



**THE COURT OF APPEAL**

Neutral Citation Number: [2018] IECA 69

**No. 2016/223**

**Ryan P.  
Peart J.  
Hogan J.**

**BETWEEN/**

**THOMAS McKENNA**

**APPLICANT/**

**APPELLANT**

**AND**

**COMMISSIONER OF AN GARDA SÍOCHÁNA**

**RESPONDENTS/**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 12th day of March 2018**

1. The appellant is a member of An Garda Síochána who has been suspended from operational duties while on 90% pay by reason of events which allegedly took place in Waterford Garda Station as far back as June 2010. On that date Garda McKenna is alleged to have used unprofessional and discriminatory language towards a person in custody and also to have used excessive force. In these judicial review proceedings he seeks to restrain a Garda disciplinary investigation into these events in circumstances I will presently describe.

2. The applicant failed to obtain this relief in the High Court. In a judgment delivered on the 18th March 2016 Baker J. rejected the applicant's contentions: see *McKenna v. Garda Commissioner* [2016] IEHC 175. The appellant has now appealed to this Court against her decision.

3. Before considering any of the legal issues which arise, it is first necessary to narrate some of the background facts.

4. On the 20th June 2010 an incident occurred at Waterford Garda station in the course of which a foreign national in custody was allegedly assaulted. The Commissioner referred the matter to Garda Síochána Ombudsman Commission ("GSOC") under s. 102 of the Garda Síochána Act 2005 ("the 2005 Act") some time later day. GSOC investigated the matter under s. 98 of the 2005 Act and then referred the matter to the Director of Public Prosecutions with a recommendation for prosecution under s. 2 of the Non-Fatal Offences against the Person Act 1997 ("the 1997 Act").

5. As it happens, the Director chose instead to present charges under s. 3 of the 1997 Act which charge represented a more serious allegation and the applicant was charged with assaulting the prisoner. He was convicted of the s. 3 offence in the District Court in December 2011, but he was subsequently acquitted on appeal on the 10th April 2013 at Waterford Circuit Court. The situation that arose at that point on the appeal was that the alleged victim did not turn up for the hearing before the Circuit Court and, as a result, the Director did not present any evidence. The Circuit Court then duly acquitted Garda McKenna of the offence.

6. Some weeks later on the 24th April 2013 GSOC notified Garda McKenna by letter that its investigation had concluded and that it would not be pursuing the matter any further. The Garda authorities nevertheless continued to examine the question of further disciplinary action and the applicant was informed of this fact. On the 20th June 2013 the Garda Commissioner referred the matter to the Chief Superintendent of Waterford Division as to whether a further inquiry under the Garda Síochána (Discipline) Regulations 2007 (S.I. No. 214 of 2007) ("the 2007 Regulations") was warranted. On the 20th June 2013 the Chief Superintendent appointed a Superintendent to investigate disciplinary aspects of the incident which is said to have occurred on the 20th June 2010. The applicant remains currently suspended pending this determination.

7. On 16th May 2014 the applicant was informed that a Mr. McCartan O'Gorman, solicitor, had been appointed to be the presiding officer of a Board of Inquiry established by the Commissioner in accordance with Article 27 of the 2007 Regulations in order to investigate three disciplinary charges, namely,:-

- (i) behaving in an unprofessional manner by using offensive language to the person in custody,
- (ii) failing to behave respectfully towards the prisoner, having regard to his rights to bodily integrity, and
- (iii) using unreasonable force towards the prisoner.

In September 2014 the applicant duly applied to the High Court for orders restraining the prosecution of these disciplinary charges.

**The judgment of the High Court**

8. As I have already noted, Baker J. found against the applicant for the following reasons. She rejected arguments that the 2005 Act envisaged that once GSOC had concluded its investigation, the disciplinary matter could not be independently pursued by the Commissioner, saying:

"GSOC was established under the provisions of the Garda Síochána Act 2005 as a body corporate to perform the functions assigned to it by that Act. Its statutory objectives, functions and powers are set out in s. 67 of the Act and include, *inter alia*, those identified in s. 67 (2), to receive complaints made by members of the public concerning the conduct of members of An Garda Síochána. Part 4 of the Act sets out the procedures for complaints and investigations before GSOC and this provides, *inter alia*, for the referral of a complaint to the Garda Commissioner to be dealt with in accordance with s. 94.

