

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2006 No. 210 J.R.]**

**BETWEEN**

**MARK GIBBONS**

**APPLICANT**

**AND  
THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**RESPONDENT**

**Judgment of Mr. Justice John Edwards delivered on the 30th July, 2007.**

**Facts**

1. The applicant is a member of An Garda Síochána. He currently faces disciplinary charges under the Garda Síochána (Discipline) Regulations 1989 and the alleged breaches of discipline relate to alleged mishandling of lost property handed into Kevin Street Garda Station by a Mr. Alan Harper on the 19th September, 2001. The lost property in question went missing whilst in Garda custody and it is alleged that the applicant was negligent in his duties and that he did not properly record the lost property or issue a proper receipt for it. The applicant was the member-in-charge of property in Kevin Street Garda Station at the relevant time.

2. On the 1st November, 2003 Mr. Harper wrote a letter to the addressed to the Lost Property Office, Garda Station, Kevin Street, Dublin 2 in the following terms:-

"Dear Sirs,

In November, 2001 I submitted nine small plastic bags containing a variety of valuable stones to the Garda Station in Kevin Street as found items for passing on to the Lost Property Office.

Will you please confirm that the person who lost them has subsequently claimed these bags?

Yours sincerely,

Alan Harper."

3. Though nothing of significance turns on it, Mr. Harper was incorrect in his recollection that he handed in the lost property in question in November, 2001. An examination of the lost property book at Kevin Street Garda Station subsequently revealed that he in fact handed in the property in question on the 19th September, 2001.

4. This letter is characterised in the applicant's submissions as being "a letter of complaint which disclosed an apparent breach of discipline by unknown members of An Garda Síochána". It is nothing of the sort. It is merely an enquiry.

5. Garda John Sheridan on behalf of the Lost Property Office at Kevin Street replied to Mr. Harper's letter by a letter dated the 13th November, 2003 in the following terms:-

"Dear Sir,

I am in receipt of your letter dated the 1st November, 2003. Can you please forward the Garda Receipt issued to you when the property was surrendered, as this contains important information, which will help me to inquire further re same property.

Yours sincerely,

John Sheridan

Garda."

6. On the 15th November, 2003 Mr. Harper replied to Garda Sheridan in the following terms:-

"Dear Sir,

Thank you for your letter of the 13th November, 2003. I do not have a receipt number from when I surrendered the bags to the Garda Office in Kevin Street. The reason I don't have a receipt is that when I submitted the bags the Gardaí in the office were under pressure of work and the young Garda who registered the acceptance was a little unfamiliar with the acceptance procedure. He entered my name in the big book a more Senior Garda had indicated he should use and when I asked him for a receipt he showed me the entry in the book and said that this was as much as I got.

I recall that the transaction was entered under my name and address, and was registered as nine small bags of stones or precious stones, or valuable stones. The location where found was in Clonskeagh, and I surrendered them in late November or early December, 2001.

Yours sincerely,

Alan Harper"

7. On the basis of this information the gardaí went about making enquiries. Arising out of those enquiries an Inspector Will Muldoon telephoned Mr. Harper sometime in January, 2004. Following that telephone conversation Mr. Harper wrote again to Garda Sheridan on the 4th February, 2004, in the these terms:-

"Dear Sir,

I refer to your letter of the 15th November, 2003 and a subsequent conversation I had with an Inspector Will Muldoon who rang me last month.

I would like to confirm the details of the conversation I had with Inspector Muldoon. Apparently I left the stones into Kevin Street on the 19th September, 2001 and they were received by a Garda James Newman who was very new to the office. The receipt number was 227378 and the property number was 96801. Inspector Muldoon was confident that they had not been claimed and that you are continuing in your efforts to find the bags.

When I had the bags of stones I roughly valued them at somewhere in the region of €3,000 to €10,000 and as you can imagine I would be anxious that they be found. I would be interested to have news of how your search is progressing.

Yours sincerely,

Alan Harper"

8. It would appear that the Garda inquiries continued but they were unsuccessful in locating the property in question. In consequence of this Inspector Muldoon of the Superintendents Office at Kevin Street Garda Street Station wrote to Mr. Harper on the 7th July, 2004 in the following terms:-

"Dear Alan,

Initially may I apologise for the delay in responding to your correspondence to Garda John Sheridan, Division Stores based at Kevin Street. Since our conversation I have had comprehensive enquiries carried out with the Gardaí who were on duty on the 19th September, 2001 at Kevin Street when you surrendered property which you had found (receipt number 227378 refers).

