[2019] IEHC 626

THE HIGH COURT

[2018/939 JR]

BETWEEN

KEITH HARRISON

APPLICANT

AND

PETER CHARLETON

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 23rd day of August, 2019

Introduction

1. "Justice must not only be done but it must be seen to be done". This pithy statement encapsulates the meaning behind the legal and constitutional right to a fair and public hearing before an independent and impartial tribunal. Not only must the decision maker be free from actual bias but there must also be no appearance of bias. As Denham J. (as she then was) in *Bula Ltd v. Tara Mines Ltd (No. 6)* [2000] 4 I.R. 412 stated:

> "there is well settled Irish law that the test is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not receive a fair trial of the issues."

2. In the present case, the applicant was the express subject matter of one of the terms of reference of the Tribunal of Inquiry into protected disclosures under the Protected Disclosures Act, 2014 and certain other matters ("the Disclosures Tribunal"). The respondent was appointed sole member of this Tribunal. The second and third interim reports of the Disclosures Tribunal strongly criticised the applicant.

3. In these proceedings, the applicant seeks to quash those interim reports on a claim of objective bias on the part of the respondent as well as related reliefs. Despite what could be understood from the wording of the originating letter and the statement grounding this application for judicial review, the applicant advanced his case before this court on the sole basis of objective bias. That is the only basis upon which this case has been argued and this judgment has been considered. There is no suggestion that the respondent was in any way actually biased in the findings that he made in those reports.

Background

4. The Disclosures Tribunal was established on the 17th February, 2017 to investigate a considerable number of topics primarily into what are termed "protective disclosures" made under the Protected Disclosures Act, 2014 ("the 2014 Act"). These terms primarily involved two other members of An Garda Síochána: Sergeant Maurice McCabe and Superintendent David Taylor. Only two terms of reference involved the respondent; and he was only named in one. At term N, the Disclosures Tribunal was to "investigate contacts between members of An Garda Síochána and Túsla in relation to Garda Keith Harrison." At term O, the Disclosures Tribunal was "to investigate any pattern of the creation, distribution and use by Túsla of files containing allegations of criminal misconduct against members of An Garda Síochána who had made allegations of

wrongdoing within An Garda Síochána and of the use knowingly by senior members of the Garda Síochána of these files to discredit members who had made such allegations."

5. The applicant had made protected disclosures under the 2014 Act. He also had made an earlier disclosure in respect of an incident in 2008 to a separate whistleblowing entity. In very brief outline, the applicant's whistleblowing under the 2014 Act, insofar as relevant, appeared to relate to his treatment in the Donegal division and in particular the notification by An Garda Síochána to Tusla, previously the Health Service Executive ("the HSE") arising from disputed domestic violence concerns in relation to the applicant and his partner insofar as those matters might have the potential to affect his partner's children.

6. The applicant's complaint in the present case relates to professional contact between the respondent in his role as lead counsel to the Tribunal of Inquiry into certain gardaí in the Donegal Division ("the Morris Tribunal"). Superintendent (as she then was) Terry McGinn had been appointed by the Commissioner of An Garda Síochána to act as liaison officer to the Morris Tribunal in March 2002. She was promoted to Chief Superintendent of the Donegal Division in August 2005. On her promotion another senior garda was appointed liaison officer. The Morris Tribunal sat from 2002 to 2008.

7. At the relevant time of the applicant's Garda service in Donegal, Chief Superintendent McGinn was the Chief Superintendent running the Donegal division. As such she was in overall control of the gardaí in that division. She had chaired certain high level meetings of senior garda personnel as a result of which notifications were made to Tusla as well as the Garda Síochána Ombudsman Commission which touched or concerned the applicant.

8. Chief Superintendent McGinn was not involved in a direct way in any of the reports that had been made to various members of An Garda Síochána by a member of the applicant's partner's family, or by other individuals, about the nature of the relationship between the applicant and his partner. While she had directed that a statement be taken from the applicant's partner, she was not involved in the taking of that statement. Arising from the detail in that statement, a meeting was convened by the Chief Superintendent in order to determine what steps were to be taken in consequence thereof. The question of a referral to the HSE was discussed as part of that meeting. A HSE referral was made by Superintendent McGovern two days later.

9. In the second interim report which dealt exclusively with reference N of the Tribunal, the respondent rejected firmly the applicant's allegations of a concerted campaign against him. He also rejected the applicant's partner's allegation that the statement had been coerced from her. The respondent roundly criticised the applicant in respect of his conduct in moving back to Donegal to serve in circumstances where a significant part of his reasoning was to pursue a relationship with this partner. The criticism was levelled by the respondent because of the view he took about the timing of the transfer where there was an ongoing investigation into the manslaughter of a well- known and well liked garda in that station by the brother of the woman with whom the applicant was pursuing the relationship.

10. The fact that the respondent had been lead counsel to the Morris Tribunal was known to this applicant at the commencement of the Tribunal of which the respondent was chair. The applicant avers he had no knowledge at the commencement of the oral hearings in September 2017, that Chief Superintendent McGinn had been the garda liaison officer.

11. On the 6th October, 2017, Chief Superintendent McGinn was called as a witness before the Tribunal. In answer to questions asked by counsel for the Tribunal, Chief Superintendent McGinn confirmed that she had been liaison officer to the Morris Tribunal. On the following Monday, counsel on behalf of the applicant questioned the Chief Superintendent further. It was put to her by counsel that she had been praised by the Morris Tribunal for her cooperation with the Tribunal. Counsel for the applicant went on to question Chief Superintendent McGinn as follows:

    Q. I think therefore in terms of that, I take it that you liaised with the Tribunal directly in respect of any evidential matters that needed to be sorted out through garda headquarters, is that correct?

    A. My purpose was as Tribunal liaison officer, which I was appointed by the Garda Commissioner at the time because I had no involvement in Donegal prior to that, and I was a newly promoted superintendent that had been assigned to the division and my role was to facilitate, you know, not the evidence but the queries from the Tribunal to garda headquarters and to follow up on any enquiries that were outstanding in terms of notifying people that they should be in attendance because they hadn't got the correspondence or following up, etc, etc, etc. That was my role.

    Q. That required very close cooperation with the Tribunal on your part.

    A. I was completely independently (sic) to the Tribunal.

    Q. I appreciate you were independent.

    A. My role was just as a liaison to the flow of information between the two organisations – the Tribunal and An Garda Síochána."

12. There was no further expansion on the respective roles or interactions between the respondent and the Chief Superintendent at the Morris Tribunal.

13. The second interim report was published by the Disclosures Tribunal on the 30th November, 2017. The applicant complains that the conduct of Chief Superintendent McGinn and her management of the Donegal Division were highly praised in this report. She was described in terms of a witness of truth as "eloquent" and a "determined commander who took decisions". The cross examination of her by counsel for the applicant was described as "unkind". The statement grounding the application for judicial review ("the statement of grounds") recites "but there is no mention of Chief Superintendent McGinn's role as garda liaison officer to the Morris Tribunal."

14. The Disclosures Tribunal published the third interim report on the 11th October, 2018. There was further criticism directed at the applicant and the Chief Superintendent was again praised.

15. The statement of grounds states that on the same day two newspaper articles relating to proceedings before the Morris Tribunal came to the attention of the applicant. In his affidavit verifying the statement of grounds, the applicant avers that it was only on that date that he or his legal team became aware of the newspaper articles. At no point does he explain how they came to his attention. It is a reasonable inference to draw that either the applicant or his lawyers carried out an in depth internet search at that point.

16. The applicant then refers to two articles in the Irish Times published on the 30th March, 2006 and 31st March, 2006. These articles arose out of a clarification read into the record of the Morris Tribunal concerning an RTE reconstruction that had been aired on RTE's "Morning Ireland" programme. This was stated to be for the purpose of correcting a deeply unfortunate and unpleasant impression that had been created by the reconstruction of evidence of Detective Garda John Dooley concerning Chief Superintendent McGinn.

17. It is appropriate to quote extensively from the transcript of the Morris Tribunal proceedings. This transcript was available to the applicant prior to launching these proceedings:

"The Tribunal resumed, as follows, on Thursday, 30th March, 2005 at 10.30 am.

Mr. Humphreys: Chairman, with your permission we discussed the order of cross examination.

Mr. Charleton: I wonder if possible could I say something first. By reason of the way I get to work, which is usually on foot, I don't normally hear the very excellent programme, Morning Ireland. But, however, a tape of it was drawn to my attention this morning particularly concerning Chief Superintendent Terry McGinn, who was, sir, the garda liaison officer to the Tribunal and fulfilled that post with distinction for some three years prior to being promoted to Chief Superintendent and given the responsibility of running the Donegal Division.

Sir, it may be an error, I do not know, but apparently during the course of a reconstruction of the evidence of Detective Garda John Dooley, as examined by myself, some substantial portions of the transcript were read out. Whereas I appreciate, sir, that it is necessary of course that these matters be truncated and that a transcript edit has to end somewhere as well as beginning somewhere, the manner in which it ended concerning Chief Superintendent McGinn was particularly unfortunate, and it seems to me, on listening to the tape, that a deeply unpleasant situation has been created, perhaps inadvertently, by the makers of that programme. In a section of the recreated transcript dealing with the manner in which the witness, Detective Garda John Dooley, came about to a position whereby

he was determined to tell the truth, he first of all spoke about the support he received from Chief Superintendent John Manley and then, on being asked as to why, given that he had made a number of false statements in his role as a member of An Garda Síochána, did he not go to someone in authority, he mentioned that he had indeed gone to then Superintendent Terry McGinn. Sir, if I can read out the portion of the transcript where the edit ends and indicate why it seems to me that a deeply unfortunate and unpleasant impression has been created, I think, sir, you will realise why that is so. A question was asked as follows (…..Mr. Charleton then quotes from the transcript).

That is the point at which the edited transcript ended creating the impression therefore that perhaps Chief Superintendent McGinn had no interest either in the truth or in assisting in any way with the Tribunal's business on behalf of the Garda Commissioner in uncovering the truth. But in fact the transcript went on and gave a totally different impression, so that the edit was, as I say, deeply unfortunate. If I can read on, sir, for the next half a page. It continues as follows (… Mr. Charleton then quotes again from the transcript).

