THE COURT OF APPEAL

Neutral Citation Number [2023] IECA 92

Record No.: 2022 145

Whelan J.
Donnelly J.
Ni Raifeartaigh J.

THOMAS MURPHY

RESPONDENT

-AND-

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

APPELLANT

JUDGMENT of Ms. Justice Donnelly delivered this 24th day of April, 2023.

1. This is an appeal in respect of an order of the High Court granting certiorari of a decision of the appellant Commissioner of An Garda Síochána ("the Commissioner") to notify the respondent, who is a member of An Garda Síochána who is on probation, of the Commissioner's intention to dispense with the respondent's service. The issues raised in the case include whether or not the respondent's judicial review was premature and whether the High Court's conclusion of the presumption of innocence and the interaction of that presumption on the process was correct.

2. Regulation 12 of the Garda Síochána (Admissions and Appointments) Regulations 2013 ("the 2013 Regulations") permits the Commissioner of An Garda Síochána to dispense with the services of a member of An Garda Síochána who is on probation ("a probationer Garda") in accordance with the procedures set out in that regulation. Both the respondent, and the Commissioner of An Garda Síochána, are now in agreement that Regulation 12 does not provide a mechanism to discipline a probationer Garda. Instead, the said regulation addresses the suitability of a probationer Garda to perform the functions of a member of An Garda Síochána.

3. On 17 December 2019, the Commissioner wrote to the respondent giving notice that he proposed to dispense with his services as a probationer Garda, citing Regulation 12(8)(a) of the 2013 Regulations. Part of the notice stated: "Your suitability with regard to your behaviour and/or disciplinary record has been assessed and the following allegation of commission/omission on your part have been brought to my attention… [sets out alleged

incidents in the early hours of New Year's Day, 2019]". According to the notice, this "was a serious matter" and the Commissioner had to consider and decide whether the respondent was likely to become an efficient and well-conducted member of the Garda Síochána in accordance with Regulation 12(8). The notice expressly stated that before doing so the Commissioner was giving the respondent an opportunity in accordance with Regulation 12(9) to make any submissions regarding the proposal within 28 days which is the period set out in the 2013 Regulations. At that time, a prosecution in the District Court was pending against the respondent in relation to an allegation of driving while intoxicated and an allegation under s. 4 of the Criminal Justice (Public Order) Act, 1994, for intoxication in a public place.

4. The solicitors for the respondent replied by way of a lengthy letter dated 8 January 2020 to the Commissioner. The letter sought, *inter alia*, confirmation that prior to the expiration of the 28-day deadline set by the notice, the Commissioner would not take any further steps on the issue until the pending prosecution was dealt with and until such time as the respondent was provided with all the material to be relied upon by the Commissioner and also afforded the opportunity to make further submissions. It is an entirely regrettable part of this entire dispute between the parties that the Commissioner failed to respond in any way to that letter; not even by way of a holding letter. The Commissioner submits that nothing ought to be read into the absence of response as the Commissioner ought to be presumed to behave in a constitutionally fair manner. The Commissioner also submitted that the deadline given to reply to the letter of 8 January 2020 was too tight, but is it only fair to point out that the initial deadline of 28 days given to the respondent was one imposed by the Regulation. Having initiated a process which contained a 28-day deadline for the respondent, the Commissioner ought therefore to have been ready to respond to a request for an extension to that time. This is a matter that will be addressed later in this judgment.

5. In a further unusual twist, in August 2020, eight months after the commencement of these proceedings, the Commissioner furnished the information requested by the respondent in the letter of 8 January 2020. That information was accompanied by what appeared on its face to be a new notice under Regulation 12, but the Commissioner sent a subsequent letter stating "[t]o the extent that [his] letter dated 6 August 2020 gave the impression that there is a second process in being this was an error and is withdrawn." The August 2020 letter triggered complaints as to whether such action had breached the stay granted by the High Court on 20 January 2020. That issue was resolved by the High Court and is not a matter for this Court.

6. The respondent's letter of 8 January 2020 addressed a range of factors. Some of these issues became the focus of the respondent's statement grounding his application for judicial review. The letter commented that no investigator appeared to have been appointed (in fact none is required under Regulation 12). The failure to provide material/evidence was particularised to include management reports, and the letter questioned if relevant points regarding his probation, both positive and negative, had been identified for consideration. The letter also stated under the heading "Innocent until proven guilty" that the only matters that the Commissioner considered relevant were subject to a pending prosecution. The

respondent said that the statements in the Commissioner's letter were presented as facts, regarding which he had no opportunity to be heard. It was said that the *findings* were made without due process and in breach of the respondent's constitutional rights.

7. The primary relief sought in the statement grounding the application for judicial review was for an order of certiorari of "the determination of the [Commissioner] to dispense with the [respondent's] services as a probationary member of An Garda Síochána". The description of the relief claimed reflects the respondent's contention in the grounding statement that the Commissioner had *made a determination* (and that such a determination was in breach of s.14 of the Garda Síochána Act 2005 and the Garda Síochána (Discipline) Regulations, 2007). No breach of discipline is now asserted. Moreover, the High Court ([2021] IEHC 354) held that the notice of the Commissioner pursuant to Reg 12(8) did not make any determination of any fact. The trial judge examined the wording of the notice and the provisions of the regulation, pointing in particular to the use of the word 'allegations'. The High Court finding that the notice did not make any determination of fact was clear and well-reasoned and was not the subject matter of any cross-appeal by the respondent. The trial judge's finding that there was no determination is an important factor in this appeal.

8. The trial judge, having identified "a number of objectionable legal flaws presenting in what has occurred", ultimately decided to grant an order of certiorari quashing the *decision to notify* the respondent of the Commissioner's decision to issue the notice under Regulation 12 of the 2013 Regulations. The two grounds identified in the judgment as the basis for the order of certiorari were:

    a) The respondent was not provided with a copy of the materials on which the Commissioner intended to rely in reaching any ultimate decision as to whether or not to dispense with the respondent's services as a probationer Garda.

    b) The manner in which the Commissioner proposed to proceed impinged upon the presumption of innocence enjoyed by the respondent in criminal proceedings.

Grounds of Appeal

9. The Commissioner has appealed against the decision of the High Court on a number of grounds:

    a) that the trial judge ought to have dismissed the proceedings as being premature,

    b) in concluding that by inviting the respondent to make submissions in accordance with the 2013 Regulations, the Commissioner proceeded in a manner which impinged the presumption of innocence and in misapplying the privilege against self-incrimination on the facts,

    c) in concluding that the failure at the *first stage of proceedings* to provide the respondent with materials upon which the Commissioner intended to rely in reaching a final determination gave rise to a breach of the respondent's rights to fair procedures.

