Neutral Citation Number: [2008] IEHC 72

THE HIGH COURT
JUDICIAL REVIEW

RECORD NO. 2005 No. 1131 J.R.

BETWEEN

DARAGH KENNEDY

APPLICANT

AND
THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 14th day of March, 2008.

1. The applicant seeks an order by way of prohibition or alternatively injunction restraining the respondent from holding a sworn inquiry pursuant to article 15(2) of the Garda Síochána (Discipline) Regulations, 1989, or further processing disciplinary proceedings against the applicant in respect of alleged breaches of discipline between the years 2000 and 2002, in an inquiry which had been listed for 25th October, 2005. The applicant also seeks a declaration that the failure by the respondent to investigate the matters in issue expeditiously breached the applicant's entitlement to fair procedures and/or constituted a breach of statutory duty, were *ultra vires*, and 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.

Background

2. It is necessary first to deal with the nature of the allegations which were to be put to the applicant in the course of the inquiry. In brief, it is alleged that between the years 2000 and 2002 he accessed pornographic websites, including websites including images of child pornography by means of a computer located at the purchasing support office at Garda Headquarters, Phoenix Park, Dublin, 8. At all relevant times the applicant was a working member of An Garda Síochána in that section.

3. In or about November, 2002, it came to light that staff in the office in question had noted that the internet on the computers was running slow and giving error messages. A member of the force examined the computers, and on one discovered material which appeared to relate to gay pornographic sites. This member of the force, Sergeant Eugene Lynch, investigated the matter further and discovered that the recycle bin on the machine contained a considerable amount of material on the sites that had been visited via the internet from the computer. On 14th November, 2002, Sergeant Daly removed the computer from the office and on the following day found child pornographic images on the computer.

The criminal investigation

4. On 15th November, 2002 a criminal investigation into the matter was commenced. Detective Chief Superintendent John Camon directed that Detective Inspector Dominic Hayes of the National Bureau of Criminal Investigation conduct that investigation. On 11th December, 2002 the applicant was interviewed for the purposes of the criminal investigation. A copy of the memo of interview which resulted is contained in the statement of Detective Inspector Dominic Hayes and has been exhibited during the course of these proceedings. This is of particular importance in the light of the fact that the applicant made a number of admissions in respect of accessing pornography on the computer, including child pornography. Included in the statement the following exchanges took place.

> "Q. Have you accessed the internet in relation to pornographic sites?
>
> A. Yes I have. I suppose it started with SPAM coming into my Hotmail and clicking onto the site out of curiosity. I suppose this was two or two and a half years ago maybe."

Later in the same interview the following exchange was recorded:

> "Q. What search criteria would you use?
>
> A. Maybe Teen Sex or something like that. These searches then produced other sites, some of which are gay and underage sites. Again, from curiosity I clicked on both of these sites and I looked at some of the images that were there."

Later in the same interview the following exchange took place:

> "Q. Did any of the images that you described earlier depict images as you have described above?
>
> A. The only site that depicted boys under 18 was (name of site identified) and the pictures on that were boys on their own and there was no sexual activity."

Later in the interview the following exchange took place:

> "Q. Detective Inspector Hayes now shows exhibit 'DH3' which are images extracted from the old computer in your office.
>
> A. I have looked at the images as shown to me by Detective Inspector Hayes and I say that they are images from the (name provided) site and I don't recollect a lot of them. I would have clicked on a few thumbnails and then closed them down. I have examined the book and I recognise some of the pictures. I have gone through the book and I have marked the images I recall seeing on the screen. I have put question marks beside a couple that I am not sure about.
>
> Q. Do you accept that your searches are responsible for the images on the computer that was downstairs in your office?
>
> A. I accept this and I have no knowledge of anybody else accessing sites like this on the computer or this type of material.
>
> Q. Do you accept that some of the images that you have seen on the computer downstairs in your office are of children and not of men?
>
> A. Yes."

5. On 14th April, 2003 the applicant was interviewed by members of the Gardaí at Harcourt Square. This interview, as was the last,

was conducted as part of a criminal investigation. During the course of this interview the applicant maintained his right to silence in respect of a number of questions. On 29th April, 2003 a file in the matter was sent to the Director of Public Prosecutions. Thereafter, on 6th May, 2003 a direction was received from the Director to prosecute the applicant for summary offences. On 7th May, 2003 two summonses were served on the applicant returnable for 4th June, 2003. One summons related to breaches of s. 6(1) of the Child Trafficking and Pornography Act, 1998 on 7th November, 2002 at Garda Headquarters. The second summons related to similar breaches of the law at the applicant's home.

6. On 9th May, 2003 a decision was made to suspend the applicant from duty and he was served with notice of this decision.

The disciplinary investigation
7. On 15th July, 2003 Detective Superintendent John O'Mahoney was appointed to investigate alleged breaches of discipline by the applicant pursuant to Regulation 8 of the Garda Síochána (Discipline) Regulations, 1989 by Detective Chief Superintendent Camon. This was a distinct process from the criminal investigation. On the same date Detective Superintendent O'Mahoney served a notice under Regulation 9 of these Regulations on the applicant and asked him whether he wished to make a submission or report in relation to the allegations. He also brought the terms of certain Regulations to the applicant's notice. The applicant said that he would be consulting with his solicitors and that he would respond without delay. No response was received from either the applicant or his solicitor afterwards.