Sir, I end the matter there, normally I wouldn't bother you with a matter such as this, save for the fact that I think (all of us) who have worked at the Tribunal have great respect for the assistance that Chief Superintendent McGinn has given and it would indeed be unfair to her, given that she has done her best to assist the Tribunal in terms of uncovering the truth, that an attitude to be left abroad whereby the people listening to the programme might feel that she simply wasn't interested in Detective Garda Dooley when he came to her and attempted to tell the truth, because the opposite is, on the basis of the transcript, the case.

Chairman: Yes, Mr. Charleton, thank you very much for bringing that to my attention and indeed the attention of the wider public. There is no doubt that if the broadcast terminated at the point that you indicate, it might well convey an entirely wrong impression of what the evidence actually was. I confirm that the evidence did go on to identify how supportive Chief Superintendent McGinn was to Garda Dooley. Hopefully, though obviously we have no control over these things, hopefully the record might well be corrected and set right, because it would be quite wrong if anybody should be left with the idea that Chief Superintendent McGinn was not extremely helpful to the Tribunal in the carrying out of its work. Thank you very much."

18. Armed with that knowledge the solicitor for the applicant wrote to the respondent. This was a lengthy letter setting out the contents of the transcripts and the articles. It also asserted the various references to Chief Superintendent McGinn in the second interim report but did not state her role as garda liaison to the Morris Tribunal. The letter asserted that those who had no prior involvement with tribunals could have no knowledge of the nature and extent of interaction between members of a tribunal legal team and a garda liaison. The letter stated "in the circumstances, it would appear to us that there

was a prior involvement between the chairman of this Tribunal and Chief Superintendent McGinn, which ought to have been disclosed. No attempt was made to disclose it in counsel's opening statement, during the course of the hearing of the evidence or in any of the interim reports. This prior involvement (and indeed the failure to disclose it) gives rise to a risk of bias, either actual or apparent, real or objective, and at the very least our client, and indeed the government and the Oireachtas, ought to have been advised of it prior to embarking on the hearings. Had our client knowledge of the prior involvement and of its nature our client would immediately have called upon you to recuse yourself from any further dealings in relation to our client's modules".

19. The solicitor for the Disclosures Tribunal replied to the applicant's solicitor on behalf of the Disclosures Tribunal chairman. The letter stated that it presumed that the applicant's solicitor's letter had been based on instructions and that ethically he felt able to promote what is alleged in it. The letter continued as follows:

> "Prior to and during the Tribunal it was generally known, and indeed a matter of public record quite often referenced in testimony and in submissions, that the chairman was lead counsel to the Morris Tribunal from 2002 until his appointment to the High Court in 2006. As such, he had professional interactions with counsel, solicitors, witnesses and liaison officers from any agencies represented at the Tribunal. As pointed out in the evidence of Chief Superintendent McGinn before this Tribunal, she had acted as liaison officer and her role was thus in relation to the flow of information between the Tribunal and An Garda Síochána and was independent from the Tribunal.
>
> All the above facts were generally known, but more particularly known to you, your counsel and your client. Indeed, a role as liaison officer to the Morris Tribunal was explored by your counsel when she, Superintendent McGinn, was giving evidence to this Tribunal. It therefore appears that the sole basis on which you allege bias against the chairman arises out of an implication he made as lead counsel to correct an erroneous report of the proceedings at the Morris Tribunal that had caused disquiet as to its accuracy. The chairman, as a matter of fact, has no recollection of this application.
>
> Such applications are common and indeed have been made and acceded to during the currency of this Tribunal. Is counsel moving the application or indeed the chairman to be accused of bias in favour of witness or party who has justifiably had an issue with media reports or some other inaccuracy and has had the true position ventilated and corrected in public?
>
> In the circumstances, your proposal that the Tribunal take the steps outlined in your letter is absurd and repugnant to the Tribunal's duty to the Oireachtas and the people of Ireland."

The latter reference was to the steps sought by the applicant in his letter; to withdraw the second interim report in its entirety and all references to their client and his module from the third interim report.

The Judicial Review Proceedings

20. It was on that basis that the applicant launched the within judicial review proceedings seeking to quash the second and third interim reports. The legal grounds were that the respondent's prior interactions with, testimonial and praise of Chief Superintendent Terry McGinn at the Morris Tribunal gave rise to a presumption of bias in the determination of the issues contained in modules N and O. It was also pleaded that, at the very least, in order to remove the possibility of objective bias the respondent ought to have disclosed to the parties his previous interactions including the nature and extent of such interactions with Chief Superintendent McGinn.

21. The legal grounds also stated that in the circumstances the respondent failed to approach the hearing with a fair and open mind but counsel for the applicant confirmed that this was not meant as a claim of actual bias but was one a claim of objective bias only. There was a certain amount of criticism levelled at the applicant in terms of the manner in which his claim was pleaded i.e. on actual bias grounds. The subsequent decision of *Shatter v. Guerin* [2009] IESC 9 was relied upon by the respondent. I do not consider it necessary in the context of the judgment being delivered to make any determination on this aspect. The applicant has clearly submitted to this Court, through his counsel, that his intention was not to allege actual bias but to make a case in objective bias only. I will make one comment however, to stress that in the aftermath of the decision in Shatter v. Guerin, no applicant and certainly no solicitor or counsel should lightly make an accusation of bias, actual or objective; unfounded and unjustified claims may have consequences in proceedings.

22. In submissions, the applicant argued that a reasonable person possessed of all the relevant facts would have a reasonable apprehension of bias. These facts were:

    (a) That the respondent and Chief Superintendent McGinn had worked together and alongside each other for a period of thirty months. He said that her task was to assist him in the Morris Tribunal legal team in any request that they had of the Garda Commissioner or Garda witnesses and to assist them in locating relevant documents. This was particularly so where she had an office located in the same building.

    (b) The apprehension of bias was said to be further heightened and cemented by reason of a clear public stated opinion of Chief Superintendent McGinn which had been expressed by the respondent at the Morris Tribunal. The apprehension in the present case he submitted went further than other cases. In usual cases of objective bias, the apprehension was that the person might have formed a positive view of a witness or party but in the present case such a view had been formed and the apprehension was that he might not have changed his mind.

23. A number of affidavits were filed on behalf of the respondent. In terms of the usual convention whereby members of the judiciary do not swear affidavits, the respondent did not swear an affidavit. This was the subject matter of a great deal of comment at the hearing and will be addressed further below. The registrar to the Disclosures Tribunal verified the statement of opposition.

24. Mary Cummins, the solicitor who acted for An Garda Síochána at the Morris Tribunal, swore an affidavit setting out that she liaised with a number of gardaí. She referred to then Superintendent McGinn's appointment as liaison officer until her replacement in August 2005 by another Inspector. She the set out the circumstances in which the clarification had arisen. She contacted by the Commissioner's office shortly after the programme had been broadcast and instructed to raise the matter with the Disclosures Tribunal. The Commissioner had been concerned about the impression created and that a failure to do so could leave the public "under a misapprehension that An Gardai Síochána and Chief Superintendent McGinn were not interested in uncovering the truth, the subject of the terms of reference of the Tribunal's inquiry.".

25. Counsel for the Commissioner noted to the Disclosures Tribunal that the impression created by the broadcast was that Chief Superintendent McGinn had no interest in either the truth or in assisting in any way with the Disclosures Tribunal's business on behalf of the Garda Commissioner. She detailed what in fact had been the position that Chief Superintendent McGinn in a role as Garda Dooley's Chief Superintendent was to support him to become what in modern parlance would be called a "whistle-blower". Chief Superintendent McGinn had never been a witness to the Morris Tribunal and had no involvement in the matters under investigation by that Tribunal. She said that the Commissioner arranged for a tape of the relevant segment to be delivered to the offices at Clonskeagh. Her counsel approached the Disclosures Tribunal's counsel to raise the concern and both counsel listened to the tape. She said that she was aware from the affidavit of Mr. Philip Barnes, administrator to the Disclosures Tribunal that practice would dictate that any clarification would have to be first approved by the chairman. She said that resulted in the clarification.

26. Mr. Philip Barnes said he was the office manager of both the Morris Tribunal and the Disclosures Tribunal the subject matter of these proceedings. He said he was very familiar with the day to day running of both Tribunals and with the roles occupied by individuals. Mr. Barnes who is an Assistant Principal (Acting) in the Department of Justice and Equality set out the actual nature of the association between the respondent and Chief Superintendent McGinn. He said that she was appointed a garda liaison officer "for the purpose of acting as a conduit for the exchange of information, to assist with requests from the Tribunal for documentation, exhibits, inspection facilities and coordination with garda witnesses and routine enquiries. He said that typically, any request for assistance from the Tribunal would be made by the solicitor to the Tribunal to the solicitor for the Garda Commissioner who would then having considered such requests if of the view that same was in order and/or did not present any difficulty for the Garda Commissioner, pass the request onto the garda liaison officer who would then ensure that the request was

complied with in as expeditious a manner as possible. In the event that the Garda Commissioner or the garda liaison officer wish to raise any issue with the Tribunal, this was typically done through either the solicitors to the Garda Commissioner and the Tribunal respectively or on a counsel to counsel basis.

27. Mr. Barnes said that Superintendent McGinn attended at the Morris Tribunal hearings on a regular basis. He said that as he understood it, this was for the purposes of ensuring that all requests made by that Tribunal of An Garda Síochána were attended to promptly, assisting both that Tribunal and the Garda Commissioner's legal team in locating material in instances where it was not immediately obvious or same was included in the large amount of material supplied to the Tribunal and ensuring that the Garda Commissioner was updated promptly as to developments at the Tribunal. He said that consequently there was a professional interaction between Chief Superintendent McGinn and the solicitors and, to a very much lesser extent, counsel to the Tribunal. He said that counsel for the Morris Tribunal consisted of Peter Charleton, Paul McDermott and Anthony Barr and when Peter Charleton was appointed to the High Court in 2006, Kathleen Leader. The vast majority of interactions that Superintendent McGinn had with the legal team to the Tribunal were conducted through either the solicitor to the Tribunal or the solicitor to the Garda Commissioner or on occasion counsel to the Tribunal and counsel to the Garda Commissioner. There is simply no cause for any regular interaction between counsel for the Tribunal and the garda liaison officer. He says that he says and believes that the respondent and Superintendent McGinn rarely spoke to one another and if they ever did the interaction between them was brief and professional. No personal relationship existed between the parties and the relationship between them is best described as nothing more than a passing professional acquaintance.

