Neutral Citation Number: [2011] IEHC 486

THE HIGH COURT

JUDICIAL REVIEW

2010 1234 JR

BETWEEN

KEVIN GALVIN

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SIOCHANA

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

THE GOVERNMENT OF IRELAND

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered the 20th day of December 2011.

1. The applicant resides at 81A Furry Park Road, Clontarf, Dublin 3. The first named respondent is the person who enjoys general direction and control of An Garda Síochána, and has his principal offices at Garda Headquarters, Phoenix Park, Dublin 7. The second named respondent is a Minister of the Government and has his principal offices at the Department of Justice, Equality and Law Reform, 72-76 St. Stephen's Green, Dublin 2. The third named respondent is the Irish Government. The fourth named respondent is sued as legal representative of the first second and third named respondents.

2. The applicant seeks the following reliefs:-

(i) Judicial Review by way of *certiorari* quashing the first named respondent's decision that the applicant be dismissed from An Garda Síochána.

(ii) In the alternative a declaration that the applicant's purported dismissal from An Garda Síochána is null, void and of no effect.

(iii) An order of *mandamus* reinstating the applicant from the date of purported dismissal.

(iv) Damages.

(v) If necessary, an order granting an extension of time for the making of this application.

(vi) Such further and other relief as seems fit.

(vii) An order providing for the costs of the proceedings herein.

Background Facts

3.1 In this case the applicant seeks to quash the decision of the Garda Commissioner, as consented to by the Government, to dismiss him from An Garda Síochána. In addition he seeks an order from this Court by way of *mandamus* reinstating him to An Garda Síochána. The applicant joined An Garda Síochána in July 1997 and commenced his training in Sligo Garda Station. He was then assigned to regular beat duties in Store Street. In October 2000, the applicant was transferred to the information technology section at Garda Headquarters.

3.2 As a result of a number of matters relating to the conduct of the applicant, the Garda Commissioner formed the view that his continued membership in the force would undermine public confidence in An Garda Síochána and that dismissal was necessary in order to maintain that confidence. The Commissioner's opinion in this regard was conveyed to the applicant by way of a letter dated the 14th January, 2010. The letter set out nineteen grounds upon which the Commissioner's opinion was based. The nineteen findings relied upon by the Commissioner can be categorised as follows:-

(i) Six findings under the Garda Síochána (Discipline) Regulations that the applicant was in neglect of duty,

(ii) One finding under the Garda Síochána (Discipline) Regulations that the applicant had engaged in corrupt practice,

(iii) One finding under the Garda Síochána (Discipline) Regulations of discreditable conduct on the part of the applicant,

(iv) Ten convictions in the District Courts relating to a number of properties owned by the applicant, and

(v) One case in the District Courts regarding a similar matter which was taken into consideration.

The letter stated that:-

> "By reason of your conduct as evidenced by the criminal court convictions and orders and as evidenced by the findings of being in breach of discipline, your continued membership would undermine public confidence in An Garda Síochána.

Your dismissal is necessary to maintain public confidence."

3.3 The applicant was invited to respond to this letter or make any representations which he wished to make by the 9th February, 2010. The applicant acknowledged receipt of this above letter on the 18th January, 2010. By letter dated the 5th February, 2010 the applicant's solicitors sought an extension of time to enable them to obtain Counsel's advices in respect of the matter. By letter dated the 8th February, 2010 the Commissioner acceded to this request and extended the timeline to midnight on 23rd February, 2010. Under cover of letter dated 23rd February, 2010 the applicant made an extensive written submission, he stated that:-

> "In relation to property issues I would submit that these have been sorted out and that work has been carried out to make all of these properties compliant with the relevant regulations."

In the cover letter it was stated that:-

> "Strictly without prejudice to the above and in an effort to resolve this matter, we would advise that Garda Galvin is prepared to commence a probationary period for six months on the understanding that should he not carry out his duties in a professional manner to the satisfaction of the Commissioner that he would be prepared not to object to the termination of his employment with An Garda Síochána at the end of the six month period provided that his pension entitlements remain intact."

3.4 By letter dated the 25th March, 2010 Brendan Cloonan on behalf of the Garda Commissioner replied and indicated that the Commissioner had decided to reject this proposal. The letter stated that:-

> "I am to inform you that the Commissioner is presently considering Garda Galvin's submissions in respect of the proceedings in accordance with Section 14 of the Garda Síochána Act 2005."

