THE HIGH COURT

[2023] IEHC 735

[Record No. 2023/352 JR]

BETWEEN:

PAUL BAYNHAM

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA, MINISTER FOR JUSTICE, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 20th day of December, 2023

INTRODUCTION

1. The Applicant is a member of An Garda Síochána who has been suspended from work on basic pay since the 7th of November, 2020 (a period in excess of three years). The Applicant's suspension is recorded and renewed in a series of "*suspension notices*" each of three months duration. He is one of several members of An Garda Síochána who are suspended from duty while directions are awaited from the Director of Public Prosecutions (hereinafter "the D.P.P.") arising from two investigations referred to in the papers before me as "*Operation Bath*" and "*Operation Modulus*". These investigations centre around the allegations of perverting the course of justice by serving members and retired members of An Garda Síochána and members of the public.

2. The investigations relate to a practice whereby fixed charge penalty notices were either not written up, not prosecuted in court and/or cancelled on the system. This practice is described as "*squaring*", a colloquial term apparently used in text communication identified on mobile phones seized as part of both investigations. In the Applicant's case some thirty-eight investigation files involving or "*featuring*" him as either a primary or secondary suspect have

been referred to the D.P.P. Two of these relate to *Operation Bath* and were referred in July, 2020 and thirty-six relate to *Operation Modulus* and were referred at various times between July, 2022 and January, 2023. D.P.P. directions are yet to be received in respect of any of the investigation files concerning the Applicant, even though it is more than three and a half years since the first files were referred.

3. In these proceedings the Applicant challenges his continuing suspension as unlawful because of, *inter alia*, a refusal to provide him with the material considered in deciding to extend his suspension, a failure to provide him with the reasons for the suspension, the passage of time (delay) and the absence of a proper legal basis for suspension (*vires*) in circumstances where the power to suspend under Regulation 7 of the Garda Síochána (Discipline) Regulations 2007 (S.I. 214 of 2007)(hereinafter "the 2007 Disciplinary Regulations") does not come within the parameters of the regulatory powers prescribed under s. 123 of the Garda Síochána Act, 2005 (hereinafter "the 2005 Act"). Although suspended on basic pay, it is claimed that the Applicant is at continuing financial loss due to the loss of allowances whilst suspended and he claims damage to his reputation and health. An application for interlocutory relief has not been pursued as an early hearing date was accommodated.

4. The Respondents maintain that elements of the Applicant's case are out of time and that only the last suspension notice stands capable of being impugned in these proceedings. The Respondents contend that the decision to suspend the Applicant is in no way a decision adjudicating or reaching a decision on the guilt or innocence of the member thereby attracting disclosure of materials relied upon as a matter of fair procedures. They contend that the requirements of fair procedures are met and the Applicant is fully aware of the basis for his suspension. The Respondents maintain that the need for discipline within the force is an integral element of the effective operations of An Garda Síochána. A power to suspend pending the conclusion of investigations is said to be critical to such effective operations and such a power derives its legal basis from regulatory powers prescribed under s. 123 of the 2005 Act.

5. The Respondents rely on the fact that the investigation is still ongoing. It is apprehended that if the Applicant were allowed to return to work in any capacity, there would be serious concerns about the fact that he may be in close contact with other co-accused, persons of interest and witnesses in these two investigations. It is the Respondents' position

that the continuing suspension is lawful in circumstances where the D.P.P. has made no directions and where the Applicant is suspected of multiple serious disciplinary breaches.

6. Overall, between *Operation Bath* and *Operation Modulus*, some one hundred and ninety-eight files have been generated. It is unclear in how many files D.P.P. directions have issued. It appears to be common case, however, albeit not addressed by either the Applicant or the Respondents on affidavit, that the trial of a retired Garda Superintendent has commenced. Seemingly a preliminary ruling made in that trial in recent weeks is now under appeal.

7. No attempt has been made to explain the delay in this case by reference to this now suspended trial. The potential significance of the fact that criminal proceedings have been directed and have proceeded in the case of a third-party retired Garda Superintendent only is unclear. Furthermore, while several other Garda members filed judicial review proceedings at the same time as the Applicant, it was determined at leave stage (Meenan J.) that a decision on applications in these other cases would await the outcome of these proceedings. Several of the intended applicants have sworn short affidavits which do not detail the allegations against them personally, but which are generally supportive of the Applicant's claims by advancing a shared understanding that the focus of the investigations, at least initially, had been on the retired superintendent whose trial has commenced.

FACTUAL BACKGROUND

8. The Applicant is a member of An Garda Síochána attested in March, 2010. He is attached to the Roads Policing Unit at Henry Street, Limerick since 2018. While some background facts are disputed and there is less than full information on both sides of this case, I am satisfied that the following pertinent facts are established on the evidence before me.

9. Sometime prior to October, 2019, the Applicant became aware of an investigation being conducted into a member of Garda Rank in West Limerick and met with the National Bureau of Criminal Investigation (hereinafter "the NBCI") by appointment in this context. According to a statement prepared by him subsequently, the Applicant made a witness statement as part of that investigation. He also showed his phone and provided a copy of his notes and screenshots of a text message which had been sent to him. Neither the witness statements nor

copy notes or screenshots are in evidence before me and the Applicant did not disclose the fact of this previous interaction in moving his leave application.

10. As disclosed in the one statement made by the Applicant which is in evidence (made on the occasion of an interview under caution in April, 2022), the Applicant became aware of a rumour on the 30th of September, 2019, that members of Limerick Roads Policing would be approached and have their mobile phones seized in relation to an investigation into a named local superintendent. On the 2nd of October, 2019, the Applicant received a phone call from a named Chief Superintendent to advise him that the NBCI had a warrant for his phone and that the NBCI would meet him by arrangement on the 4th of October, 2019.

11. It appears, in fact, that a warrant to seize the Applicant's phone under s. 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as amended) was sought from the District Court on the 3rd of October, 2019 on foot of a sworn information. On the 4th of October, 2019, the Applicant attended a meeting with the NBCI accompanied by a representative from the Garda Representative Association (hereinafter "GRA"). The warrant which had issued from the District Court was executed in the presence of the Applicant's GRA representative and the Applicant surrendered his phone. The Applicant admits in his later statement that he was told that the NBCI wished to speak with him in relation to two names and two dates which were provided to him. He was informed at that meeting in early October, 2019 that he would be interviewed "*under camera*" in the coming week in connection with a criminal investigation in respect of the "*squaring*" of penalty charges.

12. I am satisfied on the balance of probabilities that the Applicant was specifically told that he was being investigated for alleged attempts to pervert the course of justice relating to his involvement in two matters, namely:

> (1) A prosecution under the Road Traffic Act for an alleged offence of Holding a Mobile Telephone on the 22nd of March, 2018. The suspect was J. D. This prosecution concluded at Limerick District Court on the 17th of December, 2018 when it was withdrawn by the State.
> (2) A prosecution under the Road Traffic Act for an alleged offence of Holding a Mobile Telephone on the 2nd of October 2018 02/10/2018 perpetrated by L. C.

13. The fact that he was so advised is consistent with his later claim that he was told he was a "*suspect*" but depending on his responses in interview his status might change to that of "*witness*". I am satisfied that the Applicant could not but have been aware that he was the subject of a criminal investigation for suspected offences and the nature of the suspected offences.

14. The Applicant was interviewed under caution as part of the criminal investigation on the 10th of October, 2019 in the company of his solicitor. Two allegations were put to the Applicant during the meeting and interview in October, 2019 relating to the matters identified to him the previous week. The Applicant made a voluntary cautioned statement. This statement has not been produced in evidence before me by either side. The Applicant maintains, but this is disputed on behalf of the Respondents, that the questioning in October, 2019 was directed towards the investigation of alleged wrongdoing on the part of a named local superintendent (the same individual whose trial recently commenced and in respect of which an appeal is now pending) and that he was encouraged to make incriminating disclosures in relation to the said retired superintendent. It is noteworthy, however, that this interview was under camera (and presumably a recording will be available at any trial in which the Applicant's statements during interview is relied upon as evidence) and that the Applicant's solicitor, who was present, has not confirmed the Applicant's account in this regard.

15. I am satisfied that the two allegations concerning the *D.P.P. v. J. D.* and *D.P.P. v. L.C.* were put to the Applicant during this interview but I do not know what he said in response because neither side has put that evidence before me. Nonetheless, it is clear that the Applicant was made aware of the nature of the suspected offences under investigation concerning him.

16. Directions from the D.P.P. were sought in July, 2020 in respect of these two files concerning the Applicant. These files were amongst thirty-six files submitted at that time with the balance of the files un-related to the Applicant.

17. Between October, 2019 and November, 2020, the Applicant continued to work as normal. On the 4th of November, 2020, however, a further information was sworn under s.10 of the Criminal Justice (Miscellaneous Provisions) Act, 1997 and a warrant issued for the seizure of the Applicant's fixed charge notice notepad and eighteen official Garda notebooks. On that same day, the 4th of November, 2020, the Applicant was advised that NBCI had

warrants for his notebooks and his fixed charge penalty books between the dates of the 22nd of December, 2017 to the 29th of September, 2019 and that they would attend the following day to collect them. The Applicant attended with his GRA representative the following day, the 5th of November, 2020, to hand over his notebooks and fixed charged penalty books.

18. Over a year after the interviews with the Applicant in October, 2019 but within three days of the request to surrender his notebooks and fixed charged penalty books, on the 7th of November, 2020, the Applicant received a telephone call to attend at the Road Policing Office. On attendance, he was advised that he was to be suspended with immediate effect. On that date, he was served with a suspension notice stating that he was suspended until the 1st of February, 2021 pursuant to Regulation 7 of the 2007 Disciplinary Regulations. He was required to hand over his Garda badge and his Garda issued phone.

19. There is no evidence that the Applicant was advised at the time of his suspension in November, 2020 that further incidents were under investigation and I am satisfied that he was not. Accordingly, I am satisfied that the Applicant was not made aware of any specific change in circumstances in November, 2020 which might warrant his suspension when it had not been warranted over the previous year (other than what he might have gleaned from the fact that his notebooks and fixed charge penalty books had recently been seized as part of the criminal investigation). Despite this and despite being legally represented at all material times, the Applicant did not challenge his suspension at that time and is now well out of time to do so.

20. The Applicant has received numerous further suspension notices since then, made every three months, such that his suspension has been unbroken since 7th of November, 2020. Each one of the suspension notices exhibited in the proceedings contain precisely the same particulars save as to the dates of the suspension (giving a new beginning and end date each time) and the identity of the decision maker (there have been two Assistant Commissioners involved in the decisions to extend), namely that the suspension arises from alleged inappropriate interference with the administration and processing of fixed charge notices and that the Applicant allegedly received a gift. Each suspension notice is endorsed as follows in identical terms:

> *"The suspension from duty arises as a result of:*

Alleged inappropriate interference in the administration and processing of Fixed Charge Penalty Notices and Fixed Charge Notices between 22nd December 2017 to 29th September 2019.

Allegedly receiving a 'gift' as a reward for the alleged inappropriate interference in the administration and processing of Fixed Charge Penalty Notices and Fixed Charge Notices between 22nd December 2017 to 29th September 2019."

21. The first particular endorsed is couched in terms which are capable of including the two allegations discussed with the Applicant in October, 2020, albeit the specific incidents relied upon are not identified. As for the second particular endorsed, there is no evidence before me that the allegation the Applicant received a gift as a reward for alleged appropriate interference was ever raised with the Applicant prior to the service of a suspension notice or addressed with him subsequently. Nor is there evidence to the contrary. No information whatsoever regarding this alleged gift has been put before me. In circumstances where there is no evidence that the Applicant ever queried this reference to a gift or sought particulars of the alleged gift, as one would expect if the Applicant did not understand the reference, I am satisfied that the Applicant likely knows what this referred to.

22. As apparent from the foregoing, the various suspension notices served make no reference to an ongoing criminal investigation or disciplinary investigation or the requirements of discipline in the force or the interests of the force. They rest only on the two particulars as aforesaid and a reference to an authorisation under s. 31 of the 2005 Act and Regulation 7 of the 2007 Discipline Regulations. These particulars have remained unchanged over time since the first notice was served in November, 2020 despite the ongoing nature of the investigation and the fact that further files have been referred to the DPP for directions.

23. An investigating officer of superintendent rank was appointed under the 2007 Discipline Regulations in respect of a disciplinary investigation concerning the Applicant. There is a lack of clarity as to the date of his appointment. It was suggested during oral submissions on behalf of the Respondents that the date pleaded by the Applicant of the 1st of November, 2020 was incorrect and that the investigating officer had not been appointed when the suspension was imposed but this was not addressed in the Respondents' Opposition papers. In an affidavit sworn while the proceedings were at hearing, the investigating superintendent confirmed that he was appointed but does not exhibit his appointment document nor confirm

the date of his appointment. He said he met with the Applicant on the 26th of January, 2021 and served him with a copy of the Form IA32 being a Notice of Investigation pursuant to Regulation 24 of the 2007 Discipline Regulations.

