Neutral Citation Number: [2011] IEHC 237

THE HIGH COURT

JUDICIAL REVIEW

2010 1000 JR

BETWEEN

OLIVER MORAN

APPLICANT

V

THE GARDA SIOCHÁNA OMBUDSMAN COMMISSION

RESPONDENT

Judgment of Mr. Justice Hedigan delivered the 9th day of June 2011

1. The applicant is a Garda Sergeant stationed at Kilmacrennan Garda Station, Co Donegal. The respondent is a statutory body established pursuant to the provisions of Part 3 of the Garda Síochána Act, 2005, with the objective and functions set out in section 67 of that Act. Its functions include *inter alia* the investigation of complaints made by members of the public concerning the conduct of members of the Garda Síochána.

2. The applicant seeks the following reliefs:-

> (i) An Order of *Certiorari* quashing the Respondents decision of the 22nd February, 2010, to extend the six month time limit for the making of complaints under section 84 of the Garda Síochána Act 2005 in relation to a complaint made against the applicant on the 19th February, 2010 by one Josie Kelly.
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> (ii) An Order of *Certiorari* quashing the Respondents determination of the 22nd February, 2010, that this complaint was admissible, said determination being made on foot of the decision referred to in paragraph (d) (i) of the statement grounding the application for Judicial Review.
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> (iii) An Order of *Certiorari* quashing the Respondents decisions of the 23rd February, 2010 to designate said complaint for investigation under section 98 of the Garda Siochána Act 2005, said decision being made on foot of the decisions referred to in paragraphs (d) (i) and (d) (ii) of the statement grounding the application for Judicial Review.
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> (iv) A Declaration that the Respondent acted unlawfully and/or in excess of jurisdiction and/or in breach of natural and constitutional justice and/or in breach of the rights of the applicant insofar as the respondent failed to invite submissions from the applicant regarding the extension of the six month time limit and/or failed to give any or adequate reasons for the decision to so extend time.
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> (v) A Stay, pending the determination of the within proceedings, and insofar as is necessary, on the taking of any further steps in the investigation of the complaint of the Respondent.
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> (vi) An Order providing for all necessary and/or incidental directions in relation to this application for relief.
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> (vii) An Order providing for such further or other relief including any interim or interlocutory relief as this Honourable Court shall deem appropriate.
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> (viii) Liberty to file further or supplemental affidavits.
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> (ix) An order for costs.

3.1 On Friday the 19th February, 2010, a complaint regarding the applicant was made to the respondent by one Josie Kelly. The respondent deemed this complaint to be admissible the following Monday the 22nd of February, 2010. The complaint form sets out a series of incidents including two assaults which allegedly occurred on the 21st June, 2009 and the 23rd August, 2009. It also detailed certain incidents in which the applicant was named which occurred in 2003, 2004, 2005 and 2007. The complainant stated that he believed that the motive for these incidents stemmed from the fact that in 2003 the complainant was tried for rape and the applicant herein was heavily associated with the alleged victim's family. The complainant was acquitted of this charge.

3.2 The applicant was informed of the complaint by letter on the 9th March, 2010. The letter alleged that the complainant was being harassed by Garda members in Donegal and was assaulted by members of the Gardaí on two occasions in 2009. On the 26th April, 2010, the applicant met with two investigating officers from the respondent's office namely Mr Paul Hanna and Mr. Damien Gallagher. At that meeting the applicant was informed of the substance of the complaint made against him, which involved a number of incidents occurring between 2003 and 2007. These incidents were:-

> (a) that the applicant was investigating officer during the complainant's trial for rape in February, 2003, during which the complainant alleges that the applicant withheld vital evidence and admitted to this in cross-examination.
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> (b) that in 2004 the complainant reported to the applicant that his windows were smashed but the applicant did nothing to investigate the matter further.
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> (c) that in 2005 the complainant reported to the applicant that a van outside of his house had been smashed, set alight and the contents were stolen, but the applicant did nothing to investigate the matter further.

(d) that in 2005 the applicant had told the complainant's neighbours not to let their children near the complainant's home as he was a rapist.

