Neutral Citation [2013] IEHC 158

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 284 J.R.]

BETWEEN

Garda John Kelly

APPLICANT

V.

Commissioner of an Garda Síochána

RESPONDENT

Judgment of Mr. Justice Hedigan delivered on 12th day of April 2013.

Parties
1. The applicant is a member of An Garda Síochána with an address at Drumshambo Garda Station, Co. Leitrim. The respondent is the person who enjoys general direction and control of An Garda Síochána, and has his principal offices at Garda Headquarters, Phoenix Park, Dublin 7.

Application
2. The applicant seeks the following reliefs:-

(i) An order prohibiting the respondent from dismissing the applicant from his post as a member of An Garda Síochána;

(ii) *Certiorari* by way of judicial review of the decision of the respondent to dismiss the applicant dated the 12th August, 2011;

(iii) *Certiorari* by way of judicial review of the recommendation dated the 11th July, 2011, of the Board of Inquiry (hereinafter "the Board") established pursuant to the Garda Síochána (Discipline) Regulations 2007;

(iv) *Certiorari* by way of judicial review of the refusal to consider an appeal, dated the 13th March, 2012, of the Appeal Board (hereinafter "the Appeal Board") established pursuant to the Garda Síochána (Discipline) Regulations 2007;

(v) Prohibition of any further disciplinary investigation into the matters the subject matter of these proceedings;

(vi) A stay on the decision of the respondent pending the determination of the within proceedings;

(vii) An order, if necessary, pursuant to Order 84 Rule 21 of the Rules of the Superior Courts extending the time in which to bring proceedings to seek leave for judicial review;

(viii) Interim or interlocutory relief;

(ix) Further or other order;

(x) Costs.

Factual background
3.1 The applicant has been a member of An Garda Síochána for 27 years having joined in 1982. He was the subject of a number of disciplinary charges arising from statements made by him subsequent to his conducting an after-hours inspection of a licensed premises (Monica's Bar) in Drumshambo, Co. Leitrim on the 20th September, 2009, which he found to be open at 3.30am.

3.2 A board of inquiry was later established to investigate charges made against the applicant in relation to the veracity of statements given by him.

3.3 An initial statement in relation to the inspection was provided by the applicant on the 27th September, 2009, wherein he indicated that he had entered the premises and found people (two of whom were known to him) on the premises as well as the licensee and his wife, Mrs Mc Gourty.

3.4 In the days following, Mrs Mc Gourty made a statement to Sergeant Fahy to the effect that Garda Kelly had not entered the premises on the night in question but may have put his foot inside the hallway. This statement only came to the applicant's attention later on in proceedings.

3.5 The applicant's statement together with the file on the matter was submitted to Sergeant Fahy on the 18th November, 2009. On the 20th November, 2009, Sergeant Fahy sought clarification from the applicant on a number of matters. He was asked whether he had in fact entered the licensed premises. This resulted in the applicant making a revised statement on the 20th January, 2010. Sergeant Fahy felt the applicant had failed to answer his queries adequately and the file on the matter was sent to Inspector Sweeney who directed the applicant to answer the queries made. The applicant then gave a further new statement on the 1st February, 2010.

3.6 Superintendent Brian Brunton was appointed investigating officer into the matter on the 18th May, 2010, pursuant to Regulation 23 of the Garda Síochána (Discipline) Regulations 2007. He took statements from those who had been on the premises on the night in question and all denied that the applicant had actually gone into the pub. A local taxi driver did however support the applicant's

version of events and stated that he saw him enter the premises.

3.7 Following a direction from the Assistant Commissioner of the Garda Síochána of the 23rd February, 2011, that the applicant may have committed a serious breach of discipline, a board of inquiry was set up. Six charges of misconduct were made against the applicant under the 2007 Regulations.

3.8 The Board of Inquiry first met on the 26th May, 2011. The Board met for a further four days and heard witness evidence. It gave its determination on the 11th July, 2011, and decided to recommend dismissal of the applicant from his job in respect of four of the charges made against him.

3.9 The applicant appealed the Board's decision by way of formal notice of appeal which was served by the applicant on the 16th August, 2011. Final submissions and grounds of appeal were forwarded to the Appeal Board by the applicant by letter dated the 6th March, 2012.

3.10 By letter of the 14th February, 2012, the chairperson of the Appeal Board notified the applicant that the Appeal Board would meet to consider the submissions on the 12th March, 2012, and would act in accordance with the procedures set out in Regulation 35.The applicant was also informed of a possible date for hearing the appeal.