8. Before commencing his disciplinary investigation Detective Superintendent O'Mahoney enlisted a number of members of the National Bureau of Criminal Investigation to assist him. These were all persons who had not been involved in the criminal investigation. The disciplinary investigation was conducted between 29th July, 2003 and 14th January, 2004. The evidence is that this was conducted independently of the criminal investigation and its purpose was to establish whether the applicant had a case to answer in respect of any disciplinary breaches. During that time period statements were taken from all relevant parties. Between September, 2003 and January, 2004 a member of the Gardaí conducted a forensic examination of both the office computer and the applicant's home computer. The reason for the latter was to establish whether there was a pattern in respect of the type of material the applicant was alleged to be accessing.

9. On 14th January, 2004 Detective Chief Superintendent Camon directed that the disciplinary inquiry should not proceed any further at that time, pending the outcome of the criminal case against the applicant. I am satisfied that he did this on the basis that the criminal proceedings instituted against the applicant should take precedence and be completed before the applicant was interviewed for the purposes of the disciplinary inquiry. By this stage, all inquiries in the disciplinary investigation had been completed with the exception of an interview of the applicant. The evidence is that it was considered it would be unfair and improper to interview the applicant for disciplinary purposes while he had a criminal trial pending in respect of the same subject matter.

10. On 15th January, 2004 the applicant was informed of this approach at Detective Chief Superintendent Camon's direction. This information was provided to the applicant over the telephone. Neither then, nor at any stage up to the institution of these proceedings did the applicant ever make any complaint about the placing in abeyance or suspension of the disciplinary inquiry nor did he ever make any request that it be resumed. The members of the Gardaí who have sworn affidavits in these proceedings, Detective Superintendent John O'Mahoney and former Detective Chief Superintendent Camon, state that they understood and were satisfied that the applicant took no exception to the fact that the disciplinary inquiry should be suspended pending the outcome of the criminal proceedings.

Progress of the Criminal Proceedings
11. The criminal proceedings were processed through the District Court at a number of hearings commencing on 4th June, 2003. On 9th June, 2003 District Judge Early, having viewed the images, refused jurisdiction and on 15th September, 2003 the applicant was served with the book of evidence and sent forward to the next sittings of the Dublin Circuit Criminal Court where he first appeared on 7th November, 2003. The matter was remanded on a number of occasions and on 23rd June, 2004 the applicant was arraigned on both counts and pleaded not guilty. The trial date was fixed to 1st February, 2005. The trial did not go ahead on that date and was further adjourned for three days. On 4th February, 2005, for reasons which are not made clear in evidence, the criminal proceedings in respect of the applicant concluded as a *nolle prosequi* was entered by the State. The applicant's suspension from the force was lifted and he resumed service in the Garda Síochána with effect from 16th February, 2005. On that date, however, the applicant went on sick leave due to stress. There is no evidence that this stress was attributable to any delay caused in the Garda disciplinary inquiry. A number of medical certificates from February, 2005 onwards were furnished. They were not exhibited. Ultimately, on 5th July, 2005, the applicant returned to work having been certified as fit by his own doctor. He has thereafter continued to work at a garda station.

The progress of the Disciplinary Inquiry
12. After the *nolle prosequi* was entered on 4th February, 2005 the gardaí involved in the investigation, and in particular Detective Superintendent O'Mahoney, wished to resume the disciplinary investigation. However, Detective Superintendent O'Mahoney states that he was informed that the applicant was on sick leave and suffering from stress. Therefore he decided that he would not seek to interview the applicant. By May, 2005 the information available was that the applicant's condition had improved and that he was likely to return to work. On 16th May, 2005 Detective Superintendent O'Mahoney contacted the applicant and informed him that the disciplinary investigation had been recommenced. He informed the applicant that he had not contacted him up to then as he had been aware that he was on sick leave suffering from stress. He indicated to the applicant that he now wished to find out if he was in a position to meet him with a view to being interviewed in relation to the breaches of discipline alleged against him. Detective Superintendent O'Mahoney stated that he was conscious the inquiry had been hanging over the applicant and he was anxious to complete it as soon as possible. The applicant asked him if he had a problem communicating through his solicitor. Detective Superintendent O'Mahoney informed the applicant there was no provision in the Garda Disciplinary Regulations for this as it was an internal garda matter. The applicant was then requested to make contact with him, either on 19th or 20th May with an answer. The applicant undertook to do so. He was supplied with a telephone number for this purpose. The Detective Superintendent made a written record of this telephone conversation which has been exhibited. He states, and it is not denied, that he did not receive any contact from either the applicant or his solicitors within that time period.

