Neutral Citation [2015] IEHC 663

THE HIGH COURT

[2015 No. 3149P]

BETWEEN

JOHN FINTAN FANNING

PLAINTIFF

AND

PUBLIC APPOINTMENTS SERVICE,

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice David Keane delivered on the 16th October 2015

Introduction

1. This is an application for an interlocutory injunction to restrain the continuation of the recruitment process attendant upon the proposed appointment by the Government of two persons as Deputy Commissioners of An Garda Síochána. The Government is empowered to make such appointments under s. 10 (1) of the Garda Síochána Act 2005. The plaintiff is an Assistant Commissioner of An Garda Síochána who was an unsuccessful candidate in that process.

2. That interlocutory injunction is sought pending the determination of the underlying proceedings, which commenced with the issue of a plenary summons on the 23rd April 2015. The claim indorsed upon that summons seeks various reliefs comprising: declarations that the recruitment process, and the conduct of that process, infringed the plaintiff's constitutional right to fair procedures and natural justice; a declaration that the recruitment process was conducted in a manner contrary to the legitimate expectation of the plaintiff; an injunction restraining the further conduct of the recruitment process by the Public Appointments Service for an unspecified period; and damages for breach of the plaintiff's constitutional rights and breach of his legitimate expectation.

3. Regrettably, when the application came before me for hearing on the 3rd June 2015, no statement of claim had yet been delivered and so I have no formal particulars of the plaintiff's claims concerning the specific representation or representations of the defendants for which he contends; the specific conduct of the defendants alleged to have occurred in breach of any such representation; and the specific acts or omissions of the defendants that are alleged to amount to a breach of the plaintiff's constitutional right to natural justice and fair procedures.

4. However, there has been an extensive exchange of affidavits in the context of the present application, which was brought by motion on notice issued on the same date as the plenary summons, the 23rd April 2015. From the matters deposed to by the plaintiff and the submissions of the plaintiff's Counsel, a number of issues emerge.

Background

5. The recruitment process now at issue was organised by the first defendant, the Public Appointments Service ("PAS"), following a request from the Government made on the 20th January 2015. Initially, it was envisaged that the process would be completed by the 17th March 2015. Later, it was agreed that the PAS would provide the names of the recommended candidates to the Government by the 31st March 2015. Under s. 10 of the Garda Síochána Act 2005, the actual appointment of such numbers of persons to the rank of Deputy Garda Commissioner as the Government sees fit is the sole prerogative of the Government.

6. The recruitment process was an open one that commenced with the publication of a number of advertisements on the 30th January 2015 in both the domestic and foreign press and on a number of recognised websites that deal with policing matters. The closing date for receipt of completed applications was stipulated as midnight on the 19th February 2015.

7. Also commencing on the 30th January 2015, a sixteen page candidate information booklet ("the information booklet") was made available on the PAS website, describing the role, personal specification and terms and conditions of the office concerned, and setting out the process by which candidates would be selected for recommendation to Government. It is averred on behalf of the PAS that such booklets are provided in all competitions.

8. Under the heading "Selection" in the information booklet, the following text appears:

> "The selection process for this role may involve:
>
> • shortlisting of candidates, on the basis of the information contained in their application;
>
> • a competitive preliminary interview;
>
> • completion of an online questionnaire(s) (sic);
>
> • comprehensive reference checks;
>
> • work sample/role play/media exercise, and any other tests or exercises that may be deemed appropriate;
>
> • a competitive final interview which may include a presentation."

9. The information booklet as initially made available included the following statement in a section entitled "Principal Conditions of Service":

> "The appointment is subject to the Civil Service Regulations Acts 1956 to 2005 and the Public Service Management (Recruitment and Appointments) Act 2004 and any other act for the time being in force relating to the Civil and/or Public Service."

10. On behalf of the defendants it is averred that the statement just quoted was included in the information booklet in error. It does not appear to be disputed that, as a matter of law, s. 7(1)(c) of the Public Service Management (Recruitment and Appointments) Act 2004 ("the 2004 Act") expressly excludes from the scope of that Act any appointment that is to be made by the Government, such as the appointment of a person to the rank of Deputy Commissioner of An Garda Síochána.

11. Similarly, at Appendix 5 to the information booklet, which bears the title "Other Important Information", in a section headed "General Information", the following text appears:

> "The PAS will consider requests for review in accordance with the provisions of the codes of practice published by the CPSA. A candidate can seek a review by a person in the recruiting body (initial reviewer). Where a candidate remains dissatisfied following this initial review, he/she may seek to have the conduct of the initial review examined by a "decision arbitrator."
>
> As an alternative to the above, it is open to a candidate to have the matter resolved on an informal basis, as set out below. If a candidate remains dissatisfied following any such discussion it is open to him/her to seek a formal review.
>
> The Codes of Practice are available on the website of the Commission for Public Service Appointments."

12. Again, it has been averred on behalf of the defendants that this portion of the information booklet (and the summary of the codes of practice review procedures immediately following) was published in error. The relevant codes of practice are those which s. 23 (1) of the 2004 Act requires the Office of the Commission for Public Service Appointments ("the CPSA") to prepare and, as has already been noted, s. 7 (1) (c) of the same Act expressly excludes Governmental appointments from its scope. Moreover and, presumably, for the avoidance of any doubt, the code of practice specifically invoked in this case – the *Code of Practice on Appointments to Positions in the Civil Service and Public Service* (2007) – contains the following express statement at Appendix A under the heading "Excluded Positions":

> "This code of practice is not applicable to a number of positions. These include:
>
> …
>
> • Governmental appointments
>
> …."