Section 94 of the Act requires the Garda Commissioner on referral of a complaint under s. 92 to appoint a member of An Garda Síochána to investigate the complaint under the Disciplinary Regulations and to submit a report under s. 94(6) to GSOC as soon as practicable after completing an investigation of complaint. "

9. Baker J. then drew attention to the provisions of s. 95(5) which provides as follows:

"An investigation of a matter under this section does not preclude the subsequent investigation of the matter under section 98."

10. Baker J. then continued by saying that applicant had argued that, as GSOC has concluded its investigation, no power lies in the respondent to carry out a separate investigation under the Regulations, and that as GSOC is the statutory authority tasked with the investigation that no other investigation is permissible under the Act:

"The legislation establishes GSOC as an independent third party charged with exercising an independent role in regard to matters involving serving members of An Garda Síochána, including disciplinary matters. The focus of GSOC relates to complaints which may legitimately concern the general public regarding members of the Gardaí. The Act also permits the Minister under s. 123 to enact regulations concerning disciplinary matters within the Force. There is some overlap between the matters within the remit of the two investigatory procedures. For example, conduct requiring investigation of disciplinary matters at the more serious end of the scale may also draw the attention of GSOC, as happened here.

On the other hand, the primary focus of the Regulations are matters of internal discipline, for example "matters relating to work performance" as found under s.123 (2)(g). Such matters may have a public interest element insofar as the public is interested in seeing a well-run and disciplined police force, but they are appropriately matters to be dealt with internally within the Force. Although commonality of subject matter may exist, the different mechanisms of oversight exist to fulfil different regulatory goals with different standards against which conduct might be scrutinised and different possible consequences for individuals under investigation.

Conclusion on role of GSOC:

The legislation establishing GSOC makes express provision for matters referred to it that may constitute criminal liability. Section 101 of the Act of 2005 requires GSOC, if it is of the opinion that the conduct under investigation before it may constitute an offence, to send a copy of the report and of the investigation file to the DPP and provide to the DPP any information relating to the investigation that may be required by the DPP in performing her functions."

11. Baker J. then set out the provisions of s. 101(5) of the 2005 Act dealing with circumstances where a member of An Garda Síochána is convicted of an offence:

"If a member of the Garda Síochána is convicted of an offence in respect of a matter reported to the Director of Public Prosecutions under this section or if the Director decides not to institute a prosecution in relation to that matter, the Ombudsman Commission is not precluded from conducting or continuing an investigation into the matter under section 95 by reason only that the conduct under investigation is in substance the same as the conduct constituting the offence of which the member is convicted or in respect of which no prosecution is instituted."

12. Baker J. also drew attention to s. 105 which permits GSOC to investigate complaints that appear to involve an offence:

"(1) Nothing in this Act precludes a member of the Garda Síochána from charging another member with an offence, even though the conduct to which the offence relates could be the subject matter of a complaint or investigation under this Part.

(2) However, if a complaint has been made concerning the conduct of a member of the Garda Síochána, the member may not be charged with an offence relating to that conduct except by or with the consent of the Director of Public Prosecutions."