28. Mr. Barnes then referred to Garda John Dooley who was a significant witness to the Morris Tribunal. He says that the manner in which Mary Cummins described the interaction between the legal teams on the morning of the clarification before the Morris Tribunal in relation to Garda Dooley's evidence concerning Superintendent McGinn reflected generally how business was conducted between them.

29. He also referred to the letter from the Disclosures Tribunal to the applicant's solicitor that the respondent had no recollection of the application of the 30th March, 2006. He said that was not surprising considering that it happened over twelve years ago and occurred in a professional context and arose out of the evidence given by a witness that is Garda John Dooley.

30. He said that before any such application was to be made to the Tribunal the practice was that it was always drawn to the attention of the Chair of the Tribunal, Mr. Justice Morris. He said that as he understood the practice, the chairman would then give permission or not for a matter to be mentioned to him in the public forum. The practice, he said, was for two lawyers to consult with him at all times. Accordingly, when the respondent mentioned the matter of the broadcast to the Tribunal chairman publicly on the 30th March, 2006, he believed he did so entirely in his professional role as counsel to the

Tribunal and with the prior knowledge and consent of the chairman and at least one other member of the Tribunal counsel team and most probably all of them.

31. Mr. Barnes went on to describe that while the respondent was lead counsel, the Tribunal legal team acted as a team. He said that the need for a clarification had come from a represented party to the Tribunal and did not come from within the Tribunal legal team. He said that corrections of that nature were made occasionally throughout the life of the Tribunal and there was nothing unusual about the clarification made on the 30th March, 2006.

32. He also referred to the reference the applicant had made to the garda liaison office and the offices of the Morris Tribunal being both located in Belfield Office Park. He said that soon after the commencement of the Morris Tribunal, Superintendent McGinn had approached him as office manager to the Tribunal and asked him if it was possible that an office could be made available to her and her assistant Garda Brian Mahon approximate to the Tribunal hearing room. He said that was to facilitate storage of a large amount of documentation files and also to facilitate her work as garda liaison officer to the Tribunal.

33. He described the layout of the offices of the Morris Tribunal. The Tribunal hearing room and main reception area were located on the ground floor. The first floor was occupied by the administrative staff including Mr Barnes himself, Tribunal investigators, IT personnel and data analysts at the Tribunal. The second and fourth floors were occupied by the Residential Redress Board. The third floor was occupied by the Irish Prison Service, Department of Justice and Equality. The fifth floor was occupied by the legal team to the Morris Tribunal, the registrar to the Tribunal and the chairman of the Tribunal, Mr. Justice Morris. He said that access to the second and fifth floors were restricted to the Tribunal staff and legal team. Access to those floors was electronically restricted to certain individuals and was not available to garda liaison officers or garda counsel solicitors or witnesses or any garda officer or indeed anyone else. He said that access to the garda liaison room was controlled by the garda liaison officer and the Tribunal legal team or administrative staff did not have access to that room.

34. Mr. Barnes also said that he had received similar requests from media representatives who attended at the Tribunal and also from stenographers. An office was made available to all members of the media who attended the Tribunal and a separate office was made available to the stenography service. He also said that during the currency of the Tribunal "over substantial periods and on occasion rooms were made available to witnesses who attended at the Tribunal for long stretches of time so that they might have whatever facilities that they needed". Rooms were also made available to the legal teams representing their clients in order for them to discuss matters pertaining to their cases. Witnesses with long standing commitments to the Tribunal would store papers in the rooms allocated to them and that applied to a number of solicitors. He also averred to the fact that the knowledge of the report of the Morris Tribunal was widely available and concerned policing in Donegal, which was the area that the applicant was attached to at the time of the events that the Disclosures Tribunal was dealing with.

35. Mr. Barnes said a reading of the first and second Morris Tribunal reports contained references to Chief Superintendent McGinn's former role as a liaison officer. He referred to a letter addressed to her care of the Solicitor to the Garda Commissioner which appeared in the first and second reports of the Morris Tribunal. The nature of her role to the Morris Tribunal was described at p. 24, Chapter 1 of the first report of the Morris Tribunal as follows:

> "The Tribunal directly sought the assistance of the Commissioner of An Garda Síochána, the Department of Justice and a number of foreign police services. The Tribunal is happy to report that it received cooperation from all of these bodies. In particular, the Garda Commissioner appointed Superintendent Terry McGinn to liaise with the Tribunal and to assist in the furnishing of all relevant documents and information which might be of assistance to the Tribunal in pursuing its enquiries. Everything which the Tribunal asked for through Superintendent McGinn was furnished promptly. Every enquiry that was made by the Tribunal resulted in proper efforts being made, both within Garda Headquarters and in relevant Garda divisions, to uncover relevant information, insofar as that was possible."

36. The applicant swore a replying affidavit that there had been no averment as to the true nature and extent of the interaction between the respondent and Chief Superintendent Terry McGinn working in close proximity over the course of three years. He said it was entirely reasonable therefore to form, as described on affidavit, an apprehension of bias on the part of the tribunal chairman. He averred that it was clear from all the facts that the tribunal chairman had formed an opinion of the Chief Superintendent as to her honesty and integrity and her various qualities, and found himself able to publicly express that opinion of her, even after she had ceased working with the Morris Tribunal.

37. The applicant contested whether the respondent was entitled to rely on facts found in the second interim report for any other basis other than that those amounted to the respondent's findings of fact. Those findings had no force of law or presumption of truth. In so far as the respondent had pleaded denied the Chief Superintendent's influence or control over instances or interactions considered under recommendation (n), the application said no that no person capable of averring to the facts of denials had sworn an affidavit. He said that the respondent was not entitled as a matter of law or fairness to rely on findings in the second interim report.

38. The applicant said that while he had furnished a statement to the Tribunal, in his opinion there were other persons who had made protected disclosures who had also made comprehensive statements to the Disclosures Tribunal. He said and believed that those members had been interviewed prior to the public hearings but he was not. He said that it became apparent that other witnesses had been provided with his own statement and asked to comment upon them. He said and believed that it was apparent from the booklet that had been furnished to him during the course of the tribunal that the statement of Chief Superintendent McGinn was one of the first, if not the actual first, statement received by the tribunal in respect of the relevant module.

39. The applicant contested the claim that clarifications before the tribunal were not unusual. He said that he had carried out an online search with various search words and the only reports that he had found were those contained in the statement of grounds.

40. He said that he had no knowledge about the role of a garda liaison at the time of the evidence of Chief Superintendent McGinn. He said that during the tribunal he only saw Chief Superintendent Howard who was garda liaison in attendance on one date. He referred to para. 15 of the statement of opposition, which denies that any prior involvement between the pair ought to have been disclosed, and denies that their professional involvement revealed actual or perceived bias, and said that it was apparent that the respondent had almost daily contact and involvement with the Chief Superintendent McGinn, at the very least if only because they attended most, if not all, the public hearings of the tribunal until her promotion in 2005. He also suggested that the words used by the respondent in making the clarification about Chief Superintendent McGinn did not suggest that his knowledge of her was minimal.

41. The respondent repeated his assertions that the full disclosure of interaction with Chief Superintendent McGinn should have been made. He said that had he known that the respondent had worked in conjunction or proximity with her to the extent that he had "great respect" for her and learned of the nature of his application to the Morris Tribunal for correction of the record, then he would have applied for him to recuse himself in respect of the relevant modules.

42. The applicant took issue with the affidavit of Ms. Mary Cummins and the hearsay nature of her averments, particularly in relation to contact between counsel for An Garda Síochána and the respondent. He also notes that while she states that the Commissioner was concerned the public would be under the misapprehension that An Garda Síochána and Chief Superintendent McGinn were not interested in uncovering the truth, the clarification was only made in respect of Chief Superintendent McGinn but not An Garda Síochána in general.

43. He objected to the affidavit of Mr. Barnes as it is mostly hearsay and inadmissible.

He did not deal with Chief Superintendent McGinn on a day to day basis, nor did his role involve dealing with the Morris Tribunal legal team or witnesses other than providing for a scheduling and support. He says that it is impermissible for Mr. Barnes to give evidence without any actual means of knowledge, of the mechanism with which Chief Superintendent McGinn interacted with the Morris Tribunal.

Submissions

(i) On behalf of the applicant

44. The applicant submitted that tribunals of inquiry were not courts of law; therefore, the chairman of a tribunal of inquiry was not acting as a judge and is not a judge for the purposes of the law. The functions and powers of a tribunal of inquiry are very different to those of a Court. The proceedings are inquisitorial rather than adversarial. The role of the tribunal was to investigate the evidence rather than to simply hear the evidence that is

offered to it. A tribunal of inquiry must be mindful at all times of the principles of natural and constitutional justice but may determine where it is necessary to commence the evidence and where it is necessary to stop its enquiries. The basic principles as regards rights set out in *Re. Haughey* [1971] I.R. 217 apply to tribunals.

45. A major point made by the applicant in his submissions was that there had been a failure of the duty of candour on the part of the respondent in judicial review proceedings. He criticised the affidavits filed on behalf of the respondent and the lack of particular affidavits. The applicant submitted that the opposition papers do not explain or contextualise the particular words used by the respondent in making the application before the Morris Tribunal in respect of Chief Superintendent McGinn. He relied on the words used such as, "great respect" and "great distinction" and that she had "done her best to assist the tribunal in uncovering the truth". He submitted that these were not the words of a "minimal professional engagement" which had been placed upon the relationship in the opposition papers.

