APPROVED

THE COURT OF APPEAL

Appeal Number: 2022/192
Neutral Citation Number [2023] IECA 266

Donnelly J.
Noonan J.
Faherty J.

BETWEEN/

RAYMOND HEGARTY

APPLICANT/
RESPONDENT

- AND -

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT/
APPELLANT

Judgment of Ms. Justice Faherty dated the 7th day of November 2023

1. The respondent (hereinafter "the Commissioner") appeals the Order of the High Court (Ferriter J.) (hereinafter "the Judge") dated 25 April 2022 whereby the High Court granted, *inter alia,* an order of *certiorari* quashing the decision of the Commissioner to invoke s.14 of the Garda Síochána Act 2005 ("the 2005 Act") in respect of the applicant's conduct between 14 March and 17 March 2017 where such conduct had already been the subject of a determination and sanction by the Commissioner and, on appeal, by the

Appeal Board pursuant to Part 3 of the Garda Síochána (Discipline) Regulations 2007, (S.I. 214/2007) ("the 2007 Regulations").

2. The central issue that arises in the appeal (and as arose in the High Court) is whether it is lawful for the Commissioner to seek the dismissal of the applicant pursuant to s.14 of the 2005 Act arising from the applicant's conduct in circumstances where the applicant has already been the subject of a disciplinary process for the same conduct pursuant to Part 3 of the 2007 Regulations and where the Commissioner sought his dismissal from the force pursuant to that disciplinary process but where an independent appeal board imposed instead the reduced sanction of a monetary penalty.

Background

3. The facts and procedural history are not in dispute and are set out hereunder, largely (and gratefully) taken from the High Court judgment.

4. The applicant was the subject of a complaint from a member of the public arising from an incident which occurred in Lismore Garda Station on 15 March 2017. A disciplinary process was duly commenced under Part 3 of the 2007 Regulations. Under regulation 22, "serious breaches of discipline" is defined as meaning "a breach of discipline which in the opinion of the Commissioner, may be subject to one of the following disciplinary actions: (a) dismissal; (b) requirement to retire or resign as an alternative to dismissal; (c) reduction in rank; (d) reduction in pay not exceeding 4 weeks".

5. Pursuant to regulation 23, the Commissioner appointed Superintendent Christopher Delaney as investigating officer to investigate the alleged breaches of discipline by the applicant. The applicant and the complainant were duly interviewed following which Superintendent Delaney complied a statement of facts relating to the incident. Following completion of his report, Superintendent Delaney submitted it to the Commissioner

recommending that a board of inquiry be established pursuant to regulation 25 of the 2007 Regulations.

6. The role of a Board of Inquiry is to determine whether the alleged breaches of discipline have been committed by the member and, if so, to recommend to the Commissioner the disciplinary action to be taken in relation to the member. A Board of Inquiry was duly established. Thereafter, pursuant to regulation 27, the applicant was advised of the breaches of discipline alleged against him, as follows:

> "(i). Discreditable Conduct, that is to say you, Garda Raymond Hegarty…did conduct yourself in a manner which you knew or ought to have known would be reasonably likely to bring discredit on the Garda Síochána, in that you did on the 15th March 2017 engage in a sexual act with [complainant] at Lismore Garda Station, while on duty and during the course of taking a statement of evidence from her relating to the arrest of her sister on 14th March 2017.
>
> (ii) Neglect of Duty, that is to say you, Garda Raymond Hegarty…on 15th March 2017 at Lismore Garda Station, did fail to record a statement of evidence from [complainant] relating to the arrest of her sister on 14th March 2017, in accordance with proper procedure, and was your duty to do so."

7. When in September 2018, the Board of Inquiry met to hear the allegations, the applicant admitted the alleged breaches of discipline and the facts as alleged in Superintendent's Delaney's statement of facts. Following the conclusion of the hearing, the Board of Inquiry delivered its report to the Commissioner. In respect of the first breach, it recommended that the applicant be required to retire or resign from the force as an alternative to dismissal and, in respect of the second breach, that the applicant be subjected to two weeks' deduction in pay.

8. The Commissioner accepted the recommendations of the Board of Inquiry. Pursuant to regulation 31 of the 2007 Regulations, on 25 October 2018 he issued his decision to the applicant, namely that the Commissioner had decided: "In respect of the breach of discipline number 1 as attached, I hereby require that you [the applicant] resign from An Garda Síochána as an alternative to dismissal on or before midnight on the 16 day of November 2018 and in the event of your failure to so resign I order that you be dismissed from An Garda Síochána with effect from midnight on that date." In respect of the second breach, the Commissioner ordered that the applicant "receive a temporary reduction in pay of two weeks' pay".

9. Pursuant to regulation 33 of the 2007 Regulations, the applicant availed of his right to appeal to an independent appeal board. The applicant appealed both the determination and the disciplinary action to be taken. Pending the outcome of the appeal, he was suspended from duty, as is the norm in such appeals.

10. The Appeal Board was duly established on 4 December 2018 with Ms. Caroline Biggs S.C. (as she then was) as chairperson. The other members comprised Assistant Commissioner Pat Leahy and Garda Paul Crowley.

11. Ultimately, having reviewed the evidence and having heard from Superintendent Delaney and the applicant, the "Decision of the Appeal Board" dated 9 January was as follows:

> "(1) [I]insofar as the application is for a review of the determination of the Board of Inquiry
>
> *(a) affirm the determination and;
>
> …
>
> *(ii) substitute another disciplinary action of a less serious nature…".

The less serious sanction imposed by the Appeal Board in respect of the first breach of discipline was to substitute the Commissioner's requirement for the applicant to resign with "a temporary reduction in pay of 4 weeks". The Appeal Board left in place the sanction imposed by the Commissioner on the applicant for the second breach (namely, a temporary reduction in pay of 2 weeks' pay).

12. The Appeal Board's rationale was set out in its written decision communicated to the applicant on 16 January 2020 in which it held, unanimously, in relation to the first breach, that the penalty imposed at first instance was disproportionate. As already stated, it left the penalty of two weeks reduction in pay in respect of the second breach unchanged.

13. In arriving at its view, the Appeal Board considered a number of factors, including the circumstances of the commission of the breach, the applicant's previous unblemished record and other mitigating factors. While noting that the applicant was deeply remorseful for his actions, the Appeal Board stated that "public confidence mandates that these breaches be severely punished". In this regard, it noted that the applicant had been suspended from work from 25 September 2018; had been transferred prior to that to another station pending investigation, and that in respect of the first breach, he had now been fined the maximum allowed. It also noted that he had suffered reputational damage within his community and at work and that his personal life had been severely affected. The Appeal Board also took account of the fact that the applicant was the father of young children with a mortgage and a family to provide for and that "taking away his right to work as a member of An Garda Síochána, would affect his ability to support his family greatly".

14. The Appeal Board's conclusions were in the following terms:

> "The Board took the view that these were very grave breaches indeed. The Board sought further documentation and adjourned proceedings to be fully informed. The

Board discussed this matter at length and on a unanimous basis took the view that… the penalty of resignation and/or retirement was disproportionate in all of the circumstances".

15. Pursuant to regulation 37(5) of the 2007 Regulations, the Commissioner was obliged to implement the decision of the Appeal Board within seven days after the decision has been communicated to him. One of the issues that arise here is whether the Commissioner implemented the decision of the Appeal Board. This is discussed more fully later in the judgment.

Events post the decision of the Appeal Board

16. On 24 January 2020, (after the 7 days specified in regulation 37(5) for implementation had elapsed), the applicant received a notice from Assistant Commissioner Diarmuid Sheehan informing him that he was suspended from 24 January 2020 to 1 February 2020. The stated reason for the suspension was "consideration by [the Commissioner] of the position of [the applicant] pursuant to s. 14 of the [2005 Act] as amended".

17. It is apposite at this juncture to set out the provisions of s.14 of the 2005 Act. It provides:

"14.—(1) The Garda Commissioner may appoint, subject to and in accordance with the regulations, such numbers of persons as he or she sees fit to the ranks of garda, sergeant and inspector in the Garda Síochána.

(2) Notwithstanding anything in this Act or the regulations, the Garda Commissioner may dismiss from the Garda Síochána a member not above the rank of inspector if—

(a) the Commissioner is of the opinion that—

(i) by reason of the member's conduct (which includes any act or omission), his or her continued membership would undermine public confidence in the Garda Síochána, and

(ii) the dismissal of the member is necessary to maintain that confidence,

(b) the member has been informed of the basis for the Commissioner's opinion and has been given an opportunity to respond to the stated basis for that opinion and to advance reasons against the member's dismissal,

(c) the Commissioner has considered any response by the member and any reasons advanced by the member, but the Commissioner remains of his or her opinion, and

(d) the Authority consents to the member's dismissal.

(3) Subsection (2) is not to be taken to limit the power to make or amend Disciplinary Regulations."

18. On 28 January 2020 the applicant received a further notice from Assistant Commissioner Sheehan that he was suspended from 1 February 2020 to 1 May 2020. The stated reason for that suspension was that "The decision of the Commissioner to require [the applicant] to resign from An Garda Síochána as an alternative to dismissal on or before midnight on 16th November 2018."

19. It is acknowledged by the Commissioner that the reason set out in the notice for the suspension was erroneously expressed in the notice. No issue is being taken by the applicant in respect of it, and it is accepted that the reason for the suspension remained that consideration was being given by the Commissioner to s.14 of the 2005 Act.

20. Thereafter, the applicant's suspension was continued from time to time.

21. On 6 February 2020, the applicant's solicitor wrote to the Commissioner advising that "on the 9th of January 2020 an Appeal Board established pursuant to the Regulations decided to overturn [the Commissioner's] decision that our client be required to resign in lieu of dismissal, as it is lawfully entitled to do" and asserting that the Commissioner had failed to abide by the 2007 Regulations and that his actions were unlawful as a result. It was further pointed out that the Commissioner's decision of 28 January 2020 to suspend the applicant was unlawful as the only reason for the suspension was the Commissioner's decision that the applicant be required to resign "which said decision was overturned on Appeal…". The letter called on the Commissioner to reinstate the applicant to duty on or before the close of business on Friday 14 February 2020 failing which the solicitors would have no option but to seek the protection of the High Court.