13. Baker J. stressed that the effect of this statutory provision is that GSOC is not precluded from conducting or continuing an investigation under s. 95 by reason only of the fact that the matter under investigation is, in substance, the same as that in respect of which the member has been convicted or in respect of which no prosecution is initiated. She continued:

"The subsection is silent as to what is to occur if the member is acquitted. Having regard to the fact that GSOC did not continue its investigation following the acquittal, no question arises under the legislative scheme as to the power of GSOC in those circumstances. I conclude that neither the conclusion of the GSOC investigation nor the acquittal preclude a disciplinary hearing. In those circumstances the different, albeit sometimes overlapping, roles of GSOC and procedures under the Regulations do not envisage exclusivity such that investigation under one procedure can of itself preclude one under the other. Separate and distinct procedure may be conducted for separate and distinct purpose. Further, the creation of the two classes of investigation or proceedings was envisaged by the legislation and permitted under its terms. There is nothing in the Act of 2005 that suggests that the completion of one enquiry precludes the continuation or commencement of an enquiry in a different forum nor that proceedings are mutually inconsistent."

14. Baker J. also laid some emphasis on a letter of the 25th June 2010, from the Chief Superintendent of An Garda Síochána to the Assistant Commissioner of the relevant region where she said it was noted that:

"the managerial actions taken at Divisional level are on balance, *insufficient* to serve the public interest, protect the integrity and reputation of An Garda Síochána, maintain control and discipline and assure the proper continuance of the effective Garda service locally". (emphasis supplied)

15. Baker J. commented that:

"That letter was sent in the context that the GSOC investigation had been initiated and was ongoing. It seems to me that the Chief Superintendent was of the view that the GSOC investigation would not sufficiently protect the interests and principles outlined, and that view is one to which the court must have regard in considering the choice to continue the investigation."

16. As it happens, it is agreed by both parties to the appeal that the reference to "insufficient" is a transcription error, as the correct word used by the Chief Superintendent in that letter was "sufficient". For my part, however, I do not think that this error is material. The essential questions presented on this appeal are essentially legal ones concerning respectively the interpretation of the 2005 Act and the 2007 Regulations, and so to that extent the views of the Chief Superintendent regarding the adequacy or otherwise of the GSOC investigations could not be regarded as being dispositive of this appeal.

17. Baker J. then went on to consider the effect of the 2007 Regulations.

"The Regulations made under s. 123 of the Act of 2005 provide for a disciplinary process which is distinct from that engaged in by GSOC, and in a criminal prosecution, and Regulation 8 provides as follows:

(1) Disciplinary proceedings may be taken against a member under these regulations notwithstanding that proceedings for an offence have been or may be instituted against the member arising out of the same circumstances.

(2) Where a member has been acquitted on the merits of an offence, proceedings under these regulations for an alleged breach of discipline shall not be commenced or, if already commenced, continued if:

(a) the proceedings would involve conducting an inquiry into the same issues in respect of which the member was so acquitted, and

(b) in all the circumstances of the particular case and their cumulative effect, it would be unfair and oppressive to commence or continue the proceedings.

(31) The balance of Regulation 8 provides for and entitles a Board of Inquiry or an appeal board to treat as conclusive findings of fact in a criminal charge.

(32) Regulation 8 therefore permits the commencement or continuation of disciplinary proceedings where a member has been acquitted even if those proceedings involve an inquiry into the same issues in respect of which the member was so acquitted but only if, in all the circumstances of the particular case, and their cumulative effects means that it would not be unfair and oppressive to continue the proceedings.

(33) Thus, as Regulation 8 expressly provides for the circumstances that have arisen in the present case, I reject the argument of counsel for the applicant that there is no statutory or other basis on which the disciplinary inquiry may be continued, merely on account of the fact that he has been acquitted of criminal charges arising from the same or broadly the same set of facts and circumstances. The proceedings may be continued, unless fairness or injustice would result, but there is no absolute statutory or other provision that supports the argument of the applicant that the conduct of the enquiry is ultra vires the respondent.

(34) The same set of facts can give rise to concerns of a criminal or disciplinary concern, and there is nothing intrinsically unfair or illogical in this. In matters not involving members of An Garda Síochána, a set of circumstances can give rise to civil liability and criminal prosecution. In either case the outcome of the criminal trial may well create an issue estoppel, but absent such argument there is no legal or evidential impediment to the prosecution of a civil and criminal trial out of the same factual nexus."

