

THE HIGH COURT**JUDICIAL REVIEW****[2015 No. 593 J.R.]****BETWEEN****NAUGHTON & ANOR****APPLICANTS****AND****COMMISSIONER OF AN GARDA SÍOCHÁNA****RESPONDENT****JUDGMENT of Mr. Justice White delivered on the 3rd day of March, 2017**

1. This is an application to prohibit disciplinary proceedings initiated against the applicants who are serving members of An Garda Síochána. The Applicants in the alternative are seeking declarations that the relevant regulations are not being implemented in the appropriate manner. The application was heard on the 7th of December 2016 and judgment was reserved.

2. By order of the 28th of October 2015 the applicants were granted leave to bring judicial review proceedings for the following reliefs:-

(i) An order of prohibition by way of application for judicial review restraining the respondent from the taking of any further steps and from taking any further action in discipline proceedings regarding the applicants which are presently pending under and by virtue of the provisions of An Garda Síochána (Discipline) Regulations 2007.

(ii) An order of prohibition by way of application for judicial review restraining the respondent, her servants or agents from the taking of any further steps in and about disciplinary enquiry which is presently being carried out on and conducted under and by virtue of the provisions of An Garda Síochána Discipline Regulations 2007.

(iii) A declaration by way of application for judicial review that the respondent has acted in excess of authority conferred and/or that the respondent's actions are ultra vires in and about the conduct of an investigation and the conduct of disciplinary proceedings which said disciplinary proceedings have been commenced pursuant to the provisions of Regulation 24 of the Garda Síochána (Discipline) Regulations 2007. The said proceedings now fall outside the scope of the Regulations by virtue of the provisions of Regulations 8(2)(a) and (b) thereof.

(iv) A declaration by way of application for judicial review that the disciplinary proceedings insofar as they have been commenced and carried on and concern the applicant are unfair and oppressive.

The application is grounded on a statement to ground application for judicial review of 27th October 2015 and the affidavits of verification of David Naughton and Wesley Kenny sworn on the 27th of October 2015 together with the exhibits. A notice of motion issued on the 27th of October 2015 returnable originally for the 15th of December 2015. A statement of opposition was filed and served on the 19th of February 2016 together with an affidavit of Garda Superintendent Matt Nylon sworn on the 17th of February 2016. The applicant's solicitor Martin Moran deposed an affidavit on the 27th of April 2016.

3. The applicants are both members of An Garda Síochána and are stationed at Kilmainham Garda Station. Together with other friends they visited Limerick for a social weekend on 5th December 2013.. They became involved in an incident which led to their criminal prosecution for assault contrary to s. 2 of the Non Fatal Offences Against the Person Act 1997. The applicants were acquitted of this charge at Limerick District Court on the 13th of November 2014 after a contested trial.

4. Separately the applicants were served on the 6th of February 2014 with a notice dated the 29th of January 2014 informing them that an investigating officer had been appointed pursuant to Regulation 24 of the Garda Síochána (Discipline) Regulations 2007 to carry out a disciplinary investigation. On the 31st of August 2015 the chairperson of a Board of Inquiry set up to carry out the inquiry wrote to both applicants in accordance with Regulation 27 of the Garda Síochána (Discipline) Regulations 2007 and supplied them with particulars of the serious breach of discipline alleged and enclosed all relevant materials and informed them that the Board of Inquiry hearing would take place on the 28th of September 2015. The documentation furnished with the notification included particulars of the breach alleged, a statement of facts established by the investigation and a copy of all statements taken by the investigating officer and video stills but did not make any reference to the District Court criminal proceedings nor were statements taken in relation to the criminal investigation included.

5. The alleged breach of discipline before the board was:-

(1) Discreditable conduct that is to say that you Garda Wesley Kenny 34735C Kilmainham Garda Station on the 5th of December 2013 at Catherine Street, Limerick conducted yourself in a manner which you ought to have known would be reasonably likely to bring discredit on the Garda Síochána in that you did attempt to gain access to an apartment building at 15 Upper Cecil Street, Limerick seeking the services of a prostitute.

