THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2016] IECA 318

Appeal No. 2015/321

Ryan P.
Finlay Geoghegan J.
Irvine J.

ALAN SHATTER

APPLICANT/APPELLANT

AND

SEAN GUERIN

RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 10th day of November 2016

1. I have had the opportunity of reading in draft the judgment to be delivered by the President and I am in agreement with his conclusion that this appeal should be allowed. I am grateful to the President for the detailed setting out of the facts and the submissions on appeal which I do not propose repeating. I only propose addressing limited issues.

2. The background to the report of the respondent dated the 6th May, 2014 and entitled *"Review of the action taken by An Garda Síochána pertaining to certain allegations made by Sergeant Maurice McCabe"* ("the Report") is well known and set out in full in the judgment of the High Court delivered on the 20th May, 2015. It is sufficient for the purposes of this judgment to summarise it briefly.

3. Sergeant McCabe had made complaints to a number of different parties including his superiors in An Garda Síochána, the Minister for Justice and Equality ("the Minister"), the Department of Justice and Equality ("the Department"), the Garda Síochána Ombudsman Commission ("GSOC") and the Garda Síochána Confidential Recipient ("the Confidential Recipient"). Sergeant McCabe was not satisfied with the responses and ultimately in February 2014, a volume with details of ten different incidents which Sergeant McCabe considered were of a serious nature and matters of public concern were furnished to An Taoiseach by Mr. Micheál Martin TD. On the 25th February, 2014, An Taoiseach made a statement in the Dáil during which he stated:-

> "I am, however, acutely conscious that the scale of the public discussion around these matters could have implications for confidence in the administration of justice in our country. There is a need to address these concerns and put in place a process that can do so quickly and effectively. For that reason, the Government has asked an independent and objective legal expert, Mr Sean Guerin SC, to examine and access all the relevant papers and recommend what further action might be taken. If he recommends that a Commission of Investigation should be established, it will be done. The terms of reference for this work are currently being finalised. The report, which we hope will be completed before the Easter recess, will be laid before the Oireachtas by me and published. I believe this is a prudent way to proceed in view of all the comments, allegations and documents that surround these matters."

4. On the 27th February, 2014, the Government published the terms of reference for what it announced as the "Guerin Inquiry":

"Terms of Reference

> 1. To conduct an independent review and undertake a thorough examination of the action taken by An Garda Síochána pertaining to certain allegations of grave deficiencies in the investigation and prosecution of crimes, in the County of Cavan and elsewhere, made by Sergeant Maurice McCabe as specified in:
>
> a) The dossier compiled by Sgt Maurice McCabe and furnished to An Taoiseach on the 19th February 2014 and
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> b) The letter understood to be from Sgt Maurice McCabe to the Confidential Recipient, Mr. Oliver Connolly, dated 23rd January 2012, part of which was furnished to An Taoiseach on the 21st day of February 2014.
>
> 2. To interview Sgt Maurice McCabe and any other such person as may be considered necessary and capable of providing relevant and material assistance to this Review in relation to the aforesaid allegations and to receive and consider any relevant documentation that may be provided by Sergeant McCabe or such other person.
>
> 3. To examine all documentation and data held by An Garda Síochána, the Department of Justice and Equality, and any other entity or public body as is deemed relevant to the allegations set out in the documents at 1(a) and (b) above.
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> 4. To communicate with An Garda Síochána and any other relevant entity or public body in relation to any relevant documentation and information and to examine what steps, if any, have been taken by them, to investigate and resolve the allegations and complaints contained in the documentation referenced at 1(a) and (b) above.
>
> 5. To review the adequacy of any investigation or inquiry instigated by An Garda Síochána or any other relevant entity or public body into the incidents and events arising from the papers furnished at 1(a), 1(b) and 2 above.
>
> 6. To consider if, taking into account relevant criminal, civil and disciplinary aspects, there is a sufficient basis for concern as to whether all appropriate steps were taken by An Garda Síochána or any other relevant entity or public body to

investigate and address the specified complaints.

7. To advise, arising from this review, what further measures, if any, are warranted in order to address public concerns including whether it is considered desirable in the public interest for the Government to establish a Commission of Investigation pursuant to the Commissions of Investigation Act 2004 and, if so, the matters to be investigated .

8. At the conclusion of the aforesaid review, within eight weeks of 27th February, 2014 or so soon as may be thereafter, to deliver a Report to An Taoiseach on the matters set out at 1, 5, 6, and 7 above."

5. On the 4th March, the respondent was formally notified of his appointment and on the 6th May, 2014, the respondent furnished the Report (336 pages) to An Taoiseach.

6. The overall opinion and advice of the respondent is summarised at para. 20.12 of the Report where it is stated:-

> "In my opinion, having regard to the number, range and importance of the issues arising, it is desirable in the public interest that a comprehensive Commission of Investigation be established pursuant to the Commissions of Investigation Act 2004, to investigate the issues that remain unresolved arising out of the complaints made by Sergeant Maurice McCabe and examined in this report. Such a Commission is, in my opinion, desirable in the public interest to ensure continuing confidence in the institution of An Garda Síochána and the criminal justice system."

