

THE HIGH COURT

[2011 No. 462 J.R.]

BETWEEN

ANDREW KEEGAN

APPLICANT

AND

GARDA SÍOCHÁNA OMBUDSMAN COMMISSION

DEFENDANT

Judgment of Mr. Justice Hedigan delivered on 17th day of August, 2012.**1. Application**

1.1 This matter comes before the Court by way of an application for judicial review. The applicant is seeking an order prohibiting the respondent from carrying out any further investigation into his investigation of a road traffic accident which occurred on 22nd May, 2005 at Clonskeagh, Dublin. The applicant further seeks a declaration that the respondent has no lawful entitlement to investigate the applicant in respect of his investigation and seeks in the alternative injunctive relief restraining the respondent from any such further investigation. This Court granted leave to apply for judicial review on two grounds by order dated 8th June 2011, and it was also ordered that the respondent be restrained from carrying out any further investigation of the applicant until the 29th June, 2011, and that order has continued from time to time since then. By order of the Supreme Court made on the 23rd March, 2012, the applicant was permitted to amend his grounds by the addition of one further ground. These are that the respondent, having determined pursuant to section 87 of the Garda Síochána Act 2005 that the complaint of David Seavers was inadmissible, has no jurisdiction by virtue of section 88 of the said act to take any further action against the applicant

2. Parties

2.1 The applicant is a Garda Sergeant who was involved in the investigation and compilation of a report for the Director of Public Prosecutions in respect of a fatal road traffic accident which occurred on 22nd May, 2005 in which a pedestrian, the late Mrs. Mary Seavers, was killed when struck by a vehicle driven by a member of An Garda Síochána.

2.2 The respondent (hereinafter GSOC) is a body corporate established by s. 64 of the Garda Síochána Act 2005 (hereafter referred to as 'the 2005 Act'). The functions of the respondent are *inter alia* to receive complaints from members of the public concerning the conduct of members of An Garda Síochána, to carry out the duties and exercise the powers assigned to it under *Part 4* of the 2005 Act and to report the results of its investigations under *Part 4* to the Garda Commissioner and, in appropriate cases, to the Director of Public Prosecutions and, if it reports to the Director, to send him or her a copy of each investigation file. The respondent also has the power under s. 102 of the 2005 Act to investigate any matter that appears to it to indicate that a garda may have committed an offence or behaved in a manner that would justify disciplinary proceedings, where it appears to the respondent desirable in the public interest to do so.

3. Factual Background

3.1 The road traffic collision which was the subject-matter of the applicant's investigation occurred on the 22nd May, 2005, when a patrol car driven by Garda Niamh Seberry went out of control on a bend in Clonskeagh, Dublin. The patrol car crossed onto the incorrect side of the roadway, mounted the pavement, knocked down a bus shelter and drove into and killed the late Mrs. Seavers, who was standing at the bus stop at the time.

3.2 The applicant conducted the initial Garda Investigation of the road traffic accident, under the supervision of Superintendent William McCahey of Blackrock Garda Station, Dublin. An investigation file was prepared by the applicant and was submitted by Superintendent McCahey to the Director of Public Prosecutions (hereafter referred to as 'the DPP'). The DPP, having considered the file, directed in December 2005 that no prosecution should take place.

3.3 In March 2006 the inquest into the death of the late Mrs. Seavers was held by the Dublin City Coroner and a verdict of "Death by Misadventure" was returned. Following the publicity surrounding the inquest, four witnesses came forward. These witnesses were interviewed by gardaí and their statements were recorded. These four statements were treated as 'new evidence' and were submitted to the DPP, who reviewed the file and affirmed the original decision not to prosecute.

3.4 On 22nd November, 2007, Mr. David Seavers, the son of the deceased, complained to the respondent about "the nature of the Garda investigation into the death of [his] mother Mary Seavers". This complaint came to the respondent outside the 6 month time limit provided for by s. 84 of the 2005 Act and for that reason was found inadmissible. This complaint and the respondent's finding was not notified to the applicant. However, it was decided subsequently by the respondent that it would be desirable in the public interest to investigate the adequacy of the Garda investigation into the road traffic accident pursuant to s. 102(4) of the 2005 Act. This decision was recorded on 30th July, 2008 as the determination of the then chair of the respondent, the late Mr. Justice Kevin Haugh.

3.6 By direction of the respondent an investigation was commenced pursuant to s. 94 of the 2005 Act under the supervision of James Costello, Senior Investigations Officer. On 16th October, 2008, Chief Superintendent Manley was appointed to investigate. The applicant received notification on the 20th October, 2008 that he was the subject of a public interest investigation under s. 102 of the 2005 Act and that Chief Superintendent Manley had been appointed to investigate the adequacy of the Garda Investigation into the road traffic accident in accordance with s. 94 of the 2005 Act. On the 19th February, 2010, the applicant was served with a notice of investigation. These notices referred incorrectly to "the complainant, David Seavers".

