochána. The prospect of industrial action loomed.

33. Faced with what he must have regarded as this unappealing prospect, the Minister unilaterally resiled from the tacit commitment he had given to the GRA in particular and to the members of An Garda Siochána in general that the new sick pay regime would not initially apply to members of the Force. The Oireachtas enacted the 2013 Act which came into force on 24th December 2013 and the Minister subsequently promulgated the 2014 Regulations on 7th March 2014. The effect of the 2014 Regulations was that the new sick pay regime did, after all, apply to An Garda Síochána.

34. In this appeal the applicant Association has emphasised the Minister's obligation to consult with them prior to bringing about major changes in their conditions of employment. It has also drawn attention to the fact that the Minister was plainly influenced by the intervention of Mr. Cody, so that it was said that the Minister had taken irrelevant considerations into account in deciding to break off negotiations and effecting a volte face on the application to the new sick pay regime to the Gardaí.

35. If the Minister had been discharging an administrative or quasi-judicial function when making these Regulations then it would have to be admitted that the GRA's objections would have been pretty well unanswerable. The Minister had, after all, given at least a tacit commitment that there would be further negotiations and the failure to honour that commitment by a person performing quasi-judicial functions would have amounted to a clear breach of fair procedures. One might likewise say that it would have been inappropriate for such a decision-maker (*i.e.* on this hypothesis, a person performing administrative or quasi-judicial functions) to have had any regard to the intervention and objections of a third party such as Mr. Cody, not least given that that third party might not have been fully informed as to the rationale for exclusion of An Garda Síochána in the first place or to the potential political and industrial relations consequences which might have come about had Mr. Cody's warnings had not been heeded.

36. Like Kearns P. in the High Court, I consider, however, that this entire argument rests upon a subtle fallacy which obscures the real differences between the judicial role on the one hand and that performed by the two branches of government which are democratically accountable, namely, the Oireachtas and the Government, on the other. The judicial branch brings with it independence, detachment, an ability to determine facts in a systematic and rigorous fashion, the legal training to apply a large corpus of existing law and a solemn commitment on the part of each judge to uphold the Constitution and the law. Our institutional weakness is that, in Hamilton's famous words, as "the weakest branch of government", we lack "both the sword and the purse".

37. The judicial branch quite obviously lacks the institutional competence, capacity and, most of all, democratic legitimacy to pursue policy matters of the kind – such as reform of the public service sick pay regime – at issue in the present appeal. Article 34.1 of the Constitution instead requires the judicial branch to administer justice, thus typically requiring the judge to apply conventional legal materials - such as rules of statutory interpretation, precedent and reasoning by analogy – in a detached and principled fashion, regardless of the consequences. The fallacy of which I speak rests on the assumption that the other branches of government should or, indeed, must act in a similar fashion to the judicial branch when formulating matters of *policy* such as is necessarily involved in the enactment of legislation or the promulgation of generally applicable rules which are contained in a statutory instrument such as the 2014 Regulations.

38. The other branches of government bring with them the strength of democratic accountability and the constitutionally assigned role of policy making. When enacting legislation the Oireachtas does not have to reason from principle or to justify its actions by reference to conventional legal norms. It does not matter, for example, that the Oireachtas (and, by extension, the Minister) may have been influenced by wholly pragmatic considerations - such as the need to accommodate the objections of the other public sector trade unions - in deciding that An Garda Síochána should have been included within the scope of the 2013 Act from the outset of that legislation. Provided, however, that it respects the Constitution and, at a wider level, remains within the parameters of EU law and the European Convention of Human Rights, the Oireachtas may legislate as it wishes.

39. The Government brings with it the policy insights of its members and the wider civil service. It can give a lead as to what is likely to be effective in practical policy terms and it is likewise dispensed from the necessity to rationalise its actions by reference to conventional legal principles.

40. The reason for this different approach is, of course, is that, generally speaking, the other branches of government are engaged in the business of policy formulation as distinct from the administration of justice. In contrast to judicial decision-making, the policy makers of the legislative and executive branches are not required to be consistent or to have regard to established precedent or to proceed from legal principle or to give detailed reasons in writing for their decisions. Nor are they required to be detached and impartial in the same manner as would be expected and required of the judiciary. Critically, however, the other branches of government are democratically accountable in a way that the judiciary are not.

41. This democratic accountability has the important consequence that the electorate expect their politicians to achieve practical results. Politicians who are perceived by the electorate as having failed to deliver such results will potentially suffer the electoral consequences. For these reasons, these politicians must have regard to the practical consequences of their decisions – and the wishes of the electorate – in a manner which would not be appropriate to judicial decision-making.