3.11 The applicant's grounds were considered at a meeting of the Appeal Board on the 12th March, 2012. The provisions of Regulation 35(2) (b) of the Regulations were applied whereby the Appeal Board determined that the case made by the applicant on appeal was "without substance and foundation". His appeal was therefore dismissed.

Applicant's submissions
4.1 The Board of Inquiry

The grounds upon which relief is sought are set out in the statement of grounds dated the 26th March, 2012.The applicant originally contested the lack of specificity and multiplicity of charges, being grounds 1 and 2 of the statement. He is no longer proceeding with these grounds.

Part 3 of The Garda Síochána (Discipline) Regulations 2007 provides for the establishment of boards of inquiry and appeal in serious disciplinary issues within An Garda Síochána. Regulation 30 requires that the Board of Inquiry shall within 21 days after the conclusion of the inquiry submit a written report to the Commissioner. The Board in the applicant's case was charged with investigating six charges, being four charges of "falsehood" and two of "discreditable conduct". The Board recommended dismissal in each of the four counts of "falsehood".

It was alleged that the statements given by the applicant were false. However, the applicant submits that there were inconsistencies in the evidence given by the witnesses who had been on the premises and which were the basis of the finding against him. Two witnesses, Mary Lynch and her husband, disagreed by two hours regarding when they had arrived at the pub. All witnesses gave a different time when they left the pub. Some said that the pub was clean and everyone helped clean it. Others said that it was not cleaned when they were there. Some say there was tea and sandwiches and others do not mention this at all. The only fact all witnesses agree on is that the applicant did not enter the pub. However a taxi man who saw the applicant on the night says he definitely did enter the premises.

Sergeant Fahy had taken a statement from Mrs Mc Gourty three days after the incident but this was not divulged until the inquiry. There is an inconsistency between the contents of Mrs Mc Gourty's statements made to Sergeant Fahy days after the incident and that the statement made to the Board of Inquiry by her. She told Sergeant Fahy in a statement made three days after the event that the applicant may have put his foot inside the hallway. However, in her statement of the 24th May, 2010, to Superintendent Brunton she says he did not enter the pub at all. At the inquiry she also said that he never entered the premises at all. Further from the transcripts of the inquiry she appears to have denied even speaking to Sergeant Fahy soon after the incident. The applicant never had the opportunity to cross-examine her on this as her earlier statement to Sergeant Fahy was introduced at a late stage in the inquiry hearing.

The applicant argues that whether he entered the premises or not goes to the nub of the case and contends that in the face of such discrepancies of evidence the Board should have inquired further into the inconsistencies in witness statements and ought to have been more careful in finding against him.

The applicant further contends that there are serious concerns to be raised about the decision of Sergeant Fahy to withhold Mrs Mc Gourty's first statement and to make a misleading statement suggesting that her statement was taken at a later date than it actually was taken. The applicant submits that this is relevant in relation to the appeal. Had the applicant known of Mrs Mc Gourty's allegations in her statement to Sergeant Fahy he could have looked at CCTV footage to show him entering the pub.

The Board ultimately appears to have favoured and accepted evidence tendered by persons who did not deny being present in "Monica's Bar" at 3am in the morning and who had been drinking alcohol for quite a while over evidence given by the applicant and by a sober and independent witness- the taxi driver. The Board also accepted the evidence of Sergeant Fahy despite the fact that he withheld evidence during the original investigation and made materially inaccurate statements to the disciplinary investigation.

The Board's report does not indicate why it rejected the evidence of the taxi man nor how it reconciled the various inconsistencies in the evidence tendered against the applicant. It gave no reasons for its decision.

Moreover, no attempt was made to assess the import of the falsehood allegedly told by the applicant. No evidence was put before the Board as to whether or not it would have been material to any prosecution. It is submitted that this may be compared to a perjury scenario where the prosecution must show that the "lie" relates to a matter which would materially affect the outcome of the trial. An immaterial lie is not perjury. The applicant relies on s.29 of the Intoxicating Liquor Act 1962-therefore regardless of whether he did or did not go into the pub on the night in question, it seems clear that sufficient evidence was otherwise available to justify a prosecution pursuant to s. 29. This should have been taken into account by the Board.

4. 2. Breach of principles of natural justice and failure to give reasons

The applicant submits that there were many procedural irregularities at the inquiry. He contends that the Board's determination to uphold the charges in the presence of these irregularities and its failure to give reasons for its decision amounts to a breach of the principles of natural justice which renders the hearing defective.

