THE HIGH COURT
JUDICIAL REVIEW

[2005 No.230 JR]

IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 SECTION 3

BETWEEN

TINA FOWLEY

APPLICANT

AND
NOEL CONROY

RESPONDENT

Judgment of Clarke J.delivered on the 27th day of July, 2005.

1. Introduction
1.1 The applicant is a member of An Garda Síochána.She brings these proceedings for the purposes of seeking orders which would require that an investigation of an offence, of which she was the victim, should be conducted otherwise than by Gardaí of or connected with Donegal Division of An Garda Síochána.The respondent is the Commissioner of An Garda Síochána ("The Commissioner").

The applicant was given leave to seek judicial review by order of the court (Hanna J.) on 7th March, 2005.At that time she was suspended from duty.However during the course of these proceedings it would appear that that suspension has been lifted.

1.2 The issues which arise in this case are connected with the unfortunate events concerning the Gardaí in Donegal which have been the subject of significant publicity and are the focus of the Tribunal established with the former President of this Court (Morris P.) as its sole member ("The Morris Tribunal").For reasons which it will be necessary to go into in somewhat more detail the applicant has had an involvement with the events being enquired into by the Morris Tribunal and has had dealings with that Tribunal.As is a matter of wide public knowledge certain senior members of An Garda Síochána who were assigned to the Donegal Division at the time when the events to which the enquiries of the Morris Tribunal relate occurred were the subject of significant criticism by the Tribunal.

1.3 It would appear that on 10th January of this year the applicant's home at Letterkenny was the subject of a burglary where two clocks, a DVD player, two discs, a torch, a play station 2 game and a small amount of cash were stolen from the property together with tapes which the applicant describes as being "of relevance" to the Morris Tribunal.

It would also appear that at 9.10 pm on that evening the applicant reported, by phone to Garda Naomi Sloyan, (who was the Station Orderly on duty at Letterkenny General Station), that her house had been burgled.While it would appear that Garda Sloyan wrongly recorded that report as relating to damage to a car it is accepted that the report received did relate to a complaint about a burglary at the applicant's home.Furthermore it would appear that two Garda officers were directed to the applicant's residence and carried out enquiries and investigations.On the basis that the mis-recording of the applicant's complaint does not appear to have prevented an early enquiry into the burglary at her home I do not believe that anything now turns upon that mis-recording.

It is common case that a Detective Inspector Kane and a Detective Garda Lohan went to the applicant's house on 28th January, 2005.Inspector Kane has deposed to the fact that on the occasion in question he listed the various Gardaí who were involved in the investigation and asked the applicant if she was happy with same.He has further deposed to the fact that the applicant indicated, on that occasion, that she had no problem with the investigation.In her replying affidavit the applicant accepts that Inspector Kane named the Gardaí involved and indicates that they are persons "with whom I have no personal difficulty".She further indicates that she felt, on that occasion, unable to discuss the question of what she saw as a professional conflict with Detective Inspector Kane.

1.4 In any event some six days later on 3rd February, 2005 the applicant's solicitors wrote to the Commissioner.Having referred to the applicant and the fact that she had instituted proceedings in relation to her suspension which was currently before the courts, the letter went on to say the following:-

> "Garda Fowley is a key witness before the Morris Tribunal of Inquiry into certain activities of certain Gardaí in the Donegal Division and has given evidence to the Tribunal regarding acts including misconduct on the part of certain senior members of the Donegal Division.In particular,
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> > (a) Garda Fowley has informed the Morris Tribunal that Superintendent John McGinley was involved in forging the signature of Frank McBrearty Jnr,
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> > (b) Garda Fowley has pointed out discrepancies in the notes of the interview of Ms.Roisin McConnell that there were extra questions in the typed version as compared with the handwritten version thereof On 10th day of January, 2005 Garda Fowley's house at the above address was the subject of a burglary and tapes of relevance to the Morris Tribunal were stolen.Nothing else apart from two clocks, a DVD player and some cash were stolen from the property and items such as a television, jewellery, a lap top computer and other property of significant value were left untouched.
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> Our client has made a complaint to An Garda Síochána in relation to this offence.In all the circumstances it is clearly totally inappropriate that this offence be investigated by the Donegal Division as a clear conflict of interests exists between our client and senior Gardaí of the Donegal Division, particularly having regard to the nature and circumstances of this particular offence.
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> We hereby respectfully call upon you to make immediate arrangements to have the investigation of this offence be carried out by Gardaí outside the Donegal Division, with no links to the Donegal Division, and to confirm that you will do so on or before the close of business on 10th February, 2005".

