THE HIGH COURT

[2020 No. 40 JR]

BETWEEN

THOMAS MURPHY

APPLICANT

– AND –

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 11th May 2021.

SUMMARY

This is a challenge to the Commissioner's proposal, pursuant to reg.12 of the Garda Síochána (Admissions and Appointments) Regulations 2013 to dispense with the services of a probationer Garda. Notably, the probationer Garda was not provided with a copy of the materials on which the Commissioner intended to rely in reaching his decision. Additionally, the manner in which the Commissioner proposed to proceed impinged upon the presumption of innocence enjoyed by the probationer Garda in criminal proceedings arising from the same alleged events that grounded the proposal to dispense with his services. In all the circumstances presenting and considered hereafter the court proposes to quash the decision to issue the initial reg.12(9) notice that issued to the probationer, subject to any (if any) further submissions that the parties might wish to make as to the adequacy of this proposed relief. This summary is part of the court's judgment.

A. Subject of Judgment

1. There was a lot of argument over the 1½ days that this case was at hearing. So it may be useful for the court to state at the outset what this application is concerned with from a legal perspective. It is an application concerned with fair procedures and also with the fact that P/Garda Murphy, when invited to make submissions about his prospective dismissal, was not given the information on which the Commissioner as decisionmaker proposed to rely. It is not a case in which reasonableness is challenged. The essence of P/Garda Murphy's case is that the Commissioner, when dealing with a probationer Garda with whose services he proposes to dispense, cannot (i) make findings of fact in the absence of a hearing, (ii) rely on such findings of fact to form a proposal to dispense with the probationer's services, and (iii) then seek submissions without providing the probationer with the documentation that the Commissioner proposes to rely upon.

B. Probationer Gardaí

2. It is as well to get one issue out of the way before proceeding with a consideration of the more substantive matters at play. This application is brought by Probationer Garda (or 'P/Garda') Murphy. However, his counsel claims that in law there is no such thing as a 'probationer' Garda, that one can be a 'trainee' Garda and then, once attested as a member of the force, one becomes a 'Garda' but that the concept of a probationer Garda is something unknown to law. There is no doubt that a so-called 'probationer' Garda is an attested member of An Garda Síochána. However, that does not mean that it is not possible for the Commissioner to distinguish between e.g., probationer Gardaí and non-probationer Gardaí (the latter being Gardaí within typically the first two years of their careers as Gardaí, though this period is subject to extension). Section 123 of the Garda

Síochána Act 2005, which is concerned with the making of disciplinary regulations, expressly provides, amongst other matters, at subsection (6), that *"The regulations may…(b) provide for the taking of different forms of disciplinary action against members of the Garda Síochána based on their rank or on any other factor", the phrase "any other factor"* patently including the period of time that has elapsed since once's attestation as a member of An Garda Síochána.

3. Little if any of the foregoing will come as a surprise to P/Garda Murphy. On 30th January 2018, around the time that he became a trainee Garda, P/Garda Murphy signed up, amongst other matters, to the Garda *"Code of Professional Practice"* which provides, amongst other matters (at p.20) that *"Probationer Gardaí are in a unique position as they are attested with Garda powers at the end of Phase 1 of their programme of study. Therefore, they occupy a privileged position in that he or she has full Garda powers while still undergoing training*".

C. Background

4. In the early hours of New Years' Day 2019, P/Garda Murphy, then 20 years of age, so a very young man, came to the attention of fellow Gardaí while 'out on the town'. As a consequence of his interactions with certain of those Gardaí, P/Garda Murphy was later charged with a public order offence and under the Road Traffic Acts. Following on the foregoing, the Garda Commissioner, by notice of 17th December 2019, invoked the Garda Síochána (Admissions and Appointments) Regulations 2013, and advised that he proposed to dispense with P/Garda Murphy's services. The notice, as required by the regulations, afforded P/Garda Murphy 28 days to make submissions as to the Commissioner's proposal.

5. Probationer Garda Murphy contends that there was a fundamental deficiency in how the Garda Commissioner approached the proposed dispensing with his services and has come to court seeking certain reliefs. Out of respect for P/Garda Murphy's privacy the court does not propose to go into more detail concerning the events of New Year's Eve/Day 2018/2019. It is really with the process to which the letter of 17th December 2019 relates that these proceedings are concerned. For the assistance of the parties, the court notes that it accepts as correct the facts as stated in the statement of grounds under the heading *"Facts"* (paragraphs 1-7) (Book of Pleadings, pp.4-6).

6. In his notice of 17th December 2019, the Garda Commissioner states as follows (the square bracketed bold numbers have been inserted by the court):

> *"**[1]** I…hereby give you notice that I propose to dispense with your services as a member of the Garda Síochána.*
>
> ***[2]** Regulation 12(8)(a) of the Garda Síochána (Admissions and Appointments) Regulations 2013 provides that [– it provides for dispensing with the services of a probationer and is considered more fully later below.]*

[3] *Your suitability with regard to your behaviour and/or disciplinary record has been assessed and the following* ***allegations*** *of commission/omission on your part have been brought to my attention:-[the alleged events of the early hours of New Year's Day 2019 are recounted]*

1 …

2 …

3 …

4 …

5 …

6 …The behaviour displayed by you on 1st January 2019 does not represent behaviour that is consistent with that expected of a member of An Garda Síochána. Furthermore, it does not attribute [sic – attest?] to your suitability and ability to serve as an efficient and effective member of An Garda Síochána.