46. He relied upon O. 40 r. 4 of the Rules of the Superior Courts (RSC) which states that: -

> "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted."

47. He submitted that this was not an interlocutory proceeding and that none of the deponents could give evidence on behalf of the respondents of;

(a) the actual nature of engagement between the respondent and Chief Superintendent;

(b) how it came to be that the respondent became the person to correct the record regarding the *Morning Ireland* broadcast, or why he used the words he did; and

(c) the view that had been formed by the respondent of the character and veracity of Chief Superintendent McGinn prior to embarking on his role as sole member of the Disclosures Tribunal.

48. The applicant relied upon the case of *R (Huddleston) v. Lancashire County Council* [1986] 2 All. E.R. 941 in which Donaldson M. R. stated at p.945: -

> "Judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explained fully what they have done and why they have done it, but are not partisan in their own defence, … It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why."

49. He also relied upon the judgment of Barrett J. in *Murtagh v. Kilrane* [2017] I.E.H.C. 384 in which Barrett J. cites from the decision of Keane C.J. in *O'Neill v. Governor of Castlerea Prison* [2004] 4 I.R. 298 as follows: -

> "The argument on behalf of the applicants, that in judicial review proceedings a respondent should disclose to the court all the materials in its possession which were relevant to the decision sought to be impugned, is well-founded".

He also referred to the recent Supreme Court decision *in RAS Medical Limited T/A Park West Clinic v. Royal College of Surgeons in Ireland* [2019] I.E.S.C. 4 in which Clarke C.J. expressly approved the decision of Lord Donaldson M.R. in *Huddleston* and stated that: -

"parties should conduct public law litigation 'with all cards face upwards on the table'".

50. The applicant submitted that the Court could not rely upon averments made by Mr. Barnes in which he sought to characterise the relationship between the respondent and Chief Superintendent McGinn as either brief and professional or as being a passing professional acquaintance, or any other description.

51. The applicant submitted there were two circumstances in bias cases where a duty of candour arises. The first he submitted was that there was an obligation to identify any potential issue of bias from the outset. There was an onus on the decision maker to set out the relevant facts and full and frank disclosure and it was not for the parties to seek out the information. The second point arising was that the duty of candour arose in the context of the obligations to this Court in terms of its decision making function.

52. In his submission, it had been incumbent upon the respondent to inform all the parties of the situation regarding his work and Chief Superintendent McGinn's work at the Morris Tribunal. That would have been appropriate. He compared this situation with the situation of a criminal or civil jury where members of a jury were being empanelled and would be asked if they knew anyone involved in the case.

53. The applicant placed strong emphasis on the importance of revealing from the outset the full interaction between the respondent and Chief Superintendent McGinn. He submitted that the obligation to disclose had been in relation to any potential for bias or appearance of bias. What was known at the time of the application were his own words as set out in the transcript from the Morris Tribunal. On the face of it he had worked with the Chief Superintendent sufficiently to form an opinion as to service and as to her interest in the truth. Counsel submitted the critical matter was his statement regarding the truth; the respondent was essentially saying that Superintendent McGinn had an interest in the truth.

54. He submitted that it was best practice when there was a possibility of apparent bias to bring that to the attention of the parties and it was not for the decision maker to feel it was necessary that they had to do so. In other words, it was the mere possibility of apparent bias that gave rise to the duty to disclose.

55. He submitted that there was English case law to the effect that the issue is not whether the judicial person believed that they didn't meet the threshold of objective bias. He referred to *Aussie Airlines Ptv. Ltd. v. Australian Airlines Ptv. & Ors* [1996] 135 A.L.R. 753

in which it was stated that if it was possible that a reasonable person would think there was a possibility of apparent bias regarding a certain matter then it should have been disclosed.

56. Apart from the test set out in the first paragraph of the present judgment, the respondent also relied upon the judgment of Denham C.J. in *Goode Concrete v. CRH Plc.* [2015] I.E.S.C. 70. He also referred to the case of *Keegan v. District Judge Kilrane* [2011] I.E.H.C. 516 where a District Judge who had acted as a solicitor for the defendant on a number of occasions on previous criminal charges was held in the particular circumstances of that case to give rise to a risk of apparent bias. Birmingham J. held that in such cases the nature and extent of the prior lawyer/client relationship was key. The applicant submitted that in the present case the facts involved a more heightened involvement than simply that of lawyer/client. In this case the respondent and Chief Superintendent had worked side by side over a protracted period of time.

57. He also relied on *Kenny v. Trinity College* [2007] I.E.S.C. 42 in which one of the judges who heard a challenge to planning permission was a brother of an architect in the firm of architects responsible for the design and execution of the respondent's development. In that case, the judge's brother had no involvement whatsoever with the development in question and was in fact based in another city. Secondly, the firm had not been a party to the proceedings, but had provided an important witness. In holding objective bias was established, Fennelly J. in that case relied on the following dicta from the decision in *Locabail (UK) Limited v. Bayfield Property Limited* [2000] Q.B. 451: -

> "a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case…"

58. The applicant also relied upon the judgement of Dunne J. in the Supreme Court in *O'Donnell (a Minor) v. Hurley* [2016] I.E.S.C. 32 in which the Court had considered the Bangalore Principles of Judicial Conduct 2002 as they encapsulated international norms of universal application in relation to such issues as bias. The respondent relied on para. 2.5 of the Bangalore Principles.

59. The applicant took issue with the view that there could be any sense of waiver. The applicant said that he could only have brought this application when he had a basis for doing so. He could not have alleged an improper relationship without knowledge of this relationship. He brought the application when he had knowledge of what he termed "the relationship".

60. He referred to the English case of *Jones v. DAS Legal Expenses* [2003] E.W.C.A Civ. 1071 concerning a chairperson of an employment tribunal who was married to a barrister whose chambers did work on behalf of the respondent. The chairperson had disclosed that at the outset. Ultimately, the connection was deemed irrelevant as an objective observer

would not think it played on her mind. He relied on the case of *Smith v. Kvaerner Cementation Foundation Ltd*. [2006] E.W.C.A. Civ. 242 in which it was said that a waiver or acquiescence cannot occur without all material facts and the person being given a fair opportunity to reach an unpressurised decision. He said that none of that had taken place here and the issue of waiver does not arise.

61. The applicant submitted that the respondent's only substantive response to the issues raised had been that he had no recollection of making the application to correct the record of the Tribunal. The applicant submitted that the making of the application was simply a mechanism for stating that he had worked with her and that he had formed a positive opinion of her. The respondent had not denied either of those things. He submitted that what was relevant in the present case was that he had worked with her and that he had formed an opinion of him.

(ii) On behalf of the respondent

62. Counsel's preliminary submission on behalf of the respondent was that in light of the fact that no part of Chief Superintendent McGinn's evidence fell to be evaluated before the Tribunal in terms of credibility or otherwise in relation to the applicant's central allegations his entire arguments/case fell *in limine*. Thus, even if they had worked side by side in the Morris Tribunal that was irrelevant in the context of the issues at stake before the tribunal. In addition, counsel for the respondent also submitted that on the basis of the case law, it could not be said that there was any objective bias in terms of the facts that were at issue. The respondent also relied upon the issue of waiver, and the issue of discretion where there was a necessity to conduct a tribunal.

63. Counsel for the respondent also relied upon the decision in *Bula* and set out the various links between the judge and the parties. In that case, a judge had previously acted as senior counsel for a party in the case . The outcome was that despite the links there was no apparent bias. Counsel submitted that it was important to keep in mind the issue at stake here which was whether the applicant's allegations would be dealt with fairly. In reliance upon Bula he submitted that the links must be "cogent and rational". In looking at the supposed connection the question to ask was whether it was cogent and rational that the person would not get a fair hearing.

62. In relation to the applicant's criticism of the respondent for not swearing an affidavit, counsel submitted that there was no onus upon him to do so when the allegation is one of bias. He submitted that he was working in a quasi-judicial capacity at the time of the hearing. He submitted that the issue about a reasonable apprehension had to be concrete and could not be general. It was important to look at the facts, and he went through the facts of the situation, in particular as regards the fact that Chief Superintendent McGinn was a member of the organisation being investigated by the Morris Tribunal and that she had been located on a separate floor. He submitted that the present case was distinguishable from the situation in *Bula* or *Keegan* where there had been lawyer/client relationships.

63. He relied upon an extract from A*dministrative Law in Ireland (4th edn.) Hogan and Morgan* at para. 13.13. He submitted that in all of these it was important to make a distinction between different roles that people occupy. In particular, where friends get appointed to the bench no one thinks the judge will be predisposed towards them in their appearance before the judge.

64. Counsel submitted that the mere fact of prior connection or comment was not relevant if the factor did not go to the particular issue; see *O'Reilly v. Commissioner of An Garda Síochána* [2018] IECA 334. This principle was set out in Bula by Denham J who said that the mere fact that a party had received professional legal services at an earlier time from a judge did not disqualify a judge; special additional circumstances were required. Denham J. had quoted from the *Aussie Airlines* decision in that regard.

65. Counsel referred to the report itself, and to the chronology set out therein. He referred to the sequences where the Chief Superintendent had been referred to and that there was no suggestion that she had been alleged to have coerced the applicant's partner or put wrongful pressure on anybody. The reality of the situation was that the Chief Superintendent had been dealing with the aftermath of the complaints that had been made against the applicant. Counsel submitted that the applicant's complaints collapsed because even if there was a link, and even if it was of such a nature that there was a reasonable apprehension of bias it could not and did not affect the decision making process.

66. In relation to the broadcast counsel for the respondent said that it was accepted quite properly that the judge had no recollection of it. In those circumstances he submitted that a person could not be criticised if they did not know of something. It was argued that bias cannot act on a person's mind if the person is unaware of it. He also relied upon the *Locabail* case and the case of *R. (United Cabbies Group (London) Limited) v. Westminster Magistrates Court* [2019] E.W.H.C. 409 (Admin). The latter case had accepted the settled approach that it is actual knowledge of the judge that determines the assessment of apparent bias cases.