24. The details of the alleged breach as given on the Form IA32 aligned with those endorsed on the suspension notices stating:

> *"It is alleged that there was inappropriate interference in the administration and processing of Fixed Charge Penalty Notices and Fixed Charge Notices between 22nd December 2017 and 29th September, 2019.*
>
> *It is alleged that you received a "gift" as a reward for the inappropriate interference in the administration and processing of Fixed Charge Penalty Notices and Fixed Charge Notices between 22nd December 2017 to 29th September 2019."*

25. It appears that during this meeting in January, 2021 the Applicant was informed by the investigating officer that disciplinary matters would be put in abeyance pending the conclusion of the criminal investigation into allegations of wrongdoing made against him. It has since been suggested that the Applicant consented to this course of action, but the Applicant denies this. I am satisfied on the balance of probabilities that the Applicant was informed that the disciplinary matter would not be progressed pending the conclusion of the criminal investigation but was not invited to consent to this approach. This is supported by the language used in internal correspondence by the investigating officer when a query was raised internally in this regard in March, 2021. The fact that a practice of obtaining a signed consent to not progressing a disciplinary investigation pending the conclusion of a criminal investigation documented in at least one other case (as recorded in *Brannock v. Commissioner of An Garda Siochana* [2023] IEHC 300) was not observed in this case is also consistent with a finding that the Applicant's consent was not obtained.

26. While I am satisfied that the Applicant has not been invited to and has not consented to deferring a disciplinary investigation indefinitely pending a conclusion of the criminal investigation, there is no evidence that he has agitated for the disciplinary process to be pursued in tandem with or ahead of the criminal investigation in view of delays with that investigation

which have ensued. Accordingly, I am satisfied that by his actions he has acquiesced in the disciplinary process awaiting decisions on the criminal investigation.

27. Although not pressing for the disciplinary process to be progressed, the Applicant has sought information regarding the status of the criminal investigation (although not on a repeat or recurring basis). By letter dated the 1st of June, 2021, the Applicant's solicitor wrote to the Commissioner to enquire about the status of the criminal investigation, whether the matter had been considered by the DPP and whether a decision had been made regarding the Applicant.

28. By reply dated the 3rd of June, 2021, the Applicant was advised:

> *"investigation files concerning your client 's interviews were forwarded to the Office of the Director of Public Prosecutions in July 2020 and whilst directions have been received on some matters your client's directions are outstanding."*

29. The Applicant was contacted on the 31st of March, 2022 by the NBCI and provided with brief details (referred to as "*pre-disclosure*") as to a further twenty-eight incidents alleged to have occurred between 22nd of December, 2017 and 3rd of September, 2019 and requested an interview with the Applicant. The Applicant attended an interview in April, 2022 in the company of his solicitor. A copy of all the incident documentation in respect of each incident that was under investigation and intended to be used by the interview team during the interview was provided to the Applicant and his solicitor prior to the commencement of the interview. This included downloads of text communications suspected to have originated from the Applicant's phone (or emanating from phones of other Gardaí but involving the Applicant) which related specifically to the matters under investigation. While afforded an opportunity to examine this material, the Applicant and his solicitor declined to do so. This material is not in evidence before me.

30. Instead, the Applicant provided a pre-prepared statement. He then left the interview before any questions about the matters under investigation were put to him. Although he claims that no attempt was made to ask him questions, the final line of his statement reads "*on the advice of my solicitor I will be making no further comment*" and makes clear that the Applicant was unwilling to answer any further questions. This statement was not exhibited by the Applicant in moving his application for leave in these proceedings.

31. Accordingly, notwithstanding the Applicant's complaint in moving an application *ex parte* that he has not been afforded details of the allegations against him since April, 2022, it is clear that on the occasion of the interview which occurred in April, 2022 he declined the opportunity to inspect documentation in respect of some twenty-eight further allegations referred to in advance. Instead, he elected to provide a prepared statement which confined itself to his background in the force, issues with the conduct of the investigation and the way in which he had been treated and the effect this had on him but not addressing the substance of any of the allegations made.

32. On the 15th of July, 2022, the Applicant's solicitor wrote requesting a copy of the materials in the possession of the decision maker when reviewing the Applicant's suspension for the purpose of making submissions in the following terms:

> *"We are instructed to write to request copies of all materials relied upon by you when considering whether or not to extend our clients suspension on each occasion that it has taken place and if it is intended to extend their suspension periods any further periods of time.*
>
> *On receipt of the materials we intend to address you by way of submission as to why the suspension is not required and our clients should be allowed to return to duty."*

33. This was the first proposal to make any submission in respect of his continued suspension despite the fact that he had been suspended for some considerable time (more than eighteen months) as of July, 2022 on foot of successive suspension notices. No response had been received to this request when the suspension notice in place at that time was renewed on the 27th of July, 2022. Whilst the Applicant must have been aware that the existing suspension notice was due to expire or be extended, he did not elect to put in submissions without prejudice to an entitlement to expand on those submissions upon receipt of the material he had requested, if received.

34. On the 2nd of August, 2022, the Applicant's solicitor wrote again in the following terms:

"You are aware since the middle of the month of July that this office has sought to address you regarding our clients ongoing suspensions. Notwithstanding our entirely reasonable request, you have proceeded unilaterally without any regard for the representations that may be made on behalf of the Members affected by your decision.

Our clients sought to be heard on matters affecting their livelihoods and wellbeing and that of their families and such a request is in our respectful submission entirely reasonably and a function of the fair procedures required in circumstances such as these.

We are therefore instructed to repeat our request for copies of all materials relied upon by you when considering whether or not to extend our clients' suspensions on each occasion, including the most recent occasion, so that we might meaningfully address you as to why these suspensions are not required and our clients ought to be returned to duty. Please let us have the materials within 4 weeks from the date hereof so that we have time to address you in advance of any future decisions regarding our clients."

35. On the 13th of September, 2022, the Applicant was advised by letter from the Acting Commissioner then responsible for reviewing the suspension notice that:

"Your clients are fully aware of the reasons for their suspension as per Form-1A 71 issued to them and it is not appropriate at this stage in the proceedings to furnish any further materiel.

Your clients' suspension will continue to be reviewed on a regular basis in accordance with Regulation 7(3) of the Garda Siochana (Discipline) Regulations, 2007 as amended and they are entitled to make submissions they wish. Such submissions may be forwarded to their respective Divisional Officer, who will in turn forward the correspondence to Internal Affairs Section, Garda headquarters, for appropriate consideration."

36. The Applicant neither challenged this decision to refuse material at that time nor made submissions without prejudice to his claim to be entitled to the materials relied upon. He

appears to have taken no further substantive step in relation to interrogating the basis for his suspension until proceeding by way of judicial review application on foot of papers filed in these proceedings in April, 2023, well outside the time fixed under the Rules of the Superior Court, 1986 (as amended) (Order 84 r. 21) for proceeding by way of judicial review.

37. From the replying affidavits filed on behalf of the Respondents in these proceedings, it appears that further investigation files involving the Applicant were submitted in July 2022, some three months after the Applicant's interview in April, 2022 and that files continued to be referred to the DPP up to January, 2023. It has been confirmed on affidavit in relation to *Operation Modulus* that:

i. The Applicant featured in five files in which another Garda is the primary suspect which were submitted to the D.P.P. on the 11th of July 2022;
ii. The Applicant featured in a file in which a separate female Garda is the primary suspect which was submitted to the D.P.P. on the 13th of September 2022;
iii. The Applicant featured in another two files in which a separate male Garda is the primary suspect which were submitted to the D.P.P. on the 25th of October 2022;
iv. Twenty-nine files were submitted to the D.P.P. on the 18th of January 2023 in which he is the primary suspect.

38. Thus, as of July, 2023 when replying affidavits were filed, a significant number of fresh files had been submitted to the D.P.P. concerning the Applicant as a primary suspect. There is no evidence that the Applicant was advised of the fact that additional files had been sent to the D.P.P before proceeding by way of judicial review application in April, 2023. It seems that this information was only communicated to the Applicant through the replying affidavits filed in these proceedings and it is the Respondents' position that the Applicant is not entitled to be kept informed as to the status of the investigation. At the date of hearing in November, 2023, directions were awaited on all files, including those submitted in July, 2020, some three and a half years ago.

39. There is no evidence that the Applicant has been advised that the subject matter of these additional files form part of the disciplinary process which has been commenced but not progressed. Indeed, there is no evidence that any active step has been taken in the disciplinary

process since the meeting in January, 2021 when the Applicant was served with a notice under Regulation 24 in the terms set out above.

40. Although the Assistant Commissioners claim to be "*fully briefed*" in signing new suspension notices periodically, no information has been put before me as to what such briefing entailed. It is unclear, for example, what information is available to the Assistant Commissioner in extending the suspension notice as to when a decision is likely to be made as to directions on an investigation file concerning the Applicant and what factors are contributing to a delay in a decision on the files concerning the Applicant. Nor is it clear what, if any, consideration has been given to the strength of the allegations against the Applicant and the likely outcome of the ongoing process. It is unclear to what extent reliance has been placed on the fact that additional investigation files in making further suspension orders.

POLICY DOCUMENT

41. The Policy Guidelines on the application of Regulation 7 of the 2007 Disciplinary Regulations are set out in the "*Policy Document on Suspension from Duty of Members of the Garda Siochana under the Garda Siochana (Discipline) Regulations 2007 as amended*" [hereinafter "the Guidelines"]. The Guidelines provide for the types of circumstances in which suspension may occur and expressly envisage suspension, *inter alia*, prior to appearing in court in respect of criminal charges that may result in a criminal sentence being imposed or where there is evidence to show that a member may have committed acts of such seriousness as would likely result in his dismissal from An Garda Siochana if they are proved true but not until such time until investigation rules out the possibility of the member being the subject of false or malicious allegation. The Guidelines provide that in all cases where a member is suspended, he shall be informed of the reasons for his suspension.

42. The Guidelines distinguish between short term and long-term suspension. A long-term suspension appears to be understood under the Guidelines to be a suspension of more than ten days. The Guidelines provide in respect of long-term suspensions that the views of the member's Divisional Officer will be sought on the following matters when the issue of a member's long-term suspension is being considered:

Primary Considerations for Suspension

i. Strength of evidence,
ii. Seriousness of allegation,
iii. Risk to members of the public,
iv. Risk to colleagues,
v. Potential to pervert the course of justice/suborn colleagues,
vi. Options of alternatives to Suspension.

Secondary Considerations for Suspension

i. Likely outcome,
ii. Estimated time to conclude investigation,
iii. Relevant complaint history,
iv. Current performance,
v. Impact on police/public relations,
vi. Impact on service morale,
vii. Risk to officer/welfare considerations.

43. The Guidelines further provide under the heading "*Timely Investigation of Disciplinary Matters*" that any discipline investigation "*will proceed expeditiously in accordance with the provisions of the Garda Siochana (Discipline) Regulations 2007 as amended and relevant case law*."

STATUTORY PROVISIONS

44. Although primary focus in these proceedings has been on s. 123 of the 2005 Act, several provisions warrant mention in the context of consideration of the vires of the Applicant's suspension and the disciplinary regime established under the 2005 Act, particularly insofar as provision is made for maintaining discipline.

45. Section 14 of the 2005 Act provides for summary dismissal of members by the Commissioner, subject to certain statutory preconditions and irrespective of his powers under the disciplinary regulations, where the Commissioner is of the opinion that by reason of the

member's conduct (which includes any act or omission), his or her continued membership would undermine public confidence in An Garda Síochána and the dismissal of the member is necessary to maintain that confidence. For a s. 14 dismissal to be in accordance with that provision, the member must have been informed of the basis for the Commissioner's opinion and has been given an opportunity to respond to the stated basis for that opinion and to advance reasons against his or her dismissal and the Commissioner must consider any such response by the member and any reasons advanced by the member.

46. Section 26 of the 2005 Act provides for the functions of the Garda Commissioner, including insofar as relevant to the within proceedings, the function to direct and control the Garda Síochána (s. 26(1)(a)) and to carry on and manage and control generally the administration and business of An Garda Síochána, including by arranging for the recruitment, training and appointment of its members and civilian staff (s. 26(1)(b)).

47. Section 31 provides for delegation by the Commissioner of powers vested in him under the 2005 Act and a delegation recorded in writing of the Commissioner's power to suspend occurred in this case. Section 39 prescribes a broad duty on members to account and provides under s. 39(4) that any information provided by a member of An Garda Síochána in accordance with a direction under s. 39(1) to account for an act or omission is not admissible in any criminal proceedings against the member. Section 39(5) expressly distinguishes criminal from civil proceedings to make clear that s. 39(4) does not operate to preclude reliance on such information in disciplinary proceedings.