Judicial Review

22. On 30 March 2020, by Order of the High Court (McDonald J.) the applicant obtained leave to apply for judicial review of the January 2020 decisions to suspend him. The gravamen of his complaint was that the Commissioner had acted *ultra vires*, irrationally, in abuse of process and in breach of natural and constitutional justice in respect of the suspensions imposed on the applicant as the suspensions effectively flew in the face of the Appeal Board's determination of 16 January 2020.

Invocation of s.14

23. On 31 March 2020, prior to the service of the judicial review proceedings and High Court Order granting leave, the Commissioner wrote to the applicant ("the s.14 letter"). The applicant was advised that having "considered the decision of the Disciplinary Appeal Board, and, notwithstanding same" the Commissioner was of the opinion that because of the applicant's conduct and behaviour between 14 and 17 March, 2017 inclusive, including inappropriate sexual conduct at Lismore Garda Station on 15 March 2017, the applicant's

continued membership of An Garda Síochána "would undermine public confidence in the Garda Síochána" and the applicant's dismissal pursuant to s. 14 was necessary to maintain that confidence. The letter stated that the applicant's "actions were such that, in [the Commissioner's] opinion, it is not appropriate for [the applicant] to continue to serve as a member of An Garda Síochána". It was asserted that the applicant breached the rights of a vulnerable female who attended at Lismore Garda Station on 15 March 2017 "by interfering with her bodily integrity by engaging in inappropriate sexual activity with her in a Garda Station, being a place of work, safety and refuge".

24. Having quoted Article 3 of the European Convention on Human Rights and related case law, the Commissioner went on to state:

> "I am firmly of the view that you are aware and had knowledge that the female who attended at Lismore Garda Station was vulnerable and that you were on duty in a position of authority as a member of An Garda Síochána in a Garda Station alone with this female and your conduct should not have occurred.
>
> Taking all matters into consideration, I am of the opinion that your behaviour and conduct between the 14th and 17th March 2017 and, in particular, on 15th March 2017, at Lismore Garda Station, is incompatible with membership of An Garda Síochána. I am of the opinion that your continued membership is untenable given the requirement for the maintenance of public confidence and trust in An Garda Síochána. The information now in my knowledge is such that I believe it seriously undermines your professionalism, honesty and integrity and compromises your ability to serve as a member of An Garda Síochána."

25. The letter concluded by advising the applicant that he was "hereby given the opportunity, pursuant to section 14(2)(b) of the Garda Síochána Act 2005, to put forward

any representations or responses you wish to make, including any reasons why I should not dismiss you upon the basis stated above."

26. In response to the s.14 letter, on 8 April 2020, the applicant's solicitor wrote to the Commissioner stating that his decision "to subvert the decision of the Appeal Board undermines its lawful determination, is *ultra vires*, an unlawful abuse of process and entirely improper" and that the Commissioner was obliged to comply with the decision of the Appeal Board pursuant to the Regulations…".

27. The Commissioner did not withdraw the s.14(2) notice.

28. In his amended statement of grounds challenging the Commissioner's "determination" pursuant to s.14, the applicant contended that the alleged determination subverted the determination of the Appeal Board and was therefore, *ultra vires*, irrational, an abuse of process, in breach of natural and constitutional justice and a decision that could not properly be made. It was further contended that the Commissioner had unlawfully failed to implement the decision of the Appeal Board, in breach of regulation 37(5) of the 2007 Regulations. Further, the Commissioner had acted in breach of the applicant's right to fair procedures by failing prior to 31 March 2020 to conduct an inquiry into whether his continued membership would undermine public confidence in An Garda Síochána.

29. The amended statement of grounds was subsequently amended to the effect that the invocation of s.14 by the Commissioner unlawfully involved him imposing two disciplinary actions in respect of one set of breaches of discipline. This too was claimed to be in breach of natural and constitutional justice, *ultra vires* and in breach of the principle against double jeopardy.

The statement of opposition

30. The Commissioner's statement of opposition raised a preliminary objection to the judicial review proceedings to the effect that the application was premature in

circumstances where a final determination had not been reached pursuant to s.14 and that the 31 March 2020 letter was in substance a proposal only to dismiss the applicant, to which the applicant had been invited to make submissions. It was pleaded that "upon consideration of all matters including the applicant's submissions" a final determination would be made in due course "which said determination is conditional upon the approval of another body". The reference to "another body" was to the police authority, pursuant to s.14(2)(d) of the 2005 Act. Thereafter, the nub of the Commissioner's defence as set out in the statement of opposition was to the effect that s.14(2) was a self-standing statutory process which can be invoked separately from, and without regard to, any disciplinary process which may have gone on before it, even if that disciplinary process addresses substantively the same conduct which is the subject of the s.14 process.

The subsequent procedural history

31. The applicant duly obtained an order for discovery against the Commissioner of documentation in relation to the two decisions (24 January 2020 and 28 January 2020) to suspend him, documentation in relation to the implementation of the disciplinary action substituted by the Appeal Board and "all documentation concerning the decision to consider the position of the applicant pursuant to section 14".

32. Consequent on the Commissioner making discovery, the applicant's solicitor swore an affidavit in which he asserted that it was clear from a review of the documentation discovered that the Commissioner had not given any real consideration as to whether he was entitled to initiate s.14. It was also asserted that the discovery documentation suggested that the proposal that the Commissioner invoke s.14 originated from Chief Superintendent Margaret Nugent and had the support of Assistant Commissioner Sheahan.

While the applicant duly obtained an Order from the High Court granting him liberty to cross-examine Chief Superintendent Nugent, on appeal by the Commissioner, that Order was overturned by this Court ([2021] IECA 328).

The High Court judgment

33. In his "Discussion" of the issues arising, the Judge first considered the applicant's argument that as a matter of statutory interpretation s.14 cannot be invoked by the Commissioner where a prior process relating to the same conduct had occurred under the 2007 Regulations. The applicant's position was that the phrase *"Notwithstanding anything in this Act or in the Regulations…"* at the start of s.14 could not be read as meaning that anything done under the 2007 Regulations could be disregarded when it came to the invocation of s.14. He argued that s.14(2) was an empowering provision, in that it could only be invoked either where the disciplinary provisions of the 2007 Regulations had resulted in a recommendation that a member was to be dismissed and the Commissioner then formally used his power under s.14(2) to dismiss the member, or where there was admitted or incontrovertible conduct which merited the invocation of s.14(2) without the need to go through any disciplinary process under the Regulations (for example where a member had been convicted of a serious crime).

34. The applicant's contention was that where the Commissioner had invoked the disciplinary process under the 2007 Regulations, particularly a disciplinary process where the Commissioner agitated for the effective removal of a member from the force on account of their conduct, s.14(2) could not, thereafter, be initiated in effective disregard of the outcome of the disciplinary process under the Regulations. While the applicant made this argument on the facts of his case, he also contended that these conclusions followed as a matter of the correct interpretation of s.14.

35. A central plank of the Commissioner's submissions in the court below was that s.14 was a self-standing statutory provision which could be invoked by the Commissioner irrespective of the fact that a process concerning the same member of An Garda Síochána had been followed to completion pursuant to the 2007 Regulations.

36. The Judge noted that precisely that issue had been considered by Heslin J. in *Keane v. Commissioner of An Garda Síochána* [2021] IEHC 577 (*"Keane"*). There, Heslin J. was of the view that the plain meaning of the words used by the Oireachtas in s.14 *"indicate that the power available to the respondent pursuant to s.14 was exercisable without reference to the 2007 Regulations"* and that there thus *"could conceivably be situations where a decision is reached at the conclusion of a process which has been conducted pursuant to the 2007 Regulations, yet the powers of the respondent pursuant to s.14 (2) would still be available".*

37. The Judge saw no reason to depart from the decision of Heslin J. He considered that quite apart from the fact that the plain words of s.14(2) would not permit the imposition of words so that the section could be read as the applicant contended, it could readily be seen that the Commissioner could have valid grounds to seek the dismissal of a member pursuant to s.14(2) where a decision relating to that member had previously been taken under the 2007 Regulations, e.g. where the subject matter of the prior decision, coupled with some new matters, led to the Commissioner forming the necessary opinion under s.14(2), or where a series of adverse decisions had been taken against the member, each of which fell short of warranting the sanction of dismissal, "but which taken together might validly ground the formation of the necessary opinion under s.14."

38. The Judge went on to state:

> "Accordingly, in my view, it is appropriate to characterise s.14 as a self-standing provision in the sense that, as a matter of statutory interpretation, it is in principle

> capable of being invoked notwithstanding anything contained in the Regulations. However, just as Heslin J. took the view that that was not the end of the matter on the facts of *Keane*, it seems to me that that is not the end of the matter on the facts of this case. That is because it is common case that the invocation of s.14 must itself comply with constitutional justice. In particular, as I shall come on to discuss, it might well be contrary to constitutional justice for the Commissioner to invoke s.14 where to do so would unfairly put a member at peril of the sanction of dismissal for the very same conduct in respect of which the Commissioner had previously invoked a disciplinary procedure under the Regulations and where the Commissioner had contended for the removal of the member from the force but where an independent appeal board had taken the view that such sanction was disproportionate." (at para. 51)

39. The Judge next considered the Commissioner's argument that the applicant was premature in seeking to challenge the invocation of s.14 when the Commissioner had not yet made a final determination under the provision, an argument that had also featured in *Ivers v. Commissioner of An Garda Síochána* [2021] IEHC 574 (*"Ivers"*). In *Ivers*, disciplinary proceedings pursuant to Part 3 of the 2007 Regulations were instigated by the Commissioner on foot of an allegation that Garda Ivers took property from an identified motor vehicle that was not his property. On 25 February 2020, Garda Ivers was served with a notice pursuant to regulation 24 and the investigating officer was identified. The investigation, however, did not proceed following the launch by the Garda Síochána Ombudsman Commission (GSOC) of a criminal investigation. On 8 May 2020, while the GSOC investigation was pending, the Commissioner served a s.14(2) on Garda Ivers. Garda Ivers' complaint in the High Court was that by serving a s.14(2) notice on him when he did, the Commissioner had made a "determination" which contravened Garda Ivers'

right to fair procedures, natural justice and the presumption of innocence. He claimed that the determination was made in breach of both s.14 of the 2005 Act and the 2007 Regulations, in effect that before reaching his determination, the Commissioner failed to conduct a proper inquiry and had not advised the member of his concerns and invited a response from him. In *Ivers*, Heslin J. held that it was premature of the applicant Garda to seek judicial review of an alleged determination by the Commissioner under s.14(2)(a) in circumstances where the Commissioner had sent an initiating letter under s.14(2) but where the Commissioner had not yet considered representations or formed any operative opinion under the provision. Heslin J. considered that the process under s.14 involved a number of different stages, and that the *audi alteram partem* stage was addressed in s.14(2)(b), that is in between the first stage and the second stage opinions. Garda Ivers duly appealed that decision.