67. In relation to waiver, counsel for the respondent relied upon *Corrigan and the Land Commission* [1977] I.R. 317. He referred to the time line of the applicant's knowledge of the prior interaction in this case.

68. In relation to the affidavits, the respondent submitted that the duty of candour cases had concerned judicial reviews seeking to quash on the basis of traditional review grounds. He accepted that there was plenty of authority to say that there was an obligation on a body to make sure that the Court had all information necessary before it to seek judicial review. The second aspect related to when a decision making body had to give reasons. Reasons are required to be given so that effective judicial review can take place. In the present case there was no questioning or review of the decision that had already taken place. On the contrary this application is one to quash the decision in terms of objective bias. The onus therefore lay with the respondent to put forward grounds and that onus did not shift to the respondent. It was of importance however that the respondent had

put forward through two witnesses as to the facts raised by the applicant and in terms of dealing with the tribunal counsel.

69. In answer to criticism of lack of detail, this was rejected. There was no further detail to put forward. The liaison officer operated through the respective solicitors and had different premises. They could not be criticised for not describing what was there.

70. In terms of a judge swearing an affidavit there were a number of decisions of relevance presented to the Court regarding this matter and it was submitted that this applied to a judge who was acting in a quasi-judicial function.

71. In relation to the discretion it was submitted that if the Court was satisfied on any of the grounds it should still be refused. This was because the issue raised was of a slight nature, and it had been now clarified that there was no allegation of actual bias. The reality was that the applicant had had his allegations investigated fairly, and although that is not always and answer, but in this case taken at its height it was an answer.

72. Finally, it was submitted that the statement of opposition had been verified by the registrar to the tribunal with the full knowledge of the respondent.

Replying submissions of the applicant

73. The applicant took issue with the characterisation by the respondent of the nature of the Chief Superintendent's role before the Tribunal. He contested the legal position that a close family relationship to a witness or party would not require to be disclosed as long as their evidence did not require to be evaluated in relation to the core matters at issue. A stake in the proceedings was sufficient and she had a stake as the senior Garda in the Donegal Division at the relevant time. Moreover, he submitted that she had played a significant role and he had set out the role in which she had played and which had not been contradicted. In particular, she had convened a meeting whereby it was determined what steps, if any, should be taken from the statement obtained from his partner. Amongst those steps was the referral to HSE/Tusla which was the express subject matter of Term of Reference N.

74. The applicant also contested the characterisation of the relationship in the respondent's submissions between Superintendent McGinn and the respondent at the Morris Tribunal. It was the applicant's submission that the characterisation that there was that there was no direct working or personal relationship between the two was an assertion which was not evidenced at all.

75. The respondent's submissions, it was submitted, went into the realm of conjecture when they sought to give evidence that the chairman of the tribunal approved the making of a correction to the *Morning Ireland* broadcast. The applicant referred to the real issue as being that the respondent –

> "as a result of having worked in association with, beside, alongside or collaterally with Chief Superintendent McGinn over a period of two and a half years, was able to state the view which he had formed of her to the Morris Tribunal."

It was the failure to advise that the respondent previously held Chief Superintendent McGinn in high regard, or that they had both worked daily at the Morris Tribunal for a period of two and a half years, which was the real issue.

76. In terms of acquiescence, the applicant submitted that the respondent was seeking to amend the law wherein the respondent had stated that "it is settled law that where a decision is challenged on the ground of bias… a court will not interfere where it appears that the facts or suspicion of bias was present in the mind of the challenging party at the hearing." Indeed, it was submitted that this was a statement which directly contradicted the decision of the Supreme Court in *Shatter v. Guerin* [2019] I.E.S.C. 9. The applicant submitted that in reliance on the case of *Edwards v. Corrigan* [1999] 169 A.L.R 80 that it was only if a party was aware that the ground was available that the requirement to act in a timely fashion arose. In *Corrigan* it was only with full knowledge of the facts alleged to constitute disqualification that the question of waiver or acquiescence arises.

77. The applicant relied upon the case of *O'Neill v. Irish Hereford Breed Society* [1992] 1 I.R. 431, and also referred to the *Bula* case and distinguished between the nature of the relationship at issue there which was lawyer and client and that which was at issue in the present case.

78. In relation to the duty of candour he submitted that any reliance upon hearsay was clearly impermissible in light of the decision of the Supreme Court in *RSA v. Royal College of Surgeons*. He submitted that the duty of candour was not limited to administrative cases because it arose from the duty of judges to reveal the position. He referred to *Murtagh v. Kilrane* [2017] I.E.H.C. 384 which was a case where a judge was exercising judicial function and the distinction did not apply.

79. In relation to the issue of necessity, he referred to *O'Callaghan v. Mahon* [2008] 2 I.R. 514, and said that necessity does not operate as a successful defence. Necessity did not in reality apply because any person could have heard this

80. In relation to *O'Ceallaigh*, the applicant submitted that this had referred to an expert witness and not a witness as to fact. In that case there was a distinction to be made by the Court which was that the witness then had no stake in the outcome of the proceedings. In relation to the *Kenny* case he said that the Supreme Court had erred on the side of caution. He submitted that where there was a potential for bias the Court should err on the side of caution.

Analysis and determination

81. In the present case, it was not doubted that despite the difference between a Tribunal of Inquiry and a court of law, the basic principles of constitutional and natural justice demanded equal standards in respect of the absence of bias; both real and apparent. The applicant submitted that as a tribunal of inquiry had an inquisitorial role where much of the investigation and work was done by the decision maker, was done in private, that the dangers in respect of apparent bias were only heightened. In my view the test which applies, namely that set out in *Bula*, applies with equal force to a tribunal of inquiry. The

Bula test is the test which was applied in *O'Callaghan v. Mahon* [2008] 2 I.R. 514, a case which involved a tribunal of inquiry. In a situation where courts of law deal with rights and obligations but tribunals of inquiry do not, there would be no basis for holding that any greater standard must apply.

82. The test for determining objective bias is that set out at para. 1 above. That test was set by the Supreme Court having considered the jurisprudence pre-dating that decision in this jurisdiction and the leading authorities from across the common law world. The Bula decision itself gives important indications as to how the test must be applied in particular circumstances. Later cases have also addressed the application of that test.

83. In *O'Callaghan v. Mahon* [2008] 2 I.R. 514 Fennelly J. synopsised the test as follows: -

> "(a) …Objective bias is established, if a reasonable and fair minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision maker will not be fair or impartial;
>
> (b) The apprehensions of the actual affected party are not relevant;
>
> (c) Objective bias may not be inferred from legal or other errors made within the decision-making process; it is necessary to show the existence of something external to that process…"

84. Denham C.J. gave some further explanation of the test in *Goode Concrete v. CRH Plc* [2015] 3 I.R. 493 where she said: "[54] The test to be applied when considering the issue of perceived bias is objective. It is whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. As it is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is in possession of all the relevant facts."

85. In *Bula*, the Supreme Court quoted favourably from the judgment of the Constitutional Court of South Africa in President of the *Republic of South Africa v. South African Rugby Football Union* [1999] 4 S.A. 145 as follows: -

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience."

86. In the present case, the respondent is a judge. As sole member of the Disclosures Tribunal, he was not administering justice. He was however engaged in a quasi-judicial role. It does not appear in dispute that he was chosen to perform the role as sole

member of the Tribunal because of his status as a judge or at the very least with full knowledge of the values that his judicial experience would bring. In these circumstances, I am satisfied that it is appropriate to assess the reasonableness of the apprehension in light of the fact that the respondent is a judge and has made a declaration to administer justice "without fear or favour, affection or ill-will towards any man" and to "uphold the constitution and the laws". In the context of carrying out work as sole member of a tribunal, a member of the public would reasonably expect judges to apply the same strictures to the carrying out of their functions as sole member of a tribunal as they were obliged to do by the declaration in terms of their function as judges. Furthermore, the reasonableness of the apprehension must take into account that the respondent had the ability to carry out his functions in that manner by reason of his training and experience.

87. The fact that the respondent is a judge is also of relevance to the applicant's criticisms of the respondent's "election not to swear any affidavit". The applicant submitted that none of the deponents preferred on behalf of the respondent could give evidence of –

(a) The actual nature of engagement between the respondent and Chief Superintendent McGinn.

(b) How it came to be that the respondent became the person to correct the record regarding the Morning Ireland broadcast or why he used the words he did.

(c) The view which had been formed by the respondent of the character and veracity of Chief Superintendent McGinn prior to embarking on his role as sole members of the tribunal.

In those circumstances, the applicant says that the opposition papers filed lacked the necessary degree of disclosure which would be expected in a case such as this.

88. The applicant relies heavily on the case of *R. (Huddleston) v. Lancashire County Council* [1986] 2 E.R. 941. It was acknowledged by Donaldson M.R. that the general principle in public law proceedings where a public authority is a party, that such litigation should be conducted "with all cards face upwards on the table", "does not take away from the necessity for an applicant to satisfy the Court of his entitlement to judicial review". Indeed, as Clarke C.J. stated in *R.A.S.*, the requirement to conduct the litigation with all cards face upwards on the table, "does not, it should be said, provide an excuse for those challenging public law measures to ignore the rules of evidence." Moreover, in *Murtagh v. Kilrane*, a case upon which the applicant placed heavy reliance, Barrett J. decided the case on the basis that the applicant had not pointed to evidence suggesting that the respondents were in breach of the law. A breach had to be identified by at least some evidence before there could be an entitlement to success based on a lack of duty of candour.

89. Counsel for the respondent has submitted that a judicial review claim in bias is to be distinguished from the type of public law litigation at issue in Huddleston. It must however be acknowledged that the *Murtagh* decision involved a claim for *certiorari* arising

from a claim that a judge who had recused himself was allegedly then involved in the decision to assign another judge. The claim in *Murtagh* was highly unusual on its facts, was an interlocutory application and not the hearing of the judicial review. Furthermore, it involved claims arising out of affidavits already sworn and information alleged to be in the possession of the Chief State Solicitor's Office.