Some of these members are no longer stationed in Kevin Street, hence the delay since your original inquiry. Unfortunately the results of these enquiries have been negative and the items referred to in receipt number 227378 have not been located. If I can be of any further assistance do not hesitate to contact me.

Thady P. Muldoon

Inspector for Superintendent."

9. The next piece of relevant correspondence was a letter of the 13th of July 2004 from Mr. Harper to Inspector Muldoon responding to the Inspector's letter of the 7th July. It is fairly characterised as being a letter of complaint and protest in robust terms. Having so characterised it, and as the letter is of some length, it is not necessary for me to recite it. However, I would comment that this is the first letter in the nature of a formal complaint.

10. Unfortunately, Mr. Harper's letter of the 13th July, 2004 was not responded to and this further irritated an already incensed Mr. Harper, who then wrote directly to the Commissioner of An Garda Síochána on the 14th October, 2004. Again it is not necessary to recite the precise terms of Mr. Harper's letter to the Garda Commissioner. However, it is fair to say that it elicited an immediate response. The Commissioner immediately passed the matter to the Assistant Commissioner for Human Resource Management at Garda Headquarters who was then Assistant Commissioner W. I. Rice. On the 28th October, 2004 Assistant Commissioner Rice wrote to Chief Superintendent William Donoghue of Pearse Street Garda Station who was the Divisional Officer in charge of the Dublin Metropolitan Region South Central Division. Kevin Street Garda Station is within the Dublin Metropolitan Region South Central Division. Assistant Commissioner Rice's letter was in the following terms:-

"Please find attached complaint from Mr. Alan Harper, Moneyteigue, Aughrim, made to the Commissioner on 14th October, 2004.

The matter is now referred to you for your firm recommendations regarding the disciplinary and criminal aspects, if any, of this case.

If necessary, you may obtain a brief background report to decide if the provisions of the Garda Síochána (Discipline) Regulations 1989 should be invoked in this case.

To this end, there should be no delay in ensuring this matter is fully investigated and in particular, where there are issues of a criminal nature, Investigating Officers should be mindful of the statutory limitations in regard to the issue of summary proceedings in appropriate cases. In this regard you will ensure that such cases are completed in time to enable the DPP time to consider any possible summary prosecution within the six month time limit. You should set deadlines for completion of files in such cases, to ensure timeframes are adhered to.

You should also ensure the provisions of H.Q. Directive 22/03 are fully complied with.

Report developments to this Branch and ensure that the complainant is kept apprised of all developments.

Walter I. Rice

Assistant Commissioner"

11. The next thing that happened was that by letter dated the 2nd November, 2004 addressed to the Superintendent at Pearse Street Garda Station, Chief Superintendent Donoghue nominated Inspector Thomas Maguire of Pearse Street Station to conduct what was described in evidence as a "preliminary investigation" of the complaint and required him to report in early course with his observations and recommendations. The letter to the Superintendent stressed that there should be no delay in having the matter fully (my emphasis) investigated and it directed that an interim report should reach the Chief Superintendent's Office within 30 days of receipt of the file by the investigating officer. It is clear from the affidavit sworn by Chief Superintendent Donoghue on the 27th June, 2006, and indeed from his oral evidence in the course of being cross-examined upon his affidavit before me, that he was of the view, rightly or wrongly, that the task entrusted to him by the Assistant Commissioner involved a two stage process. He stated:-

"It is first necessary to appoint an Investigation Officer to conduct a preliminary investigation to establish where the

blame might lie and to establish the identity of those persons who may have been negligent in the performance of their duties, before proceeding with a disciplinary investigation pursuant to the Garda Regulations."

12. Despite rigorous cross examination before me Chief Superintendent Donoghue (now retired) remains steadfast in his belief that this was the way in which he was required by law to approach matters.

