THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 574
[Record No. 2020 363 JR]

BETWEEN

ADRIAN IVERS

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Mr. Justice Heslin delivered on the 16th day of July, 2021.

Introduction

1. The applicant is a member of An Garda Síochána. On 21 January 2020, the applicant removed a "Bluetooth" speaker and charging cables from a seized vehicle. The applicant initially brought same into the garda station. A short time later, the applicant left the station and, having locked the garda station, drove away with the speaker. The applicant acknowledges that he connected same to his phone and played music, via the speaker, which the applicant states was at the behest of his daughter who was with him on 21 January 2020. The seized car had been towed away by the time the applicant returned to the garda station.

2. On 23 January 2020 the applicant was informed that he was under investigation for the theft of the speaker, something he denied. The applicant was suspended from duty on 06 February 2020 and remains suspended. A criminal investigation was commenced, as was an investigation by the Garda Síochána Ombudsman Commission ("GSOC"). By letter dated 08 May 2020 the respondent wrote to the applicant stating that the respondent was of the opinion that by reason of the applicant's conduct on 21 January 2020 at the relevant garda station, the applicant's continued membership of An Garda Síochána would undermine public confidence in An Garda Síochána and the applicant's dismissal, pursuant to s.14 of the Garda Síochána Act of 2005, is necessary to maintain that confidence. The said letter set out specific facts including that CCTV footage from 21 January 2020 which shows the applicant getting into the seized vehicle and removing a blue object with wires attached and that CCTV footage shows the applicant leaving the station later with the item in question, following which he got into his own vehicle with the object. The letter stated *inter alia* the respondent's opinion that the applicant's continued membership is untenable given the requirement for the maintenance of public confidence and trust in An Garda Síochána.

3. The letter gave the applicant the opportunity, pursuant to s. 14 (2) (b) of the 2005 Act, to put forward any representations or responses the applicant wished to make, including any reason why the respondent should not dismiss the applicant upon the basis stated in the 08 May 2020 letter. Submissions were delivered on behalf of the applicant, dated 22 May 2020 which, *inter alia*, demanded that the respondent immediately withdraw the notification of 08 May 2020. It was submitted, *inter alia*, that the respondent had pre-determined matters, without having sought any statement or explanation from the applicant and that, by so doing, the respondent had unlawfully prejudiced the matter and

had demonstrated a complete lack of impartiality and fairness. Appended to the applicant's 22 May 2020 submissions was a statement made by the applicant on 12 May 2020. In that statement, the applicant admits that he took the speaker from the seized vehicle but the applicant states that he always intended to return same and, for the purposes of the application before this court, the applicant has averred that the contents of his 12 May 2020 statement are correct. The 22 May 2020 submissions concluded by stating that the applicant's legal representatives required confirmation, on or before close of business on 28 May,2020 that the respondent would not take any further steps in relation to the applicant's position as a member of An Garda Síochána, failing which the protection of the High Court would be sought.

4. On 8 June 2020 the applicant applied, *ex parte*, to this court and obtained leave to apply for judicial review as well as "*a stay on the determination of the subject of these proceedings"* pending the outcome of the proceedings before this court. On behalf of the respondent it is averred that the applicant's 22 May 2020 submissions had not been considered, nor was the matter the subject of any determination by the respondent, when An Garda Síochána received notification of the making of the 8 June 2020 order granting the applicant leave to apply for judicial review and ordering a stay.

The relief sought by the applicant

5. As is clear from the terms of the 08 June 2020 order (Meenan J.) the applicant was given leave to apply for the relief set out in para. (d) of the applicant's statement of grounds, dated 05 June 2020 on the grounds set out at para. (e) of same. The relief sought at para. (d) comprises the following:

> "*(i) An order of certiorari by way of application for judicial review of the determination of the Respondent, that the Applicant's continued membership of An Garda Síochána would undermine public confidence in An Garda Síochána by reason of his conduct, and that it is necessary to dismiss the Applicant to maintain that confidence;*
>
> *(ii) A declaration by way of judicial review that the determination of the Respondent made on the 8 May 2020, was made in breach of the Applicant's constitutional rights to fair procedures, natural justice and/or the presumption of innocence;*
>
> *(iii) An injunction by way of judicial review preventing or restraining the Respondent from dismissing the Applicant from An Garda Síochána;*
>
> *(iv) An order of prohibition by way of judicial review restraining the Respondent from dismissing the Applicant from An Garda Síochána;*
>
> *(v) A stay on the determination the subject of these proceedings, pending the outcome of the proceedings herein;*
>
> *(vi) Such further or other relief as this honourable court shall deem meet;*
>
> *(vii) Costs."*

6. The grounds upon which the foregoing relief is sought are set out at para. (e) of the Statement of Grounds. Paragraph 1 of same, under the heading *"Facts"* states that the applicant has nineteen years' service and an unblemished disciplinary record. It is also stated that the garda with whom the applicant worked was assaulted in August 2018 and was on sick leave since, resulting in the applicant working alone at the relevant garda station during his duty shifts. In para. 2 it is stated that the applicant was the sole garda on duty at the station on 21 January 2020. It is also stated that the applicant collected his daughter from school and brought her to the station where she did her homework while the applicant attempted to watch CCTV on the station laptop as part of an investigation into burglaries. At para. 3 it is stated that at approximately 3.15 pm the applicant received a call from Gda. Conor Rice advising him that a car had been seized, the driver having been arrested for drink driving. It is stated that the applicant declined to come to the scene and stay with the car to await the arrival of a tow truck as he was under pressure to complete his investigative work. At para. 4 it is stated that it was agreed that Gda. Ashling Walsh would drive the car to the station where it would remain until it was towed. It is stated that Gda. Walsh drove the car to the station and told the applicant that the car would not lock and gave him the keys. It is also stated that Gda. Walsh told the applicant she did not know when the tow truck would collect the car. At para. 5 it is stated that the applicant closed up the garda station at approximately 3.45pm as he had to drop his daughter to her grandmother. It is stated that the applicant recognised the car could not be locked and that he checked for property that could be stolen while the car was unattended, noticing a Bluetooth speaker with charging wires. It is stated that the applicant was concerned that it could be stolen and that he took same and returned to the garda station with it in his hand. The applicant locked the door of the station and, with his daughter, got into his own car still carrying the speaker. It is stated that his daughter noticed the speaker, asked the applicant if he would play music during the drive and that the applicant did this using his phone's Bluetooth connection.

7. At para. 6 it is stated that, approximately 30 minutes later, the applicant returned to the garda station having dropped his daughter off and noted that the seized car had been towed, at which point the applicant returned to his investigative and other policing work including a dispatch call to a domestic incident. At para. 7 it is stated that the applicant was under time pressure to collect children from their grandmother's house and to bring them home and that, such was the pressure, the applicant did not enter the domestic incident on the "PULSE" system before finishing duty, doing so the following day while on the first of his four consecutive mandatory rest days. It is also stated that, on arriving home, the applicant noticed that he still had the speaker and wires in his car and that he had forgotten to put it in the garda station. It is stated that the applicant put the speaker in the glove box of his car, intending to inform Gda. Walsh of its location later that evening, but that it slipped the applicant's mind as he was busy with his children. At para. 9 it is stated that, on the morning of 23 January 2020, the applicant cleaned the car and saw the Bluetooth speaker and wires and decided to call Gda. Walsh later that day to inform her of the speaker's location.

8. At para. 10 it is stated that at 2.42pm, the applicant received a call from Inspector Gahan who told the applicant that she wanted to speak to him following his arrival at the relevant station. At para. 11 it is stated that, after the foregoing exchange, the applicant called Gda. Walsh and told her he had taken the speaker and wires and the circumstances in which he did so and it is stated that the applicant asked for the number of the car's owner so that he could return the speaker to him. At para. 12 it is stated that the applicant attended at the station, where he met with Inspector Gahan, Sergeant Colgan and Sergeant Hayes and that Inspector Gahan told the applicant he was being investigated for the theft of the speaker. It is stated that the applicant denied stealing the speaker, saying that he had it in his car and that he had phoned Gda. Walsh a short time previously to organise its return. It is stated that Inspector Gahan stopped the applicant and cautioned him. It is also stated that the applicant accounted for his possession of the speaker, got same and its wires and gave them to Inspector Gahan who told the applicant that she would have to seize his mobile phone as evidence to see if it had connected to the speaker. It is stated that the applicant told her that it had, and that he surrendered his mobile phone.

9. At para. 13 it is stated that the applicant was suspended from duty on 06 February 2020 and remains suspended. At para. 14 it is stated that GSOC opened an investigation into the allegation that the applicant stole the speaker and it is said that this investigation is continuing. At para. 15 it is stated that the applicant cooperated fully with Inspector Gahan and has done so with GSOC. It is also stated that, on 12 May 2020, the applicant made a full voluntary cautioned statement to GSOC. At para. 16 it is stated that the applicant denies that he committed theft or that he acted dishonestly in taking the Bluetooth speaker.

10. After para. 16 there appears a heading entitled *"The Notice of Termination"* and this heading refers to the respondent's letter dated 08 May 2020 which is quoted from and commented upon in paras. 17 to 23, inclusive, in the applicant's Statement of Grounds. Later in this judgment I shall quote, verbatim and in full, the contents of the respondent's 08 May 2020 letter and shall analyse its contents. Paragraph 23 of the statement of grounds confirms that, in the 08 May 2020 letter, the applicant was invited to make representations, by 08 June 2020, following which the respondent would determine whether he was still of the opinion outlined in the notification dated 08 May 2020 and if he would therefore seek the consent of the Policing Authority for the applicant's dismissal.

11. At para. 24, it is stated that the applicant's solicitor made submissions to the respondent, dated 22 May 2020, advising the respondent: that he had made findings without having heard from the applicant; that there was an investigation ongoing; that the applicant maintained his innocence in respect of the allegations; that findings were made without due process and in breach of the applicant's constitutional rights; that the respondent was asked to set out the basis for determining that the conduct he alleges occurred, did in fact occur and to provide the applicant with a copy of the materials relied on to come to the conclusions he had reached; and that the respondent was asked to reply, by 28 May

2020, confirming that he would not take any further steps in the process. At para. 25, it is stated that there has been no response to the 22 May 2020 letter.

12. Immediately below para. 25 appears a heading entitled "*Grounds upon which the Relief at (d) (i) (ii) (iii) & (iv) are sought"* and it is appropriate to quote, verbatim, from para. 26 to 34 of the applicant's statement of grounds dated 05 June 2020, as follows:

"Grounds upon which the relief at (d) (i) (ii) (iii) & (iv) are sought:

26. In purporting to make the determination that he has made, the respondent failed to act in accordance with s. 14 of the Garda Síochána Act, 2005, or the Garda Síochána (Discipline) Regulations, 2007.

27. The determination made by the respondent in the absence of an inquiry was in breach of the Garda Síochána Act, 2005, the Garda Síochána (Discipline) Regulations, 2007 in breach of natural and constitutional justice, and is a determination that cannot properly be made.

28. The failure of the respondent to conduct an inquiry into whether the applicant had engaged in the conduct alleged, with the criminal intention alleged, before making the determination he did, was in breach of the applicant's right to fair procedures and natural justice.

29. In the circumstances, the determination of the Respondent is also in breach of the applicant's presumption of innocence.

30. The failure of the respondent to conduct a proper inquiry into whether the applicant's continued membership of An Garda Síochána would undermine public confidence in that body, before making that determination was in breach of the applicant's right to fair procedures and natural justice.

31. The failure of the respondent to advise the applicant of his concerns, to appraise him of the basis upon which they arose, and to invite his response, before making the determination he made, was in breach of the applicant's constitutional rights to fair procedures and natural justice.

32. The failure of the respondent to provide the applicant and/or his solicitor with the material that he relied upon to establish the applicant had behaved as alleged and that his continuing membership of An Garda Síochána would undermine public confidence, was in breach of the applicant's right to fair procedures and natural justice.

33. In all these circumstances, the respondent failed to comply with the principles of natural and constitutional justice basic fairness of procedures, acted in excess of jurisdiction and otherwise than in accordance with the law.

Grounds upon which the Relief at (d) (v) is sought*:*

34. Arising from the foregoing, it would be unjust to allow the respondent, his servants and agents, to summarily dismiss the applicant pending the outcome of the proceedings herein."

Affidavit of Adrian Ivers sworn 04 June 2020

13. The applicant swore an affidavit on 04 June 2020 averring, at para. 2 thereof, that the contents of the statement of grounds are correct. At para. 3 of his affidavit, the applicant exhibits the respondent's letter dated 08 May 2020 and I will presently refer to the contents of same. At para. 4 of his affidavit, the applicant exhibits a copy of the statement which, he avers, was made voluntarily by the applicant in relation to the GSOC investigation. The applicant also avers that the contents of this statement are correct. During the hearing of the present application, which took place over the course of 18 and 19 May 2021, the contents of the applicant's four-and-a-half-page statement to GSOC were not opened to the court. Senior counsel for the applicant submitted, however, that in circumstances where the applicant has averred that the contents of his statement to GSOC are true, this court is obliged to consider the contents of the applicant's statement as the uncontroverted and definitive account of what, in fact, occurred. In making that submission, it is also pointed out that the respondent did not seek any leave to cross-examine the applicant in respect of any affidavit sworn by him.

14. As regards the foregoing submission made on behalf of the applicant, I think it is important to observe, at this juncture, that this court is not tasked with investigating what occurred between 21 and 23 January 2020. Rather, this court, in the context of an application for judicial review is concerned with issues such as the power exercised, or purportedly exercised, and the process followed, including the fairness of the procedure. That being so, nothing seems to me to turn on the fact that no application was made on behalf of the respondent to cross-examine the applicant. Furthermore, even if the court accepts, as suggested by the applicant's counsel, that, for the purposes of the present application, the applicant's statement made to GSOC on 12 May 2020 represents a wholly uncontroverted account of facts, which the applicant has averred as being true, the foregoing is not, in my view, determinative of any issues which this court has to decide in the context of the relief sought.

Statement of Opposition

15. Before looking closely at the 08 May 2020 letter which, it is fair to say, is at the heart of the present proceedings, it is appropriate to refer to the balance of the pleadings before the court, the next item being the respondent's Statement of Opposition dated 30 October 2020. This pleads that the applicant is not entitled to any of the reliefs sought and the application is described as misconceived having regard to the procedures prescribed in s. 14 of the 2005 Act. It is pleaded that the respondent has not in fact made any "determination" and has made none capable of being challenged by way of judicial review or otherwise. At para. 2, reference is made to s. 14 (2) of the 2005 Act which requires that the respondent inform the applicant of his opinion and the basis for it and to give the applicant an opportunity to respond. It is pleaded that if the respondent Commissioner has considered the response of the member and remains of the opinion, and the Policing Authority consents to the member's dismissal, the Commissioner may dismiss the

member from An Garda Síochána. It is pleaded that no such decision or determination has been made. At para. 5 of the statement of opposition, s. 14 (2) of the 2005 Act is quoted verbatim and, at para. 6, it is pleaded that the respondent has acted in compliance with the provisions of s. 14 (2). It is also pleaded that, at the point of the process where the stay was granted, the respondent had not considered the response by the applicant and the reasons advanced by the applicant under s. 14 (2) (a). It is also pleaded that the respondent had not determined that he remains of the opinion referred to at s. 14 (2) (a) for the purposes of s. 14 (c).

16. Para. 7 of the statement of opposition refers to the 08 May 2020 letter and it is pleaded that the respondent thereby gave notice to the applicant of his opinion and afforded the applicant the opportunity to respond to the stated basis for that opinion and to advance reasons against his dismissal and to do so by 08 June 2020. At para. 8, reference is made to extracts from the 08 May 2020 letter and para. 9 refers to the submissions furnished on behalf of the applicant, on 22 May 2020. Para. 10 pleads that the application is misconceived and premature, there having been no consideration by the respondent of the response of the applicant, of 22 May 2020, under s. 14 (2) (c) of the 2005 Act. At para. 11, it is denied that the respondent has failed to act in accordance with s. 14 of the 2005 Act or of the Garda Síochána (Discipline) Regulations 2007 ("the regulations") and it is pleaded that no breach has been identified by the applicant. Para. 12 takes issue with para. (e) (27) of the applicant's statement of grounds and it is denied that the respondent has made a determination. At para. 13, it is pleaded, by way of response to para. (e) 28 of the statement of grounds, that an enquiry has been carried out by An Garda Síochána in the course of which the applicant made a statement. It is also pleaded that the respondent has not made the alleged or any determination.

17. At this juncture, it does not appear to be in dispute that the statement which was made by the applicant was a statement made to GSOC, in the context of an investigation carried out by it, as opposed to any enquiry carried out by An Garda Síochána. At para. 14 there is a denial that the respondent has acted in breach of natural and constitutional justice or fair procedures. Para. 15 denies that the respondent has acted in excess of jurisdiction or otherwise than in accordance with law. At para. 16, it is pleaded that the communication of the opinion referred to in s. 14 (2) (a) of the 2005 Act by the respondent is neither a determination nor a breach of the applicant's presumption of innocence. At para. 17, it is denied that the applicant is entitled to judicial review in circumstances where the respondent has complied with the procedure set forth in s. 14 of the 2005 Act. It is also pleaded that the applicant is not entitled to assert that the respondent has acted in breach of the applicant's rights or contrary to the principles of natural or constitutional justice where the respondent has acted in conformity with a procedure prescribed by the Oireachtas. At para. 18, it is stated that the respondent does not propose to plead to the narrative version of events set out at s. (e) of the applicant's statement of grounds under the heading *"Facts",* because, given the statutory function, it falls to the respondent to perform under s. 14 of the 2005 Act and because these are not matters relevant to the issues arising in the present application.