90. The decision in *Murtagh* did not refer to the final paragraph of the judgment of McGuinness J. in *Bula Ltd. v. Tara Mines (No. 6)* whose judgment is also a majority judgment of the Supreme Court. In the course of that judgment she cited with approval the following dicta of the New South Wales Court of Appeal in *Dovad Pty Limited v. Westpac Banking Group* [1999] M.S.W.C.A. 113: -

> "Statements are to be found in judgments and writings to the effect that it would be good practice for judges who may be concerned that some matter or association could possibly give rise to an apprehension of bias ought in those circumstances to disclose the matter or association. Obviously this may be prudent. And, like judicial courtesy, it may serve the interests of justice in that it removes unnecessary obstacles and difficulties. However it is a different matter to elevate cautious or even good practice into a legal principle that the failure to disclose in such circumstances is itself a ground for setting aside a judgment. The party that succeeded in litigation has interest too."

91. The applicant has submitted that the duty of candour arises in two ways a) disclosure at the outset of the Tribunal and b) in the present judicial review proceedings. In relation to his first point, I am satisfied that there is no entitlement to judicial review merely based upon a failure to make full disclosure of all matters or association that might possibly give rise to an apprehension of bias. That would be contrary to the rationale of the above dicta. It would contrary to the interests of justice to permit an unmeritorious application to succeed merely because there had been a possibility that any connection or matter might have given rise to an apprehension of bias.

92. The applicant has also submitted that the "failure" to disclose all relevant connections at the outset of the Tribunal gave rise of itself to an apprehension of bias. I reject that as a general principle on the basis that to hold with it would be to side step the clear rationale underlying the above dicta.

93. In relation to his second point that the duty of candour required disclosure in the present proceedings, the Court must assess that in light of the other arguments made by the applicant. The above dicta has some relevance, however, in its essential rationale. An entitlement to judicial review in an unmeritorious claim would not be entitled to call itself a legal principle as it would be devoid of the qualities of rationality and justice inherent in the concept of legality.

94. In bringing judicial review proceedings, particularly in a case alleging bias, be it actual or objective, it is a matter for an applicant to establish his or her case on the basis of evidence. In relation to a claim that there has been a failure of the duty of candour, the

Court must consider a number of factors. These include the strictures that apply in the particular circumstances of judges, the evidence already before the court and the strength of the claim being made by the applicant.

95. There are numerous authorities in this jurisdiction to the effect that it is undesirable that persons exercising judicial functions would rely upon an affidavit made by themselves. In an unreported decision of the Supreme Court in *The State (Sharkey) v. McArdle* (4th June, 1981) Henchy J. stated: -

> "This Court has pointed out on a number of occasions that it is undesirable in a case such as this for a person exercising judicial functions to rely on an affidavit made by himself. Such an affidavit leaves him open to the risk of being cross-examined by the dissatisfied litigant. It would be more judicious if the affidavit were made by the court clerk or registrar, and it should contain an averment that it is made from information within the deponent's own knowledge and/or from information supplied by a named person."

96. That quotation was cited approvingly by Barr J. in *The State (Freeman) v.Connellan* [1986] I.R. 433. The Supreme Court in *O'Connor v. Carroll* [1999] 2 I.R. 160 again reiterated that it would be inappropriate for any judge to swear an affidavit in any such proceedings as that would leave him open to cross-examination in relation to the judicial process. It was said that that would be contrary to the public interest. More recently, the Supreme Court in *Walsh v. Minister for Justice and Equality and Ors.* [2019] I.E.S.C. 15 , when dealing with contempt of court issues, again stated it was generally recognised as undesirable that a judge should swear an affidavit in judicial review proceedings or indeed be made a party thereto. In *Walsh*, the Court held with regard to proceedings concerning alleged contempt in the face of the Court, any attempt to have a judge called as a witness should be carefully scrutinised by the Court hearing the trial.

97. At the Disclosures Tribunal, the respondent was not acting as a judge in a court of law; he was exercising quasi-judicial functions. His appointment as a judge of the Supreme Court continued; by virtue of that appointment he cannot hold another office or position of emolument. He is not therefore in receipt of separate recompense for his Disclosures Tribunal work. It is also notable that he is not a party to these proceedings in a private sense. This, as has been acknowledged by the applicant, is public law litigation. The respondent was carrying out a public function entrusted to him by the Oireachtas in which he was obliged to act in a quasi-judicial fashion in accordance with the law on tribunals of inquiry.

98. Whatever may be the position concerning the propriety of requiring a response on affidavit or in the witness box when a judge is sued in her or his capacity as a private citizen in a private law action, there appears no basis for setting aside the general principles regarding members of the judiciary swearing affidavits arising from the exercise of their function in judicial proceedings. In the context of proceedings arising from the work of judges appointed as sole members of a tribunal, the rationale for those principles apply with equal force.

99. The applicant's concerns must also be addressed in the light of the information actually before the Court. The applicant has complained that the deponents relied upon by the respondent cannot give direct evidence of relevant matters. He complains that Mr. Barnes in particular could not. as office manager, have known of the actual nature of engagement between the respondent and the Chief Superintendent or how it came to be that the respondent corrected the record or why he used the words he did, or indeed the view that had been formed of the character and veracity of the Chief Superintendent prior to embarking on his role as the sole member of the Disclosures Tribunal.

100. He has also complained that Ms. Cummins did not have actual knowledge of how the clarification came about. He says that Mr. Kavanagh, registrar to the Disclosures Tribunal, did not have any personal knowledge of the facts in relation to the Morris Tribunal.

101. In relation to these matters, it must be observed that Mr. Barnes was able to give highly detailed evidence concerning the layout of the Morris Tribunal, the nature of the facilities provided to the garda liaison team, the role that the liaison officer played and indeed general interaction between the team, the sole member of the tribunal and finally the interaction between the garda liaison officer and the legal personnel to that tribunal. It is stretching credulity beyond its breaking point that having acted as office manager for almost nine years to the Morris Tribunal he would have been unaware of the nature of these interactions.

102. Similarly, with regard to Ms. Cummings, she gives significant detail in respect of how it was that the correction was brought to the attention of the Morris Tribunal legal team and to the attention of the respondent in particular. While she cannot say what happened thereafter, it is clear from what she says and indeed from what is recorded on the transcript, that the respondent had his attention brought to it by the lawyers acting for An Garda Síochána.

103. Importantly, Mr. Kavanagh, registrar to the Disclosures Tribunal has sworn an affidavit verifying the statement of opposition. He says he does so "with full knowledge and consent and for the sole purpose of verifying the facts contained in the statement of opposition." The statement of opposition contains a clear statement that the clarification was carried out in his professional capacity as senior counsel to the Morris Tribunal and pursuant to the pre- approval given to the tribunal chairman on foot of legitimate concerns raised by the legal team acting on behalf of the Garda Síochána. The issue had been brought to the attention of the Tribunal legal team in the hearing room of the Tribunal by solicitor and counsel for the Garda Commissioner.

104. The statement of opposition also says that the respondent was not in a position to disclose the clarification in circumstances where he did not even remember the clarification which had been made, such was routine nature of the interaction between the Morris Tribunal chairman and the legal team acting on behalf of the garda commissioner. In those circumstances, and in particular where it says that at no point did the respondent deal directly with Superintendent McGinn it is incorrect to characterise this as a situation where a disclosure has not been made. A disclosure has been made of the

situation with regard to the respondent. He made it in the appropriate way which was through a statement of opposition verified by the registrar to his tribunal. A statement of grounds of opposition is a formal court document required under Order 84 RSC to be filed in the Central Office and served on the applicant by a respondent who wishes to contest an application for judicial review. In my view, the filing and service of this document is a statement personally made by a respondent judge or at least is akin to such a statement.

105. By way of comment, it was borderline disingenuous of counsel for the applicant to submit that there was no suggestion of a cross-examination in the present circumstances. If that be the case, then it is difficult to understand why there is a dispute about the manner in which the information has been put before the Court. The respondent has put before the Court his response to these matters. The statement of opposition is his answer and has been verified by the registrar to the Disclosures Tribunal in accordance with accepted practice. All affidavits that have been filed, have been filed on his behalf in these proceedings. The letter in response to the applicant's initial complaint came from him as Tribunal chair. If there is no suggestion of cross-examining him, then there is no reason why the applicant cannot accept that the information placed before the Court is the respondent's version of events. In my view, the insistence on a sworn document can only have been because there was a desire to at least keep open the possibility of cross-examination.

106. Finally, in respect of the necessity for a sole member of a tribunal personally to make an affidavit in response to an allegation of bias, I am of the view that there is an analogy, albeit a limited one, to be made with discovery in judicial review proceedings. Although there are no different rules for discovery in judicial review proceedings, it is important for a party seeking discovery to establish that the documents must be relevant to the legal action between the parties and not simply to the original dispute. As Clarke J. said in *Mac Aodhain v. Ireland* [2012] 1 I.R. 430: "…it seems clear that in judicial review proceedings it is important, when considering relevance, to identify how the document concerned can be relevant to the specific types of issues which will arise in the relevant judicial review application rather than being relevant to the substantive questions which were before the decision maker."

107. It is important therefore to recall that what the applicant must demonstrate is that on the facts there is objective bias. It is not appropriate to launch proceedings in the hope that "something will turn up". The High Court must assess the facts that it has before it, including those facts placed before it by or on behalf of the respondent. Those facts include relevant material put forward in the three affidavits filed on behalf of the respondent as well of those of the applicant.

Objective Bias

108. Under the well settled test in *Bula* the test for objective bias is threefold. The question is whether:

(a) A reasonable person with knowledge of the relevant facts would have;

(b) a reasonable apprehension;

(c) that the applicant would not (did not) have a fair hearing of the issues.

109. The concept of reasonableness is deeply embedded in the test. It relates to a reasonable person, as well as to a reasonable apprehension. The reasonable person is not a judge or a party, but a reasonable person in possession of the facts. It is a feature of the case that the applicant in affidavit, and in particular in his replying affidavit pointed to concerns that he had. Of course, the test is not whether he has these concerns or not, but whether a reasonable person in possession of the facts would have those concerns.