7. The respondent then suggested at para. 20.13 that if the recommendation were accepted that the terms of reference "might usefully include the following definite matters of urgent public importance". The matters identified by the respondent included insofar as relevant to the appeal at para. (j):-

> "The investigation by An Garda Síochána and the Minister for Justice and Equality of the complaints made by Sergeant Maurice McCabe in relation to the above matters, and such other like matters as may seem appropriate;"

8. The general opinion reached by the respondent set out above must for the purposes of this appeal be considered in conjunction with the opinion expressed by him at the end of Chapter 19 entitled 'Role of the Department of Justice and Equality' where he stated at paras. 19.103 and .104:

> 19.103 In all the circumstances, I am of the opinion that there is cause for concern as to the adequacy of the investigation of the complaints made by Sergeant McCabe to the Minister for Justice and Equality and a sufficient basis for concern as to whether all appropriate steps were taken by the Minister for Justice and Equality to investigate and address the specified complaints.
>
> 19.104 In my opinion, these matters warrant further inquiry in an appropriate forum in the public interest.

9. The contents of Chapter 19 are central to this appeal and to which I will return.

10. The appellant was furnished with a copy of the report by An Taoiseach prior to its publication and resigned as Minister on the 7th May, 2014. The Report was published on the 9th May, 2014. It is not in dispute that the respondent was aware when conducting the review of the intention to publish the Report when furnished.

11. On the 30th July, 2014, leave was granted by the High Court (Baker J.) to the appellant to seek an order of *certiorari* of seven conclusions allegedly drawn by the respondent in the Report and identified in the schedule to the statement of grounds and related reliefs. The primary ground upon which leave was granted and pursued was that the respondent drew conclusions critical of the appellant without putting them to him or furnishing a draft of same to him with an opportunity to make submissions thereon which was contrary to the principles of fair procedures and natural and constitutional justice. Leave was granted also on grounds of *ultra vires* and one ground of bias but the latter was not ultimately pursued.

12. The statement of opposition delivered on behalf of the respondent opposed the claim upon a number of grounds which are set out at para 27 of the trial judge's judgment.

High Court judgment

13. The trial judge carefully considered the appellant's claim; the differing objections made to the justiciability of the claim; to his standing to pursue and obtain the reliefs sought and reached the conclusion that the appellant's claim should be dismissed. He did so on a number of different grounds each of which have been appealed against and may be summarised as follows:-

> 1. The Report does not give rise to any justiciable controversy between the parties and does not attract an entitlement to a public law remedy (para. 90).
>
> 2. Even if the relevant contents of the Report are regarded as justiciable there was no breach of the appellant's right to fair procedures as he was accorded fair procedures commensurate with the nature of the review being undertaken by the respondent (para. 118).
>
> 3. The appellant as a member of the Government who instructed the respondent to conduct the review and prepare the Report and which subsequently accepted the Report cannot challenge the Report (para. 121-123).
>
> 4. Even if any of the foregoing issues were decided in favour of the appellant the reliefs sought by way of judicial review would be refused in the discretion of the court as the proceedings were initiated by the appellant with a view to preventing his role in the matter being examined by the Commission of Investigation and as such were commenced for a collateral purpose and the court ought not to permit its process to be used in this way (para. 140).
>
> 5. Similarly the relief sought would be refused as a matter of discretion by reason of the allegation of bias made against the respondent on the application for leave and subsequently not proceeded with (para. 141-155).

Commission of Investigation

14. At the time of the High Court hearing, the Commission of Investigation with terms of reference in substance as recommended by

the respondent had been established on the 3rd February, 2015, by the Commission of Investigation (certain matters relative to the Cavan/Monaghan Division of the Garda Síochána) order 2015. The sole member of the Commission was the Hon. Kevin O'Higgins, retired judge of the High Court and General Court of the EU. The Report of the Commission was furnished on the 25th April, 2016, prior to the hearing of the appeal

Appeal
15. This Court in hearing the appeal was aware of the subsequent Report of the O'Higgins Commission, but its conclusion as distinct from its existence does not appear relevant to the determination of the primary issues on the appeal. Hence it is unnecessary to decide whether the content of that Report is admissible in evidence on the appeal. This Court must determine whether or not the High Court was correct in May, 2015, in refusing the appellant's claim for judicial review of the Report and reliefs claimed on the facts pertaining at that time.

Justiciability and Locus Standi
16. The question as to whether the appellant's claim is justiciable or the Report amenable to judicial review undoubtedly gives rise to difficult questions.

17. The starting point is the position of the appellant at the relevant time and his locus standi to pursue the wrong he claims has been done to him. The appellant as a natural person has a constitutionally protected right to his good name and reputation (Article 40.3). For most of the period under review he was the holder of the office of the Minister for Justice and Equality and as such a member of the Government. The Minister is a corporation sole, a legal person and as such it is agreed a public body for the purposes of the terms of reference. The Department of Justice and Equality is not a separate or distinct legal person or in that sense a public body. It is a Department of State assigned to and administered by the Minister pursuant to the Ministers and Secretaries Act 1924 (as amended). The Minister is the head of the Department and it exists for the purpose of supporting the Minister in the performance of his Ministerial functions. The Minister is normally considered responsible for acts or omissions of his Department.

18. For the purposes of the terms of reference it is the Minister which is the public body with the relevant statutory functions and who is the relevant decision maker. The terms of reference did not refer expressly to the Minister but it is accepted that he was a relevant public body referred to in same. The terms referred in paras. 4, 5 and 6 to "relevant entity or public body". An "entity" does not have an obvious legal meaning and may have been intended to refer *inter alia* to the Department since it is not a legal person.