48. The parallel and sequential investigation of complaints which also result in criminal or disciplinary investigation is provided for under Parts 3 and 4 of the 2005 Act (see, in particular, ss. 95(5), 98(4) and 101(5) of the 2005 Act) which establishes the Garda Siochana Ombudsman Commission (hereinafter "GSOC") and vests it with broad powers of investigation in relation to Garda conduct and provides for a direct power of referral to the DPP (in accordance with s. 101) where GSOC is of the opinion that the conduct under investigation may constitute an offence by the member of An Garda Síochána concerned. Where a GSOC report under ss. 94 or 95 of the 2005 Act recommends disciplinary proceedings, provision is made for reliance on the GSOC report in any such proceedings in accordance with s. 97(2) of the 2005 Act. Notably, s.103 of the 2005 Act (in Part 4) of the 2005 Act imposes a duty on the Ombudsman Commission to keep affected persons, including the member concerned, informed of the

progress and results of an investigation. No similar provision is identified as requiring the Commissioner to keep the Applicant informed of the progress of a disciplinary investigation which has not been the subject of referral to GSOC.

49. A broad range of regulatory powers are prescribed under Part VI of the 2005 Act including a power under s. 121(1)(b) to make regulations generally (with the approval of the Government) for the purposes of giving full effect to this Act, under s. 121(3) to regulate for such incidental, supplementary and consequential provisions as appear to the Minister to be necessary or expedient for the purposes of the regulations and under s. 122(1)(*r*) to make regulations for "*any other matter relating to the organisation, training, carrying out of duties, efficiency, management or administration of the Garda Síochána*".

50. Section 123 is, however, the regulatory power with which I am principally concerned. It provides specifically for the promulgation of disciplinary regulations and is the provision relied upon as the source of the power to suspend members contained in the 2007 Discipline Regulations. Section 123(1) provides:

> *"123— (1) The Minister may, after consulting with the Garda Commissioner and with the approval of the Government, make 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).*

51. Section 123(2) identifies a broad range of acts and omissions that may be subject to disciplinary action under regulations adopted. Section 123(3) makes clear that the power to regulate in relation to discipline includes provision for procedures in relation to disciplinary actions and complaints referred to GSOC and subject to investigation on foot of such referral. In this regard the potential for both disciplinary and criminal investigations is made clear. Section 123(5) provides specifically and in detail for a range of regulatory powers concerned with the establishment of a disciplinary board and an appeal body. Finally, s. 123(8) defines "*disciplinary action*" for the purpose of s. 123 as:

> *""disciplinary action" means—*
>
> *(a) dismissal,*

(b) requirement to retire or resign as an alternative to dismissal,

(c) reduction in rank,

(d) reduction in pay not exceeding 4 weeks' pay,

(e) reprimand,

(f) warning,

(g) caution, or

(h) advice."

52. It is noteworthy that while broad powers are vested under s. 123 of the 2005 Act to make regulations "*concerning the maintenance of discipline in the Garda Síochána"* and detailed provision is made for a wide range of measures, a power to suspend does not feature in express terms. Suspension is not one of the "*disciplinary actions*" specified under s. 123(8) of the 2005 Act and does not appear to be available as a disciplinary action under the 2005 Act.

53. The 2007 Disciplinary Regulations were promulgated in May, 2007 and are expressed to be made pursuant to powers conferred by s. 123 of the 2005 Act after consulting with the Commissioner and with the approval of the Government. The 2007 Disciplinary Regulations are signed not alone by the then Minister for Justice but also by the then Taoiseach under the official seal of the Government. Notwithstanding that suspension is not mentioned in s. 123 of the 2005 Act, Regulation 7 of the 2007 Disciplinary Regulations provides:

"7. (1) Where, in the opinion of the Commissioner, the circumstances render such a course desirable in the interests of the Garda Síochána, he or she may suspend a member from duty.

(2) A member so suspended remains suspended until the Commissioner decides that the suspension should cease.

(3) The Commissioner shall review the suspension of a member every 3 months or at such shorter intervals as he or she considers necessary, but any non-compliance with this paragraph does not of itself invalidate a suspension.

(4) A member to whom the function of suspending a member is delegated by the Commissioner may not suspend a member for a period exceeding 10 days, but the Commissioner may extend the suspension.

(5) A member who is suspended and is required by the Commissioner or the Government, as the case may be, to retire or resign as an alternative to dismissal, remains suspended during the period of any notice of retirement or resignation that may be given."

54. Regarding the co-existence of parallel disciplinary proceedings and criminal proceedings or the sequencing of same, Regulation 8 provides:

"8. (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."

55. In the case of alleged serious breach of discipline, the 2007 Disciplinary Regulations provide for the appointment of an investigating officer (as seemingly occurred on a date unknown prior to the 21st of January, 2021 in this case) under Regulation 23 and regulates the conduct of the investigation under Regulation 24 requiring that "*as soon as practicable after his or her appointment*", an investigating officer shall inform the member concerned in writing of the grounds on which it appears that the member may have been in breach of discipline. Regulation 24(2) refers to a requirement on the investigating officer to investigate using the words "*shall carry out the investigation*". Regulation 24(5) provides that "*within 7 days after the investigation has been completed*", the investigating officer shall submit to the Commissioner a written report of the investigation containing his or her recommendation as to whether the facts disclosed warrant the establishment of a board of inquiry, together with copies of any written statements made during it and details of any information, document or thing which the investigating officer was made aware of during the investigation. No time-frame is fixed for the conduct and conclusion of the investigation.

56. It is only where it appears from the report of the investigating officer that a serious breach of discipline has occurred that the Commissioner establishes a board of inquiry under Regulation 25. No express provision is made for the suspension of an investigation pending the conclusion of a criminal investigation. Under Regulation 27, detailed procedural requirements are prescribed requiring, *inter alia*, that the member is furnished with a statement of the facts established by the investigation and of any written statements made during it.

57. Regulation 29 provides for the hearing of the board of inquiry and provides for a right to be heard through oral or written evidence and a right to examine witnesses. Under Regulation 29(3) the Board may adjourn a hearing if it appears to it to be expedient to do so. Part 5 of the 2007 Disciplinary Regulations is directed to complaints referred to the Commissioner by GSOC. There is no fixed time-frame within which disciplinary proceedings must conclude under the 2007 Disciplinary Regulations and it is clear that a number of different processes are envisaged (before GSOC, the Commissioner and at the suit of the D.P.P.) as operating either in tandem or in parallel or in sequence.

ISSUES

58. The Applicant's case is that his suspension is unlawful because:

I. The Commissioner breached fair procedures by failing to notify the allegations leading to the suspension, failing to provide the material considered in continuing to suspend and failing to give reasons for the decision to suspend;
II. The suspension is vitiated by delay;
III. The Applicant has not been treated equally with other comparable persons;
IV. The Regulations under which the Commission made the impugned suspension is *ultra vires*, the parent Act in purporting to ascribe to the Commissioner a broader power than that envisaged in the parent Act.

DISCUSSION AND DECISION

59. The importance of placing cards "*face up*" on the table where a court is asked to determine in judicial review proceedings whether the procedures and processes followed have been lawful is clear (see, for example, McDermott J. in *McEvoy v. GSOC* [2015] IEHC 203). As may be apparent from the narrative given above regarding background facts as found by me, it is a matter of some concern to me that the important issues which arise in these proceedings require to be determined in the absence of full knowledge of the surrounding facts by reason of the way both sides have elected to present their cases.

60. While the Applicant complains about the failure to provide him with material, he elected not to put material in his possession before the Court (e.g. his original voluntary witness statement, his subsequent formal statement in April, 2022 nor the Form IA 32 served on him to notify the commencement of a disciplinary process) in bringing these proceedings and has been selective in his presentation of the facts.

61. For their parts the Respondents have also been less than fully forthcoming on matters of concern including their knowledge, if any, as to why no decisions have yet been made on the files referred for direction, the cause for delay in the investigations and the information available to the decision maker suspending the Applicant's on successive occasions. If there has been correspondence between the D.P.P. and the NBCI in relation to the progress of the criminal investigation and the reasons for delay, this correspondence has not been adduced in

evidence. If there is a legitimate impediment to producing such correspondence, this impediment has not been explained. No information regarding the alleged gift referred to on each suspension notice nor the Applicant's response to same, if any, has been put before the Court. While it is now understood that some thirty-eight alleged offences concerning the Applicant are under investigation and have been referred to the D.P.P., the outline details of only thirty have been disclosed in evidence in these proceedings.

62. Despite this lack of full information, I now proceed to determine the issues before me to the extent that it is possible for me to do so.

I. *Alleged Breach of Fair Procedures*

63. Whether and the extent to which a decision to suspend a member of An Garda Siochána is subject to a requirement of fair procedures has been considered in a number of cases spanning several decades. The question was expressly addressed in the context of significant delay and the 2007 Regulations in *Canavan v. Commissioner of An Garda Siochána* [2016] IEHC 225, in which the Court (Baker J.) considered a body of caselaw with regard to the distinction between '*holding suspensions*' on the one hand and '*lengthy suspensions*' on the other.

64. In *Canavan*, Baker J. referred to the terms in which this distinction between a holding or summary suspension on the one hand, and a lengthy suspension on the other hand had been addressed by Barr J. in *Quirke v. Bord Luthchleas na hÉireann* [1988] 1 I.R. 83. She also considered the decision of Keane J. (as he then was) in *Gavin v. Minister for Finance* [2000] IESC 8 from which it is clear the full panoply of natural or constitutional justice requirements cannot apply as a matter of "*good sense and logic*" to a decision by an employer to impose a "*holding*" suspension as opposed to a punitive suspension. She further referred to *Morgan v. Trinity College Dublin & Ors.* [2003] 3 I.R. 157 where Kearns J. held that the open-ended suspension had to be seen as a form of punishment "*and a severe one at that*". Baker J. concluded in *Canavan* in reliance on the decision of Henchy J. in *Flynn v. An Post* [1987] I.R. 68 that while a "*holding*" suspension may be justified without giving the member the benefit of procedural fairness, the balance is tipped towards a requirement to observe fair procedures when the suspension has been a lengthy one, and when no substantive progress has been made in the investigation.

65. The delay in question in *Canavan* had been of almost two years. Baker J. concluded, albeit in circumstances where a decision had been made by the DPP in early course not to prosecute, that the suspension had ceased to be a "*holding*" suspension, even though the suspension overtly remained in place pending the conclusion of a disciplinary investigation, and that fair procedures applied in respect of the decision-making process. This appears to have been because of the length of the suspension and the lack of progress in relation to any disciplinary process in circumstances where there was no ongoing criminal investigation. The considerations are clearly different again in the case of a lengthy suspension such as the one with which I am concerned in these proceedings when the suspension is on full pay but a parallel criminal process has not concluded.

66. Most recently, the distinction between "*holding*" and "*lengthy*" suspensions was considered in *Brannock v. Commissioner of An Garda Siochana* [2023] IEHC 225. In his judgment in *Brannock*, Mulcahy J. stated (at para. 50):

> *"Although the debate at hearing was concerned with the question of whether the suspension in this case was a 'holding suspension', which would not be subject to a requirement for fair procedures, or a 'long-term' suspension, which would. It seems to me that use of these labels tends to cloud rather than illuminate the nature of the decision, and the extent of fair procedures which must be afforded."*

67. I agree with Mulcahy J. in *Brannock*, and it is indeed well established, that the extent of the procedural safeguards which must attend any decision to suspend falls along a spectrum depending on all of the circumstances. This is demonstrated by a review of the case-law such as that conducted in both *Canavan* and *Brannock*. Plainly underpinning the finding that the principles of natural or constitutional justice or fair procedure cannot be imposed on a decision to invoke a holding suspension in *Gavin* was the urgency of the situation. Similarly, in *McMahon*, the suspension was imposed in response to immediate and serious safety concerns warranting immediate action which precluded compliance with a full range of procedural guarantees.

68. It appears that in cases where urgent action is taken without observance of the full range of procedural guarantees, this has been considered permissible in response to the exigencies of

the circumstances and where the fact of suspension is not indicative of a finding of guilt or innocence. Where, on the other hand, suspension is imposed as a form of penalty, this should only occur at the conclusion of a process and where it is a sanction provided for under the applicable disciplinary code and due regard is had to the impact and importance of the decision to suspend has been reflected in the procedural safeguards deployed in the process. It is also the case, however, that the fact that a suspension is not intended as punitive, does not have the effect of exempting it from a requirement to be fair in the decision-making process and a range of factors including the length of the suspension may have a bearing.

69. As identified in *Brannock*, relevant considerations which inform conclusions as to the requirements of fair procedures include the length of the suspension, whether it is open-ended, whether it is with or without pay, whether it occurs in the context of clearly defined investigative or disciplinary procedures, whether the member consented to or acquiesced in the disciplinary process being stalled pending conclusion of a criminal investigation, the status of any criminal or other investigation and whether the suspension is intended to be punitive. In this latter regard, it seems that a suspension, even if not intended to be punitive may have to be regarded as such if it continues for a sufficiently long period, especially if there is no progress in an investigation or disciplinary proceedings. Suffice to say that where the circumstance of each case is different, none of the cases examined in submissions are on all fours with the circumstances of this case.

