

THE HIGH COURT
JUDICIAL REVIEW

[2014 No. 454 J.R.]

BETWEEN

DAMIEN F. KELLY

APPLICANT

AND

THE IRISH PRISON SERVICE

RESPONDENT

AND

THE COMMISSIONER FOR PUBLIC SERVICE APPOINTMENTS

NOTICE PARTY

THE HIGH COURT
JUDICIAL REVIEW

[2014 No. 510 J.R.]

BETWEEN

RONAN MORAN

APPLICANT

AND

THE IRISH PRISON SERVICE

RESPONDENT

AND

THE COMMISSIONER FOR PUBLIC SERVICE APPOINTMENTS

NOTICE PARTY

THE HIGH COURT
JUDICIAL REVIEW

[2014 No. 511 J.R.]

BETWEEN

AISLING DUNNE

APPLICANT

AND

THE IRISH PRISON SERVICE

RESPONDENT

AND

THE COMMISSIONER FOR PUBLIC SERVICE APPOINTMENTS

NOTICE PARTY

THE HIGH COURT
JUDICIAL REVIEW

[2014 No. 514 J.R.]

BETWEEN

AOIFE QUINLIVAN

APPLICANT

AND

THE IRISH PRISON SERVICE

RESPONDENT

AND

THE COMMISSIONER FOR PUBLIC SERVICE APPOINTMENTS

NOTICE PARTY

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 571 J.R.]

BETWEEN

PETER ONYEMEKEIHIA

APPLICANT

AND

THE IRISH PRISON SERVICE

RESPONDENT

AND

THE COMMISSIONER FOR PUBLIC SERVICE APPOINTMENTS

NOTICE PARTY

JUDGMENT of Mr. Justice Eagar delivered on the 27th day of February, 2017

1. The applicants in these judicial review proceedings are prison officers in the Irish Prison Service.
2. On 30th May, 2013 the Irish Prison Service (herein "the respondent") advertised an internal competition for the promotion of prison officers to the position of Work Training Officer (pursuant to Circular 02/2013). Details of the duties, responsibilities, skills, attributes, qualifications, eligibility and the selection process relating to the position were set out in the circular. The work training officers would work with prisoners in the following areas:

1. services; laundry; industrial cleaning;
2. catering/catering bakery;
3. environmental horticultural waste management, environment;
4. industrial skills, embroidery, engraving, light assembly, domestic fabric work, painting, tiling, car maintenance;
5. crafts, metal work, welding, carpentry, joinery, construction skills;
6. ISM — Integrated Sentence Management, Personal Development — employability skills;
7. physical education;
8. computers, printing.

3. The Court will first describe the selection process that followed from the circular advertising the role of work training officer. Secondly, the role of the Commission for Public Service Appointments (herein "the Commission"), and the relevant sections of the Commission's Code of Practice (herein "Code of Practice"), which establishes review mechanisms of recruitment and selection processes will be set out. The mechanisms utilised by the applicants in requesting reviews of this selection process will be established, in assessing each of the individual applications for relief.

Selection Process

4. Candidates as part of the job application form were required to identify any qualifications they held that were relevant to the work training officer position. Marks were awarded based on the relevance of candidates' qualifications. A shortlisting process followed, carried out by 5 assessors, and initially 254 out of 394 candidates were shortlisted for interview. In order to qualify to be interviewed, candidates had to reach a qualifying mark of 115 out of an available 200 marks.

5. As a result of the shortlisting process, two lists were compiled by the assessors, one list contained the names of candidates being shortlisted for interview, and the other list contained the names of candidates not being shortlisted for interview. These lists were sent to the governors of the various institutions and posted on staff notice boards.

Review Mechanisms under the Commission's Code of Practice

Section 9 of the circular 02/2013, initially advertising the work training officer position, had referred to the Commission's Code of Practice. It stated:—

"The recruitment and selection process for appointment to this position will be conducted in accordance with the Code of Practice [...]"

By way of background, the Commission was established by the Public Service Management (Recruitment and Appointments) Act, 2004 which has a responsibility for overseeing recruitment and promotion practices within the Civil Service. The Commission has the power to amend the terms of a recruitment licence issued to a public body, or in extreme cases to revoke a licence, however the Commission does not have the power to alter a recruitment decision once made (s. 1.2 of the Code of Practice). The role of the Commission extends to auditing (this Court's emphasis) recruitment and selection policies in order to evaluate and safeguard the standards established in its Code of Practice.

Section 7 of the Code of Practice sets out the following: "review procedures where a candidate seeks a review of a decision taken in

relation to his or her application". The formal review procedure adopted under section 7 comprises two stages. The first stage involves a review by a person in the recruiting body referred to as the "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". The decision of the decision arbitrator in relation to the matters is final. In the alternative, the candidate may seek to have the matter resolved on an informal basis (section 7.5 of the Code of Practice).

Section 8 of the Code of Practice covers: "review/appeals procedures in relation to allegations of a breach of the code of practice." This review/appeals process enables persons to seek a review where a breach of the Code of Practice is alleged. An informal review may be carried out by the office holder after receiving a complaint. Should the complainant remain dissatisfied following this informal review, or wish to have the matter dealt with formally, then he/she may adopt formal procedures. This involves the complainant writing to the office holder detailing the allegation of the breach of the Code of Practice. Upon receipt of the complaint, the office holder should issue an acknowledgement within 3 working days. The complaint should be reviewed by a person other than any individual directly associated with the appointment process in question. The person conducting the review (the "reviewer") will have regard to all information which is material to the complaint. The office holder then communicates the decision of the reviewer to the complainant, and should indicate that the complainant may seek a further review, by referring the matter to the Commission, by way of an appeal of the review of the office holder. The procedures to be followed by the Commission in the handling of complaints comprises of examining a complaint and then publishing a written report, to the party making the complaint and the office holder within 25 working days. The decision of the Commission is final.

Thus, the section 7 review may be conducted on an informal basis or in the alternative, a formal review may be conducted, comprising of a review by an "initial reviewer" (a person within the recruitment body) and if appealed, a review by a "decision arbitrator". The section 8 review may comprise of an informal review carried out by the office holder, or in the alternative, a formal review conducted by a person under the auspices of the office holder, not directly involved in the initial decision under review – "the reviewer", and if an applicant remains dissatisfied with the reviewer's decision, this may be appealed to the Commission.

Review of Selection Process

6. The shortlisting process for the work training officer position was subject to a large number of requests for review pursuant to section 7 of the Code of Practice. A decision was taken by the respondent to review all applications from candidates who did not reach the qualifying mark to be called for interview. Seamus Beirne, Assistant Principal Officer of the Irish Prison Service headquarters, was assigned to carry out informal reviews under s. 7 of the Code of Practice. Ms. Angela Kenny was appointed to carry out formal reviews that arose under the Code of Practice, and Mr. Joe Boyle was appointed as the decision arbitrator.

7. As a consequence of the reviews being carried out (both informal and formal) a further 24 candidates were called for interview. As a consequence of the informal reviews undertaken by Mr. Beirne, 14 candidates were brought up to the shortlisting mark. A further six candidates were brought up to the shortlisting mark following a formal review by Ms. Kenny. Mr. Joe Boyle, the Decision Arbitrator, was referred 15 applications for review. On 7th August, 2013 he submitted a report recommending that a further 3 candidates be shortlisted.