Were proceedings before the High Court moot and is the appeal moot?

10. At the hearing of this appeal, the Court raised the issue of mootness with the parties. The first concern was whether the hearing became moot at the time the documents were given over by the Commissioner. Counsel for the Commissioner strongly urged on the Court that the appeal was not moot. She submitted that there were a number of issues at play in the High Court; one was whether the Commissioner had made a determination and that was still live even when the documents were forwarded. Primarily however, the Commissioner wished to argue that the judicial review application had been premature in circumstances where the suitability process was in being. This again raises the question as to why the Commissioner had not replied to the letter of 8 January 2020 to say that these matters were being considered and that no further steps would be taken pending a reply to that letter.

11. A separate consideration as to mootness arose in the context of the appeal. This was because the respondent's conviction in the District Court (which was known at the time of the hearing before the High Court) had since been affirmed on appeal. The Commissioner's view was that the findings in the High Court judgment were of such significance for the operation of the 2013 Regulations that it would urge the court to hear the case even if the Court considered it to be moot. It is also the case that the suitability process commenced in accordance with Regulation 12 is still in being. Counsel for the respondent's position was more subtle and reflected the robust but fair approach he took to representing the respondent's interests in this appeal. He submitted that while it may well be moot, he could understand that as a matter of principle the Commissioner may need to have a resolution on the issue of presumption of innocence.

12. In all those circumstances, I am persuaded by the argument of counsel for the Commissioner. At the time of the hearing in the High Court, it would not have been appropriate to describe the proceedings as being devoid of live controversy. Furthermore, to the extent that the Commissioner has an ongoing interest in the matters determined by the High Court, in particular the issue of the presumption of innocence, the Court ought therefore to proceed to determine the appeal.

A Violation of the Presumption of Innocence?

13. Although the claim that there was, or would be, a violation of the presumption of innocence had merited a separate heading in the respondent's letter of 8 January 2020, the grounding statement made a single, almost passing, reference to the presumption of innocence. The single ground in which it appeared is as follows:

> "The determination of the Respondent, insofar as it was based on evidence alleged against the Applicant in criminal proceedings was made in breach of the Applicant's constitutional rights to natural justice and fair procedures, and otherwise than in accordance with the Applicant's presumption of innocence."

14. The restrictive nature of this ground is immediately apparent. First, the claim was that the *determination* of the Commissioner had *already* breached the presumption of innocence (although just how or why this was had occurred was not explained). Secondly and more

importantly, the High Court judge rejected the submission that the Commissioner had made a determination.

15. Despite having rejected the basis on which the claim of violation of the presumption of innocence was made, the trial judge proceeded to make a finding that the process (as distinct from the determination) had violated the respondent's presumption of innocence. He did so in a "Court Note" following the recital of the passage from the letter of 8 January 2020 concerning the presumption of innocence. He confirmed this in the "Conclusion/next steps" to his judgment. The trial judge held that the presumption of innocence was violated by requiring the respondent to "commit to paper what amounted to the defence that he would raise" in the criminal proceedings pending before the District Court. The trial judge held:

> "A charged person is entitled to maintain the presumption of innocence and not to have to put their case on paper. The presumption of innocence is an axiomatic and indispensable aspect of our legal system, not lightly to be treated with or abrogated. Probationer Garda Murphy should not have been called upon to compromise the presumption of innocence that he enjoyed in the criminal proceedings that confronted him, and it is only through the bringing of these proceedings that he managed to halt a process which all but required him to so compromise a presumption that he enjoyed every bit as much as any other accused person."

16. The trial judge stated that this was a classic example of a process which had "gone off the rails" in terms of procedural fairness. He commented: "Compromise the presumption of innocence that attaches to you in the criminal proceedings now pending before you or I'll almost certainly dismiss you is not a procedurally correct approach for the Commissioner to adopt in a reg. 12 process."

17. Unfortunately, the issue of the impact on the presumption of innocence of the entire process under Regulation 12 was not fully argued before the High Court. We are informed that there was no oral argument made before the High Court on the issue of interference with the presumption of innocence. The claim in the pleadings was that the "determination" of the Commissioner in the notice had compromised the presumption of innocence. This claim was lightly touched on by the respondent's High Court written submissions when he argued that the obligation to ensure fair procedures are protected "includes allowing the Applicant to make the most robust case he may for his retention as a member without interfering with his presumption of innocence. This would require that the Applicant be allowed to know and challenge the evidence against him".

18. Much of the respondent's case in the High Court had focused on how the respondent was entitled to fair procedures *prior to* the Commissioner making the *determination* that he did in the notice. The trial judge criticised the Commissioner for not dealing with the argument concerning the presumption of innocence, but that does not take into account that the Commissioner had responded in detail to the respondent's High Court claim that a determination had been made. That response, which turned out to be successful, ought, it

would have seemed, to have been enough to deal with the precise claim being made which was that the *determination* was made in violation of the presumption of innocence.

19. At the appeal, counsel for the Commissioner urged the court to overturn this finding. She referred to case law (such as *Dillon v Dunnes Stores* [1966] IR 397, *McLoughlin v Aviva* [2011] IESC 42 and *Quinn & Ors v Irish Bank Resolution Corporation Ltd (In special liquidation) & Ors* [2015] IEHC 634) which established, *inter alia*, the following principles:

    a) that there was no rule that civil trials must be suspended pending the determination of criminal proceedings,

    b) that the onus rested on the person seeking to stay civil proceedings to establish grounds necessary for the court to make such an order,

    c) that the test to be applied was whether it was established that there may be a real risk that prejudice would be caused to the criminal trial, and

    d) that the public interest elements in civil litigation are matters a court ought to take into account in its decision to stay proceedings.

20. The proceedings before the Commissioner were not, of course, civil proceedings, but counsel submitted that *mutatis mutandi* the principles were applicable here and the burden had not been discharged by the respondent. Indeed, the Commissioner's argument was that they were never addressed by the respondent in the High Court and thus not addressed in the High Court judgment.