19. Objection was made to the *locus standi* of the appellant as a private citizen or natural person to complain of alleged damage to his good name or reputation by reason of alleged criticism in the Report of the Minister in respect of acts done or not done while he was the holder of the office. That objection is not sustainable. The Minister, a corporation sole, is a legal person with perpetual succession and hence in that sense a distinct person from the appellant. Nevertheless the appellant personally is identified as the Minister for so long as he holds office. Hence it appears to me that criticism in respect of acts done or not done by the Minister while the appellant was the holder of the office can only be objectively viewed as criticism of him personally with the potential to damage his good name and reputation. Hence I am satisfied the appellant, albeit no longer Minister, has *locus standi* to pursue this claim.

20. There are then two separate but related issues: is there a justiciable controversy between the parties and if so is the Report amenable to judicial review? Counsel for the appellant submits, correctly in my view, that in the absence of any contract between the appellant and the respondent or the appellant and the Government, the appellant has no entitlement to litigate in private law his dispute with the respondent. The appellant's claim is founded on an alleged breach of his constitutionally protected right to his good name which is a justiciable dispute. The real issue therefore is whether the Report is amenable to judicial review in the context of the claim made by the appellant that it breached his constitutional right to the protection of his good name by including conclusions or findings adverse to him without affording him fair procedures.

Judicial Review
21. The trial judge accepted the submission that judicial review is now available to challenge the contents of a report issued following a process of inquiry or investigation which goes beyond the long-standing situation identified by *inter alia* Hederman J. in *Murtagh v. Board of Management of St. Emer's National School* [1991] 1 I.R. 482 at p. 488:-

> "Judicial review is a legal remedy available on application to the High Court, when any body or tribunal having legal authority to determine rights or impose liabilities and having a duty to act judicially in accordance with the law and the Constitution acts in excess of legal authority or contrary to its duty."

22. The trial judge was referred, as this Court was to the application and developments to the above statement of principle in the High Court decisions of Kearns J. in *Ryanair v. Flynn* [2000] 3 I.R. 240, Quirke J. in *De Róiste v. Judge Advocate General* [2005] 3 I.R. 494, and Hedigan J. in *De Burca v. Wicklow County Council* [2009] IEHC 54.

23. In *Ryanair*, Kearns J. at 264, following the Supreme Court decision in Murtagh identified two requirements which must be fulfilled before a court can intervene by way of judicial review (apart from the public law dimension): "there must be a decision, act or determination and it must affect some legally enforceable right of the applicant".

24. In *De Róiste* and *De Burca* it was accepted that the reports in question did not determine any right or liability of the applicant in civil law. However, *De Róiste* (and followed in *De Burca*) held that the constitutionally protected right to one's good name is a legally enforceable right for the purpose of the principles as stated in *Ryanair*. That was done in reliance on the now well known observations of Hardiman J. in *Maguire v. Ardagh* [2002] 1 I.R. 385 at pp. 669-670, in relation to arguments that the findings of a tribunal of inquiry were "legally sterile" where he said:

> "It is true that even the most adverse imaginable finding of fact or conclusion by the sub-committee will not amount to a conviction and will not determine any person's rights and liabilities in civil law and will not expose him to any penalty or liability. But that is not the same as saying it has 'no' effect. Not merely is it conceded that it would have effects: these effects would sound, *inter alia*, in the area of the affected person's constitutional rights."

25. In *De Róiste* it was accepted by Quirke J. that the findings of fact and recommendations contained in the report would not have a mandatory consequence for the applicant in terms which are strictly legal in nature. However, having referred to a longer extract from the judgment of Hardiman J. in *Maguire v. Ardagh*, which included the above passage Quirke J. at p. 512 concluded:-

> "It is inescapable that the findings and conclusions resulting from the process had the capacity to affect the applicant's reputation and good name whether favourably or adversely. He enjoys the right to [right to] a reputation and a good name. That right is constitutionally protected.

> I am satisfied that since the process undertaken directly concerned matters relating to the applicant's reputation and good name, its findings and outcome affected his constitutionally protected right to his reputation and good name. Accordingly, he had a legitimate, fundamental significant interest in the process and is entitled to seek the relief which he has sought in these proceedings."

26. I am in agreement with the above approach of Quirke J. It follows as stated by the trial judge that the nature of the task given the respondent by the terms of reference is central to the question as to whether the Report is amenable to judicial review. The respondent is an experienced senior counsel with particular expertise in criminal matters. He was appointed as stated by the Taoiseach as "an independent and objective legal expert". However, I cannot share the view of the trial judge that his appointment to conduct the independent review in accordance with the terms of reference announced on the 27th February, 2014, is similar to receipt of instructions by a barrister from or on behalf of the Government to provide a legal opinion. First, his appointment to conduct the review, with publicly disclosed terms of reference and a stated intention to publish the report had a public element which would not be present in the retention of a barrister to provide a legal opinion to the Government. Apart from any other consideration, the latter would normally be on a confidential basis.

27. Second, the respondent was required by the terms of reference insofar as the Minister and Department (as a public body and entity) were concerned to examine documentation and data held; to communicate in relation to the documentation and information; examine the steps, if any taken to investigate and resolve the complaints and then by paras. 5, 6 and 7, most importantly, to review the adequacy of any investigation or inquiry instigated *inter alia*, by the Minister into the specified complaints and incidents; to consider whether there is a sufficient basis for concern as to whether all appropriate steps were taken *inter alia*, by the Minister to investigate and address the specified complaints and to advise what further measures, if any, are warranted "in order to address public concerns including whether it is considered desirable in the public interest for the Government to establish a Commission of Investigation . . .". All of this was of a different nature and order to the giving of a legal opinion. The tasks assigned at paras. 5,6 and 7 required the respondent to engage in a qualitative assessment of what had or had not been done by the Minister and then express an opinion based on same. Whether the opinion is termed opinion, advice or conclusion does not seem material. The qualitative assessment was to be based on an examination of documents and steps taken. He was not required to make findings of disputed facts.

