

**THE HIGH COURT  
JUDICIAL REVIEW**

2009 277 JR

**BETWEEN****PATRICK WALSH****APPLICANT****AND****THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND****RORY DEBRUIR, FRANCIS MOORE AND JOHN P. QUIRKE****RESPONDENTS****JUDGMENT of Kearns P. delivered the 5th day of July, 2010**

In this case the applicant seeks an order of prohibition by way of judicial review to bar the first named respondent and/or the second to last named respondents (hereinafter referred to as "the Board of Inquiry") from continuing proceedings before the Board of Inquiry (established on the 28th February, 2008 pursuant to Regulation 25 of The Garda Síochána (Discipline) Regulations 2007 (hereinafter referred to as "the 2007 Regulations")), the said proceedings being in respect of the matters the subject of a notification signed by the second named respondent on the 18th March, 2008. The applicant contends that the Commissioner is acting unfairly and *ultra vires* in continuing proceedings before the Board of Inquiry because the subject matter of the inquiry relates to facts which are inconsistent with a District Court acquittal of the applicant on a criminal charge on the 26th November, 2008. The respondents, however, assert that the disciplinary issues no longer include the criminal charge against the applicant and relate to different matters, even if the matters in question arose at the same time as the criminal charge in respect of which the applicant was acquitted. The respondents thus contend that, pursuant to Regulation 25 of the 2007 Regulations, facts from the investigative report can lawfully and fairly be considered by the Board of Inquiry under the terms of the 2007 Regulations.

**BACKGROUND**

The applicant is a member of An Garda Síochána who works in the I.T. Section of Garda Headquarters. On the evening of 2nd September, 2007 the applicant was entering the Electric Picnic concert at Stradbally, County Laois when he was searched by a security man who was employed to carry out such searches on patrons entering the concert. The promoters had an obligation to control the event and ensure patrons entering were not in possession of controlled drugs or offensive or potentially offensive weapons. In order to achieve that objective the promoters had employed a specialised security company whose employees were positioned at each entrance to the event. A condition of entry to the event printed on every ticket was that all patrons had to submit to search on request.

It is alleged that a struggle took place when the security men endeavoured to search the applicant following which the applicant was brought to a designated search area where he was searched with negative results. It is also alleged that during this sequence of events the applicant identified himself as a garda and further that he used abusive language to a superior officer when asked to submit to the search in question.

The Commissioner thereafter established a Board of Inquiry pursuant to the terms of Regulation 24 of the 2007 Regulations and the applicant was notified by letter dated 18th March, 2008 of the establishment of the Board of Inquiry and the details of four separate charges against him which may be summarised as follows:-

- (1) Discreditable conduct in that the applicant on the date in question had in his position a controlled drug, to wit, Amphetamine
- (2) Discreditable conduct in that on the date in question the applicant failed to submit to a legal drugs search
- (3) Improper practice in that the applicant identified himself as an off-duty member of An Garda Síochána when required to submit to a drugs search
- (4) Misconduct towards a member in that the applicant used abusive and insulting language to Sergeant Sylvester Murphy when failing to submit to the drugs search after being directed to do so.

Criminal proceedings were commenced by Inspector Patrick Murray, (who had been appointed by the first named respondent to investigate the alleged breaches of discipline) and were heard in the District Court in Portlaoise when the applicant was charged under s. 3 of the Misuse of Drugs Act, 1997-1984 in respect of an accusation of possession of a controlled drug. The applicant was granted leave by way of judicial review on the 19th May, 2008 to prohibit the sworn inquiry from proceeding pending the determination of the criminal proceedings. The criminal proceedings were heard by District Judge Haughton on the 26th November, 2008. At the conclusion of the case for the prosecution, the District Judge acceded to an application for a direction on behalf of the applicant and dismissed the charge against him.