18. At para. 19, it is accepted that the applicant's solicitors made submissions to the respondent dated 22 May 2020. The contents of the submissions are not conceded. Reference to the conclusion of the applicant's 22 May 2020 submissions is made and quoted. At para. 20 of the statement of opposition, it is pleaded that the applicant ignored what was stated in the 08 May 2020 notice and imposed what is described as a unilateral and wholly unreasonable deadline of less than a week for the respondent to confirm that it would not take any further steps. What is described as "*This deadline and ultimatum"* is pleaded to reflect an erroneous construction of s. 14 of the 2005 Act and it is pleaded that it further ignores the statement in the respondent's notice, dated 08 May 2020, that he would consider the submissions. The final paragraph in the statement of opposition is para. 21, wherein it is pleaded that the applicant is not entitled to the relief claimed or to any relief.

Affidavit of Supt. Finbarr O'Sullivan

19. On 15 October 2020, an affidavit was sworn on behalf of the respondent by Finbarr O'Sullivan who avers that he is a superintendent in Internal Affairs in An Garda Síochána. As well as verifying the facts contained in the Statement of Opposition, Supt. O'Sullivan avers that, following the incident on 21 January 2020, a criminal investigation into the applicant commenced, relating to the theft of a single speaker and its two charging cables from a seized car at the relevant Garda station. Supt. O'Sullivan goes on to aver, at para. 5, that on 06 February 2020, the applicant was served with a Suspension Order and associated documentation by Insp. Valerie Gahan who was appointed as the applicant's liaison Inspector and true copy of same is exhibited as "FOS 1". As is clear from its terms, the Suspension Order was signed by Chief Supt. John O'Reilly, in accordance with the provisions of s. 31 of the 2005 Act suspending the applicant from duty. The second page states as follows:-

"Garda Adrian Ivers, 28852 G…

The suspension from duty arises as a result of an allegation that you:

- *Did, on the 21st January 2020, take from MPV 08 MH 16613 property which was not your property and that you did not have permission to take.*

- *That you did not store and retain the property that came into your possession, in the course of your duty, on the 21st January 2020 from MPV 08 MH 16613 in accordance with An Garda Síochána, PEMS policy".*

20. During the course of the hearing, the court was informed that the reference to "PEMS" is a reference to a policy as regards dealing with evidence. Supt. O'Sullivan avers, at para. 6, that the applicant remains suspended from duty in accordance with Regulation 7 of the regulations and, at para. 8, reference is made to the respondent's 08 May 2020 notice, a more legible copy of which is exhibited. At para. 8, reference is made to the 22 May 2020 submissions by the applicant's solicitors, which included a copy of the applicant's statement and these are exhibited. The final paragraph of Supt. O'Sullivan's affidavit is para. 9 which comprises the following uncontested averment:-

"The letter of Hughes Murphy of 22 May 2020, and the enclosed submissions had not been considered nor was the matter the subject of any determination by the respondent when An Garda Síochána were notified that the High Court, by its order of 8 June 2020, had granted the applicant leave to apply for judicial review, and ordered that there be a stay on the determination of the subject of these proceedings pending the outcome of the proceedings or until further order".

Supplemental affidavit of Adrian Ivers sworn 16 February 2021

21. On 16 February 2021, the applicant swore a short affidavit in which he averred that on 11 February 2021, the investigating officer from GSOC contacted his solicitor by email to confirm that the DPP had directed no prosecution following the criminal investigation into his alleged conduct and the applicant referred to and exhibited a copy of the relevant email. This comprises an email from Sivan Govinder, investigating officer, GSOC, sent to Ms. Elizabeth Hughes of Hughes Murphy solicitors on 11 February 2021 which states the following: -

"RE: S. 98 investigation of Garda Síochána Act 2005 as Amended,

Complaints made by Mr. Ryan DALY and Ms. Nicola CLERKIN

Your client: Garda Adrian IVERS… – IVA 0001 001.

Dear Ms. Liz Hughes,

I refer to the complaint made by Mr. Ryan Daly and Ms. Nicola Clerkin to the Garda Síochána Ombudsman Commission ("GSOC") designated for investigation in accordance with s. 98 of the Garda Síochána Act 2005, as Amended ("the Act").

As you are aware, following the investigation of this matter a file was referred to the office of the Director of Public Prosecution ("the DPP") on 25th November 2020 to the State Solicitor for Co. Cavan, Mr. Rory Hayden. On 10th February 2021, a direction was received from the office of the Director of Public Prosecutions dated 02nd February 2021 stated that there is to be no prosecution in this matter.

The Garda Ombudsman will now consider whether further investigation of this matter will be undertaken in accordance with s. 101 (5) of the Act. In other words, the Garda Ombudsman will now consider whether a section 9.5 Disciplinary Investigation should commence where there are matters which may be a breach of the Garda discipline regulations. This decision will be notified to your client in due course.

Please update and advise your client Garda Adrian Ivers of this decision received from the office of the DPP.

If you have any queries, please contact the undersigned".

Supplemental affidavit of Adrian Ivers, sworn on 10 March 2021

22. On 10 March 2021, the applicant swore a further supplemental affidavit in which he averred that on 25 February 2020, he was served with notice pursuant to Regulation 24 of the 2007 Regulations, informing him that Insp. Lardner has been appointed to investigate alleged misappropriation of property belonging to a member of the public at the relevant Garda station on 21 January 2020 and he exhibits a copy of the said notice which is dated 25 February 2020. This was signed by Insp. Anne Marie Lardner in her capacity as "*Investigating Officer*" and was also signed, by way of acknowledging receipt of the notice, by the applicant, as the "*Member concerned*". At para. 3 of his supplemental affidavit, the applicant avers that, shortly thereafter, he was informed by his GRA representative that GSOC had taken over the investigation, although he did not receive notice of this in writing. At para. 4, the applicant avers that his solicitor contacted him on 08 March 2021 to say that she had received notification from GSOC that it was "*commencing an investigation pursuant to Section 95".* The applicant goes on to aver that he then brought to her attention the Regulation 24 notice for the first time. He avers that he failed to appreciate the significance of the Regulation 24 notice because he believed at the time that, once GSOC took over the investigation, the Regulation 24 notice no longer applied. The applicant avers that his solicitor advised him the foregoing was significant in the context of the litigation and should be placed before the court.

Affidavit of Inspector Lardner sworn 14 May 2021

23. On 14 May 2021 Inspector Ann Marie Lardner swore an affidavit supplemental to that sworn by Superintendent O'Sullivan on 30 October 2020. At para. 3, Inspector Lardner averred that, on 25 February 2020, she served a Notice of Investigation, pursuant to Regulation 4 of the 2007 Regulations on the applicant, being "Form IA 32", a copy of which is exhibited. This document is one and the same as the document which the applicant exhibited in his second supplemental affidavit, sworn on 10 March 2021. The operative part of the form states:

> *"I am to inform you:*
>
> *(a) that it appears you may be in breach of discipline, as set out at (A) below and*
>
> *(b) that I, have been appointed to investigate the matter.*
>
> *You may seek advice from your representative association and may be accompanied at any interview in respect of the alleged breaches of discipline by an official of that association or by another member of your choice, or by a solicitor or barrister at your own expense.*
>
> *(A) Brief details of the act(s) or conduct alleged:*
>
> *Alleged misappropriation of property belonging to a member of the public at… Garda Station on the 21st January 2020."*

24. At para. 4, Inspector Lardner avers that, when handing the Form IA 32 to the applicant on 25 February 2020, she informed him that the criminal investigation had been taken

over by GSOC and she avers that the applicant agreed to the discipline investigation being placed in abeyance until the criminal investigation was carried out.

25. During the hearing, counsel for the applicant submitted that, in circumstances where a member of An Garda Siochána is obliged to answer questions in the context of a disciplinary investigation and cannot rely on a right to silence, the practice has developed that, where a criminal investigation is ongoing, any disciplinary investigation is put in abeyance, pending the conclusion of the criminal investigation, with any findings of guilt in criminal proceedings being binding in so far as disciplinary proceedings are concerned.

26. At this juncture, it is appropriate to observe, for the purposes of clarity in so far as the chronology of events is concerned, that, as of 25 February 2020, there was an ongoing criminal investigation by GSOC, whereas any disciplinary investigation pursuant to the 2007 regulations had been placed in abeyance, with the applicant's knowledge and consent. As regards the relevant timeline, it was over two months later that the respondent sent the 08 May 2020 notice to the applicant. This was not a notice pursuant to the 2007 Regulations. Rather, it was served pursuant to s. 14 of the 2005 Act.

27. It is uncontroversial to say that nothing in the 2005 Act or in the 2007 Regulations disentitles the respondent from invoking s. 14 in circumstances where a notice of investigation pursuant to Regulation 24 of the 2007 Regulations has been served or where such notice has been served but any discipline investigation on foot of such notice has been placed in abeyance, or for any other reason. Indeed, this is made explicit by the phrase *"Notwithstanding anything in this Act or the regulations, the Garda Commissioner may…"* which appears in s. 14(2) of the 2005 Act.

28. At para. 5 of her 14 May 2021 affidavit, Inspector Lardner refers to the 11 February 2021 email from GSOC to the applicant's solicitor confirming that the DPP had decided not to prosecute, following the criminal investigation into the applicant's alleged conduct. I am entirely satisfied that the decision by the DPP is not determinative of any issue which arises in the case before this court.

29. At para. 6 of her affidavit, Inspector Lardner refers to the averment made by the applicant wherein he confirms that he was served with the notice pursuant to Regulation 24 but did not bring this to the attention of his solicitor until 08 March 2021, after the applicant's solicitors received notification from GSOC. It will be recalled that the relevant notification from GSOC comprised an 11 February 2021 email from Sivan Gavinder, investigating officer, GSOC, to the applicant's solicitors which confirmed *inter alia* that *"the Garda Ombudsman will now consider whether a section 95 disciplinary investigation should commence where there are matters which may be a breach of the Garda discipline regulations*". At para. 4 of the applicant's second supplemental affidavit, he avers that his solicitor contacted him on 08 March 2021 to inform him that GSOC confirmed that it was commencing an investigation pursuant to s. 95 of the Regulations. It is appropriate to observe, for the purposes of the chronology of relevant events, that the decision by the DPP, as communicated by GSOC to the applicant's solicitors and GSOC's decision to commence an investigation pursuant to s. 95 of the Regulations are matters which arose

between 9 and 10 months *after* the respondent invoked s. 14. Furthermore, it is appropriate to say that nothing in the 2005 Act states that the respondent's powers under s. 14 are dependent upon or in any way affected by decisions taken by the DPP or GSOC. At this juncture, it is appropriate to set out s. 14 of the 2005 Act, verbatim and in full, given its fundamental significance to the application before this court:

S. 14 of the Garda Síochána Act, 2005

30. Opposite the words "*Appointment of members to other ranks and summary dismissal of such members",* s. 14 of the 2005 Act provides as follows:

> "14.— (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."

Certain observations regarding s.14 of the 2005 Act

31. A number of things can be said in relation to the foregoing section. It is clear that s. 14 sets out a particular process which includes that the respondent form an "*opinion"* at two different and distinct stages in the process. The *first* arises pursuant to s. 14(2)(a). The *second* opinion is one pursuant to s. 24(2)(c). It is equally clear that the forming of a s. 14(2)(a) opinion initiates a process whereby the respondent is required to do certain things, including to: inform the member of the basis for the Commissioner's s. 14(2)(a) opinion; give the member an opportunity to respond to the stated basis for that opinion; give the member an opportunity to advance reasons against the member's dismissal; consider any responses by the member; consider any reasons advanced by the member. After all the foregoing has been done, the respondent is required to consider matters again and to form an opinion for a second time in light of the process mandated by s.

14(2)(b) and (c). This is where the s. 14(2)(c) opinion arises and it is plainly an opinion which must be formed at a *different* stage in the process and against the backdrop of all information then available to the respondent in the context of the process having been followed. Having regard to the evidence before it, I am satisfied that this court is concerned with what might be called the "first stage" opinion (i.e. an opinion pursuant to s. 14(2)(a)) not what might be described as the "second stage" opinion (pursuant to s. 14(2)(c)).

32. It is uncontroversial to say that the applicant has been informed of the basis for the respondent's opinion. That is clear from the contents of the notice dated 08 May 2020 which I will presently set out. It is equally clear that the respondent has afforded the applicant an opportunity to respond to the stated basis for the respondent's opinion, being, in fact, a "first- stage" opinion. Again, that is clear from the contents of the 08 May 2020 notice. It is also a matter of fact that the applicant's solicitors furnished written submissions dated 22 May 2020 and I will presently refer to those. There is also an uncontroversial averment made on behalf of the respondent to the effect that the said submissions made on behalf of the applicant had not been considered by the respondent by the time the applicant issued an *ex parte* application and obtained a stay. It will be recalled that the statement of grounds is dated 05 June 2020 and the applicant's affidavit verifying the contents of same was sworn on 04 June 2020. It is hardly surprising that the respondent had not considered the applicant's submissions, given that the deadline for the making of submissions, being 08 June 2020, had not yet passed, by the time the applicant sought and obtained leave to bring judicial review proceedings and also obtain a stay, the effect of which was to halt the s. 14 process.

33. It is clear from the plain meaning of the words used in s. 14 (b) that a member of An Garda Síochána is at large as regards how they wish to respond to the stated basis for the Commissioner's s. 14 (2) (a) opinion (i.e. the Commissioner's first-stage opinion). Plainly, the member could decide not to respond. Similarly, the member could decide to respond in writing in any manner they deemed appropriate, referring to any evidence whatsoever, regardless of what form that evidence took. There does not appear to me to be anything in s. 14 (2) (b) which would prevent a member from providing a written response which, in addition to referring to or attaching copies of such evidence as was said by the member to be relevant and was said by the member to undermine the basis for the Commissioner's first-stage opinion, also stated that, in the view of the member, an oral hearing was required for stated reasons. It is entirely uncontroversial to say that such a response is one which the Commissioner would be obliged to consider. In such a scenario, the Commissioner could hardly refuse to facilitate an oral hearing if same was required in the interests of fairness, natural justice principles governing that question. In other words, if the Commissioner, having been requested to facilitate an oral hearing, refused to provide for same, such a refusal could well be of relevance in the context of a challenge to any final decision to dismiss, were, in that hypothetical scenario, the Commissioner to go on to form a second stage opinion as provided for in s. (2) (c) and were the policing authority (the PA) to consent to the dismissal of the member in question.

34. The point I wish to emphasise is a simple one, namely, that it seems clear to me that s. 14 (2) (b) does not circumscribe in any way the manner or content of a response by a relevant member to the stated basis for the opinion formed by the Commissioner. Nor is the section in any way prescriptive as to the response a member can make. Furthermore, a member is not confined, under s. 14, to advancing "*reasons against the member's dismissal"*. That phrase is certainly used, but it is plain from s. 14 (2) (b) that, whereas the foregoing is i*ncluded*, nothing is *excluded* insofar as a member's response is concerned. Thus, it seems to me that s. 14 (b) sets out a process which affords someone in respect of whom a first-stage opinion has been formed, the opportunity to challenge, in any way they see fit, the basis for that first-stage opinion. The section, it seems to me, entitles the member to proffer any and all evidence they wish, including evidence undermining the facts on which the first-stage opinion was based and all evidence proffered to undermine any inferences or conclusions drawn by the Commissioner when forming the first-stage opinion. If a member feels that fairness requires that they have an opportunity to give such evidence orally and to have it tested, there is nothing in s. 14 which expressly precludes the making of such a request which, needless to say, could not validly be refused if natural justice required it.

35. The plain meaning of s. 14 entitles the relevant member to advance any and all reasons against their dismissal and these reasons are not confined in any way to making what might be considered a plea in mitigation or a pure *misericordia* submission. It is equally clear from the wording of s. 14 that it is the respondent's second-stage opinion (namely his or her opinion pursuant to s. 14 (2) (c)), which, if it remains held after the mandatory consideration by the Commissioner of the member's *response* and *reasons*, that is the operative opinion insofar as the power enjoyed by the respondent to dismiss a member (subject, also, to the consent of the PA).

36. At this juncture, it is appropriate to emphasise that no such second-stage opinion has been formed, nor has there even been any consideration by the respondent of the response by the member to the first-stage opinion. The obtaining of a stay by the applicant prevented such a consideration. For this reason, there has been no reply by the respondent to the submissions made by the applicant. It is also fair to say that much is entirely unknown at this point, insofar as the process outlined in s. 14 is concerned. This is because, on any reasonable analysis, these proceedings were instituted and the stay was commenced at a very early stage in the s. 14 procedure. It is now appropriate to look closely at the contents of the 08 May 2020 notice which, as is common case, was issued in the context of s. 14 (2) (a) of the 2005 Act.

<u>08 May 2020 letter by respondent to applicant</u>

37. Given its importance to the proceedings before this court, it is appropriate to set out in full the contents of a letter sent on 08 May 2020 by the respondent to the applicant and to make certain observations in relation to the contents of same. The letter began as follows:

"Re: Consideration by the Garda Commissioner of the position of Garda Adrian M. Ivers, 28852 G, pursuant to Section 14 of the Garda Síochána Act, 2005

I, Jeremy Andrew Harris, Garda Commissioner, am of the opinion that, by reason of your conduct on the 21st January, 2020, at… Garda Station, your continued membership of An Garda Síochána would undermine public confidence in An Garda Síochána, and your dismissal, pursuant to Section 14 of the Garda Síochána Act, 2005 is necessary to maintain that confidence.

Background:

On 21st January, 2002, Garda Ashling Walsh, Cavan Roads Policing Unit, seized a vehicle pursuant to Section 41 of the Road Traffic Act, 1994 from a member of the public whom she had arrested on suspicion of drug driving.

Garda Walsh drove the individual's vehicle to …Garda Station and parked it there. In accordance with protocol Garda Walsh called Anglo Autos to collect the vehicle under the towing contract. Garda Walsh handed the keys of the vehicle to you, which were to be provided to Anglo Autos when they arrived to remove the vehicle from the station and she continued to …Garda Station with the arrested person. The seized vehicle was left at …Garda Station.