13. On 31st May, 2005, having had no communication from either the applicant or his solicitor, Detective Superintendent O'Mahoney wrote to him requesting a reply, either in writing or by telephone, before 8th June, 2005. He was informed that if he did not take any such step the Detective Superintendent would take it he did not wish to respond to the allegations and the investigation file would be completed. On 10th June, 2005 the applicant received a letter from the applicant's solicitors dated 8th June, 2005. In that letter the applicant's solicitors indicated that they had been instructed to act in connection with the disciplinary inquiry and that in order to consider the matter they would appreciate it if they could be furnished with all papers and statements concerning this. The letter stated that upon receipt of this material the solicitors firm would revert to Detective Superintendent O'Mahoney. The letter contained no indication that the applicant was dissatisfied with the procedure. It said nothing about his attitude to the allegations.

14. On 14th June, 2005 the Detective Superintendent wrote indicating that the applicant had been furnished in writing with full details of the alleged breaches against him. He said that the only outstanding matter was whether or not the applicant was in a position to respond or to be interviewed in relation to the alleged breaches. He pointed out that he had intended to conclude the investigation file on 8th June, 2005. However, in the light of this solicitor's letter, he would now wait until 22nd June, 2005 before completing the file. He indicated that if he did not receive a reply by that date he would take it that the applicant did not wish to respond to the allegations and would proceed as previously planned. No response was received from either the applicant or the solicitor. On 24th June, 2005 Detective Superintendent O'Mahoney completed his disciplinary investigation file and forwarded this to the Detective Chief Superintendent at the National Bureau of Criminal Investigation.

15. On 22nd June, 2005 Detective Chief Superintendent Martin Donnellan, having considered the investigation file, directed the applicant be charged with breaches of discipline as set out in a form B30. On 25th July, 2005, in accordance with the provisions of Regulation 11 of the Garda Síochána Discipline Regulations, Detective Superintendent O'Mahoney served on the applicant two copies of discipline form B30, one copy of discipline form B33, along with documents required to be supplied to him under the provisions of Regulation 11. The applicant acknowledged receipt of these documents. On 13th September, 2005 the applicant was written to informing him that it was intended to hold a sworn inquiry at a named garda station on 25th October, 2005.

16. On 19th October, 2005 the presiding officer appointed to carry out the inquiry adjourned the date of the inquiry for two days to 27th October, 2005 due to the fact that there was a conference being held on the original hearing date. The applicant was informed of this change of date by way of letter dated 19th October, 2005, addressed to his solicitor. The solicitor in question was also told of the changes by telephone on 19th October, 2005.

17. Without any prior notice to the garda authorities, on Thursday, 20th October, 2005 the applicant obtained leave to bring the judicial review proceedings herein. This was seven days before the inquiry was due to commence on Thursday, 27th October, 2005. On 21st October, 2005 the applicant's application for judicial review was reported in the national newspapers. It is undisputed that the presiding officer was not given prior notification of the application by either the applicant or his legal representative and he learned of the application only through the national newspapers. On this basis the presiding officer adjourned the hearing until 1st February, 2006. The application for judicial review caused inconvenience in that the presiding officer had to give short notice to all members or witnesses involved in the inquiry that the matter was being adjourned. This involved approximately 26 persons who had to be notified. The fact that there was a substantial number of witnesses is some indication of the complexity of the Inquiry investigation.

18. Detective Superintendent O'Mahoney states in his affidavit that the investigation was carried out as expeditiously as possible. He says the applicant was kept aware of how the investigation was progressing and given ample opportunity to respond to the alleged breaches of discipline either directly or through his solicitors. Heavy reliance is placed on the fact, that at no point did the applicant or his solicitor express any dissatisfaction with the course of action which had been adopted by the Gardaí in allowing the criminal trial to proceed or in the various other postponements which took place.

Distinct features of this case

19. It is a striking feature of this case that the applicant does not deny making the admissions which have been referred to earlier in the outline of facts albeit in the criminal investigation. Indeed, less there be any doubt as to the nature of the admissions, the applicant was further asked:

> "Do you accept that your searches are responsible for the images on this computer that was downstairs in your office?
>
> I accept this and I have no knowledge of anybody else accessing sites like this on the computer or this type of material."

He stated further in the course of the same interview of 11th December, 2002:

> "I have never downloaded or saved any of these images, neither have I passed them on or communicated with any other individual regarding these images and stories. This is a curiosity that went out of control. I have never acted out or sought to make real the fantasy that is contained in the images,"

20. A further distinguishing feature of the evidence is that at no stage does the applicant assert his innocence of the charges or make any denial that he downloaded the material in question. This is a point which requires emphasis because it too is an important distinguishing feature from an authority upon which the applicant heavily relies, that is to say *McNeill v. Commissioner of An Garda Síochána* [1997] 1 I.R., p. 469. There the applicant disputed the procedure adopted by the Garda authorities in the investigation, threatened judicial review and asserted his innocence of any breach of discipline. While this issue is not dealt with in the Supreme Court report, it very clearly emerges from the narrative of events set out in the High Court judgment of Morris J. (see *McNeill v. Commissioner of An Garda Síochána* [1994] 2 I.R., p. 246 at p. 430 where Morris J. records that the applicant's solicitors in wrote to the Garda Síochána giving notice that the alleged breaches in that case were strenuously denied and that it was their intention to apply for judicial review "should you persist in your application for dismissal". Not only was it indicated that the allegations were simply denied but in fact, as the judgment records, at least one aspect of Gavan McNeill's defence was as identified the context of the charge concerning making false entries in an official record book to support his entitlement to payment for working hours. In Morris J.'s judgment it will be seen that the applicant in *McNeill* furnished an explanation for alleged discrepancies that, while he had not worked the hours which were claimed for, he had claimed the amounts in question as compensation for work which he had taken home with him from his office and, it appears, contending that he was authorised so to do.