21. As to the precise issue of whether the respondent was compelled to put his defence on paper, counsel for the Commissioner pointed out that Article 38, which provides that no person shall be tried on any criminal charge save in due course of law, gives protections to any person who claims that they were required to address issues pertaining to allegations of criminality in other proceedings. Counsel relied upon the decision of the Supreme Court in *In Re National Irish Bank (No 1)* [1993] 3 IR 145, which considered the powers of Inspectors appointed under s. 8(1) of the Companies Act, 1990, to compel persons to answer questions pursuant to s. 18 of the same Act. In relation to the argument that s. 18 violated Article 38, the Supreme Court (Barrington J.) said that what was objectionable under Article 38 was compelling a person to confess and then convicting the person on the basis of that confession. Barrington J. went on to opine that any confession obtained in the investigation would not generally be admissible at a subsequent trial unless a trial judge ruled that it was voluntary.

22. Counsel also referred to the case of *C.G. v Appeal Commissioners* [2005] 2 IR 472 where the submission was made that there was a real risk of prejudice because a taxpayer was required to give evidence in order to advance an appeal and such evidence may be considered to be voluntary by a subsequent court. The High Court (Finlay Geoghegan J.) rejected the applicant's claim on the basis that no real risk of prejudice had been established

because there was no evidence to suggest that the applicant would be required to give evidence of a self-incriminating nature.

23. Based upon the foregoing principles, counsel for the Commissioner argued that any fair trial rights fell to be protected by the trial judge in the course of criminal proceedings. Furthermore, the applicant had not established any risk of prejudice in his case. He had not identified anything to show that he was going to have to give incriminating evidence. She submitted that he could have chosen to rely upon his entire record as a probationer Garda. She also strongly urged upon the Court that the finding made by the trial judge did not represent what had been pleaded in the judicial review; that had only concerned a breach in the context of a determination and no such determination had been made by the Commissioner. Counsel emphasised the importance of pleadings in a judicial review where a party was limited in its claim to the grounds upon which leave to apply for judicial review had been granted.

24. Counsel for the respondent submitted that while the argument had not been addressed in the High Court, the trial judge was correct in holding that issues concerning the presumption of innocence were at stake. Counsel submitted that there was a distinction between a compulsory process in which a person is required to self-incriminate and a process which is voluntary. In this case, engaging in submissions would have been a voluntary act on the part of the respondent and he risked this being used against him. Furthermore, the situation in the present case was also different from other cases because the person to whom the respondent would make submissions was the Commissioner who was the party who had carriage of the criminal proceedings. This would prejudice the matter.

25. I am satisfied that the finding of the High Court that the respondent "was constrained in such submissions as he could make by the presumption of innocence that he enjoyed in the not-yet-fully complete criminal proceedings…" ought to be set aside in this case. It was an error on the part of the trial judge to reach that conclusion having regard to the particular pleadings and arguments made in the case. His conclusion was based upon considerations that were not part of the grounds upon which leave to apply for judicial review had been granted; the ground as pleaded was restricted to his presumption of innocence being breached by the determination of the Commissioner. No such determination was made.

26. I am also satisfied that if the matter had been the subject of oral argument in the High Court, the case-law dealing with the principles to be applied when considering if civil or other proceedings interfered with or prejudiced a forthcoming trial would have been opened to the High Court judge. I am certain that if those cases have been brought to the attention of the trial judge, he would not have reached such a stark, and it may be said, absolutist position, of the effect on the respondent's presumption of innocence by the Commissioner issuing the notice under Regulation 12 of the 2013 Regulations. It is not the law that a person, charged with a crime, has an *automatic* right to prevent any other proceedings (be they civil, disciplinary or employment related) from proceeding simply on the basis that they ought not to be asked to address matters which themselves are the subject matter of the criminal trial. It is not, as was confirmed by the Supreme Court in *O'Flynn & O'Regan*

v the Mid-Western Health Board & Ors [1991] 2 IR 223 (cited by Haughton J. in *Quinn v Irish Bank Resolution Corp*), that the order of proceedings is immutable. A person seeking to prevent those proceedings taking place must place before the court (or tribunal or deciding body) the grounds demonstrating the necessity to stay those proceedings. There must be a real risk of prejudice to the criminal proceedings. The issue of the public interest in proceeding with the action/hearing is also a consideration.

27. In the present case, the respondent never put on affidavit the grounds on which he said that a real risk of prejudicing his presumption of innocence arose if the matter was to be proceeded with. This was understandably so; his case was that his presumption of innocence was *already* violated because of the alleged determination. That claim, if it ever had merit, evaporated once the High Court decided – and which decision was not appealed - that no such determination was made. The High Court determination on this issue must be overturned on the basis that it was based on a matter which was neither pleaded nor argued before the court.

28. I do not consider it either necessary or appropriate to make any definitive finding as to whether the Commissioner in proceeding in the manner he did pursuant to the Regulation 12 could never be obliged to stay any final decision because of a risk of prejudice to a pending criminal trial. Each case would depend on its own facts. What is clear is that any such application ought to be made to the Commissioner in the first place. The onus is on the probationer Garda to establish grounds that demonstrate that there would be a real risk of prejudice to forthcoming proceedings. If the alleged risk is to the privilege against self-incrimination, the grounds on which this claim is made require elucidation. Whether this is a real risk – given the prohibition against involuntary confessions being admissible in a criminal trial – would require careful consideration. The respondent submits that any response he might make would be voluntary but the question of what is truly voluntary may also require consideration, especially where this is a procedure brought against him rather than by him. Matters that would have to be weighed in the balance as to whether the proceedings ought to be stayed include the public interest, if established, in the Commissioner proceeding to dispense with the services of the particular probationer Garda at that point in time. None of these matters are before this Court, nor indeed were they before the High Court.

29. For all the reasons set out above, I am satisfied that the finding of the trial judge that the serving of the notice constituted a breach of the presumption of innocence must be set aside.

The Commissioner's Argument on Prematurity

30. In the Commissioner's submission, the issue about whether the respondent was entitled to the documents he had sought by his letter of 8 January 2020 was an argument that had to be considered in the context of the prematurity argument of the Commissioner. It is appropriate to look in more detail at the chronology of events.

31. The Commissioner's notice was sent on 17 December 2019. It gave the respondent until 14 January 2020 to make submissions; this being the 28-day period prescribed in the

Regulations for submissions. The respondent replied by letter on 8 January 2020 setting out certain objections, looking for the documents that had been relied upon by the Commissioner, and also looking for more time to put in submissions. The Commissioner did not reply to this letter.

32. On Monday 20 January 2020, the respondent sought and was granted leave to apply for judicial review. As set out above, the main relief sought was an order of certiorari of the determination of the Commissioner to dispense with his services as a probationer Garda. He sought ancillary reliefs to prevent his dismissal from An Garda Síochána. The grounds were based primarily on the claim that the Commissioner had already made a determination to dispense with his services and, *inter alia*, that the failure to provide him with the material that the Commissioner had relied upon breached his constitutional rights to fair procedures and natural justice.