18. Baker J. then turned to consider whether the continuation of the enquiry would be unfair to the applicant within the meaning of the Regulations. She concluded that it would not:

circumstances when a member of the Force is acquitted without a hearing and without a finding of fact on the merits, and the consequences for the conduct of the disciplinary hearing when the acquittal has resulted from a full criminal process. The applicant was acquitted in his appeal from the conviction in the District Court because the complainant did not offer any evidence and did not attend at the hearing before the Circuit Court. There has been no determination of fact which raises an estoppel. There is no sense in which the disciplinary inquiry might seek to go behind any findings of fact of a competent court, and the difference in character between the acquittal in this case and that which formed the basis of the decision of the High Court and the Supreme Court in *McGrath v. Commissioner of An Garda Síochána* [1991] 1 I.R. 69 is critical. I consider too that the character of the criminal charges is different from those in respect of which the disciplinary proceedings were commenced. The District Court charges related to a criminal assault, but the disciplinary proceedings relate to the way in which the applicant performed his obligations as a member of the Force, in particular his conduct towards a person in custody in the Garda station where he was at all material times a member in charge. The disciplinary charges relate to conduct towards a person not stated to amount to an assault but rather a failure to respect the dignity and person of the prisoner and his physical safety, the language that he used towards him, his failure to ensure the safe custody and care of the arrested person and his failure to respect and protect his human dignity, bodily integrity and human rights. To borrow from the judgment of Kearns P. in *Walsh v. Commissioner of An Garda Síochána* [2010] IEHC 257 I consider that:

"The allegations in the disciplinary proceedings are not even the same as the charge before the District Court, let alone identical. Nor do the disciplinary proceedings involve any determination on the issue of possession or create the risk of unravelling the District Court verdict."

The particulars of the alleged misconduct introducing unprofessional and discriminatory language again are not capable of being characterised as a criminal assault. In those circumstances I consider that the applicant has not made out an argument on this ground."

### **The involvement of GSOC in the disciplinary process**

19. The first issue which arises relates to the involvement of GSOC in these disciplinary proceedings. Counsel for the applicant, Mr. McGrath S.C., submits that the structure of the 2005 Act is such that if GSOC takes disciplinary action – in this instance by recommending the commencement of a criminal prosecution – then there is no further role for the Garda authorities to take fresh disciplinary proceedings, at least absent a positive decision to this effect on the part of GSOC itself.

20. Mr. McGrath's argument is thus as follows: First, the Commissioner can refer an issue involving a member of An Garda Síochána to GSOC or he can institute disciplinary proceedings himself. If the Commissioner elects to involve GSOC, then it is a matter for that body to make various decisions. GSOC can conduct an investigation, as happened in this case, and make a recommendation in due course to the DPP. GSOC may also decide that the matter should be the subject of disciplinary proceedings. Where, as here, the Garda Commissioner has referred the matter to GSOC, then – so the argument runs – the Commissioner cannot decide freely and independently on his or her own whether to institute disciplinary proceedings in respect of any aspect of the matter. What has to happen is that GSOC has to hand the matter back to the Garda Commissioner. If that does not happen, then it is said that the Commissioner is not in a position to institute the separate disciplinary proceedings.

21. Counsel for the respondent, Mr. Mulcahy S.C., submitted that the applicant's case in relation to the 2005 Act rested essentially on the existence of an implied prohibition precluding the Commissioner taking disciplinary action after a GSOC investigation unless GSOC itself had positively recommended some further disciplinary action.

22. Before considering these submissions it is next necessary to consider the relevant provisions of the 2005 Act

### **The relevant provisions of the 2005 Act**

23. The scheme of investigation provided for by Part 4 of the 2005 Act is a rather complex one. Section 102(1) provides that:

"(1) The Garda Commissioner shall refer to the Ombudsman Commission any matter that indicates that the conduct of a member of the Garda Síochána may have resulted in death or serious harm to a person."

