Neutral Citation Number: [2009] IEHC 424

THE HIGH COURT

2008 688 JR

JOHN RYAN

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

Judgment of O' Neill J. delivered the 6th day of October 2009.

1. Relief sought

1.1 Leave was granted by this Court (Peart J.) on the 16th June, 2008, to the applicant to pursue the following reliefs by way of judicial review proceedings:-

> 1. An order of prohibition permanently restraining the respondent and the board of inquiry constituted by the respondent from taking any further steps in the Garda Síochána discipline proceedings which are the subject matter of this application.
>
> 2. A declaration to the effect that the respondent is guilty of inordinate and inexcusable delay in and about the determination of the Garda Síochána discipline matters as are alleged against the applicant, thereby requiring that the proceedings be quashed or that the respondent be permanently prohibited from the continuance of the same, the delay being so inordinate that it would now be unfair and unjust to proceed further and/or any further proceedings that have the effect of undermining the applicant's constitutional right to natural justice and fairness of procedures in and about the conduct of an inquiry with due expedition should likewise be prohibited.
>
> 3. An order of prohibition permanently restraining the respondent from the taking of any further steps in the Garda Síochána discipline matters which are the subject of this application, the respondent having failed, refused or neglected to discover or to disclose to the applicant all of the relevant documents and materials which formed part of a request made by the applicant (and agreed to by the respondent), the documents being necessary for the conduct of the applicant's defence.
>
> 4. If necessary, an order of *certiorari* quashing the Garda Síochána discipline proceedings in so far as they relate to the applicant in their entirety.

2. The facts

2.1 The applicant is a member of An Gardaí Síochána and holds the rank of sergeant. He is attached to Kilrush Garda Station. It is alleged that the applicant, between the years 1998 and 2001, submitted overtime payments and claims for travel and subsistence expenses, which at time of submission, he knew to be false. In addition, it is alleged that the applicant, during the same period, submitted his claims for payment in respect of overtime and expenses in circumstances where he had not worked the hours claimed for or was not otherwise entitled to payments or expenses.

2.2 On the 14th March, 2002, Superintendent Patrick Doyle of Westport Garda Station was appointed under the Garda Síochána (Discipline) Regulations 1989 ("the regulations") by Chief Superintendent T.P. Kelly of Ennis Garda Station to conduct a disciplinary investigation into the above allegations. The applicant was subsequently charged, under the regulations, on the 4th April, 2003, with 36 alleged breaches of discipline relating to prevarication. A Board of Inquiry was appointed on the 6th May, 2003, pursuant to regulation 14 to determine the applicant's culpability. The applicant strenuously denies these charges.

2.3 On the 12th June, 2003, the applicant's solicitors wrote to Chief Superintendent Rooney, formerly of Ennis Garda Station, seeking disclosure of fifteen categories of documents in order to assist the applicant's defence. These included copies of Forms A85 of all members of the Ennis District between January 1998 and December 2001 and copies of all station diaries for Ennis District for the same period. A Form A85 is the form submitted by members to claim payment for overtime. The station diary is where members record their hours worked each day. It is the applicant's case that the practice was that certain members did not record their hours in the station diary. The applicant outlined the reason he considered these particular papers vital for the conduct of his defence at para. 3 of his affidavit sworn on the 27th May, 2009:-

> *"Both the diaries and the said Forms A85 are required by me so as to establish that it was normal practice for members of all ranks to claim and to receive overtime payment notwithstanding any requirement, practice or procedure whereby members of An Garda Síochána signed the station diary at the commencement of a tour of duty. I am in no doubt about the practice as actually adopted at the relevant time and I am in no doubt about the fact that members of equivalent rank and members of higher rank claimed and received overtime payment without in fact signing the station diary at the commencement of duty."*

2.4 By the time the Board of Inquiry was convened to determine the allegations made against the applicant on the 30th September, 2003, the documentation the applicant had requested on the 12th June, 2003, had not been supplied to the applicant. At the hearing counsel for the applicant applied to the Board of Inquiry for disclosure of the said documents. However, the Board of Inquiry refused this application. The applicant then withdrew from the inquiry. Judicial Review proceedings were commenced by the applicant on the 2nd October, 2003 and leave was granted on the 24th day of March 2006. Injunctive relief was applied for by the applicant and granted on the 1st October, 2003, by the President of the High Court who also directed that the inquiry be restrained until further order. These proceedings were opposed and in due course and came on for hearing on the 20th July, 2006.