A meeting took place on the 18th October, 2010 attended by Mr. Hegarty of Smith, O'Brien and Hegarty solicitors, solicitors for the applicant, at which he raised several queries which were answered by Chief Superintendent Manley in a letter dated the 21st October, 2010.

3.7 The s. 94 investigation encountered delays and it was decided by the respondent on the 10th December, 2010, pursuant to s. 94(12) of the 2005 Act to move the investigation from one being dealt with under s. 94(5) of the Act to one that would be dealt with under s. 95 of the Act. Following correspondence between the parties, on the 8th June, 2011 the applicant obtained leave to seek judicial review of the respondent's investigation with a view to prohibiting the same.

4. Submissions of the Applicant

4.1 The applicant bases this application on three grounds:

- (i) the investigation is barred by virtue of s. 88 of the Garda Síochána Act 2005; the jurisdictional issue;
- (ii) the investigation cannot be lawfully carried out under the 2005 Act because it is being carried out under the 2005 Act despite the Act not coming into force until May 2007 and contains no retrospectivity provision (the retrospectivity issue); and
- (iii) Senior Investigations Officer Costello has prejudged the investigation (the bias by prejudgment issue).

4.2 In relation to the first issue, the applicant states that he was unaware that there was any dissatisfaction with his investigation of the road traffic accident until he received the notification in October 2008 that the respondent had commenced a public interest investigation under s. 102 into his own investigation. The applicant has since learned that a complaint had been made by Mr. David Seavers in November 2007, which was found to be inadmissible because it was out of time. By letter dated 15th February, 2011, Mr. Costello wrote to the applicant and told him that he had omitted to inform the applicant about the complaint which was found inadmissible as it was not made within the time allowed.

4.3 The current investigation is being carried on pursuant to s. 102(4) of the 2005 Act, which empowers the respondent to investigate conduct of a member of An Garda Síochána where "it appears to it desirable in the public interest to do so and without receiving a complaint..." S. 83 of the 2005 Act provides for dealing with complaints by members of the public concerning conduct alleged to constitute misbehaviour by a member. S. 84(1) provides that such a complaint must be made within the period of six months from the date of the conduct giving rise to the complaint. S. 84(2) empowers the respondent to extend the six month time period "if it considers that there are good reasons for doing so". S. 87(1) of the 2005 Act provides that, on receiving a complaint, the respondent shall determine whether the complaint is admissible or inadmissible. S. 88(1) provides that, on determining that a complaint is inadmissible, the respondent shall "(a) notify, in writing ... the member of the Garda Síochána whose conduct is the subject of the complaint ... of its determination, (b) include in the notification the reason for the determination, and (c) take no further action in relation to the complaint.

4.4 The applicant submits that there is a duty on the respondent to rule that a complaint is admissible or inadmissible. The applicant states that, although a complaint must generally be within six months, there is a power to extend the time if "there are good reasons for doing so". Thus, the fact that a complaint has been made out of time does not necessarily preclude an investigation by the respondent. The applicant argues, however, that there is a clear, unequivocal statutory bar on further investigation once the respondent has found a complaint to be inadmissible.

4.5 The applicant submits that the current investigation is one and the same investigation as the investigation of Mr. Seavers' complaint. The applicant claims that the respondent has not indicated any new material which warranted a public interest inquiry under s. 102 of the 2005 Act. He points to the letter of the respondent of the 15th February, 2011, which states "we have regard to the fact that the determination to initiate a section 102(4) investigation in this case was made having regard to the matters raised in the inadmissible complaint of Mr. Seavers." The letter then states that the complaint had been found inadmissible but goes on to state "The Commission however considered the matters contained in the complaint of Mr. Seavers and after due consideration determined that it would be in the public interest to investigate the adequacy of the Garda investigation into the road traffic accident involving the late Mary Seavers and the compilation of the Garda Report to the DPP in September 2007 that no prosecution was warranted."

4.6 The applicant argues that the only new element in the case was that the respondent had given Mr. Seavers' complaint "due consideration", as appears from the respondent's letter of the 15th February, 2011. The applicant submits that "due consideration" should have been applied when Mr. Seavers first made his complaint including whether or not to grant an extension of time. The applicant points out paragraph 8 of Mr. Costello's affidavit, in which he avers "Although the Seavers complaint came to the respondent 'out of time', it was decided that the issues raised were of sufficient public interest to warrant an investigation under s. 102(4) of the Act." The applicant submits that this averment shows that the current s. 102(4) investigation is nothing other than an investigation of Mr. Seavers' complaint.