13. In any event, Inspector Thomas Maguire went about his preliminary investigation and a preliminary investigation file was submitted to Chief Superintendent on or about the 1st April, 2005. This was read and considered by Chief Superintendent Donoghue who raised certain queries in respect of it relating to issued receipts from the property book and also relating to the hand writing in the property book in respect of entries on the 19th September, 2001 (the date the property was handed into Kevin Street Garda Station). These matters were not covered in the Inspector's preliminary report. Chief Superintendent Donoghue deposed that on or about the 4th July, 2005 he received a full investigation file addressing his queries of the 7th April, 2005 from Inspector Maguire. He contends that it was on receipt of Inspector Maguire's report and investigation file on the 4th July, 2005 that he became aware for the first time of the identity of the members of An Garda Síochána who were allegedly negligent regarding the property handed into Kevin Street Garda Station by Alan Harper on the 19th September, 2001 and the alleged failure to secure the same. Upon a consideration of Inspector Maguire's report he concluded that there was evidence of negligence by way of neglect of duty on the part of three members who were on duty in the public office of Kevin Street Garda Station on the date in question. One of those three members was the applicant in this case, Mark Gibbons. On the 8th July, 2005 Chief Superintendent Donoghue appointed Inspector Thomas Maguire of Pearse Street Garda Station on a form "B. 33", to investigate alleged breaches of discipline against three members, one of whom was the applicant herein. It was at this point that Inspector Maguire was formally tasked pursuant to Regulation 8 of the Garda Síochána (Discipline) Regulations, 1989 to investigate the alleged breaches of discipline against the applicant the subject matter of this judicial review. In addition, and as required under the Regulations, the Chief Superintendent furnished Inspector Maguire with a form "B. 33A" for service on the applicant. The form B. 33A is a Notice under Regulation 9 of the Garda Síochána (Discipline) Regulations, 1989 informing the applicant that he may have been in breach of discipline and briefly outlining the acts of commission or omission alleged. Further, the applicant was formally informed that Inspector Maguire had been appointed Investigating Officer and that he was investigating the matter.

14. On the 27th October, 2005 Chief Superintendent Donoghue received what was described to me as "the full disciplinary investigation file" from Inspector Maguire. Having considered it he caused the applicant to be formally charged with a breach of discipline on the 12th November, 2005 and to be served with all relevant documentation (referred to at the hearing before me as a "book of evidence"). This was done pursuant to Regulation 11 of the Garda Síochána (Discipline) Regulations 1989. The charging procedure involves serving the accused Garda with what is known as a "Discipline Form" (designated B.30) containing a statement of the charge or charges against him. The B.30 invites the accused to indicate whether he wishes to admit the charge or charges and avail of regulation 13, or not. On the 30th December, 2005 the applicant returned the form B. 30 to the Chief Superintendent's office via Inspector Thomas Maguire endorsed with an indication that he was denying all charges. At this point the wheels were to be put in motion for the setting up of a formal inquiry in accordance with Regulation 14 of the Garda Síochána (Discipline) Regulations 1989. However, before any inquiry could be held the applicant applied to the High Court by motion ex-parte on Monday 27th February, 2006 for leave to apply by way of application for judicial review for diverse reliefs including an order of prohibition restraining the respondent from further processing the disciplinary proceedings against the applicant herein in respect of the allegations of breaches of discipline preferred against him. The applicant was successful in obtaining leave to apply for judicial review.

15. Before leaving this review of the facts of the case it should also be stated that the applicant relies heavily on certain additional facts established before me in evidence. Kevin Street Garda Station is located within what is known as "A" District. Mr. Alan Harper's initial inquiries (and subsequent complaint) were all addressed to Gardaí within "A" district and were dealt with "in-house", so to speak, within "A" District. Let me hasten to add that I am not suggesting that there was anything remotely improper about this. However, it would appear that Inspector Thady Muldoon on behalf of the Superintendent in "A" district was tasked with looking into the matters raised by Mr. Harper. The evidence establishes that Inspector Muldoon reported to his Superintendent on the 6th January, 2004. The applicant contends that on the basis of this report the Superintendent responsible for "A" District had the following information as of the 6th January, 2004:-

"1. A Mr. Harper was claiming to have submitted 9 small plastic bags containing valuable stones to the Garda Station in Kevin Street as "found items" for passing on to the Lost Property Office, and was seeking confirmation that the person who had lost them had actually reclaimed them. Mr. Harper did not have a receipt nor did he have a receipt number. His explanation for this was that when he had handed in the bags to Kevin Street the Gardaí in the office were under pressure and a young Garda who received the property from him appeared unfamiliar with the procedure to be followed in the case of lost property handed in. The young Garda had entered Mr. Harper's name in a big book which a more senior Garda had indicated he should use and when Mr. Harper had requested a receipt he, the junior Garda, had showed him his entry in the book and had said that this was as much as Mr. Harper was to get. Mr. Harper recalled that the transaction as entered included his name and address and described, he thought, 9 small bags of stones or precious stones or valuable stones, and the location where they were found, namely "Clonskeagh".

2. Garda James Newman was the officer responsible for entering the lost property under reference number 968/01 in the property book. Garda Newman acknowledged receiving the 9 bags of jewellery. Garda Newman was of the belief that once he had received these items, he had completed the relevant documentation and handed the relevant items over to the member in charge, Sergeant Martin Creighton. However, he was new on the job at the time and could only vaguely remember matters. Therefore, he could not say for certain that he had in fact passed these items over to Sergeant Creighton.