2.5 Chief Superintendent Rooney in his earlier affidavit, sworn in the first judicial review proceedings, which was exhibited at "*CR1*" of his affidavit sworn in these proceedings on the 10th day of February, 2004 explains the reason for this refusal by the Board. The relevant paragraph avers as follows:-

> *"The Applicant, in his Affidavit, makes numerous references to applications made on his behalf by way of correspondence and orally seeking, disclosure of certain documentation. I say and believe that any application made in this regard was dealt with properly and in due accordance with the relevant provision of the Garda Siochana (Discipline) Regulations, 1989 and I furthermore say that in any case in which the Inquiry was dealt with to adjudicate upon matters beyond its remit, the Inquiry refused to entertain jurisdiction in respect of any such matter. The Applicant was well aware of the attitude of the Respondent to the various requests made for disclosure/discovery in advance of the commencement of the sworn Inquiry …"*

2.6 The reasons for the refusal are repeated in substance in para. 3 of the affidavit of Chief Superintendent Rooney, sworn on the 26th November, 2008 in these proceedings as follows:-

> *"…*
>
> *The Board of Inquiry refused the application of the applicant in relation to access to documents and materials as the Board considered these matters to be beyond its remit and refused to entertain jurisdiction in respect of any such matters. These grounds were contained in p.3 of my affidavit sworn for the purposes of the earlier judicial review proceedings on the 10th February, 2004, under the heading 'request for discovery/disclosure.'*

2.7 The first judicial review proceedings were ultimately compromised when the respondent agreed to make disclosure of certain documentation. By letter dated the 17th July, 2006, the Chief State Solicitor set out seven categories of documents that would be made available to the applicant. That letter stated expressly that "*the Respondent is prepared to make the documents listed below available for inspection by the Applicant by appointment through the Divisional Officer, Ennis*." The applicant, in para.5 of his affidavit sworn on the 13th June, 2008, confirmed that the terms of this letter reflected the agreement reached. The agreement stated that station diaries in respect of the period 1998 to December 2001 would be made available. However, the following was also stated:-

> *"The station diaries for the periods 21st April 2000 to 7th October 2001 and 22nd March 2001 to 31st December 2001 cannot be located. I confirm that efforts are being made to locate these diaries and they will be made available to the Applicant if they are found;"*

It has since been clarified that the 7th October, 2001, should have read the 7th October, 2000. Copies of all "*available*" A85 forms of all members of Ennis District for the period January 1998 to December 2001 inclusive were also to be made available for inspection.

2.8 A dispute then arose regarding the costs of the first judicial review proceedings. On the 17th October, 2006, this Court (MacMenamin J.) made an order, on consent, that the respondent would pay the costs. The matter was then struck out.

2.9 Notwithstanding the terms of the letter of the 17th July, 2006, the applicant's solicitors wrote to the Chief State Solicitor on the 7th December, 2006, seeking to confirm the steps that were being taken in respect of "*the handing over of the agreed copy documentation*". A reminder letter was sent on the 1st March, 2007.

2.10 By letter dated the 17th September, 2007, Superintendent Doyle wrote to the applicant's solicitors requesting them to make arrangements in respect of the inspection of documents in the following terms:-

> *"At* [sic*] this matter is now going on for over a year and no progress has been made to date, I wish to formally give you the opportunity to make arrangements with myself in order that I can give you a supervised inspection of the documentation in my possession, and which was agreed, at Westport Garda Station.*
>
> *I would thank you if you could make early arrangements in this regard in order that the matter can progress."*

2.11 The applicant's solicitors replied by letter dated the 18th October, 2007, setting out the seven categories of documents that the respondent agreed to disclose. At the end of the letter the following was stated:-

> *"It is not necessary, at this point in time, for us to inspect documentation in your possession. We require copies of all documentation as outlined above."*

2.12 Chief Superintendent Doyle wrote again to the applicant's solicitors on the 7th November, 2007, confirming the documents he had provided, which were received by the applicants on the 12th November, 2007. They included:-

> *"(a) Copies of all available Forms A.85 of all members of Ennis District between January, 1998 to December, 2001 in my possession.*
>
> *…*
>
> *(c) Copies of all available station diaries for Ennis District in respect of the period 1998 to December, 2001 as set out hereunder:*
>
> *19.02.1998 to 17.07.1998*

20.12.1998 to 24.05.1999

09.11.1999 to 20.04.2000

08.10.2000 to 22.03.2001"