28. In deciding whether the Report is amenable to judicial review the first question in accordance with the authorities is whether there is what is normally termed a "public law" element in the process sought to be reviewed. I have concluded that in all the relevant circumstances of his appointment by the Government and the task assigned by the terms of reference the respondent must be considered as carrying out a public function in conducting the Review which satisfies this requirement.

29. Next appears to be the questions as to whether (1) the process put at risk the appellant's good name and reputation and (2) the Report includes conclusions which affected the appellant's constitutionally protected right to his reputation and good name. The Report expresses opinions formed by the respondent, gives advice and makes recommendations to the Government following the examinations, reviews and consideration of the matters required under the terms of reference. As in *De Róiste* the process to be undertaken by the respondent in accordance with the Terms of Reference had the capacity to affect the applicant's reputation and good name whether favourably or adversely. It directly concerned matters relating to the appellant's reputation and good name namely: the adequacy of any investigation instigated by him as Minister and consideration of the question as to whether there was a sufficient basis for concern as to whether all appropriate steps were taken by him as Minister to investigate and address the specified complaints. Further this was in a context where the nature of the complaints was serious; was considered to have potential implications for confidence in the administration of justice and the Minister has two relevant statutory powers that he had been asked to exercise.

30. The Report is the outcome of the process of review. The conclusions complained of are primarily in Chapter 19 which culminates with the statement at para. 19.103: "I am of the opinion that there is cause for concern as to the adequacy of the investigation of the complaints made by Sergeant McCabe to the Minister for Justice and Equality and a sufficient basis for concern as to whether all appropriate steps were taken by the Minister for Justice and Equality to investigate and address the specified complaints". Whether this statement and the others complained of in Chapter 19 leading to this are objectively to be regarded as conclusions or expressions of opinions by the respondent does not appear to matter. There is an element of semantics in seeking to make a distinction. They represent the final views formed by the respondent on the matters he was required to examine, review and assess. The real question is whether the statements are critical of or adverse to the respondent such that they must objectively be considered as affecting the appellant's constitutionally protected right to his good name and reputation. The above statement in para 19.103 in the context of the serious complaints at issue in relation to the discharge by a holder of high office of his functions including statutory powers is, in my view, one which objectively must be considered as affecting the appellant's constitutionally protected right to his good name and reputation as the then holder of the office of Minister.

31. The trial judge in rejecting the appellant's entitlement to judicial review of the Report distinguished the decisions in *De Róiste* and *De Burca* at para. 86:-

> "The report in issue here clearly comes within the description of "legally sterile" insofar as it does not purport to, and could not in fact, confer any rights or liabilities or make final determinations of fact or law. That is not of course conclusive. Indeed, when one analysis the authorities above referred to, it would appear that they all concerned decisions or determinations that were intended to be final, whether they affected legal rights or not. The Report here was not the precursor to some further inevitable or probable step that might affect such rights. It appears to me that it comes back to the question of the nature of the task embarked upon by the respondent."

32. As appears the trial judge decided that the Report was not amenable to judicial review in part upon the basis that it was not a final determination or an inevitable step to a further process which would affect a right of the appellant. That does not seem to me a valid basis for distinction from the approach in *De Róiste* and *De Burca* on the facts herein. The Report finalised the process the respondent was asked to undertake by the terms of reference. It was final in that sense. Its contents, in so far as they relate to the appellant, are the final opinions or conclusions of the respondent in relation to the matters he was asked to examine and consider. It concluded the Review and the respondent's involvement in the process and any further steps were a matter for the Government.

33. It is of course necessary that judicial restraint is exercised in any expansion of the type of inquiries, processes or resulting reports which may be the subject of judicial review. However the above approach requires that both the process and its outcome are directly concerned with and have the ability to directly affect the constitutionally protected rights of an applicant to his good name and reputation. It is in those limited and perhaps exceptional circumstances that it appears to me correct to accept as amenable to judicial review the Report herein. If it is not so then the appellant, if he is correct in the claim that he seeks to make is left without a remedy to vindicate his good name as is required by Article 40.3.2 of the Constitution. This would be contrary to the well know dicta

of O'Dalaigh C.J. in *State (Quinn) v. Ryan* [1965] I.R. 70 at 122, that the courts are the custodians of the rights assured to individuals by the Constitution with the necessary powers to vindicate the rights.

34. Accordingly, my conclusion is that the Report is amenable to judicial review by the courts on the present application of the appellant.

35. In reaching the above conclusion in this judgment I have done so by consideration of the Report itself and without regard either to what happened when the Report was furnished to the Taoiseach or views expressed as to the understanding of others as to what it conveyed. I accept the submission of the respondent that such matters may be influenced by political considerations and that it is not appropriate for the Court to take them into account in deciding whether the Report should be considered as critical of and affecting the appellant's constitutionally protected right to his good name and reputation.

Vires and Fair Procedures

36. The appellant's challenge to the vires of the respondent's conclusions relating to him and the alleged denial of fair procedures, both of which were rejected by the trial judge, require a more detailed consideration of what was stated in the Report in relation to the Minister.