13. From the affidavit evidence submitted on behalf of the defendants, which is unchallenged in this respect, it would appear that, on the 4th February 2015, the errors just described were discovered and a fourteen page corrected Candidate Information Booklet ("the corrected information booklet") was published on the PAS website with effect from the 6th February 2014. The corrections made were the following:

> (a) the replacement of the erroneous statement at page 6 of the original booklet that the appointments were to be made subject to the Civil Service Regulation Acts and 2004 Act with the statement that they were subject to "the prevailing terms and conditions applicable to the rank of Deputy Commissioner in the Garda Síochána,"; and
>
> (b) the replacement of that section of Appendix 5 just described, which provides for a review process in accordance with the CPSA codes of practice made under the 2004 Act, with the following statement under the heading "Review Process":
>
> > "Should a candidate be unhappy with an action or decision in relation to their application for appointment, they may write to the Chief Executive, [PAS], setting out the basis on which they seek a review.
> >
> > This informal review will be carried out internally by the [PAS]."

14. While he does not say precisely when he did so, the plaintiff has averred that he downloaded the sixteen page information booklet from the PAS website (by necessary implication, on a date between the 30th January and 6th February 2015) and that he uploaded his completed application to that website on an unspecified date prior to the closing date for receipt of such applications, which was the 19th February 2015. The plaintiff avers that he was subsequently notified that his application had been accepted and that he had been shortlisted for interview on the 11th March 2015. By e-mail dated the 9th March 2015, the PAS representative in respect of the recruitment process, Ms Margaret McCabe, wrote to the plaintiff to inform him that the interview board would comprise: Mr Seán Dorgan, Chairman of the Irish Management Institute, as chairperson; Commissioner Noirín O'Sullivan of An Garda Síochána; Mr Dermot Gallagher, former Secretary General of the Department of Foreign Affairs; and Sir Hugh Orde, former President of the Association of Chief Police Officers of England, Wales and Northern Ireland. A PAS representative, Ms Margaret McCabe, was to be present.

15. The plaintiff was interviewed on the 11th March 2015, as arranged.

16. On the following day, the 12th March 2015, the plaintiff was notified by telephone and e-mail that he had been unsuccessful in the competition. By e-mail of the same date, the plaintiff acknowledged that communication, before going on to state: "I would appreciate the feedback and the appropriate reviews as well." The plaintiff has averred that, in doing so, he was relying on the understanding he had gleaned from the sixteen page information booklet that he had earlier downloaded from the PAS website concerning the nature and scope of the review process.

17. On the 14th March 2015, the plaintiff e-mailed Ms McCabe of the PAS, expressing surprise at having been unsuccessful in the process and requesting a copy of Ms McCabe's notes of his interview with the board. On the 16th March 2015, Ms McCabe replied by e-mail, attaching a letter containing the board's feedback on the plaintiff's interview. In material part, that letter stated:

> "The Board assessed candidates against the following criteria:
>
> 1. Strategic Thinking

2. Delivery Focus

3. Managing Relationships

4. Specialised Expertise and Self-Development

In their final summary the interview board made the following assessment from your interview, based on your performance on the day:

> *'Demonstrated good strong operational experience and good on managing relationships, however did not demonstrate the breadth of strategic thinking needed for this position to progress to the next stage.'"*

18. On the same date, the 16th March 2015, the plaintiff was also furnished separately with a copy of Ms McCabe's handwritten notes of his interview.

19. By letter attached to an e-mail sent to Ms McCabe on the 19th March 2015 and addressed to the CEO of the PAS, the plaintiff requested a formal review of the recruitment process in respect of his application.

20. On the 25th March 2015, Ms. Catherine Dobbins, a human resources manager with the PAS, wrote to the plaintiff in response, informing him that she had been asked to carry out the review requested by him and had done so. Having first dealt in that letter with certain concerns raised by the plaintiff (and which are addressed later in this judgment), Ms Dobbins then continued:

> "My investigations have satisfied me that the scores awarded to you were valid. I appreciate that you are disappointed with the findings of the Interview Board but this is a competitive process where the Board gave a lot of time and consideration to the assessment of the candidates. I have found no evidence, in the course of my review, which would require me to alter the decision of the Interview Board with regard to your application and I must therefore uphold the decision of the Board.
>
> In conclusion, I am satisfied that the process was conducted fairly and consistently. I appreciate that you are disappointed with the results of your interviews; however, I hope that this has helped to clarify issues for you."

21. On the same date, the 25th March 2015, the plaintiff again wrote to the PAS, seeking a range of additional information and a review by a "*decision arbitrator*" of the conduct of the initial review by Ms Dobbins. The plaintiff avers that he did so in reliance upon what was set out in Appendix 5 to the original information booklet, which he had downloaded prior to the 6th February 2015, concerning the availability of such an additional review, as part of the review process provided for in the CPSA *Code of Practice on Appointment to Positions in the Civil Service and Public Service.* Appendix 5 to the original information booklet states in material part:

> "The decision arbitrator is appointed by the Chief Executive. The decision arbitrator is unconnected with the selection process and he/she will adjudicate on requests for review in cases where a candidate is not satisfied with the outcome of the initial review. The decision of the decision arbitrator in respect of such matters is final."