40. It should be noted that at the time the High Court judgment was delivered in the present case, Garda Ivers' appeal to this Court was pending. However, on 30 August 2022, some five months or so, after the High Court judgment in the present case, this Court delivered its judgment in *Ivers (Ivers v. Commissioner of An Garda Síochána* [2022] IECA 206). Writing for the Court, Noonan J. allowed Garda Ivers' appeal. He did not agree with Heslin J. that s.14(2)(b) could be considered in such a way as to admit of a full inquiry into the facts being conducted after the Commissioner had formed his "first stage opinion" or that that could amount to a sufficient guarantee of fair procedures for Garda Ivers before any final determination was made under s.14(2). Noonan J. held that *"it can only be the case that the conduct referred to in s.14(2) is either conduct that has been established by virtue of some constitutionally compliant process, for example an inquiry under the regulations, conduct which is admitted (as in Jordan) or conduct which cannot be disputed (e.g. because of a criminal conviction as in McEnery)."* As there was no mechanism under

s.14(2) for establishing conduct, and where it was not open to the Commissioner to *"borrow"* the fact-finding process available under the 2007 Regulations, Noonan J. found that *"the Commissioner had no power to invoke s.14(2)"* in the circumstances of the case and *"acted ultra vires"* in doing so.

41. Returning now to the present case; the applicant had argued in the court below that the decision of Heslin J. in *Ivers* was wrong. However, it did not seem to the Judge that he had to form a view on whether Heslin J.'s approach in *Ivers* was wrong since *Ivers* had been decided in a different context to the present case. In any event, the Judge was prepared to reject the Commissioner's argument that the judicial review proceedings were premature on other grounds. While he accepted that no final determination had been made by the Commissioner under s.14 (2) in respect of the applicant, it seemed to the Judge not to answer the applicant's fundamental objection which was that "for precisely the same conduct which was the subject of the disciplinary process instituted by the Commissioner, the Commissioner now seeks the removal of the applicant from the force by different means, so that the applicant is now in peril of a second (and very grave) sanction for the same conduct" (at para. 53). As noted by the Judge, in *Ivers,* no decision had been given under the disciplinary process pursuant to the 2007 Regulations before s.14 was invoked by the Commissioner. He considered that the facts in the applicant's case were very different "where there was a disciplinary process for the very same conduct running to ultimate conclusion under the 2007 Regulations prior to the invocation of s.14." (at para. 54)

42. Accordingly, the Judge did not believe that the applicant's challenge was premature in circumstances where the applicant, by virtue of the Commissioner's invocation of s.14 and his commencement of that process, was "exposed to the peril of being removed from the force when he has already successfully faced down that peril in a prior process which

the Commissioner instigated and in which the Commissioner fully participated". (at para. 55) He noted that the applicant "has already faced the prejudice of being suspended from the force, notwithstanding the conclusion in the disciplinary process under the Regulations, while the s.14 process proceeds". He went on to state:

> "While I accept that there has not yet been a final determination by the Commissioner under s.14, the Commissioner has formed and expressed an opinion, pursuant to s.14, that the applicant should be dismissed and the Commissioner is the person with the ultimate decision under s.14 as to whether the applicant will be dismissed; there is no appeal or role for any third-party input into the final decision. On any view, the commencement of the s.14 process puts the applicant in peril of the ultimate sanction of dismissal. In my view, it is not premature of the applicant to seek to challenge the invocation of s.14 in circumstances where he maintains that exposure to such a peril is of itself unlawful". (at para. 55)

43. The Judge next considered the applicant's contention that by the invocation of the s.14 process, the Commissioner was seeking to "set the entire disciplinary process, and the Appeal Board's determination, at nought" (para. 56) and that it was a breach of the applicant's right to constitutional justice and fair procedures to subject him a second time to a process designed to effect his removal from An Garda Síochána when an independent Appeal Board had taken the view that that was a disproportionate sanction for the very same conduct (the "double jeopardy" argument).

44. In considering those arguments, the Judge found the decision of Heslin J. in *Keane* of assistance, notwithstanding the factual differences between that decision and the applicant's circumstances.

45. In *Keane,* the applicant member had been subjected to a disciplinary process under Part 3 of the 2007 Regulations. The Board of Inquiry recommended a financial penalty.

The Commissioner however invoked his powers under regulation 32 not to accept the Board of Inquiry recommendation but rather (having invited and considered submissions from the member) imposed a sanction that the member resign as an alternative to dismissal. On appeal by the member to the Appeal Board, that sanction was overturned, and a monetary penalty was substituted. As with the present case, the applicant member in *Keane* had admitted the facts forming the bases of the disciplinary breaches. Following the Appeal Board's decision, the Commissioner issued a letter pursuant to s.14(2)(a) setting out his opinion pursuant to the provision. The opinion relied on the very same conduct which had been the subject of the disciplinary process. Submissions were then made by the applicant Garda pursuant to s.14(2)(b) including a submission to the effect that the Commissioner in invoking s.14 was failing to respect the outcome of the Appeal Board's determination. The Commissioner, however, continued to remain of the opinion, pursuant to s.14(2)(c), that the applicant Garda should be dismissed, at which point Garda Keane brought judicial review proceedings (*i.e.*, a stage later than the stage in the present case).

46. Heslin J. duly quashed the Commissioner's final decision made pursuant to s.14(2) holding that the invocation of s.14 was unlawful, in particular that it was a breach of the applicant Garda's rights to constitutional justice, where the applicant Garda had been through a disciplinary process under the Regulations, where the Commissioner had directed the resignation of the Garda in lieu of dismissal and where an appeal board had overturned the Commissioner's decision and substituted instead a lesser sanction of financial penalty. Heslin J. took the view that at all times throughout the disciplinary process, the applicant Garda there:

> "*was in peril of being required to terminate his career as a member of An Garda Síochána by resigning. The forum which the respondent chose for dealing with all issues (i.e. the breaches of discipline and the consequences of same) was the*

disciplinary process pursuant to the 2007 Regulations and that process was conducted to an ultimate outcome. It is clear that the respondent wishes to set at naught that outcome (being that resignation as an alternative to dismissal is not the appropriate disciplinary action). It is clear that the respondent wishes to start a different process despite the fact that there has been no change in any facts or circumstances whatsoever. The respondent wishes to do so, despite all issues having already been raised and determined in decisions which concluded with the Appeal Board's decision. In short, the respondent wishes to invoke a different procedure and apply it to the self-same issues already determined in the previous procedure, because he wishes to obtain a different result, despite no change in circumstances. That offends natural and constitutional justice in my view." (at para. 182).

The Commissioner did not appeal the decision of Heslin J. in *Keane*.

47. As regards the present case, in the view of the Judge, Heslin J.'s *dicta* were entirely applicable to the Commissioner's decision to commence the s.14 process in respect of the applicant notwithstanding that the s.14 process had not yet reached a conclusion.

48. The Judge noted that in arriving at his decision in *Keane* Heslin J. had laid emphasis on the Supreme Court decision in *Eviston v. DPP* [2002] 3 IR 360 that it was a breach of the applicant's right to fair procedures for the DPP to change its previous decision not to prosecute the applicant and to proceed to prosecute the applicant notwithstanding that no new evidence had come to light in respect of the alleged offences.

49. The Judge went on to note that in *Carlin v. DPP* [2010] 3 IR 547, the Supreme Court had qualified the principle set down in *Eviston,* the Court holding that in the absence of *mala fides,* the DPP was entitled to review or reverse an earlier decision and that a breach

of fair procedures could only result where a reversal of a previous decision not to prosecute had resulted in an exacerbation of anxiety and stress for the accused.

50. Notwithstanding the Commissioner's submission that the applicant here could not satisfy the more stringent test set down in *Carlin,* and that had Heslin J. in *Keane* been made aware of the decision in *Carlin* his decision would have been different, the Judge did not accept that it necessarily followed that Heslin J. would have arrived at a different decision in *Keane.* This, he said, was because Heslin J. had noted that the facts in *Keane* were graver than those in *Eviston.* In *Eviston,* the applicant was only in peril on one occasion whereas, in *Keane,* the applicant *"would be in peril for a second time, despite all facts and issues having been raised and determined to concluded outcome, in the previous procedure and with no question of any change of material facts or circumstances".* (at para. 62)

51. The Judge also noted Heslin J.'s statement, at para. 178 of *Keane,* that *"it would offend principles of constitutional justice and it would be unfair and oppressive for the applicant to be exposed to punishment a second time, i.e. pursuant to the s.14 process, given that, in reality, all relevant issues have already been considered and determined to a final outcome which is binding on the respondent in the disciplinary process pursuant to the 2007 Regulations.*"

52. The Judge considered that the analogy with *Eviston* and *Carlin* could only take the Commissioner "so far". In those cases, the applicants were only being faced with one prosecution whereas in the present case "the potential injustice is of a much more serious order". The Judge put it thus:

> "The applicant has already been pursued once for misconduct and has had a penalty imposed for his conduct. The Commissioner instigated that prior process and contended for the applicant's removal from the force; an independent appeal board

> determined that such sanction was disproportionate, but imposed a penalty nonetheless. The applicant having paid that penalty, is now being subject to a second process for the same conduct where there has been no change in the underlying facts and circumstances. In my view, that fundamentally offends principles of constitutional justice." (at para. 64)

53. While the Judge accepted that the "double jeopardy" analogy was "imperfect", nevertheless the two processes at issue in the case involved "exposure to the very serious potential sanction of being dismissed from the force and losing one's career as a Garda" (para. 65). He noted that the concept that "no man ought to be twice vexed for one and the same reason" informed not only criminal law principles of double jeopardy and *autrefois convict* but also the civil law concepts of *res judicata* and the abuse of process rule in *Henderson v. Henderson* [1843] 3 HARE 100. As said by the Judge, "it embodies the universal concept that it is fundamentally unfair to be subject to potential sanction a second time for conduct for which one has already been sanctioned". (at para.65)