The vehicle was collected by Anglo Autos and brought to their yard in Virginia, Co. Cavan. Anglo Autos returned the seized vehicle to the home of the owner on the 22nd January 2020. Subsequently, the owner of the vehicle contacted Anglo Autos and informed them that a speaker and two charging cables were missing from the vehicle. Staff from Anglo Autos contacted Garda Walsh and outlined the phone conversation the owner had with them concerning the missing speaker and charging cables.

CCTV footage from…Garda Station, from the relevant time period was viewed and shows that the only person to go near the vehicle whilst in …Garda Station was you. The footage clearly shows you getting into the car and removing what appears to be a blue object with wires attached. This object is initially brought to the kitchen of …Garda Station by you and then, a short time later, you can be seen on CCTV leaving the station with the item following which you get into your own personal car and leave the environs of… Garda Station with the object you had removed from the seized vehicle."

38. Before setting out the balance of the letter, a number of comments can be made in relation to the foregoing. The very first words in the title of the letter refer to *"Consideration"* by the respondent "*of the position of 'the applicant' pursuant to Section 14"*. Plainly, this letter which is also referred to in this judgment as a notice, does not constitute the setting out of any *final* opinion as to whether the applicant should be dismissed. It is nothing of the sort. It will be recalled that, to invoke the statutory process

laid down in s. 14, the respondent must be of a certain opinion and the wording in the very first paragraph of the 08 May 2020 letter reflects, precisely, the wording in s. 14 (2) (a) (i) and (ii).

39. It is equally clear that the respondent has formed this opinion for the purposes of s. 14 (2) (a) alone. There is nothing in the letter which states, or from which this court could fairly infer, that the respondent has formed an opinion for the purposes of s. 14 (2) (c). In other words, the respondent has formed what I have described in this judgment as a first-stage opinion and there is no evidence whatsoever that the respondent has formed a second-stage opinion.

40. Earlier I looked at the provisions of s. 14 and it will be recalled that s. 14 (2) (b) requires that the member in question "*has been informed of the basis for the Commissioner's opinion*". The first four paragraphs which appear under the heading "*Background*" clearly set out facts which are said by the respondent to be relevant to the first-stage opinion he has formed. Having earlier in this judgment looked at the pleadings, affidavits and exhibits which are before the court in this application, it is fair to say that there is no dispute whatsoever in respect of much, if not all, of the facts which are detailed in the first four paragraphs of the 08 May 2020 letter as regards the relevant background. For example, there does not appear to be any dispute about the following:

- On 21 January 2020 Garda Walsh seized a vehicle from a member of the public;
- Garda Walsh drove that vehicle to the Garda Station and parked it there;
- Garda Walsh called Anglo Autos to collect the vehicle;
- Garda Walsh gave the keys of that vehicle to the applicant;
- The seized vehicle was left at the Garda Station and was collected from there by Anglo Autos and brought to their yard in Virginia;
- Anglo Autos returned the seized vehicle to the owner's home on 22 January 2020;
- The vehicle's owner contacted Anglo Autos and informed them that a speaker and two charging cables were missing;
- Staff from Anglo Autos contacted Garda Walsh regarding the missing speaker and charging cables;
- CCTV footage from the Garda Station shows that the only person to go near the vehicle was the applicant;
- The footage shows the applicant getting into the car and removing what appears to be a blue speaker with wires attached;
- The object is initially brought to the station but a short time later the applicant is seen on CCTV leaving the station with the item;

- The applicant is seen on CCTV getting into his personal car and leaving the environs of the station with the object which the applicant had removed from the seized vehicle.

41. I want to emphasise, in the clearest terms, that to make the point that none of the foregoing facts are in dispute is not for a moment to make to purport to make any finding as regards the applicant's conduct. The applicant made a statement in the context of the GSOC investigation in which he states *inter alia* that "*It was always my intention to return this speaker; I never intended to keep it*". The applicant has also averred, for the purposes of the present proceedings, that the contents of this statement are true. It is no function of this court to determine the underlying matter. I made that statement taking full account of what the applicant has averred, but entirely satisfied that it is neither necessary nor appropriate for this court to make findings in respect of the applicant's conduct.

42. Having made the foregoing clear, I would simply make the very obvious comment that in the 08 May 2020 letter, the respondent has set out, in some detail, facts which are not in dispute but which plainly relate to the basis upon which the respondent has formed an opinion in the context of s. 14 (2) (a) and the respondent has set these out consistent with the applicant's entitlement, enshrined in s. 14 (2) (b), to be informed as to the basis for the respondent's opinion (being a first-stage opinion in the context of a process set out pursuant to s. 14). That is not to say that there are not *other* facts which the applicant may wish to draw to the attention of the respondent. Similarly, there may well be inferences which the applicant says should be drawn from other facts or inferences which the applicant says should not have been drawn from the facts relied upon by the respondent when coming to his first-stage opinion. This is precisely why, *between* the first-stage opinion and the second-stage opinion, s. 14 mandates the process I have referred to in some detail earlier in this judgment, namely, a process in respect of which the applicant is at large as regards challenging inferences, tendering evidence, arguing against a basis for the first-stage opinion and advancing reasons as to why he should not be dismissed. In my view, it is not at all unfair to describe the foregoing process as one which addresses, and is consistent with, natural justice principles, in that it is a process which allows for what could be described as fact-finding *prior* to a fresh consideration by the respondent as to whether, in the respondent's then opinion, the applicant should be dismissed.

43. By way of example, it was submitted during the hearing that one fact missing from the 08 May 2020 notice is that the seized car could not be locked. This court is in no position to know whether or not the car in question could be locked, but it seems to me that the process, as set out in s. 14, is one which provides every opportunity for the applicant to furnish, in the context of his response to the first-stage opinion, evidence including evidence that the seized vehicle could not, in fact, be locked. The plain meaning of the words used in s. 14 make clear that the applicant can do so in the context of making the case, which this court understands to be, that he removed the speaker and wires in question out of fear that they might be stolen from an unlocked vehicle, always intending

to return it. A key point, for present purposes, is that the respondent has not even had the opportunity to consider the applicant's response and has made no final decision, i.e. has formed no second-stage opinion pursuant to s.14. I now return to the text of the 08 May 2021 letter.

44. Having set out certain facts which, in themselves, do not appear to be in dispute at all, the respondent's 08 May 2020 letter, or notice, continued as follows: -

> "When considering if your continued membership of An Garda Síochána would undermine public confidence in the Garda Síochána:
>
> 1. Section 7 of An Garda Síochána Act 2005, as amended, outlines that the function of An Garda Síochána is to provide policing and security services for the State with the objective of: -
>
> (a) Preserving peace and public order;
> (b) Protecting life and property;
> (c) Vindicating the human rights of each individual;
> (d) Protecting the security of the State;
> (e) Preventing crime;
> (f) Bringing criminals to justice, including by detecting and investigating crime; and
> (g) Regulating and controlling road traffic and road safety.
>
> 2. In order to carry out the functions as outlined above, An Garda Síochána must have the confidence of the public which it serves. To gain and maintain that confidence, members of An Garda Síochána are expected to demonstrate the highest level of personal and professional standards of behaviour.
>
> 3. Members of An Garda Síochána are given extraordinary powers and therefore public confidence in members is crucial in a system that rests on the principle of policing by consent. Public confidence in An Garda Síochána depends on members demonstrating the highest level of personal and professional standards of behaviour. The information to which I have knowledge of, in respect of your conduct and behaviour, namely the removal of a speaker and two charging cables from a vehicle that was seized under the provisions of s.41 of the Road Traffic Act 1994 and placing them in your own personal vehicle is not acceptable, and in my opinion, as Garda Commissioner, undermines public confidence in An Garda Síochána.
>
> 4. The rank of garda in An Garda Síochána carries not only significant responsibilities but enormous powers, and members are expected to have personal strength of character to make sound judgments under pressure and in the face of professional, moral and ethical situations.
>
> 5. The behaviour of members when they are not under direct supervision or scrutiny is hugely important. They are expected to ensure that they do not behave in a

manner which may compromise not only themselves but also compromise An Garda Síochána. Your conduct on 21st January, 2020 at …Garda Station, is not that which the public, your colleagues or I expect from a member of An Garda Síochána.

6. Policing is an honourable profession and the public expect members of An Garda Síochána to act with honesty and integrity and adhere to the highest standards of conduct and practice. Honesty and integrity in the conduct of members of An Garda Síochána are fundamental to the proper workings of the criminal justice system. The public should be able to unquestionably accept the honesty and integrity of a member of An Garda Síochána. Your conduct on 21st January, 2020 at …Garda Station would, in my belief, tarnish the reputation of An Garda Síochána and undermine the public's expectation of honesty and integrity.

7. In order to provide a good policing service it is essential that the public and your garda colleagues have trust in you. The information now in my knowledge, in respect of your conduct on 21st January, 2020 at …Garda Station, undermines the trust the public, your colleagues, and I, have in you and, in my opinion, adversely affects public confidence in An Garda Síochána.

8. It was an act of dishonesty to remove a speaker and two charging cables from a vehicle that was seized under the provisions of section 41 of the Road Traffic Act 1994 without the permission of the owner and to take these items into your personal custody in contravention of the PEMS policy. Dishonesty is unacceptable in An Garda Síochána.

9. I consider it wholly inappropriate that a member of An Garda Síochána who has committed such serious misconduct should continue to serve as a member of An Garda Síochána.

Taking all matters into consideration, I am of the opinion that your conduct of 21st January, 2020 at … Garda Station, is incompatible with membership of An Garda Síochána. I am of the opinion that your continued membership is untenable given the requirement for the maintenance of public confidence and trust in An Garda Síochána. The information now in my knowledge is such that I believe it seriously undermines your honesty and integrity and compromises your ability to serve as a member of An Garda Síochána.

Furthermore, I do not believe that you could ever again become a good and efficient member of An Garda Síochána due to a lack of trust that this incident has created. Your continued membership undermines public confidence in An Garda Síochána. Therefore, I am of the opinion that your dismissal is necessary to maintain that confidence."

45. In the foregoing manner, the respondent did a number of things. He confirmed that he had formed an opinion and, employing twice, the wording which appears in ss. (i) and (ii) of s.14(2)(a), the respondent told the applicant what that opinion was. This is plainly a first-stage opinion which is explicitly required of the respondent in the context of

s.14(2)(a) and, as the very title of the letter made clear, it was an opinion conveyed to the respondent in the context of a "*Consideration*" by the respondent of the applicant's position, pursuant to s.14 of the 2005 Act. Furthermore, the letter, or notice, informed the applicant of the basis for the respondent's opinion, consistent with the applicant's rights pursuant to s.14(2)(b).

46. It is not for this Court to prescribe the manner in which the respondent expresses himself. One can conceive of a situation where a letter like this could have been written in more anodyne language. Nothing, however, turns on this, in my view, having regard to the following. Firstly, to trigger the undoubted power conferred on the respondent by s.14, he must be of a certain opinion. The 08 May 2020 notice confirms the fact of that opinion, the nature of it and the basis for it. It does so clearly, but, insofar as statements findings or determinations are contained in the letter, they are made in a very particular context, namely in the context of a first-stage opinion for which, entirely consistent with natural justice principles, the applicant is entitled to know the basis. The basis for the respondent's first-stage opinion is manifest from the letter. That does not, however, mean that the respondent has formed a second-stage opinion, namely an opinion pursuant to s.14(2)(c). The letter says no such thing, nor can it fairly be interpreted as meaning as any such thing. Between the first-stage opinion and the second-stage opinion is a statutorily prescribed process and it is this process which the 08 May 2020 letter references, in explicit terms, from the final paragraph on the third page of same, as follows:-

> *"You are hereby given the opportunity, pursuant to section 14(2)(b) of the Garda Síochána Act 2005, to put forward any representations or responses you wish to make, including any reasons why I should not dismiss you upon the basis stated above.*
>
> *I now invite you to make a response to the foregoing, together with any representations which you wish to make on your behalf, on or before the 8th day of June 2020.*
>
> *Please note that I will consider any response provided by you in advance of arriving at my decision. In the event that no response is received from you by the above stated date, it will be taken that you do not intend to response.*
>
> *I will consider, after that date, whether I am still of the opinion as outlined above and whether I should seek the consent of the Policing Authority for your dismissal from An Garda Síochána. At that stage I will inform you of my decision which will include my rationale".*

47. The fact that the respondent has formed no second-stage opinion is wholly apparent from the foregoing. The process mandated by s.14 simply has not reached anything like that stage. Rather, the applicant is provided with the opportunity, consistent with his rights pursuant to s.14(2)(b), to make any *representations* or *responses* which the applicant wishes to make. Earlier in this judgment, I made some observations in relation to s. 14

of the 2005 Act in light of the plain meaning of the words used in that section. It is also appropriate to observe that nothing in the respondent's letter purports to confine, in any way, the representations or responses which the applicant may wish to make. The respondent does not say, for example, that he will only consider responses in writing. He does not say that he will not consider a response which, for example, challenges any of the facts or statements referred to in his 08 May 2020 letter, or which challenges any inferences drawn, or findings made by the respondent, in the context of what was a first-stage opinion. He does not say that a request for an oral hearing shall not be entertained. In short, the applicant is entirely at large insofar as representations and responses are concerned. It is fair to say that each and every "fact", each and every "finding", each and every "determination" contained in the 08 May 2020 letter can be the subject of whatever challenge, in whatever manner, the applicant wishes.

48. Nor does the letter state that the respondent will only deal with the applicant and will not entertain representations or responses from legal advisers to the applicant. Furthermore, the respondent makes explicit that the applicant's representations or responses can include any reasons why the respondent should not dismiss the applicant upon the basis stated in the 08 May 2020 notice. This makes a number of things explicit. Firstly, that the applicant is not confined, in his representations or responses, to making what might be described as a plea for mercy. On the contrary, nothing is excluded insofar as the applicant's opportunity to respond is concerned. Secondly, the very basis for the first-stage opinion is plainly something the applicant is invited to address in such representations responses or reasons as he may wish to proffer. The opportunity to respond, which is very clearly provided to the applicant in the respondent's 08 May 2020 notice, is entirely consistent with the provisions of s.14(2)(b) and, in my view, consistent with natural justice principles in particular that of *audi alteram partem*.

49. Doubtless, the 08 May 2020 letter was a very difficult read for the applicant, containing, as it does, statements such as *"It was an act of dishonesty to remove a speaker and two charging cables from a vehicle that was seized under the provisions of s.41 of the Road Traffic Act 1994 without the permission of the owner and to take these items into your personal custody in contravention of the PEMS policy. Dishonesty is unacceptable in An Garda Síochána".* Insofar as the foregoing constitutes a "finding" of dishonesty, it is plainly a finding for the purposes of the first-stage opinion formed by the respondent in the context of, and as required by, s.14(2)(a) of the 2005 Act. It is not by any means a final determination of anything. That is perfectly clear when one reads the letter as a whole. In other words, although the respondent set out his opinion in clear language which one might fairly consider to be robust, the opinion was a first-stage opinion only, being one the applicant was afforded the right to challenge by means of any representations, responses or reasons he wished, be that the tendering of new or other facts, or new or other evidence, or challenging inferences drawn from established facts, or any other way the applicant and/or his legal representatives decided to proceed by way of response.

50. Having made the foregoing clear, it could not, in my view, be suggested that the facts and factors relied upon by the respondent did not entitle him to form and to be of the first-stage opinion he expressed in the context of s.14(2)(a). In other words, and without purporting to determine anything insofar as the underlying issue is concerned, it is not disputed that the applicant did, in fact, remove a speaker and two charging cables from a vehicle which had been seized and that the applicant did so without the permission of the owner of that vehicle, taking those items into his personal custody. The applicant avers that he had no intention of holding on to the items and, in submissions on behalf of the applicant at the hearing, it was said that the applicant not only had a right but a duty to take possession of the items. Without, as I say, making any determination of such matters, the point I wish to make is that, regardless of whether the facts and findings relied upon for the respondent's first-stage opinion ultimately stand up to scrutiny, having regard to any responses representations and reasons made by the applicant, it could not fairly be said that the facts detailed in the 08 May 2020 letter, did not entitle the respondent to form the first-stage opinion he formed. Indeed, I take the view that even if the analysis is confined to facts which are not at all in dispute between the parties, those facts formed what could be fairly be said to be a valid basis for the first-stage opinion the respondent came to.

51. Two comments seem necessary to make at this point. Firstly, in saying the foregoing, this Court emphasises again and in the clearest terms that it is not purporting to decide any underlying matter. Secondly, the first-stage opinion formed by respondent pursuant to s.14(2)(a) cannot, in my view, be said to legally infirm on the grounds of irrationality in the sense used by Finlay CJ in *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39 (at 70). In other words, the applicant has not demonstrated that the respondent had before him no relevant material which would support the first-stage opinion he came to. On the contrary, that material which was before the respondent is set out in considerable detail in the 08 May 2020 letter. This is done in the context of what is plainly a first-stage opinion, not the operative or relevant second-stage opinion which would ground a final decision to dismiss.

52. The case made by the applicant appears to me to have, at its core, two related propositions. Firstly, that the respondent has, in fact, formed a second-stage opinion and has done so in breach of fair procedures and natural justice and/or by coming to his first-stage opinion, the respondent has pre-judged matters and there is, it is argued, an inevitability that the respondent will hold a similar opinion at the second-stage and that this court must halt what the applicant submits to be a fatally flawed and irremediably unfair process by way of certiorari.

53. Later in this judgment I will look quite closely at certain relevant legal authorities, but an examination of the facts in this case seems to me to undermine entirely the basis for the applicant's case. Insofar as the s.14 process is concerned, the facts in this case demonstrate, without doubt, that the only step taken by the respondent has been to form a first-stage opinion and, entirely consistent with the applicant's rights, to inform the applicant of the basis for same and to give him the opportunity to respond. Things have

gone no further, with regard to any act on the part of the respondent. He has not yet considered the submissions made by the applicant, via his solicitors, in circumstances where, prior to the expiry of the date for the delivery of a response by the applicant, the latter had obtained a stay from this Court in respect of any further progress of the s.14 process.