[4] *This is a serious matter and I have to consider and decide whether you are likely to become an efficient and well-conducted member of the Garda Síochána in accordance with Regulation 12(8)….*

[5] *Before doing so, I hereby give you an opportunity in accordance with Regulation 12(9) [considered later below] of the Regulations of advancing to me on or before the 14th of January 2020 (28 days from date of this notification),* ***any submission*** *you wish to make concerning the allegation(s)."*

[Emphasis added]

7. Probationer Garda Murphy maintains that the Commissioner's notice involves findings of fact. The court has read and re-read the notice and does not see that there is any determination of fact in what the Commissioner states. In essence: at **[1],** the Commissioner indicates what he proposes; at **[2],** he recites a statutory provision; at **[3]**, he indicates that someone has brought certain allegations to the Commissioner's attention – although point 6 reads like a determination of fact, it is clearly but one of a series of allegations that have been advised to the Commissioner; at **[4]**, the "This…" referred to is clearly the series of allegations that have been brought to the Commissioner's attention and which he has just recited; and at **[5]**, having put the allegations to P/Garda Murphy, the Commissioner invites submissions ("*any submissions*") concerning the allegations that are recited in the notice. There is no determination of fact presenting.

8. Is the Commissioner's decision to issue a notice under reg.12(9) of the Garda Síochána (Admissions and Appointments) Regulations 2013 a reviewable decision? It is, though

without something more to support a challenge, any judicial review would only go one way. But here there is and was something more. There is, for example, a perceived unfairness presenting in how the Commissioner approached matters, not least in that P/Garda Murphy, in breach of his entitlements as a matter of procedural fairness, was not furnished with the material on which the Commissioner intended to base his eventual decision whether or not to dispense with P/Garda Murphy's services. (His various causes of complaint, as set out by his lawyers in a letter of 8th January 2020 to the Commissioner are identified and considered later below).

9. In the just-mentioned letter of 8th January 2020, the solicitors for P/Garda Murphy write, amongst other matters:

> *"…Noting the seriousness of our…Submissions, we require confirmation prior to the deadline of 14th January, that the Commissioner will not take any further steps in relation to our client's suitability until such time [as] the pending prosecution is dealt* ***with and our client has been provided with all material to be relied upon and afforded the opportunity to make further submissions****…".*
>
> [Emphasis added].

10. In a remarkable turn of events, the Commissioner has argued in the within proceedings that the nature of the submissions made by and for P/Garda Murphy meant that this 14th January deadline was too tight and wholly unreasonable. This line of attack is unsustainable when one has regard to the facts. It was the *Commissioner* who sent the notice of 17th December 2019, it was the *Commissioner* who sought submissions by 14th January 2020, and it was the *Commissioner* who was set to be at large to make a potentially life-altering decision in respect of P/Garda Murphy thereafter. So the timeline and the tightness of the timeline presenting was entirely a matter of the *Commissioner's* creation. And with the Commissioner at large to make the said potentially life-altering decision post-14th January 2020, no wonder P/Garda Murphy and his legal advisors brought a laser-like focus to bear on 14th January 2020 and attached the significance to that date that they did.

11. In any event, the emphasised portion of the last-quoted text identifies an already touched upon flaw that presented in the initial approach adopted by the Commissioner vis-à-vis P/Garda Murphy. That flaw is this. If P/Garda Murphy was to make informed submissions, he needed (and was entitled as a matter of procedural fairness) to see what material was intended to be relied upon by the Commissioner in reaching his decision so that, to put matters simply, P/Garda Murphy could seek to explain away anything 'bad' in that material, highlight anything 'good' in it, and make any such further submissions as might occur to him having had sight of the material (as well, of course, as any other submissions that he was minded to make). But P/Garda Murphy was not provided with the material along with the notice of 17th December 2019. Most remarkably, when this was drawn to the Commissioner's attention in the letter of 8th January 2020, no response was received in reply, no letter, no email, no telephone call, not even a holding response,

nothing. (A reply would eventually be sent in August 2020, long after the within proceedings had been commenced).