54. While he did not see that a decision of the Commissioner under s.14 could be regarded as a decision akin to *inter partes* litigation such that the principles of *res judicata* or the rule in *Henderson v. Henderson* were engaged, nevertheless in a public law context, it seemed to him that "the applicable doctrine is that of a party's right to constitutional justice". He noted that this was the principle that underpinned the Supreme Court's approach in *Eviston* and *Carlin.* The Judge went on to state:

> "In my view, the concept of constitutional justice is sufficiently flexible, as demonstrated by the approach of the Supreme Court in *Eviston* and *Carlin,* to allow a party to contend that it is in breach of his or her rights to constitutional justice to be subjected to a statutory dismissal process at the instigation of another party for specified conduct where that other party had sought the effective dismissal of the

party in a prior statutory process based on precisely the same conduct but failed, and where the party has suffered a sanction in the earlier process. In my view, the actions of the Commissioner in seeking to invoke s.14 can be fairly said to involve vexing the applicant twice in the same matter. This renders the s.14 process in fundamental breach of constitutional justice; it is not merely procedurally unfair, but substantively unfair, that the applicant be exposed to the peril of dismissal for the very conduct which he has already suffered a penalty for, at the hands of the Commissioner". (at para. 67)

55. He next considered the Commissioner's argument that s.14(2) was not, in terms, concerned with disciplinary matters but rather had a different focus, namely that of scenarios where a member's continued membership of the force would undermine public confidence in the Garda Síochána, by virtue of the conduct of the member, and where the dismissal of the member is necessary to maintain that confidence. While noting that argument, the Judge considered that "it is difficult to conceive of circumstances where conduct which would be sufficient to merit the exercise of the exceptional power of dismissing a member would not also be conduct which would equally constitute conduct capable of being disciplined pursuant to the Regulations." (at para. 68)

56. To the Judge, it seemed fair to observe, at least in broad terms and having regard to the *dicta* of Laffoy J. in *McEnery v. Commissioner* [2016] IESC 66 at para. 53, that the machinery existing for disciplining members of An Garda Síochána under the Disciplinary Regulations "is to ensure the maintenance of public confidence in the Garda Síochána".

57. In the view of the Judge, s.14, on the facts of the case, could be regarded as involving substantially the same potential sanction as the earlier disciplinary process "for precisely the same conduct and involves the same protagonists (the Commissioner v the applicant)." (at para. 69) He considered that the applicant was "in a classic sense, sought to be *'vexed*

twice"" in relation to the same matter. As the conduct at issue in the s.14 process was one and the same as the disciplinary process, the Judge was not of the view that it was more appropriate to allow the s.14 process to conclude before entertaining any judicial review application (assuming the s.14 process was to conclude in the Commissioner remaining of the opinion that the applicant should be dismissed under s.14(2)).

58. The Judge considered that dismissal represented a devastating penalty for a member of the force, noting that there was no reference in the Commissioner's letter of 31 March 2020 to the applicant's rights or otherwise to the implications for him of being dismissed. He noted that the Commissioner "appears to take the view that the prior process and its outcome is legally irrelevant", a view not shared by the Judge since "it disregards entirely the applicant's rights in the matter". (para. 71) He continued:

> "While the Commissioner of course has the obligation in accordance with s.26(1) 'to direct and control the Garda Síochána', this is expressly 'subject to this Act and the Regulations'. It is also subject to the rights of members of the force. The Regulations provide an elaborate and delicately worked out set of checks and balances to ensure that a fair process, with independent oversight, is in place to have allegations of breach of discipline fairly determined and punished. This is not just in the public interest, but also in the interests of members of An Garda Síochána who are subject to allegations of misconduct." (at para.72)

59. In the view of the Judge the Commissioner's exceptional powers under s.14 "have been invoked in breach of the applicant's rights to constitutional justice on the facts of this case" (para. 74). In light of the unlawfulness of the substantive invocation of s.14, the Judge went on to find the applicant's suspension for the purposes of the s.14 process also unlawful.

60. Given the conclusions he reached in relation to the foregoing, the Judge did not consider it necessary to reach any conclusion on the nature of the s.14 process or the applicant's arguments relating to the scope of that process, a subject he considered likely to be addressed by the Court of Appeal in *Ivers.*

The appeal

61. In his notice of appeal, the Commissioner asserts that the Judge erred in law and/or in fact in the following regards:

- In failing to place due emphasis on the words *"Notwithstanding anything in this Act or the Regulations…"* in s.14(2) of the 2005 Act.
- In failing to place adequate emphasis on its finding that s.14 of the 2005 Act is a stand-alone power.
- In failing to apply the plain meaning of the words which the Oireachtas employed in s.14 and which confer on the Commissioner the power exercisable without reference to the 2007 Regulations.
- In failing to find that the applicant's application was premature in circumstances where the Commissioner had not yet made a final operative decision under s.14(2).
- In finding that the Commissioner's invocation of s.14 was in breach of the applicant's right to natural and constitutional justice.
- In applying the principle of constitutional justice as it did. Without prejudice to the foregoing, the Judge failed to identify any prejudice accruing to the applicant as a result of the disciplinary process pursuant to the 2007 Regulations having been concluded before the commencement of the s.14 procedure.

- In failing to recognise the s.14(2) is not in substance concerned with disciplinary matters but rather has the wider focus on circumstances where a member's continued membership would undermine public confidence in An Garda Síochána.
- In failing to consider the Commissioner's opinion that the applicant's continued membership would undermine public confidence in An Garda Síochána, by virtue of the conduct of the applicant, and that the dismissal of the applicant was necessary to maintain that confidence.
- In failing to consider the broader consideration recognised by O'Hanlon J. in *State (Jordan) v. Commissioner of An Garda Síochána* [1987] ILRM 107 in relation to the power of the State to dispense with the services of members of An Garda Síochána.
- In failing to address when exactly the preclusion of the use of s.14 arises subsequent to a disciplinary investigation pursuant to the 2007 Regulations.
- In failing to find that it was reasonable for the Commissioner to be of the initial opinion that by reason of the applicant's conduct, his continued membership of An Garda Síochána would undermine public confidence and the dismissal of the applicant was necessary to maintain that confidence.
- In relying on *Keane v. The Commissioner of An Garda Síochána* [2021] IEHC 577 in error and/or in failing to distinguish that decision and/or to find that that decision was itself made in error.

The Commissioner, by his respondent's notice, opposes the appeal in its entirety.

Discussion and Decision

62. Arising from the grounds of appeal, the respondent's notice and the parties' respective submissions, the salient issue for determination is whether it was lawful for the

Commissioner in the circumstances of the present case to invoke the s.14(2) process in respect of the applicant's found conduct in circumstances where, pursuant to a disciplinary process initiated by the Commissioner himself, that conduct was not held to be such that the applicant should be required to resign from the force, or otherwise face dismissal.

63. Before embarking on a consideration of this issue, it is perhaps apposite to deal with the Commissioner's submission that the application for judicial review is premature.

64. The Commissioner argues that the judicial review proceedings are premature on the facts in circumstances where what has been invoked is only stage 1 of the s.14(2) process, that is where the Commissioner has only formed an opinion and, as required, has given the applicant an opportunity to respond to his proposal to dismiss him. Thereafter, the Commissioner must consider the applicant's response and then remain of the opinion that the applicant should be dismissed pursuant to s.14(2). Moreover, the police authority must consent to the dismissal. It is thus argued that since the s.14(2) process is only at stage 1, and where it is not clear what the Commissioner will do thereafter, it was not appropriate for the applicant to initiate the within challenge.

65. I cannot accept the Commissioner's argument. Patently, where the applicant's very argument is that the s.14(2) process should never have been embarked on in circumstances where he had already been the subject of a disciplinary process under Part 3 of the 2007 Regulations that had run its full course, he cannot be said to have jumped the gun in initiating judicial review proceedings when he did.

66. As the Judge opined, the Commissioner's argument that no final determination had been made under the s.14 process cannot be the answer to the applicant's fundamental objection, which was that the Commissioner pursuant to s. 14 of the 2005 Act was seeking the dismissal of the applicant for precisely the same conduct which was the subject of the disciplinary proceedings under the 2007 Regulations (and which had run to ultimate

conclusion). The upshot, as the Judge said, was that "the applicant is now *in peril* of a second (and very grave) sanction for the same conduct" (para. 53) a sanction which, as the Judge observed, the applicant "has already successfully faced down" (para. 55). I have no hesitation in upholding the Judge and thus rejecting the Commissioner's submission that the judicial review proceedings are premature.

67. I turn now to the crux of the appeal. For the purposes of better understanding the issue that arises, it is perhaps helpful to have an overview of the statutory landscape under which disciplinary action up to and including dismissal may be taken against members of An Garda Síochána. At the outset, it is perhaps of some note that members of An Garda Síochána like members of the defence forces and the Prison Service when facing dismissal or indeed other disciplinary action do not have the benefit of the protections of the unfair dismissal legislation. In the case of An Garda Síochána, the provision for maintaining discipline in the force and the protections that are to be afforded to members facing disciplinary action are provided for in the 2005 Act and the Regulations made thereunder (subject of course to overview by the courts by way of judicial review).

68. There are a number of pathways under the 2005 Act that provide for disciplinary action up to and including dismissal of a member of the force. The root of title of two of those pathways is found in s.123 of the 2005 Act. Section 123 provides, in relevant part:

> " 123.— (1) The Minister may, after consulting with the Garda Commissioner and with the approval of the Government, make regulations concerning the maintenance of discipline in the Garda Síochána, including, but not limited to, regulations relating to the matters provided for in *subsections (2) to (5)*.
>
> (2) The regulations may specify the acts or omissions that may be the subject of disciplinary action under the regulations..."

69. Section 123(2) then goes on to specify the acts and omissions that may be the subject of disciplinary action. Pursuant to s.123(3):

> "The regulations may also provide for the procedures to be followed if-
>
> (a) it appears or is alleged that an act has been done or omission made that may be the subject of disciplinary action…"

As Noonan J. observed, writing for this Court in *Ivers*, *"[a]s one might expect, the language used [in the section] is provisional in its terms in respect of the 'act' alleged to have been done or that 'appears' to have been done, language which anticipates that a procedure will be devised and followed to determine if the alleged act or omission has in fact occurred".* (at para. 17)

70. Pursuant to s.123(8) of the 2005 Act "disciplinary action" means:

> "(a) dismissal,
>
> (b) requirement to retire or resign as an alternative to dismissal,
>
> (c) reduction in rank,
>
> (d) reduction in pay not exceeding 4 weeks' pay,
>
> (e) reprimand,
>
> (f) warning,
>
> (g) caution, or
>
> (h) advice."