4.7 The applicant submits that s. 102(4) of the 2005 Act cannot be used to override the statutory bar on investigating an inadmissible complaint. The applicant accepts that s. 102(4) of the Act does authorise the respondent to engage in public interest investigation and to do so without receiving a complaint, but argues that this is a residual power, as evident from the side-note to s. 102 which refers to "Other investigations by Ombudsman Commission".

4.8 The applicant claims that the 2005 Act casts an onus on the respondent to decide on the admissibility of a complaint made by a member of the public. The applicant argues that once the respondent decides that the complaint is inadmissible, s. 88(1) provides an important protection for gardaí, as "no further action" can be taken. The applicant submits that the respondent, by continuing its investigation, is overriding the express statutory prohibition in s. 88(1).

4.9 In relation to the second issue, the applicant points out that the fatal accident occurred on 22nd May, 2005 and the applicant's investigation into the circumstances of that accident concluded by 23rd August 2005.

4.10 The applicant claims that, at the time of the accident and investigation, the statutory provisions relating to complaints about gardaí comprised the Garda Síochána Complaints Act 1986 and the Garda Síochána (Discipline) regulations 1989, which have since been replaced by the Garda Síochána Act 2005 and the Garda Síochána Discipline Regulations 2007 respectively. The respondent's current investigation is being conducted under the provisions of the 2005 Act and the 2007 Regulations. The act came into force in May 2007.

4.11 The applicant argues that the 2005 Act and the 2007 Regulations are not retrospective. He states that the Constitution prohibits retrospective legislation and that, if legislation is to have a retrospective application, it should clearly and unambiguously say so. The applicant notes that s. 111 of the 2005 Act prescribes transitional periods relating to complaints under the 1986 Act, which would not be necessary if the 2005 Act can be applied retrospectively. The applicant further argues that the 1986 Act permitted

complaints in respect of conduct within six months before the date the complaint was made. The applicant submits that this protection would become meaningless if the 2005 Act can be applied retrospectively, and that there is nothing in the 2005 Act to suggest that the six month time limit in the old Act should be circumvented by giving the new Act retrospective application.

4.12 The applicant argues that s. 128 of the 2005 Act deals with the continuation of certain regulations and orders. If the 2005 Act can be applied retrospectively, there would have been no need to preserve the position in relation to existing regulations or proceedings, as s. 128 purports to do. Regulation 13 of the 2007 Regulations, which provides that proceedings which were commenced but not concluded before the commencement of the Regulations may be continued as if the Regulations had not been made. There would be no need for this regulation if the 2007 Regulations had retrospective effect.

4.13 The applicant argues that this is a case where no timely complaint was made. He states that, if there had been a timely complaint, then s. 111 of the 2005 Act would come into operation and, if the investigation had started, it could be continued under the provisions of the old Act under s. 111(3). If the investigation had not started, then the complaint could be investigated under the 2005 Act pursuant to s. 111(2). The applicant submits that if the respondent can retrospectively apply the provisions of the 2005 Act, irrespective of the fact that no complaint was made under the 1986 Act, it follows that the respondent can investigate and discipline a garda in respect of any alleged breach of discipline committed prior to the coming into force of the 2005 Act, no matter how long ago it was committed. It is submitted that it is inconceivable that the Oireachtas intended such an outcome.

4.14 The applicant submits that the respondent's position is not saved by the Interpretation Act 2005. S. 25 of that Act deals with the effect of a repeal of an enactment. S. 27(1)(c) provides that the repeal does not affect "any right, privilege or obligation or liability acquired, accrued or incurred under the enactment". The applicant had no "acquired" or accrued liability under the Garda Síochána (Complaints) Act 1986. Nothing had been determined in relation to him under that Act, since there had been no complaint against him under its provisions. The applicant argues that the Interpretation Act accordingly has no application in this case.

4.15 In relation to the third issue i.e. bias by prejudgment, the applicant points out that the respondent is carrying out a public interest inquiry under s. 102 of the 2005 Act. The applicant was informed of this inquiry by notice dated the 20th October, 2008, which notice indicated that the investigation was to be carried out by Chief Superintendent Manley in accordance with s. 94 of the 2005 Act. It would be supervised by James Costello Senior Investigating Officer on behalf of GSOC. Section 94(1)(b) of the 2005 Act requires that the Garda Commissioner shall "ensure that the appointed member has not been involved in any capacity in relation to an earlier aspect of the case". Mr. Hegarty, Solicitor for the applicant, wrote to Chief Superintendent Manley on the 5th November, 2010 and pointed out that it appeared that he had had a previous involvement in an earlier aspect of the case. The respondent indicated to Mr. Hegarty, by letter dated 17th December, 2010, that pursuant to s. 94(12) it had taken over the investigation, moving it from s. 94(5) into s. 95 of the 2005 Act. Mr Costello would be the investigating officer.