Interview Boards

8. The first respondent established four interview boards to carry out interviews with candidates who had been shortlisted. Each interview board comprised of three members, being a chairperson and two other members who held the grade of Industrial Manager/Assistant Governor. On 8th July, 2013 in advance of the commencement of the interview process, members of the interview board were provided with a briefing from the respondent on their obligations during the selection process. Board members were reminded of their obligations pursuant to the CPSA Code of Practice and were given a guide to effective interviewing. Board members were taken through the marking sheet and were informed how to complete the marking and the feedback elements of the sheet. Board members were also provided with a guide to the markings of the scheme which included appropriate ranges of scores for different qualities of interview. Board members were informed that they should be in contact with each other throughout the process, to ensure consistency in marking. Mr. Beirne in his affidavit grounding the statement of opposition of the respondent stated that the issue of the Higher Certificate in Custodial Care (HCCC) was considered by the interview boards. He set out that all prison officers recruited to the Irish Prison Service after 2006 have been required to undertake the HCCC, a level 6 qualification, as part of their training. The HCCC programme is a bespoke course developed for the Irish Prison Service. Its aim is to provide a professional development framework for a Recruit Prison Officer and to provide Recruit Prison Officers with a range of skills and competencies so they can carry out their duties in a professional manner. The course is two years in length and comprises 11 subject modules undertaken over the course of four semesters.

9. In or about 2007, the first respondent entered in an agreement with the Prison Officers Association whereby no Prison Officer recruited before 2006 would be disadvantaged in a promotion competition by reason of not having the HCCC. This approach was agreed to ensure that Prison Officers who did not have the opportunity to obtain the HCCC would not be at a disadvantage to colleagues who were recruited at a later date. At the commencement of the selection process for the position of Work Training Officer it was envisaged that the HCCC would be relevant in a generic way to the skills needed for the job. However, applicants holding a HCCC would not be awarded higher marks, by virtue of holding the HCCC in and of itself. Interview boards were informed that only marks for relevant qualifications should be awarded.

10. On or about 12th August, 2013, following the conclusion of the interview process, the first respondent issued the details of the panels of those persons who had been successful in the competition. Thereafter the Prison Officers Association raised an issue with the manner in which the HCCC was considered in both the shortlisting and interview stages. In effect, in the course of both the shortlisting stage and the interview process, assessors and interview boards accepted the HCCC as a relevant qualification in respect of some of the Work Training Officer positions. Contrary to what had been previously established, certain applicants received a higher mark, by virtue of holding the HCCC in and of itself. 25 marks had been awarded to those candidates who had been able to establish that HCCC was relevant to the position for which they had applied.

11. Following discussions with the Irish Prison Officers Association on 15th August, 2013 the respondent withdrew the panels pending an investigation into the issue of the HCCC, in particular relating to the appropriateness of awarding marks to those candidates who held the HCCC. In order not to disadvantage Prison Officers who had been recruited prior to 2006 and in furtherance of the agreement with the Irish Prison Officers Association, a decision was taken to award a minimum 25 marks to all candidates in respect of the qualifications criteria. This decision was taken in consultation with the Irish Prison Officers Association. This decision affected those candidates who only had qualifications of FETAC Level 5 or lower. Candidates with qualifications of Level 6 or above would have been given at least 25 marks in respect of those qualifications. Where candidates had scored lower than 25 marks with qualifications, their mark was raised to 25. A number of candidates were awarded an additional 5 to 10 marks in order to bring their score to a minimum of 25. This approach was taken as it was considered to be fairest to the parties. Following that decision, an Office Notice setting out the terms of the decision was issued on 23rd August, 2013 and as a consequence of that decision an additional 15 candidates were

called to interview, who had not previously been shortlisted. Following the additional interviews, the panels were reissued on 9th September, 2013.

12. All candidates were required to take part in a competitive interview and were given the opportunity to demonstrate to the interview board their skills, competencies and experience. No candidate was removed from a panel as a consequence of another candidate receiving additional marks for the HCCC. A statistical analysis of the marks awarded across the boards showed there was consistency in the average mark awarded by each board (Para. 23 of Seamus Beirne's affidavit).

13. Mr. Beirne in his affidavit said that he believed the scoring system used by the respondent in respect of the qualifications was robust and was based upon the National Framework of Qualifications. At all times the central issue was whether a particular qualification was relevant to a particular WTO skill set. All candidates were required to participate in a competitive selection process and undertake a competency based interview. It was incumbent on candidates to establish at the interview that they possessed the experience, competencies and skills required in the position of Work Training Officer.

14. Following the interview process, several panels were established under each of the 8 skill categories. Candidates only featured on panels of skill categories which were selected on their application form and were ranked in order of merit. In order to obtain a place on a panel, candidates had to score above 174 marks. Any candidate who was below this mark was not considered to be suitable for the role of work training officer.

15. Following the selection process the respondent issued the "Work Training Officer panels" (herein "WTO panels") in order of merit to all the governors and directors on 9th September, 2013. Feedback issued to all candidates in the same format, and consisted of a two page A4 document outlining specific remarks regarding competency and scores. The document was completed by the interview board at the time of the interview, and was signed and dated by the interview board.

16. The issue of an appeal to the Commission for Public Service Appointments (notice party to the proceedings, who took no part in the proceedings and were not represented) arose in respect of a number of the applicants. Mr. Beirne in his response said *it was not within the jurisdiction of the notice party (in the context of a review brought within s. 8) to change the individual results awarded to individual candidates* (this Court's emphasis). The Commission was expressly precluded from affecting any individual result by reason of s. 48(2) of the Public Service Management (Recruitment and Appointments) Act, 2004. The decision of the Commission did identify areas for improvement in the selection processes to be carried out by the respondent. The Commission issued an audit report of the policies and practices relating to internal appointments within the Irish Prison Service which was prepared in November, 2014. Mr. Beirne, in his affidavit, said that the Commission concluded that it was satisfied in the main that the processes and procedures in place for the recruitment and selection for internal appointment within the Irish Prison Service was in compliance with the principles of the Commission's Code of Practice.

The applicants

17. The Court will now consider, in turn, each of the claims of the applicants.

Damien F. Kelly

18. The verifying affidavit of Damien F. Kelly in respect of the application for leave to apply for judicial review set out a copy of Circular 02/2013.

19. He also refers to a copy of the Code of Practice of the Commission for Public Service Appointments, his job application form and a report of the Commission for Public Service Appointments dated the 24th July, 2014.

20. On 28th July, 2014 an application was made *ex parte* for leave to apply by way of an application for judicial review before Baker J. seeking the following reliefs:—

1. an order of *certiorari* by way of judicial review quashing the results of a selection process for posts of Work Training Officer in the Irish Prison Service carried out on foot of Circular 02/2013;
2. an order of prohibition preventing the respondent, its servants or agents from making appointments to the post of Work Training Officer on foot of selection process carried out under Circular 02/2013;
3. a declaration that the respondent, its servants or agents acted *ultra vires* and/or in breach of the requirements of natural and constitutional justice in deciding to make appointments to the post of Work Training Officer prior to the Commission for Public Service Appointments completing an inquiry into and making a report of the applicant's complaints;
4. a declaration that the respondent, his servants or agents, acted *ultra vires* and/or in breach of the requirements of natural and constitutional justice in the manner in which it conducted the selection process for the posts of Work Training Officer;
5. a stay pursuant to O. 84, r. 20(7) of the Rules of the Superior Courts, 1986 pending the determination of the within judicial review proceedings restraining the respondent, its servants or agents from making further appointments to the post of Work Training Officer;
6. if necessary an injunction (including an interim or interlocutory injunction) pending the determination of the within judicial review proceedings restraining the respondent from taking any further steps to implement the decisions made on foot of the selection process carried out on foot of Circular 02/2013;
7. liberty to file further affidavits and/or serve such additional parties as may be ordered;
8. damages;
9. such further or other relief as this Honourable Court shall deem appropriate;
10. the costs of and incidental to the proceedings.