22. The Chief Executive of the PAS, Ms Fiona Tierney, replied to the plaintiff by letter dated the 26th March 2015, stating in material part:

> "[T]here is no route to a Decision Arbitrator in this selection process as it is not governed by the Code. However, without prejudice and given that you are clearly dissatisfied and believe that you have been unfairly treated in this selection process, despite being assured by this Office that this is not the case, I believe it is appropriate to engage an independent external person to review this matter.
>
> I will ask this person to review the competition file, all paperwork associated with your candidature and your subsequent correspondence, and to report to me on the matters you raise, insofar as they would fall under the CPSA Code were the process to fall under the Code. I will provide you with a copy of the report. The reviewer will be free to conduct the review as s/he sees fit, which may include talking to members of my staff, with you and with the Selection Panel, in reviewing the matter. The report of the reviewer will bring an end to the administrative process, subject always to your right of access to the Courts."

23. An exchange of correspondence swiftly followed in which the plaintiff pointed out that he was seeking to invoke the procedure set out in the information booklet that he had downloaded in relation to the process and Ms Tierney responded that no such procedure was available in the final version of the information booklet. It culminated in a letter dated the 27th March 2015 from Ms Tierney to the plaintiff. In that letter, having set out the sequence of events concerning the amendment of the information booklet already described, Ms Tierney correctly surmised: "I expect that you downloaded the [information booklet] in the first week of the recruitment campaign, and we never told you subsequently it had been amended." Having explained the basis upon which the original information booklet had been replaced on the website by a corrected version on the 6th February 2015, Ms Tierney continued:

> "There was a serious error made here in PAS by not trying to identify candidates who might have downloaded the [information booklet], and contacting them to let them know about the changes. I am acting immediately to amend our processes to ensure that never happens again.
>
> The materiality of the change relates mainly to the Appeal process, which is why it is only now coming to light.
>
> I would like to apologise to you personally for our error in this regard. You will appreciate that PAS was under significant pressure to get the roles advertised, and in our haste the [information booklet] was published with serious inaccuracies, a mistake which we then compounded by not seeking to inform any potential candidate who might have downloaded the [information booklet].
>
> In reality, the process of review that I have offered to you in my letter of 25 March effectively mirrors

> the process we would use in appointing a Decision Arbitrator were the matter to fall under the Code, so it has no impact on your rights as a candidate.
>
> However, to be absolutely clear, there is no right of appeal under the process to the CPSA under Section 8 [of the CPSA Code of Practice on Appointment to Positions in the Civil Service and Public Service](breach of the Code of Practice) as this would not be legal. That was our error in the original booklet."

24. This response was plainly unacceptable to the plaintiff and, after an exchange of correspondence between the parties' solicitors, proceedings issued.

The test
25. I must consider whether, on the facts now before the Court, it is appropriate to grant the injunction sought in accordance with the applicable *Campus Oil* guidelines. In that context, the first matter that I must consider is whether the plaintiff has satisfied me that there is a fair question to be tried.

A fair issue to be tried
26. The plaintiff had not yet delivered a statement of claim when his application for an interlocutory injunction came on for hearing before me. In consequence, the various claims he makes have not yet been particularised. However, in the affidavits that he has sworn for the purpose of the present application, in the correspondence exhibited to them, and in the submissions of Counsel on his behalf, the plaintiff presents, in a discursive manner, an agglomeration of complaints concerning the recruitment process, from which the Court is invited to discern at least one fair issue to be tried and, on that basis, to stay the recruitment process (and any appointments on foot of it), pending the trial of any such issue. It is therefore necessary to endeavour to identify each of those complaints for the purpose of addressing them one by one.

The information booklet
27. One of the plaintiff's principal complaints is that, in respect of his unsuccessful application for the post of Deputy Commissioner, he has been wrongfully deprived of the right or entitlement to invoke the further review process, involving a decision arbitrator, described in Appendix 5 of the original information booklet. As well as forming part of his claim for breach of his right to fair procedures, this appears to be the basis for the plaintiff's 'infringement of legitimate expectation' claim.

28. It is difficult to see how the plaintiff's complaint in this regard can be represented as an argument for fairness. In effect, it implies that candidates who downloaded the original booklet in the first week of the process and took no further action should be treated differently – indeed, more favourably - than both candidates who downloaded it during that week but checked it subsequently and candidates who downloaded it later.

29. As regards the plaintiff's claim to a legitimate expectation that a further review by a decision arbitrator would be available to him, there are a number of surrounding facts and circumstances that cannot be ignored.

30. First, the specific portion of the original information booklet upon which the plaintiff seeks to rely commences with, and proceeds upon the basis of, a misstatement of the law governing the appointment process i.e. that a Governmental appointment under s. 10 of the Garda Síochána Act 2005 would be governed by the provisions of the 2004 Act, and the codes of practice issued under it, although s. 7 (1) (c) of the same Act expressly excludes Governmental appointments from its scope.