54. The fact that the applicant was given until 08 June 2020 to provide a response is made explicit on the fourth and final page of the 08 May 2020 letter. Also explicit is the respondent's commitment to "*consider any response provided by you in advance of arriving at my decision"*. In fact, that consideration has not yet taken place but the commitment that the respondent "*will*" consider the applicant's response is a matter of fact and is entirely consistent with the rights of the applicant and the obligations imposed on the respondent pursuant to s.14. In passing, it is worth observing that, even if a member decided not to furnish any response whatsoever to the Commissioner, it is clear from the terms of s.14(2)(c) that the Commissioner would be required to look afresh at matters and to form, at that stage, his or her opinion, namely a second-stage opinion. It is only if the Commissioner remains, at that point, of the opinion that the member in question should be dismissed (and the Policing Authority consents to such a dismissal) that the respondent's power to dismiss a member can be exercised. The foregoing interpretation of the obligation on the respondent to approach matters afresh in the context of forming a second-stage opinion, by engaging in a consideration of matters for a second time, is reflected in the explicit contents of the final paragraph of the 08 May 2020 letter. It will be recalled that, in the penultimate paragraph, the respondent made clear that he would consider any response provided and that if no response was received by 08 June 2020, it would be taken that the applicant did not intend to respond. Having said that in the penultimate paragraph, the respondent then stated *"I will consider, after that date, whether I am still of the opinion as outlined above and whether I should seek the consent of the Policing Authority for your dismissal…"*. The foregoing makes it crystal-clear that, at a future point, there will be a fresh consideration of matters in the wake of the submission by the applicant of such representations, responses or reasons as the applicant might wish to make, leading to the respondent forming, at that future point and in that, as yet unknown context, an opinion for a second time. That second-stage opinion, to be formed in the future, would be the operative one insofar as a dismissal of the applicant was concerned if at that future point, the respondent then remained of the view, having considered what was then before him, that the applicant's dismissal was warranted pursuant to s.14. In other words, even without any response whatsoever by or on behalf of the applicant, the very terms of the 08 May 2020 letter make perfectly clear that his dismissal was not a "given". A fresh consideration would have to be made.

55. At this juncture, it is appropriate to point out that among the submissions made with great skill and sophistication by senior counsel for the applicant is the submission that the only way facts can be established is by means of a disciplinary process such as provided for in the 2007 Regulations or as a result of a criminal prosecution. That submission seems to me to be entirely undermined by the existence of the process which is clearly set out in s.14 and reflected in the contents of the respondent's 18 May 2020 letter,

namely the process which is required to take place *between* the respondent coming to a first-stage opinion (pursuant to s.14(2)(a)) and revisiting the matter a second time to form a second-stage opinion (pursuant to s.14(2)(c)) *after* the applicant has the opportunity to respond in any way he wishes to the basis for the first-stage opinion, and to advance such evidence as he may wish, in the context of providing any and all representations, responses and reasons, the applicant being entirely at large in that regard, as to what he wishes to challenge, and the manner in which he wishes to challenge it. In my view, s.14 makes explicit provision for a process which includes fact-finding and, crucially, this is required by statute to take place *before* any operative i.e. second-stage opinion can be reached by the respondent such as would form a basis for the dismissal of the applicant. In other words, s. 14 does not prescribe *what* steps might be taken, but the section undoubtedly mandates that steps are taken, consistent with the principle of *audi alteram partem*. The proposition that the respondent could not validly invoke s. 14 of the 2005 Act without first having engaged in a fact–finding exercise pursuant to the 2007 Regulations also seems to me to be a submission which is fatally undermined by the explicit wording in s. 14 (2) which begins: - "*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 . . .*".

56. Having looked closely at the 08 May 2020 notice, it is appropriate to turn next to the submissions which were made on behalf of the respondent, dated 22 May 2020. These comprise exhibit "AI 3" to the applicant's 04 June 2020 affidavit and they begin in the following terms:-

> *"SUBMISSIONS ON BEHALF OF*
>
> *GARDA ADRIAN IVERS, 28852 G, COOTEHILL GARDA STATION*
>
> *Preliminary Objection*
>
> *The commissioner has invoked s. 14 of the Garda Siochána Act 2005 and invited Garda Ivers to make submissions notwithstanding that the commissioner has informed Garda Ivers that he has already formed the opinion that his continued membership in An Garda Síochána would undermine public confidence and that his dismissal is necessary".*

57. The foregoing submission seems to me to ignore, firstly, the requirement on the part of the respondent to form a particular opinion which, if the opinion is held pursuant to s. 14 (2) (a) (i) and (ii), triggers a process with which subsections (2) (b), (c) and (d) go on to detail. The foregoing submission also seems to me to ignore the vital distinction between the first-stage opinion, formed in the context of s. 14 (2) (a), as opposed to the second–stage opinion, in the context of s. 14 (2) (c). Contrary to the foregoing submission made on 22 May 2020, the evidence before this court in no way establishes that the respondent "*has already formed*" an opinion for the purposes of s. 14 (2) (c). Not only does the foregoing submission ignore what the respondent is required to do in the context of invoking s. 14 of the 2005 Act, it is a submission which ignores the statutory rights of the

applicant which are provided for in s. 14 (2) (b) and (c), being rights entirely consistent with the principles of natural and constitutional justice. The evidence before this court establishes that, as a matter of fact, the respondent has not formed any second-stage opinion pursuant to s. 14(2) (c). The 22 May 2020 submission then continues as follows: -

> *"It is submitted that by allowing himself to predetermine the matter, without having sought any statement or explanation from Garda Ivers, the Garda Commissioner has unlawfully prejudged the matter and has demonstrated a complete lack of impartiality and fairness which are required in the exercise of his statutory function.*
>
> *Given the extraordinary powers conferred on the Garda Commissioner by s. 14 it is submitted that the Commissioner is obliged, at the very least, to afford the member concerned the opportunity to provide an account before he allows himself to form the opinion envisaged by s. 14 (2) (a).*
>
> *It is not sufficient to allow Garda Ivers to respond once the Garda Commissioner has already formed the opinion".*

58. The submission that the respondent has allowed himself *"to predetermine the matter"* ignores the fact that no determination whatsoever has been made for the purposes of s. 14 (2) (c). It also ignores what is prescribed by s. 14 (2) and ignores the fact that the respondent plainly did what s. 14 (2) (a) requires and could not be said to have acted irrationally in forming his first–stage opinion in light of the facts and matters detailed in the respondent's 08 May 2020 notice, the undisputed facts alone providing a basis for the first–stage opinion to which the respondent came. To say the foregoing is not, as I am at pains to emphasise, to say that the respondent was "correct" or was "right" in the first–stage opinion he reached, insofar as a merits-based analysis might be concerned. This court cannot engage in such a merits-based analysis. Nor, is it to say that it is an opinion the respondent will hold to in the future, at a much later stage in the process, when everything contemplated by s. 14 (2) (b) and (c) has occurred. It is, however to say that there was a clear and rational basis given by the respondent for the first–stage opinion he came to, as set out in the contents of his 08 May 2020 notice.

59. The submission that the respondent is obliged to request that the applicant provide the respondent with "*an account*" of matters before the respondent can have recourse to s. 14 is a submission which flies in the face of the very wording of s. 14 itself. Insofar as it is suggested on behalf of the applicant that such "*an account*" must be given in the context of a process under the 2007 Regulations, such a submission is also undermined, entirely, by the explicit wording in s. 14 (2) beginning *"Notwithstanding anything in this Act or the Regulations, the Garda Commissioner may . . .".*

60. The submission that it is not sufficient to allow the applicant "*to respond once the Garda Commissioner has already formed the opinion*" ignores two fundamentally important points. Firstly, it ignores the architecture of s. 14 itself, in particular, the provisions of s. 14 (2) (b) and (c). Secondly, it is plain that the reference, in the foregoing submission, to

the respondent having "*already formed the opinion*" is to suggest that the respondent has formed a *final* opinion that the applicant should be dismissed. The respondent has done nothing of the sort. The foregoing submission which refers to "*the opinion*" ignores the fundamentally important point that the process mandated by the Oireachtas, in s. 14, requires that an opinion be formed, not once, but twice. Thus, the reference to "*the opinion*" is wholly misguided. There is a first–stage opinion followed by a response and only after a consideration of such response as is, or is not, made is there a second-stage opinion to be formed. The thrust of the submission made on behalf of the applicant is that the "cart" of the response is being placed before the "horse" of a final opinion to the effect that the applicant be dismissed. This is simply not the case. Based on the evidence before this Court there has been no final opinion formed by the respondent, who, as a matter of fact has yet to consider the applicant's submissions furnished in response to his first-stage opinion. The only operative opinion which could lead to the applicant's dismissal is one to which the respondent must come in the context of requirements laid down by s. 14 (2) (c). That operative, or second–stage, opinion has not yet been formed and, on the evidence before this court and entirely consistent with the provisions of s.14, it is an operative opinion which will post-date, not pre-date, the applicant's response and a consideration of same by the respondent (a consideration which, in fact, has yet to take place).

61. Similar comments apply in relation to the balance of the submission made on 22 May 2020 under the heading "Preliminary objection" which continues in the following terms: -

> *"It is a fundamental requirement of natural and constitutional justice that a person be afforded the opportunity to be heard before any determination be made against him. In this case the Garda Commissioner has made an unlawful determination which puts in immediate jeopardy Garda Ivers' constitutional right to his livelihood and his right to his good name.*
>
> *Either the Garda Commissioner is not acting in accordance with the legislation or the legislation itself is unconstitutional.*
>
> *In the circumstances, the Garda Commissioner has formed his opinion under s. 14(2)(a) unlawfully and in the absence of fair procedures or natural and constitutional justice.*
>
> *We therefore call on the Garda Commissioner to immediately withdraw the correspondence dated the 8th May 2020".*

62. A number of other comments can fairly be made in relation to the foregoing. There is no doubt about the crucially important *audi alteram partem* principle, which is referred to in the foregoing submission. What is ignored, however, is that s. 14 very explicitly affords the applicant the opportunity to be heard before any determination affecting his continued membership of An Garda Síochána is taken. Once again, this comes back to the crucially important distinction between the first–stage and second-stage opinions. It is the respondent's first-stage opinion which triggers the right of the applicant to be informed of

the basis for same and the applicant's right to challenge, wholesale, the first–stage opinion. Furthermore, it is simply factually incorrect for the above submission to suggest that any determination has been made, still less "*an unlawful determination*" which puts *"in immediate jeopardy"* the applicant's rights to his livelihood and good name. In fact, no such determination has in fact been made. A first- stage opinion has been come to by the respondent. That is all. No other determination has been made. Put simply, there is no conceivable way the respondent could lawfully dismiss or purport to dismiss the applicant on the basis of what the applicant's 22 May 2020 submission refers to as a "*determination*". Nor has the respondent made any attempt to rely on what the applicant's submissions characterise as "*an unlawful determination*" (and which is, in reality, merely a first–stage opinion) as a basis for dismissing the applicant. The respondent has done no such thing. Whether the respondent ever will, at some future point, remains entirely unknown, for the simple reason that the process mandated by s. 14 has not yet played out, by reason of the fact that the applicant commenced the present proceedings and obtained a stay which prevented further progress being made.

63. In the foregoing submissions, a binary proposition is advanced, namely, either the respondent is not acting in accordance with the legislation, or the legislation itself is unconstitutional. Those two are not the only options and I say this for the following reason. Firstly, the evidence before this Court demonstrates, beyond doubt, that the respondent is acting in accordance with the provisions of s. 14 of the 2005 Act or, more correctly, had acted wholly in accordance with those provisions until such time as the stay obtained by the applicant prevented the respondent from going further, the next stage being to give consideration to such submissions as the applicant wished to make, being something the respondent explicitly stated that he would do, reflecting, precisely, the rights of the applicant, and the obligations placed on the respondent, having regard to s. 14 (2) (c). As to the second alternative proposed on behalf of the applicant, namely that the legislation itself is unconstitutional, it is appropriate to state at this juncture that the applicant has not challenged the constitutionality of s. 14 of the 2005 Act. It was open to the applicant to do so, but this is not a choice he has made.

64. In my view, there is a third alternative, namely, that the respondent is acting wholly in accordance with s. 14 of an Act which is not unconstitutional. The evidence before this Court, in conjunction with giving effect to the plain meaning in s. 14, entitles me to take the view that this third option characterises what has transpired in the present case. The bald submission that the respondent has formed his opinion pursuant to s. 14 (2) (a) "*unlawfully and in the absence of fair procedures or natural and constitutional justice*" is unsupported by the evidence before this Court. It is not in doubt, however, that, as of 22 May 2020, what amounted to an ultimatum was given to the respondent, namely to withdraw the notice dated 08 May 2020 to which I have referred.

65. It is true to say that s. 14 of the 2005 Act does not provide for what might be called a "pre–invocation" stage. In other words, the Act does not state that, before coming to the opinion which the respondent is required to have, pursuant to s. 14 (2) (a), the respondent Commissioner must first engage in a specific process such as carrying out a

disciplinary investigation or equivalent fact–finding exercise requiring a response from the applicant *prior* to the respondent forming his first–stage opinion. As well as the fact that no such pre-invocation stage is prescribed in s. 14, the reason why this is so appears to me to be obvious. This is because, firstly, the first-stage opinion is not the *operative* opinion, insofar as any decision to dismiss a member is concerned. Fairly considered, it is what might be called a preliminary opinion or a conditional opinion. It is preliminary or conditional for the very obvious reason that it is entirely subject to challenge and a member is entirely at large insofar as making a challenge to that first–stage or preliminary opinion.

66. I do not believe it is an over–simplification to say that the process provided for in s. 14 is essentially one wherein the respondent says to the relevant member: I believe that your dismissal is required, and I have formed that opinion for the following reasons, and I am telling you those reasons, but I am giving you the opportunity to respond in any way you wish, and to furnish any evidence you wish to furnish to undermine either the basis for the view I have come to, including the facts or factors on which it is based, and/or to give me reasons why you should not be dismissed and, as well as giving you a month to provide such response as you wish to make, I am making clear that I will consider the matter again in light of your response and, even if you do not respond, I will consider the matter again before coming to a view on the issue of your dismissal for a second time and in light of everything I am made aware of, by that point. Nor is unfair to say that, in the present proceedings, the applicant seeks to have the court do away with essential elements in the foregoing process, as mandated by s. 14. Rather, the applicant seeks to halt a process at an early stage and well before it has played out to a final outcome, being an outcome as yet unknown.

67. Success on the part of the applicant would mean that the respondent could not consider the applicant's submissions and could *never* do what is required of him, pursuant to s. 14 (2)(c). In other words, the respondent would be prevented from giving appropriate consideration to all matters then before him and going on to reach a second-stage opinion, being the only operative opinion which could form a basis for the applicant's dismissal. Insofar as the aforesaid submissions made on behalf of the applicant on 22 May 2020 suggests that s. 14 either can never be invoked or can only be invoked if the respondent does something which s. 14 is entirely silent about (i.e. first engage in a process pursuant to the 2007 Regulations), I cannot see any valid basis for that submission. No challenge to the constitutionality of s. 14 is made by the applicant. Furthermore, I cannot interpret the respondent's powers, pursuant to s. 14, as being subtracted-from or circumscribed by the existence of any other powers the respondent may enjoy in the 2005 Act or in the 2007 Regulations. Nor can I interpret s. 14 as placing upon the respondent an added obligation, not found in the section itself, to justify his reliance upon s. 14, regardless of whether there are, or are not, criminal and/or other disciplinary proceedings in existence at the point at which the respondent decides to invoke s. 14 in the manner prescribed in s. 14 (2) (a).

68. Having made the foregoing observations, it is appropriate to continue by quoting, *verbatim*, the balance of the 22 May 2020 submission, which appear in the following terms: -

> "***Innocent explanation***
>
> *Strictly without prejudice to the foregoing, this is a case in which Garda Ivers has an entirely innocent explanation of the events which took place on the 21st January, 2020.*
>
> *On the 12th May, 2020, Garda Ivers attended for a voluntary interview after caution at the offices of the Garda Siochána Ombudsman Commission. He provided a full and frank account of the events and he answered all questions which were put to him. All persons present during the interview were impressed by the honesty and sincerity of his entirely innocent account. Garda Ivers' statement is attached hereto at Appendix 1.*
>
> ***Innocent until proven guilty***
>
> *The only matters which the Garda Commissioner considers to be relevant to his decision regarding Garda Ivers' suitability are events of the 21st January, 2020. These events are the subject of a criminal investigation.*
>
> *The statements in the letter received from the Commissioner are presented as facts. However, these findings have 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, we respectfully submit that any decision that the Commissioner may make with respect to our client, on the basis of these findings, will be prima facie unconstitutional.*
>
> *To enable us to advise our client we require the Commissioner to set out precisely his basis for determining that the conduct did in fact occur, and to provide us with the materials relied upon to come to that conclusion. At a most basic requirement of fairness we require to receive all the material that the Commissioner relied upon to form his Opinion.*
>
> ***Concluding Submissions***
>
> *Garda Ivers is an extremely proud member of An Garda Siochána and committed to meeting the high standards which are required of members of the force. He enjoys his work and is an integral part of the community in which he serves. He fully acquitted himself in interview in relation to these events and it is unconscionable that the Garda Commissioner would form his opinions without having heard this account.*
>
> *Noting the seriousness of our foregoing Submissions, we require confirmation on or before close of business on Thursday the 28th May, 2020, that the Commissioner*

will not take any further steps in relation to our client's position as a member of An Garda Siochána failing which we will be left with no choice but to seek the protection of the High Court.