24. It is through this particular statutory route that GSOC came to investigate the present matter.

25. Section 102(2)(a) provides that GSOC shall investigate any matter so referred under s. 102(1). Section 102(3) then provides that the provisions of Part 4 relating to investigations and reports apply "with the necessary modifications" in relation to a matter referred to in s. 102(2) "as if the matter were the subject of a complaint referred to in section 91." In effect, therefore, the referral by the Commissioner under s. 102(1) is thus to be treated as if it were a complaint made under s. 91.

26. Section 91 provides that GSOC shall upon receipt of such a complaint appoint a designated officer to investigate the matter either under s. 95 (complaints that do not appear to involve offences) or s. 98 (complaints that appear to involve offences). In the event, GSOC directed an investigation under s. 98. It should also be noted at this juncture that s. 98(4) provides that:

"(4) An investigation under this section does not preclude the subsequent investigation of the matter under s. 95."

27. Section 101(2)(a) provides that if, after considering any report received under s. 98, GSOC "is of opinion that the conduct under investigation may constitute an offence by the member of the Garda Síochána concerned", it shall send a copy of the report and of the investigation file to the DPP, "together with any recommendations that appear to the Commission to be appropriate." This is what occurred in the present case, since, as I have already noted, GSOC sent on the file to the DPP along with a recommendation for a prosecution.

28. It is next necessary to set out the relevant provisions of s. 101(5), (6) and (7):

"(5) If a member of the Garda Síochána is convicted of an offence in respect of a matter reported to the Director of Public Prosecutions under this section or if the Director decides not to institute a prosecution in relation to that matter, the Ombudsman Commission is not precluded from conducting or continuing an investigation into the matter under section 95 by reason only that the conduct under investigation is in substance the same as the conduct constituting the offence of which the member is convicted or in respect of which no prosecution is instituted.

(6) If, after considering the designated officer's report, the Ombudsman Commission is not of the opinion referred to in subsection (2) but it considers that the complaint warrants investigation under section 94 or 95, it may proceed in accordance with either of those sections as appropriate.

(7) If, after considering the designated officer's report, the Ombudsman Commission is of the opinion that it discloses no misbehaviour by the member of the Garda Síochána concerned, the Commission shall take no further action in relation to the complaint."

### **The applicant's case regarding the 2005 Act**

29. As Baker J. noted in her judgment, s. 101 of the 2005 Act is silent as "to what is to occur where the member is acquitted." The applicant maintains, however, that where the prosecution has been commenced following an investigation by GSOC and a recommendation by it under s. 101(2)(a) there should be such a prosecution, then the Commissioner no longer enjoys a power to commence disciplinary proceedings against the member where he has been acquitted of that offence.

30. It is perhaps unfortunate that, given the detail otherwise contained in the 2005 Act, the Oireachtas did not in express terms address precisely what was to occur in such circumstances. This is so because in other circumstances the Oireachtas has vested GSOC with express powers to make a recommendation that disciplinary action be taken: see s. 97(1)(b). This arises, however, following an investigation under s. 95 which is directed to whether a breach of discipline has taken place as distinct from an investigation under s. 98 which is essentially concerned with conduct that appears to involve a criminal offence.

31. One might equally observe that there are also circumstances where the 2005 Act might be thought impliedly to prohibit the Commissioner unilaterally commencing disciplinary proceedings following a GSOC investigation. If, for example, GSOC conducts an investigation under s. 98 and concludes, following a consideration of that report, that it discloses "no misbehaviour by the member of the Garda Síochána concerned", s. 105(7) provides that "the Commission shall take no further action in relation to the complaint." It seems necessarily implicit in this that the Garda Commissioner could not then take it upon himself to commence disciplinary

proceedings against the member concerned, precisely because the independent agency charged with investigating this matter (namely, GSOC) has concluded following an investigation that the member in question had not misbehaved.

32. The applicant's case under this heading is that the 2005 Act also impliedly precludes further disciplinary proceedings where, following an investigation, GSOC recommends a prosecution and that prosecution results in an acquittal. But can the same inference necessarily be drawn here as in the case arising under s. 105(7)?