The 2007 Regulations

71. The 2007 Regulations give effect to the provisions of s.123.

72. Part 2 of the 2007 Regulations deals with less serious breaches of discipline (i.e., breaches as may warrant a reduction of pay not exceeding 2 weeks' pay, a reprimand, a warning, a caution, or advice (in other words, disciplinary action not including dismissal or a requirement to resign or retire from the force). Albeit that Part 2 of the 2007 Regulations

governs less serious breaches of discipline, it is noteworthy that it nevertheless contains a significant level of investigative machinery to ensure the fairness of the process.

73. The same can be said of Part 3 of the 2007 Regulations, which is of relevance to the present case.

Part 3 of the 2007 Regulations

74. Part 3 of the 2007 Regulations governs "serious breaches of discipline". As can be seen, Part 3 provides for a significantly higher level of protection for a member who is subject to investigation for a serious breach of discipline, no doubt because of the gravity of the penalties that may be imposed if the alleged conduct is established. As already referred to, pursuant to regulation 22, a "serious breach of discipline" may be subject to one of the following disciplinary actions: (a) dismissal; (b) requirement to retire or resign as an alternative to dismissal; (c) reduction in rank; (d) reduction in pay not exceeding 4 weeks' pay.

75. Regulation 23 provides that where it appears that a member may be in breach of discipline subject to one of the disciplinary actions specified in regulation 22, the Commissioner *"shall"* appoint an investigating officer to investigate the alleged breach. The Commissioner appointed such an officer in the present case. This is an important facet of the present case, in my view, as it bears witness to the Commissioner having embarked on a statutory disciplinary procedure in respect of the applicant's alleged conduct which, if established, allowed for a sanction of dismissal to be imposed, if at the conclusion of the process such sanction was found to be warranted.

76. Following the completion of the investigating officer's investigation, pursuant to regulation 24(5) the investigating officer must report to the Commissioner *via* a written report containing his or her recommendation as to whether the facts disclosed warrant the establishment of a Board of Inquiry. Pursuant to regulation 25(1), the Commissioner is

mandated to establish a Board of Inquiry if it appears from the report of the investigation that the member concerned may have committed a serious breach of discipline. The Board of Inquiry is expressly tasked with determining whether such a breach has been committed and if so to recommend the appropriate disciplinary action to the Commissioner.

77. Regulations 27-29 govern the procedures before the Board of Inquiry including the calling of witnesses, the member's right to be heard, the requirement on persons to attend and give information and or produce documents to the Board. It should be noted that as regards these latter requirements, s.123(7) of the 2005 Act makes it an offence for any person without reasonable cause not to comply with a requirement to attend before a Board of Inquiry or who gives evidence that is false or misleading, such offence being punishable on summary conviction by a fine not exceeding €2,500 or a term of imprisonment not exceeding 6 months or both.

78. Regulation 30 provides that within 21 days of the conclusion of the inquiry, the presiding officer shall submit a written report to the Commissioner and the member together with the transcript and the determination of the Board of Inquiry as to whether the member is in breach of discipline, and if so, as to the act or conduct constituting the breach, and its recommendation as to any disciplinary action.

79. Here, following receipt of Superintendent Delaney's report, the Commissioner established a Board of Inquiry and duly received the Board's written report and its recommendations as to sanction.

80. Regulation 31 provides that where the Board of Inquiry recommends disciplinary action, the Commissioner shall within 14 days of receipt of the Board's report decide on the appropriate action to be taken. As is clear from regulation 31(1), the Commissioner is not bound by the recommendation of the Board of Inquiry. Thus, as far as the present case is concerned, once in receipt of the Board of Inquiry's report, the Commissioner could

have imposed on the applicant a more severe sanction than that recommended by the Board i.e. he could have dismissed the applicant outright pursuant to regulation 22(a). Yet, he chose to follow the Board's recommendation to require the applicant to resign as an alternative to dismissal and, on 25 October 2018, he duly notified the applicant of his decision pursuant to regulation 31(4). Had the Commissioner decided on the more severe sanction of outright dismissal, pursuant to regulation 32 he would have been obliged to so inform the applicant and request the applicant to submit any comments within 10 days. Here, however, as I have said, it is common case that the Commissioner accepted the recommendation of the Board of Inquiry, as evidenced by his notice of 25 October 2018 informing the applicant, *inter alia*, that in respect of "breach of discipline number 1", the applicant was required to resign from the force "as an alternative to dismissal" by midnight on 16 November 2018. Significantly, the 25 October 2018 communication advised the applicant that he "may give notice of appeal on form 1.A.51 not later than 7 days after receiving this notice".

81. Regulations 33-37 provide for an appeal by the member concerned of the decision of the Commissioner following the holding of a Board of Inquiry. Here, as can be seen, the applicant duly availed of his right of appeal, pursuant to regulation 33, against both the determination of the Board of Inquiry and the disciplinary action sought to be imposed on him by the Commissioner.

82. In respect of an appeal against the determination of a Board of Inquiry, regulation 37 empowers the Appeal Board to arrive at a number of different outcomes including affirming the determination of the Board of Inquiry or quashing it and the Commissioner's decision arising from it or quashing the determination and substituting a different disciplinary action. As provided for in regulation 37(2), where the member's appeal is against a decision of the Commissioner in relation to disciplinary action, the Appeal Board

may either affirm the decision or substitute another specified disciplinary action of a less serious nature. Here, as we know, the Appeal Board affirmed the determination of the Board of Inquiry but substituted the lesser specified sanction of a reduction of 4 weeks' pay in respect of the first breach.

83. Once in receipt of the Appeal Board's determination, the Commissioner was statutorily obliged to implement it pursuant to regulation 37(5) which states:

> *"The Commissioner shall implement the decision of the Appeal Board within 7 days after that decision is communicated to him or her."* (Emphasis added)

Thus, for present purposes, unlike at the Board of Inquiry stage, the Commissioner was left with no discretion when it came to implementing the decision of the Appeal Board.

84. The statutory process put in place by Part 3 of the 2007 Regulations effectively concludes with the obligation imposed on the Commissioner by regulation 37(5) to implement the decision of the appeal board. This, in my view, is not an insignificant factor as far as the present case is concerned.

85. In *Ivers,* Noonan J. described what the Part 3 process entails, in the following terms:

> *"…the Commissioner here invoked the provisions of the Regulations to set in train an investigation potentially to be followed by a Board of Inquiry…This immediately engaged the elaborate machinery under the Regulations…which are expressly designed to protect and vindicate Garda Ivers' constitutional rights at all stages of the process."* (Emphasis added) (at para. 67)

86. Clearly, as the present case shows, there was engagement by both the Commissioner and the applicant with the entire gamut of the process provided for in Part 3 of the 2007 Regulations. The Part 3 process, initiated by the Commissioner, ultimately culminated in the determination of the Appeal Board that the sanction imposed by the Commissioner in respect of the first breach (the requirement that the applicant resign within a specific

timeframe) was disproportionate in all the circumstances and that the appropriate sanction was a reduction in pay of four weeks in respect of the first breach of discipline and a reduction of two weeks in respect of the second breach. The import for the applicant (and the Commissioner) of the commencement of the Part 3 process and its run to the ultimate decision of the Appeal Board is discussed more fully later in the judgment. An issue to be decided is whether the procedural and substantive protections which the Part 3 process affords include the entitlement of the applicant to the benefit of the outcome of the Part 3 process and thus, once that process concluded, not be subjected to any further process that is instigated on foot of the same conduct that gave rise to the Part 3 disciplinary process.

Summary dismissal

87. Part 4 of the 2007 Regulations governs "summary dismissal" in cases where, essentially, the facts have been established. Regulation 39(1) provides:

> "39. (1) Notwithstanding anything in these regulations and without prejudice to section 14(2), the Commissioner may, subject to this regulation, dismiss from the Garda Síochána any member (not being above the rank of inspector) whom he or she considers unfit for retention in the Garda Síochána.
>
> (2) The power of dismissal conferred by this regulation shall not be exercised except where -
>
> (a) the Commissioner is not in any doubt as to the material facts and the relevant breach of discipline is of such gravity that the Commissioner has decided that the facts and the breach merit dismissal and that the holding of an inquiry under these regulations could not affect his or her decision in the matter,

(b) subject to paragraph (3), disclosure of the facts relating to the breach would, in the opinion of the Commissioner, be liable to affect the security of the State or to constitute a serious and unjustifiable infringement of the rights of another person, or

(c) the member concerned has failed to attend for duty over such a period and in such circumstances that it can be presumed that his or her intention has been to abandon his or her membership of the Garda Síochána.

(3) In a case referred to in paragraph (2)(b), the Commissioner shall consider whether, in the interests of the member concerned, some special inquiry can be held into the relevant breach of discipline which would not affect the security of the State or constitute a serious and unjustifiable infringement of the rights of another person.

(4) The power of dismissal conferred by this regulation shall not be exercised -

(a) where the member concerned has completed his or her period of probation, without the consent of the Minister,

(b) where paragraph 2(a) applies, without the member concerned being informed of the material facts and the relevant breach of discipline, and

(c) except where paragraph 2(c) applies or where, despite reasonable efforts to do so, the whereabouts of the member concerned have not been established, without the member being given an opportunity of submitting to the Commissioner reasons against the proposed dismissal."