31. Second, both iterations of the information booklet at issue stipulate that among the personal attributes that candidates for the role of Deputy Commissioner would be required to demonstrate is "[a]n understanding of the legislative environment in which An Garda Síochána operates or evidence of the ability to quickly grasp legislative issues."

32. Third, the plaintiff avers that he has obtained both primary and post-graduate degrees in law, as well as a post-graduate diploma in employment law.

33. This is the factual matrix against which the plaintiff's claim - that he was entitled to rely on the statement that the process was to be governed by the provisions of the 2004 Act, and the codes of conduct issued under it, despite the express exclusion of governmental appointments from the scope of that Act – will ultimately have to be considered.

34. Fourth (and most telling of all in this context), the plaintiff was offered a further review by an independent external person appointed by the Chief Executive of the PAS, which review would have been in all material respects directly comparable to that to which he would have been entitled under the 2004 Act, had it applied to the process in which he was a participant. Thus, even if the argument is being made (and I am not sure it is) that, even though the plaintiff had no strict legal entitlement to any such further review, he had received a promise or representation that a review of that kind would nevertheless be made available to him, then the offer contained in the Chief Executive's letter of the 26th March 2015 appears to provide a complete answer to it.

35. For these reasons, while conscious that the threshold is a low one, I conclude that the plaintiff has failed to raise a fair issue to be tried concerning an alleged failure to accord him the benefit of the review procedures that were erroneously identified in the information booklet originally downloaded by him.

The questions at interview
36. The other principal complaint made by the plaintiff is that he was asked an inappropriate question or series of questions at interview, thereby breaching his entitlement to fair procedures in the conduct of the recruitment process overall. Despite the fact that he has sworn three affidavits in support of the present application, precisely what the plaintiff is alleging that question, or line of questioning, was remains frustratingly unclear.

37. In the affidavit that he swore on the 23rd April 2015 to ground the present application, the plaintiff avers:

> "I say that almost at the point of concluding the interview, a board member, Commissioner O'Sullivan, interjected and asked me a series of supplementary questions concerning domestic terrorism threats.
>
> …

> I talked about ISIS in Belgium and the planned attack on a police station, and the recent incidents in Paris where lives had been lost. I say that Commissioner O'Sullivan then asked me to provide a further example and I discussed the risks posed by dissident republican activists including the IRA in its forms and gave the additional concerns and explained how I was responsible for policing the Prison in Portlaoise which is located in the Eastern Region. I say that despite having provided two examples in response to her question, the Commissioner continued and raised "*left wing political extremism in Ireland"* and asked me what my views were in relation to left wing politicians."

38. In the following paragraph of the same affidavit, the plaintiff avers to his belief that, by reference to his account of that exchange, he was wrongly or improperly asked a question "in relation to [his] political views" by a member of the interview board in breach of his entitlement to fair procedures.

39. The first reference to any such concern on the part of plaintiff appears in the e-mail that the plaintiff wrote to Ms McCabe of the PAS on the 14th March in response to a letter from PAS, dated the 12th March, informing him that he had not been selected by the interview board to go forward in the recruitment process. In that e-mail, the plaintiff requested a copy of Ms McCabe's notes of the interview, especially concerning "the question from the board member about left wing politicians."

40. On the 19th March, the plaintiff wrote to request a review of the interview board's decision concerning his candidature. In that letter, the plaintiff wrote that he had "been pressed hard on [his] views on left wing political parties in Ireland", which he believes was unfair because it is not appropriate that he should be asked about his views on any democratically elected party or his political views generally.

41. The most precise (in fact, the only precise) description of what the plaintiff alleges was an inappropriate question (or series of inappropriate question) is that set out in correspondence by his solicitor, since, in that correspondence, his solicitor purports to directly quote from the relevant part of the interview.

42. A letter written on the 27th March 2015 from the plaintiff's solicitor to the Chief Executive of the PAS is exhibited to the plaintiff's grounding affidavit. It contains the following statements:

> "Towards the end of the interview, our client was asked about a specific issue in a particular way. Because of the gravity of what occurred, it is important to set out what was said (our client made a note immediately following the interview, and his recollection was borne out by the official records since provided to him by your office).
>
> Our client was asked by one member of the interview board about what in his view "*is the biggest terrorist threat facing An Garda Síochána*." Our client replied that he was concerned about Islamic terrorism in general and ISIS in particular, having regard to recent attacks in France and Belgium.
>
> The questioner then pressed our client for "*another example".* Our client replied that there were still threats from former/dissident republicans (he referred to his experience in the context of his responsibility for the area in which Portlaoise Prison is located).
>
> The questioner then stated "*What about left wing extremism. What are your views on this?"* Our client was uncomfortable with this line of questioning, but the board member persisted and asked him about his views of left wing political groups or agitators. In the circumstances, he felt compelled to engage. There was a discussion about anti-water protesters (sic), and our client referred to the fact that the Irish deputy prime minister had been "*getting grief"* from some people at an event in Tallaght. He used the expression "*deputy prime minister*" because one of the board members was from the UK.
>
> We are satisfied that these questions were wholly inappropriate, having regard to the nature of the position being filled. Our client was asked for his views about political groups or parties in circumstances where the Garda Síochána Act expressly precludes political affiliations."