Dated this 22nd May, 2020

Signed: Hughes Murphy Solicitors"

69. With regard to the foregoing submissions, a number of things can fairly be said. As was the applicant's right pursuant to s. 14(b), the submissions made by his solicitor include providing a detailed account of what the applicant contends amounts to an entirely innocent explanation for what took place on 21 January 2020, being a copy of a 12 May 2020 statement made by the applicant to GSOC, the contents of which, the applicant avers in the present proceedings, to be true and accurate. As I have said more than once in this judgment, it is not this court's function to make findings in respect of the applicant's conduct on 21 January 2020 or to make any other findings in respect of the events in question. Far more relevant for present purposes is to note that the invitation proffered by the respondent, on 08 May 2020, was responded to on behalf of the applicant, both by way of a preliminary objection and by means of an engagement with the substance. It needs to be emphasised, however, that the respondent has not had an opportunity to consider what the applicant says in relation to the substance of the matter, for the simple reason that, before the expiry of the date for submissions, the applicant secured a stay preventing the s. 14 process from going further.

70. It seems uncontroversial to say that what the applicant's solicitors describe as being "*a full and frank account*" may well be so and what they describe as an "*innocent explanation*" and an "*entirely innocent account"* may well be accepted as such. I say "*may*" firstly, because it is no function of this court to make that determination and, secondly, because no operative determination has yet been made by the respondent. He has not yet had a chance to do so, by reason of the stay obtained by the applicant who swore an affidavit on 04 June 2020 verifying, as true, the statement of grounds dated 05 June 2020 and, by means of obtaining leave to seek judicial review and obtaining the relevant stay, prevented the respondent from considering the substantive submissions made by way of a response to what was the respondent's first-stage opinion. In other words, the respondent has yet to form any second-stage opinion, but it is beyond doubt that Appendix 1 to the applicant's 22 May 2020 submissions (the 12 May 2020 statement made by the applicant to GSOC) is fundamentally relevant to any future second-stage opinion the respondent forms.

71. Whereas reference is made in the 22 May 2020 submissions to a criminal investigation and to the principle that one is innocent until proven guilty, there is no evidence whatsoever of a breach of that principle on the part of the respondent. Things might be otherwise and the principle that one is innocent until proven guilty might well be of far more relevance if, in an entirely hypothetical scenario, a member insisted, and the respondent agreed, that an oral hearing was required as part of the response which the member wished to make in the context of s. 14(2)(b), but the member objected during

that oral hearing to answering certain questions, arising out of concerns on their part stemming from their right to silence, if, in that entirely hypothetical scenario, the relevant backdrop included "live" criminal proceedings. Later in this judgment, I will return to the principle of innocent until proven guilty but, for present purposes, it is sufficient to make the point that the facts in the present case are wholly unlike the foregoing hypothetical scenario. On the facts in the case before this court, there is no question of any breach of the principle that one is innocent until proven guilty. Furthermore, nothing in the 2005 Act provides that the respondent is not entitled to rely on the provisions of s. 14, whether a criminal investigation is being carried out, or not.

72. As to the submission that the statements in the 08 May 2020 letter "*are presented as facts"*, this is only true insofar as they are presented as facts underpinning the respondent's first-stage opinion. Indeed, the manner in which the said opinion is expressed reflects precisely the very wording found in s. 14(2)(a)(i) and (ii). In other words, the preliminary or first-stage opinion has been come to by the respondent and that opinion, as well as the basis for, it is set out with clarity, triggering a process explicitly provided for in s. 14(2)(b) and (c). In my view the respondent's 08 May 2020 notice is consistent with and complies with the provisions of s.14. The submission that the respondent has made findings without having heard from the applicant or affording him the opportunity to test the material relied upon by the respondent to make findings ignores entirely the process to which I have just referred. It ignores the explicit statutory entitlement on the part of the applicant - entirely consistent with natural and constitutional justice principles - to test, in any way the applicant deems appropriate, the basis for the first-stage opinion to which the respondent came. Nothing in s. 14 or in the 08 May 2020 letter which reflects is provisions, entitles this court to take the view that the applicant could not challenge the evidence upon which the respondent relied in reaching his first-stage opinion or could not challenge any inferences which the applicant maintains should not have been drawn from the evidence which the respondent relied upon in forming his first-stage opinion or, for that matter, that the applicant was in any way prevented from introducing new, or other, evidence.

73. Although a request is made for the respondent to provide the materials he relied upon to form what was his first-stage opinion, it is plain that this request was accompanied by what was, in reality, an ultimatum, namely, that the applicant required confirmation within six days that the respondent "*will not take any further steps",* failing which an application to the High Court would be made. In other words, the request for materials cannot be read as meaning "If you provide us with the materials you relied upon for the opinion you expressed in the 08 May 2020 letter, we have no objection to the s. 14 process continuing". On the contrary, the whole thrust of the 22 May 2020 submissions, entirely apparent from the opening section and the concluding submission, is to demand that the respondent take no further step whatsoever with regard to a process, which the applicant maintained was fundamentally flawed due to what was said to be pre-judgment.

74. There has, in fact, been no refusal whatsoever on the part of the respondent to provide the applicant with the materials relied upon in the context of the first-stage opinion which

the respondent formed pursuant to s. 14(2)(a). Rather, events have overtaken matters and the applicant secured a stay preventing the s. 14 process from going any further. It will be recalled that an explicit and uncontroverted averment is made by Superintendent O'Sullivan at para. 9 of his 30 October 2020 affidavit that the 22 May 2020 submissions on behalf of the applicant "*had not been considered nor was the matter the subject of any determination by the respondent when An Garda Siochána were notified that the High Court, by its order of 8th June, 2020, had granted the applicant leave to apply for judicial review, and ordered that there be a stay on the determination of the subject of these proceedings*…". At this point it seems appropriate to state that this court could not fairly make an assumption that, at a future point when the respondent has an opportunity to consider the 22 May 2020 submissions, the respondent will, at that future point, decide to refuse to provide the applicant with a copy of the materials sought in the context of the first-stage decision reached by the respondent.

75. It also seems appropriate to observe at this point that, despite the comprehensive nature of the 22 May 2020 submission, which plainly address issues of law as well as issues of fact, what the applicant does *not* do is ask for any oral hearing. Nowhere in the submissions is it stated or suggested that the applicant cannot properly respond to what was the first-stage opinion formed by the Commissioner *without* an oral hearing taking place. Plainly, the applicant could have requested an oral hearing, just as the applicant made a request for the materials upon which the respondent's first-stage opinion was based. No such request for an oral hearing was made and, therefore, there is no question of any such request having been refused, leaving aside the practicality that the respondent has not yet had an opportunity (due to the stay obtained by the applicant) to consider the 22 May 2020 submissions at all.

Discussion and decision

76. Before looking at certain relevant authorities which counsel very helpfully directed this court's attention to, the following can be said, having regard to the facts which emerge from the analysis of the pleadings, affidavits, exhibits and s.14 of the 2005 Act:

(1) there is no evidence before this court to support the proposition that the respondent acted other than in compliance with the provisions of s. 14 (including, in particular, s. 14(2)(a) and (b)) up to the point at which the process mandated by s. 14 was halted by means of the stay granted following the *ex parte* application made by the applicant;

(2) the applicant applied for leave to seek judicial review and a stay prior to the expiry of the period afforded to the applicant by the respondent for the making of such response and representations as the applicant wished to make in reply to the 08 May 2020 Notice;

(3) as of the date of the granting of the stay, the respondent had not, in fact, considered the submissions made on behalf of the applicant, by way of a response to the 08 May 2020 Notice;

(4) that being so, there was neither a failure on the part of the respondent to furnish the applicant with materials on foot of which the respondent formed the basis for the opinion set out in the 08 May 2020 letter, nor was there any refusal on the part of the respondent to furnish such materials;

(5) the only opinion to which the respondent has come is a first-stage opinion, as provided for in s. 14(2)(a);

(6) the first-stage opinion pursuant to s. 14(2)(a) is not an operative or determinative opinion for the purposes of grounding a decision to dismiss the applicant;

(7) the respondent has never purported to rely on the first-stage opinion as a basis for a decision to dismiss the applicant;

(8) it was made very clear in the 08 May 2020 letter that, rather than being determinative of anything, the letter was part of the "*Consideration*" by the respondent of the position of the applicant "*pursuant to s. 14*" of the 2005 Act;

(9) the 08 May 2020 letter made explicit that it was open to the applicant to put forward any representations or responses he wished to make and this was not limited to reasons why the applicant should not be dismissed;

(10) it is clear from the terms of the 08 May 2020 letter, which terms are entirely consistent with the process mandated by s. 14, that it was open to the applicant to challenge all or any element of the 08 May 2020 notice, including the evidence on which it was based, the facts set out as a basis for the first-stage opinion, any inferences drawn from facts which provided the basis for the first-stage opinion, or to introduce new evidence and the applicant was at large in relation to the scope and manner of his challenge to the basis for the respondent's first-stage opinion;

(11) the 08 May 2020 Notice was explicit that the applicant was afforded until 08 June 2020 to provide a response together with any representations he wished to make and the respondent stated explicitly *"I will consider any response provided by you in advance of arriving at my decision"* which consideration has not yet taken place;

(12) the 08 May 2020 Notice was also explicit about the fact that, even if the applicant did not provide any response, a further consideration would take place;

(13) that further and future consideration would result in the respondent deciding whether, or not, he remained of his opinion that the applicant should be dismissed, being a fresh consideration of matters and the forming of a second-stage opinion which has not yet occurred;

(14) if, at that future point, the respondent were to remain of the opinion that the applicant should be dismissed, a necessary requirement for any such dismissal is the consent of the Policing Authority pursuant to s. 14(2)(d), no such consent having been given;

(15) the respondent has not, in fact, made any "*determination*" (to use the term employed in the relief sought by the applicant) that the applicant should be dismissed; rather the respondent has come to a first-stage opinion pursuant to s. 14(2)(a), for reasons stated in the 08 May 2020 notice;

(16) had the process been allowed to proceed up to the point at which the respondent confirmed his second-stage opinion pursuant to s. 14(2)(c) and had the respondent remained, at that stage, of the opinion that the applicant's dismissal was necessary, that second-stage opinion could fairly be considered to be a "*determination*" as it would be the operative opinion for the purposes of the dismissal of the applicant, but matters have simply not reached anything like that point;

(17) the stay granted by this court has had the effect of halting a process which was, on any reasonable analysis, at a relatively early stage;

(18) there is no evidence from which this court could conclude that, upon the aforesaid stay being lifted, the respondent shall act unlawfully, be that in breach of the statutory requirements of s. 14, or in breach of any principle of natural or constitutional justice;

(19) there is no evidence before this court from which would entitle it to conclude that the respondent shall refuse any request for the materials which formed the basis for his first-stage opinion;

(20) nor is there any evidence before this court which will allow it to conclude that, insofar as the applicant may, as part of his response, make a request in the future touching on process (e.g. a request for additional time to make a further submission, or a request for an oral hearing, or a request to view CCTV footage, or any other request) that the respondent shall refuse any reasonable request to which a positive response is required in the interests of natural justice;

(21) the fact that the respondent has reached a first-stage opinion, entirely consistent with the provisions of s. 14(2), does not entitle this court to conclude that the respondent has pre-judged what may, at a future point, constitute his second-stage opinion, there being no evidence whatsoever of bias or *animus* on the part of the respondent towards the applicant;

(22) insofar as the applicant's 22 May 2020 submissions contained a request that the respondent provide the materials relied upon for his first-stage opinion, this request for materials was inextricably bound up with an ultimatum to the effect that the applicant required the respondent to withdraw, entirely, the s. 14(2) notice dated 08 May 2020 or else proceedings would issue, and the applicant followed-through on that ultimatum, thereby arresting the process provided for in s. 14 long before any determination was or could be made, namely, the second-stage opinion which has yet to be made;

(23) the present proceedings seek to halt, entirely, the s. 14 process at an early stage in that process with no evidence before this court to the effect that the applicant has suffered unfairness or has been prejudiced up to the point at which he obtained a stay preventing the process from going further;

(24) in my view, and for the reasons detailed in this judgment, the present application can fairly be characterised as premature.

Relevant legal authorities

77. Among the authorities which counsel for the respective parties very helpfully drew to this court's attention, a useful starting point is the Supreme Court's decision in *Rowland v An Pos*t [2017] IESC 20. In *Rowland,* the plaintiff/appellant was employed by the defendant/respondent as a sub-postmaster. Issues arose and the defendant instigated a process against the plaintiff which the latter asserted to be unfair and in breach of his contractual rights. Proceedings were commenced and the plaintiff sought and obtained interim and interlocutory injunctions. A plenary hearing took place before the High Court and the plaintiff's claim was dismissed. Mr. Rowland appealed to the Supreme Court. It is clear from the judgment delivered on 27 March 2017 by Clarke J. (as he then was) that the Supreme Court was concerned with the correctness of the High Court's decision concerning the process in question, which was "mid-stream" when the plaintiff obtained injunctions. It is also of relevance to note that the process itself continued to a conclusion, as a result of which the plaintiff's position as sub-postmaster was terminated and a second set of proceedings were commenced in the High Court in which Mr. Rowland asserted that his termination was unlawful. At para. 1.4, Clarke J. (as he then was) considered the proper approach for the Supreme Court to adopt in the context of the background facts, stating: "*Clearly there could be no basis on which the Court could now grant the injunction sought for the very process which was sought to be restrained has now been completed. Against that background Counsel for Mr. Rowland suggested that, if the Court were persuaded that the trial judge was wrong in his conclusions, it would be open to the Court to make an appropriate form of declaratory order which might, potentially, have an effect on the second proceedings."*

78. It is clear from the Supreme Court's judgment in *Rowland* that it was not concerned with simply the grant or refusal of injunctive relief. Rather, it constituted an appeal against a High Court decision which had been made as a result of a plenary hearing. It is equally clear that, by the time the Supreme Court gave its decision in *Rowland*, the process to which the plaintiff had objected had run its course and he was, by that stage, dismissed. Before looking further at the *Rowland* decision, I think it can fairly be said that the history in that case illustrates why, as a general rule, courts are very understandably reluctant to intervene mid-stream in a process, as opposed to looking at the process once it has concluded. It is useful to quote further from the Rowland decision beginning with para. 2, as follows:

"2.2 It must… first be noted that the proceedings were commenced and progressed to trial at a time where the process, however it might be characterised, was still in train. It must, of course, be recalled that, just after the proceedings were

commenced, interim and interlocutory orders were put in place which prevented the process going any further pending trial.

2.3 Those facts raise the question of the standard by reference to which a court should intervene, whether by injunction, declaration or any other means in a process having a disciplinary or similar character, which is still ongoing. The trial judge placed some reliance in that regard to my decision in the High Court in Becker v The Board of Management of St. Dominic's & ors [2006] IEHC 130 …"

79. It is plain that an application for judicial review comes within the phrase "*any other means*", as employed in para. 2.3 above. Thus, it seems to me that the Supreme Court's decision in *Rowland* is of fundamental relevance insofar as it addresses the standard which a court should apply in the context of a decision to intervene in a process which is still ongoing, as in the case before this court. The judgment in *Rowland* continued as follows, from para. 2.4 onwards:

"2.4 … it seems to me that the underlying principle behind Becker is equally true in the context of a full hearing of an application designed to prevent any ongoing process from continuing. In many cases the proper approach of a court when called on to consider the validity of a disciplinary-like process is to look at the entirety of the procedure and determine whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of constitutional justice. Many errors of procedure can be corrected by appropriate measures being taken before the process comes to an end. Decision makers in such a process have a significant margin of appreciation as to how the process is to be conducted (subject to any specific rules applying by reason of the contractual or legal terms governing the process concerned). Thus the exact point at which parties may become entitled to exercise rights such as the entitlement to know in sufficient detail the case against them, the entitlement in appropriate cases to challenge the credibility of evidence and the right to make submissions are, at least to a material extent, matters of detail to be decided by the decision maker in question provided that the procedures adopted do not, to an impermissible extent, impair the effectiveness of the exercise of the rights concerned."

In light of the foregoing statements in *Rowland*, it is appropriate to make the obvious point that the application before this court is one designed to prevent an ongoing process from continuing, no ultimate conclusion having been reached. It is also fair to say that a careful analysis of the evidence before this court does not demonstrate that any errors of procedure have occurred, still less any errors which cannot be corrected before the process comes to an end. It also seems appropriate to point out that it is a matter of fact that the applicant has been told in detail the case against him and has been afforded the opportunity to challenge the credibility of the evidence which formed the basis for the first stage-opinion reached by the respondent. Nor is there any evidence which would entitle the court to conclude that any procedures adopted, or intended to be adopted, impair the

effectiveness of the exercise of the applicant's rights or run contrary either to the statutory process mandated by s. 14 or the principles of natural and constitutional justice.

80. The Supreme Court's judgment in *Rowland* continued in the following terms, from para. 2.5 onwards:

> *"2.5 Precisely because procedural problems can be corrected and because there may well be a significant margin of appreciation as to the precise procedures to be followed it will, in a great many cases, be premature for a court to reach any conclusion on the process until it has concluded."*

81. The evidence before this court does not disclose the existence of any "*procedural problems"*, still less any such problems which cannot "*be corrected*". The fact that the applicant has not yet received the materials upon which the respondent based his first-stage opinion is explained by the fact that, before the respondent had an opportunity to review the submissions which, *inter alia,* requested such materials (but also issued an ultimatum that the respondent abandon the entire process) the applicant instituted the present proceedings and secured a stay.

82. I also think it is fair to say that, as things stand, it is unclear what precise procedures may yet be followed before the s.14 process has entirely concluded. I say this for two reasons. Firstly, it remains to be seen what, if any, requests the applicant may make, be that to view CCTV footage, or to have an oral hearing, or to call a witness, or witnesses, in support of his version of events, or to extend time for the making of further written submissions after any request has been made and dealt with, the foregoing simply being examples of what conceivably might constitute requests (without purporting either to give an exhaustive list of examples or to offer any view as to what any response(s) to any such request(s) might be). Secondly, it seems to me that the wording in s. 14, which explicitly gives the applicant the opportunity *"to respond"* and *"to advance reasons"* and obliges the Commissioner to consider "*any response"* as well as "*any reasons advanced by*" the applicant, is widely drafted enough to encompass a potentially wide range of procedures which could be followed.