70. Where the factors which impact on the extent to which a requirement to observe procedural fairness applies are variable and wide-ranging, it seems to me that it is not particularly helpful to identify the extent of the requirements of fair procedures by the category of suspension be it holding, punitive, lengthy, or otherwise. The primary considerations must be the impact on and consequence of the decision for the affected person and the exigencies of the situation for the employer or any identified third party interest. However, while the label which may be applied to the suspension does not determine the extent to which fair procedures apply, it is helpful in identifying what the suspension represents as an aid to measuring its impact for the suspended person. It is this impact as measured by reference to what the suspension signifies for an individual which in turn informs consideration of what the requirements of fairness involve for the case balanced again other circumstances which may also require to be factored in.

71. Given that the suspension of a member is not a sanction available to the Commissioner under the 2007 Disciplinary Regulations, the suspension in this case must be understood not as a punitive measure but as a measure available when a disciplinary process (see *Brannock*, para. 53) or criminal or investigation process as contemplated under the Regulations is underway, at least for so long as there remains an active process in being. As in *O'Sullivan v. HSE* [2023] IESC 11 and the dictum of O'Donnell CJ. (at para. 26) the suspension on full pay pending determination of disciplinary proceedings is "*in the language of the caselaw a holding suspension*". Although the suspension in this case is a "*holding*" suspension as the outcome of a third-party investigation is awaited, a holding suspension loses some of its character as such for the purpose of a consideration of the requirements of fair procedures where there is a failure to progress the process for which suspension has been triggered. Accordingly, in deciding whether a lower or higher level of procedural fairness is required in deciding to continue or maintain a suspension, consideration needs to be given to whether there has been progress in the process such that it can be concluded quickly.

72. In this case the Applicant has been under investigation for in excess of four years (at least since October, 2019). Some progress has been made in the criminal investigation in that additional files have been referred to the DPP culminating with files referred in January, 2023. It is unclear what the impediment to directions is at this stage. No steps whatsoever have been taken in the disciplinary process since January, 2021. If there is a difficulty in progressing a disciplinary process in tandem with the criminal investigation, this has not been expanded upon in evidence before me. A lack of progress and delay such as that apparent in this case support a need for heightened procedural protection given the protracted nature of the suspension. Procedural safeguards cannot be treated as unnecessary because the suspension is not intended as indicative of guilt in the light of the significant period of delay in concluding any process and the duration of the suspension.

73. As for urgency as a consideration which might mitigate against a requirement to observe a full panoply of fair procedures, the initial suspension came more than a year after the Applicant's interview in October, 2019 as part of the criminal investigation and *Operation Bath*. For whatever unexplained reason, no suspension occurred in October, 2019. While the situation may have changed between October, 2019 and November, 2020 because of the number of additional incidents of similar type alleged wrongdoing uncovered through further investigation, there is nothing in evidence to suggest that the suspension was imposed on

November, 2020 due to a particular urgency or a dramatic change in the seriousness of concerns. In my view it cannot be concluded that the decision to suspend in this case was taken in response to an urgent situation which might justify a weakened obligation to respect fair procedures. A failure to comply with the requirements of fair procedures cannot be excused because of initial urgency in the light of the delay between the first interview in October, 2019 and the suspension in November, 2020 and in view of the passage of time since then.

74. In terms of the impact for the Applicant, although the Applicant is on full pay (in distinction to the situation in *Flynn*), he is at a financial loss. The impact for the Applicant of the continuing suspension is not only financial but also inevitably impacts on his reputation. As observed by Allen J. in *O'Neill v. Commissioner of An Garda Siochana* [2020] IEHC 448 (at para. 94) *"it is axiomatic that a suspension from duty will cause upset and distress*." Even in the absence of medical evidence which could carry particular weight, I accept that the Applicant's whole life is affected by being left in a limbo state as regards his career as a member of An Garda Síochána pending directions from the D.P.P. At that point the possibility that disciplinary proceedings may be continued even where no prosecution is directed also arises. Accordingly, the impact on the Applicant of a continuing suspension is significant, albeit this is not a factor which could otherwise preclude a warranted suspension but bears upon the extent of the obligation to provide fair procedures.

75. Although I accept that the suspension in this case does not arise from a finding of wrongdoing, the suspension of an employee, whether paid or unpaid and whether a holding or punitive measure, carries significant consequences. In addition to reputational and financial concerns, there is undoubtedly also a prejudice to Applicant in terms of impact on his life, mental health and interpersonal relations arising from delay in resolving these now long-standing issues. While such effects are normal incidents of issues of the type which led to an investigation in the first place and the need to investigate such matters properly and thoroughly, they are nonetheless of consequence where there is excessive delay in those processes. As observed by Hogan J. in *McMahon v. Irish Aviation Authority & Anor.* [2014] IEHC 431 (at para. 45):

> *"…it is also true that while the suspension has not had the same extensive financial implications for the applicant as it did for the plaintiff in Flynn (where suspension had been without pay), it is plain nonetheless that the suspension has had some financial implications for the plaintiff. But most of all this long suspension has had the effect of*

seriously affecting Mr. McMahon's constitutional right to a good name and dashing a cherished ambition of his. These are matters which are prejudicial in themselves."

76. Even where suspension does not arise from a finding of wrongdoing, the suspension of an employee, whether paid or unpaid and whether a holding or punitive measure is, *per* Noonan J. in *Bank of Ireland v. Reilly* [2015] IEHC 241 (at para. 40), a:

"*.. serious measure which can cause irreparable damage to his or her reputation and standing. It is potentially capable of constituting a significant blemish on the employee's employment record with consequences for his or her reputation and standing.*"

77. Where a suspension has significant implications for the Applicant, is protracted and exceeds three years and is in respect of an even older investigation, as in this case, then notwithstanding that the criminal investigation is ongoing, I am satisfied that there is a requirement to observe fair procedures in any decision to extend or continue suspension made periodically and every three months in the case of the Applicant. What precisely respect for fair procedures entails in terms of an obligation to provide information and how that obligation may be discharged varies and is always dependent on the circumstances of the given case. In my view the decision to continue suspension over such a protracted period with an apparent intention to do so indefinitely requires steps to be taken to ensure the process is fair in terms of the information available to the Applicant so that they can know the considerations informing the decision to suspend not least to enable advice to be taken, to be heard in respect of the decision and to challenge decisions within the process as unlawful as appropriate. In this case, the Applicant makes the argument that his right to fair procedures were infringed on several grounds which I propose to now consider.

78. Firstly, the Applicant claims not to have been made aware that he was being interviewed in respect of suspected criminal wrongdoing on his own part and that he was not advised why he was being suspended. The fact that he waited several years to advance this claim means that he is out of time to make this complaint in respect of historic suspension notices. I propose to consider his claim only to the extent that it has any continuing relevance to the suspension notice in being when proceedings commenced in April, 2023. The Applicant's pleaded claim

that allegations were not put to him prior to his suspension and for some considerable time thereafter is not in my view sustainable on the facts as found by me on the evidence before me. While the Applicant was suspended on the spot and without the facility to make representations in November, 2020, he knew that his suspension was in connection with allegations of "*squaring*" which were under investigation and he was aware of at least two specified alleged incidents. To this extent, whilst he might have queried what exactly had changed between October, 2019 and November, 2020, the lawfulness of the decision-making process or the proportionality or rationality of the decision at that time (but did not), he cannot deny that he was aware of the nature of matters under investigation. It is apparent that this investigation is ongoing and the "*high level*" reason for the suspension as communicated in successive suspension notices remains unchanged.

79. Furthermore, the Applicant accepts that he has been furnished with some particulars in relation to thirty allegations comprised of the two allegations put to him on his first interview in October, 2019 and twenty-eight which were notified in advance of his second interview in April, 2022. He accepts that he has declined an opportunity to examine the underlying documentation prior to a cautioned interview and has not subsequently sought copies of this underlying documentation. While the reference to some thirty-eight files submitted to the DPP for direction suggests that there may indeed be some allegations which have yet to be notified to the Applicant, the Applicant is clearly aware of the nature of the investigation and allegations thus far and has made no enquiry to establish what the additional matters may be.

80. In written submissions filed for the purpose of the hearing before me it is stated that no allegation of receiving a "*gift*" was put to the Applicant on the 10th of January, 2019 or at all. If this is true, it is strange indeed that the Applicant has not expressly averred to this fact in grounding the proceedings and that no attempt has ever been made by solicitors on his behalf to establish what this allegation relates to before proceeding to litigation claiming a want of fair procedures. An evidential basis has not been laid for the claim that the factual basis for this allegation has been unfairly withheld from the Applicant. In circumstances where he has not said on affidavit that he does not know what the allegation in relation to receiving a gift relates to and has not exhibited correspondence in this regard, I am faced with an evidential deficit making it impossible for me to conclude that there was a want of fair procedures because this allegation was not "*put*" to him, and he was not notified of the particulars of the allegation.

81. The Applicant was fully aware what was going on: he had after all been interviewed under caution in respect of two matters pertaining to the *Operation Bath* investigation on the 10th of October, 2019 in the presence of his solicitor having previously been alerted to these matters of interest to the investigators a week earlier in the presence of his GRA representative. In circumstances where his phone had also been seized on foot of a warrant on the 4th of October, 2019 and his notebooks and fixed penalty notebook seized on the 5th of November, 2020, his claim not to have been on notice of criminal allegations against him and an ongoing investigation on the date of his suspension on the 7th of November, 2020 and that this was the reason for his suspension cannot be accepted, even if he might legitimately wonder why he was suspended then and not earlier.

82. The fact that additional allegations have been made since the initial suspension is also known to the Applicant. Those allegations, insofar as they are known, fit within the parameters of the first indorsement on his suspension notice and as alleged can amount to what was described in *O'Neill v. Commissioner of An Garda Siochana* [2020] IEHC 448 as "*an attempt to pervert the course of justice.*" In *O'Neill*, it was found to be self-evident that the Commissioner was entitled to consider suspension from duty of a member suspected of involvement in incidents of alleged perversion of the course of justice as being desirable in the interests of the force and he was also entitled to conclude that it was. It seems to me that given that the Applicant was aware since the outset and at all material times that he is suspended because he is under investigation for suspected involvement in attempts to pervert the course of justice that he must be taken to know the reason for his suspension. The absence of any enquiry on behalf of the Applicant requesting the reasons he stands suspended or the particulars of what is alleged against him is fatal, in my view, to his standing to complain that he does not know what is alleged against him. Accordingly, I have little hesitation in disposing of the Applicant's complaint that he does not know why he stands suspended, at least in general terms.

83. While I have rejected the Applicant's complaint that he was not notified of the nature of wrongdoing alleged and the reasons for the suspension, it is true that the briefest of detail has been provided in the context of the decision to suspend. While the suspension power is exercised because he is subject to investigation on suspicion of perverting the course of justice, the proper exercise of this power is subject to due regard to all relevant factors which must include not only the seriousness of the allegations (as outlined in the Guidelines) but as an incident of this the number of allegations, the estimated time to conclude investigation and the

likely outcome as well as factors such as the impact on the officer's welfare and service morale. Had the disciplinary investigation been progressed in a timely fashion, the Applicant would have been entitled to know the detail of the allegations against him in accordance with the provisions of the 2007 Regulations and to be heard in response to same.

84. It is clear from the terms of the 2007 Regulations that where disciplinary proceedings are pursued full provision is made for detailed information as to what is alleged to be made available to the member who is the subject of the proceedings. Similarly, were a prosecution directed he would be entitled to receive a book of evidence and disclosure documentation. Where an investigation is conducted by GSOC specific provision is made for notice of a complaint to be given and for the subject of the complaint to be heard in respect of same (see, for example, ss. 88 and 95 of the 2005 Act). While no similar requirement is prescribed under the 2007 Regulations in the case of a suspension power, this does not foreclose the possibility that there is an entitlement to be notified of the particulars of allegations under investigation as a matter of fair procedures where a member is suspended under the 2007 Disciplinary Regulations in consequence of an ongoing investigation in respect of said allegations.

85. Given that the Applicant is suspended in reliance on the 2007 Disciplinary Regulations which envisage that fair procedures apply in the investigation and determination of a disciplinary matter, he is, in my view, entitled to have the basis for his suspension spelt out to the extent that the investigation of specific allegations have been relied upon in the decision to suspend taken under the same Regulations. In this case, however, it is striking that although he is legally represented, not a single letter has been written on behalf of the Applicant requesting further particulars of what is alleged against him. The Applicant's failure to make enquiries as to the said allegations and the fact that he has participated in several interviews in the context of a criminal investigations satisfies me that there is a lack of reality to any genuine concern on his part as to what precisely is alleged against him as warranting suspension. In my view he has failed to establish standing to make any complaint in this regard in the absence of correspondence which would be expected where a failure to notify or particularise is pursued in judicial review proceedings.

86. Returning now to the *caveat* referred to above, although I have concluded that reasons have been given for the suspension notice in this case and the Applicant knows why he stands suspended, it is my view that the adequacy of the reasons given properly falls to be tested by

reference to the material considered by the decision-maker. The rationale which underpins the right to a reasoned decision has sometimes been expressed as the right to know if the decision maker has directed his or her mind adequately to the issues which he or she has considered or is obliged to consider (see *Mulholland v An Bord Pleanala* (No. 2) 2006 1 I.R. 453 at para. 34 and Baker J. in *M.D. v. Minister for Social Protection* [2016] IEHC 70 at para. 54 where she concluded that the material before the deciding body did not make available a factual basis on which the deciding officer could engage the full decision-making process and compare or weigh the factors supportive of each position).