In the light of this acquittal, the Commissioner directed that breach No. 1, as outlined above, should not be tried in the proceedings before the Board of Inquiry. Implicit in this direction was that the Board of Inquiry would continue and would consider charges Nos. 2, 3 and 4. The applicant's solicitors then wrote to the Assistant Commissioner contending that as the criminal charges arising out of the same circumstances had been dismissed in Portlaoise it would be *ultra vires* the 2007 Regulations to continue the proceedings and that any such proceedings would not be in accordance with fair procedures and natural justice.

**THE REGULATIONS**

The 2007 Regulations came into effect on the 1st June, 2007.

Regulation 8 of the Regulations provides as follows:-

*"(1) Disciplinary proceedings may be taken against a member under these regulations notwithstanding that proceedings for an offence have been or may be instituted against the member arising out of the same circumstances.*

*(2) Where a member has been acquitted on the merits of an offence, proceedings under these regulations for an alleged breach of discipline shall not be commenced or, if already commenced, continued if-*

*(a) The proceedings would involve conducting an inquiry into the same issues in respect of which the member was acquitted, and*

*(b) In all the circumstances of the particular case and their cumulative effect, it would be unfair and oppressive to commence or continue the proceedings."*

Regulation 5 of the 2007 Regulations provides that:-

*"Any act or conduct by a member which is mentioned in the Schedule constitutes a breach of discipline"*

In the Schedule, various acts and conduct constituting breaches of discipline are set out. Section 1 of the Schedule provides that discreditable conduct is a breach of discipline. This is defined as:-

*"that is to say conducting himself/herself in a manner which the member knows or ought to know, would be prejudicial to discipline or reasonably likely to bring discredit on the Garda Síochána"*

Section 3(c) provides that misconduct towards a member is a breach of discipline and this is defined *inter alia* as including:-

*"using abusive or insulting language to him or her"*

Section 8(c) defines the improper use of a Garda's position for private advantage as misconduct. This is defined as:

*"improperly using (or intending to use) his or her position as a member for his or her private advantage"*

Part 1 of the Regulations deals with what might be described as more serious breaches. Part 2 of the Regulations deals with *"less serious breaches of discipline"*. The present proceedings were initiated under Part 1 of the Regulations.

Regulation 23 provides that, in respect of alleged serious breaches of discipline, the Commissioner may appoint an investigating officer to investigate the alleged breach. Regulation 24 sets out the procedure for the conduct of the investigation and the requirement to notify the member concerned in writing of the grounds upon which it appears that the member may have been in breach of discipline. It further provides that within seven days after the investigation has been completed, the investigating officer shall submit to the Commissioner a written report of the investigation containing his/her recommendation as to whether the facts disclosed warrant the establishment of a Board of Inquiry, together with copies of any written statements made during it and details of any information, document or thing which the investigating officer was made aware of during the investigation.

Regulation 25 provides that, if it appears from the report of the investigation that the member concerned may have committed a serious breach of discipline, the Commissioner shall establish a Board of Inquiry to determine whether such a breach has been committed by the member concerned and, if so, to recommend to the Commissioner the disciplinary action to be taken in relation to the member, and shall notify the member accordingly. A person who has been involved in any capacity in relation to an earlier aspect of the case may not be appointed to the Board of Inquiry.

## **SUBMISSIONS OF THE PARTIES**

On behalf of the applicant it was submitted that to continue the existing proceedings before the present Board of Inquiry would be inconsistent with the District Courts verdict of acquittal, involving as it would an inquiry into matters arising out of the same facts and issues in respect of which the applicant was acquitted by the District Court. Feichin McDonagh, senior counsel for the applicant, argued that Regulation 8 of the 2007 Regulations should be interpreted to prohibit continuation of such proceedings, relying in that regard not only on Regulation 8, but on the decision of *McGrath v. The Commissioner of An Garda Síochána* [1991] 1 I.R. 69 and the consequential further cases involving the same parties. He contended that to continue the inquiry would be an unfair procedure in that grossly prejudicial material had already been placed before the Board of Inquiry which included much material dealing with the accusation of possession of a controlled drug in respect of which the applicant had been acquitted. He submitted that it would be no difficult thing to start a fresh inquiry in which the material to be placed before any Board of Inquiry would be shorn of the prejudicial material relating to the allegation of possession. At present, if things were to continue, the Board of Inquiry would be considering precisely the same material, evidence and statements which they would have considered if the criminal charge had not been withdrawn.