43. It is useful to note that, in both iterations of the information booklet provided to prospective candidates for appointment to the office of Deputy Commissioner, amongst the personal requirements that suitable candidates were required to demonstrate was:

> "An appreciation of the role of An Garda Síochána in protecting the security of the State, including against threats from terrorism, espionage and sabotage, and from activities intended to subvert or undermine parliamentary democracy or the institutions of the State, and a clear capacity to provide leadership in that role free from compromise or potential conflict of interest."

44. While the correspondence just quoted asserts that the plaintiff made a note immediately following the interview, that note has not been exhibited to any of the affidavits sworn by the plaintiff for the purpose of the present application, nor has it been disclosed to the Court in any other manner. Nowhere in the portion of the interview that the plaintiff's solicitor purports to quote from directly in that correspondence (whether by reference to the contents of the plaintiff's note or otherwise) does any question appear regarding the plaintiff's personal views on any politician or any political party.

45. In view of the personal requirements associated with the office at issue, it is inconceivable that it could be suggested that it was inappropriate (much less improper or unlawful) to ask any of the relevant candidates about his or her views on the security or terrorist threat to the State or any of its citizens that may, or may not, be posed by militant groups, whether they be of dissident republicans, jihadist extremists (such as those styling themselves ISIL, ISIS or, more recently, IS) or left wing (or, indeed, right wing) extremists.

46. Just as I cannot accept that, in referring to the potential security threat posed by dissident republicans or jihadist extremists, the plaintiff was implying anything about his own personal views on republicanism or jihadism, equally I cannot accept that, in being asked about the potential security threat to the State or any of its citizens posed by left wing extremism, the plaintiff was being asked to volunteer anything about his own personal political ideology, if any; much less can I accept that an attempt was being made to improperly elicit the plaintiff's personal views on left wing politicians or left wing political parties. At the very least, in order to establish a fair question to be tried in that regard, it would be necessary to identify the words complained of with, at least, some precision, so that a view might be reached concerning whether those words were objectively capable of bearing any such meaning.

47. Accordingly, while I reiterate my understanding that the threshold is a low one, I conclude that, on this issue also, and taking the

evidence that he has adduced at the high water mark, the plaintiff has failed to satisfy me that he has raised a fair issue to be tried, pending the resolution of which the recruitment process should be held in abeyance through the grant of an interlocutory injunction.

48. Before leaving this issue and to avoid giving a misleading impression by omission, I should briefly summarise the defendants' evidence on this point. Ms McCabe swore an affidavit on the 5th May 2015, exhibiting her own contemporaneous handwritten notes of the plaintiff's interview, together with a typed transcript of those notes. The relevant portion of the typescript reads:

> "Q. single biggest threat
>
> A. 2 – ISSES (sic) and Portlaoise prison
>
> Q. Left wing extremists – your view?
>
> A. Dep. Prime Minister is getting grief – let the gov. decide water charges etc. – shell to sea."

49. In the relevant portion of her affidavit sworn on the 26th May 2015, Ms McCabe avers:

> "10. In the light of the manner in which the interview progressed, I am particularly surprised at the issue the plaintiff now raises as to the nature of some of the questions asked. As my notes demonstrate, at 10.15 a.m. the plaintiff was asked by the chairman about the role of An Garda Síochána in security and intelligence. At 10.20 a.m. Commissioner O'Sullivan asked the Chairman if she could ask a further question.
>
> 11. I say that there was nothing abrupt in the manner she did so and that her contribution in this regard was consistent with the open and discursive way in which interviews at such a senior level operate.
>
> …
>
> 12. According to my notes, Commissioner O'Sullivan's questions only took three minutes and involved only two questions and not a series of questions, as the plaintiff suggests. I say also that the questions were asked in the context of a discussion about the demands of the role for which the plaintiff had applied rather than any enquiry into his personal views. Any such interpretation is at odds with my understanding of the nature and the context of the questions asked. I say in particular that neither the plaintiff, nor any other candidate, was asked about their personal political views. There was a question asked of the plaintiff about his views of "left wing extremists." This was asked in the context of his answer to the previous questions as referred to in paragraph 10 of Sean Dorgan's affidavit. I say he was not asked about his personal view of left wing politics, politicians or political parties."

50. In the relevant paragraphs of the affidavit sworn by Mr Dorgan on the 5th May 2015, he avers as follows:

> "10. The plaintiff's interview was conducted in an amicable and professional manner in accordance with the agreed format. After about 40 minutes of the 50 minute interview, and not as it was about to conclude as the plaintiff suggests, I asked the plaintiff about issues raised in the Morris Report, and I followed up with a question about the role of An Garda Síochána in security and intelligence matters which, as I pointed out, was not one shared by many other police forces. It was in this context that Commissioner O'Sullivan asked further questions of the plaintiff as to his assessment of the biggest threat to security, to which he replied ISIS and paramilitaries in Portlaoise Prison. Commissioner O'Sullivan further asked his view of any threat from left wing extremists, to which the plaintiff replied calmly and readily, without any sign or expression of discomfort.
>
> 11. The question was not an "interjection" by Commissioner O'Sullivan at the end of the interview as the plaintiff suggests. On the contrary, it was a question that was a natural and logical extension of a query I raised in the course of the interview about a matter of fundamental importance, namely the existence of threats to security. I say that the questioning went no further than as set out above and did not involve any query as to the plaintiff's views on left wing political extremism, much less on any left wing politicians or political parties. I am at a loss to understand how the plaintiff now seeks to characterise the questions in this manner, as I say it is completely at odds with the manner in which the questions were asked and answers given."