21. These features which distinguish this case also from 'delay' cases where, even albeit in the most cursory form, the applicant either asserts his innocence of the charges, or indicates that he will be pleading not guilty. None of these features emerge either in affidavits or the correspondence.

22. A further distinguishing feature between the instant case and *McNeill* is the nature of the allegations made here against the member of An Garda Síochána. In *McNeill*, the allegations were described by O'Flaherty J. in the course of a concurring judgment as being "quintessentially matters appropriate to a disciplinary hearing". He added:

> "If a disciplinary hearing had been held as a first step that might have rendered the involvement of the Director of Public Prosecutions unnecessary."

23. When the charges against the applicant herein came before the District Court, Judge Early declined jurisdiction and the matter was returned for trial. The allegations, therefore, are of substantially greater gravity and seriousness than arose in *McNeill*. They are by no means "quintessentially matters only appropriate to a disciplinary hearing". The nature of the allegations in the instant case are

distinct also from those which arose in the case of *Gibbons v. The Commissioner of An Garda Síochána* High Court, Unreported, Edwards J., 30th July, 2007, which related, essentially, to negligent conduct of a garda in his duty in failing to make proper records or issue a proper receipt for property. Furthermore, *Gibbons*, by way of contrast to the instant case, related only to a garda disciplinary inquiry. No issue arose therein relating to delay caused by a criminal prosecution. *McNeill* is considered in greater detail later in this judgment.

The Garda Síochána (Discipline) Regulations, 1989
24. The Regulations contained in Statutory Instrument 94 of 1989 prescribe the procedures for dealing with breaches of discipline by members of An Garda Síochána. Regulations 6 to 10 provide:

> "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 a 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 as 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 in 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 it alone or with the assistance of such other members as he may determine,
>
> report 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 with the proceedings under these Regulations
>
> (b) if he decides to continue the proceedings ?? to be entered on a form (in these Regulations referred to as a discipline form) such particulars of the breach of discipline as 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."
>
> (emphasis added)

25. The applicant's case is that the Regulations are mandatory and are directed in their entirety to the expeditious resolution of allegations of misconduct on the part of members of An Garda Síochána. Throughout the Regulations it is contended the language in question makes clear the intent of the Oireachtas, that is that an element of urgency is to be observed (see provisions emphasised in italics above). This is reflected by phraseology such as "as soon as practicable", "as soon as may be" and "without avoidable delay". These are phrases which occur in several areas of the Regulations dealing with inquiry procedure. But these provisions do not exist in isolation from the criminal law.

Interaction of Regulations with criminal law
26. The potential interaction between a garda disciplinary inquiry and a criminal prosecution or conviction is clearly envisaged in the scheme of the Regulations. Regulation 36 permits the Commissioner, Inquiry or an appeal Board to rely upon a criminal conviction, or a finding of facts proved under the Probation Act to be treated as conclusive of the fact in a disciplinary inquiry conducted, obviously subsequent to such criminal trial.

27. There is further such provision for restriction of proceedings in Regulation 38:

> "Restriction on Proceedings
>
> 38(1) Where a member has been convicted or acquitted of an offence, proceedings under these Regulations for an alleged breach of discipline shall not be commenced or *if already commenced, continued* if the breach is in

substance the same as the offence of which he has been convicted or acquitted.

(2)(a) Paragraph (1) shall not be construed as applying in relation to a breach of discipline which consists of conduct constituting an offence in respect of which there has been a conviction by a court.

(b) The reference at paragraph (1) to a member who has been acquitted of an offence shall, as respect to an offence dealt with summarily, be construed as a reference to a member who has had a complaint or charge against him dismissed on the merits."

It is impossible to avoid the conclusion that implicit in this Regulation is the possibility that an inquiry might be placed in abeyance pending the outcome of a criminal proceeding. Regulation 39, also, deals with the power of a Commissioner to give a direction to an investigating officer to investigate a breach of the Regulations in circumstances where the Director of Public Prosecutions has been consulted and has decided that proceedings for an offence against a member should not be instituted, or where the Commissioner is of opinion that a breach of discipline alleged does not constitute an offence, and where there has been a refusal to answer a question, furnish information or produce a document or thing relevant to an investigation of the breach of discipline.

28. The schedule to the Regulations too identifies a series of breaches of discipline which may be the subject matter of allegations in an inquiry. Included in these are:

"16. Criminal conduct, that is to say, conduct constituting an offence in respect of which there has been a conviction by a court."

