Neutral Citation [2015] IEHC 297

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 353 J.R.]

BETWEEN

GARDA JOHN KELLY

APPLICANT

AND

COMMISSIONER OF GARDA SIOCHANA

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 28th day of April, 2015

1. This is the third judicial review brought by the applicant, a Garda based in Drumshambo Garda Station, relating to events surrounding after hours inspection of a licensed premises on the 20th September, 2009. The judicial reviews relate to a Garda disciplinary process commenced against Garda Kelly regarding his investigation of the incident. The first of these resulted in a decision in his favour of the Supreme Court in *Kelly v. An Garda Commissioner* [2013] IESC 47, and the second was compromised to his satisfaction before it came on for hearing and after leave was granted. This judicial review relates to the conduct of an appeal from a decision in the disciplinary process by the Board of Inquiry.

Background facts

2. The applicant joined the Gardaí in 1982 and has at all relevant times been stationed at Drumshambo Garda Station. He was dismissed from the force following an investigation of his inquiries into an alleged after drinking episode at the local licensed premises. The facts surrounding this incident are not relevant to this judicial review but I do note that the controversy was whether the applicant had accurately logged the details of his inquiry into the PULSE system. No prosecution was brought against the publican, and following on a complaint made by the publican the applicant was disciplined pursuant to the Garda Síochána (Discipline) Regulations 2007 S.I 214 of 2007 (hereafter "the Regulations") and was dismissed from the force. He has as a consequence lost his entitlement to his pension until he reaches the age of 65 years, and he is in fact to retire in the next few weeks, before his 65th birthday. The result of the disciplinary process has significant financial cost to him personally.

Earlier inquiries and litigation

3. Superintendent Brian Brunton was appointed investigating officer on the 18th May, 2010 pursuant to Reg. 23 of the Regulations. Following the investigation a Board of Inquiry was established to investigate six counts of alleged misconduct on the part of Garda Kelly arising from his investigation into the alleged after-hours drinking.

4. That Board of Inquiry met first on the 26th May, 2011 and gave a determination following a lengthy oral hearing on the 11th July, 2011. An appeal by the applicant was determined by the Appeal Board and dismissed. Judicial review proceedings were commenced in the High Court, and the applicant was ultimately successful on appeal to the Supreme Court which gave its judgment on the 5th November, 2013, and remitted the matter back to the Board of Inquiry for it to state its reasons for recommending the dismissal of Garda Kelly from the Force.

5. O'Donnell J. gave the decision of the Supreme Court having concluded that fairness of process required that the Board of Inquiry and the Appeal Board should identify the tests that each applied and the reasons for the decision. He concluded that the obligation to give reasons must be:-

> *"More than a simple determination of a breach of discipline and what can be logically deduced therefrom, and should necessarily include the Board's conclusions in relation to matters of importance raised in this case on behalf of the Garda Kelly, including, the significance of the emergence of Ms McGourty's statement and the evidence of Mr McNulty, the taxi driver."*

6. O'Donnell J. concluded that the Regulations require:-

> *"That reasons be given for any determination made by the Board of Inquiry unless it can be said that the issue is so self-evident and narrow that the mere fact of the decision discloses the reason. That cannot be said to be the case here."*

7. He also dealt with the decision of the Appeal Board as follows:-

> *"It is entirely possible that the Appeal Board correctly and scrupulously applied this precise test before dismissing the appeal. But, the difficulty in this case, which in my view is fatal, is that neither this Court nor the High Court has any way of knowing that it did so."*

8. O'Donnell J. quashed the decision of the Appeal Board, which had upheld the Commissioner's decision to dismiss the applicant, and directed that the Board furnish reasons for its decision and that the matter should proceed from that point.

9. On the 20th December, 2013 the Board of Inquiry published a report giving its reasons for recommending the dismissal of Garda Kelly as a member of the Garda Síochána. The applicant then served a notice of appeal on the 11th January, 2014 and a new appeal board was constituted on the 8th May, 2014.

10. The applicant then commenced a second set of judicial review proceedings seeking to review the decision of the respondent to suspend him from his duties pending the outcome of the appeal. That second set of judicial review proceedings was compromised on

the basis that the applicant was restored to duty and the parties expressly agreed that the proceedings would continue before the Appeal Board.