51. I have summarised the evidence just described simply to record for completeness the defendants' position on the particular issue the plaintiff has raised. In considering whether the plaintiff has established a fair question to be tried on that issue, I have taken his evidence at the high water mark, without regard to the conflicting evidence that the defendants propose to adduce to rebut it, since, for as long as there remains any conflict of fact between the parties, the ultimate adjudication on the evidence will be entirely a matter for the trial judge. I have found the plaintiff's own assertions and the evidence so far adduced by him on the point to be too vague and inconsistent to establish a fair question to be tried. As Clarke J. noted in similar circumstances in *Collen Construction Ltd v. BATU* [2006] IEHC 159, that is not to say that at the trial of the action it may be possible that the plaintiff will be in a position to put before the court some further or more specific evidence that would satisfy the court, by inference if necessary, that, on the balance of probabilities, an improper or inappropriate question was put to him at interview in breach of his entitlement to fair procedures in the conduct of the recruitment process, but that is a matter for another day.

52. Before leaving this issue it is appropriate to deal with one further closely related complaint of the applicant; specifically that "the assurance given to [him] that all candidates were subject to "consistent" questioning is not correct." Apart from the claim I have just addressed that the plaintiff was asked – as he appears to imagine, uniquely among the candidates - an improper or inappropriate question about his political views, no evidence whatsoever has been adduced by the plaintiff in support of the proposition that the interview board's questioning of different candidates was inconsistent, much less unfair. Of course, I do not doubt that different candidates were asked different questions; if fairness required that every candidate be asked precisely the same questions, then this aspect of the recruitment process would have required only the circulation of a questionnaire. But, in the absence of any evidence of inconsistent questioning that was unfair, or any evidence from which such unfairness might be inferred, I cannot be satisfied that the plaintiff has raised a fair question to be tried in respect of this complaint either.

Conflict of interest

53. A complaint upon which particular reliance was placed in the course of the hearing before me is that there was a conflict of interest on the part of Commissioner O'Sullivan in sitting on the interview board because the Commissioner had previously appointed

three Assistant Commissioners either formally as Acting Deputy Commissioners (as the plaintiff submits) or informally to fulfil certain of the duties of Deputy Commissioner while the office is vacant (as the defendants readily acknowledge). For the purpose of considering the argument that the plaintiff wishes to make, it seems to me that little turns on the distinction. Though the claim has not yet been particularised, it appears to be the plaintiff's contention that, whether the role has been allocated formally or the responsibilities of the role have been allocated informally, the Commissioner is now subject to a reasonable apprehension that she is biased in favour of the candidature of any person to whom any such allocation has been made and, to that extent, against the candidature of the plaintiff, to whom no such allocation was given.

54. An interview board is a different creature than, say, a tribunal, and a very different creature than a court of law. In a recruitment process of the kind now at issue, it is frequently considered desirable, as it was in this case, to secure the involvement in the process of one or more senior figures within the organisation concerned. The advantages of such involvement are self-evident and are plainly considered to outweigh any reasonable or realistic apprehension of bias in the process arising from the resulting likelihood that the person concerned will be one who is acquainted with – and, indeed, will have had various interactions with - some or all of the candidates (in particular, the internal candidates) in the past.

55. Even in the judicial sphere, where the fundamental importance of maintaining public confidence in the administration of justice requires the utmost rigour in this respect, there is no suggestion of any unbending rule that a prior decision in relation to any of the parties implies a reasonable apprehension of bias. This is clearly demonstrated by the decision of this Court *(per* Quirke J.) in *DD v. District Judge Gibbons* [2006] 3 I.R. 17. In that case, the respondent had made a number of earlier orders concerning the custody of the parties' children in family law proceedings that were adverse to the interests of the applicant wife. She requested the respondent to disqualify himself from making any further orders on the basis that his own previous orders created a conflict of interest on his part. The High Court upheld the District Judge's refusal to accede to that application. Having noted that the applicant wife was alleging objective bias solely on the ground that an earlier ad interim decision was perceived by her to have been unfavourable to her interests (or favourable to the interests of the husband), Quirke J. concluded that an informed, objective person, occupying the position of the applicant in that case could not reasonable apprehend judicial bias in those circumstances.

56. A *fortiori,* in the necessarily less rigid context of the conduct of a recruitment process, I find it inconceivable that an informed objective person, occupying the plaintiff's position in this case could reasonably apprehend bias on the part of the Commissioner member by reference to earlier operational or management decisions involving one or more of the candidates in that process. The plaintiff could point to no authority whatsoever in support of any such conclusion. Accordingly, I am satisfied that the plaintiff has failed to make out a fair issue to be tried on this issue also.