2.13 The applicant's solicitors queried whether there were other A85 Forms that were not in Chief Superintendent's Doyle's possession and asked why copies of the station diaries had not been provided in respect of certain periods in a letter dated the 14th November, 2007. Chief Superintendent Doyle replied on the 16th November, 2007, confirming that he had furnished copies of all Forms A85 and station diaries in his possession and suggesting that the Superintendent in Ennis should be contacted with regard to obtaining further copies. On the 12th March, 2008, in response to the applicant's request, Superintendent Scanlan of Ennis Garda Station sent further copies of the Ennis station diary in respect of two periods from 1998 and one in respect of 1999. He also sent copies of A85 Forms for all members of Ennis District in respect of roster periods between June 2001 and December 2001. The applicant's solicitors then wrote back to Superintendent Scanlan on the 20th May, 2008, requesting certain other copies of station diaries.

2.14 On the 10th June, 2008, Assistant Commissioner Clancy wrote to the applicant's solicitors indicating that of the nine diaries covering the period in question from the beginning of 1998 to the end of 2001 that seven had been provided to the applicant. According to the applicant the missing two diaries cover the periods the 20th April, 2000 to the 8th October, 2000 and the 22nd March, 2001, to the 31st December, 2001. These appear to be the diaries, indicated in the settlement letter of the 17th July, 2006, that could not be found.

2.15 On the 23rd May, 2008, the applicant's solicitors wrote to Superintendent Rooney requesting that the charges against the applicant be withdrawn on the basis of the delay in providing documentation, some of which had still not been furnished, in light of the prejudice the applicant would suffer. The response of Superintendent Rooney of the 29th May, 2008, was that it was not within the Board of Inquiry's remit to withdraw the charges and that further correspondence on the issue should be sent to the Assistant Commissioner, Human Resource Management.

2.16 The applicant submits that he cannot properly defend himself without full disclosure of the documentation that were agreed to be provided to the applicant on the 17th July, 2006. In summary, the outstanding documentation that is sought by the applicant is as set out at para. (e) (xvii) of the amended statement of grounds, dated the 3rd April, 2009 as follows:-

"(a) Station diaries for the period 21st April 2000 to 8th October 2000.

(b) Station diaries for the period 23rd March 2001 to 31st December 2001.

*(c) Copies of all available A85 forms of all members of An Garda Síochána from Ennis District between the period January 1998 to December 2001 inclusive, an [*sic*] in particular, the following*

a. 1st January 1998 to 19th February 1998 – 1 roster

b. 19th February 1998 to 23rd May 1999 – 16 rosters

c. 25th September 1999 to 20th April 2007 – 7 rosters

d. 8th October 2000 to 21st March 2001 – 6 rosters"

2.17 The respondent disputes the necessity of these documents to enable the applicant to conduct his defence. Chief Superintendent Brendan Cloonan of the Human Resource Management Section of An Garda Síochána, at para. 13 of his affidavit, sworn on the 3rd December, 2008, sets out the reasons for this as follows:-

"…

For a start, the relevance of the missing documents has not been outlined. Secondly, no explanation has been given why the applicant has waited until now (some 2 and a half years since the first judicial review proceedings were settled) to claim that the absence of the diaries has prejudiced his defence. Thirdly, and more importantly, it is difficult to see what possible relevance the diaries might have to the applicant's ability to defend himself in these disciplinary charges. There are in total some 36 breaches of discipline alleged against the applicant. Of the 36 alleged breaches, 5 occurred within the period of the missing diaries, being the allegation numbers 24, 25, 26, 27 and 28. A station diary is in place for the purpose of recording members reporting on and off duty, transfers and sickness days. As Superintendent Doyle indicates in his affidavit, in the course of his investigation the applicant admitted that he did not report on and off duty in the station diary and therefore it is difficult to see how the missing diaries could have any bearing on the matter."

2.18 In his affidavit sworn on the 18th November, 2008 (para.10) Superintendent Doyle makes the same points and also adds:-

"…

In the course of this investigation, the applicant admitted that he did not report on and off duty in the station diary and therefore the missing diaries have no relevance. In fact during the course of the investigation between the 14th March, 2002 and the 11th September, 2002 a number of interviews were conducted with the applicant, after caution. In the course of the interviews, the applicant admitted on at least 38 occasions that he did not report on or off duty in the Station Diary."

3. The issues
3.1 The first issue to determine is whether the facts of this case disclose delay on the part of the respondent in progressing the applicant's case under the regulations and whether any such delay requires the prohibition of any further proceedings in the Inquiry. Intertwined with this is issue is whether the refusal on the part of the respondent and its Board of Inquiry to furnish the documentation the applicant requested was a culpable act which caused delay.

