

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 635 JR]

BETWEEN

BRIAN CANAVAN

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

NO. 2

JUDGMENT of Ms. Justice Baker delivered on the 16th day of March, 2018

1. The applicant is a serving member of An Garda Síochána and seeks an order preventing the respondent from taking any further steps in a disciplinary investigation against him.
2. In proceedings bearing record number 2015/617 JR ("the first proceedings") the applicant sought by judicial review to prevent the respondent from continuing two disciplinary investigations then in being. Judgment was delivered by me on the 3rd May, 2016, *Canavan v. Commissioner of An Garda Síochána* [2016] IEHC 225, in which *inter alia* I refused to prohibit the continuation of the disciplinary investigations, although, having taken the view that the continued suspension of the applicant without pay had not been shown to be justified, I made a declaration that his continued suspension was not valid and that he should be reinstated to his employment on full pay and allowances.
3. The present judicial review arises from events that occurred since the delivery of that judgment.
4. The applicant now seeks declaratory relief and an order to prohibit the continuation of one of the two investigations with which the first proceedings were concerned, the investigation by Detective Inspector Paul Cleary ("the Cleary Investigation") on a number of grounds which may be summarised as follows:-
 - (a) That the respondent's attempt to continue the Cleary Investigation is *ultra vires* and in breach of Regulation 24 of the Garda Síochána (Discipline) Regulations 2007, Statutory Instrument No. 214/2007 ("the Regulations of 2007").
 - (b) That the continuation or "reopening" of the Cleary Investigation is in breach of the legitimate expectations of the applicant and/or that representations or assurances in the course of the first proceedings that the Cleary Investigation had then been concluded, or would not be continued, estop the respondent from continuing or reopening that investigation.
 - (c) That the principles of *res judicata* or *autrefois* acquit in conjunction with the requirements of natural and constitutional justice mean that the Cleary Investigation should be prohibited.
5. Leave was granted by Humphreys J. on the 9th November, 2015.
6. The application is opposed on three grounds:
 - (a) That there is no reason arising under the Regulations or otherwise which would prevent the continuation of the Cleary Investigation.
 - (b) That as an order of prohibition in respect of the investigation was refused in the first proceedings the matter is *res judicata*.
 - (c) That as a matter of fact no effective or binding representation was made in the course of the first proceedings, and no circumstances exist that might give rise to an issue estoppel or any actionable legitimate expectation.

Material facts

7. On 16th June, 2016, after judgment was delivered, Detective Inspector Cleary wrote to the applicant's solicitor stating that in accordance with Regulation 23 of the Regulations of 2007 he would like to meet the applicant for the purpose of his investigation.
8. The applicant's solicitor responded on the 7th July, 2016, and said that the proposed interview was in direct contradiction to the facts advanced in the first proceedings that the Cleary Investigation had then concluded and that on a correct reading of the Regulations the matter could not be re-opened.
9. By letter of 27th July, 2016, the office of the Chief State Solicitor stated that "the Cleary Investigation was never concluded", that the applicant was required to attend for interview, and that his refusal to attend might be considered a failure to cooperate.

The Regulations

10. The Regulations of 2007 set out the legal basis for the taking of disciplinary action against a member of An Garda Síochána.
11. Part 3 of the Regulations provides for the investigation of "serious breaches of discipline". Regulation 23 provides for the appointment by the Commissioner of a member to investigate an alleged breach: -

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

investigate the alleged breach.

(2) If the breach of discipline is alleged to have been committed by a member below the rank of inspector, the investigating officer shall be of a rank not below that of inspector.

(3) In any other case, the investigating officer shall be of a rank not below that of superintendent.

(4) The Commissioner shall ensure that the investigating officer, or any other member or members referred to in Regulation 24(2), have not been involved in any capacity in relation to an earlier aspect of the case."

12. Regulation 24 governs the conduct of the investigation. Regulation 24(5) makes provision for what is to happen at the conclusion of the investigation stage of disciplinary proceedings: -

"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."