33. The Commissioner's argument is that Regulation 12(9) expressly requires the Commissioner to notify a probationer Garda in writing of any proposal to dispense with their services and that 28 days is to be provided within which to make submissions. The sequence of events provided in the 2013 Regulations requires the Commissioner a) to reach a decision to issue a Regulation 12(9) notice, b) notify the probationer that he proposes to dispense with their services and why he so proposes, c) affording the probationer an opportunity to make submissions in respect of any such proposal, d) to consider the content of such submissions and e) to make a decision either to dispense with the probationer's services, to retain their services, or to further investigate the matter. The respondent had come to court at the very beginning of that process in order to prevent the Commissioner continuing the process until the outcome of the extant criminal proceedings and until he had been provided with all the material to be relied upon by the Commissioner.

34. The Commissioner objected to that request because on the face of it, Regulation 12 does not require the Commissioner to append to the notice the material upon which he intends to base his decision. The Commissioner relied, in part, on the conclusion of the trial judge that "the advancement of a proposal is the prescribed means whereby the dismissal process is commenced so far as interactions with the affected probationer Garda are concerned; and, to this extent, the Commissioner observed the prescribed process in this case." As the trial judge went on to explain, the probationer may thereafter elect to make submissions within a 28-day period which the Commissioner would then have to consider. The Commissioner objects to the finding of the trial judge that if the probationer were to make an informed submission in respect of the proposal, he was entitled as a matter of procedural fairness to see the material intended to be relied upon by the Commissioner. According to the Commissioner's written submissions, until the Commissioner is in receipt of the probationer's submissions, he will not yet have made a decision and therefore cannot identify with any certainty the material upon which he intends to rely in reaching his ultimate decision. This latter submission was not pressed at the oral hearing in circumstances where it was a fact that the materials had been furnished without the respondent having made the full written submissions. If, however, it was a submission intended to convey that no materials dealing with the allegations need be furnished until

the point in time that a probationer makes an initial response to the effect that it is intended to challenge the allegations set out in the notice, then that makes logical sense. It must also be said however, that even if the allegations are accepted but there is a challenge to the proposal to dispense with services, a probationer may require to see all documentation before the Commissioner which is being relied upon by the Commissioner so as to ensure that he can address all material factors that may ultimately turn out to be relevant to the Commissioner's decision.

35. The gravamen of the Commissioner's submission was that the High Court judgment was out of line with those judgments, in particular *Rowland v An Post* [2017] 1 IR 355, which held that a court should only intervene in an ongoing disciplinary process where it was clear that the process had gone irremediably wrong. In the present case, the trial judge rejected the applicability of *Rowland v An Post* to this decision stating that it was "a case about the balance of convenience in interlocutory injunction applications." In so holding, the trial judge referred to the decision of Clarke C.J. in *McKelvey v Iarnród Éireann/Irish Rail* [2019] IESC 79, at para 6.12 where he stated that the principle in *Rowland* really forms part of the balance of convenience consideration that goes to the overall assessment which is made at an interlocutory stage. The trial judge did not rely on the finding in the High Court in *Student A.B. (A Minor) v The Board of Management of a Secondary School* [2019] IEHC 255 as he viewed that as a case where the argument that *Rowland* applies to judicial review appeared to have been accepted by both sides and accepted by the trial judge. The trial judge also held that even if the principle in *Rowland* applied to judicial reviews, it could not apply to the present case as the principle was based upon a process which can be remediated. He held that that could not happen here because "the notice was served; submissions were made (and no reply of any form issued until August 2020), with the Commissioner thereafter being free to make a determination until a stay was put on his doing so by order of the leave granting judge."

36. Counsel for the respondent submitted that the process at issue, being a mechanism whereby a probationer Garda may be summarily dismissed, was not comparable to the applications for interlocutory relief in the context of non-statutory processes such as were at issue in *Rowland v An Post*. The process under the 2013 Regulations was part of a statutory code covering the dismissal of Gardaí and had been refined over time to provide for respect for constitutional rights. Counsel noted that in the case *of Ivers v The Commissioner of An Garda Síochána* [2021] IEHC 574, a case involving summary dismissal under S.14 of the Garda Síochána Act, 2005, the Court of Appeal had not accepted the Commissioner's attempt to rely upon *Rowland*. The Court did so in light of the finding that where the conduct in question was genuinely in dispute, the summary dismissal provisions of s.14 had no application and therefore the issue fell away as the Commissioner had no power to invoke s. 14(2) of the Act of 2005.

37. The *Ivers* case does not, however, apply by analogy to these proceedings because the issues before this Court are different. It is not being argued that the Commissioner never had power to make the decision because the facts were contested; instead, the claim was that such a determination had already taken place. Moreover, the trial judge's decision

was based upon the fact that the Commissioner, once the notice was served, and he did not reply to the letter of 8 January 2020, could have made the decision to dismiss at any time after the expiry of the 28-day period.

38. In support of his argument that the trial judge was correct in holding that this procedure had 'gone off the rails' as he was not given any protection from a dismissal that might occur at any moment, counsel for the respondent said it was the failure to give the respondent the documents that meant that the process had 'gone off the rails'. This was in circumstances where the respondent was given no protection or indication of protection. He had waited until the 28 days were up to bring his judicial review proceedings. This was at a time when he was at risk of being dismissed. Counsel for the Commissioner in response submitted that it could not be assumed that the Commissioner would have acted without regard for the constitutional rights of the respondent. This was a matter that could have been redeemed and in fact was redeemed.