12. Among the submissions that were made by P/Garda Murphy's solicitors in their letter of 8th January were the following:

> "**Review under Regulation 12**
>
> *P/P/Garda Murphy has been provided with a letter from the Commissioner dated 17th December 2019 but there does not appear to have been an appointment of an investigator to carry out an investigation under Regulation 12 of the Regulations.*
>
> [Court Note: Such an appointment is not required under reg.12].
>
> *In the absence of this preliminary step, it is not clear whether any of P/P/Garda Murphy's probation has been reviewed and the relevant points, both positive and negative, identified for consideration.*
>
> *We are concerned, having reviewed the documentation, that out client is entirely prejudiced because only the alleged events on one night, namely the 1st January 2019, appear to be documented in this regard….*
>
> **Failure to provide material/evidence**
>
> *Furthermore the only material/evidence which P/P/Garda Murphy has received is the said letter from the Commissioner and a number of letters which appear to have been sent through the usual Garda channels of command. The said letters identify additional documentation in the Garda Commissioner's possession which has not been provided to P/P/Garda Murphy.*
>
> [Court Note: It is not clear from the evidence what letters the solicitors for P/Garda Murphy mean to refer to in this regard.]
>
> *The Private Secretary to the Commissioner writes in a letter dated 17th December 2019:*
>
> > 'I am directed by the Commissioner to refer to your correspondence of 27th November and attached management reports in this matter.'
>
> *Our client was not served with management reports, or indeed any other material upon which the Commissioner purports to base his decision.*
>
> *It is a requirement of fair procedures and natural and constitutional justice that he be provided with a copy of any material upon which the Commissioner intends to rely in making his decision.*

Therefore, we trust that you will provide us with the material and with an appropriate period of time to make the relevant submissions in relation to this material before any decision will be made regarding our client's suitability.

Innocent until proven guilty

The only matters which the Garda Commissioner considers to be relevant to his decision regarding P/P/Garda Murphy's suitability are alleged to have occurred on the 1st January 2019. These events are the subject of a prosecution which is currently before [the]…District Court….

The statements in the letter received…are presented as facts. However, these findings gave been made without having heard from our client or affording him the opportunity to test whatever material the Commissioner relied upon to make these findings. As such…any decision that the Commissioner may make with respect to our client, on the basis of these findings, will be prima facie unconstitutional.

This is not a circumstance in which concluded Court proceedings can be relied upon to establish the conduct. And, in any event, such concluded proceedings could never establish that the conduct the Commissioner asserts has occurred. It appears that the findings were made without due process and in breach of our client's constitutional rights"

[Court Note: This aspect of matters has never properly been addressed by the Commissioner, save to intimate, surprisingly, that the two procedures, criminal and civil, were running on different tracks and did not impact on each other. In truth, the Commissioner (or those around him tasked with getting matters right) appears essentially to have ignored the fact that P/Garda Murphy was at the time of the notice engaged in a criminal process and sought of him that he commit to paper what amounted to the defence that he would raise in those criminal proceedings. A charged person is entitled to maintain the presumption of innocence and *not* to have to put their case on paper. The presumption of innocence is an axiomatic and indispensable aspect of our legal system, not lightly to be treated with or abrogated. It is only through the bringing of these proceedings that P/Garda Murphy managed to halt a process which all but required him to so compromise a presumption that he enjoyed every bit as much as any other accused person. (Hyper-technically, P/Garda Murphy was not 'required' to make any submissions but if he did not make any submissions as to the allegations that the Commissioner posited in his notice of 17th December 2019, then almost certainly he was going to be dismissed). This, it seems to the court, is almost a classic example of a process which, to borrow from the railway-inspired metaphor of Clarke CJ in *McKelvey v. Iarnród Éireann/*Irish Rail [2019] IESC 79, para.4.3 has "*gone off the rails*" in terms of procedural fairness. 'Compromise the presumption of innocence that attaches to you in the criminal proceedings now pending before you or I'll almost certainly dismiss you' is not a procedurally correct approach for the Commissioner to adopt in a reg.12 process.]

Concluding Submissions….

In light of our foregoing submissions and in the absence of the material upon which the Commissioner will rely in making his decision, our client is prejudiced in that he is unable to properly and fully formulate submissions in accordance with Regulation 12(9)….

[W]e require confirmation prior to the deadline of 14th January, that the Commissioner will not take any further steps…until such time [as] the pending prosecution is dealt with and our client has been provided with all material to be relied upon and afforded the opportunity to make further submissions."

13. The court respectfully does not accept the criticism made by counsel for the Commissioner that the submissions made by the lawyers for P/Garda Murphy on 8th January 2020 fall to be criticised on the basis that they pertain to matters legal and that there is no engagement with the facts in issue. It seems to the court that there are at least three flaws in this line of criticism. First and foremost, it sets at nought the just-discussed concerns regarding the apparent disregard of the Commissioner (or at least of those around him tasked with getting matters right) for the presumption of innocence that P/Garda Murphy enjoyed in the criminal proceedings facing him. It is, in truth, quite audacious for the Commissioner to come to court and say in effect 'P/Garda Murphy ought to have addressed more fully the factual aspects of the allegations that I had put to him' when the Commissioner well knows that had P/Garda Murphy done so he might well have compromised the presumption of innocence that attached to him in the criminal proceedings then pending against him. Second, even if the foregoing concern did not present (and it did present) as P/Garda Murphy and his lawyers had not been provided with all the material on which the Commissioner proposed to base his decision they were (wrongly) hamstrung when it came to the comprehensiveness of the response they could make. Third, on a related note, in their letter of 8th January 2020 the solicitors for P/Garda Murphy were quite clearly seeking to ensure that there was a level playing-field in terms of how matters proceeded. That is a perfectly legitimate first step for an employee's legal advisors to take in the circumstances of a proposed dismissal.