13. It is only when the written report of the investigating officer is submitted to the Commissioner that a board of inquiry may be established following the consideration by the Commissioner of the report of the investigation.

The argument that the attempt to continue the investigation is *ultra vires*

14. The applicant argues that by furnishing his report, Inspector Cleary had become *functus officio* and was no longer competent to further investigate the matter in hand.

15. The applicant argues that the Regulations of 2007 make no provision for a preliminary or interim report, and accordingly, that the document prepared by Inspector Cleary must be objectively understood to comprise his final report and to complete his investigative role. It is argued in the alternative that if the Regulations do permit the preparation of an interim report, that no explanation is given by Inspector Cleary as to why he furnished an interim or incomplete report at that time. Insofar as it is suggested that Inspector Cleary found himself unable to prepare a final report because he had not had the benefit of an interview with the applicant, it is positively affirmed by the applicant that no attempt was made by Inspector Cleary to interview him before he submitted the report to his superiors. It is noted that Inspector Cleary did not say on affidavit in either judicial review application that he did in fact seek to interview the applicant and that the applicant had refused to meet him.

16. The last two pages of Inspector Cleary's report contains his conclusions and he made an express statement of his belief in respect of breaches numbers one and two that in his view it was "clear" that Garda Canavan had failed in his duties to properly record or deal with property or in the case of alleged breach number one, or with substances, in the case of alleged breach number two. It was with regard to the "exact amount" of disciplinary breaches that Inspector Cleary said he was unable to form an opinion or make a recommendation.

17. I accept the argument of the applicants that on a plain reading the Regulations of 2007 do not permit the preparation of a series of reports or an interim report.

18. The matter of *vires* is to be determined as a matter of first principle and on the facts. If Inspector Cleary had finished his investigative role, he could not thereafter seek to further engage the process or require that the applicant attend him for interview.

The Report of Inspector Cleary

19. As the applicant argues that the report of Inspector Cleary must be treated as a final report and that therefore his statutory role is complete, I consider that it is appropriate that I should approach the question by considering whether the Cleary Report is a final report, and if so, whether in that case it would be *ultra vires* the respondent to continue the investigation. The characterisation of the report must be objectively determined in the light of the Regulations.

20. A formal document was prepared by Inspector Cleary dated 7th December, 2015, described in its body as a "report", and headed up by reference to the Regulations of 2007. Certain findings were expressly made and the report sets out a number of conclusions as follows: -

(a) That based on the evidence outlined in the file, Garda Canavan failed in his duties to properly record or deal with property which came into his possession whilst on duty as a member of An Garda Síochána;

(b) That Garda Canavan failed in his duties to properly record or deal with substances which came into his possession whilst on duty as a member of An Garda Síochána; and

(c) In regard to the third alleged breach, Inspector Cleary expressed the view that the "exact amount of breaches cannot be fully quantified without analysis of Garda Canavan's account". He was prepared, however, to state that an inference could be drawn.

21. At least seven positive findings are made in the body of the report, all at paragraph 39. None of these findings are described as preliminary or interim. It is with regard to the exact amount of the breaches that Inspector Cleary found himself unable to come to a conclusion.

22. The final paragraph of the report noted that attempts to contact Garda Canavan "in person or by phone had proved unsuccessful" and noted that a "High Court injunction" had been sought by Garda Canavan. This was a reference to the application for leave to seek judicial review.

23. Inspector Cleary finished by saying he awaited the "advice" of the Superintendent to whom he reported and indicated that he was forwarding his report "for your information and consideration please".

24. Nowhere in the body of the report does Inspector Cleary say that he was furnishing the report for the purposes of Regulation 24(5), although he does say correctly that he was appointed in accordance with Regulation 23.

25. Inspector Cleary swore an affidavit in support of the statement of opposition in the present case and describes the reference to

the "complete file" as meaning that it was "... everything that I had in my possession in relation to my investigation at that time". He says that he had come to the conclusion and advised his superiors that he did not believe there was any evidence to sustain a criminal prosecution, but that with regard to the disciplinary investigation he was unable to fully quantify the amount of alleged breaches without hearing the account of Garda Canavan.