By submission dated the 14th April, 2010 the Commissioner indicated his opinion and the reasons for same to the Secretary General of the Department of Justice, Equality and Law Reform and indicated that he proposed to dismiss the applicant subject to obtaining the consent of government. The submission enclosed the attachments relating to the grounds as well as the applicant's submission in response. By letter dated the 19th April, 2009 the applicant was notified that the Commissioner had referred the matter to the third named respondent. The letter was addressed to Martin Moran and Co. Solicitors who were on record for the applicant at that time, the letter stated that:-

> "Having considered your submissions the Commissioner remains of the opinion that by reason of your client's conduct his continued membership would undermine public confidence in the Garda Síochána and his dismissal is necessary to maintain public confidence.
>
> The Commissioner, accordingly, has decided to proceed with his decision to seek the requisite consent of the Government to dismiss your client in accordance with the provisions of Section 14 of the Garda Síochána Act, 2005."

No further response was received from the applicant in respect of this letter.

3.5 The Government consented to the Commissioner's decision on 28th May, 2010. The decision was conveyed to the applicant by way of a letter dated 10th June, 2010. The letter explained that the consent of the Government had been obtained and he was notified of his dismissal with effect from midnight on 16th June, 2010. By signature dated 11th June, 2010 the applicant acknowledged receipt of the above letter. By letter dated the 15th June, 2010 the applicant's solicitors wrote and stated that:-

> "We have not had an opportunity to discuss same in detail with our client and Counsel and in the circumstances we must request that you defer your decision to dismiss our client from midnight on the 16th instant until such time as our client has had an opportunity to obtain detailed advice."

By letter dated the 16th June, 2010 the Commissioner indicated that he was not willing to alter his decision. At midnight on the 16th June, 2010 the dismissal of the applicant became effective. By emailed letter dated the 10th September, 2010 the applicant's solicitors wrote to the Commissioner stating that if the decision to dismiss him was not reviewed in its entirety then they would bring judicial review proceedings. On the 16th September, 2010 the applicant sought and obtained leave to bring the within proceedings.

Applicant's Submissions

4.1 The applicant submits that his dismissal was *ultra vires* because it seeks to penalize him using legislation not enacted at the time a number of the breaches occurred. The first three matters relied upon by the respondent to dismiss the applicant pre-date the coming into operation of the relevant section of the Garda Síochána Act, 2005. Section 14 of the Garda Síochána Act, 2005 provides for the dismissal of a member of the Gardai but it only came into force on 31st March, 2006. The disciplinary breaches which comprise the first three complaints occurred on 16th-17th August, 2005 (Complaint 1) 23rd June, 2005 (Complaint 2) and 10th August, 2005 (Complaint 3). It is submitted the first named respondent is therefore seeking to give retrospective application to an Act which has penal effect. The rationale for the rule against retrospectivity is to prevent a person from being punished for something that was not previously considered a wrong and to ensure that a person who has committed a wrong is not penalised more seriously than was provided for by law at the time the wrong was committed. It is submitted that the rule against retrospectivity is contravened in that the penalty that the applicant faces is provided for by legislation enacted after the date of the wrongs committed.

4.2 Article 40 paragraph 1 of the Garda Síochána (Discipline) Regulations, 1989 allows for the dismissal of a garda in certain circumstances. Those regulations appear to have provided the only basis for dismissal until the commencement of the Garda Síochána Act, 2005 in March, 2006. If the Commissioner wished to dismiss the applicant based on matters pre-dating the passage of the Act as well as matters post-dating the passage of the Act, the only jurisdiction to do so, would have come from Article 40 of the 1989 Regulations. That Article was not cited as providing a basis or partial basis for the dismissal. The power to dismiss was more constrained under the 1989 Regulations than the 2005 Act.

4.3 It is submitted that because the applicant had already been disciplined for at least eight of the alleged breaches of good conduct which formed the basis for the dismissal he had a legitimate expectation that he would not face further discipline. In *McGrath v Commissioner of An Garda Síochána* [1991] 1 IR 69 a member of An Garda Síochána successfully prevented an investigation into disciplinary allegations of corrupt practice and corrupt or improper practice on the basis that he had been previously acquitted

following a jury trial in relation to the same facts. The Supreme Court held (from the headnote):-

> "To re-open an allegation of dishonesty which had been clearly determined by a jury verdict given on the merits, for the purpose of re-exposing the applicant to the possibility of punishment, amounted to an unfair and oppressive procedure which should be restrained by the court."