14. It really is very strange that given the deficiencies raised by P/Garda Murphy's solicitors as to the documentation received and the possibility of High Court proceedings being commenced, there was no reply to their submissions of 8th January 2020, not even (as one would half-expect given the number of issues raised) a holding reply from a solicitor for the Commissioner. That was, at best, impolite and, at worst, imprudent. Again, the court does not accept the criticism that P/Garda Murphy and his advisors were somehow at fault in this regard, that they were setting a timeline that was just too tight for the Commissioner to meet. As mentioned above, it was the *Commissioner* who sent the notice of 17th December 2019, it was the *Commissioner* who sought submissions by 14th January 2020, and it was the *Commissioner* who would be at large to make a potentially life-altering decision in respect of P/Garda Murphy thereafter. So the timeline and the tightness of the timeline presenting was entirely a matter of the *Commissioner's* creation.

And with the Commissioner at large to make the said potentially life-altering decision post-14th January 2020, no wonder P/Garda Murphy and his legal advisors focused as they did on 14th January 2020 and attached the significance to that date that they did. Yet even after that date had passed, P/Garda Murphy and his legal advisors did not rush to court. Instead, leave to bring these proceedings was sought and granted on 20th January 2020, by which time the 'radio silence' from Garda HQ in terms of any reply to the letter of 8th January was, remarkably, still continuing. Among the orders made by the judge who granted leave were *"that there be a stay on the determination the subject of these proceedings pending the outcome of the proceedings herein"*, an aspect of matters that is returned to later below.

15. Counsel for the Commissioner noted at the hearing that in not responding the Commissioner never actually refused to supply the documentation that the lawyers for P/Garda Murphy sought. That is true so far as it goes. But in fairness to P/Garda Murphy and his lawyers, they are not mind-readers. The Commissioner had set 14th January 2020 as 'D-Day' in terms of P/Garda Murphy getting his submissions in, thereafter it was reasonable for P/Garda Murphy and his advisors to assume that the Commissioner would consider himself at large in terms of making a decision as to whether or not to dispense with the services of P/Garda Murphy, doubtless a transformative event in the life of a young man who clearly wishes to be a Garda. It was the Commissioner who, by sending his notification when he did, created 14th January 2020 as 'D-Day' in terms of getting submissions in, it was the Commissioner and his advisors who allowed the impression to arise that thereafter a decision on dismissal would be made, and it was for the Commissioner and his advisors to reply within the parameters of a timeframe that their actions had created. It is a little rich of the Commissioner to come to court 16 months later and say 'I never said I would not provide the papers'. The obvious answer to that is, 'Well, you never said you *would* provide them either, did you? Frankly, you said nothing at all until August 2020.'

16. As to the submission by counsel for the Commissioner that "*There was nothing to indicate – it is not just that there wasn't a response – there was nothing to indicate that the Commissioner was not amenable to providing the materials*", the court's sense of that is this: if I ask you by letter for something, ask you to let me know your answer by a date which has acquired a significance by virtue of your actions, and hear absolutely nothing by reply, that places me, the requester, in a position where I do not know what to think and where I simply have to take whatever action seems appropriate to protect my interests in the 'radio silence' presenting. To the suggestion (and there did seem to be a suggestion) that in the face of that 'radio silence', P/Garda Murphy and his advisors should have sent yet another letter to the Commissioner, the court would note simply that it is not for P/Garda Murphy and his legal advisors to do the job of the Commissioner and his advisors. It was the Commissioner's actions which had yielded the date of 14th January 2020 as a key date in the process and it beggars belief that the Commissioner would now come to court and say in effect, 'How impossible of you and your advisors to seek that I reply to a letter of 8th January by 14th January', when it was the actions of the Commissioner and his advisors, not P/Garda Murphy, that had turned the 14th

January into a key date, following which the Commissioner might take a decision to dismiss P/Garda Murphy, a potentially life-changing event in his very young life.

17. In the face of all the foregoing the Commissioner maintains that the within proceedings are premature. In this regard the court has been referred to the line of authorities that centre on *Rowland v. An Post* [2017] 1 IR 355. But *Rowland* is a case about the balance of convenience in interlocutory injunction applications. That this is so seems to be borne out by the Chief Justice in *McKelvey v. Iarnród Éireann/Irish Rail* [2019] IESC 79, para.6.12, when he observes that:

> *"[I]t seems to me that the principle identified in Rowland really forms part of the balance of convenience consideration that goes into the overall assessment which is to be made at an interlocutory stage, which in turn leads to the fashioning of a result which runs the least risk of injustice. The regular halting of a disciplinary process because of the possibility that something might have gone wrong (on merely the basis of an arguable case) potentially operates to defeat the orderly conduct of employer/employee relations and thus lead to a material risk of injustice to the relevant employer if an injunction is granted but the claim ultimately fails. However, requiring a process to continue in circumstances where it is almost inevitable that the result will have to be set aside at the end creates a real risk of injustice."*