The applicant's case

29. The applicant asserts (1) the alleged delay by the respondent in investigating and dealing with the alleged breaches of discipline; (2) that this delay was inordinate and inexcusable and breached the applicant's right to natural and constitutional justice and fair procedures; (3) that the respondent 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 Regulations, in purporting to put in abeyance the investigation as to breaches of discipline for a period from January, 2004 to May, 2005 and in failing to ensure that the investigating offices, Detective Superintendent O'Mahoney, completed his investigation and compiled a report in a timely manner; (4) that the respondent acted *ultra vires* and in breach of statutory duty and the Regulations in that, following the entry of a *nolle prosequi* against the respondent in respect of the criminal charges, there was a delay of a further period in excess of three months before the reactivation of the investigation pursuant to article 8 of the Garda Síochána (Discipline) Regulations, 1989.

30. It is noteworthy that the applicant's case essentially relies upon the contention that the prejudice or detriment which he alleges is entirely confined to the deprivation of his right to an expeditious inquiry. While the issue of stress is mentioned in the course of communications, and in the course of Detective Superintendent O'Mahoney's affidavit, already referred to, no substantive case has been made out on this issue.

The law

31. The term "as soon as practicable" was construed by Budd J. in *Re Butler* [1970] I.R. 45, in the sense of "capable of being … carried out in action … feasible". This common sense definition was accepted also in *Ruigrok v. Commissioner of An Garda Síochána*, The High Court, Unreported, 19th December, 2005, Murphy J., where "practicable" was defined as "feasible, capable of being done …".

32. In the course of argument the applicant strongly relies on the Supreme Court decision of *McNeill v. Commissioner of An Garda Síochána* to which reference has been made earlier in this judgment. It is necessary to consider this judgment in more detail.

33. The leading judgment in *McNeill* was delivered by Hamilton C.J. A further judgment in concurrence was delivered by O'Flaherty J. Denham J. delivered a judgment dissenting.

34. In the High Court, Morris J. had considered that the delay in question could be divided into three distinct periods; the first from the time when the applicant in *McNeill* was first interviewed, that is 18th December, 1989, to the time when District Court summonses were served in July, 1991; the second period from 30th September, 1991 when the criminal charges were withdrawn by the Director of Public Prosecutions, until 17th May, 1992 when a notice served under Regulation 40 was withdrawn (which allowed for summary dismissal); the third from 17th May, 1992 until, in the words of Hamilton C.J., "up to the present time".

35. The application in *McNeill* was heard by Morris J. on 10th June, 1994. The judgment of the Supreme Court was delivered on 30th July, 1996.

36. In the course of his judgment Hamilton C.J. stated:

"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."

The then Chief Justice observed that the Discipline Regulations were a self-contained code governing charges of alleged breach of discipline by members of the Garda Síochána. He stated:

"The fundamental question for this Court is whether the procedures provided for in the said regulations were complied with in regard to the investigation.

Was the investigation carried out by the investigating officer in this case as soon as practicable after it appeared that there may have been a breach of discipline by the applicant."

He observed that the breaches of discipline alleged had occurred prior to the end of June, 1989, were known and investigated by the garda authorities prior to December of that year, were the subject of a file sent to the Director of Public Prosecutions, were in turn the subject of summonses issued pursuant to his direction and, when such summonses were withdrawn, provided the basis for the notice served by the Commissioner in pursuance of Regulation 40. However, the investigation in accordance with the requirement of Regulation 8 was not directed until 16th July, 1992 after the collapse of criminal proceedings and the withdrawal of the Regulation 40

notice.

37. An essential passage in Hamilton C.J.'s judgment, however, is where he states:

> "I am satisfied that in December, 1989/January, 1990, that it would have been practicable to carry out an investigation into the alleged breaches of discipline in accordance with the provisions of Regulations 8 and 9 but it would appear that a decision was made not to carry out such an investigation but to refer the matter to the Director of Public Prosecutions and subsequently to regard the alleged breaches as the basis for the notice pursuant to regulation 40."

He added:

> "I am satisfied that the respondents were in breach of the obligation imposed on them by Regulation 8(1) of the Discipline Regulations to investigate the alleged breaches of discipline as soon as practicable after they became aware of them."

He further observed:

> "The reference of the matter to the Director of Public Prosecutions and the making of the Regulation 40 notice does not relieve them [An Garda Síochána] of the obligation so to do if proceedings are to be brought in accordance with the Discipline Regulations."

And further:

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

He concluded:

> "In view of the failure by the garda authorities to discharge *this obligation*, I am further satisfied that all steps taken since the presentation of the written report of the investigating officer are void and of no effect."

38. The factual context of these findings is of great importance. In *McNeill* no disciplinary investigation at all had been initiated prior to 1992, three years after the alleged breach of discipline came to light in December, 1989. Instead, only criminal proceedings had been initiated. These findings are also placed in context by O'Flaherty J. when he stated:

> "The gist of the allegations against the applicant appears to be that he wrongly recorded that he worked certain periods of time, leading to the receipt of monies by him to which he was not entitled, in the months of April, May and June, 1989. His defence to those allegations would appear to be that he had 'earned' such remuneration as he got while working at home and that a superior officer had authorised this course of conduct.
>
> I pass no judgment on whether there is a substance to the charges that are mooted from time to time, or whether there is a good defence to them – if they should have any substance. I am entitled to say, however, that I believe that the allegations appear to me to be quintessentially matters appropriate to a disciplinary hearing. If a disciplinary hearing had been held as a first step it might have rendered the involvement of the Director of Public Prosecutions unnecessarily."