3.2 It must also be determined whether the *McNeill v. Commissioner of An Garda Síochána* [1997] 1 I.R. 469 line of authority is applicable to this case or whether this case is more appropriately dealt with by reference to general delay principles.

4. Counsels' Submissions
4.1 Mr. Keane S.C., for the applicant, submitted that the respondent has been guilty of inordinate and inexcusable delay, which was a breach of the regulations. He relied on the case of *McNeill v. Garda Commissioner* [1997] 1 I.R. 469 which, in his submission, was authority for the proposition that there was a requirement for urgency or expedition in the application of the regulations. He noted that this case had been followed in *Ruigrok v. Commissioner of An Garda Síochána* [2005] I.E.H.C. 439 (Unreported, High Court, Murphy J., 19th December, 2005), *Gibbons v. Commissioner of An Garda Síochána* [2007] I.E.H.C. 266 (Unreported, High Court, Edwards J., 30th July, 2007) and in *Kneafsey v. Commisssioner of An Garda Síóchána* [2009] I.E.H.C. 89 (Unreported, High Court, O'Neill J., 20th February, 2009).

4.2 Mr. Keane pointed to a seventeen month delay before the appointment of Superintendent Doyle as investigating officer. He also highlighted a delay between the 12th June, 2003, when the documentation was first sought, and the 17th July, 2006, when it was then agreed that it would be forwarded to the applicant and a further delay in receiving the documents in November 2007 and receiving further documents in March 2008. He emphasised that the applicant is still seeking outstanding documentation. He argued that, as it stands, the material the applicant holds does not enable him to cross reference 27 of the 36 charges as he is missing 20 of the Forms A85 and two of the station diaries.

4.3 As to the rule in *Henderson v. Henderson* (1843) 3 Hare 100, Mr. Keane contended that the purpose of the first judicial review proceedings was to compel the respondent to supply the documentation sought. It would be harsh, in his submission, for the Court to ignore the totality of the delay despite the fact the delay issue was not raised in the first proceedings. Mr. Keane sought to distinguish the case of *Kennedy v. Commissioner of An Garda Síochána* [2008] I.E.H.C. 72 (Unreported, High Court, MacMenamin J.,14th March, 2008), upon which the respondent relies, on the basis that no prosecution ensued in the present case on the application of the D.P.P.

4.4 Mr. O'Higgins S.C., for the respondent, argued that the respondent had not been guilty of inordinate delay and that the majority of the time lost in the case to date could be attributed to the applicant and/or to his legal advisers. Concerning the decision taken by the Board of Inquiry not to supply the documentation, he submitted that there was a difference in fault between failing to start a process at all, as occurred in *McNeill v. Garda Commissioner* [1997] 1 I.R. 469 and allowing an error to log jam the process. He submitted that the applicant was not impaired in his defence and that no prejudice arose as the applicant had ample material in his possession to make out a case that overtime payments were claimed by some members during the relevant period without those members signing on in the station diary on all occasions. Of the thirty six breaches of discipline alleged against the applicant, in his submission, only five occurred within the period of the missing diaries.

4.5 Mr. O'Higgins argued that recent jurisprudence on delay focused not upon the fact of delay but its effects in terms of a litigant's ability to defend allegations made against him. He relied on the cases of *PM v. DPP* (Unreported, Supreme Court, 5th April, 2006), *PM v. Malone* [2002] 2 I.R. 560, *DC v DPP* [2006] 1 I.L.R.M. 348 and *CK v. DPP* (Unreported, Supreme Court, 31st July, 2006) in this regard. He submitted that prohibition only lies in exceptional circumstances and he cited *DC v. DPP* [2006] 1 I.L.R.M. 348 and *H. v. DPP* (Unreported, Supreme Court, 31st July, 2006) in support of this contention.

4.6 In urging this Court to apply the principles of ordinary delay jurisprudence to this case, Mr. O'Higgins relied on the authorities of *McCarthy v. Garda Síochána Complaints Tribunal* [2002] 2 I.L.R.M. 341 and *Kennedy v. Commissioner of An Garda Síochána* [2008] I.E.H.C. 72 (Unreported, High Court, MacMenamin J. 14th March, 2008). The latter case, he argued, established that *McNeill* should be confined to its own facts. He submitted that the particular prejudice accruing to the applicant should be considered in the context of the disciplinary proceedings.