(2) A similar allegation has been made against David Naughton

6. The Board of Inquiry sat on the 28th September 2015 and proceeded to hear submissions. Mr Moran Solicitor for the Applicants made a number of submissions to the Board of Inquiry by way of preliminary application which are summarised as follows:-

- That all information regarding the criminal prosecution ought to be before the Board of Inquiry.

- That the particulars of breach were improperly formulated as the Respondent had formulated them and must as a matter of law be formulated by the Board.

- That the disciplinary proceedings ought to be discontinued by reason of the provisions of Regulation 8 of the Garda Síochána (Discipline) Regulations 2007.

7. The Board adjourned to consider the submissions and on 15th October 2015 in summary decided that:-

- The disciplinary matter was separate and distinct from the charges before the District Court
- It would not be unfair or oppressive to commence or to continue disciplinary proceedings
- That it was open to the Respondent to draft/formulate the breaches of discipline.
- It was acceptable that the Board of Inquiry was not furnished with information regarding the criminal prosecution.

8. By reason of the aforementioned the Applicants sought and obtained the leave order.

The statutory scheme of Discipline

9. Section 123(1) of the Garda Síochána Act 2005 provides for the making of regulations concerning the maintenance of discipline in the Garda Síochána, including, but not limited to, regulations relating to the matters provided for in subsections (2) to (5) thereof.

10. Pursuant to this statutory power the Garda Síochána (Discipline) Regulations 2007 were brought into force.

11. Regulation 5 of the 2007 Regulations provides that:-

"Any act or conduct by a member which is mentioned in the Schedule constitutes a breach of discipline".

12. In the Schedule, 30 different acts or items of conduct are set out as constituting breaches of discipline. At paragraph 1, the following is defined as constituting a breach of discipline:-

"Discreditable conduct, that is to say conducting himself or herself in a manner which the member knows or ought to know, would be prejudicial to discipline or reasonably likely to bring discredit on the Garda Síochána.

13. Regulation 8 provides:-

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

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

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

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

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

(4) Any information, document or thing which the member concerned is required to provide or produce in disciplinary proceedings and which is related to and used for the purposes of such proceedings is not admissible in criminal proceedings, unless provided or produced by the member in those proceedings.

(5) The content of paragraph (4) shall be explained in ordinary language to the member concerned by the person or body conducting the disciplinary proceedings."

14. Regulation 9 provides that:-

"In any disciplinary proceedings proof of a breach of discipline is to be established on the balance of probabilities."

15. Regulation 23(1) of the 2007 Regulations provides that:-

"Where it appears that a member may be in breach of discipline and subject to one of the disciplinary actions specified in Regulation 22, the Commissioner shall appoint a member (in this Part referred to as the 'investigating officer') to investigate the alleged breach."

16. Regulation 24 deals with the conduct of that investigation and Regulation 25(1) deals with the establishment of the Board of Inquiry as follows:-

"If it appears from the report of the investigation that the member concerned may have committed a serious breach of discipline, the Commissioner shall establish a Board of inquiry

(a) to determine whether such a breach has been committed by the member concerned, and

(b) if so, to recommend to the Commissioner the disciplinary action to be taken in relation to the member,

and shall notify the member accordingly."

17. Regulation 27 deals with the pre-hearing procedure before the Board of Inquiry and provides that:-

"(1) The presiding officer shall notify the member concerned in writing, or cause the member to be so notified, at least 15 days beforehand of

- (a) the time, date and place of the hearing,
- (b) the names of the members of the board of inquiry, and
- (c) the provisions of section 123(7)

and shall supply the member, or cause him or her to be supplied, with particulars of the serious breach of discipline alleged.

(2) The notification shall be accompanied by a statement of the facts established by the investigation and of any written statements made during it.