37. The respondent had a very difficult task having regard to the terms of reference and the timescale envisaged. The care with which he approached the task and in particular the examination of the facts disclosed by the documents voluntarily provided on behalf of the appellant by the Department in Chapter 19 of the Report is emphasised by the fact that the appellant does not dispute in any way the accuracy of that narrative save one error in recording advice received from the Attorney General in para. 19.89, which is self evident from a reading of paras. 19.89 and 19.90. In any event it is not relevant to the matters in dispute.

38. The respondent interpreted his terms of reference in relation to the Minister and the Department as confining his factual examination to a review of the documents provided to him by the Department and An Garda Síochána. The approach was set out in Chap. 3 of the Report and in particular reliance placed on paras. 3.3. and 3.4 which state:-

> "3.3 Ultimately, all of these matters were brought to the attention of the Department of Justice and Equality in either one or other of the documents referred to above. What happened as a result has also been reviewed by reference to the files of the Department and the files maintained by An Garda Síochána in relation to the complaints forwarded from the Department.
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> 3.4 It is important to emphasise before embarking upon the review of individual incidents, that it is understood that the purpose of this review is not to make findings of fact or to determine any disputed question either of fact or law. Insofar as any views are expressed on factual matters, those are only facts as they appear from a review of the files that I have received. Any such expression is not an adjudication on any matter affecting the persons named or referred to in this report. It is possible that, with the benefit of an opportunity to interview or hear evidence from the individual members and officers of An Garda Síochána and civilians, including victims of crime, involved in these matters, a different view of the facts would emerge."

39. Chapter 19 of the Report must be considered in the context of the above. The respondent set out in paras. 19.1 to 19.90 inclusive, his examination of the factual sequence of events as disclosed by the documents furnished by the Department and the Gardaí. He then analysed these at paras. 19.91 to 19.104. It is this latter part of Chapter 19 which contains the "conclusions" to which the appellant objects.

40. That analysis section commences by stating that the Minister has an important and independent investigative function in relation to An Garda Síochána and that he was invited to exercise two specific statutory functions. Those two functions were pursuant to s. 42 of the Garda Síochána Act 2005 and Regulation 8(2) of the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007 (SI 168/2007). The respondent expresses an opinion at para. 19.91 in relation to those statutory powers "what is important about these specific Ministerial functions is that they enable the Minister to ensure that an investigation, in the true sense, independent of An Garda Síochána, can be conducted into matters that might be the subject of a complaint made to the Minister". No objection is taken by the appellant to the above.

41. The first set of conclusions or findings complained of by the appellant are in para. 19.93 to 19.98 inclusive which contain an analysis of the options open to the Minister upon receipt of a report under the Confidential Report Scheme which makes allegations against the Commissioner as set out in Regulation 8(2) and an examination and assessment of the facts disclosed by the documents starting with a confidential report by the Confidential Recipient dated the 23rd January, 2012, to the Minister in relation to a complaint against the Commissioner and ending with a letter believed to have issued on the 7th February, 2012, from the Minister in response subsequent to an intervening exchange between the Department and the Commissioner. Those documents are set out in some detail at paras. 19.28 to 19.66 of the Report and the analysis of the facts disclosed by the documents at paras. 19.93 to 19.98 inclusive must be considered in the context of the detail in that earlier part of Chap. 19.

42. The conclusions or opinions of which complaint is made are the following:-

> 1. The appellant did not cause the allegations of Sergeant McCabe to be investigated – paras. 19.93, 19.97 and 19.98.
>
> 2. That the response of the Commissioner of An Garda Síochána to the confidential report was accepted without question by the appellant – para. 19.98.
>
> 3. That the process of determining Sergeant McCabe's complaints went no further than the appellant receiving and acting upon the advice of the Commissioner of An Garda Síochána, the individual who was the subject of the complaint – para. 19.98.

43. It is necessary to consider these firstly in the context in which they appear in paragraphs 19.93 to 19.98 inclusive. Those sections of the Report are as follows:-

> "19.93 The options open to the Minister upon receipt of a report under the Confidential Reporting scheme which makes an allegation against the Commissioner are set out in Regulation 8(2) and were, in fact, stated in the Secretary-General's letter of 24 January 2012 to the Commissioner. The first option open to the Minister was to determine that 'he has reason to believe that the allegation ... was not made in good faith or is false, frivolous or vexatious'. If the Minister does not have such reason, he has two options. The first is to 'cause the allegation to be investigated'. The second is, instead of

an investigation, to 'take such other action as he considers appropriate in the circumstances', which appears to allow the Minister a broad discretion as to how to deal with the matter. There appears to be no question of the allegations having been investigated at the instigation of the Minister. It is not clear, however, which of the other options the Minister adopted.

19.94 In this case substantial and reasonably detailed allegations of significant misconduct were made in 2011 and 2012. In January 2012, those allegations included an allegation of misconduct by the Commissioner, through the statutory confidential reporting mechanism, for listing a Superintendent for promotion despite it being alleged that he was unsuitable for promotion by reason of his alleged involvement in the matters complained of. By September 2012, those allegations included all of the allegations contained in the dossier (although the supporting documentation, including PULSE printouts, had not been and, as far as I can tell, never were furnished to the Minister, despite requests to do so). There was also a complaint about the conduct of the existing internal Garda investigation, in a number of respects, and an assertion of a loss of confidence in such an internal investigation.