1.5 These proceedings were threatened in default.It would appear that by letter of 3rd March, 2005 sent by Assistant Commissioner Catherine Clancy on behalf of the Commissioner, the following was stated:- "I wish to advise you that burglary (sic) at the home of Garda Tina Fowley on 10th January, 2005 is currently under investigation by Gardaí attached to Letterkenny Garda Station.I have full confidence in the ability of the investigating Gardaí to carry out a thorough investigation.In addition, Garda Tina Fowley has expressed

her full satisfaction with the Gardaí assigned to investigate this incident".

1.6 The application for leave was successfully moved before the court on 7th March, 2005.In those circumstances the applicant maintains that the continued assignment of Gardaí from the Donegal Division to conduct the enquiry into the burglary at her home amounts to a breach of what are, it is asserted, her entitlements to have an investigation carried out into that burglary by Gardaí in respect of whom there would not be what she describes as "a conflict of interest".

2. The Evidence
2.1 In her original grounding affidavit the specific matters raised by the applicant concerning conflict with the Donegal Division of An Garda Síochána were put on the basis that the applicant had given evidence to the Morris Tribunal in respect of matters including "serious misconducts on the part of certain senior members of the Donegal Division of An Garda Síochána".Specific reference is then made to the fact that, it is said, the applicant informed the Morris Tribunal that Superintendent John McGinley was involved in forging the signature of Frank McBrearty Jnr.There is further reference to the fact that the applicant would appear to have pointed out discrepancies in the notes of the interview of Roisin McConnell in that there were extra questions in the typed version as compared with the handwritten version of her interview.No other specific matters are raised in that affidavit.The affidavit therefore raises the same specific matters as were set out in the letter of the 3rd February.On the basis of those contentions the applicant concluded her affidavit by expressing extreme concern that it would be "impossible" to have confidence in such senior Gardaí to the extent that I apprehend that this offence will not be properly investigated".

2.2 The original replying affidavit on behalf of the respondent was sworn by Detective Inspector Keane.Having referred to the meeting of 28th January, 2005 (as outlined above) Detective Inspector Keane further drew attention to the fact that the specific matters mentioned in the applicant's grounding affidavit occurred in the period 1996 to 1997.He noted that the Superintendent McGinley specifically referred to had been based in Galway since approximately mid 2000.He further noted that with one exception the allocation of senior Gardaí of the Donegal Division had completely changed from the period 1996/1997.

2.3 In a further affidavit of 27th May, 2005 the applicant, for the first time, makes accusations of a conflict with Detective Inspector Kane.She refers to the fact that Detective Inspector Kane was a part of the Barron Investigation and a member of the Carty Inquiry Team (both of which matters are the subject of inquiry by the Morris Tribunal).Furthermore certain accusations are made against Superintendent Gallagher and also against two named Gardaí who were members of the investigation team (Garda John Horkan and Garda Georgina Lohan) as having had an involvement "at the centre of the issues surrounding the notes of interview of Roisin having attended her interview along with Detective Superintendent John McGinley".

It is difficult to avoid the conclusion that the matters set out in this affidavit amount to a significant extension of the contended for conflict of interest over and above that set out in the original letter to the Commissioner and the original grounding affidavit which, as has been pointed out, is in very similar terms to that letter.This extension seems surprising in the light of the fact that the applicant accepts that she was aware from the meeting with Detective Inspector Kane on 28th January of the identity of each of the members of the investigation team.Indeed at paragraph 5 of the same affidavit she indicates that they are persons "with whom I have no personal difficulty".Given that the applicant was aware of the identity of those persons prior to the letter of the 3rd February (which set out to the Commissioner her concerns in relation to the investigation), it is surprising that any legitimate concerns which she might have as to a conflict of interest with individual members of the Garda Investigation Team were not directly specified in the originating letter.Furthermore, and for the same reasons, it is surprising that any genuine concerns which the applicant has with individual members of the investigation team were not referred in her original grounding affidavit.

2.4 Indeed given that the thrust of Inspector Kane's replying affidavit was to the effect that there was virtually no commonality between the identity of senior Gardaí in the Donegal Division as and between the time of the events into which the Morris Tribunal was enquiring and today and given that the focus of both the originating letter and the grounding affidavit was directed against senior Gardaí (rather than individual members of the investigating team) it is difficult to avoid the conclusion that the focus in the later affidavits on the individual members of the investigation team stemmed from a realisation that the original complaint directed as against senior members of the Gardaí in the Donegal Division was, by virtue of the fact that virtually all of them had been moved since the relevant time, less likely to be viewed as significant.