The continued or new appeal
11. The report of the Board of Inquiry which was given on the 20th December, 2013 set out its reasons for recommending dismissal, namely that Garda Kelly had knowingly made a false statement for the purpose of founding a prosecution against the licensee of the premises, that he had made a written statement containing such falsehood, failed to avail of an opportunity to correct his witness statement, and that entries were made in his notebook with the intention that they deceive his superiors. Broadly speaking the Board of Inquiry took the view that the deception alleged to have been perpetrated by Garda Kelly was grave and was a breach of discipline of such a serious nature that a dismissal was warranted.

12. Following on the furnishing of reasons Garda Kelly indicated immediately to the Garda Commissioner that he intended to appeal and sought documentation and raised questions of the Board of Inquiry with that in mind. A formal notice of appeal was lodged on the 10th January, 2014 and by a letter of the 20th January, 2014 Garda Kelly was informed that an Appeal Board had been established. The appeal documentation ran to 49 paragraphs.

The process before the Appeal Board: this judicial review
13. Certain preliminary objections with regard to the composition of the new Appeal Board were resolved satisfactorily between the parties in early 2014. The applicant however by this judicial review seeks to prevent any further determination by the Appeal Board arising from email correspondence with the investigating officer Superintendent Brunton. The primary focus of the judicial review is the decision of the chairperson of the Appeal Board to correspond with and invite submissions from the investigating officer, and it is asserted that the manner by which the Appeal Board purported to carry out its appellate process was in breach of natural justice and/or in breach of the Regulations themselves. Before I consider the procedural provisions of the Regulations with regard to the conduct of an appeal, I will consider the objection of the respondent that some of the claims made in this judicial review are barred by time.

Objection as to time
14. This judicial review seeks in all 29 categories of relief on 58 pleaded grounds. The respondents have made a preliminary objection that some of the reliefs sought are time barred. This plea is self evidently correct with regard to the pleas at paras. i, ii, iii, iv of the reliefs sought, in that all of them relate to the original Board of Inquiry which finished its determinations and made recommendations on the 7th January, 2014, and which have already been the subject of the first and/or second judicial review. I am also of the view that the claim for an order of *certiorari* to quash the decision to dismiss the applicant made on the 3rd January, 2014 is also time barred, and that each of these five claims relate to the previous Board of Inquiry and were dealt with or ought to have been fully dealt with and determined by the second judicial review such that the rule in *Henderson v. Henderson* (1843) 3 Hare 100 applies. The applicant commenced judicial review proceedings in 2014 and settled those as a result of which he *inter alia* agreed to continue with the appeal before the Appeal Board. The Board of Inquiry has completed its function under the Regulations and application for judicial review of the findings of that Board are either barred by statute or have already been conclusively determined in litigation between the parties.

15. I consider that those claims are barred by time, or under the rule in *Henderson v Henderson* and I turn now to consider those claims not so barred. The claims may be grouped under two heads: that the Appeal Board erred and failed to comply with fair procedures in refusing to furnish to Garda Kelly copies of all correspondence had with the investigating officer, and second that the Appeal Board had no power to seek any assistance from him in the performance of its functions. The ancillary claims are for orders terminating the disciplinary process and for declaratory relief that fairness has not been, and cannot now be, achieved in that process.

16. I start by an analysis of the Regulations

Procedure under the Regulations
17. The Garda disciplinary Regulations were made in 2007 with the purpose of establishing a procedure for the resolution of complaints against members of An Garda Síochána. The procedure incorporates processes to provide fairness to a garda facing a disciplinary complaint and a full and independently constituted appeal process is provided.

18. Part 3 of the Regulations deals with the investigation of an alleged serious breach of discipline on the part of a member of the Gardaí. The procedure provides for the establishment of a Board of Inquiry to determine whether a breach has been committed by the member concerned, and if so to recommend to the Commissioner that disciplinary action be taken in relation to the member. Certain pre-hearing procedures are set out for the Board of Inquiry and certain procedures are mandated for the conduct of an oral hearing before the Board, if one is required.

19. Regulation 33 provides for an appeal by the member concerned who may, not later than seven days after receiving notification of the decision of the Commissioner, appeal against either the determination of the Board of Inquiry itself or against the disciplinary action decided on or to be recommended by the Commissioner, or against both the determination and the disciplinary action or recommendation.

20. Regulation 34 provides for the establishment of an Appeal Board to hear and determine the appeal. The Appeal Board consists of three persons, one of whom shall be either a judge of the District Court, a practicing barrister or a practicing solicitor of not less than ten years standing, the other members being either the Commissioner or a member selected by her from a panel of deputy commissioners and assistant commissioners, and a member selected by the representative association of the Garda concerned or a member selected by the Commissioner.