19.95 From the papers I have seen, I have had difficulty finding material which demonstrates that the Department identified and understood the significant independent statutory role which the Minister had to perform in respect of those matters. The practice adopted when matters were brought to the Department's attention was invariably to refer the issues that had been raised to An Garda Síochána. While it would, of course, be entirely reasonable to expect that, where a complaint is made, opportunity will be given to the person the subject of the complaint to respond to it, it is a different matter altogether to be entirely satisfied by that response.

19.96 The initial response of the Commissioner in January 2012 was almost entirely lacking in any detailed account of the substance of the allegations or the conduct and findings of the internal investigation. The only exception concerned the allegations arising out of the events in the Hillgrove Hotel in October 2010, which received a somewhat more detailed treatment. The twelve complaints identified in the confidential report of 23 January 2012 were disposed of in a single paragraph.

19.97 There is no record that I have seen of that response from the Commissioner having been the subject of any submission to the Minister by his officials and there is no record of what decision the Minister made on foot of that information, apart from the contents of the letter to the Confidential Recipient which appears to have been sent on 7 February 2012. That letter is unclear as to whether the Minister had decided that there was reason to believe that the allegation was 'not made in good faith or is false, frivolous or vexatious' or whether the Minister was not of that view but was satisfied that he had taken such action 'as he consider[ed] appropriate in the circumstances'. Whichever course the Minister was taking, it is clear that the only action taken on foot of the confidential report was to seek a response from the Commissioner.

19.98 That response appears to have been accepted without question (at least until further correspondence from Sergeant McCabe the following December) and the Minister's response to the Confidential Recipient included express reference to the Commissioner's having advised the Minister of the findings of the internal investigation. In effect, the process of determining Sergeant McCabe's complaints went no further than the Minister receiving and acting upon the advice of the person who was the subject of the complaint."

44. As already stated, those paragraphs must also objectively be considered in the context of the more detailed facts set out at paras. 19.28 to 19.60. I do not propose repeating the entire herein, but draw attention to the fact that they set out in summary form the contents of the Confidential Report of 23rd January, 2014, the fact that the reporter wished to make a complaint against the Commissioner and also an Assistant Commissioner; the fact that the Confidential Report was forwarded to the Garda Commissioner by the Secretary General of the Department on the 24th January, 2012, drawing attention *inter alia*, to the steps which the Minister must take under Regulation 8(2) and seeking comments "before the Minister decided on his course of action". The Report sets out in summary the response from the Commissioner of the 27th January, 2013, and the letter which issued to the confidential recipient (believed to be on the 7th February, 2012) and to an internal email from the Minister's private secretary to an assistant secretary on the 3rd February stating that the Minister had read the letter and approved it. The Report commencing at para. 19.55 summarises the letter to the confidential recipient and at para. 19.59 sets out the conclusion to the letter in the following terms:-

> "The Garda Commissioner advises me that, having regard to the outcome of the investigation and review, he is of the view that no evidence was found of any wrongdoing (corruption or malpractice) on the part of the named Superintendent, or Assistant Commissioner Byrne. On the basis of these findings, there is no evidence to support any further action by me in relation to the allegation made in the confidential report against the Garda Commissioner."

45. The Report then states at para. 19.60:-

> "19.60 This letter is, in effect, a communication of the decision of the Minister on the complaint transmitted to him by the Confidential Recipient. The files that I have received from the Department of Justice, insofar as they relate to the handling of that complaint, consist of the relevant correspondence outlined above. I have not seen any memorandum or submission to the Minister from his departmental staff, to assist him in the exercise of his function under Regulation 8(2) of the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations, 2007. Nor have I seen any internal departmental minute or memorandum of the Minister's decision. On 11 April 2014 I specifically sought internal departmental documents related to the exercise of this function (and other matters). None have been produced relating to this exercise of the Minister's specific function under the Regulations."

46. The appellant makes no complaint about the accuracy of paras. 19.28 to 19.60 including para. 19.60.

47. The next conclusion complained of is in para. 19.100 and is "that the applicant was satisfied by a brief summary of the conclusions of the internal investigation by An Garda Síochána rather than seeking a copy of the investigation report for review".

48. Similar to the previous conclusions this must be considered in the context of the entire para. 19.100 and the preceding para. 19.99. These were as follows:-

> "19.99 A more detailed response was sought almost a year later after further correspondence from Sergeant McCabe and his solicitors. That response was contained in the letter of 26 February 2013.
>
> 19.100 Again, as had occurred when the Commissioner's initial response was received in January 2012, there does not

> appear to have been any written submission to the Minister by his officials in relation to the Commissioner's response, and there is no record I have seen of the Minister making any decision or forming any view in relation to that response. Had it been probed and tested in any reasonable way, further important questions would have come to light. (The specific issues arising are considered in detail in the relevant chapters of this report.) It is surprising that, having been informed that complaints had been investigated internally by An Garda Síochána, the Minister appears to have been satisfied by a brief summary of the conclusions of the investigation, rather than seeking a copy of the investigation report for review. Indeed, in all the papers furnished by the Department, I can find no evidence of any detailed assessment within the Department of any of the allegations made by Sergeant McCabe or of the responses received from the Commissioner."

49. Similarly the facts to which this exchange with the Commissioner refers are set out at paras. 19.74 to 19.81 inclusive.