(3) The presiding officer shall also inform the member concerned in writing, or cause him or her to be so informed, that he or she –

- (a) may admit or deny the alleged breach,
- (b) may accept that any statements in documents supplied to him or her under paragraph (2) are wholly or partly true, but deny that the facts stated in them constitute a breach of discipline, or
- (c) may deny the breach of discipline concerned but admit that the facts so stated constitute another such breach,
- (d) may seek advice from his or her representative association
- (e) is entitled to be accompanied at the inquiry and to be represented by an official of that association, by another member of his or her choice or by a solicitor or barrister at the member's expense, and
- (f) may make oral submissions to the board of inquiry either in person or through such an official, member, solicitor or barrister.

18. Sections 28 and 29 deal with requirements to give information to the Board and the procedure at hearing:-

"28(1) A board of inquiry may:-

- (a) require the member concerned or any other person who, in its opinion, possesses information or possesses or controls a document or thing that is relevant to the inquiry to give the information or produce the document or thing to the board, and
- (b) where appropriate, require the member or such other person to attend the hearing for that purpose.

(2) A requirement under paragraph (1) shall specify –

- (a) the period within which it is to be complied with by the person, and
- (b) the time, date and place at which the person is to attend to give the information, or produce the document or thing, concerned.

(3) If a board is of opinion that such a requirement purports to require the person concerned to give any information, or produce any document or thing, in respect of which he or she is entitled to claim legal professional privilege, it shall, to that extent, set aside the requirement or vary or attach conditions to it.

29(1) At a hearing the board of inquiry:-

- (a) shall give the member concerned an opportunity to be heard and to respond to any matters raised,
- (b) may –
 - (i) permit any person to give evidence orally or in writing, and
 - (ii) ask questions of any person who has given evidence,

and

- (c) shall consider and decide on a request by any person to give evidence relevant to the proceedings orally or in writing.

(2) In its conduct of the proceedings, the board shall have regard to the right of the member concerned to challenge and

test the evidence of any person.

(3) The board may adjourn a hearing if it appears to it to be expedient to do so.

(4) The board may proceed with a hearing in the absence of the member concerned.

(5) Subject to these regulations, a board may regulate its own procedure.

(6) Information at an inquiry shall be given on oath or affirmation, which the presiding officer may administer or take.

(7) A verbatim record of the proceedings shall be made by a stenographer or by electronic or other means.

(8) An inquiry shall be held in private."

The legal principles governing the application of Section 8 of the regulations

19. The impact of an acquittal in a previous criminal prosecution on subsequent disciplinary proceedings has been the subject of a number of Superior Court decisions.

20. In *McGrath v. The Commissioner of An Garda Síochána* [1991] I.R. 69, a decision of the Supreme Court, McCarthy J. at p. 75 stated:-

"Lest it be considered that acquittal on a criminal charge necessarily precludes a disciplinary investigation into the facts arising out of which a criminal charge was brought I reject such a proposition. The argument in support of such view is one of estoppel. The vital features of issue estoppel are that the fact and the parties in dispute are essentially the same. Where one organ of State has been a contestant in the first trial of the issue, then, in my view, another organ of State has the necessary privity. What is an organ of State? Certainly, the Attorney General, Ireland, the Director of Public Prosecutions, and the Commissioner of the Garda Síochána come within that category. The core question is whether or not the issue was the same. The issue in a criminal trial is the guilt or innocence of the accused; such depends upon a wide variety of circumstances the existence of which has to be proved by the prosecution. As pointed out by Henchy J. in *Dublin Corporation v. Flynn* [1980] I.R. 157, for a variety of reasons an accused person may have been prepared to accept a wrong decision in an earlier prosecution to the effect that he had committed an act of assault or had driven a motor car dangerously. In such circumstances, estoppel would be repugnant to the fair administration of justice. In the instant case the claim of estoppel is made by the accused but the legal principle is the same. Acquitting a garda of assault would not preclude a garda investigation into a breach of discipline such as abuse of authority in failing to behave with due courtesy towards a member of the public. In *Kelly v. Ireland* [1986] I.L.R.M. 318, O'Hanlon J. elaborated on this topic, including in his judgment a consideration of issue estoppel and he concluded, at p. 328:—