87. In this case reasons have been given for the decision to suspend through the endorsement on the Suspension Notice such that the Applicant cannot be heard to complain in these proceedings that he does not know why he was suspended in the absence of any request on his behalf for further particulars but it seems to me that the material considered in the decision-making process is tied to the adequacy of the reasons for the decision. Where the adequacy of the reasons given falls to be tested with reference to the material before the decision maker, or in the absence of the material itself adequate information in relation to that material, it would appear to follow that a challenge to a decision on the basis that it is inadequately reasoned is hampered by the absence of information regarding the material that was before the decision maker.

88. This brings me to the Applicant's second complaint and his claimed entitlement to be provided with the material relied upon in the decision-making process. The Applicant claims this material is necessary to enable him to make informed submissions in respect of the periodic review of his suspension which he contends requires that he is provided with the material relied upon in the decision to extend his suspension.

89. It must be said at the outset that the Respondents have not engaged with this argument in their submissions before me other than to point to the fact that the Applicant knows the criteria specified under the Commissioner's Guidelines and has never made a submission despite this and despite it being open to him to do so. Certainly, complaints about delay and a failure to provide particulars of allegations are both matters that might have been addressed by the Applicant in submissions to the Assistant Commissioner in urging that the suspension is not extended in much the same way as the Applicant has sought to do in these proceedings and it is not irrelevant that he has failed to take this opportunity. It warrants special note, however,

that the Applicant was refused the material upon a request made in July, 2022. As he did not challenge that refusal at the time, he is out of time to challenge any specific refusal of material. As the entitlement to access to this material is an ongoing issue and the Respondents contend that the Applicant is not entitled to further information, this is clearly a matter of live contention at a level of principle which affects every decision to suspend including the decision immediately prior to the commencement of proceedings and every suspension notice since then and going forward.

90. The suspension orders made in respect of the Applicant have each been made by an Assistant Commissioner in exercise of a function delegated under s. 31 of the 2005 Act pursuant to Regulation 7 of the 2007 Disciplinary Regulations. In each of two short Affidavits in these proceedings the two Assistant Commissioners who have reviewed the Applicant's suspension have confirmed in identical terms:

> *"I say that prior to signing each of these suspension orders I was fully briefed in relation to the investigations in relation to the Applicant which concern very serious matters. I made the decision to make these suspension orders, as in my opinion, the circumstances rendered such a course desirable in the interests of the Garda Siochana."*

91. None of the briefing material referred to is exhibited and no attempt is made to describe or summarise what was contained in the briefing received. In consequence the Applicant does not and cannot know whether, for example, the material relied upon contains errors of fact, is otherwise accurate and complete or deals with the relevant considerations identified in the Commissioner's Guidelines. The question which arises for me is whether the Applicant is entitled, as a matter of fair procedures on the facts and circumstances of this case which includes the length of the suspension and the failure to conclude investigations despite the passage of time, to be notified by the Assistant Commissioner exercising powers to suspend pursuant to Regulation 7 of the 2007 Disciplinary Regulations, to information concerning the material relied upon by the Assistant Commissioner in deciding to make a further suspension order. I propose to decide this question at a level of principle referrable to current circumstances where the member now stands suspended for more than three years rather than with reference to any individual suspension notice which has been made in this case until now

in circumstances where the material continues to be withheld and where it is maintained that the Applicant is not entitled to same.

92. To demonstrate how material might have been useful in identifying matters which the Applicant could have addressed in submissions, the Applicant refers to the fact that the Respondents rely on a purported agreement on his part to stall the disciplinary proceedings pending conclusion of criminal investigation which the Applicant disputes. He claims to be unaware that reliance was being placed on such an agreement until replying affidavits in these proceedings. If this contested agreement is a consideration in continuing his suspension through the making of a fresh suspension notice, the Applicant instances this as something he could usefully address in submissions. He says that because the material relied upon was not disclosed to him in response to his request for material considered, he could not have been aware of it. He has only become aware of it from for the terms of the replying affidavits filed in these proceedings.

93. The Applicant also points to the questions which arise from the replying affidavits as to just how many and what allegations against him are relied upon in respect of the continuing suspension noting that the Respondents confirm that thirty-eight files have been referred to the DPP concerning him, but he is aware of only thirty allegations albeit from interviews in the criminal investigation rather than from particulars provided by the investigating officer or the Assistant Commissioner in exercise of Regulation 7 powers. It is possible that the information before the Assistant Commissioner is inaccurate in some material respect. Disclosure of the information relied upon would afford the Applicant the opportunity to address any inaccuracies he identifies in the interest of a fair and properly considered decision on the extension of suspension.

94. It is undoubtedly the case that the substance of what is required as a matter of fair procedures in any given case may be informed by the terms of any guidelines or policies adopted and applicable to the process in question. It is a factor which weighs on me that in the case of suspensions and the review of suspensions, Guidelines adopted by the Commissioner apply to identify relevant considerations and mandate that regard should be had to the views of the Applicant's Divisional Officer on these considerations in the decision-making process. This renders due consideration of the views of the Applicant's Divisional Officer a necessary

and relevant factor in the decision-making process. As noted by Mulcahy J. in *Brannock* (at para. 52):

> *"52. In the particular context of the suspension of a member of An Garda Siochána, regard must also be had to the Suspension Policy in determining the fair procedures to which a member is entitled. Although the Policy does not have statutory force, the Commissioner has adopted a policy which provides that particular steps will be taken before suspending a member. It would be difficult for the Commissioner to argue that a decision taken without following the steps set out in that policy was in accordance with fair procedures, nor did he seek so to do. To make a decision in accordance with the Suspension Policy required the taking of the views of the Divisional Officer in relation to particular considerations. It also required the giving of a reason for the decision."*

95. In this case those views, if they were taken, have been withheld from the Applicant. Absent disclosure of the material relied upon he cannot even be satisfied that these views were canvassed or considered at all. There was some suggestion in argument that the requirement to consider the views of the Divisional Officer is once off and relates only to the first suspension and therefore any challenge which might flow is out of time. It seems to me that this view is predicated on an excessively narrow approach to the role of the decision maker in extending a suspension under the 2007 Disciplinary Regulations. The requirement for a review of suspension every three months is intended to ensure that a suspension is not left in place for an excessively long period of time. Such a review is not tokenistic but rather requires substantive consideration as to whether further suspension is warranted on a balancing of competing considerations. As Baker J. noted in *Canavan* (at para. 31):

> *"It seems to me that the three-month period must be seen as a timeframe within which the reasons for the imposition of the sanction itself should be considered. Thus, while there might be cases where three months is not sufficient for a full inquiry to be carried out, the three month framework is intended to impose a form of time limit within which it is expected that there would be some engagement with the facts, to ascertain whether they justify the continued suspension."*

96. The position of the Assistant Commissioner in withholding material relied upon to continue suspension is in contrast with the approach taken in other reported suspension cases. In *O'Sullivan v. HSE* [2023] IESC 11 O'Donnell C.J. observed that the applicant and his solicitors were informed of the information, observations and reports made available to the CEO and were given an opportunity of making submissions in respect of them (see para. 27).

97. During the hearing before me, I asked counsel for the Respondents to address me on what I considered to be the striking fact that in *Brannock v. the Commissioner for An Garda Siochana* [2023] IEHC 300 (Mulcahy J.) full disclosure had been made of the material considered in the decision to suspend. It is clear from the terms of the judgment in *Brannock* (para. 22) that the Commissioner delivered a replying affidavit in those proceedings exhibiting relevant documentation relating to the commencement of an investigation and the exchanges regarding the proposed suspension. It is further clear that the judgment proceeded on the basis that the Applicant was entitled to be furnished with the material relied upon in the decision-making process. In that case the applicant's divisional officer had not recommended suspension, a position endorsed by the Chief Superintendent in Internal Affairs but overridden by the Assistant Commissioner, whose decision it was.

98. It is true that in *Brannock* the Divisional Officer's Report and correspondence on foot thereof were not provided at the time of the decision to suspend (recalling that the time periods in question were much shorter in that case and proceedings commenced within 5 weeks of the extended suspension). The documentation referenced in the judgment appears to have only been furnished in response to judicial review proceedings challenging the proportionality of the decision and a failure to consider the Applicant's individual circumstances in accordance with the Guidelines.

99. I understand the Respondents' position in respect of the failure to make disclosure of the materials considered in this case in similar fashion to *Brannock* to be that the grounds of challenge in this case are different. This does not appear to me to be an answer to the fact that the Applicant is entitled to be heard in respect of and to challenge a decision to extend his suspension. He could potentially rely on the materials considered or the absence of considerations of the kind which were present in *Brannock* to make submissions and/or to challenge the lawfulness of the decision-making process or the decision in judicial review

proceedings by reason of, for example, a failure to have regard to relevant considerations or a challenge to the proportionality or even rationality of the decision to extend the suspension of the Applicant.

100. It is noteworthy that in *Brannock* the disclosure of the material in a replying affidavit prompted an application to amend the proceedings and advance new grounds. Ultimately, those new grounds were found to be lacking in merit. What is exemplified by the decision in *Brannock*, however, is that while it is certainly conceivable that disclosure of the material before the decision maker when extending a period of suspension which now exceeds three years might be in ease of making targeted and effective submissions on the Applicant's behalf as to why a further extension should not be granted as they contend, this is not the only potential utility of this material. Disclosure of such material would permit the Applicant to seek advice on whether a challenge lies against the decision to suspend on the basis that the decision is inadequately reasoned and/or it fails to have regard to relevant considerations and/or is affected by irrelevant considerations and/or is disproportionate and/or unreasonable or otherwise unlawful having regard to the material before the Assistant Commissioner when making his decision and the evidence upon which it was based. Disclosure of such material is therefore integral to the Applicant's ability to invoke the supervisory jurisdiction of this Court by way of judicial review in the event of a disclosed unlawfulness in the decision-making process.

101. Accordingly, it seems to me that the fact that the grounds of challenge are different in this case to those in *Brannock* does not absolve the Commissioner from a duty to disclose the material relied upon in deciding to extend the suspension in this case or obviate the necessity for such disclosure in these proceedings. While it may not be necessary to furnish this material either as a matter of course or in every case, the length of the suspension in this case is such that, as in *Canavan*, the balance has '*tipped*' such that fair procedures require that the material considered in deciding to make further suspension orders notwithstanding significant delays in the process be disclosed, at least once it was requested.

102. The fact that it is claimed that the suspension of the Applicant has been vitiated by delay, a claim which requires consideration to be given as to whether the time taken has been reasonable given the complexity and scale of the investigation, serves to reinforce the relevance of the record of the Assistant Commissioner's considerations to these proceedings. This is a question which should properly be considered in the first instance when deciding to maintain

a suspension by making a further order. While in *Canavan* it was considered by the High Court that there was a failure to "*justify*" the continued suspension or explain delay on the facts in that case in respect of a shorter delay than here, the position here is different in that the criminal investigation which was in train when the suspension was first imposed has not yet concluded.

103. In circumstances, however, where it is clear that the power to extend suspension cannot be exercised unreasonably and a suspension cannot be extended indefinitely without any realistic expectation of the criminal investigation concluding and without being satisfied that the investigation is being progressed appropriately, then the extent of delay, information regarding the cause of delay and when a decision on foot of the criminal investigation might be expected, are factors which fall to be considered in deciding whether the further extension of a suspension is warranted. It seems to me that this is particularly so in the context of a Garda suspension when the gardaí are themselves the investigating authority and in close communication with the Office of the D.P.P. While that Office is independent in the discharge of its functions, it relies directly on An Garda Síochána in the conduct of the criminal investigation and An Garda Síochána are well placed to know the reasons for delays in the investigation, whether there are any steps outstanding in the investigation and why and also to communicate with the Office of the DPP to request information in relation to an anticipated time-frame for a decision.

104. Insofar as this information was available to the Assistant Commissioner who was "*fully briefed*" when extending the suspension, it has not been shared with the Applicant either in response to correspondence on his behalf requesting same nor in response to these proceedings. As already noted, where the decision to extend or continue suspension falls to be informed by identified considerations, it seems to me that the Applicant can only effectively challenge a failure to have due regard to considerations, including delay, if he knows what material was before the decision-maker and the considerations relied upon to inform and justify the decision. The Applicant is therefore entitled, if not to the material itself for cause shown, at least to the information which allows him to be satisfied that relevant matters have been considered and the nature of those considerations.