Other issues raised

57. In the affidavits that he has sworn and in the submissions advanced on his behalf in the course of the hearing before me, the plaintiff has identified a miscellany of further complaints, each of which he relies upon more or less indiscriminately as raising a fair issue to be tried concerning whether the recruitment process was conducted in breach of his right to fair procedures.

58. Before considering each such complaint, it is helpful to remember that the parameters of the right to fair procedures vary by reference to the nature of the procedure concerned. And as Barrett J. put the matter in *Grange v. Commission for Public Service Appointments* [2014] IEHC 303 (at para. 41):

> "Notably, one finds in neither [*BFO v Governor of Dóchas Centre* [2005] 2 I.R. 1] nor [*Dellway Investments Ltd v NAMA* [2011] 4 I.R. 1] nor elsewhere in the applicable case-law any suggestion that procedural perfection is a pre-requisite for a finding of fairness. In an imperfect world, some imperfection of process is to be expected and when it arises, as it almost inevitably shall, it will not necessarily be a bar to a finding that there was nonetheless basic fairness of procedures; a flawed process may still be entirely fair. As Denham J. states in *Dellway*, at para. 114 [page 227 of the report}:
>
> > *'[W]hat is sought is fairness, which will depend on all the circumstances of a case, and vary from one type of procedure to another.' "*

59. In *Dóchas*, Finlay Geoghegan J. explained (at p. 27 of the report):

> "The requirement that there be due fairness of procedures and due and proper consideration of the rights of others… appears to require that such procedures and consideration be capable of being objectively perceived to be fair."

60. Accordingly, it seems to me that, in order to make out a case for the injunctive relief that he seeks in these proceedings, the plaintiff must establish, in respect of one or more of the complaints that he makes, a fair issue to be tried that the procedures and consideration of the interview board as they applied to his candidature are not capable of being objectively perceived to be fair.

61. Perhaps the most significant of the remaining complaints made by the applicant is that he was denied fair procedures in that he was wrongly deprived of an opportunity to participate properly or fully in the review of his candidature conducted by Ms Dobbins. Specifically, he complains that the review was conducted without his input in that Ms Dobbins did not personally interview him. However, in circumstances where the review was conducted at the plaintiff's request by reference to the specific concerns that he had raised in his letter to the Chief Executive of the 19th March 2014, in accordance with the procedure expressly stipulated in the relevant part of the CPSA *Code of Practice on Appointment to Positions in the Civil Service and Public Service*, upon which procedure the plaintiff himself seeks to rely, I do not see how any fair question to be tried can arise in those circumstances. As the defendants point out, that code of practice makes clear that it is for the reviewer, in this instance Ms Dobbins, to decide whether it is necessary to meet with the candidate in order to elicit further information as part of the process. There is no entitlement on the part of the candidate to any such meeting.

62. The remaining complaints made by the plaintiff, insofar as they can be identified from the affidavits that he has sworn and the submissions made by Counsel on his behalf, can be summarised as follows:

> (i) That the interview board did not receive the appropriate training to properly conduct the interview process, as prescribed in a document entitled *the Public Appointment Service Quality Customer Service Action Plan 2014 - 2016.*
>
> (ii) That the interview board departed from an assessment of the key skills/competencies that candidates were required to demonstrate as identified prior to interview, by not considering all of those competencies, and by considering other competencies that had not been specifically identified, as part of the assessment of candidates.
>
> (iii) That the interview board departed from the marking scheme contained in the guidelines, both by fixing a specific pass

mark for each area of competence and by excluding candidates from the process who failed to reach the pass mark in each area of competence, rather than by assessing candidates solely in respect of the aggregate mark of each.

63. The defendants' response to each of those complaints may be shortly summarised as follows:

> (i) The section of the PAS *Quality Customer Service Action Plan 2014 – 2016* upon which the plaintiff relies, far from mandating training for interview board members in every instance, merely states that relevant training will be provided 'as appropriate' and 'where required.' The CPSA *Code of Practice on Appointment to Positions in the Civil Service and Public Service,* upon which the plaintiff himself seeks to rely for other purposes, describes the mandate of the PAS to ensure either that board members have received the appropriate training or that they "have sufficient interviewing experience at an appropriate level." The defendants contend that the interview board comprised four senior individuals who have extensive previous experience in interviewing at senior levels. All candidates were interviewed by the same board.
>
> (ii) As the material provided to candidates demonstrates, the interview was to be "informed", not constrained, by the key skills/competencies identified in it. Those key skills or competencies were described using broad headings or umbrella terms and were neither designed not intended to artificially narrow or constrict the scope of the assessment being conducted. For example, it would be absurd to suggest that because the term "leadership" was not expressly used in the identification of the relevant competencies, that a consideration of leadership ability could not form part of the assessment of candidates. None of the competencies identified was disregarded. All candidates were marked by reference to the same competencies.
>
> (iii) The plaintiff misunderstands the suggested evaluation and scoring system set out in the *Preliminary Interview Board Member Guidelines* that were prepared for the Deputy Commissioner recruitment process. In relying on the statement that "the scores on each skills area are added together to get the overall score" in order to suggest that the interview board was bound to have regard solely to the overall score of each candidate, the plaintiff entirely ignores the subsequent statement that board members should also satisfy themselves that "for each of the key skill areas: the information and experience presented to them was at the appropriate level for consideration for this appointment at senior management level; [and] the candidate demonstrated a track record of achievement in the area and was credible in relation to effectively addressing challenges in the role." In any event, the plaintiff's overall score fell below the overall score necessary to progress. Each of the candidates was assessed by reference to the same evaluation and scoring system.