21. An appeal may be based on one or more of the five grounds set out in Reg. 33 (3), the relevant grounds on which Garda Kelly appealed being Reg. 33 (3)(a) that provisions of the Regulations were not complied with, Reg. 33 (3)(c) that all relevant facts were not ascertained or considered or were not considered in a reasonable manner, and Reg. 33 (3)(d) that the member was not given a reasonable opportunity to be heard and to respond to matters raised.

22. Regulation 34 (7) is important and this provides:-

> *"Subject to these regulations, an Appeal Board shall determine its own procedure."*

Procedure before the hearing of an appeal

23. The Regulations are detailed in the procedures which must be followed before an appeal is heard. Regulation 35 (1) requires the Board to request the member in writing to send to it a written statement of the grounds of appeal and any submissions that it may request. Garda Kelly submitted a long written statement of his grounds of appeal and this contains both the grounds of the appeal and his submissions.

24. The Appeal Board is given a discretion to invite oral evidence, and such evidence may be given in writing by *"any person"* invited by the Board to do so, and it also is given the power to grant or refuse a request from any party to the proceedings to give evidence to it.

Procedures on hearing of appeal
25. Specific protection is afforded to the member appealing a decision and he or she is entitled to be accompanied at the hearing and be represented by an official of his representative organisation, another member of his or her choice, or by a solicitor or a barrister at the member's own expense, and the member is entitled to make oral submissions to the Appeal Board either in person or through such representative.

26. Provision is expressly made for the circumstance when the Appeal Board is hearing oral submissions and certain persons may be present including the member concerned and any person who is entitled to represent the member, and a catch-all provision permits *"any other person permitted by the Appeal Board"* to be present in such oral hearing.

27. The applicant seeks by this judicial review to quash the decision of the chairman of the Board of Appeal to refuse to furnish all of the correspondence held with the investigating officer and/or seeks *mandamus* for the delivery up of that correspondence. The reliefs sought at v to xiv inclusive all relate to the request for comment or submissions from the investigating officer and/or to prevent the Appeal Board from accepting and/or considering the correspondence from Superintendent Brunton. The grounds on which this relief is sought are procedural, that the Regulations do not admit any role for the investigating officer at this stage in the process.

28. The specific provisions of the Regulations which regulate proceedings at the Appeal Board and the pre-hearing protocol are the main focus of this judicial review. In summary, and I will detail the precise arguments later in this judgment, the applicant claims that the communication had between the Appeal Board and the investigating officer is not permitted within the specific appellate procedure established by the Regulations, and is in breach of fair procedures. It is argued by the applicant that the process envisages an inquisitorial and not adversarial system or process. It is also argued that while the Appeal Board may hear evidence, which may be given orally or in writing, the Board has no statutory power under the Regulations to permit to require submissions or comments from any person other than from the appellant herself or himself.

The procedures adopted by the Appeal Board
29. The applicant's judicial review is focused on a particular series of happenings in and around early June of 2014. On the 5th June, 2014 the Chairperson of the Appeal Board, a senior counsel, wrote to the investigating officer, Superintendent Brunton, and provided him with a copy of the submissions made by the applicant and his grounds of appeal, and a reply was invited. The respondent asserts that this was done by the Appeal Board in the exercise of its discretion contained in Reg. 36 (1) which permits the Board at its discretion to invite any person to give evidence orally or in writing. The investigating officer by a letter of the 7th June, 2014 furnished a detailed document to the Chairperson of the Appeal Board and the applicant expresses a number of concerns arising out of this document.

30. The first point that is made is that the letter was received from Superintendent Brunton less than 48 hours after email correspondence from the Chairman of the Appeal Board and it is suggested that I ought to extrapolate from this fact that the appeal documents submitted by the applicant had been provided at an earlier date in other correspondence either by the Appeal Board or by some other person not identified. An alternative argument namely that the investigating officer showed "admirable industry" is asserted to be "not credible". I reject this argument as it is not my function, nor would it be proper for me, to speculate as to how Superintendent Brunton came to furnish such a prompt reply.