(e) that in 2007 the applicant stopped the complainant on a spurious dangerous driving charge and said to him "we will see if that wee girl solicitor will get you off this time."

There was no reference to the two alleged assaults at this meeting.

3.3 The respondent wrote to the applicant on the 28th April, 2010, listing all of the incidents that had been outlined to the applicant at the meeting and requested that the applicant make a statement. The applicant's solicitors wrote to the respondent on the 30th April, 2010, seeking clarification as to whether the contents of the letter of the 9th March, 2010, constituted the entirety of the allegations. The query also noted that all the incidents raised at the meeting had occurred at least 3 years prior to the making of the complaint. Section 84 of the Garda Síochána Act 2005 requires complaints to be made within 6 months of the events complained of unless there are good reasons for extending time. The response to this query came by email dated the 5th May, 2010, in which the respondents stated:-

"Mr Kelly has alleged harassment since 2003 by various Gardaí including Sergeant Oliver Moran. He has also alleged he was assaulted by various named and unnamed Gardaí in 2009 but has not specifically mentioned Sergeant Moran as assaulting him. However Sergeant Moran is mentioned on Garda records as the investigating Garda of an incident on 23/8/09 in Kilmacrennan. Mr Kelly has alleged he was assaulted by Gardaí during this incident."

3.4 On the 25th May, 2010, the applicant's solicitors again wrote to the respondent seeking clarification as to the substance of the complaint made against the applicant. On the 31st May, 2010, the respondent responded as follows:-

"Further to your letter dated the 25th May, 2010 to GSOC, I can confirm the allegation made against Sergeant Moran by Mr Josie Kelly is one of harassment from February 2003 to present. There is no allegation of assault against Sergeant Oliver Moran."

In light of this response the applicants solicitors sent a fax to the respondent on 1st June, 2010, seeking clarification as to whether the conduct complained of fell within the six months immediately preceding the date upon which the complaint was made as required under s. 84 of the Garda Síochána Act 2005. On the 8th June 2010, the respondent informed the applicants solicitors by way of email that:-

"Further to your fax dated the 1st of June 2010, I can confirm there is no specific conduct complained of by Mr. Kelly six months prior to the date of the complaint (19th February 2010) against Sergeant Oliver Moran. The Garda Ombudsman has determined the allegations from 2003 to present are admissible for investigation under section 98 of the Garda Síochána Act 2005 despite aspects of the complaint occurring outside the six month time limit. It was decided that given the pattern described by the complainant may be proven as harassment, the time limit was extended accordingly to include conduct complained of dating back to 2003."

3.5 The applicants solicitors wrote to the respondent on the 11th June, 2010, requesting confirmation of:-

"The good reasons for extending the time limit for the making of the complaint which the Ombudsman took into consideration in this instance within the meaning of section 84 of the Garda Síochána Act 2005."

On the 23rd June, 2010, the respondent wrote to the applicant requesting that he provide a witness statement without further delay. On the 29th June, 2010 the applicant's solicitors wrote to the respondent again raising the queries outlined in their letter of the 11th June, 2010, along with other matters. On the 30th of June the respondents wrote to the applicant's solicitors stating:-

"A request has been made for Sergeant Oliver Moran to provide a witness statement in relation to the allegations already provided to him by the Garda Ombudsman. Should Sergeant Oliver Moran not wish to provide a witness statement, then consideration will be given to how this matter can be meaningfully progressed without his cooperation."

On the 1st July, 2010, the applicant's solicitors again reiterated their request that the respondent would address the matters raised in their letter of the 29th June, 2010.

On the 5th July, 2010, the respondent sent an email to the applicant's solicitors stating:-

"Further to your fax dated 1st July, 2010, I wish to make you aware that Sergeant Oliver Moran has been sent a letter today requesting that he attends the Office of the Garda Síochána Ombudsman on Thursday 22nd July 2010 at 2pm, in order to provide an account under Section 39 of the Garda Síochána Act, 2005."

On the 19th July, 2010, Peart J. granted leave to quash the decision of the respondent of the 22nd of February, 2010, to extend the six month time limit for the making of complaints pursuant to section 84, and the determination of the same date that the complaint was admissible.