33. For my part, I do not think that it can, as the same premise is simply not present. By contrast to the situation which obtains in the case of s. 105(7) (*i.e.*, no evidence of misbehaviour), GSOC arrived at exactly the opposite conclusion in relation to the applicant since it recommended a criminal prosecution. It seems unlikely that the Oireachtas would have intended that in this situation the Garda Commissioner would have been powerless to take any further action where that prosecution resulted in an acquittal, although I quite agree that it might have been preferable had the Oireachtas expressly addressed what was to happen in the present circumstances.

### **Conclusions regarding the 2005 Act**

34. In summary, therefore, I find myself concluding that there is nothing in the 2005 Act which expressly precludes the commencement of disciplinary proceedings following the acquittal of the member in the wake of a criminal prosecution which GSOC itself had recommended under s. 101(2)(a) of the 2005 Act.

### **Article 8 of the 2007 Regulations**

35. It is next necessary to consider the alternative argument advanced by the applicant. This was based on provisions of Article 8 of the 2007 Regulations which deal with the rather vexed question of when disciplinary proceedings may be continued against a member of the force even though (as here) that Garda may have been acquitted of any criminal charge.

36. Article 8 of the 2007 Regulations provides in relevant part as follows:

"(1) Disciplinary proceedings may be taken against a member under these regulations notwithstanding that proceedings for an offence have been or may be instituted against the member arising out of the same circumstances.

(2) Where a member has been acquitted on the merits of an offence, proceedings under these regulations for an alleged breach of discipline shall not be commenced or, if already commenced, continued if:

(a) the proceedings would involve conducting an inquiry into the same issues in respect of which the member was so acquitted, and

(b) in all the circumstances of the particular case and their cumulative effect, it would be unfair and oppressive to commence or continue the proceedings.

(3) Where the District Court, without proceeding to a conviction, finds the facts alleged in a criminal charge to have been proved against a member, the Government, the Commissioner, a board of inquiry or an Appeal Board is entitled to rely on the finding as conclusive."

37. In this context the provisions of Article 8(2) are crucial. There are here three separate questions which must be considered. First, was the applicant acquitted "on the merits"? Second, would the disciplinary investigation involve an inquiry into the same issues "in respect of which the member was so acquitted? Third, if the answers to these questions are in the affirmative, can it be said that the commencement or continuation of the disciplinary charges would be unfair and oppressive?

Was the applicant acquitted on the merits within the meaning of Article 8(2)?

38. So far as the first question is concerned, Baker J. held that the acquittal was not an acquittal on the merits, saying:

"I consider that there is a difference in character, and one envisaged by the case law, between circumstances when a member of the Force is acquitted without a hearing and without a finding of fact on the merits, and the consequences for the conduct of the disciplinary hearing when the acquittal has resulted from a full criminal process. The applicant was acquitted in his appeal from the conviction in the District Court because the complainant did not offer any evidence and did not attend at the hearing before the Circuit Court. There has been no determination of fact which raises an estoppel. There is no sense in which the disciplinary inquiry might seek to go behind any findings of fact of a competent court, and the difference in character between the acquittal in this case and that which formed the basis of the decision of the High Court and the Supreme Court in *McGrath v. Commissioner of An Garda Síochána* is critical."

39. While it is true that what Baker J. describes is a classic example of an acquittal on the merits, I think that it must nonetheless be accepted that the applicant was acquitted on the merits in the sense envisaged by Article 8(2). It is true that the DPP found herself in a difficult position because the chief witness (namely, the person in custody who was allegedly assaulted and ill-treated by the applicant) did not attend the Circuit Court appeal so that key prosecution evidence could not be tendered. One way or another, however, the DPP was not in a position to tender the necessary evidence to sustain a successful prosecution under s. 3 of the 1997 Act, so that an acquittal was thereby inevitable.