50. The next set of conclusions of which complaint is made are stated to derive from the opinions expressed in para. 19.101:-

> "19.101 There is a near-total absence in the papers I have seen of written records of any submissions made or advice given to the Minister by his officials, in particular at the times when the exercise of specific statutory functions by the Minister arose. Similarly, I have seen no written internal records of decisions made by the Minister (in particular between 23 January and 7 February 2012). As a result, this review is unable to shed any light on the reasons for the approach adopted by the Minister to the exercise of those functions. For whatever reason, the approach adopted had the result that there was no independent investigation of Sergeant McCabe's complaints. The absence of the records that one would expect of a careful and reasoned exercise of an important statutory function is a matter of some concern. Insofar as the letter of 7 February 2012 records reasons that are not otherwise apparent, it appears that the Minister acted as he did on foot of advice received from the Commissioner, without that advice being questioned or analysed."

51. The views expressed by the respondent therein relate to the identified absence of written records of any submissions made or advice given to the Minister by his officials and of an absence of written internal records of decisions made by the Minister. They are for the most part expressions of opinion based upon, in this instance the absence of documents. Those documents had been specifically sought in a letter dated the 11th April, 2014. The appellant does not dispute the factual accuracy of what is stated in that paragraph.

52. The final conclusion reached in Chap. 19 is that in para. 19.103 is not a stand alone opinion, but must be considered in the context of all that goes before it, it states:-

> "19.103 1n all the circumstances, I am of the opinion that there is cause for concern as to the adequacy of the investigation of the complaints made by Sergeant McCabe to the Minister for Justice and Equality and a sufficient basis for concern as to whether all appropriate steps were taken by the Minister for Justice and Equality to investigate and address the specified complaints."

53. One further complaint is made in relation to a conclusion allegedly reached by the respondent in para. 20.11. Chapter 20 contains the overall conclusion and recommendations of the respondent prior to reaching the point of expressing his opinion that "it is desirable in the public interest that a comprehensive commission of investigation be established". The Report also comments briefly on the position of whistleblowers and observations made in relation to Sergeant McCabe. At para. 20.11 the Report states:-

> "20.11 No complex organization can expect to succeed in its task if it cannot find the means of heeding the voice of a member whose immediate supervisors hold him in the high regard in which Sergeant McCabe was held. Ultimately, An Garda Síochána does not seem to have been able to do that. Nor does the Minister for Justice and Equality, despite his having an independent supervisory and investigative function with specific statutory powers. The same appears to be true of GSOC, although this review is hampered in making any assessment in that regard by the fact that GSOC has not made documentation available."

54. The above is essentially a comment albeit critical of the appellant as Minister. In my view it is not central to the issues on appeal. The critical questions are whether the opinions or conclusions expressed in Chapter 19 insofar as they relate to the appellant whilst Minister were *intra vires* and/or in breach of fair procedures.

55. The trial judge at para. 89 of his judgment concluded that the respondent was required and mandated by the terms of reference to express the views described as "conclusions" to which objection is taken. He also accepted the submission that the alleged conclusions were not more "than a narrative account of what the documents disclosed and where views were expressed, these were no more than expressions of opinion based on those documents".

56. I am in agreement with the trial judge that the respondent was required and mandated by the terms of reference to express opinions on the matters he considered in Chapter 19. That Chapter contains an examination of the documents supplied; an examination of the steps taken by the Minister (and Department) to investigate and then reviews the adequacy of the investigation by *inter alia* the Minister and considers "whether there is a sufficient basis for concern as to whether all appropriate steps were taken [by the Minister] to investigate and address the specified complaints". Such review and consideration was mandated by paragraphs 5 and 6 of the Terms of Reference and required the respondent to express opinions or conclusions on the matters he reviewed and considered to explain the basis for the advice given in Chapter 20. Accordingly the conclusions complained of were *intra vires* the Terms of Reference.

57. However, as already stated in this judgment I am also of the view that, at minimum, the final opinion in para. 19.103 whilst, *intra vires*, was objectively seriously adverse to the good name and reputation of the appellant. To express an opinion in the Report to the Taoiseach on behalf of the Government in the context of the matters under review that "there is cause for concern as to the adequacy of the investigation of the complaints made by Sergeant McCabe to the Minister for Justice and Equality and a sufficient basis for concern as to whether all appropriate steps were taken by the Minister for Justice and Equality to investigate and address the specified complaints" was objectively critical of and seriously adverse to the good name and reputation of the appellant as the person then holding the office of Minister in the context of the nature of the complaints and the Minister's powers under review in chapter 19 of the Report. It affected his constitutionally protected right to his good name. Certain, but not all, of the earlier opinions or conclusions of which complaint is made whilst they are expressions of opinion based on the documents are also expressions of opinion critical of the appellant as Minister in relation to the conduct of the investigation into the specified complaints. These include the last sentence in 19.98 and comments in 19.100.

58. Hence I have concluded that the trial judge was in error in his conclusion (which was *obiter* by reason of his other decisions) that in all the circumstances of the Review the appellant was afforded fair procedures. He was correct in accordance with the well known

authorities including *Kiely v The Minister for Social Welfare* [1977] I.R. 267, 281 per Henchy J. in stating that the requirements of fair procedures or natural justice depend upon the circumstances of the case. However, on the particular facts and circumstances of the Review the appellant was, in my judgment entitled to be heard before the respondent could include in the Report the type of statement made at para 19.103 and certain earlier expressions of opinion in Chapter 19. At its simplest the respondent's obligation to hear the appellant follows from the *audi alterem partem* principle as applied in *Re Haughey* since the appellant's good name was at risk in the Review process. This applies irrespective of whether one considers the contested statements to be an expression of opinion or a conclusion. It is unnecessary for the purposes of this appeal to identify whether each of the earlier opinions so required. Further it is not necessary to decide what would have constituted fair procedures but simply to observe that the cornerstone of the appellant's submission on appeal was that he ought to have been given notice of the intention to include in the Report such critical statements or given a draft of same and an opportunity to make representations thereon. He appears to have contended for additional rights in the High Court.