Submissions of the Applicant

4.1 Section 84(1) of the Garda Síochána Act 2005 provides:-

"(1) A complaint must be made within the period of 6 months beginning on the date of the conduct giving rise to the complaint or within any extension of that period allowed under sub-section (2).

(2) The [respondent] may extend the time limit for making a complaint if it considers that there are good reasons for doing so…"

The respondent's reasons for deciding to extend time were outlined in paragraph 10 of the affidavit of Louise Prendergast which states:-

" What might, upon full investigation, be found to amount to a serious campaign of harassment, may escape scrutiny

> entirely if the Commission fails to consider that individual acts by individual members of the force may in fact be connected or interrelated and may form part of a continuum…I formed the view that the most recent alleged assault of the 23rd August 2009 was the most recent incident in a continuum of behaviour alleged against a group of Gardaí possibly amounting to harassment."

4.2 The applicant submits that the reasons which have been provided by the respondent demonstrate that it failed to direct its mind adequately to the issues before it extended the time limit. In particular the respondent failed to ascertain any reason for the complainant's delay in making the complaint. Section 84(2) allows the Ombudsman to extend time if there are "good reasons". The meaning of the term "good reasons" has been discussed in relation to cases where there have been applications to extend time pursuant to Order 84, rule 21(1) of the rules of the Superior Courts. In determining whether a "good reason" exists an objective test is to be applied. In *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301 Costello J said at 315:-

> " The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court shall not extend time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O. 84, R. 21 is on the plaintiff) is that there are reasons which both explain the delay and offer a justifiable excuse for the delay."

The applicant submits that the respondent should be guided in its approach to extending time by the approach taken by the courts. It is submitted that the respondent should have requested from the complainant an explanation concerning delay, which it failed to do.

4.3 The respondent should have had regard to the rights of the applicant in deciding whether to extend the six-month time limit and in particular, it should have considered whether any prejudice would be caused to him by admitting a complaint of such antiquity. The speed at which the respondent decided to extend the limitation period demonstrates that the respondent had little regard to the fact that such complaints should be made promptly. It seems that time was extended merely by reason of the nature of the complaint i.e. the complaint was one of harassment. The decision to extend the time limit was made with unnecessary haste over the course of a weekend and the respondent did not spend any time considering the relevant factors such as the reasons for the delay and the prejudice to the applicant. In the instant case the complaint was a complex one spanning seven years. The members named in the complaint are from seven different garda stations in Donegal it is not clear if they even knew each other. It seems incredible that the complainant waited until 2010 before making his complaint, bearing in mind the public controversy relating to Donegal gardaí during the Morris Tribunal inquiry that commenced in late 2002.

4.4 At paragraph 9 of her affidavit Ms Prendergast states that:-

> "In relation to the time issue, the particular difficulty that arises with the applicability of the time limit to allegations of harassment is that it is often impossible to break the complaint up into individual discreet component parts. Conduct which may seem justifiable and a legitimate exercise of powers by a member or members of the Gardai may, when read, in the context of other conduct, either by the same or other members of the Gardaí, justify a description of the conduct as a whole as harassment."

The applicant submits that this line of reasoning does not apply to the instant case having regard to the substance of the complaints made. A significant number of the alleged incidents quite clearly constitute harassment and inappropriate behaviour on the part of the members involved. There is no possibility, therefore that the complainant could have misunderstood the motivation or purpose behind the conduct of the said members nor could he have understood them to have been legitimately exercising their powers as members.