4.16 S.97(1) of the 2005 Act provides that the respondent shall provide to the Garda Commissioner a statement of the facts established by the investigation and a recommendation about whether or not disciplinary proceedings should be brought. S. 97(2) of the 2005 Act gives evidential status to the report compiled by the investigating officer, providing that the report is evidence of the facts stated therein unless the contrary is proved. The applicant submits that, since Mr. Costello is not a mere investigator but is also a fact-finder, he has a duty of impartiality and should not determine the facts of the case until he has heard from the applicant nor should he pre-judge those facts.

4.17 The applicant states that a conversation took place between Mr. Costello and Mr Gerald O'Donnell, the applicant's solicitor, in the car park of Terenure Garda Station on the 1st September, 2010. The applicant had not at that stage been interviewed by or on behalf of the respondent.

4.18 Mr. O'Donnell and Mr. Costello differ in their accounts of what was discussed during this conversation. Mr. O'Donnell states that Mr. Costello said that he would be writing the s. 97 report, but Mr. Costello denies that they discussed the preparation of the report. Mr. O'Donnell says that Mr. Costello told him that 200 questions would be prepared for the applicant and that he wouldn't be able to answer all of them as he would simply have no response to them. Mr. Costello, on the other hand, states that Mr. O'Donnell asked whether the applicant would be able to answer the questions. Mr. O'Donnell says that Mr. Costello said that the applicant was "at serious risk" and that he could be dismissed. He says that Mr. Costello told him that the matter could be dealt with in a different way if the applicant adopted a certain attitude and explained that he was acting under direction. Mr. Costello, however, says that he does not recall discussing with Mr. O'Donnell the fact that the applicant was under investigation for a serious breach of discipline and denies the allegation that he would adopt a certain attitude if the applicant were to take a certain course of action. He further says that he had no power to enter into any sort of deal. Mr. O'Donnell says that Mr. Costello repeatedly asked him where he lived which he found strange and inappropriate. Mr Costello states that the only reason he may have asked where Mr. O'Donnell lived was for the purpose of offering him a lift home.

4.19 The applicant relies on the decision of Clarke J in *AP v McDonagh* [2009] IEHC 316, where the Court granted judicial review arising out of family proceedings in the Circuit Court on the basis that the judge had pre-judged the issue between the parties. Clarke J stated that pre-judgment occurs *inter alia* "where the adjudicator indicates that the adjudicator has reached a conclusion on a question in controversy between the parties, at a time prior to it being proper for such adjudicator to reach such a decision."

5. Submissions of the Respondent

5.1 In relation to the jurisdictional issue, the respondent states that s. 88 of the 2005 Act is limited in its scope to decisions taken in respect of a claim received under s. 87. The respondent submits that, accordingly, no further action may be taken in respect of a complaint ruled inadmissible under s. 87 in the sense that the Commission will not continue to investigate an inadmissible complaint *qua* inadmissible complaint. This does not, however, preclude further action in relation to matters which may have been encompassed in the individual complaint in an investigation directed under other provisions of the 2005 Act.

5.2 The respondent draws the attention of the Court to s. 67 of the 2005 Act, which provides *inter alia*:-

"(1) The objectives of the Ombudsman Commission are-

(a) to ensure that its functions are performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations under *Part 4* concerning the conduct of members of the Garda Síochána, and

(b) to promote public confidence in the process for resolving those complaints.

(2) The functions of the Ombudsman Commission are-

(a) to receive complaints made by members of the public concerning the conduct of members of the Garda Síochána,

(b) to carry out the duties and exercise the powers assigned to it under *Part 4* in relation to those complaints,

(e) to conduct, in accordance with section 102, other investigations of matters concerning the conduct of members of the Garda Síochána "

5.3 The respondent accepts that it is apparent from a consideration of the terms of s. 67 and in particular ss. 67(1)(b) and 2(a) and (b) that it is an important part of the functions of the respondent to receive complaints made by members of the public, but argues that a separate and distinct aspect of the functions of the respondent is provided for at s. 67(2)(e). The respondent submits that in addition to carrying out duties in respect of complaints made by members of the public, the respondent is to conduct, in accordance with s. 102, other investigations of matters concerning the conduct of members of the Garda Síochána.

5.4 The respondent argues that it is obliged pursuant to s. 87 of the 2005 Act to determine whether a complaint received from a member of the public is admissible or inadmissible. The respondent accepts that no decision was made extending the time limit for making a complaint by a member of the public and that the respondent was not in receipt of an admissible complaint by a member of the public relevant to the issues giving rise to these proceedings. The respondent submits that it is obliged pursuant to the provisions of Part 4 of the 2005 Act to take a set of detailed steps pursuant to the Act for the purposes of investigating the complaint from the members of the public. If the complaint is found to be inadmissible, then no such obligation arises. The respondent argues that the essential difference between a complaint which is found to be admissible and a complaint which is found to be inadmissible is that if a complaint is found to be admissible, the respondent has no discretion as to whether or not it will investigate the matter.