39. Certain of the other findings of O'Flaherty J. are also important as to context. He observed that the preparation of evidence to ground the charges in *McNeill* would not have been a very difficult task; that the Regulations required that matters should proceed with a degree of expedition at every stage; that the matters in question in that case dated back to 1989 "seven years ago" (this was, of course, from the time of the judgment in the Supreme Court) and that the initial time lapse between December, 1989 and 1992 was unwarranted. He stated that:

> "A timetable that accords with the requirements of the Regulations would have to lay down a much shorter time span: 'ideally a matter of weeks, or months at the most'."

40. In her dissenting judgment Denham J. considered the issues from a different standpoint, that is to say the jurisprudence which even then had been developed by the courts in relation to delay which she sub-divided into the then applicable sub-divisions of (a) delay causing specific prejudice, (b) delay arising by reason of the conduct of a party, or (c) unconstitutional delay. She considered that there was credible evidence before Morris J. that it was reasonable of the authorities to proceed with a criminal trial prior to the disciplinary proceedings. With regard to the second period, 1st October, 1991 to 29th May, 1992, she noted that the trial judge's findings that the reason why the matter did not conclude under the Regulation 40 proceedings was that legal advice had been received and the withholding of the Minister's consent to this summary procedure. With regard to the third period, May, 1992 to January, 1993, Denham J. observed that the trial judge had found that after an investigating officer had been appointed the Supreme Court gave judgment in *McGrath v. The Commissioner of An Garda Síochána* [1991] 1 I.R. 69, necessitating a revision of the charges and that between January, 1993 and September of that year it was reasonable that the respondent should have considered the implications of *McGrath* where Denham J. stated that:

> "There was credible evidence upon which the learned trial judge had come to his conclusion that the applicant had not established that the respondents had been guilty of conduct for which they could be criticised."

She was referring there to the period of four and a half years which elapsed since the time when the matters first came to the notice of the applicant and the further finding of Morris J. that the applicant had not established that the respondents had been guilty of conduct for which they could be reasonably criticised. Denham J. observed at p. 490:

> "The garda authorities face particular difficulties when an alleged wrong could give rise to proceedings under criminal law as well as disciplinary proceedings under the Discipline Regulations. … On the one hand if the accused is acquitted by a jury there is one situation, while if he is convicted there is another. Neither can be foretold by the authorities prior to the criminal trial. …"

She then considered the delay which had occurred, having regard to the criteria then applicable in delay jurisprudence and in particular considered the issue of "impairment" and the balancing test envisaged by Powell J. in *Barker v. Wingo* [1972] 407 US 514, these factors being the length of delay, the reasons for the delay, the defendant's assertion of his right, and prejudice to the defendant. Thus a close analysis of the three judgments in *McNeill* renders it impossible to conclude that it is authority for the

preclusion of the normal delay jurisprudence, a matter referred to only in the judgment of Hamilton C.J.

41. A further noteworthy feature as to the facts as found in *McNeill* was that on the appointment of the investigating inspector (an Inspector Lennon) only on 3rd October, 1992, three years after matter came to light, the applicant's then solicitors wrote three letters over a period of a month and a half in which they asked that officer to hold his hand so as to give them the opportunity to prepare the defence and subsequently notifying Inspector Lennon of their intention to apply for judicial review "with as much speed as possible".

42. In January, 1993, a notice under articles 11 and 12 of the Regulations was served on the applicant containing a list of the witnesses whom it was proposed to call before the inquiry and "the book of evidence". Thereafter, the matter was delayed as a consequence of consideration of legal issues arising from McGrath in the Supreme Court judgment referred to earlier.

43. The applicant's solicitors wrote yet a further letter on 23rd December, 1993 requiring that the respondent agree not to pursue the matter.

44. On 11th January, 1994, subsequent to all this correspondence clearly indicating no acquiescence whatever in the procedures, an application was made ex parte to the High Court.

45. The stance of the applicant in *McNeill* vis-à-vis the inquiry investigation and in asserting his defence and indicating an ongoing intention to apply for judicial review is not reflected on the facts of the instant case. At no stage did the applicant indicate any opposition to any step taken by the respondents prior to the application for judicial review. Indeed, it may be thought that a number of the steps taken were to his benefit, not detriment. All of these matters must be considered too in the context of the absence of any specified prejudice in evidence, the apparently uncontested admissions even in the course of interviews in the criminal investigation and the absence of an assertion of innocence or denial of guilt. I would emphasise that these latter omissions cannot in themselves be seen as factors *ipso facto* debarring the applicant from judicial review. They are, however, factors in the court's consideration and weigh in its discretion.