18. As for *Student AB (A Minor) v. The Board of Management of a Secondary School* [2019] IEHC 255, yes it appears to have been argued by the parties in that case that Rowland applies 'willy-nilly' in respect of judicial review and this contention appears to be accepted at para.12 of the judgment. On the face of things, that is difficult to square with what the Chief Justice states in McKelvey, para.6.12, as quoted above, *viz*. that "*the principle identified in Rowland really forms part of the balance of convenience consideration*" and there is just no "*balance of convenience consideration*" arising in the context of (these) judicial review proceedings. However, any (if any) issue presenting in this regard is here overcome by the fact that even if *AB* is correct and *Rowland*, notwithstanding the thrust of the above-quoted observations of the Chief Justice, has some sort of general application, it cannot apply here. Why? Because *Rowland* is premised on the notion that the steps in a process can be remediated (corrected). But that cannot happen here: the notice was served; submissions were made (and no reply of any form issued until August 2020), with the Commissioner at large after 14th January 2020 to reach a determination, at least until a stay was put on his doing so by order of the leave-granting judge.

19. A lot of sub-Commissioner level preparation went into the issuance by the Commissioner of his notice of 17th December 2019. Thus Chief Superintendent Murray, a member of An Garda Síochána, has averred, amongst other matters, as follows, in an affidavit filed in the course of these proceedings:

> *"4. I say that by letter dated 27th November 2019, Joseph Nugent, Chief Administrative Officer in Garda HQ wrote to the Respondent recommending the Respondent dispense with the services of the Applicant. The said letter attached*

correspondence from the Executive Director of the Human Resources and People Development Section of An Garda Síochána on 7th September 2018 and set out details of the incident on the 1st of January 2019….

5. *I say that by letter dated 22nd November 2019, the Office of the Chief Superintendent, Director of Training and Continuous Professional Development wrote to the Executive Director of Human Resources and People Development in relation to a recommendation to dispense with the services of the Applicant. Enclosed with the said letter were a number of documents comprising a suitability file which contained a number of favourable reports….*

6. *I say that the said letter dated 22 November 2019 recorded the recommendation from Garda management in Kilkenny/Carlow division that the Applicant should be retained as a member of An Garda Síochána, however, the letter also refers to a report of Assistant Commissioner Finn recommending that the Respondent gives serious consideration to dispensing with the services of the Applicant.*

[Paragraphs 7-9 then recite a lengthy list of "*suitability reports*" prepared by various members of An Garda Síochána, as well as certain commentary from supervising Gardaí concerning P/Garda Murphy. The impression of all those who have personal dealings with him appears to be that P/Garda Murphy is a good man with a lot of promise as a Garda who has already put in some good work as a member of An Garda Síochána.]"

20. As already touched upon, a difficulty that presents for the Commissioner is that a large number of matters contained in all of the documentation referenced at paras.7-9 does not feature in, nor was it sent to P/Garda Murphy with, the notice of 17th December 2019. Yet all of this material was relevant to whatever submissions P/Garda Murphy might wish to make. If P/Garda Murphy was to make *informed* submissions, he needed (and was entitled as a matter of procedural fairness) to see that material. 'Make your submissions by reference to what you know and without knowledge of what I might have seen or not seen' is not a process that either accords with any concept of procedural fairness or commends itself to the court.

21. On the first day of the hearing of this application, the court was furnished with an affidavit which brought the court up-to-date on what had happened in this matter. It turned out that there had been a slightly unexpected turn of events. Thus it turns out that on 6th August 2020, a fresh reg.12 notice issued from the Commissioner to P/Garda Murphy in almost the same terms as the notice of 17th December 2019. That notice included the following paragraph:

"The allegations listed above were directed to you previously when I originally proposed to dispense with your services as a member of An Garda Síochána on the 17th day of December 2019. In your submissions, in response to my original proposal, you requested the documentation which I utilised in making my proposal. You also requested an appropriate period of time to make submissions following

receipt of this documentation. I have now decided to issue you with the documents on which my original proposal was based and grant you further time to make submissions in response."

22. In a later part of the letter, the Commissioner gave P/Garda Murphy until 4th September 2020 (28 days from the date of the notification) to respond. Later on the same day, the solicitors for P/Garda Murphy responded, indicating that the issuance of the letter was "*clearly in breach of the Order*" granted at the leave stage of these proceedings. Presumably, this is a reference to the portion of the said order (mentioned previously above) which requires "*that there be a stay on the determination the subject of these proceedings pending the outcome of the proceedings herein*". A later letter from the Chief State Solicitors' Office brought welcome clarity to matters, stating, amongst other matters as follows:

> *"On 8 of January 2020 your client, through your firm, requested that in compliance with 'fair procedures and natural and constitutional justice that he be provided with a copy of any material upon which the Commissioner intends to rely in making his decision. Therefore, we trust that you will provide us with the material and with an appropriate period of time to make the relevant submissions in relation to this material before any decision will be made regarding our client's suitability.'*
>
> *The Commissioner wrote to your client by letter dated 6 August 2020. This was simply an attempt to facilitate your client's request dated 8 January 2020.*
>
> [Court Note: This, with respect, is not credible. If this was all that was at play, then why did the Commissioner not just send the materials, i.e. why did he also issue the fresh reg.12(9) notice and set a fresh date for submissions?]
>
> *The Commissioner, in issuing the said documents, was not acting in breach of the Order of 20 January 2020. He has not yet made a final determination in the matter.*
>
> *For the sake of clarity, there is only one process pursuant to regulation 12(8) of the Garda Síochána (Admissions and Appointments) Regulations 2013 in being. That is the process initiated by our client's letter dated 17 December 2019. To the extent that our client's letter dated 6 August 2020 gave the impression that there is a second process in being this was an error and is withdrawn.*
>
> [Court Note: Probationer Garda Murphy and his advisors could be forgiven for arching an eyebrow at this last sentence. There had been a fresh reg.12(9) notice issued on 6th August 2020. But be that as it may, the CSSO pulls the second notice off the table, saying "*To the extent that our client's letter dated 6 August 2020 gave the impression that there is a second process in being this was an error and is withdrawn".*]

23. It seems notable that the Commissioner was willing to provide the materials that ought to have accompanied the notice of 17th December 2019. Indeed the provision of the said

materials could be argued to involve an implicit acceptance that the provision of such material was appropriate and necessary if P/Garda Murphy was ever to have a chance of making informed submissions pursuant to the notice of 17th December 2019.

24. In passing, the court does not see that the correspondence of 6th August 2020 involved a breach by the Commissioner of the order of made by the leave judge. That judge's order prohibited an actual act of determination*, i.e. "that there be a stay on the determination the subject of these proceedings pending the outcome of the proceedings herein*", not on any process leading thereto. The Garda Commissioner has at no point sought to determine the matter that is the subject of these proceedings; and the CSSO's letter goes on to state that "[T]*he Commissioner will not make a determination in relation to your client until the stay is lifted".*

25. The affidavit lately supplied by the Commissioner also indicated that on or about 29th September 2020, P/Garda Murphy was, regrettably, convicted under s.4(4) of the Road Traffic Act 2010, as amended, following on a full District Court hearing. He was fined €400 and disqualified from driving for a period of three years. His conviction is currently under appeal. So the criminal proceedings dimension of his actions on New Year's Day 2019 has not yet reached a full and final conclusion.

D. Some Applicable Law

26. Some key legislation of relevance to this application is identified below. Some of it has already been touched upon in the preceding pages.

(i) Garda Síochána Act 2005

a. Section 14

27. Section 14 of the Act of 2005 provides as follows:

"(1) The Garda Commissioner may appoint, subject to and in accordance with the regulations, such numbers of persons as he or she sees fit to the ranks of garda, sergeant and inspector in the Garda Síochána.

(2) Notwithstanding anything in this Act or the regulations, the Garda Commissioner may dismiss from the Garda Síochána a member not above the rank of inspector if—

(a) the Commissioner is of the opinion that—

(i) by reason of the member's conduct (which includes any act or omission), his or her continued membership would undermine public confidence in the Garda Síochána, and
(ii) the dismissal of the member is necessary to maintain that confidence,

(b) the member has been informed of the basis for the Commissioner's opinion and has been given an opportunity to respond to the stated basis for that opinion and to advance reasons against the member's dismissal,

(c) the Commissioner has considered any response by the member and any reasons advanced by the member, but the Commissioner remains of his or her opinion, and

(d) the Authority consents to the member's dismissal.

(3) Subsection (2) is not to be taken to limit the power to make or amend Disciplinary Regulations."

28. Though neither side considered this provision in detail, it is the provision from which the Commissioner's power to 'hire and fire' ultimately derives.

b. Section 122

29. Section 122 provides, *inter alia*, as follows:

"(1) The Minister may, after consulting with the Garda Commissioner and the Authority and with the approval of the Government, make regulations for the management of the Garda Síochána, including regulations relating to any or all of the following matters…(f) the training of members".

c. Section 123

30. Section 123 provides, *inter alia*, as follows:

"(1) The Minister may, after consulting with the Garda Commissioner and the Authority and with the approval of the Government, make regulations concerning the maintenance of discipline in the Garda Síochána, including, but not limited to, regulations relating to the matters provided for in subsections (2) to (5)…

(6) The regulations may…provide for the taking of different forms of disciplinary action against members of the Garda Síochána based on their rank or on any other factor [e.g., probationary status*]….*

(8) In this section "disciplinary action" means – (a) dismissal".

31. So, the Minister may make regulations concerning the maintenance of discipline and the combined effect of s.123(6) and (8) is that the form of sanction to be imposed on a member (and a probationer Garda is a member) may differ based on rank or "*any other factor*", *e.g.*, probationary status.

(ii) The Garda Síochána (Discipline) Regulations 2007

32. These Regulations made pursuant to s.123 of the Act of 2005 deal, as their title suggests, with various aspects of disciplinary matters within An Garda Síochána. Thus, Part II deals with lesser breaches of discipline, Part III deals with serious breaches of discipline, and Part IV deals with summary dismissals. It is worth pausing to consider reg.39 of these Regulations. It provides, amongst other matters, as follows:

"(1) Notwithstanding anything in these regulations and without prejudice to section 14(2), the Commissioner may, subject to this regulation, dismiss from the Garda

Síochána any member (not being above the rank of inspector) whom she considers unfit for retention in the Garda Síochána.