3. The official receipt book in relation to the property gave no further details in relation to the incident apart from the receipt number 227378 (recte 227377). Garda Newman stated he had not written this receipt.

4. That the items could not be located.

5. That there had been a careful search for the items with the help of Garda Kenny and Sergeant Millea.

6. Garda Gibbons (the applicant) had been responsible for the entry in the property book which indicated the items had been moved to Shed B but Garda Gibbons could not recall anything else in relation to the property.

7. Sergeant Martin Creighton had been the member in charge in the station on the day in question (readily ascertainable from the roster book).

8. Garda Gibbons (the applicant) had been detailed to work in the public office and was the member in charge of property at the time of the incident which duty involved monitoring property that came into Kevin Street Garda Station and ensuring that property was adequately recorded in the relevant property book and receipt book. Further, it was Garda Gibbons' responsibility to ensure that all property was stored in Shed B. Further, as member in charge of property at the time, it was Garda Gibbons' responsibility to forward property from Shed B to the Divisional Stores.

9. Garda Newman was of the belief that having completed the entry in the property book he may have handed the bags over to another member to place in the property press but he could not recall that for certain.

16. The respondents do not dispute that items 1 – 9 above were known to, or were readily ascertainable by, the Superintendent in charge of "A" District on the 6th January, 2004.

17. The evidence further establishes that one additional piece of information came to light subsequently. On the 21st June, 2004 Sergeant Creighton reported to Inspector Thady Muldoon that although he (Sergeant Creighton) was station house orderly and member in charge of Kevin Street Garda Station on the day of the incident, he had no recollection of receiving the property from Garda Newman and he was of the view that Garda Newman might have handed same to either the station orderly or the console operator.

#### **The Present Proceedings**

18. This matter came before me by way of notice of motion dated the 3rd March, 2006, and pursuant to the aforementioned order granting leave dated the 27th February, 2006, seeking the following reliefs by way of a judicial review:

1. An order, by way of prohibition, or in the alternative injunction, restraining the respondent from further processing the disciplinary proceedings against the applicant herein in respect of two alleged breaches of discipline on the 19th September, 2001.
2. A declaration that the failure by the respondent to investigate the matter expeditiously breached the applicant's entitlement to fair procedures and/or constituted a breach of statutory duty, was *ultra vires*, and/or breached the applicant's legitimate expectation that serious allegations of misconduct alleged against him pursuant to the Garda Síochána (Discipline) Regulations, 1989, would be dealt with expeditiously.
3. Costs.

The grounds upon which the said relief is sought are as follows:-

1. The delay by the respondent in investigating the alleged breaches of discipline by the applicant on the 19th September, 2001, pursuant to the Garda Síochána (Discipline) Regulations 1989, was inordinate and inexcusable and breached the applicant's right to natural and constitutional justice and fair procedures and breached his legitimate expectation that allegations of breaches of discipline alleged against him would be dealt with expeditiously.
2. The respondent has acted *ultra vires* and in breach of statutory duty in failing to investigate the alleged breaches of discipline as soon as practicable pursuant to Article 8 of the Garda Síochána (Discipline) Regulations, 1989.
3. The respondent has acted contrary to natural and constitutional justice and fair procedures and/or *ultra vires* and in breach of statutory duty and/or in breach of the applicant's legitimate expectation that serious allegations alleged against him pursuant to the Garda Síochána (Discipline) Regulations, 1989, would be dealt with expeditiously.
4. The delay by the respondent in processing the alleged breaches of discipline pursuant to the Garda Síochána (Discipline) Regulations, 1989 has given rise to the applicant suffering additional distress and anxiety by reason of the fact that he must now defend allegations which date back to 2001, and that delay has prejudiced his ability to defend himself."

#### **The Garda Síochána (Discipline) Regulations, 1989**

19. These regulations, contained in statutory instrument No 94 of 1989, were promulgated on the 28th April, 1989 and prescribed the procedures for dealing with breaches of discipline by members of An Garda Síochána. The scheme of the Regulations is as follows:-

Regulations 1, 2, 3 and 4 deal with preliminary matters, including interpretation and definitions.

Regulation 5 contains a transitional provision covering enquiries under the Garda Síochána (Discipline) Regulations, 1971 which were not concluded at the date of coming into force of the 1989 Regulations.

Regulations 6 and 7 appear under the heading "*Breach of discipline*".

Regulations 8 and 9 appear under the heading "*Investigation*".