4.5 A preliminary inquiry must be carried out before the respondent initiates any investigation. The respondent must determine: (a) whether the statement has been made within six months, (b) if not, whether there are "good reasons" to extend that time limit and (c) whether the statement is admissible under section 87. The applicant submits that as part of this preliminary procedure the respondent should have notified it of the substance of the complaint and invited the applicant to make submissions. There were no circumstances of urgency or necessity that prevented the respondent from doing this. In *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54, the respondent had received complaints about the applicants fitness to practice as a midwife. The respondent had written to the applicant with regard to one of these complaints requesting the applicant's comments. The respondent subsequently held a preliminary inquiry at which it decided there was a *prima facie* case for the holding of an inquiry. That decision was made despite the fact that the applicant had yet to respond to the letter. The respondent never wrote to the applicant regarding three other complaints nor did it seek her views thereon prior to directing that there was a *prima facie* case for the holding of an inquiry. In the Supreme Court Hardiman J. stated at 130:-

> "I cannot see that in the circumstances of this case that the Board would have suffered any impairment to its ability to discharge its statutory functions by notification of the complaints of the 16th May or the 26th June, 2007. It would have been perfectly entitled to require any answer within a reasonable time. Indeed, if [the applicants] answer to the second complaint is the very basic one that she was not the midwife in charge of the case and was not responsible for the plan to have a home delivery, very little time would be required to make that point. I believe that in all the circumstances [the applicant] was not treated fairly in relation to the s 38 decision to hold inquiries. She ought to have been told about the allegations made to the Board and given a chance to deal with them- not necessarily by oral hearing but in whatever way was necessary for her reasonably to make her reply."

Just as the applicant in *O'Ceallaigh* could have pointed out that she was not the mid-wife in question, Sergeant Moran could have pointed out that the Garda records which recorded him as the investigating Garda for the assault on the 23rd August, 2009, were incorrect.

4.6 The decision in *O'Ceallaigh* was followed in *O'Callaghan v. Disciplinary Tribunal* [2002] 1 I.R. 1. In that case complaints were made to the respondent about the applicant, who was a solicitor. The complaints were examined to determine whether there was a *prima facie* case for inquiry. Although the applicant was not formally put on notice of the initial *prima facie* examination, the Law Society did write to him about the complaints and he had been afforded an opportunity, which he availed of, to write a reply. This correspondence was before the tribunal before it decided to hold the inquiry. The tribunal decided that a *prima facie* case existed and that a full inquiry was appropriate, the inquiry resulted in a recommendation that the applicant be struck of the roll of solicitors. The applicant sought judicial review of this decision on the ground that the respondents holding of a *prima facie* inquiry without putting him on formal notice was not in accordance with the principles of natural justice. The Supreme Court held that the natural justice requirement had been satisfied by notifying the applicant in writing about the complaint and affording him an opportunity to reply. Geoghegan J held at page 7:-

> "…all that is required, in my view, is that the solicitor be notified of the complaint and be given an opportunity of responding to it and that that notification and any response that may have been given to it should be before the Tribunal before it makes its decision as to whether there is a *prima facie* case for an inquiry. It is entirely irrelevant how the Tribunal comes into possession of this correspondence. As Barron J. points out in *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54, there cannot be hard and fast rules as to procedures. There is therefore no technical requirement upon the Tribunal itself to serve notice and await a reply."

While the Garda Síochána Act 2005 does not impose a "technical requirement" on the respondent to serve notice of the complaint on the applicant and then await a reply, the applicant submits that natural justice and fair procedures required such an obligation in the instant case.

4.7 The respondent contends that the present proceedings are moot because the applicant now has full information relating to the contents of the complaint originally made against him. This contention is misplaced. While information is now available which assists the applicant to meet the case being made against him on the merits, this does not in any way avail the applicant in relation to the decision already made to admit the complaint, or the decision to extend time. The applicant is now shut out from raising the time bar issue. The respondent also contends that its decision as to the admissibility of the complaint is not a decision which attracts the requirements of natural or constitutional justice. The applicant submits that the respondent is incorrect to take this view. The whole scheme of the relevant legislation involves a balance of rights of the public and members of the Garda Síochána, included in this balancing of rights is a provision for the time period within which complaints may be brought, this time frame should not be dispensed with without good reasons. The determination reached by the Ombudsman could potentially impact adversely on the rights of the applicant including his right to earn a livelihood. Fair procedures were not followed in this case as the applicant did not have an input into the decision, the decision is also irrational as the decision maker did not hear both sides. The applicant submits therefore that the matter should be remitted back to the respondent to allow the applicant to make submissions on the issue of whether to extend time.