31. Counsel for the applicant also makes the point that it is apparent from the reply furnished by the investigating officer that he had been furnished with copies of the High Court and Supreme Court judgments in the first judicial review proceedings. Written judgments of the Superior Courts are now publicly available on the Courts Services website and this is a welcome means of making judgments of these courts more accessible, of improving the participation of lawyers and members of the public in the administration of justice, and furthering generally the rule of law by improving knowledge of the common law. I am certain that the decisions of the High Court and of the Supreme Court in the first judicial review would have been of direct interest to members of An Garda Síochána generally, and to the colleagues of Garda Kelly in Drumshambo in particular and also of course to Superintendent Brunton. I can make no criticism of the fact that Superintendent Brunton was aware of the High Court and Supreme Court judgments, nor of the fact that copies of the written judgments were furnished to him by the Appeal Board, if this in fact occurred. Superintendent Brunton was involved in the initial investigation and would have been interested in the written judgments on that account and on account of having been requested to comment on the grounds of Garda Kelly's appeal. I reject the argument that any injustice or unfairness arises from the fact that Superintendent Brunton was given or had available to him, by whatever means, these judgments of the Courts.

The exchange of correspondence
32. The first substantial ground on which the applicant brings this judicial review is that there has been a failure of transparency in the process and this results in unfairness in the process. By email of 10th June, 2014 the applicant's solicitors were furnished with a document from Superintendent Brunton. In an email of the 11th June, 2014 the solicitors for the applicant sought all correspondence between the Board, its members and the investigating officer,

33. By an email of the 12th June, 2014 the respondent enclosed a copy of the response from the investigating officer and suggested that any matters "arising in relation to" the investigating officer's response can be addressed at the hearing "as a matter of course". It is not said in that email that the investigating officer would be available for cross examination at the hearing but somewhat elusively the following comment is made:-

> "The presence of the Investigating Officer at the hearing is no more than to assist the Board if required and as appropriate."

34. The applicant was told he need not have any concerns "in this regard".

35. By another later email of the same day, the solicitors for the applicant, stressing, as would be expected, their client's right to natural justice and fair procedure, suggested that the Appeal Board ought not have invited Superintendent Brunton to furnish "submissions", and that objection would have been made had the applicant been told in advance that this was intended. A concern is

expressed in the letter as to the "highly partisan submissions" submitted by Superintendent Brunton and general concerns are raised with regard to the approach adopted by the Appeal Board in regard to his involvement. The solicitors for the applicant ask in that letter for:-

> "A clear statement of the precise legal basis upon which our client's Grounds of Appeal were forwarded to Superintendent Brunton, and the precise legal basis upon which submissions were sought and accepted from Superintendent Brunton."

The Board responded by an email of the 13th June, 2014 saying the matter was as previously indicated and that there was no requirement to furnish the documents.

36. From the above short exchange of emails it can be seen that the applicant has three complaints:

> 1) That the Appeal Board had no power to seek "submissions" from Superintendent Brunton.
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> 2) That the legal basis upon which the applicant's appeal documentation was forwarded to Superintendent Brunton ought to be set out.
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> 3) That the precise legal basis upon which submissions were sought and accepted from Superintendent Brunton ought to be identified and that for this purpose the correspondence had between him and the Board must be disclosed.

I deal first with the last concern.

37. The argument raised in correspondence was with regard to the structure of the appeal process and the appellate board was asked to indicate the legal basis upon which the investigating officer was asked to comment, or make submissions, by virtue of which the appellate documentation lodged by the applicant was furnished to him. There was no direct request in the correspondence for the letter sent to the investigating officer by the Board, although that has become a central plank of the argument on the application before me.

38. Grounds 34 and 37 in the grounds in which judicial review was sought pleads simply that:

> "34. An open and transparent disciplinary process demands that the documentation sought should be provided to the applicant
>
> 37. It is ultra vires the Appeal Board to refuse to disclose communications between the Appeal Board, and any of its members, and the investigating officer."