105. In this case, as in *Canavan*, no record or note concerning the decision to suspend and extend suspension on successive occasions has been exhibited. In a substantive affidavit filed

in opposition to the proceedings a Chief Superintendent with the Internal Affairs within An Garda Síochána stated:

> *"The Respondents are not in a position to exhibit certain documentation which is available for operational reasons in circumstances where the proceedings concern investigations which are currently ongoing, and for which DPP directions are awaited."*

106. No attempt is made to explain or elaborate on the "*operational reasons.*" The "*operational reasons*" which preclude the disclosure of materials are not understood. In circumstances where if a prosecution were to be directed by the D.P.P. carries significant disclosure obligations such that the Applicant would, in any event, be entitled to sight of material generated in the investigation process, this response from the Respondents requires scrutiny. Accepting a blanket or bare assertion of "*operational reasons*" in this manner would, it seems to me, be an abdication of my supervisory jurisdiction in judicial review proceedings and my duty to safeguard the Applicant's rights to constitutional justice in the ongoing process affecting his employment. Whilst I readily accept that potentially premature disclosure of certain types of material could prejudice an investigation, this has not been identified as a reason for failing to disclose the material in this case. As a justification for non-disclosure, it too would require to be considered.

107. Presuming adequate demonstration of "*operational reasons*" which might be considered sufficient to override the Applicant's entitlement to receive a copy of the material relied upon as an incident of his right to fair procedures could be demonstrated, it should nonetheless be possible for the Applicant's rights to be addressed by an explanation as to what these reasons are and by the deployment of appropriate measures, for example, redaction or a summary of matters considered, as a means of balancing whatever "*operational reasons*" arise with the Applicant's rights.

108. If it were to be contended that it is simply not possible to balance whatever "*operational reasons*" might be specifically identified as existing with protection of the Applicant's rights through measures tailored for the purpose, it seems to me that a clear explanation as to why this is so would be warranted before it could be accepted. This much is clear, in my view, from the decision of the Supreme Court in *A.P. v. Minister for Justice* [2019] 3 I.R. 317.

109. In *A.P. v. Minister for Justice*, the Supreme Court, in the context of a refusal to grant a certificate of naturalisation, considered a refusal to disclose a report said to contain information received on a strictly confidential basis and which appeared to relate to *"national security/international relations considerations" which it was claimed could not be disclosed on the basis of the "State's interest in protecting its security and international relations"* which were said to outweigh the applicant's interests in knowing the specific basis for refusing to grant a certificate of naturalisation. At para. 4.3 of his judgment Clarke CJ. stated:

> *"4.3 But it is also clear that a person who may potentially be directly and adversely affected by a public law decision is entitled to be heard in the decision making process and, in that context, will ordinarily be entitled to be informed of any material, evidence or issues which it might be said could adversely impact on their interests in the decision making process. See, inter alia, the judgments of this Court in State (Gleeson) v. Minister for Defence [1976] I.R. 280, Kiely v. Minister for Social Welfare [1977] I.R. 267 and State (Williams) v. Army Pensions Board [1983] I.R. 308."*

110. He added:

> *"4.5 However, the precise nature of the information to which a person involved in a public decision making process may be entitled can itself be dependent on the nature of the decision concerned."*

111. He continued by considering the types of cases that fall at either end of the spectrum (paras. 4.5 and 4.6) and distinguished between cases potentially interfering with rights and imposing obligations and cases involving a discretionary benefit concluding (at para. 4.7):

> *"4.7 Against the backdrop of that analysis, it may be that, in some circumstances, there will not be any significant material difference between the right to know and make representations on the case which might be made against a person in the context of a public law decision, on the one hand, and the right to be given reasons for an adverse decision, on the other."*

112. I am satisfied that on the facts and circumstances of this case and at a remove of more than three years from first suspension, the Applicant is *prima facie* entitled, as an incident of his right to fair procedures, to know the material relied upon or the gist of the material relied upon in making the decision to further suspend him in order to enable him to make informed submissions and/or correct any errors of fact and/or challenge the decision in judicial review by reason of factors such as a failure to have regard to relevant considerations, having regard to irrelevant considerations, rationality or proportionality, as appropriate. The proper protection of his constitutional right to a good name and to due expedition in the investigation process demands no less.

113. It seems to me that at this remove the refusal *simpliciter* to provide this material is a breach of the Applicant's rights and is unlawful. If there are *bona fide* operational reasons which preclude the complete disclosure of this material, it has not been established what these are or that the only way to safeguard legitimate interests concerning the prosecution of the crime is a complete denial of information. It has not been demonstrated that it is not possible to put in place a mechanism which balances operational reasons with the Applicant's rights by informing the Applicant of the gist, if not the full detail, of the material relied upon. It is for the decision maker when deciding to suspend the Applicant again to determine how to vindicate the Applicant's right to information whilst also respecting such legitimate operational difficulties as may present.

II. *Suspension Vitiated by Delay*

114. The Applicant contends in these proceedings that the Commissioner has had ample time to investigate the complaints against him (paragraph 13 of his Affidavit sworn on the 31st day of March, 2023) and that his suspension is in fact a punitive measure (paragraph 15 of his Affidavit) and that the Commissioner is using the suspension process as a rolling, disciplinary measure (paragraph 16 of his Affidavit). He is suffering financial loss in the form of loss of allowances. He is also concerned by the effect on his reputation of a long suspension. His ambitions for a career as a member of An Garda Síochána is rooted in a family history and tradition with the result that his suspension weighs very heavily on him. In the absence of any progress in the disciplinary process and no decisions yet on the investigation files referred to the D.P.P., the case made on his behalf is that the lawfulness of his suspension is vitiated by delay.

115. *Operation Bath* concluded upon the submission of the files on the 29th of July, 2020 and the new investigation, *Operation Modulus*, then commenced. *Operation Modulus* contained a number of primary suspects who, save for one exception, all worked together in the same Roads Policing Unit or the same Garda Division. It is deposed on behalf of the Respondents that to ensure the systematic approach of this investigation, files were categorised under the name of the primary Garda and all the files pertaining to that primary suspect were submitted to the D.P.P. in one go, thereby eliminating duplication. While the Applicant's initial suspension on the 7th of November, 2020 related to two matters pertaining to the *Operation Bath* investigation which resulted in files being sent to the D.P.P. in July 2020, numerous further allegations of wrongdoing are said to have emerged as against the Applicant since his initial suspension such that the Applicant now features in thirty eight of these one hundred and ninety-eight separate investigations files for *Operation Bath* and *Operation Modulus* which have been sent to the D.P.P. and in which D.P.P. directions in relation to prosecution have been sought. The majority of these files were only sent to the D.P.P. in January, 2023.

116. It seems to me that a starting point when considering whether the suspension in this case has been vitiated by delay is to recall that the Commissioner (or his duly authorised delegate) has no power to suspend indefinitely under the 2007 Disciplinary Regulations but must be satisfied upon balancing the Applicant's interests and the interests of the force that an extension of the suspension is warranted every three months. Suspension under the 2007 Disciplinary Regulations and in accordance with the Commissioner's Guidelines is imposed having regard to considerations which include the factors relevant to supporting public confidence in the force through the maintenance of discipline balanced against consideration of the member's interests. An important safeguard is thus provided under the 2007 Disciplinary Regulations in that suspension can only lawfully be maintained in place following periodic review of the decision to suspend in light of relevant considerations. The requirement to review every three months is itself an indicator that suspensions should not be longer than necessary for the completion of a process contemplated under the 2005 Act or the 2007 Disciplinary Regulations.

117. The requirement for periodic review of suspension under the 2007 Disciplinary Regulations allows for due consideration of all relevant factors which include, *inter alia*, in

accordance with the Commissioner's Guidance: the strength of evidence; the seriousness of allegations; the risk to members of the public; the risk to colleagues; potential to pervert the course of justice/suborn colleagues; options of alternatives to suspension; likely outcome; estimated time to conclude investigation; impact on police/public relations and; the risk to officer/welfare considerations. Where there is delay in the conclusion of the process and a related extension of the period of suspension, these factors must be kept under review and the impact of continuing suspension on the Applicant requires to be weighed with other factors (including estimated time to conclude the investigation) in deciding whether to further suspend or not.

118. It seems to me that save in exceptional cases, a court should be slow to intervene by way of an application in judicial review proceedings to find suspension unlawful where there is available a statutory process such as that provided under the 2007 Disciplinary Regulations for the extension or continuation of a suspension in the absence of submissions directed to the Commissioner (of his duly authorised delegate) in the first instance in respect of delays making a case as to why the suspension should not be further extended or maintained and why continuing suspension would be unlawful.

119. It is noteworthy that in *Canavan* a complaint had been communicated regarding delay in progressing the disciplinary proceedings and seeking reasons for the ongoing suspension but no similar correspondence was directed in this case. It was against a background of correspondence complaining about the delay that the Court granted relief by way of judicial review in *Canavan*. I accept that the Applicant was impeded in accessing this review process or raising an issue in respect of a decision made in the process by the refusal to share with his legal advisors the material considered by the Assistant Commissioner in deciding to further suspend the Applicant although it would nonetheless have been open to the Applicant to advance submissions even in the absence of material. The refusal to provide the material operated as a barrier to accessing the review process which in turn permitted the argument that the delay vitiated the lawfulness of the suspension in judicial review proceedings without this argument having first been addressed to the appropriate decision maker whose function it is in the first instance to consider whether to make a further suspension order in circumstances where there has been delay.

120. A suspension which has been ongoing for more than three years without any concluded investigation in respect of the alleged underlying wrongdoing is very concerning. Expedition in both a criminal investigation and the disciplinary process is an incident of the subject's right to constitutional justice. A requirement for expedition which arises as a matter of constitutional justice is also built into the disciplinary process by the language of the 2007 Disciplinary Regulations under which the suspension is imposed which provides for the giving of notice of an investigation "*as soon as practicable*" after the appointment of an investigating officer under Regulation 24 of the 2007 Regulations. It is undoubtedly the case that as a matter of law a suspension should in all fairness be disposed of, either by raising the suspension or by dismissing the employee, as soon as is reasonably practicable. When it is reasonably practicable to do so, however, is fact specific and depends on the facts and circumstances of the case and most especially the cause of delay. It is to this issue I now turn.

121. It is clearly unsatisfactory in the light of a statutory obligation to appoint as soon as practicable and where delay is an issue in the proceedings that the date of appointment of the investigator under the 2007 Disciplinary Regulations is not in evidence before me. Irrespective of when the investigator was appointed for the disciplinary investigation, there is clear evidence of delay in progressing any disciplinary investigation. Indeed, it appears that no substantive steps whatsoever have been taken in that process other than the giving of initial notice. While no time limits are imposed under the 2007 Disciplinary Regulations in relation to the conclusion of a process, a requirement for expedition is imposed under the Commissioner's own Guidelines. The fact that a criminal investigation is ongoing does not negate the possibility of disciplinary proceedings being progressed in tandem. Both s. 39(5) of the 2005 Act and Regulation 8(4) of the 2007 Disciplinary Regulations are plainly directed to removing an impediment to proceeding with both criminal and disciplinary investigations at the same time by protecting the member's right to exercise a right to silence and to not self-incriminate in any criminal proceedings whilst fully co-operating with a disciplinary process. The estimated time to the conclusion of investigation is also a matter which should inform a decision to suspend for a period exceeding ten days in accordance with the Commissioner's Guidelines and this presumably applies both to a criminal and a disciplinary investigation, as appropriate.

122. Notwithstanding the exhortation against delay contained in the disciplinary regulations in their various iterations over the years and the requirement for expedition deriving from the

requirements of constitutional justice, the Courts have tolerated significant delays in Garda disciplinary processes finding that a breach of the obligation of expedition does not give rise to invalidity of the process. Underpinning a conclusion to this effect in *Gillen v. Commissioner of An Garda Siochana* [2012] 1 I.R. 574 in the context of a delayed commencement to a disciplinary process was the Supreme Court's finding that while it is critical both to the operation of An Garda Síochána and to public confidence in the force that disciplinary matters be dealt with speedily, the statutory purpose of the Disciplinary Regulations (in that instance the 1989 Regulations where an express requirement for expedition appeared) could only be achieved if the disciplinary proceedings were resolved on the merits and none of the objects sought to be achieved by the Regulations would be furthered by a premature termination of the process on technical grounds.