46. The proposition that *McNeill* should be considered as a decision on its own special facts is clear from the decision of the Supreme Court in *McCarthy & Anor. v. The Garda Síochána Complaints Tribunal & Ors*. [2002] 2 I.L.R.M. at p. 341, a decision relating to the Garda Síochána (Complaints) Act, 1986. In a judgment with which the other four members of the full Supreme Court agreed, Geoghegan J. cited the passage from Hamilton C.J.'s judgment referring to the self-contained nature of the Regulations observed of *McNeill*:

> "On the facts of that particular case Hamilton C.J. came to the conclusion that the obligation placed on the garda authorities to investigate alleged breaches of discipline as soon as practicable was not complied with and that the obligation was 'mandatory'. He then went on to express the view that because of the failure by the garda authorities to discharge that obligation all steps taken since the presentation of the written report of the investigating officer were void and of no effect.
>
> "This last observation was not essential to the decision made and the relief granted in the form of an injunction and it may well be that it should be regarded as *obiter dicta*. There is nothing in the report of the case to indicate that there had been any particular argument as to whether breach of an expedition obligation rendered subsequent steps voidable or automatically void. At any rate, O'Flaherty J., who concurred with the Chief Justice in relation to the allowing of the appeal and the granting of the relief expressed no view on this aspect of the matter. Until it arises in some other case therefore, I would express doubt as to whether breach of an expedition obligation in relation to different steps in a procedure is necessarily tantamount to a failure of the condition precedent to the taking of the next step. but what is important about the *McNeill* case is that the Supreme Court held by a majority of two judges to one that on the facts of that particular case there was a breach of the statutory obligations of expedition and that was on the basis that the Oireachtas had intended that members of the force subjected to disciplinary scrutiny were entitled to have their investigations heard and determined quickly."

47. Geoghegan J. also distinguished between *McCarthy* and *McNeill* on the basis that the procedures under the Discipline Regulations did not arise out of a complaint by the public, this being a major difference between the cases. Having cited persuasive authority in relation to public interest in complaints against police officers being fully investigated and adjudicated in a speedy fashion, he added:

> "I would observe in passing that when Hamilton C.J. used the word 'mandatory' in the *McNeill* case it cannot be regarded for certain that he was doing so in contradistinction to 'directory'. I take the view that 'as soon as may be' means as soon as may be reasonably practical in all the circumstances and if I am right about that then it may not make very much difference whether on a theoretical basis the words requiring expedition in the 1986 Act or, indeed, in the Garda Discipline Regulations, are to be regarded as mandatory or directory, nor indeed on the legal principles to be applied is there all that much difference between the views expressed by Denham J. in her minority judgment in *McNeill* from the views expressed by Hamilton C.J. and O'Flaherty J. The difference was in the application of the principles to the particular facts."

48. I would respectfully adopt these observations and apply them to the present case.

49. It follows from the analysis of the Regulations set out earlier that I consider them directory in their application to the facts of this case which are very distinct from those in *McNeill* for the reasons set out in this judgment. The Disciplinary Regulations 36 to 39 which deal with the interaction of the Regulations with the criminal process did not arise for consideration in that case.

50. In *McAuley v. Keating & Ors*., the High Court, 1987 IEHC 118, O'Sullivan J., that judge also had to consider a case where the applicant, a student member of the Garda Síochána, was facing disciplinary proceedings. He challenged those proceedings successfully in the High Court. This was appealed to the Supreme Court which upheld the decision of Barr J. insofar as it quashed the proceedings. However, the court did not conclude that further proceedings should be prohibited and the matter was thereafter the subject of further disciplinary proceedings in the light of the Supreme Court order which stated:

> "provided that such proceedings are conducted in accordance with the provisions of the Disciplinary Code and the requirements of natural and constitutional justice."

In his judgment, O'Sullivan J. carefully examined the various causes of delay which prevented the inquiry from going forward, including the re-admission of the applicant as a student garda, the necessity to act in accordance with the Supreme Court decision, the provision of a "complete and thorough independent impartial fresh look" at the alleged breaches of discipline in the context of a delay

which was, of course, significantly shorter than that in the instant case, that is between 15th February, 1996 and the service of new statements on 9th September of that year. While the period in question was very significantly shorter than that in the instant case, it can only be seen that on the facts of that case the Regulations in their entirety were to be seen as directory and not mandatory in the full sense of the term.

Decision
51. A solipsistic consideration of Regulations 8 to 13 in isolation is by no means an appropriate portrayal of the scheme and rationale of the Regulations as a whole. The Regulations considered in their entirety are, so far as relate to this case, to be seen as directory but not mandatory in the context of elapses of time which I consider are justified in the circumstances outlined in this case and in the context of a criminal investigation which was initiated in December, 1992 followed by a disciplinary inquiry initiated on 15th July, 1993, while the criminal process was still ongoing. The disciplinary procedure was suspended for good reason on 14th July, 2004. The resumption of the inquiry after the *nolle prosequi* on 4th February, 2005 was postponed for good reason: *viz*. the absence of the applicant on sick leave and the impropriety of completing the investigations by interview while the applicant was on sick leave. The procedure was resumed and completed 'as soon as practicable' and was therefore in compliance with the Regulations.