2.5 While there is some limited implied criticism of the way in which the enquiry was actually carried out by the investigation team, I am not satisfied that it has been established that there was anything in the manner in which the investigation was, in fact, conducted that would have led the Commissioner, or those to whom the Commissioner entrusted senior decision making in this matter, to conclude that the investigation had not been properly conducted.

3. The Legal Argument
3.1 As was pointed out by counsel for the applicant there is little direct authority on this issue.In summary the applicant argues that she has an entitlement to have the burglary committed at her home the subject of a proper police investigation by members of An Garda Síochána who are not the subject of bias in the legal sense of that term.In other words she contends that the proper test as to whether it is appropriate for a member of An Garda Síochána to be involved in an enquiry of this type is similar to the test that would be applied to an adjudicator who was asked to make a decision which might have an impact on the applicant's rights.On that basis she seeks to have applied to her case the well established jurisprudence of the courts in respect of such matters.

3.2 The respondent does not argue that the court has no jurisdiction to intervene in matters such as this.However attention is drawn to the jurisprudence of the Courts of the United Kingdom in which jurisdiction it is clear that, while there is a jurisdiction to intervene, same can only arise in clear and compelling cases.

3.3 It should be noted that while the leave granted in this case included orders under the European Convention on Human Rights Act, 2003, that aspect of the case was not pursued at the full hearing.

4. The Case Law
4.1 In *R.v.Commissioner of the Police of the Metropolis* (ex parte Blackburn) 1968 2 QB 118 the entitlement, at the level of principle, of the courts to intervene in relation to the exercise of police powers came for consideration by the United Kingdom Court of Appeal.The case was concerned with a policy decision made by the relevant Commissioner of Police not to attempt to enforce certain provisions of the United Kingdom Gaming Legislation in relation to gaming clubs in London.A private citizen sought an order of mandamus directing the respondent to reverse the policy decision.In dealing with the issue of principle Lord Denning MR held the following:-

> "I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every Chief Constable, to enforce the law of the land.He must take steps so to post his men that crimes may be detected; and that honest citizens may go

about their affairs in peace.He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought.But in all these things he is not the servant of anyone, save of the law itself.No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one.Nor can any police authority tell him so.The responsibility for law enforcement lies on him.He is answerable to the law and to the law alone.That appears sufficiently from Fisher v.Oldham Corporation (1930) 2 KB 364 and *Attorney General for New South Wales v.Perpetual Trustee Company Limited* (1955) AC 457.

Although the Chief Officers of Police are answerable to the law there are many fields in which they have a discretion with which the law will not interfere.For instance it is for the Commissioner of Police of the Metropolis or the Chief Constable, as the case may be, to decide in any particular case whether enquiries should be pursued, or whether an arrest should be made, or a prosecution brought.It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area.No court can or should give him direction on such a matter.He can also make policy decisions and give effect to them as, for instance, was often done when prosecutions were not brought for attempted suicide.But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere.Suppose a Chief Constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value.I should have thought that the court could countermand it.He will be failing in his duty to enforce the law".

To like effect Salmon L.J.stated the following:-

> "The chief function of the police is to enforce the law.The Divisional Court left open the point as to whether an order of mandamus could issue against a Chief Police Officer should he refuse to carry out that function.Constitutionally it is clearly impermissible for the Secretary of State for Home Affairs to issue any order to the police in respect of law enforcement.In this court it has been argued on behalf of the Commissioner that the police are under no legal duty to anyone in regard to law enforcement.If this argument were correct it would mean that insofar as their most important function is concerned, the police are above the law and therefore immune from any control by the court.I reject that argument.In my judgment the police owed the public a clear legal duty to enforce the law – a duty which I have no doubt they recognise and which generally they perform most conscientiously and efficiently.In the extremely unlikely event, however, of the police failing or refusing to carry out their duty, the court would not be powerless to intervene"

4.2 This area was the subject of further consideration by the United Kingdom House of Lords in *R.v.Chief Constable of Sussex (ex parte International Traders Ferry Limited)* 1991 1 All ER 129.That case involved the live transport of stock across the English Channel from a port in Sussex by International Traders Ferry Limited.Those opposed to the live transport of stock in that manner mounted protests.The policing of the difficult situation that ensued placed very considerable demands on the local police force.As a result, and after a period, the Chief Constable indicated that he would have to limit police operations in a manner which would, in practice, have significantly reduced the amount of shipments that could have occurred.In those circumstances the company sought orders requiring a heightened level of police enforcement of the law.