As submitted above Mrs Mc Gourty made a contradictory statement which only came to light at the inquiry. She had denied speaking to Sergeant Fahy until months after the event and therefore the applicant argues that she has perjured herself before the Board. Her evidence was only introduced on the last day of the hearing and was admitted without warning. This should have been done earlier and the applicant forewarned. The late introduction of evidence meant the applicant had no opportunity to compare it to the evidence already offered and did not get a chance to cross-examine Mrs Mc Gourty. He argues that constitutional and natural justice must be abided by even if the Board is conducted under the Garda Regulations.

There were serious evidential problems before the Board of Inquiry which the applicant wished to raise at the Board of Appeal but they were considered to be of no significance and the applicant contends that this is *ultra vires* and a breach of natural justice.

The applicant argues that there is no evidence that the Board considered the appropriateness or proportionality of dismissal as a sanction or that it considered other options to dismissal provided for at Regulation 22 of the 2007 Regulations.

The fact the applicant has been dismissed after 27.5 years of service means that he is not entitled to a pension until he turns 65, therefore not only has he lost his job but he has also lost his pension for the next 14 years, and he will only get 60% of his pension at 65 . There was no consideration of this before the Board of Inquiry and it is argued that there is a want of natural justice in this matter.

The applicant relies upon a number of cases. In *State (Gleeson) v. Minister for Defence* [1976] IR 280 (at p. 296) Henchy J. held that in a case where a member of the defence forces is to be discharged for discreditable reasons high standards of natural justice must apply:-

> "Where….. the discharge is for a reason that is discreditable, the fundamentals of justice require that the man shall have an opportunity of meeting the case for discharging him for that reason. That is the minimum that is needed to guard against injustice…..It would be an affront to justice if the law were to hold that a decision with such drastic consequences for the man involved, and possibly for his dependants could be made behind his back."

In *Prendiville v. Medical Council* [2008]3 IR 122 Kelly J. noted that the standard of natural justice is elastic but as the professional reputation of the applicant was at stake he said at para. 131 :-

> ….I am satisfied the high standards of natural justice must apply…..The applicants were entitled to expect that there would be strict adherence to the rules of natural justice and that justice would not only be done but be seen to be done in their dealings with the Council."

Thus the applicant submits that in this case a high standard of natural justice must be applied.

The applicant accepts that the Board's recommendation complies with Regulation 30 insofar as it determines that the applicant was in breach of discipline. He contends however that it does not comply with the Regulation insofar as it fails to specify the act that was the cause of the breach. The applicant was said to have made written statements which he knew to be false however the recommendation does not specify what parts of the statement were false. He submits it was incumbent on the Board to do so. It did not do so, nor did it indicate the reason for choosing one version of events over another. He argues therefore that the recommendation was actually made in breach of Regulation 30.

In this regard he relies on the following cases:

In *Sister Mary Christian & Ors. v. Dublin City Council* [2012] IEHC 163 in relation to the general obligation to give reasons Clarke J. said at para. 8.15:-

> "In at least some cases if a court does not know why a decision was taken, then the court may not be able to ascertain whether the decision was lawful for the lawfulness of the decision in question may depend on whether the reasons were valid in the light of the appropriate statutory and legal regime applicable."

In the case of *F.P. v. Minister for Justice* [2002]1 IR 164 Hardiman J. stated at p.172:-

> "Moreover, it seems clear that the question of the degree to which a decision must be supported by reasons stated in detail will vary with the nature of the decision itself. In a case such as International Fishing Vessels Ltd. v. Minister for Marine [1989] I.R. 149 or Dunnes Stores Ireland Company v. Maloney [1999] 3 I.R. 542, there was a multiplicity of possible reasons, some capable of being unknown even in their general nature to the person affected. This situation may require a more ample statement of reasons than in a simpler case where the issues are more defined."

The applicant submits that the jurisprudence in relation to the duty to give reasons establishes three criteria to be set out in the decision. In *Mulholland v. An Bord Pleanála (No. 2) [2006]* 1 I.R 453 at p. 460 et seq., the court set these out as follows:-

(i) Does it allow the applicant to consider whether he has a reasonable chance of succeeding on review?

(ii) Does it demonstrate that the respondent had directed its mind adequately to the issues?

(iii) Does it give sufficient information to enable the court to review the decision?

The recommendation made by the Board of Inquiry in this case meets none of these three criteria and the Board's failure to do so vitiates its determination and warrants the granting of the reliefs sought in the notice of motion.

4.3 Proportionality and a failure to consider relevant matters.

The applicant argues that the failure to specify what falsehood the applicant was guilty of has further relevance in respect of the issue of proportionality and whether the dismissal was appropriate in all the circumstances. The applicant again reiterates that there was no ostensible consideration of the impact of the various forms of penalty on the applicant by the Board of Inquiry. He argues that there is no evidence before this Court that these matters were properly considered and that a proportionate decision was made in relation to them.