39. The first issue to resolve is whether the principles set out in *Rowland v An Post* are applicable to judicial reviews. In that case, the key issue before the Supreme Court was whether the trial judge had been correct in his conclusion that the application to the Court for an injunction to intervene in a disciplinary process that was underway was premature. Clarke J. (as he then was) held:

> "2.3 **Those facts raise the question of the standard by reference to which a court should intervene, whether by injunction, declaration or any other means, in a process having a disciplinary or similar character, which is still ongoing.** The trial judge placed some reliance in that regard to my decision in the High Court in *Becker v The Board of Management of St Dominic's School & Ors* [2006] IEHC 130. It is true that *Becker* was a decision given on an application for an interlocutory injunction seeking to restrain an employment disciplinary procedure. There may well be additional reasons why it may not make sense for the Court to consider injuncting, at an interlocutory stage, an ongoing disciplinary process. In the ordinary way a plaintiff seeking an interlocutory injunction only has to establish an arguable case before the Court goes on to consider the balance of convenience and other similar matters. If, at every stage of a disciplinary process, a party could secure an interlocutory injunction if there was even an argument about whether the procedures adopted were permissible, the practical consequences for any effective disciplinary process would be obvious.
>
> 2.4 However, it seems to me that the underlying principle behind *Becker* is equally true in the context of a full hearing of an application designed to prevent any ongoing process from continuing. In many cases the proper approach of a court when called on to consider the validity of a disciplinary-like process is to look at the entirety of the procedure and determine whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of constitutional justice. Many errors of procedure can be corrected by appropriate measures being taken before the process comes to an end. Decision makers in such a process have a significant margin of

appreciation as to how the process is to be conducted (subject to any specific rules applying by reason of the contractual or legal terms governing the process concerned). Thus the exact point at which parties may become entitled to exercise rights such as the entitlement to know in sufficient detail the case against them, the entitlement in appropriate cases to challenge the credibility of evidence and the right to make submissions are, at least to a material extent, matters of detail to be decided by the decision maker in question provided that the procedures do not, to an impermissible extent, impair the effectiveness of the exercise of the rights concerned.

2.5 Precisely because procedural problems can be corrected and because there may well be a significant margin of appreciation as to the precise procedures to be followed it will, in a great many cases, be premature for a court to reach any conclusion on the process until it has concluded.

2.6 However, the practical consideration which leans against a court interfering with an ongoing process may point in the opposite direction in a limited number of cases where the conduct of the process, up to the point when the Court is asked to review it, is such that it is clear that the process has gone irremediably wrong. In such a case, rather than the practicalities pointing to letting the process come to its natural conclusion and, if necessary, being reviewed by a court thereafter, those same practicalities point to stopping the process and thus saving all concerned from engaging in what must necessarily turn out to be the fruitless exercise of continuing a process whose conclusions if adverse are almost certain to be quashed.

2.7 However, in order for that latter consideration to become the dominant factor in the Court's assessment, it follows that the Court must be satisfied that it is clear that the process has gone wrong, that there is nothing that can be done to rectify it and that it follows that it is more or less inevitable that any adverse conclusion reached at the end of the process would be bound to be unsustainable in law. In any case where the plaintiff cannot establish that the case meets that standard it will ordinarily be inappropriate for the Court to intervene at that stage but rather the process should be allowed to continue to its natural conclusion at which stage it can, if any party wishes it, be reviewed." (**Emphasis added**)

40. The Commissioner relies upon the words "injunction, declaration or by any other means" to seek to demonstrate that the decision has application beyond the field of interlocutory injunctions. Those words must be considered in light of the procedural history leading to the decision of the Supreme Court which was itself quite complex. What was at issue in *Rowland v An Post*, was not an interlocutory injunction, as the full hearing as to the injunction had already taken place in the High Court. By the time the matter came before the Supreme Court however, the disciplinary proceedings had already been concluded. Further proceedings had been brought by Mr. Rowland challenging those conclusions and, in those circumstances, he sought a declaration from the Supreme Court concerning the procedures as it was now too late to achieve an injunction where the procedures had concluded. Clarke J. clarified that the key question for the Supreme Court was whether the

overall conclusion of the High Court, which was in substance to the effect that any application to that court was premature, was correct. He said that if that view of the High Court could not be disturbed then it would follow that the High Court was correct to refuse the injunction sought and irrespective of subsequent developments, it would be inappropriate for the Court to make any order in favour of the appellant.

41. In my view therefore, as the *Rowland* case was a decision after a plenary hearing, it supports the contention that its field of application is wider than that of interlocutory relied and extends to ongoing employment disciplinary procedures by way of interim, interlocutory, or permanent injunction, or by way of declaration. Thus, it cannot be said to apply only to an interlocutory injunction as was the situation in *Becker* which was another decision of Clarke J. (albeit in the High Court). In that sense the trial judge was incorrect to say that *Rowland* was about the balance of convenience in an interlocutory injunction; Clarke J. expressly acknowledged that the situation in an interlocutory injunction application requires different considerations to those at issue after a plenary hearing. The trial judge made his findings by relying upon the decision in *McKelvey* in which Clarke C.J. said: "the principle identified in *Rowland* really forms part of the balance of convenience consideration that goes into the overall assessment which is to be made at an interlocutory stage, which in turn leads to the fashioning of a result which runs the least risk of injustice". That dicta must be considered in the context of the *McKelvey* case, which itself concerned an application for an interlocutory injunction. The *Rowland* principles have a clear application to the balance of convenience, but they also apply to any form of injunction or declaration seeking to halt a disciplinary/dismissal process.

42. An application for judicial review is similar to a plenary decision in that it is intended to be final, although interim/interlocutory relief may be sought within the judicial review proceedings. A judicial review must, by definition, involve an aspect of public law. This is usually, though not necessarily, absent from employment injunctions sought by way of plenary proceedings. Does that make any difference to the principles set out in *Rowland*? It appears that Simons J. in the High Court in *Student A.B. (A Minor) v Board of Management of a School* did not think so. He stated:

> "Secondly, even if judicial review were an appropriate remedy, the application in the present case is premature. The disciplinary process is still in train, and no substantive hearing has yet taken place before the Board of Management. Still less has a decision actually been made to expel the Student. The Supreme Court in *Rowland* indicated that a court should only intervene in an ongoing disciplinary process where it was clear that the process has gone wrong; that there is nothing that can be done to rectify it; and that it follows that it is more or less inevitable that any adverse conclusion reached at the end of the process would be bound to be unsustainable in law."

43. As the trial judge pointed out however, the applicability of *Rowland* may appear to have been accepted by the parties to that case. On the other hand, the trial judge did not explain why he thought he reached the conclusion that Simons J. had an incorrect view of the law

other than to rely on *McKelvey* and the reference therein to the *Rowland* principle being a balance of convenience issue. That, as I have demonstrated, is not a correct characterisation of the *Rowland* decision. Furthermore, there is nothing explicit in the *McKelvey* decision that could not apply to employer/employee relationships in the public law sphere. Indeed, even the test for interlocutory injunctions – a fair trial/bona fide issue to be tried – is similar to that which applies to the grant of leave for judicial review, namely whether there is an arguable case. Clarke C.J. referred to that test, albeit in the context of an interlocutory injunction when he said:

> "The regular halting of a disciplinary process because of the possibility that something might have gone wrong (on merely the basis of an arguable case) potentially operates to defeat the orderly conduct of employer/employee relations and thus lead to a material risk of injustice to the relevant employer if an injunction s granted but the claim ultimately fails."