88. In *Ivers*, Noonan J. described the summary dismissal process prescribed by Regulation 39 in the following terms:

> *"Clearly the power exercisable under Regulation 39 is limited to very specific circumstances which appear to include that there can be no real dispute as to the facts concerned, e.g. where the member concerned has been convicted of an offence involving the same facts which are alleged to constitute the breach of discipline. One can readily appreciate how, in such circumstances, the holding of a Board of Inquiry would be entirely otiose, there being no room for dispute about the facts. Similarly, where those facts are expressly admitted by the member concerned, there will be nothing to be gained by the holding of a Board of Inquiry so that it could not be said in either instance that there had been any denial of fair procedures in all the circumstances."* (at para. 34)

Section 14(2) dismissal

89. The third pathway providing for dismissal of a member from the force is found in s.14 of the 2005 Act. The provision is already set out above in full earlier in this judgment. In summary, s.14(2) provides that the Commissioner may dismiss from An Garda Síochána a member not above the rank of Inspector if the Commissioner is of the opinion that by reason of the member's conduct his or her continued membership would undermine public confidence in An Garda Síochána and the dismissal of the member is necessary to maintain that confidence. As made clear by Noonan J. in *Ivers,* the "conduct" referred to in s.14(2) must be established by some previous process prior to the Commissioner forming his opinion. It is not in dispute that the requisite conduct for the purposes of s.14(2) may be established under the Part 3 disciplinary process. What the applicant contends is that in the circumstances of his case, invoking s.14(2) was entirely impermissible.

90. Notably, if the requisite components of s. 14(2) are met, and, after hearing from the member, the Commissioner remains of the opinion he formed in respect of the member's conduct, then, as the terms of s.14(2) make clear, dismissal is the only sanction provided

for. I consider this a relevant factor in the present case in circumstances where the applicant, effectively, has already faced and overcome (by dint of the statutory appeal process provided for in Part 3 of the 2007 Regulations) a decision that he resign from the force in lieu of dismissal. In such circumstance, it is thus imperative that, having faced down the spectre of dismissal, the applicant would not be subjected to *"the exceptional and limited power of dismissal"* (as Noonan J. described it in *Ivers*) that is contained in s.14(2) unless it was lawful for the Commissioner to initiate that process against the applicant. I will return to this theme in due course.

91. It can, I believe, reasonably be said that the s. 14(2) process bears some passing similarity to the summary dismissal procedure pursuant to regulation 39 of the 2007 Regulations in that neither process involves the requisite fact-finding exercise that the Part 3 process requires, the underlying premise of both s.14(2) and regulation 39 being that there is already found or established conduct such as would warrant s.14(2) or regulation 39 being invoked.

92. Both s.14(2) and regulation 39 are "free-standing" processes, as was made clear by the Supreme Court in *McEnery v. Commissioner of An Garda Síochána* [2016] IESC 66. There, Laffoy J. stated:

> *" The power invoked by the Commissioner in relation to Sgt. McEnery is the power contained in Regulation 39, which is a specific regulation dealing with summary dismissal, the authority for which is. S. 123 of the Act of 2005. While no issue has arisen between the parties as to any connection between s.14 and Regulation 39, and each party simply refers to the provisions of s.14, albeit that counsel for the Commissioner points to the recognition by the Oireachtas in enacting that provision that in certain circumstances it is for the Commissioner to determine what amounts to conduct sufficient to warrant dismissal, it seems to me that each of*

those provisions is an independent 'stand-alone' provision and s.14 has no specific relevance to the proper interpretation or application of regulation 39." (at para. 15)

It would appear to follow from what was said in *McEnery*, that the Part 3 process is also a "free-standing" process.

93. Pursuant to s. 14(2)(b), the powers given to the Commissioner under s.14(2) cannot be exercised unless the member has been informed of the basis for the Commissioner's opinion and given an opportunity to respond and to advance reasons against the proposed dismissal and the Commissioner has considered the member's response and any reasons advanced against the member's dismissal. Pursuant to s.14(2)(c), the police authority must also consent to the member's dismissal.

94. As to the formation of the Commissioner's opinion for the purposes of s.14(2), as Noonan J. observed in *Ivers*, at para. 73:

"There are… two component parts to the formation of [the Commissioner's] opinion. The first is that there has been conduct. This is a finding of fact that does not constitute a matter of opinion. The second component is the formation of the opinion concerning public confidence arising from that found conduct and it is important to emphasise that this is not an opinion or belief that the conduct occurred."

95. He went on to state, at para. 74:

"The language of the section can in my view only be consistent with that construction. In contrast to s. 123 and the Regulations, s. 14(2) does not refer to 'alleged conduct' or that 'it appears that there may have been conduct' or similar expressions. It must follow in my view that the conduct which is referred to in s. 14(2) is conduct which has already been established on the basis of facts found.

Where those facts are contested, that must in turn mean that there has to be a process for finding facts which complies with the requirements of constitutional justice and fair procedures. There is none in the section."

96. Given that, as Noonan J. observed, there is no machinery contained in s.14(2) which admits of a fact finding exercise, he considered that *"it can only be the case that the conduct referred to in s. 14(2) is either conduct that has been established by virtue of some constitutionally compliant process, for example an inquiry under the Regulations, conduct which is admitted (as in Jordan) or conduct which cannot be disputed (e.g. because of a criminal conviction as in McEnery)."* (at para. 74)

The present case, viewed through the prism of s.14(2)

97. Undoubtedly, as far as the present case is concerned, the first component (as described by Noonan J. in *Ivers*) of the entitlement to invoke s.14(2) is met in that the applicant's conduct has been found, further to the Part 3 process invoked by the Commissioner under the 2007 Regulations (albeit it was found following upon the admissions made by the applicant, but nothing turns on the manner by which the found conduct was established). Clearly also, in this case, the Commissioner has formed the requisite first stage opinion *"concerning public confidence arising from that found conduct"* to borrow the phraseology of Noonan J. in *Ivers.*

98. One of the arguments the Commissioner advances in the appeal is that s.14(2) is not a truly disciplinary provision. It is argued that the section is not concerned exclusively or even primarily with disciplinary matters as such but rather has a wider focus, namely that of scenarios where a member's continued membership would undermine public confidence in An Garda Síochána, by virtue of the conduct of the member, and where dismissal of the member is necessary to maintain that confidence. In other words, it is said that s.14(2) is concerned with maintaining public confidence in An Garda Síochána rather than with

disciplining the member concerned and that that task is, the Commissioner says, "peculiarly and statutorily invested in the Commissioner alone". The aforesaid argument, coupled with what is described as the status of s. 14(2) as a "stand-alone" provision (containing its own *audi alteram partem* process), constitute the cornerstone of the Commissioner's appeal arguments. Each component of the Commissioner's cornerstone requires interrogation.

Section 14(2) as a "stand-alone" provision?

99. As is evident from his judgment, having regard to the wording of s.14(2), in particular the phrase *"Notwithstanding anything in this Act or in the Regulations…",* and having noted the view taken by Heslin J. in *Keane* that the power available to the Commissioner under s.14(2) was exercisable *"without reference to the 2007 Regulations"*, the Judge was satisfied to hold that, in principle, s.14 was a self-standing statutory provision which could be invoked by the Commissioner against a member irrespective of the fact that a process concerning the same member had already been followed to completion pursuant to the 2007 Regulations. Indeed, the Judge (and Heslin J. in *Keane*) envisaged scenarios where the Commissioner might have valid grounds to seek the dismissal of a member under s.14(2) where a decision on the member had already been taken under the 2007 Regulations. As to how this might arise, the Judge referred, by way of example, to a decision relating to a member previously taken under the 2007 Regulations, "coupled with some new matters", that might lead the Commissioner forming the necessary opinion under s.14(2). Accordingly, in his view, it was "appropriate to characterise s.14 as a self-standing provision in the sense that, as a matter of statutory

interpretation, it is in principle capable of being invoked notwithstanding anything contained in the Regulations".

100. As the Judge had anticipated, the nature of the s.14(2) process was considered by this Court in *Ivers*. At para. 65 of his judgment, Noonan J. had the following to say:

> *"As the authorities demonstrate, it cannot be doubted that s.14(2) has been described as a free standing provision that may be availed of, where appropriate, without reference to the Regulations. That much is clear from the express wording of the section itself…that seems to be further supported by the terms of Regulation 39 of the Regulations concerning summary dismissal, which power is expressed to be 'without prejudice to s.14(2)'. That is however quite a different thing to saying that s.14(2) exists or can be operated in a vacuum without any regard to anything that may have occurred pursuant to the Regulations…".*

101. I entirely agree both with the learned Noonan J.'s conclusion that s.14(2) must be read "*as a free standing provision that may be availed of, where appropriate, without reference to the Regulations"* and his observation that that did not mean that s.14(2) exists or can be operated *"in a vacuum"*.

102. Returning to the judgment under appeal; while the Judge was satisfied that s.14(2) was in principle capable of being invoked notwithstanding that a member may have been the subject of the full gamut of the disciplinary process provided for in Part 3 of the 2007 Regulations, in his view, that was not the end of the matter as far as the facts of the present case were concerned. This was, he said, because "the invocation of s. 14 must itself comply with constitutional justice". For the reasons he set out at paras. 56-74 of his judgment **(**already referred to earlier in this judgment and which need not be rehearsed again), the Judge was satisfied that the Commissioner's "exceptional" powers under s.14 "have been invoked in breach of the applicant's rights to constitutional justice on the facts

of this case". Indeed, as Noonan J. observed in *Ivers* (when referring to the judgment under appeal here and the decision of Heslin J. in *Keane*), *"[t]he obvious tension that exists between s.14 on the one hand and the operation of the regulations on the other came into very sharp focus in both Hegarty and Keane and in both cases, the resolution of that tension was achieved in large measure by reference to the constitutional rights of the members concerned and their entitlement to fair procedures in the operation of both s.14.(2) and the Regulations."* (at para. 66)

103. Earlier, at para. 64 of his judgment in *Ivers*, Noonan J. characterised the Judge's decision here as one where *"[i]n effect…Ferriter J. concluded that in all the circumstances obtaining in Hegarty, the Commissioner was not entitled to invoke s.14 at all. This is similar to the conclusion reached by Heslin J. in Keane where what was sought to be achieved by the Commissioner invoking s.14(2) was a nullification or cancelling of the entire disciplinary procedure invoked by the Commissioner himself. Both Hegarty and Keane turned in significant measure on the broad concept of 'double jeopardy' insofar as each member had been subjected to a procedure under the Regulations at the instigation and with the participation of the Commissioner who appears to have found the outcome unsatisfactory and resorted to s.14(2) in consequence."*

104. As I have alluded to already, in broad brush the mainstay of the Commissioner's argument before this Court is that s.14(2) is a "separate express statutory power" "not concerned exclusively or even primarily with disciplinary matters" but rather, "concerns a wider consideration i.e. public confidence in An Garda Síochána".