Regulation 22 of the 2007 Regulations defines a "serious breach of discipline" as a breach which may be subject to either:-

1. Dismissal;

2. Requirement to retire or resign as an alternative to dismissal;

3. Reduction in rank;

4. Reduction in pay not exceeding four weeks' pay.

The applicant argues that there is no indication from the recommendation of the Board or from the transcripts of the hearing as to whether the Board considered the appropriateness, or otherwise, of alternative sanctions i.e. if it considered the proportionality of the recommendation to dismiss the applicant. The applicant submits that the apparent failure to consider the question of proportionality and to consider matters which might have prompted a less draconian sanction is central to this application.

4.4 The Appeal Board.

In a letter on the 2nd March, 2012, the chairperson of the Appeal Board assured the applicant's solicitor that any appeal hearing that may take place would only take place the following law term, commencing on the 16th April, 2012. However, the applicant was notified of the decision that his appeal was "without substance or foundation" on the 13th March, 2012. No reasons were furnished for the decision and the applicant does not know what the Appeal Board discussed when it met on the 12th March, 2012. Further, the decision of the Appeal Board was made while a request for pulse records from the day of the 20th September, 2010, was extant and was apparently being processed.

The applicant does not submit that he is entitled to a full oral hearing on appeal (and indeed this question does not arise since he was not given the right of appeal). However he does argue that he clearly had grounds and substance in respect of an appeal and thus should at least have been afforded a right of appeal, in the sense that the Appeal Board could have considered the appeal and then refused to give him an oral hearing.

4.5 The unreasonabless test

The applicant relies on Hogan & Morgan "Administrative Law in Ireland, (3rd ed.) wherein the learned authors state at p.642 that the unreasonableness test is formulated so as to set a reasonable balance between on the one hand permitting some latitude to a public body invested with a discretionary power and on the other hand preventing really abnormal exercises of discretion.

The accepted formulation is that of *The State (Keegan) v.The Stardust Victims Compensation Tribunal* [1986] 1 IR 642 at p. 658 where Henchy J. said this test:-

> "….lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense."

The applicant argues that the decision of the Appeal Board was unreasonable and/or irrational. The applicant's complaints submitted to the Appeal Board were:

(i) Lack of specificity of breaches of discipline;

(ii) Repetition and multiplicity of charges;

(iii) Failures of disclosure during the inquiry;

(iv) Failure to give reasons of particular findings of fact;

(v) Improper weight given to the evidence of witnesses;

(vi) Disproportionate sanctions.

The Appeal Board (without testing the evidence or hearing oral submissions) found that all of the applicant's submissions to it were "without substance or foundation" and they did not give any rationale for so finding.

The applicant submits that the respondent in these proceedings is now appearing to suggest that the applicant did not have an automatic right of appeal from the decision of the Board. The respondent appears to have characterised the Appeal Board's role, not as hearing appeals but more as a forum for hearing miscarriages of justice and appears to suggest that the absence of new evidence may be why the applicant's appeal was found to be without substance.

Regulation 33(1) does not say "Not later than 7 days after receiving notification of the decision of the Commissioner ….the member may seek leave from the Commissioner to appeal". It says "the member concerned may give notice of appeal to the Commissioner ….".It is clear from the wording of the regulation that there is no question of having to seek leave to appeal. It is akin to there being an automatic right of appeal from the Employment Appeals Tribunal to the Circuit Court in respect of any finding made by the Tribunal.

Further, Regulation 33(3) sets out the grounds under which a member may appeal. The applicant argues that as the Appeal Board was not given the reasons of the Board nor any findings of fact it cannot have found that the case made by the appellant was without substance or foundation.

4.6 Grounds of opposition

The respondent argues that the applicant delayed in bringing his claim in these proceedings. The applicant contends that he presumed that the Appeal Board would rehear the matter, which in the end it did not do.

The respondent also alleges acquiescence and suggests that the applicant raises various matters in these proceedings for the first time. The applicant refutes this and submits that it is clear that the applicant had complained of the matters now complained of to the Appeal Board, as can be seen from the grounds of appeal, before he even thought of having the matter judicially reviewed. Merely because the respondent did not acknowledge the applicant's complaints does not mean that they were not made.

4.7 Frivolous, vexatious or without substance or foundation

Regulation 35(2) (b) provides that an Appeal Board may refuse to consider an appeal where:-

"(b) having considered the member's statement of the ground or grounds of appeal, it is of opinion that the case made by the member is frivolous, vexatious or without substance or foundation."