As an alternative submission, Mr. McDonagh argued that the statutory provisions did not permit or enable the Garda Commissioner to withdraw a particular allegation of breach of discipline from the Board of Inquiry and to permit the proceedings to continue in respect of other allegations of breach of discipline.

He further argued that to continue the present inquiry, constituted as it had been under Part 1 of the 2007 Regulations, was far more onerous in terms of penalties than proceedings brought afresh under Part 2 of the Regulations, and submitted that the remaining allegations should more appropriately be the subject matter of a Part 2 inquiry only.

In response, Diarmaid McGuinness, senior counsel for the respondent, submitted that the disciplinary proceedings proposed in relation to the remaining breaches of discipline alleged do not involve an inquiry into the same issues as those in respect of which the applicant was acquitted by the District Court, nor would it be unfair or oppressive to allow the disciplinary proceedings to continue. Regulation 8 of the 2007 Regulations only prohibited the conduct of an inquiry into the same issues in respect of which a member was acquitted if in all the circumstances taken cumulatively it would be unfair and oppressive to do so. A continuation of the disciplinary

proceedings in respect of breaches Nos. 2, 3 and 4 was entirely consistent with the terms of Regulation 8 of the 2007 Regulations.

In the present case the charges were neither ostensibly or substantially identical. The remaining charges were different in nature and kind altogether. Failure to submit to a legal drug search, improper use of his position as a member of An Garda Síochána when required to submit to a drug search, and the use of abusive and insulting language, were not matters tried before the District Court nor was the Learned District Judge required, nor did he, make findings of fact in relation to those matters and issues. The only issue upon which the District Court had to make a finding was on the possession charge.

He further submitted that it was indeed lawful and *inter vires* for the Commissioner to withdraw the allegation of the possession of a controlled drug from its disciplinary proceedings and to allow the inquiry continue with the remaining allegations. He submitted that that was implicit from the case law and furthermore that the 2007 Regulations themselves indicate that the Commissioner can lawfully withdraw a charge. In this regard Regulation 8(1) of the 2007 Regulations specifically allows for disciplinary proceedings to be taken against a member of An Garda Síochána notwithstanding that proceedings for an offence have been instituted arising out of the same circumstances. Article 8(2) prohibits the continuation of proceedings for an alleged breach of discipline (where there has been a criminal acquittal) if the proceedings would involve an inquiry into the same issues. He submitted that a consideration of Articles 8(1) and 8(2) as a whole clearly implied that an entitlement existed to withdraw an allegation of breach of discipline without having to halt the entire disciplinary process.