59. I consider the trial judge was entitled to conclude that the appellant as a member of the Government must have been aware that the adequacy of the investigations conducted by him of Sergeant McCabe's complaints would be the subject of review but cannot agree that it was a matter for him to make contact with the respondent and provide information that he would wish to be taken into account. The obligation to ensure that fair procedures were accorded to an individual whose good name was at risk in the process was on the respondent. The appellant only had a right to be heard because the respondent proposed including statements critical of him in the Report. If no statements critical of the appellant were to be included the respondent would not have been obliged to give him an opportunity to be heard.

60. I have also concluded and am in agreement with the President that the procedure followed by the respondent in writing directly to the appellant in his initial letter of the 5th March, 2014, seeking documents and the nomination of a person within the Department as a point of contact and following up with that person in particular by the letter of the 11th April, 2014, drawing attention to the absence of certain classes of documents is not a sufficient discharge of the obligation to put the appellant on notice of the intended statements of opinion adverse to him in Chapter 19. The respondent was entitled to rely on his communications with the nominated official as being communication to the Minister. If the only adverse opinion expressed in the Report was of surprise in relation to the absence of certain documents that exchange might have been sufficient. However the opinions expressed goes beyond that and the letter of the 11th April, 2014, cannot objectively be considered as notifying the appellant as Minister of the respondent's intention to express all the opinions adverse to him contained in Chapter 19.

61. Similarly, I do not consider that what was stated at para 3.4 of the report is sufficient to prevent what is stated at para.19.103 being objectively considered as a final opinion of the respondent (on the matters he was required to consider) adverse to the good name and reputation of the appellant.

62. Hence I have concluded that the opinions in the Report critical of the appellant when Minister were reached in breach of his right to fair procedures.

63. I want to address only one further submission made on behalf of the respondent on these issues. It was submitted that if this Court were to hold that the appellant was entitled to be heard in advance of the respondent expressing the opinions that he did in the Report that it would potentially constitute a serious limitation on the power and right of the Taoiseach and the Government to inform themselves by means of a scoping report written by a senior counsel as to whether or not there are matters of concern in relation to the exercise of executive powers that require a statutory fact finding Commission of Investigation. It was submitted that such a conclusion would encroach upon the separation of powers. I do not accept that this submission.

64. My conclusion on the entitlement of the appellant to have been heard is reached on the particular terms of reference; the focus in the Review on the adequacy on what was done by the appellant as Minister in relation to serious complaints concerning the administration of justice such that his good name and reputation were at risk in the process and the other relevant facts and circumstances in relation to the Review and Report. It is also relevant that the appellant was at the time a person nominated as Minister by the Taoiseach who may also seek his resignation and if necessary advise the President to terminate his appointment pursuant to Article 28.9.4 of the Constitution. What procedures will be required in any future non statutory inquiry or review commissioned by the Government will depend upon all the circumstances including the subject matter; terms of reference and most particularly whether the good name or reputation of an individual is at risk in the process to be undertaken.

Relief

65. I do not consider that relief should be refused to the applicant by reason of the unfounded claim of bias. Whilst the trial judge was entitled to express serious displeasure at the inclusion of this ground and the manner in which it was done withholding relief where breach of a constitutionally protected right is established is not warranted.

66. I am in agreement with the President that the appeal should be allowed and that the appellant is entitled to a declaration that the conclusions or opinions in the Report critical of him when Minister for Justice and Equality were reached in breach of his right to fair procedures.

67. The President has proposed that the parties should be heard on the form of order and additional reliefs, if any, to which the appellant may be entitled. He has adverted in his judgment to relevant issues. I am aware that Irvine J. is in agreement that the parties should be so heard. I would like to add the following for consideration by the parties prior to any such hearing.

68. The appellant brought these proceedings against the respondent alone. The respondent delivered the Report to the Taoiseach on behalf of the Government in May 2014. The Report is no longer under the control of the respondent nor was it at the date leave was granted. The appellant was given the Report in advance of publication and did not seek to restrain its publication. The Government published the Report by laying it before the Oireachtas. It has acted on the advice contained in the Report and established the Commission of Investigation. At the time of the High Court decision the Commission had been established in accordance with the recommendations in the Report. The appellant did not seek to restrain, by legal action, either the Government from acting on the Report or the Commission from proceeding. Rather he participated in the Commission which by statute provides for full fair procedures for a person in the position of the appellant prior to the Commission reaching its conclusions. The matters of which the appellant makes complaint in the Report are all matters included in the Commission's terms of reference. The Commission provided the appellant with an opportunity to publicly vindicate his good name in relation to the matters in the Report.

69. The appellant did not apply to quash the entire Report as was done in the cases of *De Róiste* and *De Burca*. He did not seek to quash any part of the conclusions and recommendations of the respondent in Chap. 20 of the Report (save one comment in para. 20.11). With the possible exception of para. 19.103 of the Report the conclusions of which complaint are made are not stand alone statements. In some instances the conclusions set out in the schedule to the statement of grounds are part sentences or not the

actual words written in the Report such that they could simply be deleted. Any order that certain of the specified conclusions be deleted would appear to require re-writing of the relevant paragraphs of the Report. I am unclear as to the Court's jurisdiction to now make any such order.