(2) The power of dismissal conferred by this regulation shall not be exercised except where –

(a) the Commissioner is not in any doubt as to the material facts and the relevant breach of discipline is of such gravity that the Commissioner has decided that the facts and the breach merit dismissal and that the holding of an inquiry under these regulations could not affect his or her decision in the matter."

33. Why has the court bothered to quote from reg.39. Because counsel for P/Garda Murphy has sought to place no little reliance in this application on the decision of the High Court in *State (Jordan) v. Commissioner of An Garda Síochána* [1987] I.L.R.M. 107. That was a case where a member of An Garda Síochána was summarily dismissed and where his dismissal was upheld as valid by O'Hanlon J., who observed, amongst other matters, as follows:

> *"I am of opinion that special considerations apply in relation to the power of the State to dispense with the services of members of the armed forces, of the Garda Síochána, and of the prison service because it is of vital concern to the community as a whole that the members of these services should be completely trustworthy. For this reason, I take the view that it was permissible to confer on the Commissioner of the Garda Síochána the exceptional powers contained in Reg. 34 of the Discipline Regulations, 1971 [now reg.39 of the Garda Síochána (Discipline) Regulations 2007], but I also accept the contention of counsel for the prosecutor that* ***the scope for making use of these powers must be very limited in character.*** *Presumably, if the Commissioner were to witness a grave breach of discipline committed in his presence he would be justified in dispensing with the holding of an inquiry. Similarly, as was accepted by counsel for the prosecutor, if the member against whom it was proposed to exercise the power of dismissal, admitted that he was guilty of a serious breach of discipline, the Commissioner could lawfully act upon the faith of such admission without resorting to the time-consuming process of the inquiry machinery which is outlined in the regulations."*

[Emphasis Added]

34. Why does O'Hanlon J. note that *"[T]he scope for using these powers [of summary dismissal] must be very limited in character"?* It seems to the court that his reasoning must be viewed as informed by a sense that reg.34 (now reg.39) is an exceptional provision that falls to be exercised in what must be the quite exceptional circumstances where, for example, the Commissioner is *"not in any doubt as to the material facts"* and the relevant breach of discipline is of such gravity that the Commissioner has decided dismissal must follow and (a rare enough conclusion one would have thought) *"that the holding of an inquiry under these regulations could not affect his or her decision in the*

matter." (To take an extreme example, if the Commissioner saw film footage of a member of An Garda Síochána killing an arrestee that would seem a classic case for the invocation of reg.39 against that officer). The end-result of the foregoing is that O'Hanlon J.'s above-quoted observations fall to be viewed as informed by the express provision of regulation and not the establishment of what counsel for the Commissioner referred to as "*freestanding principle".*

35. In passing, going back to the 'is there such a thing as a probationer Garda?' issue addressed at the outset of this judgment, the court notes that reg.48 of the 2007 Regulations (headed "*Breach of discipline at Garda Training College by member on probation*" expressly contemplates that there can be such a creature as a member of An Garda Síochána who is, to borrow from reg.48(1), *"a member…who has not completed the period of probation."*

36. Also in passing, the court notes what it understands to have been a contention that a probationer Garda may elect to insist on the application of Part III to her/him in appropriate circumstances. This proposition is very difficult to reconcile with the Regulations of 2013 (considered below). For example, if the Garda Commissioner had proceeded against P/Garda Murphy under Part III, an investigator would need to be appointed, a report would then issue to the Commissioner, if the Commissioner decided that it was necessary to progress matters further there would be a board of inquiry, followed by a report of that board of inquiry, the Commissioner might suggest a punishment worse than that proposed by the board, and an appeals process could ensue. The length and complexity of that process is very difficult to reconcile with a relatively brief two-year period of probation (subject to extension) following on attestation as a member of An Garda Síochána. This difficulty of reconciliation does not decide the within proceedings but it does point to the contention made by P/Garda Murphy in this regard to be mistaken. After all, the Commissioner has to, and has to be able to, run the Garda Síochána with some semblance of efficiency – and one can take it as writ that the Oireachtas and the Minister intended that the Commissioner should be able to do so.

(iii) Garda Síochána (Admissions and Appointments) Regulations 2013

37. These Regulations are made by the Minister pursuant to various statutory provisions, including s.123 of the Act of 2005. Section 123 (and, more especially, s.126(b)) have been considered previously above.