5.5 The respondent states that, in addition to the obligation to investigate a complaint from a member of the public under s. 87, the respondent may also, at its discretion and where it is in the public interest, investigate certain limited categories of behaviour in accordance with s. 102 of the 2005 Act. S. 102 provides:-

"(1) The Garda Commissioner shall refer to the Ombudsman Commission any matter that appears to the Garda Commissioner to indicate that the conduct of a member of the Garda Síochána may have resulted in the death of, or serious harm to, a person.

(2) The Ombudsman Commission shall ensure that the following matters are investigated:

(a) any matter referred to the Commission under subsection (1);

(b) any matter that appears to the Commission to indicate that the conduct of a member of the Garda Síochána may have resulted in the death of, or serious harm to, a person.

(3) The provisions of this Part relating to investigations and reports apply with the necessary modifications in relation to a matter referred to in *subsection (2)* of this section as if the matter were the subject of a complaint referred to in *section 91*.

(4) The Ombudsman Commission may, if it appears to it desirable in the public interest to do so and without receiving a complaint, investigate any matter that appears to it to indicate that a member of the Garda Síochána may have-

(a) committed an offence, or

(b) behaved in a manner that would justify disciplinary proceedings.

(5) The Minister may, if he or she considers it desirable in the public interest to do so, request the Ombudsman Commission to investigate any matter that appears to the Minister to indicate that a member of the Garda Síochána may have done anything referred to in *subsection (4)*, and the Commission shall investigate the matter.

(6) The provisions of this Part relating to investigations and reports apply with the necessary modifications in relation to a matter referred to in *subsection (4)* or (5) of this section as though that matter were the subject of a complaint other than one referred to in *section 91*."

5.6 The respondent states that the power under s. 102 of the 2005 Act is quite different to that contained in s. 87. The respondent points out that s. 102(4) places a discretion in the respondent where it appears "desirable in the public interest". The respondent notes the phrase "and without receiving a complaint", and states that the provision does not purport to restrict the discretion of the respondent but to clarify that the discretion to be exercised under that subsection is not dependent upon there having been a complaint from a member of the public. The respondent argues that the discretion vested in it is a broad one and is not fettered by the necessity for there to have been a complaint from a member of the public. It is submitted that the fact that the discretion may be exercised in the absence of there having been a complaint from a member of the public does not lead to the conclusion that where there has in fact been a complaint from a member of the public, which complaint has been found to be inadmissible, the broad discretion vested in the respondent is then fettered. The respondent submits that to so interpret the section would be contrary to the primary concern of the Oireachtas: to ensure that the public interest prevails even in the absence of a complaint.

5.7 The respondent states that, if the reasoning of the applicant is to be followed, the respondent would be precluded from investigating a matter pursuant to s. 102(4) where a complaint made by a member of the public was found to be inadmissible. The respondent argues that a matter may be the subject of an individual complaint but simultaneously be a matter of public interest which the respondent has the power to investigate of its own motion.

5.8 In relation to the retrospectivity of the 2005 Act, the respondent states that it is not confined by the terms of the Act to dealing only with circumstances arising since its establishment. It is pointed out that the Act establishes a new investigatory body to replace an existing body and provides for new procedures in relation to the conduct of an investigation. The respondent claims that there is

nothing in the Act that precludes it from investigating misbehaviour which occurred prior to its establishment. It is submitted that, given that the Garda Síochána Complaints Board was abolished by the Act, there is a clear public policy imperative that the 2005 Act and the 2007 Regulations be interpreted so as to allow for the investigation of matters arising prior to the establishment of the respondent. The respondent states that this policy is clear from the 2005 Act, which provides for the transfer of staff from the Complaints Board to the respondent and also contains transitional measures in respect of complaints made in respect of complaints of which an investigation had yet to commence and investigations which were already in train at the time of commencement of the Act. The respondent argues that it is clear that the legislative intent was that the respondent would take over seamlessly from the Complaints Board and that there would be no lacuna in the investigation of matters.

5.9 The respondent submits that the presumption against retrospective construction does not apply to enactments which affect only the practice and procedure of the courts.

5.10 In relation to the complaint of bias, the respondent submits that there is no evidence that Mr. Costello, as Investigating Officer, had arrived at conclusions in respect of matters the subject of his investigation before hearing evidence from the applicant. It is argued that Mr. Costello has not breached the applicant's right to constitutional justice or fair procedures. The respondent states that Mr. Costello is not the decision-maker in respect of an investigation under the 2005 Act and that his power is limited to the making of recommendations pursuant to s. 97 of the Act. Where such recommendations are made, it is a matter for the Garda Commissioner to determine what, if any, further steps are to be taken.