It is submitted that the decision to re-open these matters is *ultra vires* and amounts to an error of law in circumstances where the applicant has already been disciplined under a separate disciplinary regime.

4.4 The applicant submits that the decision of the Commissioner was made in breach of natural and Constitutional Justice in that not all of the evidence before the decision-maker(s) was disclosed to him. The applicant was presented with the charges on 14th January, 2010 and given an opportunity to respond to the charges by the first named respondent which opportunity he availed of. However the first respondent took the decision to forward his recommendation for dismissal to the Government on 14th April, 2010 without first informing the applicant. This recommendation contained further evidence about the applicant's character and negative comment on his original submissions. The applicant only became aware that this further evidence was put to the ultimate decision maker after the institution of these proceedings. He was never given an opportunity to counter the additional evidence which included:-

> (a) A letter dated 29th February, 2009 from the Litter Prevention Officer.
>
> (b) A report dated 27th July, 2009 by a Superintendent Paul Moran of the events at Dublin District Court on that day
>
> (c) A letter from Desmond Byrne, Chairperson of a resident's association dated 5th February, 2009.

Evidence was before the ultimate decision maker about which the applicant through no fault of his own was entirely ignorant and was therefore unable to counter.

4.5 In *Kiely v. Minister for Social Welfare* [1971] IR 21 Kenny J. held (from the headnote) that:-

> "the decision of the appeals officer should be set aside on the ground that, due to a misunderstanding, the appeals officer had made his decision without giving the appellant an opportunity to adduce further evidence to controvert the evidence contained in the written report, which had been disclosed to the appellant for the first time on the day of the hearing before the appeals officer."

Similarly in this case the applicant never had an opportunity to counter evidence of which he was entirely unaware. It is clear that such an opportunity should be afforded from the case *O'Shea v Commissioner of Garda Síochána and Ors* [1994] 2 IR 408. In May 1992, the first respondent served a notice of proposal to dismiss the applicant. The applicant was invited to furnish submissions contesting the dismissal. In response, the applicant's solicitor wrote to the first respondent denying the charge and requesting copies of the evidence and documents which the first respondent had relied on. In reply, the applicant's solicitor was informed that no purpose would be served by a further meeting between the parties, that the applicant had had a sufficient opportunity to make submissions and that the first respondent had relied upon the reports outlining the admissions made by the applicant after being cautioned. Carroll J. held that it was an essential requirement of natural justice that the first respondent furnish the applicant with an account of the admissions he was alleged to have made and the factual background to those admissions. In *O'Shea* the applicant was granted a reconsideration of his case because he was not given a written account of (primarily) his own admissions. In the circumstances of this case there was a breach of natural and constitutional justice in that the applicant did not even know the extent of the evidence against him.

4.6 It is submitted that although an initial opportunity to challenge the evidence was provided, the decision to deploy additional evidence and additional argument to "bolster" the case before it went to the Government in circumstances where the applicant was unaware of that evidence or argument is a breach of constitutional justice. The unfairness visited upon the applicant by the failure to disclose evidence to him is further exacerbated by the fact that the new evidence contained hearsay which the applicant was unable to challenge as he was unaware of it. In this regard the applicant refers to an extract from *Administrative Law in Ireland* (Hogan and Morgan) at 658:-

> "But it is probably correct to take the law, in regard to (say) tribunals, to be that hearsay evidence is not as such excluded, but rather that, where the circumstances are that the absence of this opportunity would be unfair, a person adversely affected by evidence must be allowed an opportunity to test it by cross-examination.

Finally it is noted that but for the bringing of these proceedings the applicant would not have known the material which was before the ultimate decision maker when it was making its decision.