'In the rare case where a clearly identifiable issue has been raised in the course of a criminal trial and has been decided against a party to those proceedings by means of a judgment explaining how the issue has been decided, I would be prepared to hold that such decision may give rise to issue estoppel in later civil proceedings in which that party is also involved. Such estoppel would arise, not only in relation to the specific issue determined (in this case, whether the statement was made freely and voluntarily) but also to findings which were fundamental to the court's decision on such issue.'

21. In *Walsh v. The Commissioner of an Garda Síochána & Ors*, a decision of the High Court of 5th July, 2010, Kearns P. approving of the principles in *McGrath* reiterated in *Garvey v. The Minister for Justice, Equality and Law Reform* [2006] 1 I.R. a decision of Geoghegan J., stated at p. 17 of his judgment:-

"I am satisfied that in the present case the circumstances are not such that to allow the disciplinary process to proceed would be unfair or oppressive. The allegations in the disciplinary proceedings are not even the same as the charge before the District Court, let alone identical. Nor do the disciplinary proceedings involve any determination on the issue of possession or create the risk of unravelling the District Court verdict.

While the remaining matters before the inquiry arise out of the same set of events as the possession allegation, they are quite different in character. During the course of the hearing I invited counsel for the applicant to consider whether the instant case was any different from the situation which might arise where a garda, stopped at a road checkpoint, is charged with drunken driving in circumstances where a criminal charge to that effect is later unsuccessful but where, at the time of being stopped, the garda in question had identified himself as a member of the Garda Síochána with a view to avoiding a breath test and had used abusive and insulting language. Could it be said that a disciplinary inquiry into those latter events would be either unfair or oppressive? It seems to me that to ask the question is to know the answer. It would not."

22. Kearns P. was interpreting the 2007 Regulations.

23. In *McKenna v. Commissioner of an Garda Síochána*, a recent decision on garda disciplinary regulations of Baker J. of 18th March, 2016, the judgments in *McGrath*, *Garvey* and *Walsh* were approved in the context of the 2007 Regulations. At paras. 31, 32, 33 and 34, she stated:-

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

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

33. Thus, as Regulation 8 expressly provides for the circumstances that have arisen in the present case, I reject the argument of counsel for the applicant that there is no statutory or other basis on which the disciplinary inquiry may be continued, merely on account of the fact that he has been acquitted of criminal charges arising from the same or broadly

the same set of facts and circumstances. The proceedings may be continued, unless fairness or injustice would result, but there is no absolute statutory or other provision that supports the argument of the applicant that the conduct of the enquiry is *ultra vires* the respondent.

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

24. The submission on behalf of the applicants that the decision of *McGrath v. Commissioner of An Garda Síochána*, is no longer relevant or that the decision in Walsh was based on an application of the Regulations prior to those subject of this inquiry is incorrect. Baker J. relied on these authorities. The core principles enunciated in the *McGrath* judgment are relevant in the consideration of the 2007 Regulations. The fact that the wording of s. 8 has somewhat changed and is broader than previous Regulations is not relevant in the consideration of this application.

25. The respondent was incorrect to argue that a Board of Inquiry could not rely on a criminal conviction in a criminal trial. It is open to a Board to do so, and a criminal conviction may of itself be a serious breach of discipline. The Commissioner is the correct respondent in the proceedings.