5.11 In this regard, the respondent sets out a well-established line of authority in relation to the test to be applied in assessing whether a judge is biased or not. In *Dublin Wellwoman Centre Ltd. v Ireland* [1995] 1 I.L.R.M. 408, Denham J (as she then was) observed that the test was an objective one and stated:-

"[T]he test is objective... whether a person in the position of the appellant in this case, a reasonable person, should apprehend that his chance of a fair and independent hearing by reason of the actions of the learned High Court judge in her capacity as chairwoman of the Commission on the Status of Women would prevent a completely fair and independent hearing of the issues which arise."

The respondent submits that an objective and informed person in the position occupied by the applicant could not reasonably apprehend that the respondent has not brought an impartial mind to bear on the investigation.

5.12 The respondent further states that, as the allegations of bias arise from a conversation of the 1st September, 2010, and the applicant did not seek to challenge the conduct until the 8th June, 2011, the applicant has failed to comply with the time limit set out in Order 84 and further has failed to seek an extension of time to bring proceedings reliant on that claim. The respondent submits moreover that the applicant has engaged with the investigation and made representations to the respondent, subsequent to the 1st September, 2010 and without seeking to rely on the claim of bias now advanced. Consequently, the respondent argues that the Court should decline the relief sought as a matter of discretion if not on the basis of breaching Order 84.

5.13 The respondent argues that the applicant has not obtained leave to seek relief on the basis that whereas the events which are the subject matter of the investigation occurred in 2005, the Garda Síochána (Discipline) Regulations 2007 did not come into operation until June 2007. The respondent further claims that such proceedings as may or may not be commenced by the Garda Commissioner on foot of a report by the respondent are a matter for the Garda Commissioner and not for the respondent.

5.14 It is submitted that the applicant has failed to demonstrate a real or serious risk of unfairness and that it would be disproportionate in the circumstances to prohibit the investigation having regard to the public interest in the investigation including, the right to life protected under the Constitution and under Article 2 of the European Convention on Human Rights. The respondent cites the case-law of the European Court of Human Rights which requires an effective and expeditious investigation into the death of a person at the hands of state agents.

6. Decision of the Court

6.1 The applicant bases his case on three grounds:-

- (i) A jurisdictional issue. The respondent having determined pursuant to s. 87 of the Garda Síochána Act 2005 that the complaint of David Seavers was inadmissible has no jurisdiction by virtue of s. 88 to take any further action in relation to the complaint.
- (ii) A retrospectivity issue. The investigation is being carried out under the Garda Síochána Act 2005 despite the Act only coming into operation in May 2007 and having no retrospective provision.
- (iii) Bias by pre-judgment. The applicant argues that Special Investigating Officer Costello has pre-judged the investigation.

6.2 (i) The jurisdictional issue:

The power granted to GSOC under s. 87 of the 2005 Act is different to that granted under s. 102 thereof. The first gives to GSOC the power and obligation to investigate an admissible complaint from a member of the public. The second gives a broader discretionary power to investigate where it appears to him to be "desirable in the public interest". This second power does not depend upon the existence of a complaint from the public and is the power invoked here to investigate the conduct of the applicant. This is a very important power in the interest of building and maintaining public confidence in the Gardaí. The applicant argues that once a complaint by a member of the public is declared inadmissible under s. 87, then s. 88(i)(c) precludes the Ombudsman from taking any further action in relation to the complaint.

6.3 In this case such a complaint was received from David Seavers in November 2007. The complaint was considered and rejected for being outside the time limit provided ins. 84 for bringing a complaint, i.e. six months. This decision was made in November 2007 but no notification of the complaint nor reason for its rejection were given to the applicant. This oversight was in violation of s. 88(1)(a) and (b). In July, seven months later, for reasons which have not been specified, GSOC decided to utilise the general investigative powers of s. 102(4) to investigate the complaint. On the respondent's part there appears to have been initially some confusion. GSOC's Office appears to have thought it was dealing with the original complaint of Mr. Seavers. It has subsequently admitted this error and has also apologised for the failure to notify the applicant of the rejection of this complaint. The applicant says he first was notified of an investigation into possible misconduct on his part on the 20th October, 2008. He did not discover there had been a complaint by

Mr. Seavers found to be inadmissible until the 15th February, 2011.

6.4 Section 67 of the Garda Síochána Act 2005 provides, *inter alia*:

"(1) The objectives of the Ombudsman Commission are-

(a) to ensure that its functions are performed in an efficient and effective manner with full fairness to all persons involved in complaints and investigations under *Part 4* concerning the conduct of members of the Garda Síochána, and

(b) to promote public confidence in the process for resolving those complaints."