44. Since the judgment of the High Court in this case, it seems also to have been accepted by the Court of Appeal in *Ivers v Commissioner of An Garda Síochána* that as a matter of general principle, the *Rowland* decision was applicable to judicial review proceedings. It must be said that the acceptance of the general principle does not form the *ratio decidendi* of the decision because the Court of Appeal held that *Rowland v An Post* had no application on the facts of that case.

45. The case of *Rowland v An Post* was also touched upon by Murray J. in the Court of Appeal decision in *Habte v Minister for Justice and Equality & Ors* [2020] IECA 22. The applicant in that case had sought certiorari of a decision of the Minister to refuse to amend her certificate of naturalisation where she said it contained a mistaken date of birth which she herself had innocently provided to the Minister. The Minister had also commenced a new procedure pursuant to s. 19(2) of Irish Citizenship and Nationality Act, 1956, in which the Minister gave notice of his intention to revoke the certificate, stating the grounds therefor and the right of the person to apply to the Minister for an inquiry as to the reasons for revocation. Given the wording "notice of intention" etc. contained in s.19(2), the procedure has some similarities with the procedure at issue in Regulation 12.

46. Murray J., at para 96, agreed with the trial judge that "it is not, in general, appropriate to grant Judicial Review directed to a mere proposal or, as [Humphreys J.] later put it (at para 62), 'the decision to initiate a procedure is not liable to judicial review in the same way as the outcome of the procedure'". Murray J. went on to say "even if there is a 'decision' made that is in theory amenable to judicial review, the Court may refuse to accede to an application for that relief where there exists an alternative remedy. Where a process is initiated by a decision amenable to judicial review, with an entitlement thereafter for an affected person to make representations in advance of the final determination of that process, there is available to that person another remedy which, in an appropriate case, may be held to debar him or her from obtaining relief by way of judicial review. It may also be said that the proceedings are premature. However, it is important to keep all of these issues distinct. Prematurity and the availability of an alternative remedy, while they

may often overlap, are not always the same thing. A case may be premature because there is at the time of the institution of the proceedings no properly developed factual context in which the Court can adjudicate on the issues presented by the case, without there necessarily being any adequate alternative remedy available".

47. Murray J. held that the formation by the Minister of an intention under s. 19(2) was a decision which was amenable to judicial review. It was taken under statute and the applicant had to engage with the process or risk revocation of her naturalisation. Murray J. referred to *Borges v Fitness to Practice Committee of Medical Council* [2004] 1 IR 103, saying that similar characteristics had been held to render interlocutory orders in various inquiry processes capable of review. The respondent also relied on the decision in *Borges* to demonstrate that judicial review was an appropriate remedy where fair procedures were being denied. In *Borges*, the Supreme Court upheld the High Court finding that granting relief by way of judicial review was not, in fact, premature even though the hearing before the disciplinary body had yet to take place. The decision to uphold the High Court was based on the fact that the Committee denied the applicant's right to fair procedure, with Keane C.J. observing, in a quote relied upon by the respondent, at pg. 110: "Either the Committee's decision constitutes a denial of fair procedures to which the applicant is entitled or it does not. If it does, then it would seem wrong that the applicant should be subjected to the anxiety and expense of a hearing which, on that hypothesis, does not respect his right to a fair hearing. It seems to me that the modern judicial review process should be sufficiently flexible to allow for the granting of the appropriate declaratory relief in such circumstances".

48. Murray J. in *Habte* rejected the applicant's reliance on *Rowland* who argued that the process had 'gone irremediably wrong' but, in doing so, it could be said that he implicitly accepted that the *Rowland* principle may be a relevant consideration. Having stated that the scope of the inquiry at issue in *Habte* was broad and would allow all relevant issues raised to be addressed, Murray J. stated:

> "For this reason, the applicant's reliance on the comments in *Rowland v. An Post* [2017] 1 IR 355 at pp. 360-361 is misplaced: there is no process here that has 'gone irremediably wrong' and therefore no basis for intervention by the Courts at this point on the grounds that it has. The applicant has a full entitlement to make, and the Minister a consequent obligation to take account of, all and any submissions relevant to the question of whether her certificate of naturalisation should be revoked which the applicant chooses to advance prior to his making a final decision."

49. The reference to *Rowland* in the judgment in *Habte v Minister for Justice & Equality* arose at the point where Murray J. was addressing a contention made by that applicant which was strikingly similar to the argument made in this case; that the formation of an intention to revoke/dispense with services was a *determination* to revoke/dispense with services. That contention was rejected in *Habte* (see para 46 above) and it was rejected by the trial judge in the present case. This is of significance because what *Habte* demonstrates is that this type of process, which commences with a stated intention by a decision maker to begin

the process (which is correctly described as the formulation of a proposal), should usually be allowed to run its course. In that particular case Murray J. held that the burden on an applicant seeking to quash the formation of such an opinion and the halting of the s. 19 procedure as substantial. The Minister must be fully entitled to begin the process that will enable such an enquiry. He went on to say that the issue of when the Court should intervene so as to arrest that procedure must be viewed in the light of the overriding consideration that this is the arena determined by the Oireachtas as the proper location for the resolution of the issues touching on the revocation of the certificate of naturalisation.

50. The decision in *Habte* strongly points towards the contention that, regardless of whether the argument is that the application for judicial review is premature (because the factual contest has not yet been identified) or that it ought to be rejected on the grounds of an alternative remedy (the existence of a procedure subject to constitutional and natural justice), the decision in *Rowland v An Post* is one which has relevance and application to judicial review proceedings. There is no tension with the decision in *Borges*. The facts in *Borges* were entirely different; the stage the process was at in *Borges* had reached a level where it could be said that the applicant could not get a fair hearing. It was an appropriate time for the courts to intervene.

51. On the basis of the decision of the Court of Appeal decision in *Habte*, it is arguable that the present case may be more properly identified as an issue of whether the Court ought to exercise its discretion to refuse judicial review on the basis of the available statutory remedy rather than as one of prematurity. No matter how it is characterised, the outcome remains the same. There was a process open to this applicant through which he could contest the proposal that his services ought to be dispensed with. The Commissioner was obliged to follow the principles of constitutional and natural justice and the courts will only intervene in that process where it can be said that it has 'gone irremediably wrong'.