## DISCUSSION AND DECISION

Any consideration of the issues in this case must necessarily involve a revisitation of the principles established in *McGrath v. The Commissioner of An Garda Síochána* [1989] I.R. 241. In that case, the applicant, a member the Garda Síochána, was charged before the District Court with embezzlement of three sums of money received by him in the course of his employment on foot of court orders imposing fines. The applicant was returned for trial before the Circuit Court and was acquitted by a jury on all three charges. He subsequently received notification that he was to be charged with a number of breaches of Garda discipline amounting to seven in total, including three charges of corrupt or improper practice. Those three charges alleged failure to account for the three sums of money received by him in the course of his duty which had been the subject matter of the criminal charges. In the disciplinary context they were characterised as "*corrupt or improper practice*" in that the applicant had failed to account for the relevant sums of money and that such corrupt or improper practice was a breach of discipline within the meaning of the Garda Síochána (Discipline) Regulations 1971. The applicant applied by way of judicial review for an order prohibiting the respondent from holding the inquiry into the seven alleged breaches of discipline, arguing to allow the disciplinary proceedings to continue would be invalid as purporting to reopening and override a matter already decided in the criminal courts. In the High Court, Lynch J. prohibited the Board of Inquiry from inquiring into the three allegations insofar as they alleged corruption or dishonesty on the part of the applicant. However, Lynch J. went on to hold that the disciplinary inquiry into the events could proceed provided the breaches of discipline alleged were confined to charges of merely improper, rather than corrupt or improper practice. In the Supreme Court, the respondents appeal was dismissed, and Hederman J., in delivering the leading judgment of the Supreme Court, stated that the object of the criminal proceedings had been to establish that the applicant was guilty of dishonest acts which would, in effect, mean that the applicant was being retried on issues already determined and which would again expose the applicant to the possibility of punishment.

However, the Court was not of the view that no disciplinary inquiry could take place arising out of the alleged events. Matters of internal discipline in the Garda Síochána were not to be equated with the criminal charges of which the applicant had already been acquitted. Thus McCarthy J. in his judgment rejected any contention that an acquittal on a criminal charge precluded the disciplinary investigation into the facts from which a criminal charge was brought. To acquit a Garda of assault would not preclude a Garda investigation into a breach of discipline such as abuse of authority in failing to behave with due courtesy towards a member of the public.

In the course of his judgment in the Supreme Court, Finlay C.J. stated:-

*"I would emphasise, however, as is clear from that judgment (i.e., that of Hederman J.) that there cannot, it would appear to me, be any general principle that an acquittal on a criminal charge in respect of an offence, irrespective of the reason for such acquittal, or the basis upon which it was achieved, could be inevitably an estoppel preventing a disciplinary investigation arising out of the same set of facts."*

While there were further legal proceedings brought by the applicant, I do not find it necessary to consider same in any detail in circumstances where a distinguished former member of the Supreme Court, Geoghegan J., in *Garvey v. The Minister for Justice, Equality and Law Reform* [2006] 1 I.R. 548 characterised the legal landscape following the various McGrath cases in the following manner:-

*"However, it is clear both from McGrath v. The Commissioner of An Garda Síochána [1991] 1 I.R. 69 and Mooney v. An Post [1998] 4 I.R. 288 that an acquittal does not necessarily per se bar a disciplinary inquiry involving the same matter. Still less does McGrath v. The Commissioner of An Garda Síochána support any suggested estoppel or res judicata."*

Geoghegan J. also stated:-

*"In summary, my view is that McGrath v. The Commissioner of An Garda Síochána [1991] 1 I.R. 69 is authority for the proposition that it may, in any given circumstances, be unfair and oppressive to conduct a disciplinary inquiry into the same issues in respect of which there has been an acquittal on the merits at a criminal trial but this will depend on the particular surrounding circumstances and in particular their cumulative effect. There is no necessary preclusion per se of such a double process."*

The critical question, it seems to me, is to consider whether it would be unfair or oppressive to continue the disciplinary proceedings in the particular circumstances. If the disciplinary inquiry crosses that threshold, the matter then becomes, as was emphasised by Hederman J. in *McGrath*, "*a form of unfair and oppressive procedures which calls for the intervention of the court*".