26. The applicants have further submitted that an inquiry pursued by a Board of Inquiry pursuant to Part 3 of the Regulations is, in its totality, an inquisitorial one and rely on the Supreme Court decision of *Kelly v. Commissioner of An Garda Síochána*, decision of 5th November, 2013. O'Donnell J stated at para 32:-

"As counsel for the appellant has pointed out, the Board of Inquiry does not conform to the model of the decision maker coming to a dispute with no prior knowledge, which can be encountered in other areas of the law. There is an inquisitorial element to this procedure. It is for the Board of Inquiry to formulate the breaches of discipline alleged and provide particulars thereof, and to provide notice of such allegations to the member concerned. It follows therefore that the Board of Inquiry will have had some degree of prior engagement with the facts, and importantly in the present context, will have made some assessment of their significance. It is also important that while the Board of Inquiry makes a decision in relation to the fact of breach, that decision is not final and may be appealed to the Appeal Board. Furthermore, the Board itself does not impose a sanction, but rather recommends it. It is for the Commissioner to decide, in the light of the Board's determination of the facts, and recommendation as to penalty, what penalty he or she considers appropriate. Thus, in every case the conclusion of the Board's inquiry must go to another decision maker (the Commissioner and in some cases the Government) and in many cases will be considered by a third decision maker (the Appeal Board). Thus, when the Regulations impose an obligation on the Board of Inquiry to "submit a written report to the Commissioner" such an obligation must be read in the light that the Regulations themselves contemplate important decisions being made, and possibly reviewed, on foot of that written report. This in itself suggests that the Regulations contemplated a narrative setting out the views, and therefore the reasons, of the Board."

27. The applicants thus argue that there is an onus on the Board of Inquiry on its own initiative to bring before it the evidence heard in the District Court criminal prosecution.

28. The respondents submit that the onus is not on the Board but the Applicants to raise the issue at the inquiry. Paragraph 75 of the respondents legal submissions states:-

"It is further submitted that the argument that the Board of Inquiry failed to have any or any adequate regard for the investigation, proceedings and outcome before the District Court does not stand up to scrutiny. What the Board decided in its ruling of 15th October 2015 was that if the Applicants' solicitor believed it was appropriate to call any evidence or witnesses in relation to the District Court matter he could make an application to the Board of Inquiry and the Board would consider that application. It is noteworthy that no such application was made to the Board and therefore it is difficult to see how the Applicants can argue that the Board of Inquiry failed to have regard to the proceedings and outcome of the District Court proceedings or refused to inquire into the circumstances of the prosecution and the acquittal in the District Court, when no application was made by the Applicants solicitors, after the Board of Inquiry ruling, for such evidence to be adduced before the Board of Inquiry."

29. One issue which is of some concern to the court is that the regulations do not specify who is responsible for implementing a decision pursuant to section 8(2)(a) and (b). to commence, continue or discontinue a disciplinary hearing.

30. The wording of s. 8(2)(a) and (b) implies that a decision maker is not precluded from proceeding with an inquiry into the same issue in respect of which the member is acquitted in a criminal prosecution unless in all the circumstances of the particular case and the cumulative effect, it would be unfair and oppressive to commence or continue the proceedings. Section 8(2)(a) is not a stand alone provision but has to be read in conjunction with section 8(2)(b).

31. There is nothing in the Regulations to prevent an investigating officer appointed by the Commissioner pursuant to s. 23 of the Regulations making a recommendation pursuant to section 8. It is open to the Commissioner not to commence disciplinary proceedings if s. 8(2)(a) and (b) applies.

32. There may be occasions when s. 8(2)(a) applies, but it is still obvious from an investigating officer's report that the statements taken disclose a *prima facie* case of a serious breach of discipline.

33. It is open to an investigating officer as part of an investigation where a criminal prosecution has been initiated against a member and the member has been acquitted to recommend that a *prima facie* case of a serious breach of discipline separately from the facts in issue in the criminal prosecution arises although for investigation purposes, the series of events is treated as one. This is the situation here.

34. It is not obligatory either on an investigating officer, the Commissioner, or a Board of Inquiry set up pursuant to s. 25 of the Regulations, in every case to refer specifically to the provisions of s. 8 of the Regulations. That would depend on the nature of the evidence assembled, and the report of the investigating officer.