21. The proceedings were taken against the Irish Prison Service as respondents and the Commission for Public Service Appointments as notice party.

22. Baker J. ordered:—

The applicants do have leave to apply by way of application for judicial review for the reliefs set out forth at subparas. (1), (2), (4), (5) and (6) in the aforesaid statement on the grounds set forth at para. (e) (25) therein.

23. The statement required to ground the application for judicial review indicates that the applicant is a Prison Officer in the Irish Prison Service and joined the Prison Service on 12th January, 2008. He refers to the Circular 02/2013 which advertised an internal competition for promotion to Work Training Officer on 13th May, 2013.

24. The applicant completed the job application form for the work training officer position on or around 17th June, 2013. The applicant was shortlisted for interview. The applicant was to learn that the shortlisting process was the subject of complaints from a large number of applicants.

25. The applicant was called to interview on 11th July, 2013

26. The applicant's name did not appear on any of the panels of successful candidates.

27. On 28th August, 2013 the applicant approached the Governor of Mountjoy Prison requesting confirmation if he had been placed on any of the selection panels. He was informed by the Governor that he was not on any of the panels received by her. He complained that he believed the marking scheme adopted by the respondent was inherently unfair.

28. The applicant had been placed on the 'order of merit' on each of the skills areas in the following positions:

1. placed 58 on the order of merit for computers out of 59 candidates interviewed (46 placed on panel);
2. placed 71 on the order of merit for craft out of 73 candidates interviewed (60 placed on panel);
3. placed 90 on order of merit for integrated sentence management out of 91 candidates interviewed (72 placed on the panel);
4. placed 78 on the order of merit for industrial skills out of 79 candidates interviewed (66 placed on panel);
5. placed 101 on order of merit for environment out of 103 candidates interviewed (78 placed on panel).

29. On 2nd October, 2013 Mr. Kelly sought to appeal the marks awarded to him, communicating this in an e-mail sent to Frank O'Hanlon and the HR Contact centre. On 12th November, 2013 Ms. Angela Kelly of the Finance Directorate of the respondent wrote to Damien Kelly confirming that she had been nominated to carry out a formal review of the decision in relation to his appeal under the Code of Practice. She wrote that she had reviewed his submission, and she advised him that his appeal was not upheld. She notified him that should he wish to appeal this decision, he must clarify in writing to Anne Marie Flynn whether his appeal is under s. 7 or s. 8 of the Code of Practice, so that should he require a further appeal, it could be progressed to the correct forum.

30. By e-mail dated 20th November, 2013 the applicant indicated that after receiving legal advice, he sought a review under s. 8 of the Code of Practice. He believed that there had been breaches of the Code of Practice and he now requested the Commission to undertake an examination of the alleged breaches.

31. His grounds were that the marks awarded for educational qualifications were awarded unfairly. He outlined that he had successfully completed the HCCC and that he had an honours degree in business, and questioned his only receiving 25 marks.

32. By e-mail dated 16th May, 2014 Evelyn Hernon of the Commission sent an e-mail to Damien Kelly indicating that the Commission had received 11 formal complaints and numerous informal complaints about the recruitment process. She said each complaint will be fully examined and considered by members of the Commission, however the Commission only intended to issue one report on the matter.

33. Mr. Kelly's solicitors, Damien Sheridan Solicitors, by letter from dated 18th July, 2014, stated as follows:—

"The legitimate expectation of our client is that in accordance with the Code of Practice that appointments would be made on merit on the basis of a fair and transparent process. On the basis of an inquiry and analysis by the CPSA, an independent body created by statute, the selection process falls short of the standard set out in the Code of Practice. Adherence to the Code was written into Circular 02/2013. *Our client has exhausted all the internal IPS procedures. He has referred the matter to the CPSA which despite finding breaches of the Code, cannot effect changes in the result of a flawed selection process.* Effectively, our client now finds himself the victim of a process lacking fairness and transparency at the hands of an organ of the State but without any form of redress within the internal system (this Court's emphasis).

Our client's career within the IPS and will continue to be damaged into the future. He has suffered and will continue to suffer serious financial loss. His unfair treatment by his employer, the IPS, has caused him serious upset and distress. The IPS is not just his employer but is an organ of the State and the failure of an organ of the State to vindicate our client's rights raises serious legal issues.

Accordingly, we now call on you to undertake that you will:—

1. Quash all decisions made on foot of the selection process for a WTO carried on per Circular 02/2013.
2. Amend the Circular and conduct a fresh selection process under the management of the CPSA with their own relevant selection criteria and taking account of the contents and conclusions that the report of the CPSA of June, 2014.
3. Pay compensation to our client.
4. Pay our legal costs.

Unless we receive the above undertakings by noon, next Thursday, 24th July, we will have to instruct counsel to initiate judicial review proceedings.”

34. Replying to the second affidavit of Damien Kelly, Seamus Beirne indicated that Circular 02/2013 provided that the panels for work training officer would have a life of 18 months, and that within that period, any vacancy arising would be offered in turn to candidates in a panel in order of merit. He notes that the work training officer panels expired on 8th March, 2015 and had not been renewed. The expiry of the panels means that all the panels had been dissolved and that there would be no further appointments from these panels, with one exception. Two candidates who were placed on the Industrial Skills panel and the Environment panel were passed over for appointment, for issues related to attendance. He states that both those candidates appealed that decision. If the appeal were to be successful, one or both of the candidates may be given a work training officer position.

35. Seamus Beirne further stated that if there were to be future appointments to the work training officer position, it would be done by way of fresh competition. He stated that the applicant will, in the ordinary way, be entitled to apply for any new competition. The applicant’s failure to obtain a place on these panels will have no impact on any application he may have in the future.

36. In an affidavit sworn by Frank Hanlon who is a Higher Executive Officer in the Staff and Corporate Services Directorate of the Irish Prison Service on 14th April, 2016, he stated at para. 5:—

“The main relief sought by the applicant is an order seeking to quash the results of the selection process for the position of Work Training Officer. The grant of this nature and serious consequences, not only for the respondent, but also for all persons who have now been appointed to the position of Work Training Officer. In summary, the grant of this relief across all the panels would involve reversing 124 promotions that have been made by the respondents since 25th October from all Work Training Officer panels arising from Circular 02/2013.

6. An order of this nature would not only have impacts for individual Prison Officers who obtained promotion but also have operational impacts throughout the Prison Service as well as impacts on Prison Officers who have left promotion to the position of Work Training Officer but who may have transferred prisons as a consequence of vacancies arising.

7. The Prison Officers promoted as a consequence of this competition have been in these roles for at least one year and are settled in these positions. In many of the cases the successful candidates move location geographically to take up their new positions. This may have involved domestic implications for those individuals and their families. The promotions may also have had financial implications for those candidates. The quashing of those results would have a significant impact on their social, domestic and financial wellbeing.”

At para. 13 he states:—

“I do not believe that the applicant has suffered any negative impacts or damage by reason of his failure to be appointed to a panel and/or to be appointed to the position of Work Training Officer. The applicant remains as Prison Officer, serving in Mountjoy Prison and has no negative impacts on his position as a consequence of not being successful in this competition.”

He also noted, at para. 15:—

“The applicant has recently applied for promotion to the position of Assistant Chief Officer. The Circular for this competition sets out the specific competencies and skills needed. The interview board members have given no indication of previous performance in other competitions. Preliminary interviews for this ACO competition apparently underway, having commenced on 8th April, 2016. Furthermore, there are no restrictions on eligibility for the position of Assistant Chief Officer by reference to the outcome of the Work Training Officer competition. By way of general comment, since 18th December, 2013 Prison Officers are no longer restricted from applying for competitions based on grade or salary scale.”