39. The core of the complaint made by the applicant is that the appellate body may not unilaterally engage in correspondence with witnesses or outsiders to the process. It is asserted that the Appeal Board is wrong in law and has breached fair procedures by withholding all of that documentation. It is argued that there is a real and not irrational fear on the part of the applicant that the correspondence was such that it tainted the process and that while some of the documentation sought has been furnished the refusal to furnish the letter inviting Superintendent Brunton to assist (to use a neutral word) cannot reasonably admit of an innocent explanation. The applicant argues that it is difficult to conceive of an innocent explanation for why the letter sent to the investigating officer was not disclosed to the applicant's solicitors once that documentation was sought. Reliance is placed on para. 14.36 of Hogan and Morgan, *Administrative Law in Ireland*, 4th ed., to support a proposition that the Appeal Board has breached the rule of *audi alteram partem* as follows:-

> *"One form of denial of audi alteram partem occurs when, although some type of hearing (whether oral or written), has been allowed, the decision maker relies upon information or argument which has been obtained outside the hearing and not disclosed to the party adversely affected by it….The most straight forward category is where the evidence or information is gathered specifically for that case. Here there is no doubt that the principle has been violated."*

40. In *Prenderville v. Medical Council* [2008] 3I.R. 122 Kelly J. held that the receipt of legal advice by a decision maker without permitting the affected party to comment on it also offended against the principle of *audi alteram partem*. It is argued by analogy that the Board has failed to give a complete disclosure such that the question asked is not clear.

41. I accept first that disclosure is a means by which fairness is achieved in administrative decision making and that the requirement of disclosure, in the context of fairness and transparency, flows from an entitlement to know the evidence documentation and argument on which a deciding body is asked to adjudicate and a person likely to be affected by a decision must, where necessary, or maybe even where desirable, be entitled to interrogate that evidence by cross examination or the furnishing of contrary documentation or argument. The respondent argues that the documentation refused by the Appeal Board is purely administrative, and that the requirement of fairness imports disclosure of Superintendent Brunton's substantive response, but not all incidental or administrative correspondence seeking that response. It is argued that the smooth operation of the process, or of any administration process, would not be supported by full disclosure of all correspondence.

Discussion: The role of the investigating officer

42. In order to fully appreciate the argument made by the applicant, it is necessary to briefly consider the provisions of the Regulations with regard to the conduct of an investigation and the role of the investigating officer in this.

43. An investigating officer is appointed for the purposes of an investigation of an alleged serious breach of discipline as define in Part 3 of the Regulations. His or her role is to recommend or advise if inquiry is warranted. The role is to avoid unwarranted continuation of an investigation. The Commissioner appoints an investigating officer pursuant Reg. 23 "to investigate the alleged breach". The investigating officer after he or she is appointed informs the member concerned of his or her appointment and of the matters to be investigated. Regulation 24 (2) provides that the investigating officer shall carry out the investigation either alone or with the assistance of another member or members. Various procedures not relevant to this judicial review are out in place to ensure fairness and transparency in the process. At the completion of the investigation Reg. 24 (5) sets out what must be done by the investigating officer as follows:-

> *"Within 7 days after the investigation has been completed, the investigating officer shall submit to the Commissioner a written report of the investigation containing his or her recommendation as to whether the facts disclosed warrant the establishment of a board of inquiry, together with copies of any written statements made during it and details of any information, document or thing which the investigating officer was made aware of during the investigation."*

44. If it appears from the report of the investigation that a Board of Inquiry is warranted, then the Commissioner appoints a Board to recommend to the Commissioner what, if any, disciplinary action is to be taken in relation to the member. The investigating officer is not a member of the Board of Inquiry, and by the Regulations no person who has been involved "in any capacity" in relation to "an earlier aspect of the case" may be a member of that Board.

45. The Board of Inquiry then has certain pre-hearing protocols imposed by Reg. 27 and again the investigating officer has no role to play at the pre-hearing or at the procedures mandated by Regulation 29. There is a general provision in Reg. 29 (14)(b) that the Board of Inquiry may permit any person to give evidence orally or in writing, and evidence is to be given on oath or affirmation. There is nothing in the Regulations that requires the investigating officer to be called to give evidence at the Board of Inquiry, nor could it be said that there is any reason why the investigating officer cannot give such evidence.

46. Following on a hearing the Board is mandated under Reg. 30 to give a written report to the Commissioner within 21 days of the conclusion of the inquiry and that report shall include copies of statements made or documents provided to the Board together with a verbatim record of the proceedings, the Board's determination and its recommendation. The Commissioner then has power under Reg. 31 to act on the recommendation subject to the limitations and requirements that are imposed by virtue of the rank of the member concerned.

47. An appeal may be made by the member concerned to be lodged not later than seven days after receiving notification of the decision of the Commissioner.

48. The Appeal Board is established for the purposes of determining that appeal and it may pursuant to Reg. 34 (7) *"determine its own procedure"*. Regulation 35 and 36 however do set out a considerable amount of provisions relating to the structure of the appeal.