40. One may pose the question this way: suppose that in a particular prosecution the DPP had decided not to offer evidence because she was no longer convinced of the credibility of a key witness or witnesses and an acquittal thereby ensued. It could hardly be said that in such circumstances that such an acquittal would not have been on the merits.

41. In these circumstances, however, I do not think that this Court can look behind the decision to offer no evidence and the ensuing acquittal. It is not as if, for example, the accused was acquitted by reason of the exclusion of vital evidence on the ground that it was unconstitutionally obtained or because the prosecution was time-barred in some way. While it is not necessary to pronounce on the precise circumstances in which a particular might have been acquitted otherwise than on the merits, it is sufficient to say that this is not the case here. The first limb of the Article 8(2) test has, accordingly, been satisfied.

**Whether the disciplinary proceedings would involve an inquiry into the same issues in respect of which the applicant was so acquitted?**

42. The second question is whether the disciplinary proceedings would involve conducting an inquiry into the same issues in respect of which the member was so acquitted. The applicant was charged with an offence under s. 3(1) of the 1997 Act, i.e., assault causing harm. Can it be said that the three disciplinary charges which the applicant is facing involve conducting an inquiry into the same issues in respect of which he had been acquitted?

43. This is certainly not so in the case of the first of these charges, namely, behaving in an unprofessional manner by using offensive language to the person in custody. The criminal charge involved an allegation of assault, whereas this disciplinary charge is exclusively concerned with an allegation that offensive language was used.

44. By contrast, this requirement of Article 8(2) is satisfied in the case of the third allegation, namely, using unreasonable force towards the prisoner, since this essentially amounts to a contention that the prisoner was assaulted. An allegation of using excessive force would be hard to distinguish from the charge of assault.

45. The second charge, namely, failing to behave respectfully towards the prisoner, having regard to his rights to bodily integrity, presents the greatest difficulty. At one level it could be said that behaving disrespectfully towards a prisoner might involve language or conduct falling short of physical violence. Depending on the circumstances of the allegation, a sneer, a slighting comment or a rude gesture could all amount to disrespectful conduct towards a prisoner and yet an investigation of any of these three actions would not involve an inquiry into facts of matters that were the subject of the criminal charge in the present case.

46. That, however, would not appear to be the essence of this particular allegation. I say this because the particulars of the charge are that the applicant "failed to respect and protect the human dignity, bodily integrity and human rights" of the detained person. It is not easy to see how it could be alleged of a Garda that he behaved disrespectfully towards a person in custody having regard to the latter's right to bodily integrity unless that conduct also involved an assault of some kind. In these circumstances, I believe that this requirement of Article 8(2) is also satisfied in respect of the second charge.

47. In summary, therefore, this requirement of Article 8(2) is satisfied in the case of two of the three charges, namely, charges (ii) and (iii). This in itself is not enough to warrant a prohibition on the prosecution of these two disciplinary charges, since Article 8(2) also these proceedings must also be unfair and oppressive to the individual before a prohibition comes into effect. How then, it might be asked, would it be oppressive and unfair to an accused if he were to face a fresh disciplinary investigation in respect of these two charges?

#### **Would the continuation of the disciplinary charges be unfair and oppressive within the meaning of Article 8(2)?**

48. The starting point, of course, is that in one sense the fact that the applicant is facing disciplinary charges in the wake of an acquittal on a criminal charge might be regarded as unfair and oppressive. But that is not the unfairness and oppression contemplated by Article 8(2) because this provision explicitly envisages that an applicant may face such disciplinary charges after an acquittal. Something more is therefore required in order to tip the balance into unfairness and oppression.