Ronan Moran

37. In the early part of July, the second applicant learned that he had not been shortlisted for interview. In an e-mail to the Governor of Cloverhill dated 9th July, 2013 the applicant raised his dissatisfaction with the scoring of the marking by the assessors. The Governor forwarded this to the Respondent’s head office. He made the point that the scores he obtained for the competencies were “well below expectation” and asked for them to be reviewed. The review that follows appears to be a section 7 review. By letter dated 25th July, 2013 Ms. Annemarie Flynn, Human Resources Director of the respondent, advised the applicant that his application had been reviewed by the “formal reviewer” and that while the “formal reviewer” had increased his overall marks to 103 from 94, this had not brought his mark above that required to be shortlisted for interview and accordingly his appeal had failed. The applicant was advised that he could request a further by a “decision arbitrator” by 1st August, 2013. By letter dated 31st July, 2013 the applicant made a submission to the decision arbitrator, setting out in detail the bases of his appeal. By e-mail dated 8th August, 2013 Ms. Anne Marie Flynn of the respondent advised the applicant that the arbitrator had adjudicated on his appeal, that his appeal had been unsuccessful, that he would not be shortlisted for interview and that the decision of the arbitrator in that matter was final. By letter dated 3rd September, 2013 the applicant submitted an appeal to the Commission, under section 8 of the Code of Practice.

38. The applicant received a copy of the report of the Commission by letter dated 8th July, 2014 from Andrew Patterson, Secretary to the Commission. The report set out that the Commission had concerns about the management of the work training officer recruitment process, particularly in relation to how candidates’ experience and qualifications were assessed for different roles. The letter stated that despite the report finding that the respondent fell short of the standards set out in the Code of Practice, it was not the role of the Commission to re-examine individual scores awarded to candidates during the selection process.

39. On 29th August, 2014, counsel on behalf of the applicant made an application *ex parte* for similar leave to that applied for by the first named applicant before MacEochaidh J. The applicant was given leave to amend the statement of grounds by amending the heading at para. e to disclose the following:—

1. “e. background facts”; and
2. the addition of the following additional paragraph, e.1. to read as follows:—

"e.1. Grounds upon which relief is sought

The applicant's legitimate expectation was that the selection process would be conducted in a fair and transparent manner in accordance with the Code of Practice of the notice party as set out in the respondent's circular, 02/2013, of May, 2013. The notice parties found that the respondent's management of the selection process in relation to the use of the selection criteria and also its handling of both complaints and requests for review fell short of the standard set out in the Code of Practice. This breach is a breach of the applicant's rights and amounts to illegality."

40. The applicants were granted leave to apply by way of an application for judicial review for the relief set out in paras. g. 1, 2, 4, 5, and 6 matching the reliefs granted by Baker J. in relation to the first applicant.

Aisling Dunne

41. This applicant joined the Irish Prison Service on 10th January, 2000. Since 2000, the applicant has worked in the Dochas Centre which is part of the Mountjoy Campus. For the majority of her career, the applicant has specialised in the area of Sentence Management. The first such programme was entitled "Renew" and was initiated by the then governor Ms. Kathleen McMahon. The programme worked with prisoners by setting goals and focusing on rehabilitation. The applicant applied for the work training officer position through the application form, and forwarded same to the Human Resources Directorate of the Irish Prison Service on 16th June, 2013. The applicant was shortlisted in this process. When the panels of successful candidates were first issued following interview, the applicant was placed 24 on the panel for 'Work Training Officer in Integrated Sentence Management'. Notwithstanding her specialist skills, knowledge and experience, by reason of the low placement on the panel she was unsuccessful in securing a position of Work Training Officer in Integrated Service Management. The applicant, in a letter dated 18th September, 2013 sought to appeal the result of the selection process.

42. The applicant's letter of appeal was acknowledged by Ms. Annemarie Flynn of the respondent. The applicant was advised that in line with the Commission's Code of Practice, the appeal would be dealt with in the first instance by informal review. In a letter dated 14th October Mr. Seamus Beirne, Assistant Principal Officer, on behalf of the respondent advised the applicant that he had been nominated to carry out an informal review of the applicant's complaint, and concluded his letter by stating that the competition on a competitive merit base selection process and all candidates were treated equally at each stage. By letter dated 16th October, 2014 the applicant sought a formal review and by letter dated 11th November, 2013 Ms. Angela Kenny on behalf of the respondent advised the applicant that her appeal had not been upheld. By letter dated 13th November, 2013 the applicant, in acknowledging the letter of 11th November from the respondent, sought to appeal that there had been a breach of the Commission's Code of Practice. By letter dated 25th November, 2013 Ms. Evelyn Hernan of the Commission advised the applicant that each complaint must be considered and approved by members of the Commission. The applicant received a copy of the report of the Commission by e-mail on 9th July, 2014, the contents of which were set out above by this Court.

43. On 29th August, 2014 counsel on her behalf applied to MacEochaidh J. *ex parte* and was granted relief on the same basis as the second named applicant.

44. The respondents issued a notice of motion in this application for judicial review seeking an order pursuant to the inherent jurisdiction of the Court striking out or dismissing the claims of the applicant on the grounds that the proceedings were then moot. White J. gave a judgment in this matter on 16th March, 2016. At para. 19 he stated:—

"However the applications for *certiorari*, prohibition, a stay and an injunction are now moot. The only remaining matter that is justiciable between the applicants and the respondent is the declaration sought at para. 3 of the original notice of motions that is "a declaration that the respondent's servants or agents acted *ultra vires* and are in breach of the requirements of natural and constitutional justice in the manner in which it conducted the selection process for the posts of work training officer."

Aoife Quinlivan

45. The fourth named applicant joined the Prison Service on 9th June, 2008. She holds a Bachelor of Arts degree in Legal Science and Geography awarded by the National University of Ireland, Galway, and a Masters of Social Science Degree in Criminal Justice awarded by Queen's University, Belfast. Since 2008, the applicant has worked in the Dochas Centre.

46. The applicant completed the job application form applying for work training officer in both Services and Integrated Sentence Management on 17th June, 2013. The shortlisting process was carried out by the assessors and as a result of the shortlisting process the applicant was one of those shortlisted for interview.

47. When the panels of successful candidates were issued following the interviews, the applicant was placed 21 on the panel for 'Work Training Officer in the Integrated Sentence Management' and 23 on the panel for 'Work Training Officer in Services'. In the foregoing circumstances, notwithstanding her skills, knowledge and experience, this effectively meant that the applicant was unsuccessful in securing a position of Work Training Officer. By letter dated 15th November, 2013 the applicant sought to appeal the number of points she had received. In a later e-mail sent to Elaine Laird, she questioned 'what the official procedure should be with regard to appeals?' It is clear to this Court that there was some confusion on the part of all the applicants as to which appeals procedure to undertake. In an e-mail dated 30th January, 2014 to Mr. Frank Hanlon of the respondent the applicant asked 'can you just confirm that it is under section 8 which my appeal was dealt?'

48. By e-mail dated 31st January, 2014 Mr. Frank Hanlon advised the applicant the following: 'in line with all the other formal appeals under section 8 we appointed a person separate to the appointment process to review the complaint.' He further informed her that Ms. Angela Kenny, Assistant Principal, Finance Directorate of the respondent, would examine the applicant's appeal on 3rd February, 2014. By letter dated 4th March, 2014 Ms. Kenny on behalf of the respondent advised the applicant that she had been nominated to carry out a formal review of her appeal. She attached the marking guidelines which applied to the competitions and she concluded her letter advising the applicant that she had reviewed her submission, and that her appeal had not been upheld. She advised her that should she wish to appeal the decision, she must clarify in writing to Anne Marie Flynn whether her appeal was under section 7 or 8 of the Code of Practice, so that should she require a further appeal it can be progressed in the correct forum.