The Appeal Board rejected the applicant's appeal on the basis that it was without substance or foundation.

The applicant argues that it is clear from the regulation that the absence of substance or foundation must be apparent and clear from the grounds of appeal itself and not from consideration of any other matter. The applicant also argues that the power to dismiss an appeal as unfounded or without foundation should only be used in circumstances analogous to court proceedings.

In this context the applicant notes that the power of the court to dismiss proceedings arises from the Rules of the Superior Courts O19 R 28 and the inherent jurisdiction of the court. In *Barry v. Buckley* [1981]1 IR 306 Costello J. at p.308 said:-

> "This jurisdiction should be exercised sparingly and only in clear cases….[i]f, having considered the documents, the Court is satisfied that the plaintiff's case must fail, then it would be a proper exercise of its discretion to strike out proceedings…."

Similarly, the applicant submits the power of the Appeal Board to refuse to consider an appeal is an extremely limited one, which can be exercised only in rare circumstances. Where this is done, he argues, the Board is obliged to give reasons. In this case no reasons whatsoever were furnished.

In *Mallak v. Minister for Justice* [2012] IESC 59 in relation to the requirement to give reasons Fennelly J. at para.66 said:-

> "In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded".

In this case the applicant argues the reasons are not obvious and he has not in fact any idea why his appeal was dismissed. The Board of Appeal's argument is that the applicant's appeal is without substance .The applicant contends he needs to know why this is the case.

Respondent's submissions.
5.1 The applicant is seeking *certiorari* and prohibition. There are three grounds relied on now by the applicant:-

1. The absence of reasons given by the Board of Inquiry;

2. The admission of the first statement of Mrs Mc Gourty;

3. The decision of the Board of Appeal.

Many of the issues raised in relation to the Board by the applicant are no longer in time as its deliberations were complete by July 2011.This includes the admission of the statement of Mrs Mc Gourty.

5.2 The Garda Síochána Act 2005 and Regulations.

The specific procedures for discipline are contained in the Garda Síochána (Discipline) Regulations 2007. Under Regulation 9 thereof, in any disciplinary proceedings proof of a breach of discipline is to be established on the balance of probabilities.

The respondent submits that it fully complied with the provisions of the regulations. No issue is raised in the within proceedings concerning adherence to the relevant provisions of the regulations, by the investigating officer, the Board of Inquiry or the

Appeal Board. The applicant does not challenge the lawfulness of the Regulations.

5.3 The grounds of challenge to the board's decision.

a) *Admission of undisclosed evidence*

The applicant alleges that a witness statement from Mrs Mc Gourty was admitted in evidence which had not been disclosed to him before the inquiry. The element of surprise alleged by the applicant regarding this statement is overstated. Although the actual statement was not given to the applicant until the hearing, he knew the statement had been taken from the statement of facts signed by Superintendent Brunton dated the 28th October, 2010, and served well in advance of the inquiry.

The applicant had the full possibility to cross-examine witnesses at the inquiry. He had the possibility of asking for further time to consider the new evidence and make submissions thereon but he did not do so and the respondent argues he is now estopped by his acquiescence and/or delay from making this complaint.

b) *The absence of reasons given by the Board of Inquiry*

The respondent argues the Board acted as was required of it pursuant to the Garda Síochána (Discipline) Regulations 2007 and acted lawfully. No challenge is made by the applicant herein to those said regulations. The Board is not obliged to give reasons as to why it discounted the evidence of allegedly independent third parties as asserted. The respondent denies that the applicant suffered any prejudice by reason of the alleged failure to make findings of fact or to give reasons as alleged. At no stage did the applicant request any such reasons or findings from the Board prior to the initiation of the within proceedings or at any stage during the preparation of his appeal from the recommendations of the Board.

The respondent contends that there is no general standard of duty to give reasons in cases such as this. The purpose of the decision of the Board is not to give reasons but is to specify the act giving rise to the breach. This is different to giving reasons. The Board did this. It found the charges that specified the breach to be well-founded.

The nature of decisions of a board was considered by O'Neill J. in *Farrelly v. Garda Commissioner* [2007] IEHC 84 under the heading "decision of inquiry". This related to a previous version of the regulations but it is still relevant for the current version. He said:-

"As is apparent the decisions of Sworn Inquiries as provided for in the 1989 Regulations are not discursive judgments but are merely a record of the decision actually taken without any statement of the reasons for the decision."