123. Of course, here I am not concerned with the termination of the disciplinary process on grounds of delay (which was the issue in *Gillen*) but rather the lawfulness of a continuing suspension where that process has been significantly delayed. It is now well established that a suspension may be vitiated by delay. In *Flynn v. An Post* [1987] I.R. 68 the Supreme Court held that a suspension of an employee for a three-year period ceased to be valid after a point when the disciplinary investigation ought to have been ready to proceed (notwithstanding intervening criminal proceedings which ended in acquittal), which in that case the court measured as four months after the date of suspension. At p.76 of the judgment, Henchy J. said as follows:

> *"In a bilateral situation, such as existed here between an employer and employee in regard to the right to suspend and dismiss for disciplinary reasons, justice cannot be treated as a one-way street. The rights of both parties must be taken into account for the purpose of determining which of the claimed rights should prevail so as to achieve a compliance with the fundamental requirements of justice. Where (as happened here) the employee has been suspended without pay, that suspension should in all fairness be disposed of, either by raising the suspension or by dismissing the employee, as soon as is reasonably practicable. But when it is reasonably practicable to do so is something that a court cannot decide without also taken into account the considerations put forward by the employer as being basic to his needs. It is only when the claims of both parties have been set against one another and duly balanced that a court can decide what is needed to satisfy the fundamental requirements of justice."*

124. In *Flynn* the decision to suspend was based on a preliminary process conducted by an investigating officer who had concluded that the plaintiff was guilty of dishonestly misappropriating postal packages. Before a decision was made to convene a full disciplinary inquiry, An Post was notified that the plaintiff was to be prosecuted by the DPP arising from the same matters. No further steps were taken in a disciplinary process pending the conclusion of the criminal trial. A trial on indictment proceeded and the plaintiff was acquitted. Following his acquittal, the plaintiff demanded to be reinstated but An Post replied that acquittal was irrelevant and did not trench on the right of An Post to pursue a disciplinary process. Thereafter, however, An Post took the position that it should not convene a disciplinary inquiry until the issue of its *vires*, then under challenge by the plaintiff in proceedings before the Courts, had been decided. The judgment in *Flynn* was applied by Kearns J. in *Allmann v. Minister for Justice Equality and Law Reform & Ors.* [2003] 14 E.L.R. 7 in which he accepted that the principles explained by Henchy J. could apply even when a person was suspended on reduced pay.

125. While the authorities make a distinction, as noted above, between a suspension required to address an urgent issue, a summary or purely holding suspension, as identified in *McMahon v. Irish Aviation Authority & Anor.* [2014] IEHC 431, and a lengthy suspension when considerations of fair procedures and unwarranted prejudice come into play, the latitude to suspend summarily afforded to public authorities is constrained by a requirement to accompany suspension with a full, fair and prompt investigation. In *McMahon v. Irish Aviation Authority & Anor*. [2014] IEHC 431, Hogan J., dealing with a suspension of the applicant from his role in the Irish Aviation Authority and requirements of aviation safety, put the matter thus (para. 58):

> *"The law affords considerable latitude to a regulatory body such as the Authority to act speedily and decisively in the interests of public safety. It is nevertheless to be expected that the Authority will thereafter act with all due speed to ensure that the complaints against named individuals are investigated fully, fairly and promptly".*

126. It is noteworthy that in *Flynn*, delay was found to vitiate the suspension in circumstances where the criminal investigation had concluded, albeit that the Court was not prepared to excuse delay during the period of the criminal process as reasonable in

circumstances where no case had been presented that there were good reasons to stay the disciplinary process pending a determination in the criminal process. In *Flynn*, the Court found delay vitiated the suspension because of what was later described by Murray J., speaking of the decision in *Flynn* in *McGrath v. Minister for Justice* (at p. 635) as follows:

> *"the arbitrary and wanton conduct of the defendant in refusing and failing to proceed with the completion of the investigation and inquiry where, on the one hand, there was no obstacle to or justification for not doing so and, on the other hand, where the plaintiff had been suspended without any pay so as to give rise to severe hardship."*

127. There may be no general or inflexible rule as to which proceedings, criminal or disciplinary, should be heard first. The reality of the potential interaction of criminal and disciplinary investigations is recognised within the scheme of both the 2005 Act and the 2007 Disciplinary Regulations. The 2007 Disciplinary Regulations both define the commission of a criminal offence as Garda misconduct and provide for specific actions depending on the outcome of the criminal process. As observed in *Flynn v. An Post* [1987] I.R. 68 (see Henchy J. at p. 77), there may be good reasons why an employer would decide to stay a disciplinary process until criminal proceedings are over. Reasons may be so good as to be sufficient to prevail over a party's wish to proceed with the disciplinary investigation without awaiting the outcome of the criminal process, notably if this can not be done without prejudicing the criminal process. If there are reasons in this case, they have not been advanced in evidence before me. Some rational basis capable of justifying consequential delay is required recalling that specific provision is made for material generated in a disciplinary process not being admissible in evidence as part of a criminal process.

128. None of the cases cited in argument before me in which delay has been found to vitiate a suspension have direct application to the facts in this case even though periods of suspension although shorter than in this case has been found to be unlawful.

129. Applying the principles which emerge from the case-law in deciding whether the suspension is vitiated by delay in this case, it seems to me that it cannot be ignored that the suspension was imposed to allow for the investigation of serious allegations in circumstances where it is recognised and accepted in the case law (recalling most particularly the decision of

the Supreme Court in *Gillen v. Commissioner of An Garda Siochana*) that there is a clear public interest that allegations of garda misconduct be investigated. In this case, investigations take two forms – the criminal investigation and the disciplinary investigation. Given that suspension may have been imposed ever before the disciplinary process was initiated, it is likely that the suspension is imposed in this case as much in ease of the conclusion of the criminal process as the disciplinary process and both remain relevant. Accordingly, the further suspension under review in these proceedings arises in a context where both investigations have encountered delays. While the disciplinary investigation has barely commenced, the criminal investigation has not reached conclusion and no indicative timeframe for its conclusion has been offered in evidence. There may be very sound reasons which persist, however, as to why the fact that a criminal investigation is ongoing in this instance is sufficient justification to extend the period of suspension.

130. It is clearly material to a balancing of interests that the Applicant has not been suspended without pay as occurred in *Flynn* and nor has he pressed for a disciplinary process to be progressed as also occurred in that case. It is clear from the judgment of McCarthy J. in *Flynn* that underpinning the decision in that case was the fact that Mr. Flynn had wished to go ahead with the process. Accordingly, the Court was not concerned with a situation where there had been "*acquiescence by both parties in awaiting the outcome of a criminal process*" (*per* McCarthy J. at p. 84).

131. This case also differs from *Canavan* in the very material respect that this is not a "*bilateral*" situation. While the investigation of a crime is a responsibility of An Garda Síochána, the decision to make directions on a file rests with the D.P.P. A further distinguishing feature in *Canavan* was that a complaint of delay was made before resort was had to judicial review proceedings. It is impossible to ignore the striking fact that in this case the Applicant made no complaint about delay prior to the commencement of these proceedings. At no point did he request that the disciplinary process be progressed because of the delays with the criminal investigation. If he did not agree to stay the disciplinary process, he certainly acquiesced in this course of action by not pressing for a conclusion of the disciplinary process before the conclusion of any criminal process.

132. It seems to me that it is no accident that the Applicant has not pressed for the disciplinary process to be expedited. From his perspective there is good reason not to press for

an earlier determination of the disciplinary proceedings as explained in *Brannock* (at para. 56) where the Court referred to Regulation 8(2) of the Discipline Regulations provides that disciplinary proceedings may have to be discontinued if the Applicant is acquitted on the criminal charges. This is so notwithstanding that the criminal proceedings need to be proved to a higher standard than the disciplinary proceedings (see Regulation 9). Similarly, there is a benefit for the Commissioner because if a finding of criminal wrongdoing is made in criminal proceedings, the Commissioner is not separately required to establish a breach of discipline as part of the process under the 2007 Regulations.

133. While in general a holding suspension ought to be seen as a measure designed to facilitate the proper conduct of the investigation and any consequent disciplinary process, there is the added consideration in this case that as the power to suspend is a free-standing power which is not tied to the existence of disciplinary proceedings but rather to the interests of An Garda Síochána in relation to matters of discipline of the force, that a positive outcome in disciplinary proceedings might not in itself result in the suspension being lifted if it were properly concluded that the interests of An Garda Síochána precluded the Applicant's return to work before the particular criminal process had concluded. A decision whether to extend or continue suspension should be guided by information available as to the length of time remaining until processes have concluded.

134. By way of explanation for delay, the Respondents refer in somewhat general and non-specific terms to the complexity of the investigations which are being conducted and the fact that many additional allegations pertaining to the Applicant have emerged since his initial suspension. It is contended that *Operation Bath* and *Operation Modulus* have been complex and difficult investigations which have taken a considerable time, as well as involving considerable Garda resources. According to the evidence adduced on behalf of the Respondents they have involved hundreds of suspects interviewed nationally. It is contended that approximately 2,500 statements and memorandums of interviews have been produced during the investigations. The investigations have resulted in 198 files in total being submitted intermittently over a 2-to-3-year period.

135. Concerning as a three year suspension is, where the criminal investigation has been on such a significant scale and directions are awaited from a third party, where the Applicant as the suspended party has not been pressing for the disciplinary proceedings to be pursued in

tandem with or ahead of the criminal process and where there is a potential benefit in allowing a parallel process, such as a prosecution, to proceed first, the Applicant has failed to satisfy me that his suspension is as yet vitiated by delay such as to warrant interference by way of relief in judicial review proceedings.

136. The situation might very well be otherwise had the Applicant been complaining about delay and pressing for an early conclusion of the disciplinary process or calling for information as to why the criminal investigation was delayed. In those circumstances, there would be a very heavy onus on the Commissioner to explain why it was not reasonably practicable to progress the disciplinary investigation in tandem with or ahead of the criminal investigation and far more granular detail would be required in relation to the lapse of time and why no directions have yet been made by the D.P.P. than has been presented in evidence in this case. In a case where an applicant had been pressing for explanations for delay in the criminal process and pressing to progress the disciplinary process or to have the suspension lifted in light of delays, a failure to put this information before the court could be fatal as the delays could not be justified.

137. The requirement to progress the disciplinary process "*as soon as reasonably practicable*" and expeditiously in accordance with the requirements of constitutional justice falls to be read as being as soon as allowing a criminal process to conclude permits where it is determined for good reason that it is appropriate and necessary that a criminal process proceed first in time and where this does not result in a disproportionate interference with the subject's rights. The fact that I do not find delay has vitiated the ongoing suspension on the circumstances as they are presented on this application does not mean that further delay in circumstances where the Applicant were pressing for the disciplinary investigation to be pursued and delays in the criminal process were not better explained might yield a different result. As Kearns J. found in *Nash v. Minister for Justice* [2004] 3 I.R. 296 albeit in a very different context, a position adopted on a particular issue may at one point in time be reasonable but at a later point may be the passage of time become unreasonable or even irrational.

138. With the passage of time the case for further suspension is weakened particularly if no progress is demonstrated in either investigation without adequate explanation. It should normally be a matter for the Commissioner (or his duly authorised delegate) in the first instance, however, to conduct a review of suspension in a manner which gives due

consideration to relevant factors. The information relied upon during this review should, absent good reason and where steps are taken to otherwise safeguard fairness, be available to the affected suspended member. This ensures that the affected suspended member can be heard before a decision which impacts on their rights is made and so that they can seek to challenge the decision to extend by way of judicial review, if so advised in appropriate cases. In such a scenario a decision that the prevailing circumstances continue to support suspension notwithstanding delays might be amenable to challenge on identified legal grounds such as, for example, a failure to have due regard to relevant considerations or on the basis that the decision is unreasonable and not sustainable having regard to the materials and information available to the decision maker or results in a disproportionate interference with the Applicant's rights. Properly, at least in my view, a court in judicial review proceedings should not be asked to decide such issues in an evidential vacuum and without being appraised of the material relied upon on behalf of the Commissioner in making the decision to further suspend in the first instance.

III. *Unequal Treatment*

139. In support of his claim to have been treated unequally the Applicant relies on an Affidavit sworn by the President of the GRA who confirms that approximately 130 members of An Garda Síochána were the subject of investigation under *Operation Bath* and *Operation Modulus*. He confirms that they are or were suspected of, and were subject of investigation with regard to, the same offences the same offences as the Applicant but the vast majority of those members have not been suspended. He confirms that many of those members have indeed been allowed to work, permitted to give evidence in court proceedings, appointed to specialist roles within An Garda Siochána and promoted, including promotions to Detective roles and national units. He says that from his knowledge of the circumstances of the various members under investigation he cannot understand the reason why "*some small number of members such as Garda Baynham have been subjected to long term suspension whilst the vast majority of members have not been suspended at all*."

140. While the Applicant did not resile from his case that he has been unequally treated during the hearing before me, I did not understand this claim to be seriously pressed. The fact that not everyone against whom allegations are made has not been suspended does not establish unequal treatment as the circumstances of those other cases are not in evidence. The Applicant

has not satisfied me on evidence that a garda member who is otherwise in a like position to him and against whom similar or more egregious allegations have been made has been treated more favourably by not being suspended.

141. The mere fact that not every garda member suspected of involvement in "*squaring*" has been suspended, as the Applicant believes, does not establish unequal treatment. As noted in the judgment in *Bank of Ireland v. Reilly* [2015] IEHC 241 complaint was made in that case that five employees were accused of misconduct involving their use of email but only three of the five were suspended. Noonan J. concluded that the inference was that the Bank were taking a particularly serious view of the matter in some cases and not others based on the content of the emails. The logical inference from the fact that not every garda member against whom allegations are made has been suspended is that the allegations against the Applicant are either more numerous or more serious than allegations against others. The Applicant has failed to discharge the evidential burden upon him to establish unequal treatment.