49. In a letter dated 2nd May, 2014 sent to Ms. Laird of the Commission, the applicant confirmed she was appealing the decision of the selection process under s. 8 of the Code of Practice. Specifically, the applicant contended that the applicants were not treated

equally at each stage of the process.

50. The applicant received a copy of the report of the Commission by letter dated 7th July, 2014, indicating the same as set out previously.

51. On 29th August, 2014, as with the second and third named applicants, an application was made to MacEochaidh J. *ex parte* and she was granted the same *ex parte* reliefs as the second and third named applicants.

52. As with the previous applicant, the application that was made to White J. by the respondents and her application was dealt with the same as with the third named applicant by White J.

Peter Onyemekehia

53. The fifth applicant has a Bachelor of Engineering degree in Manufacturing Engineering awarded by the Dublin Institute of Technology and a Bachelor of Science degree in Applied Physics awarded by EDO State University, Nigeria. The applicant joined the Irish Prison Service on 30th August, 2008 and since 2008 the applicant has worked in the Mountjoy campus since joining the Prison Service. The applicant completed the job application form applying for 'Work Training Officer in Service, Environment, Industrial Skills, ISM and Computers/Printing'. A shortlisting process was carried out by the assessors and the applicant was one of those shortlisted in the process for interview.

54. When the panels of successful candidates were issued following interview, the applicant was not placed on any of the panels. By letter dated 24th September, 2013 to the Human Resources Directorate of the respondent, the applicant made a formal complaint and requested a review of the selection process under s.8 of the Code of Practice.

55. By letter dated 26th September, 2013 Ms. Annemarie Flynn of the respondent Staff and Corporate Services Directorate acknowledged the applicant's letter. She informed the applicant that his appeal would be dealt with in the first instance by way of informal review and if he was not satisfied with the outcome, the matter could be dealt with by a formal review.

56. In a letter dated 14th October, 2014 Mr. Seamus Beirne informed the applicant that he had been nominated to carry out an informal review of his complaint, and advised the applicant that his appeal was not upheld. On 11th November, 2013 Ms. Angela Kenny of the respondent indicated that she had been nominated to carry out a formal review of the decision. She had reviewed his submission and she advised him that his appeal was not upheld. On 26th November, 2013 the fifth named applicant wrote to the Secretary of the Commission for Public Service Appointments indicating that he wished to appeal and again he received a letter dated 23rd December, 2013 from Ms. Evelyn Hernan of the Commission acknowledging receipt of his letter and stating that a copy of a Commission report would issue to him. On 7th July, 2014 he received the Commission's report and on 3rd October, 2014 counsel on behalf of the fifth named applicant made an application *ex parte* to O'Malley J. granted the applicant leave to apply by way of application for judicial review for all the reliefs set forth including:—

1. an order of *certiorari* by way of judicial review quashing the results of the selection process for posts of Work Training Officer in the Irish Prison Service carried out on foot of Circular 02/2013;
2. an order of prohibition preventing the respondent to its servants or agents to making appointments to the post of Work Training Officer on foot of selection processes carried out under Circular 02/2013;
3. a declaration that the respondents, its servants or agents, acted *ultra vires* and/or in breach of the requirements of natural and constitutional justice in deciding to make appointments to the post of Work Training Officer prior to the Commission for Public Service Appointments completing an inquiry into and making a copy of the complaints;
4. a declaration from the respondents, its servants or agents, acted *ultra vires* and/or in breach of the requirements of natural and constitutional justice in the manner in which it conducted the selection process for the posts of Work Training Officer;
5. a stay pursuant to O. 84, r. 20(7) of the Rules of the Superior Courts finding the determination of the within judicial review proceedings to restrain the respondent, its servants or agents, from making further appointments to the post of Work Training Officer;
6. if necessary, an injunction (including an interim or interlocutory injunction) pending the determination of the within judicial review proceedings restraining the respondent from taking any further steps from implementing the decision on foot of the selection process carried out on foot of Circular 02/2013.

Judgment of White J. in the case of Aisling Dunne and Aoife Quinlivan

57. White J. heard the respondent's identical motions in the two applications for judicial review, seeking an order pursuant to the inherent jurisdiction of the courts striking out or dismissing the claims of the applicants on the grounds that the proceedings were then moot. In his judgment, he recited the history of the circular and the motions seeking the reliefs which were granted by MacEochaidh J. on 29th August. White J. set out the fact that Ms. Dunne was placed 24 on the 'Panel for Integrated Sentence Management' and was unsuccessful in securing a position on that panel. He also set out that Ms. Quinlivan was placed 21 on the 'Panel for Integrated Sentence Management' and 23 on the 'Panel for Services' and was unsuccessful in procuring a position. He noted that both had appealed these decisions, and had been granted leave by the court.

58. White J. set out the factual matrix to the proceedings as follows. Following the service of the proceedings, the respondent did not proceed to fill further vacancies in either the 'Panel for Integrated Sentence Management', or the 'self-assist' panel. However, by letter dated 6th January, 2015 the Chief State Solicitor's Office advised that the first respondent ought proceed with appointments to the position of work training officer as and from 13th January, 2015. This was opposed by the applicants. By letter dated 13th February, 2015 the first respondent offered Ms. Dunne a promotion to the position work training officer with effect from 28th February, 2015. She accepted the offer of the position as work training officer in integrated sentence management, but stated that the acceptance of the offer did not in any way amount to withdrawing or compromising the judicial review proceedings.

59. By letter dated 2nd February, 2015 the respondent offered Ms. Quinlivan a promotion to the position of work training officer with effect from 21st February, 2015. The second applicant accepted the position but advised by letter that the acceptance of the offer

by her did not in any way amount to withdrawing or compromising the judicial review proceedings.

60. The respondent viewed the further prosecution of these proceedings as an abuse of process.

61. White J. quoted Ms. Dunne's affidavit sworn on 17th June, 2015:—

"[11] I note that in para. 16 of his affidavit that Mr. Beirne contends that I have suffered no loss or damage as a result of my placement on the panel as a result of what I say was a defective selection process save that this is not the case. As a result of having to accept the position in the Midlands Prison, I will incur new additional travelling expenses. Furthermore, I say that being the most junior WTO in Integrated Sentence Management (ISM) that future transfer requests will be effected but more immediately will affect me on my return to work from maternity leave as due to staffing levels, the most junior WTO is regularly reassigned off ISM duties to work in the floor of the prison.

[12] I say that I have found the whole experience to be humiliating and stressful in that as a result of the flawed selection process, I was removed from an area of work where I was greatly experienced and had an acknowledge expertise.

[13] I say that in December 2013, I was instructed to clear out my office for someone else who was a place higher up to me on the WTO panel. Furthermore, I say that I was regularly upset at home as I found it very difficult in work as prisoners and colleagues were regularly commenting to me that I was no longer working in ISM and why I was placed so low on the panel. I was placed in the embarrassing position of having to explain to prisoners and outside services to inform them that I would no longer be dealing with them.

[14] I say that I initiated these proceedings because of the actions of the respondents specifically and they conducted the selection process in breach of the Code of the practice of the notice party.

[15] I say I have followed the procedures laid down by the respondent for dealing with complaints and reviews including a reference to the notice party.

[16] I say that I awaited the issue of the report by the notice party, as it is the statutory body charged with responsibility in such matters.

[17] I say that I exhausted all the internal mechanisms available to me prior to a reference to this Honourable Court by way of judicial review and I say I am advised that this was the proper course to follow.

[18] I say that subsequent to initiating these proceedings I accepted my current position in order to mitigate my loss.