Respondents' Submissions

5.1 The applicant is not entitled to relief by reason of his delay and want of promptness in seeking leave. The applicant seeks an order of *certiorari* quashing the decision of the first named respondent that the applicant be dismissed from An Garda Síochána as well as an order of *mandamus*. That said decision and the fact that the Government had consented to it was communicated to the applicant on the 10th June, 2010. The applicant sought and obtained leave to bring the within proceedings on the 16th September, 2010 over three months later. The outer time limit for *certiorari* is six months. However in circumstances where the applicant was seeking an order of *mandamus* reinstating him in the force and in circumstances where the backdrop of the whole case is public confidence in the force, it is submitted that it is quite simply unacceptable to wait for over three months before launching such a challenge. No explanation has been put forward for this delay of over three months. Thus the respondents have not been told what steps if any were taken in that three month period to prepare the case or when the applicant first instructed legal advisors to bring judicial review proceedings to challenge his dismissal. All that is known is that by letter dated 15th June, 2010 (which is one of the letters that the applicant failed to disclose when seeking leave) the applicant's solicitors indicated that they wished to discuss the decision to dismiss as consented to by the Government with their counsel and they asked for the actual dismissal to be deferred. This suggests that the applicant was seeking legal advice about the decision as of 15th June, 2010. It is not explained why it then took him another three months to actually seek leave. Finally, if the applicant had been of the view that what the Commissioner was doing was *ultra vires* he would not even have had to wait until the final decision issued before seeking relief from the courts.

5.2 It is submitted that the applicant is not entitled to relief by reason of his material non-disclosure when seeking leave. The applicant omitted to exhibit or to refer to several material items of correspondence in the process that led up to his dismissal. The omission of so many key items cannot be dismissed as an oversight or a mistake and indeed the applicant does not suggest that it

was. In paragraph E (3) of the Statement of Grounds it is stated that:-

> "The First Named Respondent did not give the Applicant any warning that he had taken the decision to refer the matter to the Third Named Respondent."

In fact the applicant was notified that the Commissioner had referred the matter to the third named respondent by way of letter dated 19 April, 2010. The applicant did not refer to or exhibit this letter when seeking leave. In paragraph 6 of his replying affidavit the applicant provides a wholly unsatisfactory response to the non-disclosure of this letter. Oddly the applicant avers that the letter is undated (when in fact it is dated) and says that it "appears" to have been sent to his then solicitors. However he does not explain whether or not he is suggesting that his then solicitors did not act on the letter or pass it on to him either at the time or later. This is a text book case of material non-disclosure and led to the court that granted leave being wholly misled as to the actual factual position. By letter dated the 5th February, 2010 the applicant's solicitors sought an extension of time to put in a replying submission and stated that they had sought the advices of Counsel. No explanation for the non disclosure of this letter is offered. By letter dated 23rd February, 2010 the applicant stated that if after a probationary period of six months the Commissioner was not satisfied that:-

> "He would be prepared not to object to the termination of his employment with An Garda Síochána at the end of the six month period provided that his pension entitlements remain intact."

The applicant's explanation for not bringing this letter to the attention of the Court when seeking leave is that "as the letter in question was designated 'private and confidential' it was not exhibited" (paragraph 7 of his replying affidavit). This the respondents submit is an incredible and unsatisfactory explanation. The letter they submit is no more private and confidential than any other document in the case. By letter dated 5th March, 2010 the Commissioner rejected this proposal. No explanation for the non disclosure of this letter is offered. By letter dated 15th June 2010 the applicant's solicitors wrote and asked for the decision to dismiss him to be deferred until he had consulted with counsel. Non disclosure of this letter is not explained. By reply dated 16th June, 2010 the Commissioner indicated that he was not willing to alter his decision. No explanation for the non disclosure of this letter is offered.

5.3 The failure to exhibit or to refer to any of the above correspondence meant not only that the Court was unaware of its existence and content but also meant that the Court was given a wholly misleading sense of the nature of the process and of the various opportunities the applicant had to raise issues such as an oral hearing if he had wished to do so. The omission also meant that the Court was unaware that the applicant was fully legally advised throughout the process and so was in a position to raise any procedural requests or objections. It is further submitted that the applicant is not entitled to relief by reason of his acquiescence. At no stage during the process did he indicate that he had any further submissions to make or request that an oral hearing take place. Instead the applicant fully engaged with the process to the extent of trying to negotiate a six month deferral of any dismissal and it was only three months after he was informed of an adverse decision that he raised the within complaints by means of judicial review proceedings.