42. In the present case the Minister was engaged in the practical politics of policy formation by piloting the 2013 Act through the Oireachtas and by subsequently promulgating the detailed and generally applicable rules contained in the 2014 Regulations which gave effect to that legislation. It is true that the GRA might legitimately consider that they had been let down by the manner in which that decision was arrived. The GRA are also entitled to feel disappointed given that the critical intervention of Mr. Cody was not disclosed to them at the time and this only came to light subsequently in the course of the discovery process after these proceedings had been commenced. Yet, from the Minister's perspective, the greater prize of securing the reform of a very expensive feature of public service pay and conditions while avoiding the threat of industrial action from other public sector unions made it imperative in the circumstances that a snap decision of this kind (*i.e.*, to include An Garda Siochána in the new regime) be taken immediately, regardless of any assurances in relation to consultation which the Minister might previously have given to the GRA.

43. This conclusion finds expression in the case-law which has consistently rejected the suggestion that legislative, or quasi-legislative decisions, attracts the principles of fair procedures, even though such generally applicable rules might have significant implications for the livelihood, well-being and general welfare of those affected by such decisions. In *Cassidy v. Minister for Industry and Commerce* [1978] I.R. 297 McMahon J. held that the Minister was not required to consult with local vintners' associations before

promulgating a statutory instrument fixing maximum prices for the sale of alcohol in the Dundalk. (It is true that the associations succeeded on appeal in the Supreme Court, but on different grounds). Likewise, in *Gorman v. Minister for Environment* [2001] 2 I.R. 414 Carney J. held that there was no duty to consult taxi-drivers prior to making a statutory instrument effectively de-regulating the industry by abolishing a quota licensing system, despite the capital loss in the value of their licences which would necessarily ensue as a result. As Carney J. put it ([2001] 2 I.R. 414, 419):

> "Whilst there can be no doubt as to the existence of a constitutionally protected right under Article 40.3 to fair procedures in decision-making, it has been recognised in the case-law that the principles of constitutional justice do not apply with equal force to every situation and, indeed, in some circumstances where decisions are taken by public bodies, such as a decision to enact a particular piece of legislation by the Oireachtas, the *audi alteram partem* or the duty to consult and hear submissions does not arise at all. The citizen is not consulted in relation to increased taxation in the budget. There may, of course, be various practices in place to consult interested bodies or persons before legislative decisions, but this is undertaken as a matter of practice, not of law."

44. In *Gorman*, Carney J. stressed the practical difficulties which any other conclusion would necessarily entail. It must be borne in mind that many legislative enactments and statutory instruments have implications for persons affected thereby. In recent years the Oireachtas has found itself obliged by reason of acute fiscal necessity to enact a swathe of legislation imposing new taxes and charges, reducing social assistance payments and reforming matters such as pension and sick pay entitlements of public service employees. While none of these measures have been welcomed with any enthusiasm by those affected by these increased taxes and charges or reduced social assistance payments, it has never been suggested that these measures were rendered somehow unconstitutional or invalid for want of formal consultation with the representatives of those likely to be affected thereby. As Kearns P. pointed out in his judgment, the practical business of the other branches of government would effectively come to a halt if there was a *legal* obligation to consult with even the representative bodies of the persons affected by the enactment of these generally applicable rules.

The decision in Burke v. Minister for Labour

45. It is true that there have been cases where a duty to consult has been found to exist, even in the case of a statutory instrument. Yet such cases have been exceptional and, upon closer examination, may be thought to present examples of where what in reality was an administrative decision (or, to use the words of Kearns P., a "targeted decision"), even if in form the decision in question had been taken by way of statutory instrument. The best example in this context is perhaps supplied by the Supreme Court's decision in *Burke v. Minister for Labour* [1979] I.R. 354. In that case a Joint Labour Committee fixed minimum wages for persons working in the hotel industry by means of an order made under the Industrial Relations Act 1946. Employers were required by the 1946 Act to comply with the terms of the order. The representatives of the hotel industry wished to adduce evidence as to the real costs to them of supply board and lodging to employees, but the Committee fixed minimum wages for such employees without having regard to such evidence.