105. In canvassing this argument, the Commissioner accepts that by invoking s.14(2) he is subjecting the applicant to a statutory dismissal process for specific conduct in circumstances where the Commissioner has already sought the effective dismissal of the applicant in a prior statutory process based on the same conduct and where an appeal board

has imposed a lesser sanction which the Commissioner is statutorily obliged to accept. Counsel for the Commissioner maintains, however, that there are important differences between the process under the 2007 Regulations and the s.14 process such that the invocation by the Commissioner of the "stand-alone" s.14(2) is entirely permissible in this case. Accordingly, it is suggested - if s.14(2) is indeed a stand-alone provision - that it cannot be the case that the s.14(2) process cannot be invoked once the disciplinary process pursuant to the 2007 Regulations is underway.

106. One difference between the disciplinary process and the s. 14 process highlighted by counsel for the Commissioner (in aid of the Commissioner's argument) is that the s.14(2) process does not involve fact finding since the facts have to be found by the time the Commissioner forms his opinion for the purposes of s.14(2)(a). Hence, it is said, the initiation of s.14(2) cannot put the applicant under any renewed "vexation" in that respect. It is also argued that once the applicant's conduct had been established, it was "reasonable" for the Commissioner to form at least the initial opinion that by reason of the applicant's conduct, his continued membership of An Garda Síochána would undermine public confidence in the force.

107. On the facts of this case, I cannot accept this argument on any level. To my mind, counsel's submission overlooks completely the Judge's finding that the applicant has been "twice vexed" by the fact that the sanction (removal from the force), which he successfully staved off in the disciplinary process under Part 3 of the 2007 Regulations, is now being sought to be imposed on him in respect of the self-same conduct that was at issue in the Part 3 disciplinary proceedings. The fact that the applicant by virtue of the provisions of s.14(2) has somehow been "spared" the burden of a fact-finding exercise does little, in my view, to make the Commissioner's overall argument more palatable. Furthermore, the argument that it was "reasonable" for the Commissioner to form the opinion he did does

not hold weight, in my view, in circumstances where both the Board of Inquiry and the Appeal Board in the Part 3 disciplinary process patently took account of the likely impact of the applicant's conduct on public confidence in An Garda Síochána and where notwithstanding the potential for the applicant's conduct to impact on public opinion, the Appeal Board, for the reasons it gave, considered that the requirement imposed on the applicant to resign in lieu of dismissal was disproportionate. I will return to the Commissioner's "public confidence" argument in due course.

108. Insofar as the Commissioner relies on the fact that he invoked s.14(2) only after the completion of the Part 3 disciplinary process under the 2007 Regulations, by which stage his opinion under the section had been informed by the applicant's conduct as found/admitted to in the disciplinary process, I do not consider that that fact can appease, in any regard, the concerns regarding constitutional justice which the invocation of s.14(2) present on the facts of this case. On any reading of the Appeal Board's decision, viewed in the context of the disciplinary process under which that decision was made, the logical, and indeed legal, upshot of the Appeal Board's decision was that as far as the Part 3 disciplinary process which the Commissioner initiated was concerned, the applicant was no longer at peril of dismissal from the force or, more pertinently, of being required to resign in lieu of dismissal (the sanction imposed by the Commissioner under the disciplinary process).

109. The invocation of the s.14(2) process, however, resurrects the peril of dismissal.

110. It will be recalled that the sanction imposed by the Appeal Board in respect of the first disciplinary breach was the "temporary reduction in pay of 4 weeks" in substitution for the Commissioner's sanction that the applicant must resign from the force by midnight on 16 November 2018 (the Appeal Board leaving intact the Commissioner's sanction of the "temporary reduction in pay of 2 weeks" in respect of the second breach). The

applicant submits that by the invocation of s. 14(2), the Commissioner has in fact ignored the determination of the Appeal Board that dismissal was too severe a sanction in this case. He argues that the Commissioner's failure to abide by the determination of the Appeal Board is manifestly wrong and constitutes the reason why s.14(2) cannot be invoked by the Commissioner.

111. On the other hand, counsel for the Commissioner argues that there is no question of the Commissioner being in breach of regulation 37(5) of the 2007 Regulations because the Commissioner has implemented the Appeal Board's decision by deducting six weeks' pay from the applicant.

112. It is not in dispute but that the sanction imposed by the Appeal Board was put in train. On 20 January 2020, Chief Superintendent Nugent wrote to the Human Resources Directorate of An Garda Síochána requesting them to make arrangements for the implementation of the monetary penalties. Thus, for the purposes of regulation 37(5) of the 2007 Regulations, it can be said that the decision of the Appeal Board to impose a monetary penalty on the applicant has been implemented.

113. In my view, however, the fact that the sanction imposed by the Appeal Board has been implemented does not lend credence to the Commissioner's argument that he is entitled to invoke s.14(2). The monetary sanction imposed by the Appeal Board (incidentally one of the sanctions reserved in regulation 22 for "serious breaches of discipline") was imposed in circumstances where albeit the Appeal Board (rightly, in my view) considered the applicant's conduct very grave (and thus upheld the Board of Inquiry's determination), it nevertheless adjudged the Commissioner's sanction of requiring the applicant to resign as an alternative to dismissal too severe, for the reasons it set out in its determination. Hence, the Appeal Board's imposition of a lesser sanction other than dismissal is inextricably allied to its finding that the applicant's dismissal from

the force was disproportionate in all the circumstances. Thus, it cannot reasonably or lawfully be argued (as the Commissioner purports to do) that the fact that the Commissioner has implemented the sanction imposed by the Appeal Board means that he has abided by the decision of the Appeal Board and thus the applicant has no cause for complaint. In short, the upshot, legally and factually, of the Appeal Board's decision was that the applicant was to remain a member of An Garda Síochána, albeit subject to the monetary sanctions imposed by the Appeal Board.

114. The applicant's principal submission in the appeal is that it is not permissible for the Commissioner, after electing for the disciplinary procedure provided for in the 2007 Regulations to discipline the applicant, to invoke the s.14(2) procedure since, as a matter of logic, to do so would completely negate the appeal provisions of Part 3 of the 2007 Regulations and the applicant's successful invocation of that appeal process. He says that the invoking by the Commissioner of s.14(2) is, in the circumstances of the present case, tantamount to the eradication of the outcome of applicant's statutory right of appeal under the 2007 Regulations and, thus, contrary to substantive constitutional fairness.

115. In essence, what counsel for the applicant contends is that once the disciplinary process under Part 3 was invoked against the applicant, and progressed to its ultimate statutory conclusion, the Commissioner cannot then invoke the s.14(2) process. He submits that the statutory due process provided for in Part 3 of the 2007 Regulations cannot be denigrated in the manner sought by the Commissioner. It is also argued that the fact that the applicant made admissions in the course of the investigation phase of the disciplinary process cannot assist the Commissioner since, irrespective of the admissions made, the process provided for in Part 3 of the 2007 Regulations allowed the applicant to go on to make his case (both at the Board of Inquiry and the Appeal Board stage) as to what sanctions should be imposed on him.

116. Having regard to the circumstances of the present case, I am persuaded by the applicant's submissions. Once the Commissioner elected for and instigated the disciplinary process provided for in Part 3 of the 2007 Regulation, and saw it through to its ultimate conclusion, it cannot be said to accord with the precepts of constitutional justice for the Commissioner, having invoked the Part 3 disciplinary process with its various mandatory provisions, then to, by invoking s.14(2), effectively overturn that process at the very point where the Commissioner was obliged to apply the Appeal Board's determination as a matter of law. As far as the present case is concerned, s.14(2) cannot be operated *"in a vacuum"* (to borrow the words of Noonan J. in *Ivers*) without regard to the earlier statutory disciplinary process. Pursuant to that process, which was instigated by the Commissioner and seen through both by the Commissioner and the applicant to its end, the applicant secured an outcome which is totally at variance with the outcome which the Commissioner now seeks *via* a parallel statutory pathway. In my view, the applicant is procedurally and substantively entitled to the benefits of the Appeal Board's determination, which was that requiring him to resign in lieu of dismissal was a disproportionate sanction.

117. What the Commissioner advocates for here, effectively, is that the applicant's successful overturning before the Appeal Board of the requirement imposed on him to resign can be trumped by virtue of the Commissioner having invoked s.14(2) of the 2005 Act. However, as put by the Judge, it is "not merely procedurally unfair, but substantively unfair, that the applicant be exposed to the peril of dismissal for the very conduct which he has already suffered a penalty for, at the hands of the Commissioner".

118. Furthermore, the fact that s.14(2) contains its own *audi alteram partem* provisions cannot assist the case the Commissioner seeks to make in circumstances where, as a matter both of fact and law, the applicant has made his case under the Part 3 process that was

instigated against him by the Commissioner, the upshot of which resulted, as I have said, in the applicant successfully overturning the requirement that he resign from the force.

119. While the analogy the Judge made with double jeopardy in the criminal context was "imperfect" (as the Judge himself acknowledged) as neither the Part 3 disciplinary process nor the s.14(2) process involve criminal sanctions, as the Judge stated, "both processes nonetheless involve exposure to the very serious potential sanction of being dismissed from the force and losing one's career as a garda." (at para. 65) When overlaid with the universal concept that it is fundamentally unfair for a person to be subject to potential sanction a second time for conduct for which the person has already been sanctioned, s.14(2) cannot, in my view, for the purposes of this case, be read in the manner advocated by the Commissioner.

120. One of the arguments advanced by the Commissioner was that the fact the applicant's participation in the Part 3 process did not amount to prejudice to the applicant such as to preclude the provisions of s.14(2) being invoked against him and that the applicant "must establish a particular prejudice to prevent the Commissioner from entering upon the [s.14(2)] process in the first instance". I disagree for all of the reasons set out above. In short, what greater prejudice can there be for an individual than being "twice vexed" in respect of conduct for which he has already been sanctioned by a body statutorily established to administer that sanction? Here, such a statutory body-the Appeal Board-has imposed its sanction which, most importantly, the Commissioner is statutorily obliged to abide by.

121. For all of the foregoing reasons, the status of s.14(2) as a "stand-alone" provision from the disciplinary processes contained in the 2007 Regulations cannot assist the Commissions in the circumstances of the present case.