IV. *Whether Regulations Ultra Vires*

142. It is contended on behalf of the Applicant that Regulation 7 of the 2007 Disciplinary Regulations has been made under powers conferred, and for the purposes authorised, by the Oireachtas and specifically under s. 123 of the 2005 Act, s. 123 being the regulatory power invoked in the 2007 Disciplinary Regulations. As O'Higgins C.J. stated in *Cassidy v. Minister for Industry* [1978] I.R. 297, at 305:

> *"If the powers conferred by the Oireachtas on the Minister do not cover what was purported to be done then, clearly, the instrument is ultra vires and of no effect. Equally, if the rule making power given to the Minister has been exercised in such a manner as to bring about a result not contemplated by the Oireachtas, the Courts have the duty to interfere. Not to do so in such circumstances would be to tolerate the unconstitutional assumption of powers by great departments of State to the possible prejudice of ordinary citizens. If what the Minister seeks to do was not contemplated by the Oireachtas then, clearly, it could not have been authorised".*

143. This test has undergone some refinement in more recent cases. I was referred in argument to *Bederev v. Ireland* [2016] 3 I.R. 1 and *Náisiúnta Léictreach Contraitheoir Éireann*

v. Labour Court [2021] IESC 36. The test as I broadly understand is whether in prescribing a power to suspend by Regulation, the Minister has trespassed on the constitutional power of the Oireachtas under Article 15.2 of the Constitution by ousting or usurping its exclusive law-making role in assuming a power to legislate which has not been conferred on it.

144. It is noteworthy that whereas the power to suspend prescribed under the 2007 Disciplinary Regulations is expressed as exercisable "*in the interests of An Garda Síochána",* the primary power to regulate from which it derives vests powers for the purpose of *"the maintenance of discipline in the Garda Síochána"* rather than *"in the interests of An Garda Siochana".* On their face the suspension notices relied upon in respect of the Applicant do not specify either that he is suspended for the maintenance of discipline in the Garda Síochána or in the interests of An Garda Síochána but no challenge is contained in the Statement of Grounds on this basis. Rather, in these proceedings it is contended that Regulation 7 of the 2007 Disciplinary Regulations is *ultra vires* as the power to suspend a member of An Garda Síochána either "*in the interests of An Garda Siochana"* or at all is not provided for in s. 123 of the 2005 Act.

145. While a power to suspend is provided for in the 2007 Disciplinary Regulations, the word suspension does not appear in s. 123 and "*suspension*" is not a disciplinary action envisaged either under s. 123 or the 2007 Regulations and is not, in terms, confined to persons who are the subject of disciplinary proceedings. This has been described as a "*curious feature*" of the Regulations by Mulcahy J. in *Brannock v. Commissioner of An Garda Siochana* [2023] IEHC 300 albeit he was not in that case concerned with a *vires* challenge to the Regulations. At para. 29 of his judgment he observed:

> *"29. A curious feature of Regulation 7 is that, although contained within Regulations relating to disciplinary matters, it does not expressly confine the power of suspension to members who are the subject of disciplinary proceedings. It is noteworthy, however, that the disciplinary actions available under Regulations 14 and 22 of the Regulations do not include a power to suspend. Put otherwise, a suspension is not a disciplinary measure available to the Respondent under the Regulations."*

146. Despite this "*curious feature*" of the power to suspend under the Disciplinary Regulations and the fact that it is not a new power and existed in like terms in previous iterations of Garda Disciplinary Regulations over decades, somewhat surprisingly the vires of Regulation 7 has not previously been challenged on the basis that it exceeds the delegated regulatory authority and the principles and policies prescribed in primary legislation (be that s. 123 of the 2005 Act or previously s. 14 of the Police Forces Amalgamation Act, 1925). Indeed, while the suspension of garda members has been subjected to challenge in many cases, the existence of a power to suspend at all has never been called into question.

147. In *McGrath v. Minister for Justice* [2003] 1 I.R. 622, the Courts were concerned with a power to suspend under the Garda Siochana (Discipline) Regulations 1971 and the Garda Siochana (Discipline) Regulations 1989 in respect of a continuum of suspension between December, 1987 and January, 1993 on foot of a large number of suspension orders each of which was effective for a period of three months and treated by the parties in those proceedings as one continuum. Murray J. records in his judgment (p. 627):

> *"there is no issue in these proceedings concerning the power, as such, of the relevant authorities to suspend the Plaintiff from duty pending the completion of such disciplinary proceedings, the point being that the suspension became unlawful at a certain point as found by the High Court Judge by virtue of the a wrongful and negligent delay on the part of the defendants in the completion of such investigations and inquiries."*

148. He further observed (p. 636):

> *"An Garda Siochana is a public authority with policing powers and charged, inter alia, with the enforcement of the law and maintenance of public peace and order. It is entirely consistent with that role and the public interest that that the Garda Commissioner has a power to suspend from duty a member of a force with such important public duties pending the completion of any inquiry on serious disciplinary charges against such a member should the Commissioner, in his discretion consider it in the best interests of the force to do so. None of this has been put in issue in these proceedings. Indeed, it seems to me it would be very much contrary to the public interest if a member of An Garda Siochana were permitted to carry out his policing*

duties when there were reasonable grounds for conducting an investigation or an inquiry into disciplinary matters which could call into question his integrity."

149. I do not doubt that the public interest and the maintenance of confidence in policing warrants the existence of a power to suspend pending an investigation or inquiry. The question which presents now arises only because it is not expressly provided for under s. 123 or anywhere else in the 2005 Act. On one view this is surprising in that it is clearly a necessary power which is frequently used such that one would expect it to be to the forefront of the Legislative's considerations and it would be surprising if it were overlooked. On the other hand, the obvious necessity for such a power may also explain why a requirement to precisely set it out in primary legislation when providing for regulations in the interests of discipline with the force was not considered to arise.

150. Whichever view one favours, it is clear from the case-law that it has always been taken for granted that the power has been lawfully prescribed through the vehicle of the various iterations of the Disciplinary Regulations as they have evolved over time. A power to suspend was provided for in each of the 1926, 1971 and 1989 Disciplinary Regulations (specifically, Garda Síochána (Discipline) Regulations, 1926, Regulation 26, the Garda Síochána (Discipline) Regulations, 1971 (S.I. No. 316/1971), Regulation 31. and Garda Síochána (Discipline) Regulations 1989 (S.I. No. 94 of 1989), Regulation 35) even though the legislative authority for those regulations deriving from s. 14 of the Police Forces Amalgamation Act, 1925 similarly made no express reference to suspension. Of some note, however, while not identifying a power to suspend particularly, s. 3 of the Garda Síochána Act, 2005 makes express reference to the 1989 Regulations which were to continue in force in accordance with s. 128 of the 2005 Act until replaced by regulations adopted pursuant to s. 123 of the 2005 Act in this way giving some indirect statutory imprimatur for the power to suspend as then previously provided for under the 1989 Regulations.

151. It may indeed be curious that s. 123 of the 2005 Act makes no express provision for a power to suspend and that the word "*suspension*" nowhere features in that section but I cannot conceive of a situation where it was not the intention of the Oireachtas to provide for a power to suspend when providing in clear terms for regulation for the purpose of maintenance of discipline within the police force as it does in s. 123 of the 2005 Act. The maintenance of discipline is itself so obviously integral to the legitimacy of An Garda Síochána in policing and

public confidence in the force that in my view it must have been within the contemplation of the Oireachtas that the disciplinary regulations provided for by it would equip the Commissioner with all the powers necessary for and incidental to the maintenance of discipline. A power to suspend is essential to effectively equipping the Commissioner to ensure the maintenance of discipline within An Garda Síochána.

152. I am quite satisfied that when providing in broad and expansive terms complaints and investigations under the 2005 Act (whether as a matter of internal discipline, pursuant to powers exercised by the Garda Síochána Ombudsman or as part of a criminal process) and for disciplinary powers under s. 123 of the 2005 Act, it is a necessary implication that the Oireachtas also delegated a power to provide for suspension by subordinate legislation in the interests of and for the purpose of maintaining discipline within the force.

153. This brings us to the dichotomy between the wording in s. 123(1) identifying the purpose for which subordinate legislation may be prescribed as "*the maintenance of discipline*" and the language deployed in the 2007 Disciplinary Regulations which refer not to the "*maintenance of discipline*" but the "*interests of An Garda Síochána*". Effective policing is built on confidence of the public in the integrity and probity of members of the force and the steps taken to uphold and set standards throughout the force. Given the integral link between the maintenance of discipline and the interests of An Garda Síochána in circumstances where the legitimacy of the force in policing is dependent on the standards set and enforced within the force, I further consider that the "*maintenance of discipline*" is synonymous with the "*interests of An Garda Síochána.*"

154. Doubts in relation to vires of the power to suspend are also addressed, in my view, by the fact that the suspension power is not an unfettered power exercisable by the Commissioner on a whim where he considers it in the "*interests of An Garda Siochana*" for reasons unrelated to the discipline of the force. The power to suspend is firmly located within the disciplinary regulations which in their terms envisage criminal, disciplinary investigations and investigations on foot of complaints received, as do the provisions under the 2005 Act. Indeed, the 2005 Act makes comprehensive provision for summary dismissal (s. 14), a calling to account (s. 39), a disciplinary process, a complaints process before GSOC (Part 4 of the 2005 Act), as well as a criminal process in relation to matters of garda misconduct. Accordingly, the 2005 Act makes enhanced provision for accountability by members for garda misconduct

(not least through the establishment by the provisions of the 2005 Act of the Garda Síochána Ombudsman Commission and the vesting in it of extensive statutory investigative powers operating in tandem with the disciplinary powers of the Commissioner) relevant to the maintenance of discipline in the force.

155. No provision is made for suspension as a form of disciplinary action in the punitive sense and the power to suspend under the 2007 Regulations is constrained and exercisable only for the purposes of proceedings relating to discipline in the force in being under the 2005 Act and/or the 2007 Regulations. It is manifestly clear therefore that the power to suspend under the 2007 Regulations is not an untrammelled or unfettered power divorced from matters of discipline within the force within the terms of s. 123 of the 2005 Act. The principles and policies guiding the exercise of a power to suspend for the purpose of maintaining discipline within the force are clear both from the terms of s. 123 and from the provisions of the 2005 Act as a whole. As already set out above detailed provision is made for the maintenance of discipline through various provisions of the 2005 Act. In the circumstances, I am not persuaded by the Applicant's argument that the 2007 Disciplinary Regulations are *ultra vires* s. 123 of the 2005 Act.

CONCLUSION

156. I do not accept that the Applicant does not know the reasons for his continuing suspension in broad terms. He has adopted a selective approach in complaining of lack of notice while at the same time refusing to inspect disclosure documents or to seek copies of them or otherwise correspond in relation to the detail of what is alleged or interrogate the reasons for his suspension. He clearly knows he is suspended because serious allegations of "*squaring*" are made against him and files await direction from the D.P.P. He knows that the current intention is not to progress a disciplinary investigation while the issue of criminal charges is being determined. If he requires further information as to the precise allegations made against him, it is surprising that he has not written looking for this information.

157. In proceedings of this nature, it cannot be overlooked that the Applicant's solicitors have at no time sought further particulars of the reasons for his suspension in correspondence. What they have sought is the material relied upon in arriving at the decision to extend a suspension in July, 2022. When this material was not provided, the refusal communicated by

letter in September, 2022 was not challenged within the time limits prescribed under the Rules of Court. In fact, these proceedings were not commenced until April, 2023. In consequence the refusal to provide material when requested in July, 2022 cannot now be impugned in these proceedings.

158. I consider, however, that the Applicant is entitled, where possible, to information which allows him to be satisfied that relevant matters have been considered in respect of decisions to extend his suspension. These decisions are being made on an ongoing basis every three months. The information necessary to ensure that fairness is preserved in the decision-making process surrounding the periodic extension of his suspension notwithstanding investigation delays has been withheld in this case in breach of the Applicant's rights to fair procedures.

159. It seems to me that the material relied upon in deciding to extend the Applicant's suspension should be disclosed, absent proper basis for withholding it, and he should be furnished with sufficient information to enable him to be satisfied as to the factors weighed in the decision to further suspension thereby enabling him to make appropriate representations and/or to challenge a suspension decision as appropriate. In my view the appropriate remedy, given that each suspension order is of short duration and properly grounded challenges have not been brought in accordance with time limits fixed under Order 84 rule 21 of the Rules of the Superior Court, 1986 (as amended) in respect of any specific decision, is to declare the Applicant's entitlement as a matter of constitutional justice to the materials relied upon in the decision-making process so that he is fully equipped both to make submissions and/or to challenge any further period of suspension which may occur.

160. I am satisfied that the Applicant has not established unequal treatment on the evidence adduced.

161. I have decided that the power to provide for suspension by subordinate legislation comes within the four squares of the regulatory parameters fixed under s. 123 of the 2005 Act. Regulation 7 of the 2007 Disciplinary Regulations is not *ultra vires*. The power to suspend as prescribed under the 2007 Regulations may properly be exercised only for the purpose of complaints, investigations or other procedures contemplated under the 2005 Act as directed towards the maintenance of discipline.

162. I will hear the parties as to the final form of my order and any consequential matters in the event that these cannot be agreed.