46. The Supreme Court held that the statutory instrument made by the Committee was invalid by reason of a failure to permit such evidence to be adduced. But the decision in Burke cannot realistically be regarded as an authority for the wider proposition that persons affected by the making of a statutory instrument are entitled to be heard prior to its adoption. On the contrary, it appears that the Joint Labour Committee in that case essentially made an administrative decision to which effect was then given by a statutory instrument without any further ministerial involvement or parliamentary control: see [1979] I.R. 354, 358-359, *per* Henchy J. It may also be significant that the Supreme Court subsequently held that the legislation at issue in Burke was unconstitutional, precisely because it allowed the delegation of law making functions to an entity which was not even a direct delegate of the Oireachtas, so that the 1946 Act contravened Article 15.2.1 of the Constitution: see *McGowan v. Labour Court* [2013] IESC 21, [2013] 3 I.R. 718. As O'Donnell J. stressed in *McGowan*, the remarkable extent to which these powers had been delegated was clearly a factor which had influenced the reasoning of the Supreme Court in *Burke.*

47. Viewed thus, the circumstances of *Burke* must be regarded as exceptional and special. The decision making at issue in that case in substance involved a targeted administrative decision. It was, however, quasi-legislative in form, as effect was subsequently given by statutory instrument to the actual decision made by the Joint Labour Committee.

48. I agree with Kearns P. that this is also the true explanation for the decision of the UK Supreme Court in *Bank Mellat v. HM Treasury (No.2)* [2013] UK SC 39, [2014] 1 A.C. 700. In that case the appellant successfully challenged a decision of the UK Treasury made by way of statutory instrument to exclude a major Iranian commercial bank from the UK financial sector on the ground of its alleged connections with a covert Iranian nuclear weapons programme. A majority of the Court held that the Treasury should have given the Bank an opportunity to make representations.

49. As Lord Sumption JSC observed ([2014] 1 A.C. 700, 776):

> "In my opinion, unless the Act expressly or impliedly excluded any relevant duty of consultation, it is obvious that fairness in this case required that Bank Mellat should have had an opportunity to make representations before the direction was made. In the first place, although in point of form directed to other financial institutions in the United Kingdom, *this was in fact a targeted measure directed at two specific companies,* Bank Mellat and IRISL. It deprived Bank Mellat of the effective use of the goodwill of their English business and of the free disposal of substantial deposits in London. It had, and was intended to have, a serious effect on their business, which might well be irreversible at any rate for a considerable period of time. Secondly, it came into effect almost immediately. The direction was made on a Friday and came into force at 10.30 a.m. on the following Monday. It had effect for up to 28 days before being approved by Parliament. Third, for the reasons which I have given, there were no practical difficulties in the way of an effective consultation exercise. *While the courts will not usually require decision-makers to consult substantial categories of people liable to be affected by a proposed measure, the number of people to be consulted in this case was just one*, Bank Mellat, and possibly also IRISL depending on the circumstances of their case. I cannot agree with the view of Maurice Kay LJ that it might have been difficult to deny the same advance consultation to the generality of financial institutions in the United Kingdom, who were required to cease dealings with Bank Mellat. They were the addressees of the direction, but not its targets. Their interests were not engaged in the same way or to the same extent as Bank Mellat's. Fourth*, the direction was not based on general policy considerations, but on specific factual allegations of a kind plainly capable of being refuted, being for the most part within the special knowledge of the Bank.* For these reasons, I think that consultation was required as a matter of fairness. But the principle which required it is more than a principle of fairness. It is also a principle of good administration. The Treasury made some significant factual mistakes in the course of deciding whether to make the direction, and subsequently in justifying it to Parliament. They believed that Bank Mellat was controlled by the Iranian state, which it was not. They were aware of a number of cases in which Bank Mellat had provided banking services to entities involved in the Iranian weapons programmes, but did not know the circumstances,

which became apparent only when the Bank began these proceedings and served their evidence. The quality of the decision-making processes at every stage would have been higher if the Treasury had had the opportunity before making the direction to consider the facts which Mitting J ultimately found." (emphasis supplied)

50. It is perfectly clear from this passage – and perhaps especially the words I have taken the liberty of highlighting – that the sanctions order was in reality an administrative decision taken under the guise of a statutory instrument. As Lord Sumption made clear, this Treasury direction was not taken on "general policy considerations", but rather on the basis of specific factual allegations – namely, complicity in supplying banking services to a covert nuclear weapons programme – of a kind which were "plainly capable of being refuted."