Regulation 10 appears under the heading "*Report of investigation*".

Regulations 11 and 12 appear under the heading "*Documents to be supplied to the member concerned*".

Regulation 13 deals with "*Procedure where certain breaches of discipline are admitted by the member concerned*".

Regulations 14, 15, 16 and seventeen appear under the heading "*Inquiry*" and deal with the procedures for the convening of a disciplinary inquiry.

Regulations 18, 19, 20, 21 and 22 deal with "*Inquiry Procedure*" and describe the procedures to be followed at a disciplinary inquiry.

Regulation 23 relates to "*Action by Commissioner on report of inquiry*" and regulation 24 relates to "Review by

Commissioner of disciplinary action".

Regulation 25 deals with "*Appeal Boards*" and regulations 26, 27, 28, 29, 30, 31, 32 and 33 deal with "*Review by an Appeal Board of a decision of an inquiry or a decision of the Commissioner*".

Regulations 34 to 39 inclusive deal with sundry matters and Regulations 40 to 42 deal with sanctions.

Regulation 43 revokes the 1971 Regulations and there is then a "*Schedule*" defining such matters as discreditable conduct, misconduct, neglect of duty, disobedience of orders, corrupt or improper practice, breach of confidence, abuse of authority, neglect of health, untidiness on duty or in uniform, misuse of property, intoxication, drinking on duty, unauthorised entering of licensed premises, prohibited spare time activity, criminal conduct and so on.

20. It is clear that in the present proceedings the Court is concerned with that portion of the disciplinary process covered by Regulations 6 to 10 inclusive. These are in the following terms:-

*"Breach of discipline*

6. An act or omission described in the Schedule shall be a breach of discipline and 'in breach of discipline' shall be construed accordingly.

7. Nothing in these regulations shall affect the right of the Commissioner or any other member whose duties include the supervision of another member to deal informally (whether by advice, admonition or warning as the circumstances may require) with a breach of discipline of a minor nature.

*Investigation*

8. (1) Subject to regulation 7, where it appears that there may have been a breach of discipline, the matter shall be investigated as soon as practicable by a member not below the rank of inspector (in these regulations referred to as an investigating officer).

(2) An investigating officer shall be appointed by a member (in these regulations referred to as an appointing officer) who is not below the rank of Chief Superintendent or who is a superintendent assigned to discharge the duties of a Chief Superintendent.

9. (1) As soon as practicable after his appointment, an investigating officer shall inform the member concerned in writing –

(a) that it appears that the member concerned may have been in breach of discipline, and

(b) that he is investigating the matter.

(2) Where it appears to an investigating officer that an alleged breach of discipline may constitute an offence, the law and practice applicable to the investigation of offences shall apply in relation to the investigation.

(3) An investigating officer shall carry out the investigation either, as he thinks fit, alone or with the assistance of such other members as he may determine.

*Report of investigation*

10. (1) Upon completion of an investigation under Regulation 8, the investigating officer shall as soon as may be submit to the appointing officer a written report of the investigation, together with copies of any statements made.

(2) Upon receipt of a report under this Regulation, the appointing officer shall without avoidable delay –

(a) decide whether or not to continue the proceedings under these regulations, and

(b) if he decides to continue the proceedings, cause to be entered on a form (in these regulations referred to as a discipline form) such particulars of the breach of discipline alleged as will leave the member concerned in no doubt as to the precise nature of it.

(3) A discipline form shall be in such form as the Commissioner shall from time to time approve."

**The Applicant's Case**

21. Counsel for the applicant has filed very helpful legal submissions. It is submitted that the Garda Síochána (Discipline) Regulations, 1989 are directed in their entirety towards the expeditious resolution of allegations of misconduct on the part of members of An Garda Síochána. Throughout the Regulations the language used makes it clear that an element of urgency is to be observed (e.g. "as soon as practicable," "as soon as may be" and "without avoidable delay"). It is noted that the phrase "as soon as practicable" is used in Article 8 of the Regulations. The phrase "as soon as practicable" was considered by the Supreme Court in *Re: Butler* [1970] I.R. 45 and I am referred to the judgment of Budd J. in that case. It was also considered by the High Court in *Ruigrok v. The Commissioner of An Garda Síochána* (Unreported, High Court, Murphy J., 19th December, 2005). While the judgments in these two cases are certainly of some assistance, even greater assistance is provided to me by the Supreme Court judgment in *McNeill v. The Commissioner of An Garda Síochána* [1997] I.R. 469 which is directly in point.