110. The concept is well known to the law. Reasonableness or more correctly its antonym irrationality is a ground frequently used when challenging decisions by way of judicial review. It has given rise to a jurisprudence peculiar to that type of challenge. The embodiment of the reasonable person is also quite familiar in the sphere of criminal law, as is the idea of "reasonable" as the standard of proof in criminal trials is one of "beyond reasonable doubt".

111. In both notions of "reasonable", a central feature is whether there is a rationality to the person or the position. For example, in explaining the concept of "reasonable doubt" to a jury, judges may use a formula of words which includes a doubt based on reason and a doubt which is not manufactured or fanciful. In my view, a reasonable person must act rationally and their apprehension must not be fanciful or manufactured.

112. The applicant has correctly indicated that the reasonable person must be possessed of all the relevant facts. In concluding his written submissions, the applicant identifies as relevant facts "that the respondent and Chief Superintendent McGinn worked together and alongside each other for a period of thirty months. Her task was to assist him in the Morris Tribunal legal team in any request that they had of the Garda Commissioner or Garda witnesses and to assist them in locating relevant documentation". The applicant submits that those facts of themselves would give a reasonable person cause for apprehension of the potential for bias. Prior to moving on to the applicant's submission that the clarification to the record at the Morris Tribunal heightened the concern of bias, it is necessary to consider this aspect of his claim that this amounts to objective bias.

113. In the first place, it is surprising that the applicant makes this claim at all given that he was in possession of the essential core facts from at the very least the beginning of Chief Superintendent McGinn evidence to the Disclosures Tribunal. His counsel cross-examined the Chief Superintendent in relation to her role. If her role as Garda liaison was truly a cause for concern, it is entirely unclear why he waited so long to make this particular claim. From the correspondence with the Disclosures Tribunal exhibited by the applicant, it is clear that he had no hesitation in making written complaints to the Disclosures Tribunal about any hint of unfairness e.g. his eleven page letter complaining mainly about the opening statement of counsel to the Disclosures Tribunal. It is particularly unclear why, if the Chief Superintendent's role itself gave rise to the claim of bias, that he had not immediately launched proceedings after the second interim report.

114. I make those comments not for the purpose of invoking issues of waiver or acquiescence, although they could probably be so invoked in relation to this aspect of his claim at least, but for the purpose of drawing the inference that those facts did not raise an apprehension of bias on the part of the applicant and, by extension, his lawyers who were clearly alert to this issue based upon the cross-examination of the Chief Superintendent. Most importantly for the application of the test for objection bias, it is abundantly clear that a reasonable person appraised of facts demonstrating that persons worked in close professional proximity for a number of years, albeit for different clients and in different capacities where one was a senior counsel and the other a garda tasked with liaison duties and which working relationship had ended eleven years earlier, would not have a reasonable apprehension of bias.

115. It is also important to record that the "facts" the applicant relies upon do not reflect the nature of the working relationship. Superintendent McGinn and the respondent did not work together and alongside each other for a period of thirty months. Superintendent McGinn as she then was, was a liaison officer for An Garda Síochána. It was the actions of An Garda Síochána that were being investigated in the Morris Tribunal.

116. As Ms. Cummins, solicitor acting for the Garda Commissioner stated she liaised with a number of members of An Garda Síochána. She then refers to Chief Superintendent McGinn and her replacement Inspector Downey. The applicant criticises her lack of detail about how the liaison occurred but in my view she is directly stating that she liaised with the relevant Garda liaison officer. Moreover, in outlining the manner in which the issue of the clarification was dealt with, she gives an example of counsel to counsel contact between the relevant legal teams at the Tribunal.

117. As Mr. Barnes has set out in his affidavit, on which he was not cross-examined, he was very familiar with the day to day running of the tribunals and the roles occupied by the individuals. I accept that he was entitled, and had the knowledge, to make the statements he made. The request for assistance from the tribunal would be made by the solicitor to the tribunal to the solicitor for the garda commissioner who, having considered same would, if it was in order, pass the request on to the garda liaison officer who would then ensure that the request was complied with in as expeditious a manner as possible. The garda liaison team were given an office at the tribunal, but so too were the media and other witnesses/solicitors who might need them on an ongoing basis. That office was located on a separate floor to where the tribunal chair and lawyers were based.

To suggest that Superintendent McGinn worked together and alongside the respondent in his capacity as lead counsel to the Morris Tribunal is entirely misplaced. Her role was to assist the tribunal in locating relevant documents. It is also important to identify what her role was not. Her role was not that of a witness. Her role was not that of a client of the respondent. Her role was not that of a party to the proceedings in which the respondent was acting. Her role was not akin to being an employee of a client of the respondents. It is also of relevance that the contact at the Morris Tribunal had been over twelve years prior to the present tribunal the subject matter of these proceedings.

118. The applicant has complained about various descriptions of the professional involvement of the respondent with Chief Superintendent McGinn. He compares "minimal professional involvement" in the statement of opposition with "passing professional acquaintance" in the affidavit of Mr. Barnes. He complains that these are not evidence based. In my view it is important to return to the verified statement of grounds of the respondent and consider it as his statement. I accept that "minimal professional involvement" is the respondent's statement as to his interaction with Chief Superintendent McGinn. I do so as the applicant has not pointed to any reason not to accept that (other than it has not been put on affidavit by the respondent). Moreover, the observations of Mr. Barnes as to how the Morris Tribunal personnel interacted and the process operated, derived from his lengthy period as office manager supports that contention.

119. In respect of point (a) of the applicant's grounds for claiming bias, on the basis of the "facts" put forward by the applicant and on the basis of the facts as I have found them to be, no reasonable person in possession of those facts could have a reasonable apprehension of bias that the applicant did not get a fair trial on the issue.

120. The second point upon which the applicant claims bias is that the respondent had expressed in a clear and public manner an opinion of the Chief Superintendent when he made the clarification at the Morris Tribunal. This, he claims, means that it is no longer a question of an apprehension that he might have formed a positive view or connection with the Chief Superintendent and might be prejudiced against any person making allegations against her; instead he claims that as he had formed a positive view, the apprehension was simply that he might not change his mind.

121. In examining what occurred on the 30th March, 2006, eleven years prior to the beginning of the Disclosure Tribunal, it is of note that the request for the clarification did not come from the respondent or any member of the Morris Tribunal team. As confirmed by Ms. Cummins it was clearly made at the request of the Garda Commissioner through his solicitor at the tribunal. It arose because of the manner in which the dramatised proceedings had been cut short on the radio. Counsel for the tribunal and counsel for the commissioner both listened to the tape.

122. The applicant has placed huge emphasis on the respondent's failure to establish by direct evidence of either himself or others as to whether the respondent took it upon himself to make the clarification. Again, this does not take account of the direct plea in the verified statement of opposition that the respondent sought pre-approval. Mr. Barnes has given evidence of what he says was his understanding of the practice was that before any type of application was made to the tribunal was that it was always drawn to the attention of the chair, Mr. Justice Morris. There seems to be no basis for doubting his understanding of that practice. Moreover, the clarification by the respondent occurred over four pages of a transcript. It is only at the end of that that the then chair Mr. Justice Morris stated: -

> "Yes Mr. Charlton thank you very much for bringing that to my attention and indeed the attention of the wider public. There is no doubt that if the broadcast terminated at the point that you indicate, it might well convey an entirely wrong impression of

what the evidence actually was. …. Because it would be quite wrong if anybody should be left with the idea that Chief Superintendent McGinn was not extremely helpful to the tribunal in the carrying out of its work. Thank you very much."

123. In circumstances where his own counsel was in a material sense interrupting the work of the tribunal, it is not credible that such an interruption would have occurred over a period of time amounting to four pages of transcript without the chair of the tribunal having interrupted prior to that as to querying the relevance of what was going on. In all the circumstances, it is clear that the interruption was made with the knowledge and approval of the chair of the tribunal.

124. Even more importantly, it is important to focus on what was actually said at the Morris Tribunal by the respondent, the height of which was that those who worked at the tribunal had great respect for the assistance that the Chief Superintendent had given and "it would indeed be unfair to her, given that she has done her best to assist the tribunal in terms of uncovering the truth, …" that people would believe that she wasn't interested in assisting a guard when he came to her and attempted to tell the truth because "in fact the opposite is, on the basis of the transcript, the case."

125. As is apparent therefrom, the height of any positive impression is that the respondent was stating, in his capacity as lead counsel to the Morris Tribunal, that Chief Superintendent McGinn had done her best to assist the tribunal in terms of uncovering the truth and that it was not correct to say that she was not interested when a named garda came to her and attempted to tell the truth because "on the basis of the transcript" the opposite was in fact the case. On two levels therefore, the quote was in fact quite particular and specific to the occasion of the Morris Tribunal. It was a statement that she had done her best to assist the tribunal in uncovering the truth at that tribunal and that on the transcript before it, it could not be said that she was not interested when a particular guard came to her and attempted to tell the truth.

126. The statement that she had done her best to assist the Morris Tribunal in terms of uncovering the truth has to be seen not in the context of her being a witness to the tribunal, but in the context of her seeking out documentation as requested by the tribunal and in the context of such request being passed on to her by the solicitor for the tribunal. That is a very specific role. There was no statement by the respondent that her evidence had been truthful, or indeed that she was a truthful person in general. Furthermore, this was not a statement made in the context of having deliberated upon her *bona fides* and arising in the context of the overall conclusions of a decision maker. This had arisen in a very particular context where the public may have been left under a misapprehension that a particular senior garda had essentially discouraged a garda from telling the truth.

127. The applicant complains that the clarification only referred to Chief Superintendent McGinn and not to An Garda Síochána generally. In my view that submission can be readily dismissed. The clarification was accepted on the day without demur by solicitor and counsel for the Garda Commissioner. The clarification had only been requested about the specific reference to Chief Superintendent McGinn and the clarification that would

correct any misapprehension about An Garda Síochána generally. The clarification in respect of Chief Superintendent McGinn was therefore, of itself, a correction in terms of the image or impression that was being left on the public of An Garda Síochána itself.