5. Decision
5.1 In respect of the complaint of delay of seventeen months in the appointment of Superintendent Doyle as investigating officer on the 14th March, 2002, and the delay incurred in the convening of the Board of Inquiry on the 30th September, 2003, I am satisfied that the well established rule in *Henderson v. Henderson* (1843) 3 Hare 100 must apply. These facts existed at the time of the institution of the first judicial review proceedings and were clearly known to the applicant at that time. Insofar as a discrete ground of delay is complained of on this basis it cannot be raised at this stage.

5.2 As to the next period of delay complained of the period between June 2003 and July 2006, namely, the time taken in the first judicial review proceedings, this delay resulted from the refusal on the part of the respondent to furnish the applicant with the documents he first sought on the 12th June, 2003. This occurred in correspondence and in the refusal of the Board of Inquiry to accede to the application made to it. Whilst this refusal was the subject matter of the earlier judicial review case which was compromised, for the purpose of considering the delay issue in this case it is necessary for me to consider, solely in the context of that delay issue, whether or not the period of three years taken up by those proceeding amounted to culpable delay on the part of the respondents. As said these earlier proceedings were compromised but on a basis as set out in the letter of the 17th July, 2006, from the respondent which appears to concede the substance of the demand made by the applicant which led to the first judicial review proceedings. As the reason for the refusal was put in evidence in this case, in my opinion, this Court is entitled to consider that reason in the context of the delay issue in this case

5.3 I am satisfied that the explanation for this refusal does not appear to have been supported on any sustainable principled basis. The documents sought by the applicant were manifestly relevant to the case that he wished to make, that is, that it was not the practice that officers of his rank would sign in for duty in the station diary. Whilst these

documents may not have been documents stipulated by the regulations to be furnished (the reason for refusal) that did not exhaust or confine the jurisdiction of the Board in dealing with the request for these documents. Apart from its jurisdiction clearly set out by the letter of the regulations, the Board, in addition, was bound to respect and vindicate the applicant's constitutional right to fair procedures and natural justice. In my judgement, it was apparent that the documents sought or the substantial part of them were clearly relevant to and necessary for the defence which the applicant intended to make to the very serious charges leveled against him. I am satisfied that the refusal to furnish the documents he requested was unlawful and that precipitated the institution of the first judicial review proceedings, which led to a delay of almost three years, until the proceedings were ultimately compromised on the 17th July, 2006. This wrongful refusal on the part of the respondents was wholly inconsistent with the mandatory obligation of expediency imposed on the respondent under the regulations, which was recognised by the Supreme Court in *McNeill v. The Commissioner of An Garda Síochána* [1997] 1 I.R. 469. The following passage from the judgment of O'Flaherty J. at p.485 is instructive:-

> *"The Disciplinary Regulations require that the matter should proceed with a degree of expedition at every stage. And for good reason; members of the Garda Síochána have special privileges as well as special responsibilities not shared by the ordinary citizens; therefore, if suspicion descends on a member of the Garda Síochána it is important from a public policy point of view that the matter should be investigated and dealt with quickly. The air should be cleared one way or the other. I am talking of matters of substance, needless to say, and not with every idle word that may be uttered in a locality from time to time. Similarly, from the perspective of members of the Garda Síochána: they are entitled to hold their heads up in the community in which they serve; they are entitled to expect that if a charge is contemplated that it should be brought forward with a degree of expedition and that they should be given a chance to meet it: it may be, in certain circumstances, by admitting a breach of discipline but, in other circumstances, by disputing the allegation on which the charge is based."*

5.4 This requirement for expediency was also noted by Geoghegan J., in the context of the complaints procedure under the Garda Síochána (Complaints) Act 1986 in *McCarthy & Anor. v. Garda Síochána Complaints Tribunal & Ors.* [2002] 2 I.L.R.M. 341, albeit as part of the balancing exercise to be undertaken where a complaint is made against a garda by a member of the public, at pp.357 to 358 quoted later in this judgment.

5.5 In my judgment the refusal to furnish the documents sought was inconsistent with the obligation to conduct proceedings under the regulations in a reasonable and expeditious way. Reasonable requests such as the kind made, should not be refused. Rather, what is required is the taking of expeditious steps by the respondent to accommodate the reasonable requirements of the defence. In my judgment, the loss of the three years taken up by the earlier judicial review proceedings was the result of culpable delay within the context of the regulations on the part of the respondent.