The power of the Appeal Board to investigate: Is the appellate process prosecutorial or adversarial?
49. It is argued by the applicant that the investigating officer furnished not merely evidence that he wished to tender for consideration by the appellate board but also submissions, and that he treated his role and the process as adversarial, and took within that adversarial process a prosecutorial role himself. It is further argued that the investigating officer ought not to have been furnished with the submissions already furnished by Garda Kelly, as that the investigating officer has no formal role in the appellate process it was not proper for the Appeal Board to seek submissions from him. Indeed it was suggested that, as there was nothing in the Regulations that permitted the Appeal Board to seek submissions from the investigating officer, that there was no provision to enable the Appeal Board to take the submissions on board.

50. I turn now to attempt to characterise the response from the investigating officer.

51. The respondent argues that under Reg. 36(1) the Appeal Board is an investigating body with the power to seek evidence from any person, a power not constrained by any limitations as to how the evidence might be furnished to it, and it is clear from the language of the Regulation that evidence can be furnished or required to be furnished either orally or in writing. There is nothing in the Regulations that prevents the Appeal Board from seeking evidence from the investigating officer.

52. I reject the argument made by the applicant that an investigating officer can have no role to play in the appeals process, as his investigation may have generated material which can properly be characterised as evidence in the investigation, and it appears to me to be proper not to prevent the Appeal Board from obtaining assistance from him, provided procedural fairness is met.

53. The Appeal Board has a discretion to seek evidence from any party that it considers can assist it its inquiries under Reg. 36(1), and there are no limitations on the class of persons who may be so invited. It goes without saying, and is accepted by the respondent, that the discretion to seek evidence is a discretionary power that must be exercised lawfully, but that this exercise must be seen within a context that respects the independence of the appellate body itself, the power of the appellate body to manage its own process and administration.

Discussion
54. The Appeal Board is established under the Regulations and is mandated to have a chairperson with legal qualifications and who is a practising lawyer, either a barrister or a solicitor. The Appeal Board in this case was chaired by a senior counsel. It is entitled, as any administrative body must be, to manage its own process and administration, and Reg. 36 (1) gives it the power to carry out an investigation in any way it considers desirable. The discretion given to it to seek evidence is a discretion to invite evidence from any person, and it may seek that to be furnished either orally or in writing. Fairness would dictate that any written evidence would be furnished to the appellant before the appeal came on for hearing, an opportunity to cross examine or otherwise test the evidence is in my view implicit in this. Thus far the matter cannot be controversial.

55. What was received from the investigating officer in this case was a long document which contained the results of the investigating officer's inquiry and was lengthy and discursive. The Chairperson of the Appeal Board in his email of the 10th June, 2014 described it as "responding submissions submitted by" the investigating officer. This may have been a somewhat unintended characterisation of the replying document furnished by the investigating officer, and it is a matter for me to properly characterise Superintendent Brunton's four and half page letter, which I now do.

Superintendent Brunton's response of 7th June, 2014
56. Superintendent Brunton opened his response by referring to an "your email correspondence dated 5th June 2014" and outlined his response to the "Grounds of Appeal as submitted". It is clear then that Superintendent Brunton had the grounds of appeal lodged by Garda Kelly. He dealt in numbered paragraphs with several of the points raised in the grounds of appeal, identifying the various points in bullet paragraphs.

57. Superintendent Brunton did more than merely furnish written evidence and his response is replete with argument and comment. In particular I note the following:

> 1) At ground 13 he points to other statements of evidence from Inspector Sweeney and comments that "this is not covered in the statement of evidence" and then goes on to make the following observation:-
>
> > "The fact that something is not mentioned in the statement does not mean that there is a deliberate attempt to conceal something. When I met with Mrs McGroarty to take her statement she did not indicate that she had made a statement to Sergeant Fahy and therefore my investigation was not influenced by what may have been in that statement. What is of note and does appear to have been commented upon by the High Court, the Supreme Court or anywhere in the Grounds of Appeal, is that at the end of the statement made by Mrs McGroarty to Sergeant

> Fahy she clearly states that "I do not wish to make an official complaint at this time". This brings into the question the value of, if any, that particular statement to my investigation and whether I could have used it as part of my investigation. If that statement was brought to my attention at the time and I saw the comment at the end of the statement I would have taken a completely new statement anyway indicating that she was not prepared to make a complaint. It is also important to point out that any statements or correspondence taken or written by Sergeant Fahy at that time related to the investigation into after hours drinking at Monica's Bar and are a separate matter to my investigation into the discipline matter. It is important to distinguish this here again as during the Board of Inquiry it was also necessary for me to clarify this issue on day 3, page 128, paragraph 419."