35. There may be occasions where the breach of discipline investigated, is so closely related to the evidence adduced in the criminal

prosecution that it is incumbent on an investigating officer to examine the evidence tendered at the criminal trial and for the Commissioner when considering commencement of disciplinary proceedings, to take into consideration that evidence, and if a Board of Inquiry is set up that board has the continuing responsibility to determine if s. 8(2)(a) and (b) applies.

36. For example, if a member when off duty was charged with an offence pursuant to s. 3 of the Misuse of Drugs Act 1977, as amended, for possession of a prescribed drug and there was no other extraneous issue as to the member's behaviour other than the possession and the relevant court conducting the criminal trial has acquitted the member. It would then be incumbent on an investigating officer, and the Commissioner to consider the evidence adduced in the criminal prosecution or if the Commissioner has decided to activate a Board of Inquiry, the Board would have an ongoing responsibility to examine the evidence in the District Court prosecution.

37. It is not obligatory though it may be necessary in some cases to consider the evidence adduced at a criminal prosecution of a member. It is incorrect to state that in all cases of an alleged serious breach of discipline where a criminal prosecution has taken place that the evidence tendered at the trial has to be considered.

38. On an analysis of Superintendent Alan Cunningham's investigation into the events surrounding the 5th December, 2013, there are three witnesses to the events that preceded the allegation of assault. The *prima facie* evidence adduced is that these events occurred at least ten minutes prior to the events, the subject matter of the criminal prosecution. Two of those witnesses according to the investigating officer's report were not present when the events surrounding the criminal prosecution occurred. Ashley Moore and Keith O'Neill deal only with the events surrounding the allegation that the applicants tried to gain entry to an apartment block at Upper Cecil Street in Limerick and that they were looking for girls or brazzers. Luke Morrison is a witness to both events, while James Morrison is a witness only in respect of the events, the subject of the criminal prosecution.

39. The Board in its determination on 15th October 2015 of the preliminary submissions of the applicants, stated:-

"The Board having reviewed the transcript is satisfied that Garda Naughton and Garda Kenny were charged with a section 2 assault contrary to the Non Fatal Offences against the Person Act 1997 in the District Court. Both members were acquitted of these offences. The matter before the Board refers to alleged breaches of discipline...The Board is satisfied that this Board of Inquiry is not conducting an inquiry into the same issues in respect of which the member was acquitted of in the District Court. The Board is also satisfied that in all the circumstances of the case it would not be unfair or oppressive to commence or continue these proceedings."

40. It is the court's opinion that the investigating officer in his recommendation and the Commissioner in her decision, had ample *prima facie* evidence to commence an inquiry and to invoke s. 25 to set up a Board of Inquiry without reference to s. 8 of the Regulations.

41. A Board of Inquiry invoked pursuant to Part 3 of the Regulations has a responsibility to apply fair procedures to the conduct of its investigation. If an issue of credibility arises in respect of a witness upon whose evidence the Board wishes to rely, it has to ensure that the members accused have the right to test the credibility of that witness.

42. The logic of the submissions of the applicants to this Court is that it has to direct the Board of Inquiry on how to apply fair procedures in the conduct of the disciplinary hearing. It would be inappropriate for this Court to direct how the Board approaches the issue of the credibility of the witnesses who alleged that the applicants attempted to gain entry to an apartment and intimated they were looking for girls or brazzers. The Board with its specialist expertise is entitled to curial deference from this Court. Its ruling was not illogical or irrational. Its ruling was also in accordance with the established jurisprudence of the Superior Courts.

43. If the Board of Inquiry does not apply fair procedures in ensuring that the evidence of the relevant witnesses is credible then it is open to the applicants to judicially review, the final decision of the Commissioner based on the recommendation of the Board of Inquiry.

44. The reliefs are refused