The first four allegations are in relation to falsehood. There are very specific charges. The core question is if the applicant can reasonably say he did not know the reasons for his dismissal. The respondent contends that he did know the reasons and it is not an obligation for the Board to say why it chose one set of evidence over another.

5.4 The grounds of challenge to the decision of the Board of Appeal

Under regulation 35(2) (b) the Appeal Board may refuse to consider an appeal where

" (b) having considered the member's statement of the ground or grounds of appeal, it is of the opinion that the case made by the member is frivolous, vexatious or without substance or foundation."

It was clear to the applicant that his statement of grounds would need to make a clear case for appeal and that a hearing would only proceed if the provisions of Regulation 35 were satisfied. This was reiterated in a letter from the chairman of the Appeal Board to the applicant's solicitor on the 2nd March, 2012, wherein he also replied to a request from the applicant (the first such request) for the statement of Mrs Mc Gourty as well as a request for pulse information for the 20th September, 2010.

The applicant suggests there was an assurance given that an appeal would be allowed and he was shocked that no appeal then took place. However, the respondent denies that any such impression was given and argues that the applicant was informed by the chairperson on the 14th February, 2012, that the Appeal Board would meet to consider his submissions on the 12th March, 2012. He was told of a possible hearing date "if the appeal was to proceed".

The respondent argues that the applicant's submissions and grounds of appeal of the 26th March, 2012, were short and contained no evidence or submissions that could not have been made at the initial inquiry and thus there was no case for an appeal hearing.

5.5 Submissions and grounds of appeal

As noted above all of the applicant's submissions on appeal were matters that could have been raised before the Board of Inquiry, with the exception of that relating to the penalty. Grounds (1) and (2) of the submissions and grounds of appeal allege a lack of specificity of charges, although these grounds are no longer being pursued. These matters ought to have been raised before the Board of Inquiry but were not. Ground (3) concerns the failure of the investigating officer (Sergeant Fahy) to disclose a statement of an exculpatory nature. That statement was read at the Board of Inquiry and the applicant's counsel had full opportunity to comment thereon.

The statement of Sergeant Fahy was given to the applicant before the Board of Inquiry hearing. From this statement of the 20th July, 2010, it is clear that Sergeant Fahy spoke to Mrs Mc Gourty prior to sending a letter to the applicant raising questions in relation to whether he had actually entered the pub. It was no secret that there was such a conversation as can be seen from the investigation file returned to the applicant. It is denied that Mrs Mc Gourty perjured herself at the hearing.

The applicant asserts a failure by the Board of Inquiry to give reasons, however the respondent argues that the reasons are clear from its deliberations. The applicant raises concerns in his appeal about the Board's reasons for preferring one version of events over another. The respondent contends that is not the same as an obligation to provide reasons for a decision.

Ground (5) alleges improper weight was given to the evidence of certain witnesses and contains no new evidence. The respondent argues it is therefore largely a plea for reconsideration and that this is not the purpose of an appeal under the regulations.

Ground (6) alleges that the penalty was disproportionate. The respondent argues the applicant's submissions contained nothing about why or how this was so and was again a mere request for reconsideration. Therefore the respondent argues that taken in the round, the Appeal Board was correct in finding that the case made by the applicant in respect of the appeal was without substance or foundation

The decision of the Appeal Board, the respondent contends, was made in accordance with the Garda Síochána (Discipline) Regulations 2007 and was lawfully made, notwithstanding that it did not address the merits. The respondent argues that the Appeal Board did not cause the applicant to believe that he would receive a full and proper hearing of his appeal and it was not reasonable for him to believe so. The applicant was informed of Regulation 35 and knew or should have been aware that he needed to make out a case that would not be considered "without substance or foundation."

The decision is not unreasonable or irrational. The test for this was set out in *The State (Keegan) v.The Stardust Victims Compensation Tribunal* [1986] and *O'Keeffe v. An Bord Pleanala & Ors.* and the core principle is that the decision maker should not disregard fundamental reason or common sense in reaching his or her decision.

The applicant argues that the Appeal Board delayed in its decision. The respondent lays the blame for delay on the applicant because of requests made by him for extensions of time to put submissions before the Appeal Board. These submissions were finally received on the 6th March, 2012.The decision of the Appeal Board was made on the 12th March, 2012.The respondent contends that the applicant was guilty of delay and not the respondent and that the only grounds of appeal that were entered within the time permitted by the regulations were the very vague grounds submitted in August 2011.

6.1 Decision of the court

In this application the Court is not concerned with the merits of the recommendations made and the decisions taken by the respondent. It is not the function of the High Court in judicial review to decide whether the respondent has made a correct decision, whether a better decision might have been made or whether the decision is justified on the merits of the claim (see *Mc Carron v*

Kearney [2008] I.E.H.C. 195). The Court is concerned only with the legality of the decision and the lawfulness of the process by which it has been reached.