83. It seems to me that, although the drafting of s. 14 reflects the principles of natural justice, in particular the *audi alteram partem* principle, it is not prescriptive in relation to what specific procedures shall apply in any given case. The foregoing does not at all give rise to a presumption of unfairness in my view. Rather it seems to me that it gives sufficient latitude, in any given case, for a procedures to be tailor-made to reflect the requirements of fair procedures and natural justice, against the backdrop of the specific facts and issues in the case in question. There is no doubt whatsoever as to the fact that the relevant process mandated by s. 14 has not concluded, insofar as the case before this court is concerned. No second-stage opinion and, therefore, no operative determination has yet been reached. That being so, I fail to see how this court can fairly reach any conclusion on a s. 14 process which is at a relatively early stage and has plainly not yet run its course to any conclusion.

84. Returning to the Supreme Court's decision in *Rowland*, para. 2.6 appears in the following terms:

> *"2.6 However, the practical consideration which leans against a court interfering with an ongoing process may point in the opposite direction in a limited number of cases where the conduct of the process, up to the point when the Court is asked to review it, is such that it is clear that the process has gone irremediably wrong. In such a case, rather than the practicalities pointing to letting the process come to its natural conclusion and, if necessary, being reviewed by a court thereafter, those same practicalities point to stopping the process and thus saving all concerned from engaging in what must necessarily turn out to be the fruitless exercise of continuing a process whose conclusions if adverse are almost certain to be quashed.*
>
> *2.7 However, in order for that latter consideration to become the dominant factor in the Court's assessment, it follows that the Court must be satisfied that it is clear that the process has gone wrong, that there is nothing that can be done to rectify it and that it follows that it is more or less inevitable that any adverse conclusion reached at the end of the process would be bound to be unsustainable in law. In any case where the plaintiff cannot establish that the case meets that standard it will ordinarily be inappropriate for the Court to intervene at that stage but rather the process should be allowed to continue to its natural conclusion at which stage it can, if any party wishes it, be reviewed."*

85. In the manner explained in this decision, I am very firmly of the view that it would be premature for this court to reach any conclusion on the process in the case before this court. If this court poses the question *"Is it clear that the instant process has gone irredeemably wrong?*", the answer in my view is undoubtedly "*No, that is not at all clear".* If this court asks: "*Having regard to the process to date, will the conclusion necessarily be infirm and/or is the conclusion of the process almost certain to be quashed?",* the answer is also in the *negative*. In the manner explained in this judgment, the applicant has not demonstrated that the process has gone wrong, nor has he demonstrated that, to the extent the process has gone wrong, there is nothing that can be done to rectify this. In the present case, I am entirely satisfied that the appropriate approach for this court is not to intervene at this early stage, but to allow the process to continue to a natural conclusion, conscious that, at that future point, a review can take place if such a review is called for. I am fortified in that view by what the Supreme Court stated at para. 2.8 in *Rowland* as follows:

> *"2.8 But in the light of one of the issues which arose on this appeal, it is important to emphasise that a finding by a court, invited to intervene in an ongoing process, to the effect that it is premature to find the process defective on the basis of the sort of considerations which I have sought to identify, necessarily means that such a finding cannot prevent some or all of the points then sought to be raised from forming part of the proper assessment of a court invited to review the ultimate conclusion reached at the end of the process.*

2.9 To take a simple example which arises in the context of one of the issues which it will be necessary to address in this case, the fact that a court may conclude that it is premature to determine that a procedure has gone irrevocably wrong because cross-examination of a particular witness was not allowed at a particular stage cannot be held to mean that a denial of cross-examination at all stages might not, in the circumstances of a particular case, render an ultimate adverse conclusion unsustainable. Indeed, there might even remain an argument, which it would be possible to pursue at the end of the day, that a delay in allowing cross-examination beyond a particular point rendered the process ultimately unfair to the extent that its conclusion should be quashed. Under the test which I propose the Court should only intervene in an ongoing process where it is ***clear*** *that the process has gone irretrievably wrong. The fact that a court may not be so satisfied does not mean that a court reviewing an ultimate adverse decision made at the end of the process must necessarily disregard the points raised. Such points may not be sufficiently clear, at the stage of a challenge which is found to be premature, to justify intervention. But they, either alone or taken in conjunction with the remainder of the process, may nonetheless be sufficient to persuade a court at the end of the day that the ultimate decision cannot be sustained."*

86. It is clear from the foregoing that where, as in the present case, the applicant has not established that it is *clear* that the process has gone irretrievably wrong, the court should not intervene in an ongoing process and the case before this court undoubtedly involves an ongoing process which is at an early stage. As *Rowland* indicates, arguments can be deployed afresh in the event of, for example, a legal challenge to the ultimate conclusion reached at the end of the process. That, however, is for the end of the process, not a basis for halting it mid-stream. Later in *Rowland*, Clarke J. (as he then was) made a number of statements in reference to the specific facts in the case before the Supreme Court but which are of obvious relevance to the position this court is faced with:

"5.3 It is true that, at earlier stages of the process, An Post had set out its initial queries in quite robust terms and had demanded replies without giving Mr. Rowland either access to the data in question or the right to cross examine. However, it does not appear to me to be "clear" that the process could be said to have gone irremediably wrong simply by An Post adopting that initial position. A contract of employment or a long term contract such as that with which the Court is concerned in this case will almost inevitably involve a level of confidence and trust. In the context of such a contract it is not appropriate for a party to whom queries relevant to the performance of the contract are addressed to adopt a position which might be characterised as typical of Bart Simpson and demand proof. Rather it is appropriate to address the issues raised as best they can.

5.4 In addressing the issues raised it may well be that a party could legitimately qualify certain answers by reference to a lack of access to sufficient information. But to refuse to answer questions at all is not, in my view, appropriate, at least as a general proposition."

87. Similarly, in the present case, the first-stage opinion to which the respondent came was communicated by means of the 08 May 2020 letter or notice in what might well be called "*robust terms*". There was no question, however, of replies being "*demanded",* without the opportunity for the applicant to access such information as he wished or, should he so wish, to seek to cross-examine anyone. The foregoing did not arise.

88. Section 14 and the 08 May 2020 letter, the terms of which are entirely consistent with s. 14(2)(b), makes clear that the applicant has the right to respond in any way he deems fit. I cannot interpret s. 14(2)(b) or the respondent's 08 May 2020 letter as meaning that the applicant was prevented from either requesting any relevant information or documentation he felt he needed in the context of a reply, or that the applicant was prevented from putting questions to any witness said to be relevant, had the applicant wished to do so. It is appropriate to observe that the applicant did not seek the latter, prior to obtaining a stay in the context of commencing the present proceedings. As to the former, the applicant's request for material was bound up with an ultimatum that the entire process be abandoned, and there is simply no question of the respondent having refused the applicant access to any materials. This court simply cannot interpret the terms of the 08 May 2020 letter as evidencing unfairness, still less the type of unfairness referred to by the Supreme Court in *Rowland* which would entitle this court to take the view that it is clear that the process has gone irredeemably wrong.

89. The Supreme Court's decision in *Rowland* was applied in this court's 17 April 2019 decision in *Student A.B. (a Minor) v The Board of Management of a Secondary School* [2019] IEHC 255, being a decision of Mr. Justice Simons. By means of judicial review proceedings, the student in question sought to challenge the manner in which a particular secondary school was carrying out a disciplinary process in respect of one of its students. The disciplinary process had been invoked in circumstances where allegations had been made that the student in question was in possession of cannabis on school premises and had supplied same to another student. There was an admission that the student had personally used cannabis, but a steadfast refusal that the student was in possession of the drug on school premises or that he was involved in the supply of the drug. The dispute in the judicial review proceedings centred on whether the school Principal carried out their functions in breach of the requirements of the relevant code of behaviour, in circumstances where the first two steps in the relevant process involved the carrying out of a "*detailed investigation"* under the direction of the Principal and the making of a recommendation to the Board of Management by the Principal. It was submitted on behalf of the applicant that the Principal was not entitled to make what he characterised as "*findings of fact*" and the applicant submitted that the making of a finding of fact was reserved exclusively to the Board of Management. It was submitted on behalf of the applicant that, by purporting to make findings of fact, the school Principal contaminated the decision-making process. At this juncture I would pause to observe that, in the present case, a key contention made by the applicant is that the respondent has made findings of fact in the 08 May 2020 letter which, it is argued, contaminates the decision-making process in that it is alleged to amount to pre-judgment. It is appropriate to quote

as follows from para. 69 onwards of the judgment of Simons J., wherein he explicitly references and relies upon the principles derived from *Rowland:*

> *"69. The judgment in Rowland is especially apposite to the circumstances of the present case. One of the curiosities of this case is that the Student has failed to articulate what precisely it is that he says that fair procedures require. Counsel on behalf of the Student sought to deflect this by suggesting that it was a matter for the Board of Management to put forward proposals for the procedure to be adopted.*
>
> *70. With respect, I do not think that this is correct. The onus of proof lies with an applicant in judicial review proceedings. If an applicant wishes to allege that a procedure is unfair, then he or she must identify the nature of the deficiency in the procedure complained of, and indicate what the minimum requirements to ensure fair procedures would involve. There is also an expectation that an applicant will seek to engage with the decision-maker before having resort to the courts."*

90. It is fair to say that, in the present case, the applicant has not identified, with anything like precision, what he says that fair procedures require. It will be recalled that, under the heading "*Preliminary Objection",* the applicant's solicitors, on 22 May 2020, submitted that the entire process should be halted and called upon the respondent to immediately withdraw the 08 May 2020 Notice. I have already looked in detail at the wording of this preliminary objection and it is not necessary to repeat that analysis here. It is, however, fair to say that the preliminary objection makes very broad or general assertions, namely that the respondent, by forming what was his first-stage opinion, had pre-determined the entire matter. This submission, of course, ignores the architecture in s. 14 which provides for a process which must take place *between* the first-stage opinion and the second-stage opinion. Another of the preliminary objections was the claim that the respondent must afford the applicant the opportunity to provide an account before the respondent allowed himself to form an opinion pursuant to s. 14(2)(a). This ignores the fundamental fact that such an opinion is merely a first-stage or preliminary opinion, the basis for which the applicant must be informed of, pursuant to s. 14(2)(b), in the context of giving the applicant the opportunity to respond to the stated basis for same. The applicant was undoubtedly informed of and afforded the opportunity to challenge the basis for the first-stage opinion. The preliminary objection also claimed that the respondent had made an unlawful "*determination*" putting the applicant's right to his livelihood and good name immediately in jeopardy. This is simply not so and ignores the distinction between the first-stage and the second-stage opinion. Only the latter could fairly be called a "*determination*" in the sense that the second-stage (but not the first-stage) would be the operative opinion, were the respondent to remain of the view, at that future point, that the applicant's dismissal was justified in light of the other provisions in s. 14. The foregoing is the essence of what the applicant said to the respondent and he says no more than that insofar as what he claims is required in order to constitute fair procedures. At no stage did the applicant, for example, set out a list of steps which, in the applicant's view, should be taken in order to ensure fairness if, to quote a phrase

which will later emerge from certain authorities, the applicant was of the view that the process had gone "*off the rails*".

91. In other words, to the extent that the applicant took the view that he had been treated unfairly in what was, on any analysis, an ongoing process, the applicant did not set out what steps he believed the respondent should take in order to address his concerns and to rehabilitate the process, insofar as the applicant was concerned, from the perspective of fairness and natural justice. The only specific thing raised by the applicant was to call for the materials relied upon by the respondent, upon which he based the opinion detailed in his 08 May 2020 letter. Two comments arise. Firstly, and in the manner explained in this judgment, this was, in fact, a first-stage opinion only. Secondly, the request for materials was inextricably bound up with an ultimatum that the respondent immediately withdraw the 08 May 2020 notice and, in the manner explained in this judgment more than once already, leave and a stay were successfully applied for *before* the respondent had the opportunity to consider the applicant's submissions which included the request for the aforesaid material and there has, in fact, been no refusal on the part of the respondent to provide such materials.

92. Taking on board the foregoing facts in conjunction with the final sentence in para. 70 of the decision of Simons J. in *Student A.B.*, it is plain that the applicant opted to resort to the courts, rather than to seek to engage with the decision maker. By using the term decision-maker I do not suggest for a moment that any final decision has been made in the present case. Plainly, it has not. No final or operative decision or determination has, in fact, been made by the respondent which puts the applicant at hazard. The respondent has simply gone as far as, but no further than, forming a first-stage opinion, telling the applicant what that opinion is, and the basis for it, and inviting such response as the applicant may wish to proffer, emphasising that the respondent shall consider (something that has not yet taken place) in the context of a second-stage opinion (not yet formed).

93. The foregoing, in my view, highlights how premature the present application is and fortifies me in the view that this is certainly not a process which has gone wrong or has gone irredeemably wrong or has gone "off the rails". The relationship between the parties is that of a serving member of An Garda Siochána and the Commissioner of An Garda Siochána and, if it was the case that the applicant believed that there were deficiencies in the process to which he was subject, it seems to me that there was an onus on the applicant to set out each and every one of those, in clear terms, such that the respondent could understand the complaints made in respect of the process and had an opportunity to address same in what was an ongoing process, prior to the applicant resorting to litigation. If the applicant's answer to the foregoing proposition is to say that the process was so fundamentally flawed from the outset that nothing could have been done to save it, such an assertion is not underpinned by evidence. Alternatively, if the applicant's answer is to say that no process commenced by the invocation on the part of the respondent of his statutory power pursuant to s. 14 could ever be fair, that is in reality to assert that the section is unconstitutional, a case not made and a finding this court cannot make.

94. It is also appropriate to quote from para. 75, onwards of the decision by Simons J. in *Student A.B.:*

> *"75. During the course of the hearing before me, counsel was coy as to what precisely it is that the Student says must be done to ensure fair procedures. Counsel was keen to stress that his client was not 'wedded to' the notion that there had to be cross-examination of the other pupils. It was suggested, for example, that the members of the Board of Management might instead interview the other pupils (in the presence of the Student's parents).*
>
> *76. The very fact that these matters are in a state of flux confirms the wisdom of the approach of the Supreme Court in Rowland. It is precisely because the details of the procedure to be adopted at the hearing before the Board of Management have not yet been finalised, that the application for judicial review is premature. The Student should instead have taken the obvious step of engaging with the Board of Management in correspondence, and then attending at a rescheduled hearing. If, following the conclusion of the disciplinary process, the Student considered that he had not been afforded fair procedures, then at that stage he could seek to challenge the decision. As indicated earlier, such a challenge should be pursued by way of an appeal pursuant to section 29 of the Education Act 1998. Lest I am incorrect in this, then the Student would be entitled to apply for judicial review but only once the disciplinary process had concluded. As matters currently stand, however, the application for judicial review is premature."*

95. In the present case, there is no question of the applicant having made a request for something to be done to ensure fair procedures which request has been refused by the respondent. Earlier in this judgment I gave examples of the type of requests which might arise (such as a request to view the CCTV footage for 21 January 2020; a request to have an oral hearing; a request to cross-examine an individual or individuals; a request for additional time to prepare further submissions etc). No request of the foregoing type has been made whatsoever and none has been refused. Were such requests to be made, and were such requests to be refused for reasons which the applicant believed were unjustified, resulting in what the applicant believed as a breach of fair procedures, the foregoing might well speak to the question of the fairness of a final decision at the conclusion of the process. At this stage, however, the present judicial review proceedings are entirely premature, in my view.

96. In *Iarnród Eireann/Irish Rail v McKelvey* [2018] IECA 346, Irvine J. (as she then was) delivered, on behalf of the Court of Appeal, a judgment in which that court allowed an appeal which had been brought by Iarnród Eireann in respect of a judgment of this court which had granted injunctive relief to restrain the appellant from commencing a disciplinary hearing against Mr. McKelvey in respect of alleged misconduct unless his claimed entitlement to legal representation was agreed to. Irvine J. was satisfied that the circumstances were not such that it could reasonably have been contended that Mr. McKelvey would not obtain a fair hearing absent legal representation. Mr. McKelvey

appealed that decision to the Supreme Court and the Chief Justice delivered a judgment on 11 November 2019 in *McKelvey v Iarnród Eireann/Irish Rail* [2019] IESC 79. At para. 4.2 of the Supreme Court's judgment, the Chief Justice referred to the legal principle concerning "*the appropriateness or otherwise of a court intervening either before or during (as opposed to the end of) a disciplinary process*" and he referred to his 2017 judgment in *Rowland,* stating, at para. 4.3 of *McKelvey,* that:

> *"While it will again be necessary to refer in a little more detail to the judgment in that case in due course, it is fair to say that the basic principle identified is to the effect that courts should be reluctant to intervene while a disciplinary process is ongoing but rather should wait until the process has come to an end and then decide whether the result of that process is sustainable in law. However, the judgment in Rowland also recognises that there may be cases where it is clear that the process has, as it were, "gone off the rails" to such an extent that there could be no reasonable prospect that any ultimate determination could be sustainable in law. In such cases, it is clear that the Court can and should intervene at an interlocutory stage to prevent a process continuing in circumstances where the result of that process will almost certainly be redundant."*

97. In light of the foregoing, it seems appropriate for this court to pose the following question: "*Is it the case that the final result of the process with which this court is concerned will almost certainly be redundant?*" and the answer, in my view, is undoubtedly "No". Later, the Chief Justice referred again to the principle identified in *Rowland* and it is appropriate to quote from para. 5.11 of the Supreme Court's decision in *McKelvey*, as follows:

> *"Insofar as the question of legal representation was concerned, neither the High Court nor the Court of Appeal dealt expressly with the question of the appropriateness or otherwise of intervening in advance of or during the disciplinary process. However, at the hearing before this Court, it was accepted by both parties that the principle identified in Rowland was such that the Court should only intervene if it was clear that legal representation was required. It seems to me that such was the correct approach. If it is clear that legal representation is required in a disciplinary process, then a denial of such representation would undoubtedly meet the criteria identified in Rowland, for it would be equally clear that it would be highly unlikely that any decision made at the end of such a process would be sustainable. On the other hand, if it is not clear that legal representation is necessarily required, then it would follow that it would be premature for the Court to intervene, for the Court should not assume that legal representation would be wrongfully refused in circumstances where it had subsequently become clear that the process necessitated such representation in order that it be fair."*

98. The proposition that a court should not assume that something regarded as essential to ensure that a particular process meets the relevant standards of fairness, would be "*wrongfully refused",* seems to me to be of fundamental relevance to the case before this

court. It seems to me that, implicit in much of what is argued on behalf of the applicant, is the proposition that this court should assume that the respondent will act unlawfully or wrongfully in the future. There has, in fact, been no refusal on the part of the respondent to provide or to facilitate anything requested. Furthermore, it is a fact that the respondent has made no operative determination. Rather things have reached only the point where the respondent has come to a first-stage opinion which is required of him prior to a process mandated by s. 14 which plainly addresses the principle of *audi alteram partum,* continuing further. Despite this, the court is, in a very real sense, being asked to take the view that at a future point when it comes to the respondent forming his second-stage opinion, the court should assume that the respondent will act unlawfully and will wrongly stick to his first-stage opinion regardless of the process between those two stages i.e. regardless of any challenge the applicant makes to the respondent's first-stage opinion, regardless of any additional evidence tendered by the applicant and regardless of such procedures as may be agreed in terms of the practicalities of facilitating such responses, representations or reasons as the applicant may wish to proffer. This court simply cannot proceed on the assumption that, at a future point, the respondent will act unlawfully, whether by wrongfully doing something, or by refusing to do something.