The requirement to be efficient, effective and fair carries with it also a requirement to deal with complaints or investigations in an expeditious manner. When a complaint is found to be *prima facie* inadmissible on time grounds then, in order to comply with its obligations under s. 67 of the 2005 Act to perform its functions efficiently, effectively and with full fairness to all involved in complaints, it seems to me that GSOC should there and then examine whether there are any grounds which might lead it to extend the time. All aspects of the case as then known to GSOC should be examined at this time to determine this question. If a decision is then made not to extend the time and thus to refuse the complaint then, absent some further significant information coming to the attention of the Ombudsman, no further action should be taken. To find otherwise would allow the Ombudsman without reason to simply change its mind in relation to a matter of public importance and great significance to all parties including the member whose conduct has been questioned. It seems to me that to interpret the legislation in any other way would lead inevitably to unfairness.

6.5 Applying this interpretation of the legislation to the facts of this case, it is first of all common case that no further evidence was relied upon when GSOC made the decision in July 2008 to launch as. 102(4) investigation. The matters to be investigated were those already raised in the complaint of David Seavers. It is the case that the said complaint was never notified to the applicant but that does not appear to me to be relevant. GSOC's failure to examine the complaint fully in November 2007 cannot be excused by its failure to notify the applicant. The consideration of the complaint in November was not adequate. If the s. 67 requirement of efficiency, effectiveness and fairness requires that all then known facts upon which the complaint is based should be examined to determine whether an investigation should proceed, then that is what should have been done by the Respondent in its first consideration of the complaint in November 2007. Clearly it was not but equally clearly it should have been. In the admitted absence of any further information that arose after such a decision under s. 87, it seems to me there was no jurisdiction to conduct an inquiry in relation to the exact same facts. Whilst I accept that the section 102 power is a separate and not a residual power of investigation, when deciding to reject for being out of time GSOC should have considered the case in the round to determine if time should be extended. Having determined against extension and thus for rejection, GSOC cannot without good reason, clearly specified to the member concerned, open an investigation under s. 102(4). In my judgment, therefore, in this case, the Ombudsman has no jurisdiction to conduct an inquiry under s. 102(4).

6.6 It seems to me that the above finding is dispositive of this application. Nonetheless, I think I should deal with the retrospectivity issue and the bias issue because of the possibility of an appeal. Nothing in the 2005 Act provides that the new regime introduced by the 2005 Act was intended to create an immunity in respect of conduct prior to its establishment and I do not believe that it does so. The scheme of the Act replaced the Garda Complaints Board but provided for a seamless transfer both of staff and of existing complaints, both those in the course of examination and those where an investigation had yet to commence. It establishes a new investigative body to replace an existing body and new procedures in regard to the conduct of an investigation. It does not create new sanctions or penalties. It would be a very strange interpretation of the legislation to hold that it precluded any investigation either of a complaint under s. 87 or an inquiry under s. 102(4) where the circumstances involved occurred prior to the establishment of the new regime but where no complaint had yet been made. Such an interpretation would read into the Act something which is not there, i.e. quite a dramatic limit on the investigation of alleged misconduct. Moreover, it would be at variance with Ireland's obligations under the European Convention on Human Rights to provide a full and proper investigation into the death of a person involving State agents, see *Jordan v. United Kingdom* [2001] 37 EHRR 52. The relative applicability of the Garda Discipline Regulations does not arise in this case as they have not been challenged and are, in any event, a matter for the Garda Commissioner not GSOC which has no power to impose sanctions or penalties. I accept that the presumption against retrospective construction of a statute does not apply to acts which affect only the practice and procedure of the courts, see *Kimbray v. Draper* [1868] LR 3 Q. B. 160 and *In Re Hefferon Kearns Ltd. (No. 1)* [1993] 3 I.R. 177 at p. 184. This rule is clearly set out in Maxwell on *Interpretation of Statutes* (12th Ed. 1969) at p. 222 in the following terms:-

"No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and if an Act of Parliament alters that mode of procedure, he can only proceed according to the altered mode."

The principle in this passage is equally applicable to an investigation by the Garda Ombudsman Commission.

6.7 (ii) The bias issue

The applicant claims that Mr. Costello is biased in that he has prejudged the complaint against him. This claim is based on a conversation had between Gerald O'Donnell, solicitor for the applicant, and Mr. Costello, on the 1st September, 2010 in the car park of Terenure Garda Station. They had both just participated in a lengthy meeting involving another GSOC inquiry into another Garda. Mr. O'Donnell says that this meeting involved discussions concerning the s. 97 report, a list of questions to be furnished in advance and the suggestion that if the applicant "took a certain course" things would go easy for him. He said he felt the meeting was very disturbing and he was truly shocked with it. He believed he was being manipulated and that Mr. Costello was in effect telling him his client was guilty some seven weeks before the first interview with him. He had thus prejudged the complaint. He was shocked by this - it was appalling he said. In his evidence Mr. O'Donnell was highly emphatic on this point.