The Court must assess whether the material conclusions reached are tainted by any irrationality or unreasonableness having regard to the facts found or accepted and the evidence and information before it. (*See The State (Keegan) v Stardust Victims Compensation Tribunal* [1986] I.R. 642.)

The precise role of the court in judicial review has been outlined most recently in the case of *Meadows v. Minister for Justice Equality and Law Reform* [2010] IESC 3.where Denham J. articulated the core principles as follows:-

> (i) In judicial review the decision-making process is reviewed;
>
> (ii) It is not an appeal on the merits;
>
> (iii) The onus of proof rests upon the applicant at all times;
>
> (iv) In considering the test for reasonableness, the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense;
>
> (v) The nature of the decision and the decision maker being reviewed is relevant to the application of the test;
>
> (vi) Where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the Court should be slow to intervene in the technical area;
>
> (vii) The Court should have regard to what Henchy J. in *The State (Keegan) v. Stardust Victims Compensation Tribunal*, referred to as the "implied constitutional limitation of jurisdiction" in all decision-making which affects rights. Any effect on rights should be within constitutional limitations and should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision.

Thus, it is evident that there is limited scope to interfere with the exercise of discretion by an administrative body. As judicial review is not an appeal from an administrative decision but a review of the manner in which the decision was made the court cannot substitute its opinion for that of the decision maker merely because it may have reached a different conclusion to the decision maker.

The applicant challenges the decision of the Board of Inquiry ("the Board") and of the Appeal Board ("the Appeal Board") wherein it refused to consider the applicant's appeal because it considered it without substance or foundation.

6.2. The decision of the Board.

The applicant does not rely on grounds 1 and 2 of his statement of grounds i.e.lack of specificity and multiplicity of the charges. Counsel for the applicant has grounded his application against the board's decision on:

(i) the absence of reasons for its decision and

(ii) the failure to reveal the statements of Mrs Mc Gourty taken by Sergeant Fahy sometime in September 2009 until the third day of the hearing.

Dealing with (ii) first. In evidence given by Mrs Mc Gourty on day two of the hearing, in answer to Q.386 she said Garda Kelly was standing at the door of the pub but was on the street facing the end door and facing her husband, Mr Mc Gourty. She stated he was absolutely not in the pub at any stage. The conversation between Mr Mc Gourty and Garda Kelly took place at the door of the pub. She said he did not look into the pub. The closest he came was standing just outside on the pavement. A statement she gave to Superintendent Brunton on the 24th May, 2010, was in accordance with that evidence. This statement was handed into the Board.

The applicant complains that Mrs Mc Gourty made a statement to Sergeant Fahy about three days after the event that contradicted this. He argues that she stated in that statement that Garda Kelly may have put a foot inside the hallway. I note however that she goes on to say in that statement that he never looked in, or came into, the pub.

It is clear that on any objective assessment of her evidence to the Board, her statement to Superintendent Brunton and her statement to Sergeant Fahy, that it is consistent in all save the doubt as to whether the applicant may have put a foot into the hallway. In my view this evidence cannot be described as contradictory evidence and to characterise it as perjury was in my judgment wholly inappropriate and clearly incorrect. Moreover, the existence of the statement made to Sergeant Fahy by her had been well flagged in advance of the hearing before the Board when on 5th April, 2011, the applicant was served with the statement of facts by Superintendent Brunton which referred to her statement. Thus, I reject the submission that the applicant was taken by surprise in this regard.

Her further evidence in answer to two questions also does not, in my view, support the description of perjury. She was asked at Q. 641when she became aware of the investigation. Before she had a chance to respond to this question she was asked at Q. 642 "Did you speak with any members in Drumshambo a couple of days after the incident?" She answered "it was a long time after I became aware of it, a long time." That answer on a simple reading of it refers to the investigation and not to any meeting with a member in Drumshambo a couple of days post incident.

6. 3. In any event the complaints made in relation to Mrs Mc Gourty's alleged contradictory evidence and the admission of her statement to Sergeant Fahy were matters that should have been raised at the hearing if they were to be raised at all. I can understand why they were not. No real contradiction emerges at all as observed above. No question of surprise arose because the nature of Mrs Mc Gourty's evidence was well known from the early stages of the disciplinary investigation. The applicant could never have been in any doubt about the dispute over his presence or not in the pub on the night in question. This was the key part of the dispute from the very beginning. Superintendent Brunton's statement of facts dated the 28th October, 2010 served under cover of letter dated the 5th April 2011 shows Mrs Mc Gourty had raised concerns in this regard to Sergeant Fahy three days after the incident.