99. Returning to the *McKelvey* decision, it is also appropriate to quote the following passages, wherein the Chief Justice again identified the importance of the Rowland principles and their applicability in the following terms,

> *"6.11 In addition, it is necessary to have regard to the principles identified in Rowland. What is sought here is an interlocutory injunction to restrain a disciplinary process before it has begun. The same principles apply here as would apply in respect of an attempt to restrain an ongoing disciplinary process before it has come to its natural conclusion. The process should only be restrained where it is clear that things have gone sufficiently off the rails such that no decision at the end of the process is likely to be sustainable in law.*
>
> *6.12 In passing, I would add that it 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."*

In my view, the statements by the Chief Justice at paras. 6.11 and 6.12 in McKelvey do not constitute a narrowing of the field of application of the *Rowland* principles such that they relate exclusively to situations where an injunction is sought and the *Rowland*

principles form part of the balance of convenience consideration. It will be recalled that, when deciding *Rowland,* the Supreme Court was dealing with an appeal from a decision of this court which had been given following a plenary hearing. In other words, when deciding *Rowland* and enunciating the relevant principles, the Supreme Court was not simply considering the balance of convenience in the context of an injunction. It will also be recalled that the backdrop to the *Rowland* decision was that the relevant disciplinary process had run its course and Mr. Rowland had in fact been dismissed, giving rise to a second set of proceedings. It seems to me that, at para. 6.2, the Supreme Court did no more than observe that the *Rowland* principles form part of the balance of convenience consideration at an interlocutory stage, rather than confining the *Rowland* principles to that scenario. Even if I am entirely wrong in that view, the undeniable fact is that the process in the present case is at an early stage and there has been no operative determination, as opposed to a first-stage opinion, and there is no evidence that the respondent has, up to the point at which the process was halted by means of a stay obtained by the applicant, acted other than in accordance with the respondent's statutory powers and statutory obligations, being obligations which accord with the principles of natural justice, in particular the *audi alteram partem* principle. That being so, I am entirely satisfied that the present application is premature and I am equally satisfied that the principles derived from *Rowland,* and applied in *Student A.B* and referenced again in *McKelvey*, are of direct relevance in the present case, in the manner explained in this judgment, having regard to the particular facts in this case.

100. In *McEnrey v Commissioner of An Garda Siochána* [2016] IESC 66, the applicant, who was a Garda Sergeant, brought judicial review proceedings against the respondent Commissioner seeking an order of certiorari quashing a decision made by the Commissioner to summarily dismiss the applicant. In 2011, the applicant was charged with assaulting a member of the public. She was acquitted of assault causing harm, contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997 (the 1997 Act) but she was convicted of one count of assault contrary to s. 2(1) of the 1997 Act and received a sentence of four months imprisonment, suspended for six months on condition that she enter into a bond to keep the peace, which she did, and be of good behaviour for a period of six months. The applicant was unsuccessful in an appeal against her conviction. The summary dismissal procedure employed by the respondent was pursuant to Regulation 39 contained in Part 4 of the Garda Siochána Disciplinary Regulations 2007 (i.e. the "2007 Regulations"). For the sake of clarity and completeness, s. 39 of the 2007 Regulations provides 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 Siochána any member (not being above the rank of Inspector) whom he or she considers unfit for retention in the Garda Siochána.
>
> (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,

(b) subject to paragraph (3), disclosure of the facts relating to the breach would, in the opinion of the Commissioner, be liable to affect the security of the State or to constitute a serious and unjustifiable infringement of the rights of another person, or

(c) the member concerned has failed to attend for duty over such a period and in such circumstances that it can be presumed that his or her intention has been to abandon his or her membership of the Garda Siochána.

(3) In a case referred to in paragraph (2)(b), the Commissioner shall consider whether, in the interests of the member concerned, some special inquiry can be held into the relevant breach of discipline which would not affect the security of the State or constitute a serious and unjustifiable infringement of the rights of another person.

(4) The power of dismissal conferred by this Regulation shall not be exercised –

(a) where the member concerned has completed his or her period of probation, without the consent of the Minster,

(b) where para. 2(a) applies, without the member concerned being informed of the material facts and the relevant breach of discipline, and

(c) except where paragraph 2(c) applies or where, despite reasonable efforts to do so, the whereabouts of the member concerned have not been established, without the member being given an opportunity of submitting to the Commissioner reasons against the proposed dismissal."

101. Before looking further at the Supreme Court's decision in *McEnery,* it is appropriate to make a number of observations. Firstly, the powers enjoyed by the respondent pursuant to s. 39 of the 2007 Regulations are expressed, in very clear terms, to be "*without prejudice to s. 14*(2)" of the 2005 Act. It is also fair to say that under both regimes, the bar is set high insofar as what is required before the Commissioner can exercise the right to summarily dismiss a member of an Garda Siochána. Earlier, I set out s. 14 of the 2005 Act in full and it will be recalled that the relevant test is that the Commissioner must be "*of the opinion that by reason of the member's conduct, his or her continued membership would undermine public confidence in an Garda Siochána and the dismissal of the member is necessary to maintain that confidence*." On any reasonable analysis, this is a high threshold and, in the manner explained in this judgment, the s. 14 process involves a first-stage opinion, followed by the opportunity for the member to test the basis for that opinion (with the member being at large insofar as how they decide to respond), followed by a consideration of such responses, representations and reasons as the member has proffered, followed by a second stage opinion, (involving a fresh exercise in opinion formation on the part of the Commissioner, who must decide whether or not he or she remains of the opinion that the member's dismissal is warranted in light of the statutory

test). The bar is also set high pursuant to Regulation 39, in that the Commissioner must not be "*in any doubt as to the material facts and the relevant breach of discipline is 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*". It is also appropriate to observe that the foregoing provision in Regulation 39 of the 2007 Regulations envisages a scenario where no inquiry would be held. That is not the position in respect of the s. 14 process, which leaves the member at large as to how they wish to respond to the Commissioner's first-stage opinion, i.e. s. 14 explicitly envisages a two-way process which Regulation 39 does not.

102. Among the submissions made on behalf of the applicant is that the respondent can only rely on s. 14 once the facts have been established elsewhere, such as via the use of the procedure pursuant to Regulation 39 of the 2007 Regulations. That submission seems to me to ignore the respondent's explicit entitlement to exercise the power conferred on him by the relevant section *"Notwithstanding anything in… the regulations…",* as section 14(2) makes clear. Indeed Regulation 39(1) of the 2007 Regulations is also explicit that the respondent's powers therein are "*without prejudice to section 14(2)".* The submission also ignores the process which exists in s. 14(2)(b) which allows the applicant to call into question any and all facts which are said by the respondent to form the basis for his first-stage opinion (which is not the operative opinion insofar as dismissal is concerned).

103. That is not to say that it would be impermissible for the respondent, should he or she so deem it appropriate in a given situation, to commence a fact-finding process under the 2007 Regulations *prior* to invoking the power conferred on the Commissioner pursuant to s.14. As well as Regulation 39 being available, the respondent could, in a given situation, decide that it was appropriate to appoint an "investigating officer" (pursuant to Regulation 23) to conduct an investigation (pursuant to Regulation 24) and to prepare and submit a report to the Commissioner (pursuant to Regulation 24(5) of the 2007 Regulations). That would certainly constitute a fact-finding exercise, but it is not the only means by which facts might be found and I am entirely satisfied that it is not mandatory for the respondent to take the foregoing, or any specific approach as a pre-requisite in terms of the Commissioner's entitlement to invoke s.14. Firstly, s. 14 of the 2005 Act does not mandate use of the 2007 Regulations as a fact-finding methodology. Secondly, to deploy the 2007 Regulations is not the only approach to finding facts. In short, using certain provisions found in the 2007 Regulations seems to me to be entirely open to the Commissioner to do, or *not* to do, depending on what the respondent deems to be appropriate in any given case, having regard to the relevant circumstances and the principles of natural justice.

104. It seems to me that, in a purely hypothetical scenario, the fewer facts that are known and the fewer facts that are agreed, the greater the potential need for fact-finding prior to the invocation by the respondent of their power pursuant to s.14 and, it can be presumed, the greater the likelihood that the respondent would consider employing the architecture of the 2007 Regulations as a possible means of such fact-finding. To say the foregoing is not to say that the respondent's "hands are tied" insofar as what the Commissioner must

do, or not do, as a pre-condition for the invocation of the power conferred on the Commissioner by the Oireachtas. There is no pre-condition specified in the 2005 Act and it would be to do violence to the wording of s.14 and would be to trespass impermissibly on the role of the legislature, for this court to import such a pre-condition. Well known principles, including of rationality in the judicial review context, apply, of course, to administrative decisions but that is not to say that there is any pre-condition which requires the Commissioner, in every or in any case, to invoke the 2007 Regulations before he can have recourse to s.14. Furthermore, on the particular facts in the present case, being facts which are not in dispute, there is certainly no question of the respondent having no relevant material on foot of which he could base a first-stage opinion.

105. In *McEnery*, the Supreme Court approved the statement of Kelly J. (as he then was) in the Court of Appeal, wherein the learned judge referred to a passage from the judgment of this court (O'Hanlon J.) in *State (Jordan) v. Commissioner of an Garda Siochána* [1987] ILRM 107, that the power of summary dismissal is an exceptional one which may only be used in "*very limited"* circumstances. Kelly J. went on to state at para. 36 of the Court of Appeal's judgment (*McEnery v Commissioner of an Garda Siochána* [2015] IECA 217) that:

> *"36. Given the very limited recourse which is available to a Garda who is subject to a summary dismissal under Regulation 39, the exceptional nature of the power given to the Commissioner and the very limited scope for the exercise of that power, the courts on judicial review ought to be astute to ensure that the power is exercised properly and in accordance with law."*

106. There can be no issue taken with the foregoing principle. Even though it was a statement made in respect of s. 39 of the 2007 Regulations, it could hardly be said that the Respondent's power to summarily dismiss a member, pursuant to s. 14 of the 2005 Act, is other than an exceptional power to be used in very limited circumstances and only exercisable in accordance with law. That said, the applicant has not discharged the burden resting on him in these proceedings of demonstrating that the respondent has acted other than in accordance with law. In submissions on behalf of the applicant it is argued that the principle outlined by Kelly J. (as he then was) in *McEnery* has been breached, insofar as the applicant argues that he was not allowed to know and to challenge the evidence against him before a determination was made that he had acted dishonestly and that his continued membership of an Garda Siochána would undermine public trust. The foregoing submission ignores the fact that no determination of that sort has been made. Rather, a first-stage opinion has been come to and the basis for same has been outlined, in detail, to the applicant in a letter which made clear that this was part of the respondent's *consideration* of the applicant's position in the context of s. 14 of the 2005 Act. The same letter made perfectly clear that it was open to the applicant to challenge the evidence relied upon by the respondent in forming the opinion he came to (or, for that matter, to proffer other evidence), in circumstances where the manner and content of the applicant's response was in no way prescribed by the respondent or limited to any issue.

107. Insofar as it is submitted on behalf of the applicant that the power to dismiss the applicant, pursuant to s. 14, must be exercised in accordance with law, I am entirely in agreement with that principle. There is, however, no evidence that it has been exercised unlawfully although a more accurate statement is that there is no evidence that the power will be exercised unlawfully, because, as matters stand, no operative determination has been made by the respondent. Rather, he has reached a first-stage opinion and, in circumstances where the process was arrested at a relatively early stage, he has yet to consider such response or responses as the applicant has to date provided (and any further response or responses as the applicant may yet provide, depending on how the process develops) and the respondent has yet to reach a second-stage opinion which would, at that future point, represent an operative determination. There is simply no evidence from which this court could conclude that the respondent *will,* at that future point exercise his powers pursuant to s. 14 other than in accordance with law. This court cannot take the view that the respondent has closed his mind to such responses or submissions as the applicant may ultimately make. Yet a fundamental aspect of the applicant's claim seems to me to be that, despite the respondent stating clearly that he will consider matters afresh in light of such responses, representations, reasons or submissions as the applicant makes, this court should ignore that explicit confirmation and should, instead, and without evidence, assume that the respondent has already formed an opinion which he shall resolutely stick to, regardless of such evidence to the contrary as may emerge from a process which has yet to be concluded.

108. In *McEnery* the Supreme Court ultimately decided that, in circumstances where the breach of discipline relied on by the Commissioner was the criminal conduct constituting an offence pursuant to s. 2 of the 1997 Act for which Sergeant McEnery had been convicted, the only material facts for the purposes of the proper application of Regulation 39(2)(a) of the 2007 Regulations were the facts of the conviction, with the consequential imposition of the sentence by the Circuit Court. The Supreme Court held that, accordingly, the respondent's decision was not *ultra vires* Regulation 39 by reason of the Commissioner's reliance solely on those facts for the purposes of complying with the requirement of Regulation 39(2)(a) that he should not be in doubt as to the material facts and for the purpose of assessing whether the facts and the breach of discipline were of such gravity as to merit dismissal. At this juncture, it is appropriate to point out that the facts in *McEnery* can be distinguished from those in the case before this court. There is simply no question of the respondent purporting to rely, for example, on a small number of facts as having been proved in the context of criminal proceedings. Rather, it is plain that, having merely come to a first-stage opinion, the respondent has an open mind in so far as any future second-stage opinion is concerned. That is evident from the explicit invitation in the 08 May 2020 notice for any representations or responses the applicant may wish to furnish, coupled with the commitment that the respondent will consider same in advance of arriving at his decision.

109. At the risk of stating the obvious, the explicit statement in the penultimate paragraph of the respondent's 08 May 2020 notice that *"Please note that I will consider any response provided by you in advance of arriving at my decision"* is clear evidence that the

respondent has yet to make his "*decision*". The respondent's reference to "*my decision*" is plainly a reference to forming, at a point in the future, his second-stage opinion as required by s. 14(2)(c). In *McEnery* the Supreme Court held that there was a failure on the part of the respondent Commissioner to give adequate reasons for his decision to confirm the proposed decision to dismiss Sergeant McEnery from an Garda Siochána following receipt of submissions made on her behalf and it was on that basis the decision in question was quashed, the applicant not having established that the Commissioner's decision contravened natural and constitutional justice in treating her in a manner which was discriminatory and disproportionate in comparison to the treatment of other members of an Garda Siochána convicted of assault. The judgment of the Supreme Court in *McEnery* establishes that the power of summary dismissal as contained in Regulation 39 of the 2007 Regulations is one that can validly be used by the Commissioner when the conditions for its exercise have been properly implemented. The judgment also recognises that the Commissioner is obliged to maintain discipline and public confidence in the force, matters which, in fairness, are issues which are not at all in dispute between the parties in the case before this court.

110. It is unsurprising that the threshold laid down under Regulation 39 of the 2007 Regulations is so high involving, as it can, the dispensing with an inquiry. By contrast, there is no evidence that the applicant in the present case has dispensed with or attempted to dispense with an inquiry or a process equivalent to same. Rather, he has afforded the applicant the opportunity to challenge the basis for a first-stage opinion and, in essence, to put the applicant's "side of the story" and to do so *before* the respondent comes to any final opinion or operative decision, i.e. before any second-stage opinion. Another distinguishing feature of *McEnery* is that the Sergeant in question had actually been dismissed and sought an order of *certiorari* challenging that dismissal. In other words, *McEnery* was certainly not a case involving an application to try and prevent a process from reaching a conclusion. Even if this court were to ignore the fact that McEnery was exclusively concerned the Regulation 39 procedure and even if this court were to ignore the material differences in the Regulation 39 procedure as opposed to that outlined in s. 14 and also to ignore the fact that the applicant in *McEnery* sought to challenge a dismissal which had in fact taken place, in my view reliance on *McEnery* cannot entitle the applicant to relief in the present case. I take this view because, regardless of how exceptional the power of summary dismissal may be, there can be no doubt about the existence of the respondent's s. 14 powers (and duties), but no evidence whatsoever of an exercise of same other than in accordance with law.