Submissions of the Respondent

5.1 The respondent submits that the rules of natural and constitutional justice do not apply to the exercise of discretion pursuant to section 84(2) of the Act of 2005. It is well established that the applicability of the rules of natural and constitutional justice depends on the nature of the discretion involved and a consideration of the consequences for the individual. Where there are consequences such as the imposition of a punishment or an effect on reputation then the rules of natural and constitutional justice may apply. The respondent submits that a decision to extend time does not have adverse consequences for the applicant. It merely enables an investigation to take place. That investigation itself does not produce any legally binding sanction or outcome for the applicant.

5.2 In *McCormack v. Garda Síochána Complaints Board* [1997] 2 I.R. 489, the applicant sought to quash a decision of the respondent due to the boards failure to state the reasons for its decision. Costello P. stated:-

> "It is not the law of this country that procedural fairness requires that in every case an administrative decision-making authority must give reasons for its decisions. Where a claim is made that a breach of a constitutional duty to apply fair procedures has occurred by a failure to state reasons for an administrative decision the court will be required to consider (a) the nature of the statutory function which the decision-maker is carrying out (b) the statutory framework in which it is to be found and (c) the possible detriment the complainant may suffer arising from the failure to state reasons."

The Court ultimately found against the applicant on the basis that the applicant was in fact provided with information concerning the material on which the Boards opinion was based.

5.3 In the case of *Flood v Garda Síochána Complaints Board and Walsh* [1999] 4 I.R. 560, the applicant alleged a breach of natural justice and a breach of the principles of fair procedures in the failure by the Board to keep him informed and to allow him to make representations following the report of the investigating officer. Barron J. held as follows:-

> "The right to know the case you have to meet and the right to have time to prepare an answer and an opportunity to present that answer applies to a person who stands accused or to a person in respect of whom a tribunal has to act judicially or quasi judicially. That is not the case here. The Board is forming an opinion as to whether an investigation should proceed to a further stage.
>
> The Board has the statutory power to form an opinion. As with all statutory powers, it cannot be unfettered, it must be exercised in accordance with fair procedures. This means that the opinion must be reached *bona fide*, be factually sustainable and not be unreasonable."

The respondent submits that the facts of *Flood* are analogous to the facts in the present case and the test outlined by Barron J is equally applicable here. The applicant was informed that time was extended because the complaint related to a pattern of harassment dating back to 2003, the most recent incidents of which fell within the six month time period. The respondent submits that this reason is perfectly adequate to inform the applicant of the basis for the decision, and secondly, to permit him to challenge the lawfulness of the decision, should he see fit to do so.

5.4 The applicant has sought to suggest that there was continuing ambiguity about the assaults perpetrated in 2009 and that if given the opportunity he could have made a submission that he was not the investigating garda for these assaults. The reality is that no such ambiguity existed the applicant was told that no conduct on his part contributed to the assaults which were to be investigated. The position is different to the case of *O'Ceallaigh* where in the context of a *prima facie* case, the applicant would have wished to inform the Board that in respect of the second allegation there had simply been a case of mistaken identity. Nothing of that sort arises in the instant case.

5.5 The applicant claims that there has been a breach of natural and constitutional justice by the respondent's failure to invite his submissions prior to extending the time. The reason for extending time was that the complaint related to a pattern of harassment dating back to 2003. Given the nature of the complaint made, it is difficult to see what purpose the invitation of submissions could serve. The applicant would no doubt contend that the complaint was factually inaccurate or that it did not amount to harassment, but such submissions go to the substance and validity of the complaint and should be made during the substantive investigation. Once the complaint was made, its fundamental nature as an allegation of a pattern of harassment was established, and since that was the reason for the extension of time, fairness did not require the invitation of submissions.

Decision of the Court
6.1 This case arises from a complaint made by one Josie Kelly to the Garda Síochána Ombudsman Commission. The complainant alleges that he was harassed by the applicant who is a Garda Sergeant. The motive for the alleged harassment is that the applicant was friendly with the family of a girl that the complainant was accused of raping. The complainant was acquitted of raping this girl in 2003. However he alleges that the applicant subjected him to a campaign of harassment from 2003 until 2007. He also alleges that in June and August 2009 he was assaulted by members of the Gardaí, however he does not name the applicant as being one of those responsible.