5.4 The respondents submit that for reasons such as delay, non-disclosure and acquiescence the applicant's judicial review never gets out of the starting blocks. Moreover on the merits of the applicant's complaints, it is submitted that they are of no substance. The applicant claims that a number of matters which the respondent sought to rely on in dismissing the applicant pre-date the coming into operation of section 14 of the Garda Síochána Act, 2005. It is submitted that the Commissioner of An Garda Síochána is therefore seeking to give retrospective application to an Act which has penal effect. The position of the respondents is that the first named respondent is entitled to take into account conduct that pre-dates the commencement of Section 14(2) of the Garda Síochána Act 2005. It is submitted that when one looks at Section 14 it is focused on someone who is unfit to be in the force as of the date when the decision to dismiss him is made. However there is nothing to limit the basis on which that decision is made to events which post-date the commencement of the section. Such an interpretation of the section would be absurd since the only way in which you can judge someone's fitness to be in the force as of today is to look at their record. The absurdity of any other interpretation becomes clear when one asks whether or not a member would be entitled to point to their prior good conduct (i.e. prior to the commencement of the Act) when seeking to persuade the Commissioner that their continued presence in the force does not undermine public confidence in it. The whole concept of public confidence is clearly one that is based on a person's historical as well as their recent conduct. Regulation 4(c) provides that the member shall be given an opportunity to make submissions in this regard, and that has occurred with respect to his 2005 convictions. Thus, at its very highest, the applicant's case on retrospectivity is an empty and technical one, incapable of improving his position in any way. This provides a strong reason for exercising the Court's discretion against granting judicial review.

5.5 The applicant complains that he has already been disciplined for many of the matters that were taken into account by the Commissioner when deciding that he should be dismissed. The key issue here is that the applicant has not challenged the Constitutionality of Section 14. If it is the case that the Commissioner has correctly interpreted the section as permitting him to take a person's entire disciplinary and criminal record into account when deciding whether that person should remain in the force then that is the end of the matter since there is no challenge to the validity of the section. The idea that punishment for an instance of wrongdoing means that the same incident can never be taken into account again is entirely unrealistic. Even in sentencing on criminal charges, prior convictions and sentences can constitute an aggravating factor justifying a more severe sentence on a subsequent occasion. Any employer must be free to have regard to a cumulative pattern of misconduct. In *Registrar of Companies v Anderson and Another* [2005] 1 IR 21 Murray CJ held at 21:-

> "However one approaches it, the fundamental point is that the rule of double jeopardy and associated protections against being prosecuted twice for the same offence is a rule which arises in relation to the prosecution of offences."

It is abundantly clear that the principle of double jeopardy does not prevent a person from being convicted in court in respect of an offence and punished under a separate disciplinary or administrative regime in respect of exactly the same conduct.

5.6 The applicant submits that his prior punishments meant that he had a legitimate expectation that he would not be subjected to further punishment. It is manifest that the test for existence of a legitimate expectation is not made out on the facts of this case. It is unclear how the applicant could have reasonably believed that if he continued to accumulate disciplinary findings then no time would ever come when the Commissioner would decide that his cumulative conduct meant that his continued presence in the force would undermine public confidence in it. Nor does the applicant explain how he relied or acted on foot of such an alleged expectation. There simply was no promise or representation, express or implied to the effect that a Garda would not be dismissed once he/she had already been disciplined.

5.7 Judicial review is a discretionary remedy. In *Judicial Review*, (2nd ed) at p. 421 De Blacam speaking about *certiorari* notes that:-

> "The Courts sometimes refuse relief where they conclude that the applicant has suffered no injustice as a result of the

> impugned order or decision. In these cases the Court does not necessarily stand over the impugned order. If there is no injustice, then, it is reasoned why grant relief by way of *certiorari*?"

Here there are particularly compelling factors militating against the exercise of the court's discretion. The applicant, subsequent to his dismissal, was jailed for failure to comply with undertakings he gave the High Court. The President of the High Court described this as "a most serious contempt". This throws into question the entire factual basis of the applicant's challenge to his dismissal. An applicant's conduct must loom particularly large in the exercise of the court's discretion where, as here, there are consequences for public confidence in An Garda Síochána.