2) At ground 14 he commented with regard to what he saw as "discrepancies" with identified paragraphs in the transcript of the evidence taken at the Board of Inquiry.

3) At ground 15 he commented that the issue of a statement from an identified witness was "misrepresented".

4) At ground 17 he commented on the observations of the Supreme Court with regard to two possibly different statements taken from Mrs McGroarty and stated the view that "there was no substantive difference in the two statements in my opinion", and went on to quote directly from p. 16 of the Supreme Court decision.

5) At ground 18 he made an argument as to the meaning of the relevant Regulation.

6) At ground 19 he made the point that it was evident to him during his investigation that all the witnesses in the case knew each other and some were related. Again he noted the Supreme Court observation that the town of Drumshambo had a very small population, and went on to say that had he known that Sergeant Fahy was the secretary of the golf society (a point that was made by Garda Kelly as suggestive of bias) "it would not have impacted on my investigation of this matter".

7) At ground 22 he refers again to the Supreme Court decision, and comments that the Supreme Court had "correctly" recognised and made comment "on the incorrect reading of my statement of facts by the High Court". He also says that the High Court was correct in other matters.

8) At ground 23 he made an observation on Garda Kelly's own belief as to the number of people who were on the premises and he notes and identifies what he believes are various discrepancies in the statements made by a number of people.

9) At ground 30 he points to the transcript of the hearing of the Board of Inquiry and makes the following comment:-

> "An impression has been given throughout the Grounds of Appeal that Sgt Fahy is trying to hide something here. He is quite open about this when questioned under cross-examination about when he met Mrs McGroarty. While it was late on in his cross-examination when Sergeant Fahy introduced the statement he does provide a perfectly plausible explanation as to why he did not provide it. He was away on UN duty and his papers were back in Drumshambo."
>
> He then went on to point to various factors which he believes adds weight to particular findings of fact, and says:-
>
> "To get a proper feel for this particular issue it is necessary to read the direct evidence at cross examination of Sergeant Fahy as contained in the transcript."

10) At ground 45A he makes the point that the fact that people were or were not related to one another "made no difference nor did it influence my investigation".

11) At ground 45B he points to the fact that the legal representatives of Garda Kelly had "an opportunity during cross examination of witnesses to raise [questions as to the sobriety of witnesses] and also an opportunity during closing submissions to raise with the Board itself if it believed to be an issue".

12) At ground 45C he makes the point that the availability of CCTV footage "was not raised as an issue with me during my evidence to the Board of Inquiry."

13) At ground 45D he responds by saying "this issue is commented upon throughout this submission. I do not accept that the statement of facts is inaccurate in a critical respect." He points to the fact that the Supreme Court does not appear to share this view but that on the contrary the Supreme Court referred to it as an *"admirably succinct document."*

14) At ground 45E he says that Sergeant Fahy "provided a perfectly plausible explanation" during his evidence regarding the CCTV.

15) At the end of his letter Superintendent Brunton gave a general comment which is worthwhile repeating in full:-

> "I interviewed every witness in this case and was present at the Board of Inquiry for all evidence. It is extremely difficult to capture in a written statement or transcript of evidence the manner in which evidence is presented. Body language, cold tone, sincerity and emotion are issues which are evident to a jury, in the case of a criminal trial and a Board of Inquiry in this particular case. These issues contribute to forming an opinion regarding evidence presented. It is my opinion that not only was the threshold as provided for in Reg. 9 met, it was exceeded with regard to every breach to be considered.
>
> The Board of Appeal will not have the opportunity or the benefit of hearing of all of those witnesses in person however, the weight of the evidence provided to the Board of Inquiry coupled with their experience should carry sufficient weight to the Board of Appeal.
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> In the submission he has made comment on points that I believe I can provide clarification or informed opinion. I trust these submissions will assist the Board of Appeal in your deliberations."