64. It seems to me that matters such as setting appropriate levels of experience or training for interview board members; defining the skills and competencies on which candidates are to be assessed; defining the range and scope of the appropriate assessment; and designating the appropriate qualifying mark or standard, are quintessentially matters of professional or administrative judgment, concerning which views may legitimately differ in pursuit of the, no doubt unattainable, goal of the perfect process in every instance. The principles of constitutional justice require fair procedures not perfect procedures. Even if the Court was to assume, *arguendo*, the validity of the plaintiff's various criticisms of the process as just summarised above, there is no apparent basis upon which any of the principles that comprise the entitlement to constitutional justice in its broadest sense can be said to be engaged or offended by any of the procedural shortcomings alleged, and the plaintiff does not suggest one. For that reason, the plaintiff has failed to satisfy me that he has identified any fair issue to be tried in respect of each of those complaints also.

65. I therefore conclude that the plaintiff's claim for an injunction restraining any further steps in the recruitment process for the appointment of persons as Deputy Commissioner of An Garda Síochána pending the trial of the present action must fail *in limine* since, on the material before me, the plaintiff has failed to establish a fair question to be tried.

Adequacy of damages

66. Lest I am mistaken in that conclusion, I now propose to consider, in turn, the adequacy of damages and the balance of convenience.

67. On the adequacy of damages, the plaintiff has averred "in light of the position and the potential damage to my reputation as a senior member of An Garda Síochána, it must be that damages would not be an adequate remedy." However, as Kelly J. pointed out in *Fitzpatrick v. Commissioner of An Garda Síochána* [1996] E.L.R. 244, damage to reputation is frequently compensated by an award of damages, and the plaintiff seeks damages as a relief in this case to the exclusion of any mandatory or coercive order regarding the conduct of the recruitment process at issue (although that may be because the plaintiff proposes to rely on the, no doubt safe, assumption that the State defendants' respect for any declaration the Court might grant would amount to the same thing: see, for example, Hogan and Morgan *Administrative Law in Ireland,* 4th ed. (Dublin, 2010) at para. 16-27).

68. More fundamentally, to be wrongly deprived of an opportunity to progress in a promotion or recruitment process, were that to occur, while it would obviously entail a loss of opportunity, can hardly properly be characterised as necessarily implying damage to a person's reputation. As Barrett J. put the matter in *Grange v. Commission for Public Service Appointments* [2014] IEHC 303, a case brought by a disappointed applicant for a particular position within the Civil Service, (at para. 33):

> "It is not clear that the findings of the Commission have any negative consequences for Mr Grange as regards his reputation and good name. Like many people who apply for a particular employment, Mr. Grange has been unsuccessful in a competition in which he was not deemed to be among the suitable candidates. This entails no general reflection on his abilities and there is no suggestion, nor does the court find, that there are any negative consequences for him in terms of his chances of success in any future competition, whether in the civil service or otherwise, for which he is eligible."

69. Turning to the related question of the plaintiff's undertaking as to damages for the defendants, should the plaintiff's claim fail at trial, it is difficult to see how that could be considered adequate to protect the interests of the State. It must be presumed that, in recognising the office of Deputy Commissioner under s. 10 of the Garda Síochána Act 2005, and in authorising the contingent assignment of certain functions to the holder of that office under s. 32 of the same Act, the Oireachtas has ascribed a particular importance to that role for the efficient and effective operation of An Garda Síochána as an institution. Insofar as an order restraining that process for an indefinite period pending trial might have adverse consequences for the effective operation of An Garda Síochána, it is difficult to see how an award of pecuniary damages could properly compensate the State, should the plaintiff's claim ultimately fail. On this point, it was suggested on behalf of the plaintiff that any concerns in that regard should be allayed by the knowledge that, apparently, the office of Deputy Commissioner has already been vacant for some time. Of course, if that is so, it is very much a consideration that cuts both ways, since it might be argued with equal force that any such prior delay serves to emphasise the need to conclude the present recruitment process with all due promptness.

70. In the circumstances, the plaintiff has failed to persuade me that damages would not be an adequate remedy in respect of the

claims that he asserts, whereas I am persuaded that damages would not adequately compensate the State were an injunction to be granted and should the plaintiff's claims later fail. For those reasons also, I would refuse the present application.

Balance of convenience
71. Finally and for completeness, I will address the issue of the balance of convenience. In that regard, while I acknowledge, as O'Higgins J. did in *Garrahy v. Bord nag Con* [2002] 3 I.R. 566 (at 579), that the test for obtaining interlocutory relief in relation to public bodies (and, in particular, the threshold test of a fair question to be tried) does not alter, I take the view, as O'Higgins J. suggested, that the fact that the defendant is a body performing public duties in the public interest is material to a consideration of the balance of convenience.

72. For that reason and for each of the reasons that I have set out in the earlier portion of this judgment, I am satisfied that the balance of convenience is against the grant of the injunction sought and I refuse the application on that basis also.

Conclusion
73. The application is refused.