5.6 A further delay occurred between the 17th July, 2006, the date of the compromise of the first judicial review proceedings and March 2008, when the last of the documents were furnished. The correspondence illustrates a failure on the part of the applicant to make arrangements to inspect the documents. For example, in their letter of the 18th October, 2007, the applicant's solicitors stated that inspection of the documentation was "*not necessary, at this point in time*". They also persisted in requesting copies of the documentation at issue, notwithstanding that the precise terms of the compromise as set out in the letter of the 17th July, 2006, of the Chief State Solicitor provided for the "*inspection by the Applicant by appointment through the Divisional Office Officer, Ennis*" of the documents. The applicant was dilatory in not taking up the inspection facility from October 2007 onwards, when the costs issue had been resolved. Thereafter, I am satisfied that the correspondence illustrates that it was the respondent who sought to move the matter forwards, eventually for that purpose, conceding on the issue of providing copies rather than inspection facilities. Thus, any delay from July onwards was, in my judgment, caused by the incorrect insistence on the part of the applicant on getting copies of the documents to be disclosed, rather than, as was clearly provided for in the agreement evidenced in the letter of the 17th of July 2006, inspection of these documents. Apart from this there was clear delay on the part of the applicant in responding to correspondence during this period. Thus, so far as delay post July 2006 is concerned, in my view, there was no culpable delay on the part of the respondent.

5.7 As to whether complaints procedure under the regulations is to be viewed as a self-contained statutory code or whether recent general delay principles are to be imported into it the following statement from Hamilton C.J. from *McNeill v. Commissioner of An Garda Síochána* [1997] 1 I.R. 469 at p.479 is relevant:-

> *"In these proceedings, the court is not really concerned with the principles established with regard to the effect of delay on either civil or criminal proceedings because the proceedings instituted by the respondent against the applicant are neither civil nor criminal. They are in respect of breaches of discipline alleged to have been committed by the applicant as a member of the Garda Síochána and must be dealt with in accordance with the provisions of the Discipline Regulations, which set forth in detail the procedure for dealing with alleged breaches of discipline by a member of the Garda Síochána."*

The above passage unequivocally states that wider delay principles are not relevant to cases under the regulations.

5.8 In the present case the applicant points to the fact that he is missing 30 rosters over a 3 year period and two station diaries out of a total of nine. I am satisfied that the applicant in this case has ample material now disclosed to him to make the case he wants to make (i.e. it was not the standard practice to sign in the station diary). Apart from the documentation he has to hand, there is also a variety of evidence which could be called by him to support his defence. In addition, it is to be observed that this case is largely based on documentary evidence and, as such, less exposed to deleterious effects of the passage of time. The applicant does not point to any specific loss of evidence at this stage. I am satisfied on balance that he applicant's defence has not been materially impaired by the delay that has occurred.

5.9 This brings me to a consideration of whether the absence of a prejudicial effect on the applicant's defence to the charges brought against him in the disciplinary process, can be a decisive factor, as would be the case if the general jurisprudence on delay in criminal and civil proceedings were to be imported into the operation of the regulations. As indicated above, the *McNeill* case is a clear authority to the effect that the regulations are a self-contained statutory code with an inherent overriding requirement of expedition, which excludes the ordinary jurisprudence on delay. In *McCarthy v Garda Complaints Tribunal* [2002] 2 I.L.R.M. 341 Geoghegan J. addressed this topic but in the context of a

case concerning a complaint made by a member of the public to that respondent in respect of the conduct of the applicant garda. He said at pp. 357-358:-

> *"There is no doubt about that but in interpreting the statutory provisions it must be borne in mind that the Oireachtas clearly intended expedition both in the interests of the complainant and in the interests of the members complained about. It could never have been intended that if there was some small delay in the procedures and possibly indeed delay engineered by the garda authorities themselves, the matter could never be processed further as this would be grossly unfair to a complainant not in any way responsible for the delay. On the other hand a disciplinary complaint against a member of the force is a serious matter and under any reasonable interpretation of the legislation it would have been intended that the expedition was also in the interests of those members. Accordingly, a reasonable balance must be struck between what could be conflicting interests in determining whether in any given circumstance there was a delay which offended the time provisions in the Act irrespective of whether the time provisions are to be regarded as mandatory or directory."*

The learned judge, with whom the other four members of the Court agreed, went on to say the following concerning the judgment of Hamilton CJ in the *McNeill* case at pp.361-362:-