This complaint was submitted on Friday the 19th of February, 2010. The respondent deemed the complaint to be admissible on Monday the 22nd of February, 2010. The applicant was informed of the complaint on the 9th March, 2010, and met with two investigating officers from the respondent's office on the 26th April, 2010. The applicant's solicitors wrote to the respondent noting that all of the complaints made against the applicant occurred at least three years prior to the making of the complaint whereas Section 84 of the Garda Síochána Act 2005 requires that complaints be made within six months of the conduct complained of. This time limit can only be extended if there are good reasons. On the 8th of June 2010, the respondent emailed the applicant to say that the respondent had decided that given that the pattern described by the complainant may be proven as harassment, the time limit should be extended. The applicant's solicitors looked for the "good reasons" for extending the time. The respondent requested that the applicant provide a statement. On the 19th July, 2010, the applicant sought and was granted leave to judicially review the respondent's decision of the 22nd February, 2010, to extend the time limit.

6.2 The grounds upon which relief are sought are contained at paragraph (xviii) of the Statement of Grounds. The first three grounds, upon which the decision of the 22nd February, 2010 is impugned, allege a failure to give sufficient reasons for exercising the discretion to extend the six month time limit. The fourth ground alleges that the reasons fail to establish that the respondent directed its mind adequately to the issues before it and that the reasons given were insufficient to allow the court to review the decision. The fifth ground complains that the applicant was not invited to make submissions prior to the decision to extend time.

6.3 It seems to me that this case turns on the following key issues:-

> (i) Whether the decision to extend time was fair and reasonable.
>
> (ii) Whether there was an obligation on the respondent to have invited the applicant to make submissions prior to the taking of the decision.

I will address each of these issues in turn. The reason given by the respondents for extending time is outlined in paragraph 10 of the affidavit of Louise Prendergast which states:-

> " What might, upon full investigation, be found to amount to a serious campaign of harassment, may escape scrutiny entirely if the Commission fails to consider that individual acts by individual members of the force may in fact be connected or interrelated and may form part of a continuum…I formed the view that the most recent alleged assault of the 23rd August 2009 was the most recent incident in a continuum of behaviour alleged against a group of Gardaí possibly amounting to harassment."

The applicant suggests that it is clear from the affidavit of Ms Prendergast that time was extended merely by reason of the nature of the complaint i.e. that the complaint was one of harassment. The applicant submits that the nature of the complaint alone is not an adequate reason to extend time and the respondent should have requested that Mr Kelly provide an explanation for his delay, and the respondent should also have considered the prejudice to the applicant of admitting a complaint of such antiquity.

6.4 The Garda Síochána Act 2005 vested in the respondent the jurisdiction to decide whether there are good reasons to extend the time for the making of a complaint. It is the Commission, which must decide whether those good reasons exist. The manner in which the jurisdiction has been framed gives wide latitude to the Commission. Whilst the exercise of this discretion is subject to review; the High Court cannot substitute its opinion on the facts for the views of the respondent. The scope for reviewing a decision as to whether an investigation should proceed was set out in *Flood v Garda Síochána Complaints Board and Walsh* [1999] 4 I.R. 560, where Barron J. held:-

> "The Board is forming an opinion as to whether an investigation should proceed to a further stage. The Board has the statutory power to form an opinion. As with all statutory powers, it cannot be unfettered, it must be exercised in accordance with fair procedures. This means that the opinion must be reached *bona fide*, be factually sustainable and not be unreasonable."

It seems to me that in order for the applicant to successfully challenge the respondent's decision, the applicant would have to demonstrate either that the decision was not reached *bona fide* or that the decision was not factually sustainable or that the decision was irrational. The applicant has not made the case that the opinion of the respondent was not reached *bona fide*. The opinion was factually sustainable; the complaint alleged a series of incidents which if upheld in the investigation would have amounted to harassment. The opinion was rational based as it was on the concern that if there had been a campaign of harassment it would escape scrutiny if the respondent failed to consider that individual acts might form part of a continuum of misbehaviour. I am not satisfied that the applicant has advanced grounds to successfully challenge the decision of the respondent in this regard.