49. A good example of such unfairness is supplied by the judgment of Geoghegan J. in *Garvey v. Minister for Justice, Equality and Law Reform* [2006] IESC 3, [2006] 1 I.R. 548. In this case the applicant who was a prison officer had been acquitted after a long trial and a lengthy deliberations by a jury. Geoghegan J. considered that the allegations subsequently proposed to be investigated in the internal enquiry to be conducted by the Prison Service were identical to those in the criminal charges and the same witnesses and evidence would be tendered. He pointed to the fact that it would be ([2006] 1 I.R. 548, 558):

"... impossible to imagine that such a lengthy trial leading to an acquittal did not give rise to a flow of arguments and opinions throughout the prison. In this claustrophobic atmosphere, I believe that....it would be a "basically unfair procedure" to conduct a disciplinary inquiry on what in effect are identical allegations to the criminal charges based on essentially the same evidence and the same witnesses."

50. That, however, is not the case here, precisely because no evidence was tendered by the prosecution at the appeal hearing. The applicant, however, also points to the issues of acute stress and delay as grounds for saying that the commencement of the disciplinary inquiry would be unfair and oppressive.

51. As the applicant's general practitioner, Dr. Michael Crotty, has attested, there is no doubt but that this entire episode has been painful and stressful for him and has caused him a high degree of psychological anxiety. One could, of course, envisage circumstances where the applicant's anxiety had reached a point that his mental well being had been wholly undermined and if that were to occur, one might say that the continuation of the disciplinary charges would be oppressive and unfair. But all disciplinary charges of this kind inevitably cause strain, distress and upset to the person accused of wrong-doing and, as Finnegan J. observed in *Gillen v. Garda Commissioner* [2012] IESC 3, [2012] 1 I.R. 574, 595 this "of itself" is not to a reason to justify the prohibition of disciplinary proceedings. I therefore agree with Baker J. when she said that she was not satisfied that the applicant has not "adduced evidence of anxiety or prejudice outside of that which would be normal in the circumstances."

52. Nor can I agree that there has been any undue delay on the part of the Garda authorities in establishing a disciplinary inquiry in May 2014. After the alleged incident in June 2010 the matter was swiftly referred to GSOC who in turn made a recommendation to the DPP. The applicant might have hoped that the matter had come to an end following his acquittal in April 2013, but within a few weeks of that day, he knew, to adopt the words of Baker J. that "the internal investigation was underway and that there was the possibility that a formal enquiry would be directed."

#### **Conclusions on the Article 8(2) issue**

53. In summary, therefore, I am of the view that:

54. First, the applicant's acquittal must be regarded as an acquittal on the merits for the purposes of Article 8(2) of the 2007 Regulations

55. Second, the applicant can demonstrate that two of three disciplinary charges involve an investigation into the same facts as the criminal prosecution. This requirement is not, however, satisfied in the case of the other charge of using unprofessional language towards the prisoner.

56. Third, the applicant cannot, however, demonstrate on the facts of the present case that the commencement or continuation of any of these disciplinary charges would be oppressive or unfair within the meaning of Article 8(2).

#### **Legitimate expectations**

57. It remains to consider the issue of legitimate expectations. It is true that GSOC wrote to the applicant in the immediate wake of his acquittal informing him that its investigation was at an end and that "no further action will be taken." But that was a representation only that no further action would be taken by GSOC and, if, as I have found, the 2005 Act did not preclude the Garda authorities separately taking disciplinary action, the representation given by the GSOC could not bind the Commissioner, so that the applicant could not have had any expectation *vis-à-vis* the Garda authorities that was, in truth, a legitimate one.

58. I agree, of course, that in these circumstances it was incumbent on the Garda authorities to act quickly. If the applicant had been led to believe that the GSOC investigation was over, he might well have legitimately assumed that no other disciplinary action would be taken against him. In those circumstances, the commencement of disciplinary proceedings after a long interval after that date might well have been unfair and even oppressive.

59. But this is not what occurred here, because within a few short weeks of the GSOC letter the applicant had been informed that disciplinary proceedings were under active consideration.

60. In these circumstances, it cannot be said that the applicant had acquired any legitimate expectation which bound the Commissioner and precluded the commencement of these disciplinary proceedings

### **Conclusions**

61. I would therefore uphold the decision of the High Court and refuse to grant the applicant the relief which he seeks in these proceedings.