> *"The former Chief Justice then referred specifically to the relevant provisions of the regulations which in each case contained an obligation of expedition though expressed in different ways. The expressions 'as soon as practicable', 'as soon as may be' and 'without avoidable delay' were all used in different regulations. The learned Chief Justice expressed the view that the use of each of these phrases clearly indicated the intention of the Minister for Justice as expressed in the regulations that the alleged breaches of discipline by members of the Garda Síochána be dealt with expeditiously and as a matter of urgency. On the facts of that particular case, Hamilton CJ came to the conclusion that the obligation placed on the garda authorities to investigate alleged breaches of discipline as soon as practicable was not complied with and that the obligation was* ***'mandatory'****. He then went on to express the view that because of the failure by the garda authorities to discharge that obligation all steps taken since the presentation of the written report of the investigating officer were void and of no effect. This last observation was not essential to the decision made and the relief granted in the form of an injunction and it may well be that it should be regarded as* ***obiter dicta****. There is nothing in the report of the case to indicate that there had been any particular argument as to whether breach of an expedition obligation rendered subsequent steps voidable or automatically void. At any rate O'Flaherty J, who concurred with the Chief Justice in relation to the allowing of the appeal and the granting of the reliefs, expressed no view on this aspect of the matter. Until it arises in some other case therefore I would express doubt as to whether breach of an expedition obligation in relation to different steps in a procedure is necessarily tantamount to failure of a condition precedent to the taking of the next step. But what is important about the McNeill case is that the Supreme Court held by a majority of two judges to one that on the facts of that particular case there was a breach of the statutory obligation of expedition and that was on the basis that the Oireachtas intended that members of the force subjected to disciplinary scrutiny were entitled to have their investigations heard and determined quickly [*emphasis added*]."*

He then went on to distinguish *Mc Neill* on the following basis at p.362:-

> *"But the procedures under the discipline regulations do not arise out of a complaint by the public and that is a major difference between the McNeill case and this case. In so far as this court has to consider what might be regarded as unreasonable delay from the point of view of the respondents the McNeill case is relevant, but in balancing that against the reasonable rights and expectations of the complainant from the public different considerations apply."*

Geoghegen J. then went on to consider the English case *R. v. Chief Constable of the Merseyside Police*, ex p. Merrill [1989] 1 WLR 1077:-

> *"Nevertheless the words of Lord Donaldson of Lymington MR in R. v. Chief Constable of the Merseyside Police, ex p. Merrill [1989] 1 WLR 1077 at p. 1088 are equally applicable to this jurisdiction. Referring to English regulations which required public complaints against police to be dealt with expeditiously he observed as follows:*
>
> ***"The public interest in complaints against police officers being fully investigated and adjudicated is undoubted, but it must be done speedily."***
>
> *In that particular case heard by the English Court of Appeal, Lord Donaldson, delivering the judgment of the court with which Woolf LJ (as he then was) and Sir Denys Buckley concurred, found on the facts that there was excessive delay and held that the disciplinary proceedings should be quashed, notwithstanding the view which he took that the time limits were all directory rather than mandatory. I would observe in passing that when Hamilton CJ used the word 'mandatory' in the McNeill case it cannot be regarded as certain that he was doing so in contradistinction to 'directory'. I take the view that 'as soon as may be' means as soon as may be reasonably practicable in all the circumstances and if I am right about that then it may not make very much difference whether on a theoretical basis the words requiring expedition in the 1986 Act or indeed in the Garda Discipline Regulations are to be regarded as mandatory or directory, nor indeed on the legal principles to be applied is there all that much difference between the views expressed by Denham J in her minority judgment in McNeill from the views expressed by Hamilton CJ and O'Flaherty J. The difference was in the application of the principles to the particular facts [*emphasis added*]."*

5.10 In the case of *Kennedy v. Commissioner of an Garda Siochana* 2008] I.E.H.C. 72 (Unreported, High Court, MacMenamin J.,14th March, 2008) MacMenamin J. had to consider delay in the context of a breach of the regulation. At paras. 53 and 54 he said the following:-

> *"**53**. I do not consider that the elapse of time which occurred either before, during or after the pendency of the criminal trial gives rise to a finding that there has been a breach of the Regulations. The duty to proceed with expedition is to be determined in accordance with what was practicable at the time. Nor do I consider that the elapse which occurred between a decision to enter a nolle prosequi and the determination ultimately to resume the inquiry and to fix the inquiry date was such as to give rise to a conclusion the obligation of expedition had been lost or ignored. The applicant was on sick leave. The investigating officer not unreasonably concluded that it would be inappropriate to question the applicant in such circumstances. Even after the applicant's resumption of duty, the evidence is that matters moved with relative expedition from July, 2005 onwards. The time and the date for the inquiry was identified.*
>
> ***54**. In the light of the foregoing I conclude firstly that there has not in fact been a breach of the Regulations. The entire Regulations encompass the possibility of not only an interaction with, but the utilisation of, the criminal process prior to an inquiry. Matters proceeded as soon as practicably possible on the facts of this case. The facts of this case, for the reasons which have been outlined earlier in more detail, are substantially at variance from those in McNeill. The decision in McNeill must be seen in the light of the subsequent authoritative decision of the full Supreme Court in McCarthy. For the reasons identified earlier, I do not consider that the judgments in McNeill when considered as a totality are authority for the proposition that ordinary delay jurisprudence should be precluded in a consideration of the Regulations. In the light of the foregoing, I do not consider that the applicant has established any form of prejudice or detriment such as would merit an injunction or prohibition."*