22. In *McNeill* the Supreme Court considered the Garda Síochána (Discipline) Regulations, 1989 and Hamilton J. had this to say with respect to those regulations:-

"The provisions of the said regulations are binding not only on the applicant but on the respondents and the entire question of delay must be considered in the context of such regulations and the requirements thereof.

In these proceedings, the court is not really concerned with the principles established with regard to the effect of delay on either civil or criminal proceedings because the proceedings instituted by the respondent against the applicant are neither civil nor criminal. They are in respect of breaches of discipline alleged to have been committed by the applicant as a member of the Garda Síochána and must be dealt with in accordance with the provisions of the Discipline Regulations, which set forth in detail the procedure for dealing with alleged breaches of discipline by a member of the Garda Síochána.

If the procedures set forth in the Discipline Regulations are followed and the principle of fair procedures applied, then the court should not intervene."

23. Counsel for the applicant submits that the regulations are mandatory in their terms. Therefore irrespective of whatever views one may have of the delay, the length of same, or the putative reasons for it, the regulations must be observed in the fashion described by the Supreme Court. He goes on to point out that if there were any doubt on this point, Hamilton C.J. states at p. 484:-

"The obligation placed on the garda authorities by reg. 8 (1) of the Discipline Regulations to investigate alleged breaches of discipline as soon as practicable is mandatory."

24. In his judgment in the same case O'Flaherty J. explains the reasons why it must be so:-

"I cannot believe that the preparation of the evidence to ground charges in this case would have been a very difficult task. The Disciplinary Regulations require that the matter should proceed with a degree of expedition at every stage. And for good reason; members of the Garda Síochána have special privileges as well as special responsibilities not shared by the ordinary citizens; therefore, if suspicion descends on a member of the Garda Síochána it is important from a public policy point of view that the matter should be investigated and dealt with quickly. The air should be cleared one way or the other. I am talking of matters of substance, needless to say, and not with every idle word that may be uttered in a locality from time to time. Similarly, from the perspective of members of the Garda Síochána: they are entitled to hold their heads up in the community in which they serve; they are entitled to expect that if a charge is contemplated that it should be brought forward with a degree of expedition and that they should be given a chance to meet it: it may be, in certain circumstances, by admitting a breach of discipline but, in other circumstances, by disputing the allegation on which the charge is based."

25. The court is also referred to the decision of the Supreme Court in *McCarthy and Denny v. Garda Síochána Complaints Tribunal* [2002] 2 I.L.R.M. 371, (a case which dealt with the delay under the Garda Síochána (Complaints) Act, 1986). In his judgment in that case Geoghegan J. stated as follows:-

"In interpreting the statutory provisions it must be borne in mind that the Oireachtas clearly intended expedition both in the interests of the complainant and in the interests of the members complained about. It could never have been intended that if there was some small delay in the procedures and possibly indeed delay engineered by the Garda authorities themselves, the matter could never be processed further as this would be grossly unfair to a complainant not in any way responsible for the delay."

26. The applicant seeks to distinguish the *McCarthy and Denny* case from the *McNeill* case on the basis that *McCarthy and Denny* concerned the procedure under the Garda Síochána (Complaints) Act, 1986 wherein the proceedings are initiated by a complainant. That is not always the case under the Garda Síochána (Discipline) Regulations, 1989. The applicant submits that there has been substantial delay in this case. He submits that the whole tenor and spirit of the regulations is directed towards the speedy processing of alleged breaches of discipline. He contends that all of the information required for the purposes of regulation 8 was in the possession of the Superintendent in charge of "A" District as of the 6th of January 2004. Notwithstanding this, an investigating officer was not appointed until the 8th of July 2005. He further submits that there is no justification for this delay and that the delay in this case must be regarded as inordinate and inexcusable in the circumstances and in breach of the respondent's statutory obligation.

### **The Respondent's Case**

27. Counsel for the respondent has also filed very helpful legal submissions. By way of preliminary objection the respondent contends that the applicant was himself guilty of delay in seeking relief by way of judicial review and that he ought to be denied relief on account of that delay. Order 84, r. 21 of the Rules of the Superior Courts requires that an application for injunctive relief by way of judicial review should be made promptly, and in any event, within three months of the grounds of the application first arising. The respondent contends that the applicant was served with all relevant documents in relation to the investigation on 12th November, 2004, and upon which the respondent proposed to rely for the purposes of the sworn inquiry into the matters alleged. Accordingly, the applicant was fully aware of all relevant matters for the purposes of initiating judicial review proceedings, so says the respondent. The applicant did not in fact seek leave to apply for judicial review until 27th February, 2006. The respondent contends that he was out of time and on that ground alone the application should be refused.