[19] I say the current state of affairs had been brought about entirely by the actions of the respondent, in particular the decision by the respondent to resume appointments to WTO in January of this year which has the effect of exhausting the panels. I note that in para. 20 of his affidavit that Mr. Beirne stated the respondent has been prepared to defer appointments to other WTO posts pending appeals by other individuals, yet was not prepared to defer further action in my case despite the proceedings herein."

62. Ms. Quinlivan, in her affidavit of 17th June, 2015 stated at para. 11:—

"I note that in para. 16 of his affidavit that Mr. Beirne contends I have suffered no loss or damage as a result of my placement on the panel as a result of what I say was a defective selection process. I say that this is not the case. I say that as a result of being so far down the panel I was junior to other WTOs and this will effect my position in relation to future transfers. Further, being so far down the panel means the positions available to me that is Limerick and the Dochas Centre, were limited.

[12] I say I have found the whole experience to be humiliating and stressful.

[13] I say I had I been offered the WTO position in Limerick earlier I could have moved home to the Limerick region prior to my baby being born. This was my intention as I have a strong family network of support in the Limerick area. This would have allowed me ample time to organise living arrangements, crèche/childminding facilities and afforded my private time to seek alternative employment in the region. I say my son was 5 months old when I was offered a position, that he had been enrolled in a crèche in Dublin at that point and relocation to Limerick, closer to my family was not an option at that point in time.

[15] I say the whole experience caused me undue stress and anxiety and may have been a contributory factor in being diagnosed with postnatal depression.

[16] I say that I initiated these proceedings because of the actions of the respondent specifically in that they conducted a selection process in breach of the code of practice of the notice party.

[17] I say that I followed the procedures laid down by the respondent for dealing with complaints and reviews including a reference to the notice party.

[18] I say that I awaited the issue of the report of the notice party as it is the statutory body charged with responsibility in such matters.

[19] I say that I exhausted all the internal mechanisms available to me prior to a reference to this Honourable Court by way of judicial review and I say I am advised that this was the proper course to follow.

[20] I say that subsequent to initiating these proceedings I accepted my current position in order to mitigate my loss.

[21] I say that the current state of affairs has been brought about entirely by the actions of the respondent, in particular the decision by the respondent to resume appointments to the WTO in January this year which had the effect of exhausting the panels. I note that in para. 20 of his affidavit that Mr. Beirne states that the respondent had been prepared to defer appointments to other WTO posts pending appeals by other individuals, yet was not prepared to defer

action in my case.”

63. White J. in para. 19 stated: —

““However the applications for *certiorari*, prohibition, a stay and an injunction are now moot. The only remaining matter that is justiciable between the two named applicants and the respondent is the declaration sought at para. 3 of the original notice of motion that is ‘a declaration that the respondent’s servants or agents acted *ultra vires* and are in breach of the requirements of natural and constitutional justice in the manner in which it conducted the selection process for the posts of work training officer’.”

64. The Court adopts this view of this decision of White J. in respect of all the applicants in this matter. Counsel for the applicants conceded that he was not continuing to seek an order of *certiorari* quashing the results of the selection process but rather that his clients had a legitimate expectation that the appointments would be made on merit as a result of fair and transparent processes arising from the Commission’s Code of Practice. In those circumstances the claim is limited to that arising from the principles of legitimate expectation.

65. Many of the applicants are disappointed with the results given to them. It is not the role of this Court in any way to act as an appellate body against the marks made by the selection process.

Legitimate expectation

66. The doctrine of legitimate expectation has been interpreted in a variety of different ways since it first emerged as an aspect of administrative law. Costello J. commentated in the course of his judgment in *Hempenstall v. the Minster for Environment* [1994] 2 I.R. 20:—

“The law relating to the doctrine of legitimate expectation is an evolving one, whose parameters have not yet been defined and whose exact scope has not yet been established.”

67. According to Biehler, writing in *Judicial Review of Administrative Action (a comparative analysis)*, 3rd. Ed, (Roundhall, 2013):“the widest meaning which has been suggested is that the doctrine can confer on an individual a substantive entitlement to whatever benefit or privilege is sought”. A narrower reading of the doctrine would afford a protection in the form of a procedural guarantee only. The concept has also been equated with the adoption of fair procedures, however, this interpretation confuses substantive interests which provide the basis for the requirement of procedural fairness, with the requirement of fair procedures itself, and therefore is consequentially unhelpful. More recently in this jurisdiction, the courts have awarded damages for breach of a legitimate expectation and this allows for a more limited form of remedy to be provided, for what might be termed an abuse of power.

68. In *Webb v. Ireland* [1988] I.R. 353 Finlay C.J. said that the doctrine of legitimate expectation is:—

“but an aspect of the well-recognised equitable concept of promissory estoppel.”

Biehler in *Judicial Review of Administrative Action (a comparative analysis)*, 3rd. Ed, (Roundhall, 2013) further writes that “reference has been made to its equitable origins and to equitable considerations such as the surrounding circumstances including the behaviour of the parties, in deciding whether they grant the relief on this basis.”

69. In *Glencar Explorations p.l.c. v. Mayo County Council* (No. 2) Fennelly J. stated:—

“Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it.”

Submissions on behalf of the applicants

70. Counsel on behalf of the applicants outlined that the Irish Prison Service is a non-statutory executive agency established with the Department of Justice and Equality with continuing responsibility for the State’s prison system, led by a Director in General who is a member of the Department of Justice and Equality.

71. Counsel for the applicant also set out that the Commission was established pursuant to s. 11 of the Public Service Management (Recruitment and Appointments) Act, 2004. The statutory functions of the Commission are set out in s. 13(1) of that Act and include:

“(a) to establish standards of probity, merit, equity and fairness, and other principles as they consider appropriate, to be followed, in the public interest, in the recruitment and selection of persons for positions in the Civil Service and other public service bodies;

(b) to publish as codes of practice—

(i) standards referred to in paragraph (a) in accordance with section 23 ;

(ii) standards on the selection procedures for promotion under Part 6;

(iii) procedures to which section 23 (3) relates;

and any such code may include all or any of the matters referred to in subparagraphs (i), (ii) and (iii) and may, from time to time, be amended or replaced.”

72. Counsel for the applicants submitted that the Commission is the statutory authority with continuing responsibility for the regulation of the selection procedures for promotion in the Irish Prison Service. He reviewed the facts as the Court has set out. He

then submitted that

- a. the legitimate expectation of the applicants was that in accordance with the Code of Practice of the Notice Party, that appointments would be made on merit, as a result of fair and transparent processes.
- b. On the basis of an inquiry and analysis by the notice party, an independent body created by statute, the selection process fell short of the standard set out in the Code of Practice. Adherence to the Code was written into Circular 02/13.
- c. The applicants have exhausted all the respondent's procedures and the applicants referred the matter to the notice party, which despite finding breaches of the Code of Practice, cannot effect changes in the result of a flawed selection process.
- d. The applicant was subject to a process lacking fairness and transparency at the hands of an emanation of the State, but without any firm redress in the internal system.

73. Counsel for the applicants referred to legitimate expectation as an aspect of promissory estoppel. He quoted from Barr J. in *Cannon v. Minister for the Marine* [1991] 1 I.R. 82 where Barr J. stated:—

"the concept of "legitimate expectation", being derived from an equitable doctrine, must be reviewed in the light of equitable principles. The test is whether in all the circumstances it would be unfair or unjust to allow a party to resile from a position created or adopted by him which at that time gave rise to a legitimate expectation in the mind of another that that situation would continue and might be acted upon by him to his advantage."