The utilisation of s.14(2) in order to maintain public confidence in An Garda Síochána

122. As I have earlier referred to, a particular tenet of the Commissioner's argument on appeal is that s.14(2) of the 2005 Act, unlike the processes provided for in Part 3 and Part 4 of the 2007 Regulations, is not a truly disciplinary provision. The Commissioner's contention is that s.14(2) is not concerned exclusively, or even primarily, with disciplinary matters as such but rather has the wider focus of ensuring that public confidence in An Garda Síochána is maintained. He submits that in this regard, s.14(2) is to be contrasted with Part 3 of the 2007 Regulations which concerns a detailed process in respect of which considerable if not primary emphasis is on the rights of the member the subject of the disciplinary process.

123. Clearly, the Judge was not persuaded by the Commissioner's argument in this regard. At para. 68 of his judgment, he observed that, "at least in broad terms, the machinery existing for disciplining members of An Garda Síochána under the disciplinary regulation is to ensure the maintenance of confidence in the Garda Síochána". In so observing, the Judge quoted the *dictum* of Laffoy J. in *McEnery* that *"[w]hile maintaining discipline is important in its own terms, it is also crucial for maintaining public confidence in An Garda Siochana".*

124. In his submissions to this Court, counsel for the Commissioner argues that it is demonstrably not the case that the 2007 Regulations are the exclusive mechanism for maintaining public confidence in An Garda Síochána since "any such approach would render s.14(2) a dead letter". He says that pursuant to s.14(2), the task of maintaining public confidence in An Garda Síochána is "peculiarly and statutorily invested in the Commissioner alone".

125. Counsel for the applicant does not agree with the Commissioner's submission that the emphasis in s.14(2) on maintaining public confidence in the force allows the Commissioner to invoke s.14(2) irrespective of the outcome of the disciplinary process

under the 2007 Regulations. He submits that, as indeed the Judge found, public confidence in the force also informs and is indeed inherent in the disciplinary process provided for in the 2007 Regulations. This, he says, is evidenced not only by established case law but also by various internal Directives sent by the Commissioner to members of the various boards set up pursuant to the 2007 Regulations, and to the lawyers sitting on those boards.

126. While it cannot be disputed that the statutory basis for the invocation of s.14(2) is the Commissioner's opinion that the found conduct of a member of An Garda Síochána undermines public confidence in the force, it is clear from the established case law that, disciplinary infractions apart, the broader consideration of public confidence in An Garda Síochána also underpins the decision to dismiss a member whose conduct is established following the invocation of the disciplinary processes provided for in Part 3 and Part 4 of the 2007 Regulations. In *State (Jordan) v. Commissioner of An Garda Síochána* [1987] ILRM 107, when discussing the summary dismissal procedure contained in regulation 34 of the Discipline Regulations, 1971 (the predecessor to regulation 39 of the 2007 Regulation), O'Hanlon J. stated:

> *"I am of the opinion that special considerations apply in relation to the power of the State to dispense with the services of members of the armed forces, of the Garda Síochána, and of the prison service because it is of vital concern to the community as a whole that the members of these services should be completely trustworthy, For this reason, I take the view that it was permissible to confer on the Commissioner of the Garda Síochána the exceptional powers contained in Reg. 34 of the Discipline Regulations. 1971, but I also accept the contention of counsel for the prosecutor that the scope for making use of these powers must be very limited in character…"* (at p.115)

127. Having regard to the dicta of O'Hanlon J. in *Jordan*, and what was said by Laffoy J. in *McEnery*, I cannot agree with the Commissioner's argument that the public confidence criterion which underpins the invocation of s.14(2) is, of itself, sufficient to warrant the invocation of the s.14(2) process in this case. To my mind, the Commissioner's position ignores not just the fact that the applicant has already been through a disciplinary process designed to address the conduct of which he stood accused, but also the jurisprudence just quoted which explicitly recognises that an inherent component of the disciplining of members of An Garda Síochána is the efficacy of the force and the public's confidence in the force. Indeed, this is evident from the determinations given by both the Board of Inquiry and the Appeal Board in the present case.

128. As regards the Board of Inquiry, in recommending to the Commissioner, in terms of the applicant's found discreditable conduct, that the applicant be required to retire or resign from the force as an alternative to his dismissal, the Board had regard to how the applicant's "actions and the degree of same may have damaged the professional reputation of An Garda Síochána as an organisation" (my emphasis). The fact that the Board's recommended sanction, and the Commissioner's acceptance of that sanction, did not later find favour with the Appeal Board does not detract from the consideration the Board of Inquiry gave to the likely reputational damage to the force as a result of the applicant's conduct.

129. Likewise, the Appeal Board, in deciding on the sanction it did (4 weeks' reduction in pay as regards the first breach and 2 weeks' reduction in pay as regards the second breach) took account of the fact that "public confidence mandates that these breaches be severely punished…" (my emphasis). Thus, public confidence in the force clearly permeated the deliberations of both the Board of Inquiry and the Appeal Board, as would indeed be expected in the circumstances of this case. Accordingly, it is not, in my view,

sufficient for the Commissioner to seek to simply rely on the "public confidence" considerations that underpin s.14(2) as a justification for invoking the section as against the applicant. Thus, for the reasons just stated, I find no merit in the Commissioner's argument, at para. 27 of his submissions, that the Judge did not deal adequately with the matter when he held that it would be difficult to conceive of circumstances where conduct which would be sufficient to merit the exercise of the exceptional power of dismissing a member would not also be conduct which would equally constitute conduct capable of being disciplined pursuant to the 2007 Regulations.

When, if not in this case, can s.14(2) be invoked?

130. In the course of his submissions to the Court, counsel for the Commissioner asked the rhetorical question, when therefore, if not in the circumstances of the present case, could s.14 be lawfully invoked against a member of the force. Given that I have found that the precepts of constitutional justice preclude the Commissioner from invoking s.14(2) in this case, it is unnecessary for me to speculate on the circumstances in which s.14(2) might lawfully be invoked against a member of the force who has been subjected to the disciplinary process provided for in Part 3 of the 2007 Regulations. I note however that both the Judge, and Heslin J. in *Keane*, gave some consideration to this issue. The Judge opined that one could readily envisage that the Commissioner could have grounds to seek the dismissal of a member of the force under s.14(2) in respect of a decision relating to that member previously taken under the 2007 Regulations where "the matter the subject of the prior decision, coupled with some new matters, led to the Commissioner forming the necessary opinion under s.14(2) or, perhaps, where a series of adverse decisions had been taken against the member, each of which fell short of warranting the sanction of dismissal, but which taken together might validly ground the formation of the necessary opinion under s.14" (emphasis added).

131. I find no reason to demur in this regard. What is apparent from the examples the Judge gave is that if the scenarios the Judge described were to occur, what the Commissioner would be faced with is *a new factual matrix* concerning a member of the force, which, for the purposes of the first example the Judge gave, would encompass both a prior concluded disciplinary process concerning that member and some further new element (say perhaps a criminal conviction or series of convictions imposed on the member) which potentially might lead the Commissioner to form the requisite opinion under s.14(2). In such case, presumably, it would be argued by the Commissioner that he was invoking s.14(2) in circumstances where the combined effect of the prior disciplinary process and the criminal conviction(s) (in other words, this new factual matrix) led to the formation of the requisite opinion under s.14(2). Presumably, the same argument would be made in the case of the second example given by the Judge. However, neither of the aforesaid scenarios pertain to the present case.

132. I hasten to add that the degree to which I have speculated as to when s.14(2) might be invoked is not intended to corral the Commissioner into a particular course of action in any given case. I highlight the issue only to emphasise that the present case is at a considerable remove from the potential circumstances where s.14(2) might be lawfully invoked following a disciplinary process pursuant to Part 3 of the 2007 Regulations.

Invoking s.14(2) during the currency of the Part 3 disciplinary process

133. During the appeal hearing there was some debate as to whether the Commissioner, having established a Board of Inquiry pursuant to Part 3 of the 2007 Regulations where it appeared to the Commissioner that a serious breach of discipline may have been committed, would be at liberty during the currency of that process, and once the relevant conduct was found or established, to dis-establish the Board of Inquiry and embark on the s.14(2) process if he formed the opinion that by reason of the member's found conduct, his

continued membership would undermine public confidence in An Garda Síochána. Counsel for the Commissioner suggested that in such a scenario the disciplinary process pursuant to the Regulations could be paused and the s.14(2) process commenced, albeit he acknowledged the likelihood of the member seeking to judicially review such a decision. Counsel further suggested that if the Commissioner did embark on the s.14(2) process during the currency of Part 3 disciplinary proceedings, and the outcome of the s.14(2) process was that the Commissioner remained of the opinion that the member should be dismissed pursuant to s.14(2), then the outstanding paused disciplinary process would effectively cease to be of relevance because, if dismissed under s.14(2), the member would no longer be a member of the force and, hence, would have lost his rights as a member and, hence, the benefit of the 2007 Regulations. It was also suggested that in the present case the Commissioner could have invoked the s.14(2) process after the applicant made his admissions at the investigation stage of the disciplinary process. Counsel opined that the reality must be that the question as to whether the invocation of s.14(2), either during the currency of a disciplinary process pursuant to the 2007 Regulations, or at the end of that process, is warranted, must be assessed on a case-to-case basis. Counsel for the applicant's position was that once the disciplinary process under Part 3 of the 2007 Regulations has been invoked (including seeing that process to its conclusion), the Commissioner cannot invoke the s.14(2) procedure. Counsel's submission was that that the Commissioner must choose the process to be initiated and once chosen, he cannot change course. For him to do so, counsel said, would amounts to a type of double jeopardy in the sense outlined by the Judge. Counsel did however opine that s.14(2) might be invoked by the Commissioner in a case under the Part 4 summary dismissal procedure once there was established conduct that manifestly would undermine public confidence in An Garda Síochána.

134. It is I believe unnecessary for the Court to express a view on the submissions advanced by counsel in the above regard. Suffice it to say that in the circumstances of this case, I am satisfied that the Commissioner had no lawful basis for invoking the s.14(2) process. Accordingly, for the reasons set out herein, I would dismiss the appeal.

Costs

135. The Commissioner has not succeeded in his appeal. It would seem to follow that the applicant should be awarded his costs. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within 28 days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the 28-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

136. As this judgment is being delivered electronically, Donnelly J. and Noonan J. have indicated their agreement therewith and with the orders I have proposed.