6. 4. The adequacy of the reasons given by the board.

The board recommended dismissal of the applicant for breach of discipline based on four of the six grounds made against him being:-

(i) Falsehood in respect of a written statement made by the applicant on 27th September, 2009, which he knew to be false;

(ii) Falsehood in respect of a written statement made by the applicant on the 20th January, 2010, which he knew to be false;

(iii) Falsehood in respect of a written statement made by the applicant on the 1st February, 2010, which he knew to be false;

4) Falsehood: that between the 20th September, 2009, and the 20th January, 2010, the applicant added entries to his official Garda notebook relating to actions at "Monica's" in September 2009.

The obligation to give reasons and the adequacy thereof was considered in *Farrelly v. Garda Commissioner* 2007 IEHC 84. Although O'Neill J. in that case was dealing with a previous version of the regulations nonetheless what he stated therein is apposite here:-

"As is apparent the decisions of Sworn Inquiries as provided for in the 1989 Regulations are not discursive judgments but are merely a record of the decision actually taken without any statement of the reasons for the decision.

That being so in my view previous decisions of Sworn Inquiries in regard to breaches of discipline or alleged breaches of discipline by other members, would be of no assistance to the applicant in making submissions on the question of penalty nor would these decisions be of any assistance to the Sworn Inquiry itself in arriving at an appropriate penalty.

The decisions of these Sworn Inquiries as provided for under the 1989 Regulations are of a wholly different character to the decisions of the Refugee Appeal Tribunal, which are in the nature of a discursive judgment of the issues canvassed in those appeals and do state the reasons for the decision reached."

The requirement to give reasons and the adequacy thereof is therefore dependent on the individual case. Here the complaints made against the applicant were clearly set out both in form and in the evidence at the hearing. The case here is not one of citizenship or planning where a party needs to know the precise reasons for refusal. It is a straight factual dispute and it was resolved by the assessment of the evidence by the Board. It is not possible to accept that he was not fully aware of the reasons why the Board came to the conclusions that it did. No discursive reasoning was required.

6.5 The decision of the Appeal Board

It is not in my view possible to successfully argue that the applicant was misled as to whether there would be an oral hearing. He was told in writing by the chair of the Appeal Board that if there was a hearing it would take place in April. However having received the applicant's final submission of his grounds of appeal, the Appeal Board felt able to decide the matter under Regulation 35(2)(b) on the basis of its being without substance or foundation. No intimation of a further hearing was made and there are no grounds for complaint on this front.

6.6 The applicant further argues that the absence of substance or foundation must be apparent from the grounds of appeal itself and not from any other matters. The power to dismiss an appeal, he argues, is a power to be executed sparingly. Where it is, the Board is obliged to give reasons. The applicant says he has no idea why his appeal was refused.

6.7 The grounds of appeal that the applicant submitted on the 6th March, 2012, were as follows;

(i) Lack of specificity of breaches of discipline;

(ii) Repetition and multiplicity of charges;

(iii) Failure on the part of the investigating officer to disclose evidence; including evidence of an exculpatory nature;

(iv) Failure to give reasons or particular findings of fact;

(v) Improper weight given to the evidence of witnesses;

(vi) Disproportionate sanctions.

The first two grounds are no longer being pursued. The third, as set out above, is clearly incorrect. There was no failure to disclose any evidence. The only instance of this to which the applicant alludes is the statement of Mrs Mc Gourty. I have already dealt with that issue and found it to be entirely without substance. The fourth ground is also incorrect in the light of the extremely limited obligation to give reasons as cited above. The fifth is simply a base claim for a reconsideration of the evidence with no reason offered as to why that should be done. No right is provided for a full appeal de novo in the garda regulations and as noted these are not challenged. It must also be remembered that the hearing before the Board was a full scale adversarial process with the applicant represented by solicitor and counsel. The final ground is simply unsupported by any statement of reasons as to why the sanction was disproportionate.

I note the decision of the Appeal Board is communicated by the ticking of a box marked "without substance or foundation". There may be instances where such a bare dismissal may not meet even the relatively low standard in relation to the obligation to give reasons in those cases. However here the grounds for appeal are so patently insubstantial and unfounded that it is hard to see how else they could be accurately described. It is further to be noted that even these bare grounds had to be elicited from the applicant by the chair of the Appeal Board. The initial appeal form submitted had left the section requiring the grounds of appeal entirely blank.

For all these reasons the reliefs sought are refused.