74. He submitted that the decision of Costello J. in *Tara Prospecting Ltd. v. the Minister for Energy* [1993] I.L.R.M. 771 is the seminal case pertaining to the meaning of legitimate expectation in Irish administrative law:—

"England has established that a duty to afford a hearing may be imposed when such expectations are created by public authorities. The correlative right thus arising is therefore a procedural one. And it is important also to recognise that the claim I am now considering is a very different one. It is not that the legitimate expectations which the applicants held entitled them to a fair hearing (such a right arising from constitutional and well established common law principles I have already considered), but that they created a right to the benefit itself which should be enforced by an order of mandamus."

Costello J. further stated: —

"I can summarise the legal principles which I think are to be derived from the authorities to which I have referred and which are relevant for the purposes of this case as follows:

(1) There is a duty on a minister who is exercising a discretionary power which may affect rights or interests to adopt fair procedures in the exercise of the power. Where a member of the public has a legitimate expectation arising from the minister's words and/or conduct that (a) he will be given a hearing before a decision adverse to his interests will be taken or (b) that he will obtain a benefit from the exercise of the power then the minister also has a duty to act fairly towards him and this may involve a duty to give him a fair hearing before a decision adverse to his interests is taken. There would then arise a correlative right to a fair hearing which, if denied, will justify the court in quashing the decision.

(2) The existence of a legitimate expectation that a benefit will be conferred does not in itself give rise to any legal or equitable right to the benefit itself which can be enforced by an order of mandamus or otherwise. However, in cases involving public authorities, other than cases involving the exercise of statutory discretionary powers, an equitable right to the benefit may arise from the application of the principles of promissory estoppel to which effect will be given by appropriate court order.

(3) In cases involving the exercise of a discretionary statutory power the only legitimate expectation relating to the conferring of a benefit that can be inferred from words or conduct is a conditional one, namely, that a benefit will be conferred provided that at the time the minister considers that it is a proper exercise of the statutory power in the light of current policy to grant it. Such a conditional expectation cannot give rise to an enforceable right to the benefit should it later be refused by the minister in the public interest.

(4) In cases involving the exercise of a discretionary statutory power in which an explicit assurance has been given which gives rise to an expectation that a benefit will be conferred no enforceable equitable or legal right to the benefit can arise. No promissory estoppel can arise because the minister cannot estop either himself or his successors from exercising a discretionary power in the manner prescribed by parliament at the time it is being exercised."

75. The applicants are aware by virtue of a freedom of information request that a meeting took place on 2nd April, 2014 between Seamus Beirne and Frank Hanlon, deponents of the respondent's affidavits, and Elaine Laird and Evelyn Hernon of the notice party, the Commission. This meeting took place two months before the completion of the Commission's report and eight months before the respondents filed a statement of opposition. Minutes of the meeting of 2nd April, 2014 indicate that the Corporate Services Directorate of the Prison Service were unaware of an agreement with the Prison Officers Association as to the status given to the HCCC in the interview boards running the competition for the work training officer position. This only became an issue when a member of the union had sight of a marking sheet, and it seems that Corporate Services Directorate of the Prison Service whose role was to organise the promotion process, was unaware of any agreement with the Prison Officers' Association.

76. The minutes of the meeting of 2nd April, 2014 clearly indicate that the first respondent was aware at that time and prior to the completion of the Commission's report in June, 2014 that there failures/flaws in the process. Admissions were made by Mr. Beirne and Mr. Hanlon regarding this promotion process which included the following: —

1. That the competition was too big.
2. In future, separate WTO competitions would be held in respect of each discipline (there were 8 disciplines included in this competition).

3. There had been 500 to 600 new staff recruited to the Irish Prison Service since 2008. This was the first promotion opportunity since that date. The Prison Service had received more applications than anticipated.
4. The Corporate Services Directorate of the Prison Service has now produced a 3-page internal document completing application forms for promotions.
5. The Corporate Services Directorate of the Prison Service has tendered for an outside company to deliver training regarding producing competency based application forms.
6. The Corporate Services Directorate of the Prison Service stated that in the following competition for C & R instructors there were 4 boards and the CSD asked for the marks to be sent to it and Frank O'Hanlon then met with the boards after the interview process. This did not occur in the promotion for WTO.
7. Regarding the HCCC in the allocating of 25 marks Mr. Beirne and Mr. Hanlon clearly advised that the Corporate Services Director did not intend using this marking of qualifications in future competitions.

77. Despite the above information, in particular with regard to the minutes of the meeting of 2nd April, 2014 clearly indicating that the first respondent was aware prior to the completion of the Commission's report in June, 2014 that there failures/flaws in the process, the respondents denied in para. 12 of the statement of opposition that the applicants were subject to a process lacking fairness and transparency.

78. Counsel for the applicants further submitted,

1. The respondents were aware of the flaws in the process prior to the publication of the Commission's report of June 2014.
2. The respondents made admissions to this effect at the meeting of 2nd April, 2014 with the Commission.
3. None of these admissions are included in any of the respondent's pleadings.
4. There are factual inaccuracies in some of the respondent's pleadings whether by accident or design.
5. The applicants are no longer relying on the report of the Commission for Public Service Appointments.
6. The applicant can now also rely on the admissions made by the representation of the respondent in the meeting of 2nd April, 2014 and on the basis of the above he submitted that the respondents had acted in breach of natural and constitutional justice in relation to the five applicants.

Legal submissions on behalf of the respondent

79. Counsel for the respondent summarised the facts, and also addressed the status of the HCCC and the manner in which it was considered by the interview boards.

80. She submitted that appointments to the work training officer position was a competitive process, whereby each applicant would be given the opportunity to demonstrate their skills, competence and experience.

81. There were a number of issues which the respondent made submissions in relation to, outlined below.

Preliminary application to strike out on the grounds of being moot

82. White J. determined in respect of the applicants Aisling Dunne and Aoife Quinlivan that the applications for *certiorari*, prohibition, a stay and injunction were moot. He determined that the only remaining justiciable matter between the parties was the declaration sought at para. 3 of the original notice of motion. Therefore this is the only relief that remains in issue in the Dunne and Quinlivan proceedings.

83. Counsel submitted that the panels expired on 8th March, 2015 and had not been renewed. The expiry of the panels meant that all panels have now been dissolved, and there would be no further promotions to the position of work training officer arising from these panels. If there are to be any promotions to the position of work training officer in the future, this would only be done after a new competition, which would not be impacted by the competition that is under challenge in the within proceedings.

Preliminary objection — failure to move application within the time

84. Counsel for the respondent submitted that the within proceedings had been brought outside the time allowed by the Rules of the Superior Courts, and therefore the applicants are not entitled to the relief sought. In the alternative, it is submitted that the applicants have delayed to such an extent in the commencement of these proceedings that this Court should exercise its discretion to refuse the relief sought. Order 84, rule 21 of the Rules of the Superior Courts allows for an application for judicial review to be brought within 3 months "from the date when the grounds for the application first arose."

85. She submitted that insofar as the applicants seek to rely on their appeals to the Commission as reasons for the failure to bring this application at an earlier stage, it is submitted that the applicants elected to undertake an appeal route which they knew would not alter the outcome of the competition.

The applicants had the option of seeking to review the competition process by using section 7 of the Code of Practice. This process could have resulted in individual decisions being altered in a substantial review of the merits of the decision (this Court's emphasis) made in respect of each applicant. However, the applicants instead elected to seek a review under section 8 of the Code of Practice, which applies to generalised complaints about the process and cannot result in any changes to individual decisions taken in the competition process.

Status of the report of the Commission on Public Service Appointments

86. Counsel for the respondent stated that the role of the Code of Practice in any recruitment or promotion process is specifically limited by s. 24(8) which provides:—

"If in respect of a code of practice a question arises as to whether a candidate is or is not qualified for appointment to a post to which that code relates, it shall be decided upon by the licence holder responsible for the competition concerned."