In the course of his speech Lord Slynn made the following statement of principle:-

> "The courts have long made it clear that, though they will readily review the way in which decisions are reached, they will respect the margin of appreciation, or discretion, which a Chief Constable has.He knows, through his officers, the local situation, the availability of officers, his financial resources and the other demands on the police in the area at different times: Chief Constable of the *North Wales Police v.Evans* (1982) 3 All ER 141 at 154.Where the use of limited resources has to be decided, the undesirability of the courts stepping in too quickly was made very clear by Bingham MR in *R.v.Cambridge Health Authority* (Ex p B (1995) 2 All ER 129 at 137) and underlined by Kennedy L.J.in the present case.In the former, Bingham MR said, in relation to decisions which have to be taken by health authorities:
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> > "difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients.That is not a judgment which the court can make"".
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> Later in the judgment Lord Slynn quoted with approval from the judgment of Balcombe L.J.in *Harris v.Sheffield United Football Club Limited* (1987) 2 All ER 838 at 849 to the following effect:-
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> > "The true rule, in my judgment, is as follows.In deciding how to exercise its public duty of enforcing the law, and of keeping the peace, a Chief Constable has a discretion, which he must exercise even handily.Provided he acts within his discretion, the courts will not interfere … in exercising that discretion a Chief Constable must clearly have regard to the resources available to him …"

4.3 I do not doubt that the position concerning the extent of the discretion of the Commissioner in Ireland is similar to that of a Chief Constable in the United Kingdom.However it is clear that this case is different, in several significant respects, from the sort of cases which have been the subject of judicial determination in the United Kingdom.This is not a resources case.It is not contended that An Garda Síochána cannot carry out a level of investigation which the applicant desires because of the resources available to it.For the reasons set out in *International Traders Ferry* a court would, necessarily, be very slow indeed to interfere with any decision by the Commissioner as to the allocation of the resources available to him.

4.4 In those circumstances it seems to me that *Blackburn* is more relevant.However, even there, there is a significant difference.*Blackburn* and other similar cases were concerned with a policy decision on the part of a police commissioner not to prosecute a particular category of offence.While making clear that the court has a jurisdiction in relation to such general policy decisions it is equally clear from the passages from *Blackburn* referred to above that the court was concerned, in that case, with a policy of general application and appeared to be of the view that the courts would not interfere with the exercise of a discretion in respect of an individual case.This is, of course, an individual case.In the light of that fact it is necessary, largely from first principles, to consider what individual rights the applicant may have in relation to the investigation of an offence which directly affects her.

It is, of course, the case that *Blackburn* was concerned with the right of any citizen (not necessarily someone who might reasonably be described as a victim of the crime concerned) to ensure that, at least in general terms, and subject to resources and reasonable policy considerations, the law was generally enforced.That a member of the public may retain some level of entitlement of recourse to the courts where the Commissioner adopts a legally impermissible policy in respect of the prosecution of offences generally would seem clear from those authorities which, as I have indicated, I find persuasive as to the law in this jurisdiction.

5. The rights of a victim

5.1 The question remains as to the extent to which an individual has a similar, or any, entitlement in respect of an offence of which that individual may be said to be the victim.It seems to me that there would be no logical basis for treating an individual's entitlement in respect of an offence in relation to which that person has a particular interest as victim in any less way than the entitlement of a citizen, with no particular interest, to ensure that the law generally was enforced in a reasonable and even handed manner.It may, of course, in practice, be all the more difficult for an individual to establish that the Commissioner has not, having regard to all relevant circumstances, including resources, information available to the Commissioner, and the like, not acted reasonably and appropriately in relation to the investigation of an offence.However I would not be prepared to hold that the courts could not, in any circumstances, have a jurisdiction to intervene, in a clear and manifest case, at the instigation of a victim of a crime, to ensure that an investigation of that crime was carried out in a manner which vindicated the rights of that victim.That does, however, perhaps, beg the question as to precisely what are the rights of a victim of a crime to have that crime properly investigated.

5.2 It seems to me that it may be easier to express any such rights and entitlements in a negative way.There may be a whole series of legitimate reasons why there may not be an enquiry, or at least a significant enquiry, into a particular crime.The resources issue, which was the subject of *International Traders,* is just one such reason.It is also clear from *Blackburn* that a police force may have legitimate policy reasons for not vigorously pursuing crimes of a particular type.There may well be other legitimate reasons why, in all the circumstances, a police force may decide not to embark on an investigation of a particular crime.To assert, therefore, a positive entitlement to have a proper investigation of a crime of which a person might be the victim would seem to me to go too far.

Similarly once embarked upon, there may be all sorts of legitimate reasons why an enquiry being conducted by the Gardaí may be put on hold or terminated.In the context of the manner in which the enquiry is actually conducted it is accepted by counsel on both sides that, in virtually all cases, the court would have no jurisdiction to review operational matters such as the manner in which the enquiry is being conducted.