28. It may be convenient at this point to indicate the applicant's response to this preliminary objection. The applicant contends that it only became clear that he would be subjected to a sworn inquiry when he received a letter dated 30th January, 2006 from Chief Superintendent Fanning informing him that a sworn inquiry would take place on 7th March, 2006 and specifying the witnesses on which they were to rely. Accordingly, the three month period runs from 30th January, 2006. Leave was granted by Peart J. in the High Court on 27th February, 2006 to seek the reliefs now sought by way of judicial review. Accordingly, the applicant contends he acted promptly and within the specified three months. Moreover, the applicant contends that the respondent has suffered no prejudice by reason of any alleged delay.

29. The respondent says this in relation to the substantive issue in the case. He submits that this application should be viewed in the context of the relatively minor nature of the disciplinary charges facing the applicant. Counsel for the respondent has reviewed the evidence before me and submits that the respondent was not guilty of inordinate delay in investigating and processing the disciplinary matters alleged against the applicant. The court's attention has been drawn to various explanations offered for the passage of time and in particular reliance is placed upon the testimony of Chief Superintendent Donoghue both in his affidavit and in the course of his cross examination with respect to the matters contained in his affidavit before this Court. It was put to Chief Superintendent Donoghue in the course of cross examination by counsel for the applicant that he did not carry out the Assistant Commissioner's direction and obtain a brief background report for the purpose of establishing if there might have been a breach of discipline. He disputed this. It was further put to him by counsel for the applicant that all of the information that he required was contained in Inspector Muldoon's report to the Superintendent at Kevin Street on 6th January, 2004. In response to this Chief Superintendent Donoghue accepted that Inspector Muldoon's report might have given him the information that he required or at least had gone part of the way. However, Chief Superintendent Donoghue asserted that in his view it was essential not just to establish that there may

have been a breach of discipline, but also who it was that may have been in breach of discipline. He indicated that it was necessary to obtain handwriting analysis and to pursue other enquiries for the purpose of seeing if the member or members concerned could be identified. The Chief Superintendent asserted that it would be wrong of him to make allegations against members unless he was sure that those allegations were appropriate. In order to be so sure, he had to identify the members who were potentially negligent and also determine what degree of potential negligence was involved. He contended that he was unable to do that until he had Inspector Maguire's preliminary report and he further contended that it was necessary, arising out of that preliminary report, to seek certain clarifications from Inspector Maguire. It was therefore his contention that the matter was being progressed at all stages and there was no delay.

30. The respondent further argued in the alternative that even if there was delay, the very fact of delay would not of itself be sufficient to justify prohibition. It was urged upon me that the decision in *McNeill v. The Commissioner of An Garda Síochána* pre-dates what the respondent characterises as:

"The seismic shift in the jurisprudence on delay, the thrust of which is to focus not upon the fact of delay but its effects in terms of a litigant's ability to defend allegations made against him".

31. In that regard the respondent relies upon the line of jurisprudence culminating in the recent decisions of the Supreme Court in *P.M. v. The Director of Public Prosecutions* (Unreported, Supreme Court, 5th April, 2006) and *H. v. The Director of Public Prosecutions* (Unreported, Supreme Court, 31st July 2006). The respondent submits, correctly, that in these cases the Superior Courts have re-emphasised the supremacy of the role of the trial judge/arbitrator of fact who can give such rulings and warnings as may be necessary so as to ensure that the accused person receives a fair trial. Any points on delay can be taken before the tribunal, particularly if, as the evidence unfolds at the hearing, a particular issue of prejudice arises. Of course, the paramount consideration must be whether or not there is a real and serious risk of an unfair trial and the test in that regard was restated by the Supreme Court in *H. v The Director of Public Prosecutions* in the following terms:-

"The test is whether there is a real risk that the applicant, by reason of the delay, would not obtain a fair trial, that the trial would be unfair as a consequence of the delay. The test must be applied in the light of the circumstances of the case."