She submitted that it was clear that the scheme of the 2004 Act envisages that whether an individual is qualified for appointment to a particular post is a matter for the employer and not for the Commission. The Commission has no role in the question as to whether any individual is suitable for promotion and may not interfere with the powers of an employer in that regard.

87. She submitted that this was further enforced by Part IV of the 2004 Act which sets out the responsibilities and powers of the Commission with respect to recruitment, and enables them to grant a recruitment licences to public service bodies. Section 48 of the 2004 Act provides for a power whereby the Commission, where it is believed that "an aspect of the recruitment process has been or is likely to be compromised", the Commission may issue instructions to the licence holder concerned. However that power is expressly limited by s. 48(2) of the 2004 Act which provides:—

"(2) Nothing in subsection (1) shall be read as permitting an instruction to be issued which has the result of affecting any particular appointment or purported appointment or the recruitment process relating to that appointment or purported appointment."

Counsel for the respondent stated it was clear that the statutory framework precludes the Commission from having a role in any appointment decisions within the civil and public service. She stated that in the circumstances where there is an express statutory preclusion on the Commission from giving instructions in respect of any particular appointment, or purported appointment, or the recruitment process relating to an appointment, the applicants are not entitled to rely on the Report of the Commission in order to impugn the selection process for the position of work training officer.

Legitimate expectation

88. She addressed the central contention of the applicants, that they had a legitimate expectation that the promotion competition would be operated in a certain manner in accordance with the Code of Practice. Their complaint relates to the manner in which the HCCC was treated in the course of the competition. She submitted that the logic of the argument made by counsel for the applicants is questionable. Whilst the applicants' complaint focuses on the competition process, in reality the complaint relates to the fact that, to varying degrees, the applicants were not successful in the competition as they believe they ought to have been. She said that the applicants were not significantly impacted by the manner in which the HCCC was treated and that the results reflect the relative merits of different candidates. In respect of Mr. Moran, she said that Mr. Moran benefited from the decision to award all applicants 25 marks in respect of the qualification which resulted in him obtaining an additional 5 marks, although this was not sufficient to enable him to reach the threshold to be shortlisted for interview. In the case of Mr. Kelly, while he reached the interview stage of the process, he was not successful at interview. His performance at interview is not a matter that can give rise to a ground for judicial review. In the case of Mr. Onyemekeihia, he performed sufficiently well to be placed on the environmental panel but did not reach a sufficient standard to be placed on the other panels. In the case of Ms. Dunne and Ms. Quinlivan, they were successful in their applications and have now been appointed to the position of work training officers. She emphasised the third point made by Fennelly J. in *Glencar Explorations p.l.c. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84:-

"it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to renege from it".

She stated that while it was accepted that a competition in principle (this Court's emphasis) should be run in the manner outlined in a circular underpinning that competition, it was not accepted that there had been any fundamental breach of the circular that would justify the competition being quashed. She stated that presumably, the applicants argue that the circular constitutes the representation that is alleged to have been made. In those circumstances, it is not clear how the applicants contend that they have relied upon the circular to their detriment and have changed their position by reason of the circular. It cannot be said that the simple fact of applying for a promotional job can be considered to be acting as a detriment. She also submitted that there had been no resiling from the circular by the respondent such that it would amount to a breach of any expectation. The competition was organised in the manner envisaged by the circular, in particular with the emphasis being on having a competitive merit-based process that focused on the skills and competencies required. Insofar as there was an adjustment to certain scores arising from the status of the HCCC, she submitted that this was done in order to ensure fairness between all the applicants and in order to respect an agreement entered into with the Prison Officers Organisation. The Circular did not prohibit the consideration of the HCCC as a relevant qualification, and the manner in which the HCCC was considered in the competition process must come within the terms of the test identified by Fennelly J., namely that *any expectation that may arise must be considered in the context of the public interest* (this Court's emphasis). Although an initial error was made in respect of the marks awarded for the HCCC, it was clearly in the interest of fairness to all the candidates that the later approach in respect of the HCCC was taken, i.e. that the additional 25 marks were awarded, and therefore it cannot be considered to be a breach of any legitimate expectation that may arise.

89. She quoted from Barrett J. in *Grange v. the Commission for Public Service Appointments* [2014] IEHC 303 where a challenge was brought to an investigation conducted by the Commission on fair procedures grounds. In respect of the general issue of fair procedures in an investigation Barrett J. stated that:—

"It is clear from the decision of the Supreme Court in *Dellway* that the notion of fair procedures includes but is not limited to the right to be heard. Thus, per Denham J., at para. 109: "There is a right to fair procedures, which includes a right to be heard." Notably, one finds neither in the *Dóchas* nor *Dellway* cases nor elsewhere in the applicable case-law any suggestion that procedural perfection is a pre-requisite to 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:

'[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.'"

90. In that case, Barrett J. was of the view that on the facts there had been substantial compliance with the Codes of Practice, and therefore it could not be concluded that a legitimate expectation had been breached.

91. Counsel for the respondent argued that insofar as the applicants claimed to have a legitimate expectation based on the circular that the Code would be complied with and the CPSA report suggested the Code was not complied with, it is clear that the legitimate expectation cannot prevail against the statutory framework, in particular s. 14(8)(2) of the 2004 Act and ultimately s. 17 of the Civil

Service Regulations, 1956.

92. Insofar as any fair procedures argument is pursued, the respondent relies on the decision of Keane J. in *Fanning v. the Public Appointments Service* [2015] IEHC 663 in which the High Court refused the plaintiff, who is an Assistant Commissioner of An Garda Síochána, an injunction to restrain the conduct of the recruitments process by the Public Appointments Service for the position of Deputy Commissioner. The plaintiff made various allegations in respect of alleged breaches of fair procedures in the interview process but Keane J. was not satisfied that a fair issue to be tried had been raised such that it was necessary to grant an injunction to prevent a continuation of the recruitment process. She suggested that the competition was correctly and properly run with candidates being selected on foot of a competitive merit-based interview process. At the height of the applicant's cases it may be possible to identify a number of minor procedural shortcomings. However, these minor shortcomings are not such that ought to vitiate the entire competition process. The true complaint of the applicants relates to the merits of the decisions taken in respect of their applications which are not appropriate matters to be considered in judicial review proceedings.

Judgment

Preliminary point of the failure to move the application within the time allowed

93. With regard to the preliminary point of the failure to move the application within the time allowed, this Court is of the view that whilst the applicants did use the appeals process, nevertheless in the circumstances of the case it appears to this Court that it was appropriate to await the decision of the Commission. In these circumstances the Court will not rule against the applicants on having failed the bringing of the proceedings within the time allowed by the Rules of the Superior Courts.

94. It is also the view of the Court that the only argument that remained open to the applicants in the case was that of legitimate expectation.

95. The applicants place reliance on the report of the Commission in this appeal. The Court finds that the applicants are precluded from relying on this report by reason of s. 48(2) of the Public Service Management (Recruitment and Appointments) Act, 2004.

96. The Court's view is that the applicants have not established any legitimate expectation or breach of same by way of the operation of the competition in question. The competition was operated in accordance with the circular, save that the CPSA did have some criticisms of the process which insofar as these proceedings are concerned relate to the fact that fresh arrangements had to be put in place in respect of the HCCC. The Court agrees that this was a fair and reasonable response by the respondent to a particular circumstance that arose in the course of the competition as acknowledged by the Commission.

97. Fourthly, the Court agrees with the counsel for the respondents in that the main complaint of each of the applicants concerned their placement in the competition, and in these circumstances the Court dismisses these proceedings.