38. Regulation 12 of these Regulations provides, amongst other matters, that *"(1) Upon the first appointment under these Regulations of a person by the Commissioner to be a member, the member shall hold the rank of Garda and shall be on probation for the probationary period."* The term "*probationary period"* is defined in reg.3 as meaning *"in relation to a member on probation, a period of 2 years from the date on which that person is appointed to be a member* [of An Garda Síochána] *or such longer period as may be directed by the Commissioner in accordance with Regulation 12*". Regulation 3 also defines the term "*probationer"* as meaning *"a member on probation in accordance with Regulation 12".*

39. Key to the within proceedings is reg.12(8)-(10), which provides as follows:

"(8)(a) The Commissioner may, at any time, subject to the provisions of this Regulation, having assessed the suitability of a probationer for retention in the Garda Síochána, dispense with the services of the probationer if he or she considers that – (i) that probationer is not suited, physically or mentally, to performing the functions of a member, or (ii) having regard to one or more of – (I) the performance of that probationer, (II) the behaviour of that probationer, (III) assessments made by that probationer's Superintendent of the matters specified at (I) or (II) or of matters otherwise relating to that probationer's competence to serve as an efficient and effective member, or (IV) the disciplinary record of that probationer has not demonstrated during the probationary period the competence to serve as an efficient and effective member. (b) The Regulations of 2007 shall not affect the application of subparagraph (a).

[Court Note: It seems to the court that the reference to *"an efficient and effective member"* referred to in the above-quoted text refers, amongst other matters, to performance, conduct, and behaviour.]

(9) Where the Commissioner proposes to dispense with the services of a probationer under paragraph (8), (a) the Commissioner shall notify the probationer in writing of the proposal and the reasons for that proposal, and (b) the probationer shall have 28 days from the date of the Commissioner's notification to make submissions to the Commissioner regarding the proposal.

[Court Note: Harking back to the issue of pre-determination contended for by P/Garda Murphy and mentioned previously above, it is perhaps worth noting that the procedure provided for in reg.12(9) expressly provides that "*Where the Commissioner proposes*…", so it is a proposal only, "*to dispose with the services of a probationer…the Commissioner shall notify the probationer in writing of the proposal*", *i.e*. the Commissioner must advance the proposal to the affected probationer, "*and the reasons for that proposal*". The court does not see that when the Commissioner makes such a proposal, in the manner contemplated by law (as occurred here), he has somehow determined matters for the purposes of reg.12(8). That just does not follow. The advancement of a proposal is the prescribed means whereby the dismissal process is commenced so far as interactions with the affected probationer Garda are concerned; and, to this extent, the Commissioner observed the prescribed process in this case. The probationer may thereafter elect to make submissions within a 28-day period, such submissions obviously have to be considered by the Commissioner when received, with a timely decision to follow thereafter.]

(10) Where the Commissioner proposes to dispense with the services of a probationer under paragraph (8), he or she shall, if he or she considers it appropriate and necessary, for the purpose of enabling the probationer to – (a) make submissions to the Commissioner regarding the proposal, or (b) obtain advice, including

professional legal advice in relation to the matter, direct that the probationary period of the probationer be extended for a period not exceeding 28 days, and such period shall be specified in the direction.".

E. Conclusion/Next Steps

40. As indicated above there are a number of objectionable legal flaws presenting in what has occurred, this in a context where submissions were made on 8th January 2020, the Commissioner never bothered to issue any reply of any nature by 14th January and after that date was at large to reach a decision to dismiss (if so minded), the order of the leave judge on 20th January 2020 being all that eventually held him back in this regard. Probationer Garda Murphy was constrained in such submissions as he could make by the presumption of innocence that he enjoyed in the then pending criminal proceedings (now at the appeal stage) and by the failure to provide him with such materials as the Minister proposed to rely upon. From 14th January 2020, he was at risk of an adverse decision against him until the stay order issued from the leave-granting judge, and the Commissioner (or his advisors) did not deign to reply to the letter of 8th January 2020 until the shenanigans of August 2020 (some seven months later) saw the requested documentation issue to P/Garda Murphy when, remarkably a second (now withdrawn) reg.12(9) notice also issued to him. The court cannot see that so tainted a process can now be rescued via reg.12(10) or (11).

41. When it comes to the reliefs sought, the applicant has come seeking as his principal reliefs: (i) an order of certiorari in respect of "*the determination of the respondent to dispense with the applicant's services as a probationary member of An Garda Síochána",* (ii) an injunction preventing or restraining the respondent from dismissing the applicant from An Garda Síochána, (iii) an order of prohibition restraining the respondent from dismissing the applicant from An Garda Síochána, or (iv) such further or other relief as to the court shall seem meet. Relief (i) as sought cannot be granted: there has been no such determination. It is difficult to conceive of circumstances in which a court would so interfere with the internal operation of An Garda Síochána as to grant relief (ii) or (iii) as sought; certainly such circumstances do not present here. And still the flaws in the process under consideration present. So, what is the court to do? Whether as a variant of relief (i) and/or as a form of relief (iv), the court proposes to quash the notice of 17th December 2019 (or, more particularly, the decision to issue that notice at the time and in the circumstances in which it issued). The court is conscious that this proposed relief was not expressly sought, nor was it discussed at the hearing. Thus, the court will schedule a brief further hearing should the parties wish to make any submissions as to the proposed relief. As P/Garda Murphy has won his application he would seem to have a fairly unanswerable case to be awarded his costs; however, if counsel for either side take a different view the court will schedule a brief costs hearing. Counsel might kindly advise the registrar or the court's judicial assistant within 14 days of the date of this judgment how they wish the court to proceed.