52. Apart from relying on the trial judge's view that the *Rowland* principles did not apply to judicial review proceedings, the principal argument made by the appellant against applying those principles to public law was that public law cases involved an exercise of statutory powers. There was a considerable difference, counsel argued, between the exercise of statutory functions and the exercise of functions in the private sphere. Persons carrying out functions in the private sphere ought to be permitted to correct themselves in the course of their own proceedings as they were in effect "amateurs". On the other hand, those involved in public law had a statutorily imposed duty to carry out and that permitted the person concerned to go to court to ensure that those statutory duties were adhered to and thus that statutory rights were preserved. The fact that statutory powers were at issue therefore put judicial review into a separate category and access to it could not be curtailed for the same reasons as applied to the private law sphere. Counsel's arguments also relied upon the enormity of the consequences for this probationary Garda which was the risk of immediate dispensation of services with no right of appeal.

53. At the level of principle there is no reason why injunctions or declarations sought by way of judicial review are exempt from the principle set out in *Rowland v An Post*. The same

rationale behind the principle in *Rowland* applies whether the proceedings are taken as a plenary action or by way of judicial review. As Clarke J. said in *Becker*: "[i]t does not seem to me to be consistent either with a proper invocation of the Court's jurisdiction or the proper conduct of disciplinary processes in an employment context that the Court should be invited to intervene at a variety of stages in the course of that process." Although these are not disciplinary proceedings, they are employment related proceedings which may lead to the termination of employment. The principle in *Becker* applies to both.

54. The issue in terms of court resources is the same whether the challenge is by plenary summons or by way of judicial review. To accept that all judicial review challenges to employment proceedings should be permitted to proceed simply because public law is involved, regardless of the stage those employment proceedings have reached, would not be consistent with the proper conduct of the statutory process. It would have the result of potentially stymieing employment proceedings even though the statutory process may ultimately be found to have been properly and lawfully invoked and conducted. It would also not be a proper use of the courts' resources to have interventions to prevent statutory procedures taking place, which it must be presumed, incorporate a right to fair procedures (see the Supreme Court (Walsh J.) in *East Donegal Co-op v The Attorney General* [1970] IR 317 at page 348.). The Commissioner is therefore bound to comply with constitutional and natural justice in dealing with a probationer Garda when considering whether to dispense with his or her services in accordance with Regulation 12.

55. In judicial review applications it must be acknowledged that the requirement to move the application at an early stage may have a particular importance because of the necessity to comply with time limits as set out in Order 84 RSC. An application for judicial review must be made within three months from the date when grounds for the application first arose. In some areas such as planning or immigration, there may be statutory imperatives as to why decisions must be challenged at particular stages of a process. O. 84 r. 21(2) provides for the situation where court procedures are at issue where time only begins to run from the date of "any judgement, order, conviction or proceeding". The procedures in this case were not court procedures; they involved the process through which the Commissioner was seeking to exercise his regulatory power under Regulation 12. It is necessary to look at the precise challenge in this case, as in every judicial review challenging a decision-making process which is statutorily based, to assess whether this application was truly premature. A court must be mindful of whether there is a realistic apprehension that a later court would find that time had actually run against the applicant because they had not moved the application for judicial review earlier.

56. As counsel for the respondent fairly acknowledged during the appeal, the challenge made in this case was to the *determination* by the Commissioner to dispense with his service. If there had been such a *determination*, the proceedings would not have been premature. The determination would have been, and to comply with the rules, would have had to have been made within three months of the date of the notice of proposal. No such determination had been made of course and what was left was a challenge to an ongoing process. Although the trial judge quashed the notice in this case (which was not a relief for which

an application had been made) he did so on the basis that a) the presumption of innocence was violated and b) that the respondent's constitutional rights were breached in not being given the documents. The first of those grounds did not really arise in the process at that time and the second was not one that could be said to have irremediably gone wrong since it was capable of being rectified. This was a process that was in being and was one that was required to be carried out fairly.

57. The respondent's argument that he is in a special circumstance because he is at risk of immediate dispensation of services without an appeal is not one which compels a different conclusion, namely that challenges to employment proceedings must fall *per se* outside the *Rowland* principle. The respondent makes this argument in a general sense but more specifically by reference specifically to probationer members of An Garda Síochána. I cannot see any reason to consider it as a special circumstance merely because probation is at issue; it would apply to all probationer employees in the civil or public service. Rights are to be protected within the employment arrangements to which probationer employees are subject. The procedures must be allowed to take place subject to the *Rowland* principle that if the wrongs are irremediable the courts may intervene, or, to put it in terms of the discretion of a court to refuse on the basis that an alternative remedy exists which satisfies the requirements of fair procedures.

58. Undoubtedly, the situation of a member of An Garda Síochána, whether on probation or otherwise, is a very particular one. It is a *sui generis* employment where the members have standing, powers and rights unlike any other role or employment in society. The fact that the disciplinary and indeed probationary proceedings are set out in detailed regulations by way of statutory instrument reflects that standing. The regulations, the legislation, and the Constitution provide protections for the members, as the recent decision in *Ivers* demonstrates. On the other hand, the Commissioner has a concomitant duty to make decisions in accordance with the regulations, the legislation, and the Constitution. That creates a balance between the interests of the member and that of the Commissioner. There is nothing in that dynamic however which places the situation of a member of An Garda Síochána into a special category which permits him or her, in contradistinction to other employees, public or private, to challenge those procedures at every step of the way without regard to the principle that the courts will only intervene where the employment process has gone irremediably wrong or where no other alternative remedy exists. There is a guarantee of the protection of rights and if, at the end of the process, it is considered that rights have been violated, there is an access to the courts, which may, in an appropriate case, even halt a proposed dispensing of services. Overall, I am satisfied that in this situation there is no reasonable apprehension that a later court could find that the challenge to the fairness of the procedure ought to have been made as soon as the Regulation 12 procedure was invoked.

59. Once it is properly understood that what was at issue in the present case was merely a proposal and that what would follow was a statutory process which was bound to respect norms of constitutional and natural justice, it is apparent that it could not be said that the process had gone irredeemably wrong or that no alternative remedy existed. The only

wrong at issue that remained to be addressed in the case was whether the documents would be made available to the respondent. It could not be assumed that he would not receive them in the course of the process which was only being commenced by the proposal to dispense with his services.

60. Was this a procedure that had gone irremediably wrong? Or a procedure that could not be cured during the statutory process? To draw a conclusion that it had gone irremediably wrong or could not be cured would be inappropriate. Although the respondent submitted that he was at imminent risk of having his services dispensed with, such action would only have occurred if the Commissioner had failed to engage at all with the respondent's submissions. Those submissions included his claim to entitlement to documentation. The Commissioner was constitutionally bound to act fairly and in accordance with natural and constitutional justice. Despite the failure to respond to that request in a timely fashion, the documents were ultimately given to the respondent. The process was at the beginning. It cannot be said that the process had gone irremediably wrong at the time the respondent invoked the court's protection. The process ought to have been allowed proceed in accordance with the principles of natural and constitutional justice.