Discussion on the contents of Superintendent Brunton's report
58. On any characterisation of that response by Superintendent Brunton it includes comment, observation with regard to evidence, observation with regard to the particular weight that should be given to evidence, and comment on what parts of the evidence influenced or did not influence his findings. Superintendent Brunton seeks to draw together various threads from the transcript of the hearing before the Board of Inquiry, and the decisions of the High Court and Supreme Court in the first judicial review and comment on the credibility of, and weight that ought to be given to, certain evidence tendered by Garda Kelly for the purposes of his appeal. The mere fact that Superintendent Brunton's letter is called a "submission" both by himself at the end of his letter, and by the Chairperson of the Appeal Board does not make it a submission, but from the extracts I have included above it is clear to me that it is to a large degree comment and not evidence. The role of the investigating officer is a fact-finding role and he or she is positioned in that role in the early part of the investigation. His active role in the investigation ceases when he or she prepares a report for the Commissioner. The investigating officer performs an inquisitorial or investigative role and his primary function is to submit to the Commissioner sufficient information on which the Commissioner can take a view that a further inquiry is warranted.

59. It would be artificial to suggest, as is argued by the applicant, that the investigating officer can play no further part in the process once he or she produces an initial report, and it would further be a poor use of resources if the person who carried out the initial investigation, and examined the facts as initially presented, were to have no role as a witness before the Board of Inquiry, or perhaps even before an appeal board. But the role of the investigating officer as an investigator, or as a person who has an inquisitorial role, ceases once the first report is furnished to the Commissioner on foot of which a board of inquiry is established. The investigating officer is the first conduit through whom the process is filtered and he or she can have no active role beyond that. But the investigating officer may well have assembled documents, or be in a position to give evidence, and those documents and evidence may well, but may not always, come to be considered at a Board of Inquiry, subject of course in each case to the rules of evidence, and the requirements of fairness of process and natural justice.

60. Thus it follows that the investigating officer has no role at appeal stage which would entitle him or her to comment upon evidence, to draw together threads of evidence and to analyse that evidence in the context either of conflicting, or arguably conflicting, statements from different witnesses, or in the context, as what somewhat unusually arose in this case, where there was a High Court and Supreme Court decision relating to the outcome of the Board of Inquiry.

61. Thus I consider that the investigating officer has wrongly engaged with the process at appeal. The question however is whether this engagement has or is capable of being seen as having tainted the process as a whole and whether fairness has thereby been denied to Garda Kelly. I consider that there has been a high degree of comment on and in some cases criticism of the evidence and the contents of the notice of appeal and I consider that it could be difficult for the Appeal Board to objectively engage with the evidence and argument once it has had the commentary of Superintendent Brunton. The requirement is that justice be done in a transparent manner by an independent body and I accept that the applicant's concerns are genuine and real that some degree of objectivity and transparency has already been lost in the process.

Discussion
62. I am of the view that the letter from Superintendent Brunton will require careful scrutiny at the hearing of the appeal but that fairness can be achieved by giving Garda Kelly an opportunity to cross examine him at the hearing and of making submissions to counter those in Superintendent Brunton's letter. To stop the disciplinary process now would in my view be a disproportionate response to what I consider to be the over zealous scrutiny of the Superintendent. The statutory disciplinary processes has been put in place to ensure fairness and I must at this stage assume the Appeal Board is likely to conduct its role with the utmost proprietary and professionalism, and in the context of the well established requirements of fair procedure.

63. It is probable in that context that the applicant will seek to elicit from Superintendent Brunton the full file of correspondence with the Chairman of the Appeal Board, but I consider that fairness may better be achieved by directing that the entire correspondence be furnished now. I do so noting and accepting the argument of the respondent that an administrative body ought not always be required to furnish purely administrative documentation to a party likely to be affected by a decision but because in this case I am of the view that the response of Superintendent Brunton may be fully understood in the context of the request for his assistance. I find it difficult in those circumstances to reject the argument of the applicant that the full chain of correspondence is not at least potentially relevant and it is potentially and not actually relevant which is the correct test to guide the requirements of fairness.

64. Accordingly, I will make an order granting the relief sought at (vi), (vii) and (viii), refusing the relief sought at (ix) to (xiv) inclusive. I refuse to grant an order quashing the appeal process, or to make an order that the entire disciplinary process has now become tainted or has become oppressive. I refuse to make an order of *certiorari* quashing the appeal process, albeit that I accept that the correspondence with Superintendent Brunton is more value laden and inflammatory than is desirable. I am confident that the Appeal Board will so manage the hearing of the appeal, and its own response to the letter so as to avoid unfairness at the hearing. An application arising from the hearing itself is premature.