32. The respondent submits that the applicant in the present case will most certainly obtain a fair trial of the disciplinary charges against him before the inquiry set up under the Garda Síochána (Discipline) Regulations, notwithstanding any delay that may have occurred. Accordingly, it is urged upon me that I should refuse prohibition. The respondent submits that in accordance with the decision in *P.M. v. the Director of Public Prosecutions* the applicant would have to have put something more into the balance than mere delay to outweigh the public interest in having the disciplinary charges against him proceed to trial before a disciplinary Tribunal under the regulations. Counsel for the respondent emphasises the need for this balancing exercise and he points to eight factors which he says would weigh in the balance against the granting of prohibition. These are:-

1. Certain limited admissions made by the applicant.
2. The relatively minor nature of the alleged disciplinary offences and the likely penalties.
3. The fact that the complaint in this case emerged from a member of the public.
4. The utility of having the disputed facts of this case resolved before an appropriate Tribunal.
5. The fact that it is a largely a "documents" case.
6. The fact that there has been no assertion of an early trial right.
7. The fact that the applicant's contention that he has been subjected to stress on account of the delay is nothing more than an assertion and is not backed by any kind of medical evidence.
8. The absence of demonstrated prejudice.

## Decision

33. With regard to the preliminary issue raised by the respondent I accept the applicant's submissions and I hold that the application for leave in this case was brought promptly and within time.

34. Turning now to the substantive issue, the facts of this case are clear and there is really no dispute between the parties as to the facts. The real question is as to the correct interpretation of the facts. The applicant contends that the facts as established in evidence exhibit inordinate and inexcusable delay on the part of the respondent in investigating possible breaches of discipline involving him in accordance with Regulation 8 of the Garda Síochána (Discipline) Regulations, 1989. The respondent says that the time taken was justifiable and excusable and that there was no delay. I must hold with the applicant on the facts. I am quite satisfied that Chief Superintendent Donoghue acted conscientiously and in good faith, but that he approached the matter on the basis of an incorrect understanding as to what the regulations required of him. I am satisfied that the interpretation of Article 8 of the Garda Síochána (Discipline) Regulations contended for by the applicant is correct. It was incumbent upon him to appoint an investigating officer as soon as it was apparent to him that there may have been a breach of discipline. It was not necessary for him to conduct a comprehensive investigation before doing so. Indeed, it would appear that Assistant Commissioner Rice correctly understood the regulations inasmuch as his letter to Chief Superintendent Donoghue requested him to:

"Obtain a brief background report to decide if the provisions of the Garda Síochána (Discipline) Regulations, 1989 should be invoked in this case."

35. Assistant Commissioner Rice also emphasised that there should be no delay.

36. I do not think that the delay goes back to the 6th of January 2004. However, there certainly was delay from the end of 2004. In my view obtaining the brief background report envisaged by A/Comm Rice should have taken no more than eight weeks, which would have taken him up until the end of December 2004. Thereafter he was in delay. Ret Chief Superintendent Donoghue was, I think, incorrect in his belief that the task entrusted to him by the Assistant Commissioner involved the two stage process described by him.

The clear intention of the regulations is that the investigation should take place after there has been a determination that "there may have been a breach of discipline", and not before. I think that Chief Superintendent Donoghue's concern that it would be wrong to make an allegation against a member unless he was sure that it was appropriate, was an understandable concern but Regulation 8 does not require him to make an allegation against any member in the first instance. All he has to do is to satisfy himself that "there may have been a breach of discipline" by someone. If he is so satisfied he must then appoint an investigating officer to investigate. If, in the course of the investigating officer's investigation, any particular member of An Garda Síochána is identified as having potentially been guilty of a breach of discipline, then the investigating officer is required to inform that member in accordance with Regulation 9. Regulation 9 requires a member under investigation to be notified "as soon as practicable" after the appointment of the investigating officer. However, if the investigating officer has not identified a particular officer as being in the loop so to speak, he cannot be required to inform him until he has made that identification. So in all the circumstances I am satisfied that there was delay in this case and that it was regrettably inordinate and inexcusable delay.

37. It then falls to me to consider what be the consequences of this delay in terms of whether or not I ought to grant the applicant the relief that he seeks in these proceedings. While I was initially sympathetic to the arguments being advanced on behalf of the respondent I cannot ignore the decision of the Supreme Court in the case of *McNeill v. The Commissioner of An Garda Síochána*. Even though the *McNeill* case pre-dates the recent jurisprudence on prosecutorial delay, it is clear in its terms and it is directly in point. Moreover, it was stated expressly in *McNeill* by Hamilton C.J. that the court was not concerned with the principles established with regard to the effect of delay on either civil or criminal proceedings. The applicant has very strongly urged upon me that the Garda Síochána (Discipline) Regulations, 1989 embrace a self contained and discreet statutory code and that it must be strictly interpreted. I have to agree with counsel for the applicant. In the circumstances therefore I find that the respondent did not comply with the regulations and in particular that there was a breach of Article 8 of the Regulations. I am therefore disposed to grant the applicant the relief that he seeks and I will hear submissions from counsel as to the appropriate form of the order.