Decision of the Court

6.1 The applicant joined An Garda Síochána in July 1997. In January 2010 the Garda Commissioner formed the opinion that as a result of the applicant's conduct his continued membership in the force would undermine public confidence and that dismissal was necessary. The Commissioner's opinion was based on nineteen findings made against the applicant which included six findings of neglect of duty, one finding of corrupt practice, one finding of discreditable conduct, ten convictions in the District Court relating to a number of properties owned by the applicant and one case in the District Court regarding a similar matter which was taken into consideration. The Commissioner's opinion was conveyed to the applicant by way of a letter dated the 14th January, 2010. The applicant was invited to respond by the 9th February, 2010. By letter dated the 5th February, 2010 the applicant's solicitors sought an extension of time. The Commissioner acceded to this request on the 8th February, 2010. By letter dated 23rd February, 2010 the applicant made an extensive written submission. The applicant stated *inter alia* that the property issues had been sorted out and that he was prepared to commence a probationary period for six months at the end of which he would accept dismissal if not satisfactory. By letter dated the 25th March, 2010 the Garda Commissioner replied rejecting this prohibition proposal. By letter dated the 14th April, 2010 the Commissioner wrote to the Secretary General of the Department of Justice, Equality and Law Reform and indicated that he proposed to dismiss the applicant subject to obtaining the consent of government. The submission enclosed the attachments relating to the grounds as well as the applicant's submission in response. By letter dated the 19th April, 2009 the applicant was notified that the Commissioner had decided to proceed with his decision to seek the requisite consent of the Government to dismiss the applicant. No further response was received from the applicant in respect of this letter. The Government consented to the Commissioner's decision on 28th May, 2010. The decision was conveyed to the applicant by way of a letter dated 10th June, 2010. By letter dated the 15th June, 2010 the applicant's solicitors wrote to the Commissioner requesting that he defer the decision to dismiss the applicant until he had an opportunity to obtain detailed advice. By letter dated the 16th June, 2010 the Commissioner indicated that he was not willing to alter his decision. By emailed letter dated the 10th September, 2010 the applicant's solicitors wrote and stated that if the decision to dismiss him was not reviewed in its entirety then they would bring judicial review proceedings. On the 16th September, 2010 the applicant sought and obtained leave to bring the within proceedings. The applicant seeks an order of *certiorari* quashing the decision to dismiss him and an order of *mandamus* reinstating him in An Garda Síochána.

6.2 At the outset I propose to consider the preliminary objections to the applicant's judicial review. The first of the preliminary objections concerns delay on the part of the applicant in seeking leave to review the decision of the first named respondent. The decision in question was communicated to the applicant on the 10th June, 2010. The applicant sought and obtained leave to bring the within proceedings on the 16th September, 2010 over three months later. The outer time limit for *certiorari* is six months. But the rule also requires the application should be made promptly. In this context in *De Roiste v Minister for Defence* [2001] 1 IR 190 McCracken J held that the primary provision is that an application for judicial review must be made promptly and it is only a secondary requirement that, in any event, the application must be made within the stated time depending on the nature of the application. Similarly in *Dekra v Minister for the Environment and Local Government*, Fennelly J. noted that:-

> "An applicant who is unable to furnish good reason for his own failure to issue proceedings for judicial review 'at the earliest opportunity and in any event within three months from the date when grounds for the application first arose' will not normally be able to show good reason for an extension of time."

The backdrop to this case is public confidence in the force. It is clear that in the events in the District Court prior to the Commissioners taking the action he did there had been considerable publicity adverse to the gardaí. I would accept this was a situation of grave concern to the Commissioner of An Garda Síochána. It seems to me that where the applicant intended to seek an order of *mandamus* compelling the first respondent to reinstate him in the force, there was a heavy onus on him to act promptly. Such a matter can not be allowed to lie idle. Moreover, the applicant had been thirteen years in the gardaí and had been dismissed. In my view in such circumstances, in order to comply with the requirement to act promptly, an applicant for judicial review is obliged to move all but immediately. No explanation is offered for the delay. In my view the applicant has not acted with the promptitude required.

6.3 The second of the preliminary objections concerns non disclosure on the part of the applicant when he sought leave. The applicant failed to exhibit several material items of correspondence in the process that led up to his dismissal. On the 14th January, 2010 the Garda Commissioner informed the applicant of his decision to dismiss him and invited the applicant to submit a response. By letter dated the 5th February, 2010 the applicant's solicitors sought an extension of time to put in a replying submissions. This letter was not exhibited and no explanation for the non disclosure of this letter is offered. By letter dated 23rd February, 2010 the applicant offered to commence a six month probationary period at the end of which he would accept dismissal if still unsatisfactory. The applicant's explanation for not bringing this letter to the attention of the Court when seeking leave is that the letter in question was designated "private and confidential". By letter dated 5th March, 2010 the Commissioner rejected this proposal. No explanation for the non disclosure of this letter is offered. In his statement of grounds the applicant claimed that the first respondent failed to warn the applicant that he had taken the decision to refer the matter to the Government. The applicant was notified of this on the 19th April, 2010, again the applicant failed to exhibit this letter when seeking leave. The applicant fails to properly explain why this letter was not disclosed, he merely states that the letter is undated (when in fact it is dated) and says that it "appears" to have been sent to his then solicitors. He does not explain whether or not he is suggesting that his then solicitors did not act on the letter or pass it on to him. By letter dated 15th June 2010 the applicant's solicitors wrote and asked for the decision to dismiss him to be deferred until he had consulted with counsel. The non disclosure of this letter is also not explained. By reply dated 16th June 2010 the Commissioner indicated that he was not willing to alter his decision. No explanation for the non disclosure of this letter is offered. It is clear to me that the failure to exhibit this correspondence meant that the Court was given a misleading sense of the process being challenged. I find the reasons proffered in explanation for this non disclosure to be devoid of merit. When seeking leave for judicial review an applicant must act *uberrima fides*. It is not open to an applicant to deprive the court of the opportunity to consider key items of correspondence. It seems to me that there has been material non-disclosure by the applicant when he applied for leave.