5.3 In all those circumstances it seems to me that it would be very difficult to formulate any form of positive entitlement on the part of a victim.However I am satisfied that a victim may have an entitlement to ensure that an enquiry into the crime concerned is not dealt with in a capricious manner.For example a refusal to investigate the crime for no good reason may be reviewable even though it must be clear that the courts would afford a very wide margin of appreciation to the Gardaí as to any legitimate basis for not embarking upon an investigation of a crime.It would, therefore only be in the most exceptional cases indeed that a jurisdiction to intervene could arise.Similarly once embarked upon the Gardaí must enjoy a very wide margin of appreciation indeed as to the manner in which the enquiry is conducted and only in the most exceptional cases could the court have a jurisdiction to intervene.

6. Bias
6.1 Before leaving the case law it is necessary to consider the potential application to this case of authorities such as *O'Neill v.Beaumont Hospital* [1990] ILRM 419 which make it clear that an adjudicator carrying out a decision making role which can affect the rights of an individual must be a person who meets an objective test as to whether the individual whose rights may be affected by their decision might reasonably fear that circumstances would prevent a completely fair and independent hearing of the issues which arise.It is clear that the fear must be judged objectively from the standpoint of what Finlay C.J.described as "a reasonable man".

6.2 That principle clearly applies to cases of adjudication.I am not, however, persuaded that it can reasonably be said to apply to a police investigation.While police officers conducting an investigation are obliged to comply with both common law and statute in the exercise of their powers, they are not adjudicators and are not obliged to act in a quasi judicial way.Indeed police officers will, quite frequently, conduct enquiry into an offence in respect of whom the prime suspect is someone with whom they will have had many adverse dealings in the past.It could hardly be said that a career criminal could object to a member of An Garda Síochána being involved in an enquiry into an offence for which that career criminal was a prime suspect on the grounds that the member of An Garda Síochána concerned had a pre-conceived suspicion concerning the individual involved.I am not satisfied, therefore, that the objective bias cases have any application to a police enquiry.

6.3 Therefore, while the possibility that an individual Garda or Gardaí might not be fully objective about a case is a factor which senior Gardaí must take into account in assigning members to an investigating team, any perceived lack of objectivity is not, of itself, necessarily a bar to the members concerned being involved in the investigation.Other legitimate operational factors (such as local knowledge, knowledge of the case and many others) might also play a legitimate role in the consideration.The extent of any perceived lack of objectivity could also be a legitimate factor.

6.4 The test to be applied is, therefore, as to whether any reasonable police commissioner could, on any basis, have come to the view that it was appropriate to conduct the enquiry in the way in which it was.In approaching that test the court must afford the widest conceivable margin of appreciation to the Commissioner.

7. Application to facts of this case
7.1 It is important to remember that the case made to the Commissioner, and rejected by him or on his behalf, was that set out in the letter of 3rd February.For the reasons indicated above that case concerned a very narrow contention directed solely at senior Gardaí.For the reasons set out in Inspector Keane's original replying affidavit there was more than ample basis for rejecting the specific application made on the grounds that there had been a very large change in the identity of senior personnel within the Donegal Division from the time to which the enquiries of the Morris Tribunal related to the time of the investigation of the burglary at the applicant's home.On that basis it seems to me that the Commissioner was more than entitled to take the view which he (or perhaps Assistant Commissioner Clancy on his behalf) took.

7.2 However even if the full case as now made on the affidavits had been put to the Commissioner it does not seem to me that I could hold that the Commissioner would have acted in a capricious manner in declining to direct that the investigation be conducted by Gardaí other than those from the Donegal Division.I have already indicated that there are grounds for taking the view that the expanded suggestion of conflict of interest stem, at least in part, from an attempt to shore up the application in circumstances where the initial basis put forward for it was not perceived as being sustainable.Furthermore, and in particular on that basis, it was open to the Commissioner to include in his considerations the extent of any perceived "conflict of interest".He could also take into account his knowledge, or that of his senior officers, concerning the manner in which the investigation had in fact been carried out and many other relevant factors (such as the advantage of continuity and the conduct of the enquiry by those with local knowledge).In the light of all such factors I cannot conclude that even had the expanded case now made to the court been put to the Commissioner he would have been irrational or capricious in declining to accept it.

7.3 In those circumstances it does not seem to me that the applicant has met the exceptionally high threshold that would be necessary to entitle her to an order of the type she seeks in this case.I would therefore dismiss the applicant's case.