26. Inspector Cleary says that while he did describe the report as his "complete file", he did not mean by this to say that the investigation was "completed", except with regard to the criminal aspect. He expressly says he had not completed his investigation into the alleged breaches of discipline.

27. In his affidavit grounding the notice of opposition, Chief Superintendent Matthew Nyland describes Inspector Cleary's report as "an interim report" and notes that it did not contain any recommendation as to the establishment of a board of inquiry. My observations above regarding the question whether an interim report could be prepared are relevant and the Regulations make no provision for the preparation of an "interim report".

28. Mr Canavan in his first supplemental affidavit says that the characterisation by the respondent of the Cleary investigation is a "... clear attempt to strain the meaning of unambiguous words in a technical and Jesuitical manner in order to seek to circumvent the clear representations ..." said to have been made. He also says that on its face the Cleary Report does contain conclusions and an expression of the opinion of Inspector Cleary regarding the alleged failures.

Conclusion on the status of the report

29. The Regulations of 2007 comprise a complete statutory code and if the respondent proposes to conduct a disciplinary inquiry it must do so within the procedural requirements of the Regulations. Having regard to the fact that the interests and livelihood of the member who is to be subjected to the investigation may be impacted by the result, there must be both fairness and transparency in the course of the investigation, and the process must be conducted within the procedural requirements of the Regulations.

30. Inspector Cleary was appointed to conduct an investigation and came to a number of firm conclusions but was unable to make a recommendation in some respects. That is as far as he purported to go, and he chose to prepare a report. As there is no express time limit in the Regulations within which the report of the investigating officer is to be prepared, there was no reason why he was required as a matter of express procedure to furnish his report in a specific time.

31. On its face, the Cleary Report says that "the breaches cannot be quantified" at that time and no recommendation is made. Whilst the parties have engaged in an amount of semantical argument, I consider that the question is one of fact, and that Inspector Cleary had not concluded his investigation and did not prepare a final report.

32. The report on its face is not a complete or final report. It does not contain the recommendation required by Regulation 24(5) whether the facts disclosed warrant the establishment of a board of inquiry. It does not purport to be a final report, and whilst the characterisation of the report is a matter for me, the fact that the writer asked for further comment is indicative of his intention in preparing the report.

33. Inspector Cleary did not indicate that his findings were intended to be conditional. In my view, the Cleary Report was not a finalised report for the purposes of Regulation 23 and the stage of the process giving rise to a report and the making of recommendations had not concluded. In my view, Inspector Cleary did not complete the function required of him under the Regulations but asked for advice from his instructing officer as to how he should proceed. His report is not one for the purposes of Regulation 24(5).

34. I am influenced too by the fact that in the course of the first proceedings the written legal submissions submitted by the applicant observed that Inspector Cleary had not identified any recommendations or what was described as "the outcome of his investigation" (paragraph 20 of those submissions). The applicant there sought to argue that the Cleary Report was not one in conformity with the requirements of Regulation 24(5) in that it did not contain a recommendation, was therefore incomplete and not suitable for the purpose for which a report under s. 24(5) is to be completed. That argument conforms to my view of the status of the report prepared by Inspector Cleary. I do not consider that the applicant may now argue the contrary factual proposition, although as with any litigation different legal consequences may be propounded.

35. Therefore, I reject the argument that Inspector Cleary is *functus officio* or that the continuation of his investigation is *ultra vires*.

Was a representation made in the first proceedings?

36. The applicant argues in the alternative that the matter falls to be considered by virtue of communications or alleged representation made by the respondent in the first judicial review.

37. The applicant argues that the first proceedings were based on or created a belief or shared assumption that the Cleary Investigation had concluded.

38. This argument hinges on two sentences contained in Inspector Cleary's affidavit sworn on the 5th February, 2016, in the first proceedings where he avers as follows: -

"The complete investigation file was forwarded to my superiors in December 2015. There was no criminality uncovered in this investigation."