5.11 From the foregoing extracts from the judgment of Geoghegan J. in *McCarthy* I deduce the current state of the law in this regard to be as follows: If the obligation of expedition in the regulations is not mandatory but rather directory, with the consequence that culpable delay does not have the effect of rendering the process void from the point of delay onwards, it necessarily must follow that in certain cases the discipline procedure under the regulations will be permitted to continue and in other cases the delay *per se* will result in the prohibiting of the process. Whilst the *McCarthy* case and the judgment of MacMenamin J. in *Kennedy* appear to permit or contemplate other factors being taken into account to determine the outcome once culpable delay is established, neither judgment considers what those factors might be or how they should be weighted in the ultimate decision. Undoubtedly, MacMenamin J. does suggest that the normal jurisprudence on delay in other types of litigation should have a role to play, although in the light of his finding to the effect that in the *Kennedy* case there was no breach of the obligation of expedition under the regulations, his *dictum* in this regard may be considered as an *obiter dictum*.

5.12 In my judgement, if delay *per se* does not result in prohibition, the Court must be entitled to have regard to public interest matters and also the effect of the delay on the capacity of the member to defend himself or herself against the charges of breach of discipline. It must be borne in mind that it was a public interest which appeared to sway the Supreme Court in the *McNeill* case, in particular, the judgment of O'Flaherty J., namely, the public interest in ensuring that members do not have their reputation in the community they serve tarnished for a lengthy period while the disciplinary process unfolds. There can be no gainsaying the considerable weight that must be given to this aspect of the public interest. Another aspect of the public interest must also be weighed in the balance and that is where serious charges are leveled against a garda, which potentially seriously damage the reputation of the garda in question and as a necessary consequence damage the reputation of the Garda Síochána as a police force, it is very important if not essential, if the member in question remains in the force, that the allegations of breach of discipline in question not only should be dealt with expeditiously but, also, the process must be permitted to proceed to an adjudication on those allegations. If the process does not proceed to adjudication, the member affected will not have his name cleared, if he is innocent of the charges, and An Garda Síochána, as a police force, will inevitably suffer reputational damage.

5.13 If the door is open to consider factors beyond mere delay itself, inevitably, the Court should consider the effect of the delay on the capacity of the garda to defend the charges. If the delay has materially impaired the defence to an extent that it is unlikely that the garda is unlikely to have a fair hearing of the charges, then as with criminal and civil litigation, the disciplinary process should be stopped. Impairment of defence of a lesser degree, falling short of creating a real risk of an unfair hearing, should be considered in a balancing exercise with the public interest factors discussed above. Thus, where the charge of breach of discipline is of a less serious type not involving a risk of damage to the reputation of the force in the community, the balance would tilt in favour of giving priority to the public interest in having the process completed as speedily as possible so that the individual garda can face the community without any lack of confidence resulting from having a disciplinary charge hanging over him or her. Indeed, the less serious the charge the greater should be the weight attached to this factor, even to the point of entirely discounting a lack of impairment of the defence, particularly if the delay is unusually lengthy.

5.14 In this case the charges of breach of discipline against the applicant are serious, involving as they do an imputation of serious dishonesty. As such, in my view, they have the potential to cause serious injury to the reputation of An Garda Síochána if left without adjudication. Additionally, the reputation of the applicant will inevitably be impaired in the community he serves unless his name is cleared in the Inquiry. If he was left in that wounded state, his capacity to discharge his functions as a sergeant in An Garda Síochána would inevitably be short of full effectiveness. As his capacity to defend himself has not been materially impaired by the culpable delay resulting from the refusal by the respondent to provide him with the documents requested in June 2003, I have come to the conclusion that the correct balance as between the foregoing interests lies in favour of permitting the disciplinary process to proceed to adjudication in the inquiry.

6. Conclusion

6.1 For the reasons set above, I must refuse the relief sought in these proceedings.