128. A reasonable person, who is rational but is not a judge or a party to the proceedings but who is in possession of all the relevant facts, would be aware that this was a statement made eleven years prior to the commencement of the Disclosures Tribunal. The applicant did not take issue with the fact that the respondent had forgotten that this clarification was made. The applicant's complaint is however, that the fact that this positive statement was said and would leave a reasonable person with a reasonable apprehension that this view had remained in place.

129. When one considers that the clarification had taken place more than eleven year prior it is unsurprising that the respondent had not recalled it. Is it of any importance to this issue that the fact that it was said is sufficient to cause a reasonable person to have a reasonable apprehension of bias? The positive view expressed was as a senior counsel in respect of the professional duties carried out by the Chief Superintendent in her role as liaison office in finding the truth there. All of the facts that I have found would be in the possession of the reasonable person. The reasonable person would be aware that these were matters which had occurred eleven to twelve years earlier. There was a minimal professional involvement over a period of about thirty months. Outside the sitting hours of the Morris Tribunal, the respondent and superintendent worked in different offices on different floors. The respondent's office was located on a floor to which the Superintendent did not have access.

130. The respondent had no memory of making this clarification. In terms of a clarification, the respondent was not the instigator of the clarification and had the pre-approval of the chairman of the Morris Tribunal when doing so. That statement of commendation of the superintendent was highly specific and particular to the work of that tribunal in terms of her role as liaison officer and also was said in terms of the actual evidence that had been given about her by another member of An Garda Síochána.

131. It is important to bear in mind the nature of the role of senior counsel and their interactions with clients, with witnesses, with professional persons such as members of An Garda Síochána. That role was highlighted in the Bula decision. Despite the applicant's submissions to the contrary the working relationship here was not any closer than the barrister/client relationships at issue in *Bula*. On the contrary, it was of a more minimal degree. The forming of a view, even a publicly expressed view, by a senior counsel as to bona fides of a person with respect to the particular brief on which they are acting, is not a matter of itself that would give rise to a reasonable apprehension of bias. Just having acted for a person previously was insufficient in Bula to disqualify a judge from acting; some additional factor must come into play. Indeed, it would be the rare case where an advocate would not have formed some view of a client either before or after the proceedings. That additional factor would have to be found in this case. Merely having had a view of a person especially a long time previously could not disqualify a judge from

sitting. It would require a clear and cogent link between the association and the capacity to influence the decision to be made. In the present case, there is nothing beyond a public statement of respect for the Chief Superintendent in her assistance to the work of an earlier Tribunal eleven years previously in seeking the truth. This was not in respect of evidence she had given but in respect of complying with requests for information sought by the Tribunal from An Garda Síochána.

132. In those circumstances, no reasonable person could have a reasonable apprehension of bias as regards the fairness of the respondent dealing with any issue that would require an assessment of the truth of the Chief Superintendent's evidence before him. In that regard, it would also be appropriate to factor in that the respondent had made a declaration under the Constitution as to how he would fulfil his judicial functions. These required impartiality towards all before him. As stated above, he was not acting in a judicial role but a quasi- judicial role. It is nonetheless a factor which ought to be taken into account that as a professional judge, the assessment of his ability to make impartial judgments when acting in either a judicial or quasi-judicial role.

133. I am quite satisfied that even if Chief Superintendent McGinn is considered a vital cog in, and central to the terms of reference of the Disclosures Tribunal, that no reasonable person could have a reasonable apprehension of bias based on the overlapping working period of the respondent as lead counsel to the Morris Tribunal and the Superintendent as liaison officer thereto. On that basis, I am satisfied that the applicant's claim of objective bias must be rejected.

134. It is strictly speaking unnecessary to go further and examine whether the previous acquaintance through their work at the Morris Tribunal between the respondent and the Chief Superintendent could have had any relevance at all to whether the applicant received a fair hearing of the issues. The applicant's claim was based upon Chief Superintendent McGinn playing a key role in matters concerning the applicant and the terms of reference to be investigated by the Disclosures Tribunal. It is notable that the applicant says that in or around September/October 2013 Chief Superintendent McGinn was informed by an inspector that an argument had occurred between the applicant and his partner. Chief Superintendent McGinn took a particular personal interest in the matter and assumed control of the investigation and directed the acts of members of An Garda Síochána. She directed a statement be obtained from his partner and that she be informed when the task was complete, and she also directed the inspector and a sergeant to obtain a statement from the mother of the applicant's partner. She convened a meeting with all district officers within the Donegal division along with other inspectors and members of lower ranks in order to devise a strategy to deal with the applicant. She directed the referral to the Garda Síochána Ombudsman Commission and also the HSE referral in respect of the applicant's partner's children.

135. The applicant is correct in his contention that this court must not refer to the findings of the Disclosures Tribunal as evidence in this case of the facts so found. The Tribunal report only amounts to evidence that those facts were found by the respondent but they do not

amount to evidence of the truth of those facts. That is in essence what the respondent pleaded in his statement of oppositions when he relied upon the fact in the interim reports "as being the matters which, as a matter of fact, were found by the Disclosures Tribunal". This Court is mindful of that situation. On the other hand, it is for the applicant, to show that the assessment of Chief Superintendent McGinn's evidence was relevant to the fair issue to be tried. In my view, on the basis of what he has placed before this court, he has failed to do so.

136. Undoubtedly, Chief Superintendent McGinn was in control of the Donegal division. Even on the applicant's own statement of grounds, it is said that Chief Superintendent McGinn was informed that an argument had occurred between the applicant and his partner. Although Chief Superintendent McGinn assumed control of the investigation and directed the acts of members of An Garda Síochána, his own statement confirms that a statement from his partner and from his partner's mother was taken by other members of An Garda Síochána. It was on the basis of that statement that the referral to the HSE/Tusla was apparently made. The applicant has not placed before this Court any material other than the various reports and the statements attached thereto. He has not demonstrated even an arguable case, that Chief Superintendent McGinn was acting in any way improperly by directing another member of An Garda Siochana to take a statement when she had a report made to her of an argument between the applicant and his partner. Furthermore, he has not in any way made an argument to this Court that this direction influenced in any way that could even remotely be seen as improper, the actual manner of the taking of the statement by the member of An Garda Síochána. Furthermore, he has not placed before this Court, any material, that would even give rise to an arguable belief that faced with the statements before her, that Chief Superintendent McGinn's convening of a meeting to discuss steps including referral to the HSE/Tusla (and the subsequent referral by another member) was in any way improper, irrational, unreasonable, wrong in law, biased, discriminatory or unfair.

137. All that the applicant has done is himself put forward bald assertions that Chief Superintendent McGinn was a key witness or somehow central or at least of importance to the issues before the Disclosures Tribunal. He has not however truly put the Court in a position to make any such determination. For example, in his affidavit he claims that his counsel's cross-examination was "described as "unkind" and any issues arising from that or any other cross-examination of her are simply ignored". The nature of those "issues" are not clarified or more particularly substantiated as relevant in the context of the Disclosures Tribunal's brief. I have not been able to comprehend his complaints in that regard even having read the reports. I have not been furnished with the relevant transcripts. The second and third interim report and certain statements or portions of statements are before the Court. Some of the second interim report is in narrative form citing from statements or from the transcript of evidence. At least one of the alleged incidents touching or concerning the disputed claims of domestic violence were reports given to Gardaí by private citizens.

That is not a finding of fact by the Disclosures Tribunal but part of the history of the information before the Tribunal. I mention this solely for the purpose of noting that the applicant has not made clear if he was disputing that those complaints were made or if his only dispute was that any of those complaints were wrongfully followed up by members of An Garda Síochána, be that at the behest of Chief Superintendent McGinn or otherwise. Either way, the simple assertion that Chief Superintendent McGinn was at the apex of the Donegal division is not sufficient to show that this, or any direction she gave, was central to the issue before the Disclosures Tribunal, which was in essence an improper use of referral procedures to the HSE/Tusla.

138. In short, the applicant has failed to demonstrate that in relation to the fair issue to be tried, Chief Superintendent McGinn's evidence, and in particular the evaluation of her evidence by the respondent, that he would not receive a fair hearing of the issue, namely the contacts between the members of An Garda Síochána and the HSE/Tusla in relation to him. In his replying submissions the applicant laid great emphasis of the stake that Chief Superintendent McGinn had in the outcome of the Disclosures Tribunal as head of the Donegal division and that it was not simply her evaluation as a witness that was at issue. In my view any such stake, if there be one merely arising from her position as head, is so tangential to the real issue before the Disclosures Tribunal that it can be dismissed out of hand.

139. I would finally refer to the applicant's submission that the position of reasonable apprehension of bias could be judged upon the standard of a juror who would be excused on the grounds of objective bias if they knew any member of An Garda Síochána associated with a particular case. That situation is again to confuse good practice with an invariable rule. In selecting juries parties are allowed to challenge for cause shown any number of jurors. The situation where a judge may be satisfied with the cause shown may not necessarily reach a standard of objective bias if the same circumstances arose in respect of a judge. In the context of a potential juror in a jury trial, it is always better to err on the side of caution. This is particularly so where at the outset of a trial, the prosecution and the judge may never know which member of An Garda Síochána is really going to be of relevance in a particular case. Moreover, judges and jurors are not identical in terms of their professional training and experience. Judges, by the very nature of their job, may have seen or even made pronouncements previously in respect of certain gardaí, but did so purely in a professional context. Jurors would not have that type of professional contact with the gardaí. That analogy is rejected.

140. In the present case, a comment made by respondent in a highly particular situation eleven years previously when he was acting as senior counsel to a different tribunal, to the effect that a Chief Superintendent had done her best to assist that tribunal in finding the truth in her capacity as a liaison officer, has been elevated by the applicant as a ground for claiming objective bias, but this does not bear rational scrutiny. No reasonable person with knowledge of all relevant facts could have a reasonable apprehension that as regards the matters that were investigated in the second interim and third interim reports of the Disclosures Tribunal that this applicant did not have a fair hearing.

141. For the reasons set out above, the applicant is not entitled to the reliefs claimed. I therefore reject his application for judicial review.