39. The other factual matter on which the applicant relies is the statement at paragraph 12 of the written legal submissions furnished by the respondent as follows: -

"Inspector Cleary's own investigations is completed, albeit in the absence of any interview with the Applicant who had displayed a distinct lack of interest in engaging with Inspector Cleary - it was done in a matter of six, dispute the difficulties in communicating with the Applicant - and the files was forwarded to his superiors on December 2015."

40. The applicant argues that all parties behaved in the course of the first judicial review as if the Cleary investigation had concluded, and that as a result he had a legitimate expectation arising from the conduct of the first proceedings that the Cleary Investigation would not be continued. In the alternative he argues that the respondent is estopped by assurances or representations from continuing the investigation.

41. The respondent argues that, to use the language of Chief Superintendent Matthew Nyland, no "intimation" was ever given at any

time that the Cleary Investigation had concluded or would not be taken further.

Estoppel by representation

42. The applicant relies on the principle of estoppel by representation and/or by convention. The elements of estoppel by representation were explained by Charleton J. in *National Asset Management Ltd. v. McMahon* [2014] IEHC 71 [2015] 2 IR 385 where he approved the statement in *Snell's Equity* (32nd Ed. London, 2010 at paragraph 12.009) as follows: -

"Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect, and, before it is withdrawn, the other party acts upon it, altering his or her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it."

43. The elements of such estoppel are: -

- (1) That the promise or assurance must be clear and unequivocal;
- (2) There must be an intention to affect legal relations;
- (3) It must be reasonable for a receiving party to rely on the promise or assurance;
- (4) The reliance must be an alteration of the position of the receiving party of such a nature that makes it inequitable for the party making the promise or giving the assurance to act inconsistently with it.

44. The applicant says that he relied upon the representations made in the course of the hearing by counsel, in the written legal submissions furnished by the respondent, and by the express averment of Inspector Cleary that he had furnished his "complete report". It is argued that it would now be inequitable to permit the continuation of the investigation.

45. Estoppel by convention is a subset of the doctrine of estoppel by representation, and such an estoppel may arise when the promise or assurance is not clear or unequivocal, but may derive from the creation of or encouragement of an assumption. Estoppel of this nature was recognised by the Supreme Court in *Courtney v. McCarthy* [2007] IESC 58, [2008] 2 IR 376, where Geoghegan J. referred to the passage of Spencer, Bower, and Turner, in *Estoppel by Representation* (3rd ed., 1977) cited by Brandon L.J. in *Amalgamated Property Co. v. Texas Bank* [1982] 1 QB 84 that such estoppel might arise in circumstances where parties have acted upon an "... agreed assumption that a given state of facts is to be accepted between them as true".

46. The applicant argues that he relied on the representations made in the course of the first judicial review by altering his position irrevocably in the manner by which he dealt there with the Cleary Report as the matter of real concern to him there was the investigation of Superintendent Hand ("the Hand Investigation").

47. Counsel for the respondent accepts for the purpose of the present hearing that the submission that the Cleary Investigation was complete was incorrect insofar as it is a submission regarding the facts. The respondent argues that public policy dictates that the public interest in the performance by the respondent of its statutory duty could not as a matter of law be defeated by a representation contained in written legal submissions.

48. It is also argued that Garda Canavan cannot show that he relied to his detriment on any of the representations.

Legitimate expectation

49. The applicant also relies on the doctrine of legitimate expectation on the same factual matrix. The leading judgment remains that of Fennelly J. in *Glencar Exploration PLC v. Mayo County Council (No.2)* [2001] IESC 64, [2002] 1 IR 84 where it was held that an expectation could be derived from: -

"...an act which is accompanied by or implies an intention to follow an identifiable course of conduct by the public authority."