6.4 The third preliminary objection raised by the respondents, concerns acquiescence on the part of the applicant. Active participation in a hearing has long been held to be sufficient to deprive an applicant of the right to complain about it subsequently. In *Hayes v. Financial Services Ombudsman* (Unreported, High Court, 3rd November 2008), MacMenamin J stated at paragraph 40 that:-

> "As a matter of logic, I find it difficult to see how the decision of the respondent can now be attacked on the basis of issues that were not properly raised or ventilated before him."

At no stage during the process did the applicant indicate that he had any further submissions to make or request that an oral hearing take place. The applicant fully engaged with the process to the extent of trying to negotiate a six month deferral of any dismissal and it was only three months after he was informed of an adverse decision that he raised the within complaints by means of judicial review proceedings. Having accepted and engaged with the process it is difficult to see how the applicant can now turn around and seek to object to it. In my view the applicant acquiesced in the procedure and cannot now challenge the result.

6.5 Individually and cumulatively the above findings are dispositive of this case. However I think I should express a view on the merits of the case. The applicant complains that the recommendation for dismissal sent to the Government contained negative comment about the applicant which he only became aware of after the institution of these proceedings and which he was therefore unable to counter. This additional evidence included:-

> (a) A letter dated 29th February, 2009 from the Litter Prevention Officer.
>
> (b) A report dated 27th July, 2009 by a Superintendent Paul Moran of the events at Dublin District Court on that day
>
> (c) A letter from Desmond Byrne, Chairperson of a resident's association dated 5th February, 2009.

The Commissioners decision to dismiss the applicant was based on 19 grounds. These grounds included the District Court convictions that the applicant received in relation to his properties. No new ground justifying the dismissal was sent to the Government. Nothing in these other documents furnished to the Government raised matters not already fully dealt with in the 19 grounds above. The applicant has not pointed to any thing in these documents that could be considered as new or significant. I consider any failure on the Commissioner's part in this regard to be *de minimus*. The applicant has further submitted that he would have liked to make further submissions but was not granted an oral hearing. The applicant never asked for an oral hearing which is not surprising since in his written response to the Commissioner he set out detailed submissions on the matters raised. There is no dispute on the facts of the case. The applicant's District Court convictions are a matter of fact, as is his disciplinary record. The applicant complains that he had no opportunity to make further submissions yet despite being asked by the Court during the hearing he has been unable to point to anything he was precluded from saying. In short, he has failed to engage with the issue by setting out what it was he was deprived of submitting whether by the Commissioner or by the Government.

6.6 It is not for this Court to say what amounts to conduct sufficient to warrant dismissal on the basis that retention would undermine public confidence in the force. This is a matter for the Garda Commissioner and the Government on consent. In the circumstances however, it appears that there are ample grounds upon which it was reasonable to conclude that a person who, in addition to a number of disciplinary offences, has ten District Court convictions is not an appropriate person to serve in An Garda Síochána. It seems to me that the decision of the Commissioner was eminently reasonable. Furthermore I consider that in the context of determining whether the Court should exercise its discretion to quash and order *mandamus*, it must take account of the fact that since his dismissal, the applicant has been jailed by the President of the High Court for what he described as "a most serious contempt" arising out of the very District Court proceedings that formed a part of the reasons for the Commissioners action herein. Taking this into account, even were the applicant to have surmounted the preliminary objections herein and even had he proved his entitlement to relief on the merits herein, I would have refused to exercise the court's discretion in his favour. I refuse the relief sought in this application.