In *Garvey v. The Minister for Justice, Equality and Law Reform* [2006] 1 I.R. 548 the Supreme Court had to consider whether it would be unfair and oppressive to allow the disciplinary process proceed, having regard to the fact that the applicant had been acquitted by a jury after lengthy deliberation following a trial which had lasted five weeks and where the imposition of any punishment in the disciplinary proceedings would unravel the verdict of the jury. Geoghegan J. in the course of his judgment stated:-

*"There was a simple issue of credibility in this case, namely, whether the appellant had kicked the prisoner in the*

*face and inflicted the injuries. While the issue was simple, its resolution was clearly anything but simple. As already mentioned, the trial lasted five weeks and the jury took sixteen hours to deliberate. The jury then found in favour of the applicant. It is true, of course, that it is possible that a jury merely had a reasonable doubt but I do not think that that speculative possibility, by itself, justifies a rejection of the contention by the applicant that, given the nature of the criminal trial he faced, the issues involved and the fact that essentially it is all a matter of internal dispute between prison officers, it would be oppressive and an unfair procedure now to unravel the verdict of the jury by way of disciplinary inquiry. . . . By now every aspect of the case must have been discussed within the prison service whether at Governor level or prison officer level. It is impossible to imagine that such a lengthy trial leading to an acquittal did not give rise to a flow of argument and opinions throughout the prison. In this claustrophobic atmosphere, I believe that to use the expression of Finlay C.J. in McGrath v. The Commissioner of An Garda Síochána, it would be a "basically unfair procedure" to conduct a disciplinary inquiry on what in effect are identical allegations to the criminal charges based on essentially the same evidence and the same witnesses."*

I am satisfied that in the present case the circumstances are not such that to allow the disciplinary process to proceed would be unfair or oppressive. The allegations in the disciplinary proceedings are not even the same as the charge before the District Court, let alone identical. Nor do the disciplinary proceedings involve any determination on the issue of possession or create the risk of unravelling the District Court verdict.

While the remaining matters before the inquiry arise out of the same set of events as the possession allegation, they are quite different in character. During the course of the hearing I invited counsel for the applicant to consider whether the instant case was any different from the situation which might arise where a garda, stopped at a road checkpoint, is charged with drunken driving in circumstances where a criminal charge to that effect is later unsuccessful but where, at the time of being stopped, the garda in question had identified himself as a member of the Garda Síochána with a view to avoiding a breath test and had used abusive and insulting language. Could it be said that a disciplinary inquiry into those latter events would be either unfair or oppressive? It seems to me that to ask the question is to know the answer. It would not.

It is of course true, as pointed out by Mr. McDonagh, that any inquiry will of necessity have to consider the same statements which underpinned the inquiry when all four matters were under investigation. Mr. McDonagh argued that a fresh inquiry, brought under Part 2 of the 2007 Regulations, could "easily" be arranged, with suitable redactions from the various statements of the witnesses. This strikes me as an unreal and impractical approach because the remaining matters, though different in character, can only be placed in context by reference to some consideration of the events at the Electric Picnic concert and the stewarding arrangements then in operation. Notwithstanding that fact, I fail to see how the respondents are thereby "contaminated" by having before them the original material or that one should assume that the respondents will be incapable of differentiating between the different charges.

I also accept as correct the submissions made on behalf of the respondent that it is both lawful and *inter vires* for the Commissioner to withdraw a particular charge and to allow the inquiry continue with remaining allegations. I believe that is implicit from the case law and from the 2007 Regulations themselves. In this regard Regulation 8(1) of the 2007 Regulations specifically allows for disciplinary proceedings to be taken against a member of the Garda Síochána notwithstanding that proceedings for an offence have been instituted arising out of the same circumstances. Article 8(2) goes on to prohibit the continuation of proceedings for an alleged breach of discipline (where there has been a criminal acquittal) if the proceedings would involve an inquiry into the same issues. Considering both sub articles together, it seems to me implicit in those provisions that there exists an entitlement to withdraw an allegation of breach of discipline without having to halt, abort and restart the entire disciplinary process. Indeed in *McGrath v. The Commissioner of An Garda Síochána*, Lynch J. indicated that the disciplinary proceedings could proceed provided the allegation of corruption and dishonesty was withdrawn. I specifically note that there is no provision in the 2007 disciplinary regulation which prohibits or precludes the withdrawal of an allegation of breach of discipline from a Board of Inquiry by the Commissioner.

I would therefore refuse the relief sought in this case.