50. A party may rely on a legitimate expectation even without detrimental reliance, provided it can be shown that there was a change in position such that in the light of the equity of the matter the other party ought not be permitted to "... depart from an undertaking or promise without taking account of the legitimate expectation created by them", per Fennelly J. in *Daly v. Minister for the Marine* [2001] IESC 77, [2001] 3 IR 513 at 528.

Conclusion on estoppel and legitimate expectation

51. Having examined the written submissions and the pleadings in the first proceedings, it seems to me that they proceeded on the basis that the applicant did not challenge the course of the Cleary Investigation, and the focus was on the continued suspension of the Hand Investigation.

52. My judgment in the first proceedings did not consider how the Cleary Report was to be treated and whether it was a final report for the purpose of the Regulations of 2007. It was primarily focused on the suspension of the applicant from Garda duty and no express consideration was made as to whether the Cleary Investigation was complete. This is because that was not an element of the judicial review as pleaded and leave had not been granted to seek declaratory or other relief in relation to this point.

53. It seems to me that the applicant cannot argue now that he failed to advance particular arguments in the course of the first proceedings in the light of what he describes as representations or assurances given in legal submissions or the replying affidavits of the respondent in those proceedings. The statement of grounds dated 9th November, 2015, sought general prohibitory relief including relief regarding the ongoing suspension of the applicant from duty. No express plea was made with regard to the Cleary Report or the continuation of the Cleary Investigation. At paragraph 8 of his grounding affidavit in the first proceedings, the applicant says he was unclear what Inspector Cleary was investigating and how his investigation was to be reconciled with the then existing investigation being carried out by Garda Hand. It was not until Inspector Cleary swore his affidavit on 5th February, 2016, that the reference to the "complete investigation file" was first made.

54. The leave granted by Humphreys J. did not enable the applicant to make arguments relating to the nature of the Cleary Report, whether it was a final or interim report, or one contemplated by the Regulations. In those circumstances, I do not accept the argument that the applicant is entitled to rely on an estoppel by convention or representation, as no statements or representations,

even if they be such, could have led to the alteration of the applicant's position or the manner by which he pleaded or argued in the first proceedings. The grounds on which leave to seek judicial review was granted had been formulated and approved by Humphreys J. before the Cleary Report, the affidavits and submissions were to hand. The statement made after leave was granted could not have led the applicant to alter his position irrevocably in the first proceedings.

55. It is reasonable to make an assumption that the Cleary Report was furnished to the applicant to on 7th December, 2015, after the order of Humphreys J. giving leave to seek judicial review, and that Inspector Cleary prepared the report for the purpose of informing his superior officer, Superintendent MacMenamin, of the progress of his investigations. As noted above, Inspector Cleary expressly made reference to an application by Garda Canavan for an injunction, and that he was awaiting advice from Superintendent MacMenamin to what steps he should take thereafter.

56. I do not consider therefore that the contents of the report or of the legal submissions in the course of the first proceedings were in fact relied on by the applicant in such a way that to resile from the comments or representations might give rise to an injustice. Mr Canavan did not rely on any of these facts or comments and did not alter his position in any way arising therefrom.

57. The claim on this ground must fail on this account.

The public interest

58. I conclude that the report of Inspector Cleary is not a final report, and was not intended to be such. It is not a report that contains the necessary requirements for the purposes of Regulation 24(5), and it does not contain a recommendation on foot of which the Commissioner could continue the investigation.

59. Garda Regulations are to be interpreted in a way which gives a degree of transparency in their operation. As observed by O'Donnell J. in *Gillen v. Commissioner of An Garda Síochána* [2012] IESC 3, [2012] 1 IR 574, the Regulations perform an important function in the public interest. As noted by Finnegan J. in *Gillen* at pp. 592 and 589, the Court must weigh the interest of the individual Garda against the public interest in having complaints investigated. The argument made in the present case is not just technical, but in my view it would be against the public interest that an estoppel would operate on a mere technicality or semantic argument. I am not persuaded by the argument of the applicant that it would be wrong or unfair to him in any substantive manner to permit Inspector Cleary to conclude his investigation.

60. I therefore propose to refuse the relief sought.