6.8 There are a number of difficulties with this account of the meeting. Firstly, Mr. O'Donnell was clearly wrong in his account of the telephone conversation with Mr. Hickey and his recollection of the s. 97 report and the discussion arising there from with Mr. Costello. GSOC records show that the report had not been sent at the time and thus confirmed that Mr. O'Donnell's account could not be correct whereas Mr. Costello's account was correct. Secondly, Mr. O'Donnell's striking description of the unprecedented turn he thought the investigation was taking by showing him in advance the questions the applicant would be asked to answer is totally misconceived. That very day, in the case they had just dealt with, the same procedure had been followed, i.e. the questions had been given in advance. I accept this was an honest lapse of memory. It is, however, an astonishing one, particularly in the light of the great emphasis placed upon it in his affidavit by Mr. O'Donnell. I note also his comments about Mr. Costello's letter of the 17th December, 2010 which stated that GSOC did not hold an admissible complaint from Mr. Seavers. Mr. Costello said he had only just taken over the case as the officer in charge. He said he did not have access to all the files in the case until after Christmas and then

he notified the applicant's solicitors of the Seavers' complaint and the decision on inadmissibility. This was by any measure at least credible as an explanation. Mr. O'Donnell, however, described this act of Mr. Costello in his letter of the 17th December as the "very clever and wrongful withholding of information from him". This very serious allegation had not been put to Mr. Costello in cross examination nor had it appeared in any of the affidavits sworn herein. Thus Mr Costello had never been given the opportunity to address such a grave allegation. Despite being pressed on this, Mr. O'Donnell refused to retract this statement. In the circumstances, it seems to me that the comment of Mr. McDonagh, Senior Counsel, for the respondent that Mr. O'Donnell was taking somebody's good name very easily was justified.

6.9 The most striking difficulty with Mr. O'Donnell's account of the meeting, however, is what did not happen thereafter. Mr. O'Donnell says he was shocked and appalled. He was being manipulated, he said, and by any measure his client's interests were being greatly prejudiced. Yet he made no note whatever of the conversation. One would have expected a detailed attendance to be drafted immediately and not some six months later on the 24th March on the advice of counsel. An immediate letter to GSOC should have been written demanding the removal of Mr. Costello. No such action was taken. This is in stark contrast to the objection that was made to Chief Superintendent Manley continuing in charge on the basis of his previous very limited involvement with the investigation. Objection was also made to the alleged retrospectivity of the legislation being deployed against the applicant. No objection whatever was made to Mr. Costello. When Chief Superintendent Manley was replaced and Mr. Costello took charge of the investigation, the applicant's solicitors were invited to bring to his attention anything they might think relevant. No mention was made then or at any time in their dealings with GSOC of any problem with Mr. Costello as the officer designated under s. 97 to prepare a report. The final correspondence prior to seeking leave was a pre litigation letter dated the 30th March, 2011. In this letter it is stated that unless the investigation into the applicant is ended, they will seek judicial review in order to obtain an order of *certiorari* and/or prohibition. The letter relies upon the argument that the legislation under which GSOC is moving is being applied retrospectively and thus unlawfully. No mention is made of the issue of bias. This objection was first raised without notice to the respondent when the applicant appeared *ex parte* before this Court seeking leave on the 8th of June 2011.

6.10 This extraordinary failure of the applicant's solicitors to prepare an immediate and detailed note of the meeting if it really was of the nature dramatically described by Mr. O'Donnell coupled with their failure to notify GSOC immediately of their alleged concern, calls into question the veracity of the complaint. It also, of course, rules it out. An applicant is obliged to move for *certiorari* and/or prohibition not only within the specified time limits but "promptly" as Order 84 requires. Not only was this issue of bias raised outside the relevant time limit, it could by no stretch of the imagination be considered as having been raised promptly. Promptitude may vary in accordance with the type of complaint to be raised. Where the complaint is of bias on the part of the investigating officer of an agency such as GSOC, the complaint to be prompt must be all but immediate. The officer's removal should be sought from the agency in question as soon as time permits and within days rather than weeks. It is impermissible to allow an investigation to proceed whilst holding such a complaint "*in pectore*" to produce at the last minute or upon the decision made. The body in question should be given the opportunity to inquire into the complaint of possible bias or conflict on the part of its investigating officer and to remove the same if necessary. For all of these reasons the reliefs sought in respect of bias is refused.

6.11 There will thus be an order of prohibition on any further investigation by GSOC into the applicant's investigation of the road traffic accident that occurred on the 22 May 2005.