51. Of course, this is not at all to suggest that the principles of fair procedures and legitimate expectations do not apply to ministerial decisions or even to decisions taken by the Government. It is clear from the Supreme Court's decision *in East Donegal (East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317) that these principles apply to governmental and ministerial decisions affecting individuals or discrete groups of individuals which are essentially administrative in character and which do not involve the promulgation of generally applicable policies or legislative rules. Thus, for example, the rules of fair procedures apply to decisions concerning the grant of a licence (see, *e.g.*, the decision in *East Donegal* itself) or an occupational pension (see, *e.g. Kiely v. Minister for Social Welfare* [1977] I.R. 287) or the dismissal from employment (see, *e.g., Garvey v. Ireland* [1981] I.R. 75). Numerous other examples could be given along similar lines.

52. Where, however, the actions of the legislative and executive branches involve policy formation and the approval of *generally applicable rules* contained in either primary legislation or in a statutory instrument, entirely different considerations apply. Not only is the nature of the decision making different – which, as I have already endeavoured to point out, *is itself* a reason to justify the non-application of the principles of fair procedures – but as Carney J. noted in *Gorman* and as Kearns P. stated in the judgment under appeal, decision making of this kind would become impracticable were the principles of fair procedures to be applied.

53. Insofar as the GRA seek to rely on a legitimate expectation of the promise of consultation independently of the principle of fair procedures, it is perhaps sufficient to say that any expectation of that kind could not prevail against the subsequent enactment of the 2013 Act. As Keane J. said in *Pesca Valentia Ltd. v. Minister for Fisheries (No.2)* [1990] 2 I.R. 305, no estoppel "could conceivably operate so as to prevent the Oireachtas from legislating or the Executive from implementing the legislation when enacted."

54. In any event, as Kearns P. pointed out, s. 58C(b) of the 2013 Act expressly disapplies in the context of the operation of Part 7 (from whence the power to make the 2014 Regulations derives) any "verbal agreement, arrangement or understanding or any expectation". The constitutionality of this sub-section has not been challenged or questioned and the plain language of these provisions is sufficient to extinguish any legitimate expectation which might otherwise have existed.

The rationality of Article 9 and Article 10 of the 2014 Regulations

55. It remains to consider the rationality of Article 9 and Article 10 of the 2014 Regulations. Counsel for the GRA, Mr. McDonagh S.C., submitted that these provisions were so opaque that it was simply impossible to ascertain their true meaning. No case is made by either applicant that they are immediately prejudiced by the operation of these provisions, save that Mr. McDonagh S.C. submits that his clients are entitled to know what they might mean. It is true these provisions defy easy analysis and, with respect, they would be unlikely to be held out as a model of simple or elegant drafting.

56. The fact remains, however, that it would be premature for this Court to conduct, as it were, an Article 26-style abstract review of the 2014 Regulations which was entirely divorced from the concrete and factual circumstances of an individual case where these provisions fell to be applied: see, *e.g.,* by analogy the comments of the Supreme Court to this effect in *Collooney Pharmacies Ltd. v. North Western Health Board* [2005] IESC 44, [2005] 4 I.R. 142. Nor would it be appropriate for this Court to give what might amount to an advisory opinion on the possible meaning and interpretation of these admittedly complex and somewhat convoluted provisions. The determination of these issues will have to await a specific and concrete case involving an individual specifically affected by the operation of these Regulations: see, e.g., by analogy the comments of Henchy J. in *Cahill v. Sutton* [1980] I.R. 269, 283-284.

Conclusions

57. For the reasons stated, therefore, I consider that while the GRA are understandably aggrieved by both the manner of the Minister's sudden *volte face* and the reasons for it, this does not give the applicants any legal ground of objection to the manner in which the 2014 Regulations were promulgated. These are generally applicable rules which were made by the respondent Minister pursuant to the authority conferred on him by the 2013 Act. The principles of fair procedures have no application in the context of the making of generally applicable regulations of this kind.

58. Insofar as the applicants rely on a principle of legitimate expectations that they were be consulted on the question of whether the Regulations should apply to An Garda Siochána from the outset, it is sufficient to say that any such expectation could not prevail in view of the subsequent enactment of the 2013 Act and the making of the 2014 Regulations. In any event, s. 58C(b) of the 2013 Act expressly disapplied any such expectation.

59. Nor would it be appropriate at this juncture for this Court to consider the possible application and interpretation of Article 9 and Article 10 of the 2014 Regulations, as this should more appropriately await a specific case where these provisions fell to be interpreted and applied by the Minister in the first instance.

60. It is for these reasons that I consider that the decision of Kearns P. was correct and that the appeal should be dismissed.