6.5 The second issue to be determined is whether there was an obligation on the respondent to have invited the applicant to make submissions prior to the taking of the decision to extend time. The applicant argues that a decision as to the admissibility of a complaint attracts the requirements of natural and constitutional justice, and that fair procedures were not followed in this case as the applicant did not have an opportunity to make submissions. The applicant seeks to rely on the case of *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54. In that case the respondent had received complaints about the applicant's fitness to practice as a midwife. The respondent decided there was a *prima facie* case for the holding of an inquiry. That decision was made despite the fact that the respondent never wrote to the applicant regarding three of the complaints nor did it seek her views thereon. It was held that the applicant was not treated fairly in relation to the decision to hold an inquiry. She ought to have been told about the allegations made to the Board and given a chance to deal with them. Counsel on behalf of the applicant argues that just as Nurse O'Ceallaigh could have pointed out that she was not the mid-wife involved in one of the complaints, Sergeant Moran could have pointed out that he was not the Garda who investigated the assault on the 23rd August, 2009, and that the Garda records were incorrect.

6.6 The applicant seems to suggest that there was on- going ambiguity about the assaults perpetrated in 2009. The respondent did refer in an email on the 5th of May, 2010 to Sergeant Moran being mentioned as investigating Garda for the assault on the 23rd August, 2009. The applicants sought clarity as to the substance of the complaint. On the 31st May, 2010, the respondents clarified

the situation by sending the applicants solicitors an email stating:-

> "Further to your fax dated the 1st of June 2010, I can confirm there is no specific conduct complained of by Mr. Kelly six months prior to the date of the complaint (19th February 2010) against Sergeant Oliver Moran."

Any ambiguity that may have existed was clarified by this email. It was clear that there was no conduct complained of within six months prior to the date of the complaint. The position is different to *O'Ceallaigh* where in respect of the second allegation against Nurse O'Ceallaigh, she could have informed the Nursing Board that there simply had been a case of mistaken identity. No such simple issue of fact arises here.

6.7 The context in which the decision was taken in *O'Ceallaigh* is also different to the context in which the decision was taken in this case. The *O'Ceallaigh* case concerned a finding that a *prima facie* case existed in respect of a number of the allegations. This case has not progressed to the stage of any such finding. The context here is whether to embark on an investigation in the first place. It is at the conclusion of the Ombudsman's investigation that a *prima facie* case may be found to exist. Fair procedures may not apply at every stage of a process. One looks at the process as a whole to establish whether it is fair. In *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54, reference is made to an extract from De Smiths 'Judicial Review of Administrative Action' (4th ed 1980) at p199, which reads as follows:-

> "Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests, the courts will generally decline to accede to that person's submission that he is entitled to be heard in opposition to this initial act, particularly if he is entitled to be heard at a later stage."

The rules of natural and constitutional justice will apply to the Ombudsman's investigation and any findings ultimately arrived at will have been made in the context of the applicant having had an opportunity to make submissions. I am satisfied therefore that the respondent was not obliged to request the applicant to make submissions as to whether it should exercise its discretion to extend time to allow it embark on an investigation of the complaints.

Lastly, I consider that the claim of inadequate reasons having been given for the decision to extend time is unfounded. The reason given by the email of the 8th of June 2010 was that "given the pattern described by the complainant may be proved as harassment, the time limit was extended accordingly to include conduct complained of dating back to 2003". This was expanded upon by Ms Prendergast in her affidavit herein at paragraphs 9 and 10 where she stated her view that harassment complaints needed to take into account conduct as a whole over time and involving other Gardaí, rather than breaking the complaint into constituent parts. The nature of harassment was that individual acts over a number of years might form part of a continuum. This obliged an investigation to consider acts outside the six month limit. Her first explanation although terse was, in my view a clear reason for the decision. Her subsequent explanation more than met the requirements to explain.

For all the above reasons, I must refuse the relief sought by the applicant.