Conclusion

61. For the reasons set out above, this appeal must be allowed. It could not be said that the decision of the Commissioner to serve a notice on the respondent, a probationer Garda, proposing to dispense with his services, amounted to a violation of his presumption of innocence where he was facing criminal charges concerning the same matters which were alleged against him in the notice. Furthermore, the challenge to the notice was premature in that the procedure could not be said to have gone irremediably wrong. The principle in *Rowland v An Post* applies to a challenge of a probationer Garda of a proposal to dispense with his services.

Costs

62. Since the courts have begun to deliver judgments electronically it has become usual for the courts to make a presumptive order of costs. The order proposed may be challenged by either party in either a written or oral form, or sometimes both, as directed by the Court. Often these presumptive orders are made on the basis that "costs follow the event" which is, it is said, a shorthand for the usual order made under s. 169 of the Legal Services Regulation Act, 2015, in favour of an entirely successful party. Section 169 provides that a party who is entirely successful in civil proceedings is entitled to an award of costs against the unsuccessful party, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including, *inter alia*, the conduct before and during the proceedings. In the ordinary course, costs following the event would mean that the order of the High Court that the Commissioner is to pay the costs of the respondent must be vacated and that the Commissioner be granted his costs in this Court and in the High Court.

63. I propose however, to make a presumptive order that is not the usual order that "costs follow the event". It is appropriate to do so in this case because of matters that have been referred to in the judgment. The parties, more likely to be the Commissioner, will have a

full opportunity to contend for a different order should they choose to do so. The presumptive nature of the order must be taken as no more than an indication of the matters which have concerned this court about the conduct of the proceedings. The fact that these concerns have been spelt out in advance of any hearing that takes place will permit the submissions of the parties to be more focussed.

64. In the course of this judgment, I have referred a number of times to the failure of the Commissioner to respond, even by way of a holding letter, to the letter of the respondent's solicitor dated 8 January 2020. The respondent required confirmation that no further steps would be taken in relation to the respondent's suitability as a Garda until such time as the criminal prosecution was dealt with, that the material on which the Commissioner relies be provided to him, and he had the opportunity to make further submissions. In the absence of a response to that letter, the respondent launched these judicial review proceedings. Eight months later, the Commissioner forwarded that documentation to the respondent.

65. Part of the Commissioner's response to the respondent's argument about the failure to provide him with the material was to say that the respondent "did not give the Commissioner a reasonable opportunity to consider and respond to the [respondent's] solicitor's letter dated 8 January 2020 before applying for leave on 20 January 2020". The counter argument to which is that the respondent had been directed that he had 28 days in which to respond (as required by the regulations) before the Commissioner would proceed.

66. In my view, notwithstanding the fact that this judgment has upheld the Commissioner's argument that the respondent acted prematurely in proceeding to judicial review in circumstances where the Commissioner was obliged to carry out his functions in a constitutionally fair manner, the failure of the Commissioner to respond in any way to the letter (which included submissions on the procedural issues raised in the letter) is conduct to which this Court should have regard in considering the costs. The Regulation set out what is clearly intended to be a prompt procedure to enable the Commissioner, provided the criteria are met, to dispense with the services of a probationary Garda. The requirement in Reg 12(9) regarding the time for submissions is phrased as a mandatory 28 days. There is further power given to the Commissioner to expand the period of probation by 28 days and further in exceptional circumstances.

67. On the facts of this case, it is also clear that An Garda Síochána spent almost the entire of 2019 considering the suitability of the respondent as a member of An Garda Síochána. A "suitability file" was compiled by Superintendent Aidan Brennan in respect of the respondent in March 2019 but for some reason this was not received in the Probationer Training Performance and Development Office until 9 October 2019. Superintendent Brennan recommended the respondent's retention as a member of An Garda Síochána. Various other reports were then compiled at a high level within An Garda Síochána during November 2019 and it is striking how these reports state in various ways that "although the criminal case has not concluded, there is sufficient evidence that the nature of the behaviour of [the

respondent] was such as to show that his continued service in An Garda Síochána is untenable".

68. The above demonstrates that a) there were different views at management level as to the suitability of the respondent to be retained as a member of An Garda Síochána and b) the fact that the criminal case had not concluded was a "live" consideration. These factors must have been to the forefront of the Commissioner's mind when he sent the notice proposal to dispense with the services of the respondent. I make absolutely no criticism of the Commissioner's decision to issue the notice proposal. My purpose in highlighting this is solely to demonstrate that it must have been anticipated, or at least ought to have been anticipated by the Commissioner, that the respondent would be likely to seek any documentation that "assisted" his case for retention and that the pending criminal proceedings would be raised as an issue by the respondent. Moreover, in general terms, as the Commissioner was obliged to carry out his functions in a constitutionally compliant manner, he ought at least to have considered in advance the parameters of the procedure he was undertaking. If he had done so, he ought to have been able to respond to the issues raised by the respondent. That he did not do so and in fact argues that it was unreasonable to expect a prompt answer leaves much to be desired in terms of the optimum conduct one would expect in an employment procedure, which was statutorily required, in which the consequences for the respondent were so severe given the uniqueness of his role as a member of An Garda Síochána, albeit one on probation. It was also therefore, in my opinion, conduct to which this Court ought to have regard in relation to the question of costs.

69. In all the circumstances, the respondent was not entirely without appropriate concern as to his position in January 2020 when he launched these proceedings, even if he did do so on a basis that has been rejected in this judgment. If the Commissioner had responded to a request that ought to have been anticipated in a timely manner, even to the extent of a holding letter, then these proceedings would not, in all likelihood, have been commenced. That would have saved public money and of course eased the burden on the courts resources which would have been to the value of other litigants. In those circumstances, I am satisfied that the respondent ought to be entitled to the costs of the application for leave to the High Court and for his costs up to the service of the documentation on him on 8 August 2021. Thereafter, the respondent and Commissioner are to bear their own costs in respect of the High Court and this Court. Should either party wish to contest this matter they should indicate that fact to the Registrar of the Court of Appeal within 21 days of the delivery of this judgment. This Court will thereafter give further directions as to written or oral submissions as may be appropriate.

As this judgment is being delivered electronically my colleagues Whelan and Ní Raifeartaigh JJ. have authorised me to record their agreement with the judgment and the orders proposed.