52. The court in this case must consider what is practical as depending on the relevant circumstances. A practical difficulty which arose in the instant case was not only the technical nature of the evidence as to the conduct in question but also a lack of clarity as to precisely what had occurred or who might be responsible for it. Detective Chief Superintendent Camon justifiably decided that a criminal investigation should have priority in the hope that it would "ascertain precisely what conduct may have occurred and by who". This was a form of forensic investigation necessary to establish what had occurred on a computer. It was pre-eminently the type of issue which falls for consideration in a criminal investigation. I conclude, therefore, that what was "practicable" was to proceed with the criminal case and identify precisely what case could be made against the applicant before determining whether the completion of the full disciplinary investigation was necessary. In that way, the authorities would have been placed in a position where, had there been a conviction, they would be entitled to rely on such conviction as being conclusive for the purposes of the inquiry.

53. I do not consider that the elapse of time which occurred either before, during or after the pendency of the criminal trial gives rise to a finding that there has been a breach of the Regulations. The duty to proceed with expedition is to be determined in accordance with what was practicable at the time. Nor do I consider that the elapse which occurred between a decision to enter a *nolle prosequi* and the determination ultimately to resume the inquiry and to fix the inquiry date was such as to give rise to a conclusion the obligation of expedition had been lost or ignored. The applicant was on sick leave. The investigating officer not unreasonably concluded that it would be inappropriate to question the applicant in such circumstances. Even after the applicant's resumption of duty, the evidence is that matters moved with relative expedition from July, 2005 onwards. The time and the date for the inquiry was identified.

54. In the light of the foregoing I conclude firstly that there has not in fact been a breach of the Regulations. The entire Regulations encompass the possibility of not only an interaction with, but the utilisation of, the criminal process prior to an inquiry. Matters proceeded as soon as practicably possible on the facts of this case. The facts of this case, for the reasons which have been outlined earlier in more detail, are substantially at variance from those in *McNeill*. The decision in *McNeill* must be seen in the light of the subsequent authoritative decision of the full Supreme Court in *McCarthy*. For the reasons identified earlier, I do not consider that the judgments in *McNeill* when considered as a totality are authority for the proposition that ordinary delay jurisprudence should be precluded in a consideration of the Regulations. In the light of the foregoing, I do not consider that the applicant has established any form of prejudice or detriment such as would merit an injunction or prohibition.

No prejudice
55. It is difficult to avoid the conclusion that what occurred was a series of steps, which it might well be thought were in ease of the applicant, that is to say were benefits. Now, but only in hindsight, these are portrayed as detriments or prejudice and the denial of a right to an expeditious hearing. In the light of the applicant's Janus-like conduct in this regard I do not consider as a matter of law he is entitled to judicial review.

Unexplained delay
56. A further issue is the timing of the application for leave. It is clear that judicial review is a discretionary remedy. In *De Roiste v. Minister for Defence* [2001] 1 I.R. 190, Denham J.:

> "Judicial review is an important legal remedy, developed to review decision making in the public law domain. As the arena of public law decision making has expanded so too has the volume of judicial review. It is a great remedy modernised by the Rules of the Superior Courts, 1986 and by precedent. However, there is no absolute right to its use, there are limitations to its application. The granting of leave to apply for judicial review and the determination to grant judicial review are discretionary decisions for the court. This has been set out clearly in precedent."

57. Here the applicant sought leave one week before the oral inquiry was due to commence. While not, strictly speaking an 'eve of trial' application, it was certainly not brought promptly, an issue raised in the statement of opposition. No reason for the delay in bringing the application was given on affidavit. Therefore I conclude that the delay is on the evidence not explained.

58. While the situation is not strictly speaking comparable to a criminal trial, I consider that the observations made by Hardiman J. in *Scully v. D.P.P.* [2001] 1 I.R. 242, (by now so well known as not to require any repetition), are by analogy applicable here. No circumstance has been identified here which justified the late application. There is an obligation that such an issue be specifically addressed in the statement of grounds or the verifying affidavit. It was not dealt with. Thus, the court has not been provided with evidence upon which it might exercise its discretion to allow for what is by any standards a late application in the context of the inquiry date as fixed.

Applications not made 'promptly'
59. The Discipline form 30 was served on the applicant on 25th July, 2005. On 13th September, 2005 the applicant was notified that a sworn inquiry was to be held to investigate the alleged breaches of discipline in question. The application for leave was moved, without notice to the respondents on 20th October, 2005. I do not consider that the elapse of time from13th September, 2005 when the applicant was written to and informed that a sworn inquiry would be held on 25th October, 2005, to 20th October (date of application) could be conceived of as being outside the time limitation if that was the only time criterion. However, it should be seen in the context of the communication of 16th May, 2005 when the applicant was told that the disciplinary investigation would recommence (he had been on sick leave previously). While the application may have been moved 'in time', having regard only to the date of information as to the inquiry (13th September, 2005), I consider in the light of the information that had been received by May, 2005, five months beforehand, the application was not moved 'promptly'. While the applicant was not under any obligation to

“engage” with the investigation, he was nonetheless on notice of the fact that the garda authorities had determined to resume the investigation process. Consequently, I consider that the application for judicial review should also be denied on discretionary grounds by reason of absence of promptness in making the application. (c.f. Order 84, rule 21 of the Rules of the Superior Courts, 1986)