111. Another authority upon which the applicant placed considerable reliance *was The State (Jordan) v. Commissioner of An Garda Síochána* [1987] ILRM 107. That case concerned Regulation 34 (a) of the Garda Síochána (Discipline) Regulations, 1971 which conferred on the respondent Commissioner a power to dismiss a member of the force without holding an inquiry *"where 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 could not affect his decision".* Thus, what was at issue was not s. 14 of the 2005 Act, but

Regulations which were the precursor to the 2007 Regulations. It should also be pointed out that there is no question of the respondent in the case before this court having made a decision to dismiss the applicant without holding an inquiry. The respondent has neither made a decision to dismiss the respondent at all, nor has he refused any request for an inquiry. Having made the foregoing observation, it is appropriate to note that at para. 114, O'Hanlon J. stated in *Jordan* that:

> *"The power to dismiss without holding an inquiry, which is conferred by this Regulation is an unusual and exceptional one, but it was not contended on behalf of the prosecutor that the Regulation was unconstitutional or invalid per se. Instead, it was submitted that where it was necessary to resolve contested issues of fact before the commissioner could reach a decision to dismiss, an inquiry must be held; that an inquiry could only be dispensed with where the member concerned has admitted his guilt and there is no room for an inquiry, or in a case where the member concerned has not denied his guilt when given an opportunity to do so, and his guilt is clear."*

112. With regard to the foregoing comments, which were plainly made in respect of Regulation 34 of the 1971 Regulations, not s. 14 of the 2005 Act, it is appropriate to note once more that, despite the proposition advanced in the applicant's "preliminary objection" dated 22 May 2020 that "*either the Garda Commissioner is not acting in accordance with the legislation or the legislation itself is unconstitutional*", no challenge has been brought by the applicant in relation to the constitutionality of s. 14. Furthermore, in the manner explained in this judgment, there is no evidence from which this court could conclude that the respondent is not acting in accordance with s. 14. Moreover, despite furnishing detailed written submissions on 22 May 2020, the applicant did not suggest in those submissions that, insofar as there were contested issues of fact, an inquiry involving an oral hearing must be held. That may yet be something the applicant seeks and, in my view, there is nothing in s. 14 which would disbar the applicant from seeking it, but there is no question whatsoever of the respondent having refused an inquiry or declined a request for an oral hearing. On the contrary, the respondent was engaging in a process, pursuant to s.14, which has, it seems to me, built into the framework of that section, the principle of hearing the other side. Later in the same judgment O'Hanlon J. went on to state:

> *"I am of the 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, 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.

In such circumstances there could not be said to be a denial of natural or constitutional justice, since the member concerned has an opportunity to deal with the facts which are regarded as constituting a grave breach of discipline and makes it clear by his own admission that these facts do, indeed, apply to his case.

I have come to the conclusions that the present case is one of the rare cases where a situation akin to that outlined above arises, and where the Commissioner was justified in his decision to dismiss without setting the inquiry machinery in motion before doing so."

113. Without, I want to stress again, purporting to decide any issues of fact or any issues as regards the applicant's conduct, there is no dispute about the fact that the applicant removed a Bluetooth speaker and charging cables from the seized vehicle in question. This is accepted by the applicant in his statement made to GSOC on 12 May 2020 which statement he proffered alongside his 22 May 2020 submissions nor did the applicant request, in his 22 May 2020 submissions that he had an opportunity to give his version of events, orally, and be cross-examined in respect of that version of events. Thus, there is no question, in the case before this court, of the respondent refusing an oral hearing which had been requested, or refusing any particular type of inquiry. It is plain that the decisions in *McEnery* and *Jordan* involved a consideration of the exercise by the Commissioner of Regulations which, in certain circumstances, would give him the power to dismiss a serving member of An Garda Síochána without holding an inquiry. To my mind, the position which pertains pursuant to s. 14 of the 2005 Act is materially different.

114. What, it might be asked, is an *"inquiry"*? It seems to me uncontroversial to say that the essential characteristics of an inquiry is that it is a process which involves the seeking of relevant information, with the outcome, in terms of a conclusion or final decision, being made only *after* such information has been provided and considered. In my view, what is provided for in s. 14 (2) (b) and (c) encapsulates or provides for what can fairly be considered to be a form of inquiry. How much information will be proffered and how many exchanges between the parties might take place in relation to same may well vary widely depending on the particular circumstances of each different case, so it is not possible, in the abstract, to know the precise steps which may be taken in a given situation but the drafting of s.14(2)(b) and (c) certainly seems to me to be broad enough as to include what, on any common sense analysis, could be called an inquiry. It is also fair to say that the inquiry in the present case was halted by means of a stay obtained *ex parte* by the applicant.

115. For the purposes of the proceedings before this court, the applicant avers that his version of events is truthful and entirely correct, specifically, that he intended to return the

speaker and cables. As well as being no function of this court to decide the underlying matter, it is a fact that the relevant process has not yet reached a stage whereby the version of events which the applicant swears to be correct has been considered by the respondent. Once considered, at a future point, the respondent may find the applicant's version of events entirely satisfactory, or he may not. To say the foregoing is merely to state the obvious and to highlight the premature nature of the application before this court. Similarly, as matters stand, the respondent has not yet had a chance to consider what the applicant regards as other essential evidence – a prime example being the applicant averring to the fact that the seized car in question could not be locked.

116. The fact that s. 14 explicitly mandates a process which involves the exchange of information, and a consideration of all information that the applicant may wish to proffer, highlights the difference between it and the Regulations which were the subject of *McEnery* and *Jordan.* Nothing which emerges from those two decisions, however, takes away from the fact that s. 14 (2) *prima facie* can be employed once the respondent "*is of the opinion that*" by reason of the applicant's conduct his continued membership would undermine public confidence being, as I say, simply a first-stage opinion. Unlike the position in both *McEnery* and in *Jordan*, where the relevant members had already been dismissed, the applicant in these proceedings has certainly not been dismissed. It is common case that the applicant has remained on full pay since his suspension commenced. The s. 14 process is something which commenced but is certainly not something which has reached anything like a conclusion.

117. Relying on the decisions in *McEnery* and in *Jordan*, it is submitted on behalf of the applicant that the respondent has sought to exercise his powers pursuant to s. 14 to summarily dismiss the applicant where the applicant protests that he was not acting dishonestly and where the respondent has not utilised statutory disciplinary procedures, in the form of the 2007 Regulations, which, according to the applicant are "*tailor-made"* to address allegations such as those, the subject of the present proceedings. That submission seems to me to ignore the undoubted power vested in the respondent by the Oireachtas as per s. 14 which is without pre-conditions. Nowhere does the Act say that a *sine qua non* in respect of the exercise of the respondent's s. 14 power is to first employ wholly separate powers and procedures found in the 2007 Regulations. Why this is so is, in my view, wholly apparent from the provisions of s. 14 which explicitly envisage information-exchange and information-gathering and a considering of information prior to the formation of any second-stage, i.e. operative opinion, or final determination, the respondent might make. I do not accept that the process set out in s. 14 is any less tailor-made to address the subject matter of the present proceedings, but that is merely an observation in circumstances where the relevant power, with attendant duties, is the respondent's to exercise.

118. Regulation 34 of the 1971 Regulations, as referred to by O'Hanlon J in *Jordan*, is the predecessor to Regulation 39 of the 2007 Regulations. *Jordan* explicitly recognises that the respondent has the power to dismiss a member of An Garda Síochána and that, in an appropriate case, this includes the power to dismiss without the holding of any inquiry.

That, of course, does not mean that the respondent Commissioner has not also vested in him all of the powers and duties provided for in s.14 of the 2005 Act. Plainly he does, and the applicant does not take issue with the existence of that power or its constitutionality. Despite making the foregoing clear, it is submitted on behalf of the applicant that the respondent was required, prior to invoking s.14, to conduct a separate fact-finding exercise consistent with the principles of natural and constitutional justice, which exercise required the applicant to provide an account *before* the respondent formed an opinion pursuant to s.14(2)(a). Counsel for the applicant submitted that to invoke s.14 "at all" involved a breach of fair procedures, because it involved a determination of wrongdoing and dishonesty without a hearing. On behalf of the applicant it is submitted that invoking s.14 involves an impermissible bypassing, on the part of the respondent, of the type of fair procedures which Regulation 39 in the 2007 Regulations provides for. The foregoing submissions essentially say that the respondent should not have commenced the s.14 procedure at all because, doing so in the present case involved a breach of fair procedures. Leaving aside, for the moment, whether such submissions reflect the case pleaded by the applicant, I regard myself bound to reject them and I do so for the following reasons. I am unable to interpret s.14 as laying down a pre-invocation requirement that the respondent must make final determinations of fact, whether by employing the 2007 Regulations or by means of the outcome of criminal proceedings or through admissions of a member, or otherwise. Section 14 is entirely silent in relation to such a prerequisite for its invocation and I am entitled to take the view that if the Oireachtas required the respondent to do what the applicant says he must do as a *sine qua non* for invoking the section in the first place, the Oireachtas would have stated that clearly. Furthermore, the proposition that to invoke s.14 "at all" necessarily involves a breach of natural and constitutional justice or fair procedures is, in reality, to challenge the constitutionality of s.14. There is, of course, no such challenge made by the applicant. Furthermore, the submission that fact-finding must take place prior to s.14 being invoked seems to me to ignore the fact that the very provisions of s.14(2)(b) and (c) envisage a fact-finding process which must take place *before* a final opinion is reached by the respondent with regard to the dismissal of a serving member of An Garda Síochána, namely, what I have referred to in this judgment as the second-stage opinion, being the only operative opinion or determination upon which a decision to dismiss can be based insofar as the architecture of s.14 is concerned.

119. At the heart of this case before this Court is, in truth, an attack on the respondent's first-stage opinion which is not a determination and which is not an operative decision for the purposes of any dismissal of the applicant and which *precedes* the fact-finding exercise envisaged in s.14. For the foregoing reasons, I agree with the submission made by counsel for the respondent to the effect that the case made by the applicant and the case for which leave was granted is not that it was impermissible for the respondent to invoke s.14 at all. No order of prohibition is sought, nor is the constitutionality of s.14 impugned. Even if I am entirely wrong in that view, and even if this Court assumes that the foregoing submissions made on behalf of the applicant are reflective of the case actually pleaded, they are submissions this Court is bound to reject for the reasons stated. In short, there is no bar to the respondent invoking s.14 and the invocation of

s.14 in the present case did not, contrary to the applicant's submission, involve "*a breach of fair procedures because it involved a determination of wrongdoing and dishonesty without a hearing*". Firstly, s.14(2)(b) and (c) provides for the very fair procedures the applicant submits were denied. Secondly, there has been no "*determination"* of wrongdoing and dishonesty without a hearing. Rather, there has been a first-stage opinion formed on a particular and explicit basis, which basis is entirely open to challenge *before* any determination shall be made in the future, namely, the second-stage opinion which, at that future point, would become the operative opinion and, thus, can properly be called a determination.

120. On behalf of the applicant, reliance is also placed on the recent decision of this Court (Barret J) in *Murphy v. Commissioner of An Garda Síochána* (11th May, 2021). At the outset it is appropriate to note that the facts in *Murphy* are wholly unlike those in the present case. The *Murphy* decision concerned an application brought by a probationer garda and concerned s.123 of the 2005 Act which, pursuant to sub. (6), relates to regulations providing for the taking of different forms of disciplinary action against members of An Garda Síochána based on their rank or any other factor. The case also concerned the Code of Professional Practice which refers to the unique position of probationer gardaí as well as Regulation 12(8)(a) of the 2013 Regulations, pursuant to which the Garda Commissioner gave notice to the applicant of his potential dismissal and the Commissioner invited any submission Probationer Garda Murphy wished to make concerning the relevant allegations.

121. Importantly, the applicant in *Murphy* applied for a stay in respect of the Regulation 12 procedure *after* the deadline set out in the Commissioner's letter with respect to submissions and at a time when the Commissioner was at large as to reaching a decision to dismiss. The facts and context in the present case are wholly different. The applicant in this case resorted to the courts prior to the expiry of the period which had been provided to the applicant in respect of such responses, representations and reasons which he wished to make. The respondent Commissioner was certainly not at large to reach any determination when the present proceedings were commenced. This was in circumstances where, entirely consistent with the provisions of s.14, the respondent had given a commitment to consider such response as the applicant decided to make and to do so prior to looking at the matter afresh in the context of what s.14 required of the respondent, namely to reach a second-stage opinion, pursuant to s.14(2)(c). Indeed, the respondent was explicit about the fact that, even if the applicant chose not to respond at all, the Commissioner would consider matters afresh before reaching what would, at that future stage, be the operative determination (being what I have described as the second-stage opinion).

122. Another significant point of distinction between the case before this court and the situation in *Murphy* is that, in truth, the applicant's submissions in the present case were inextricably bound up with an ultimatum that the whole s.14 process be abandoned by the respondent. Another material difference is that, in the case before this Court, unlike *Murphy,* there has been no failure or refusal on the part of the respondent to furnish any

materials which the applicant might require. Matters simply have not reached that stage because the entire process was arrested by the institution of the present proceedings and the obtaining by the applicant of a stay to prevent further progress.

123. In *Murphy*, the Commissioner's initiating letter was dated 17th December 2019 and set a deadline for Probationer Garda Murphy's submissions of 14th January 2020. Paragraph 40 of the decision in *Murphy* illustrates how different the facts were from those in the present case:-

> *"40 …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 (if so minded) the order of the leave judge on 20th January 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 advisers) did not deign to reply to the letter of 8th January, 2020…".*

124. When the applicant commenced the present proceedings, he was not at risk of an adverse decision against him, nor was the respondent at large to make any operative decision to dismiss him. There is no question of the respondent having failed to provide the applicant with such materials as the respondent proposed to rely upon. There are two aspects to the foregoing. Firstly, the only "decision" the respondent in the present case has made is to form a first-stage opinion. With regard to same, there has been no failure or refusal to provide the materials on which that first-stage opinion is based. A request was included in submissions which themselves constituted an ultimatum that the entire process be abandoned and it is incontrovertible that those submissions have not yet been considered by the respondent. In short, the foregoing materials have been sought, but sought in a very particular context and, before there was any opportunity for the respondent to supply the materials, the entire s.14 process was stayed on foot of an *ex parte* application. The second aspect in respect of "*materials"* is that there is no question whatsoever of any failure to provide the applicant with such materials as the Minister proposes to rely upon in the context of a second-stage opinion. No such materials have been sought, nor have they been refused, and the obvious reason is, of course, that matters have not proceeded nearly that far. This illustrates how different the situation in *Murphy* was from the position in the present case.

125. It also seems appropriate to contrast the 22 May 2020 ultimatum, which was given to the respondent by the applicant in the present case, with what occurred in *Murphy*. It will be recalled that the 22 May 2020 submissions demanded confirmation by close of business 6 days later, on 28 May 2020, that the respondent would take no further steps whatsoever,

failing which an application to court would be made. As can be seen from para. 9 in *Murphy*, what happened in that case was entirely different and was put as follows: -

> *"In the just-mentioned letter of 8th January 2020, the solicitors for Garda Murphy write, among 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****…'"*

126. In *Murphy* the applicant explicitly sought materials and the opportunity to make further submissions. In the present case, the request for materials was bound up with a request that an undertaking be provided within 6 days to the effect that the entire s.14 process be abandoned by the respondent and there was no question of the respondent having refused the applicant an opportunity to make further submissions. The reality is that the respondent in the present case has not even had an opportunity to consider the submissions made, which submissions assert, *inter alia,* that the respondent has either failed to follow a statutory process or the statutory process is unconstitutional. Reliance is also placed by the applicant on the following passage from *Murphy:* -

> *"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. Iarnrod 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'"*

127. In *Murphy,* at the time the Commissioner issued the relevant notice, there was a pending District Court prosecution. The position before this Court is wholly different. There is simply no question arising in the present case of a demand being made of the applicant which impinged in any way on his presumption of innocence. It is appropriate, at this junction, to refer to what the learned authors state in "*Administrative Law in Ireland"* (Hogan, Morgan, Daly, 5th Ed. 2019). It is sufficient for present purposes to refer to para. 7-82 wherein, in the context of a discussion of the Supreme Court's decision in *Re National Irish Bank Ltd No. 1* [1999] IR 145, a case involving an inquiry by inspectors in

relation to possible malpractice or illegality in the operation of the banking system, the learned authors state as follows: -

> *"[7-82] …the Supreme Court held that s.18 of the Companies Act 1990, which expressly permitted the use of incriminating statements in evidence against an accused person, could not be construed to permit a court to admit the statements at a criminal trial, save where the statements were voluntarily made. In short, the court held that the only interpretation of the section consistent with Art. 38 of the Constitution was, first, that a failure to answer questions could be made an offence; but, on the other hand, his answers would not be admissible against him in evidence at a subsequent criminal trial."*

128. As the learned authors in "*Criminal Law and Evidence"* (Charleton & McDermott, 2020) make clear (at para. 15.47): "*It is proper therefore to make clear that what is objectionable under Art. 38 of the Constitution is compelling a person to confess and then convicting them on the basis of their compelled confession*". There is no breach of the foregoing principle in the case before this Court. It is also appropriate to point out that if the "*presumption of innocence"* issue were to arise at all, it would have arisen at a criminal trial. As of 08 May 2020, when the respondent sent notice to the applicant, there were no criminal proceedings in being. As regards the process commenced pursuant to s.14 by means of the 05 May 2020 notice, there has been no breach of the principle of the presumption of innocence. In the manner pointed out earlier in this judgment, it has subsequently become clear that there will not be any criminal prosecution. Again, this distinguishes the position before this Court from the facts in *Murphy.*

129. It also seems to me that the presumption of innocence issue comprised a significant part of the *Murphy* judgment. It seems that the learned judge took the view that it was the violation of the presumption of innocence which had caused the process in *Murphy* to go "*off the rails*". In the case before this Court, there has neither been a breach of the foregoing principle, nor has the process "gone off the rails", having regard to the facts in the present case. In *Murphy*, the learned judge made reference to the Supreme Court's decisions in *Roland* and in *McKelvey*, as well as this Court's decision in *Student AB*, but it seems to me that any view expressed in *Murphy* to the effect that the *Roland* principles are confined to balance of convenience considerations represent *obiter* comments, rather than the *ratio* of the *Murphy* decision. It is equally clear that the learned judge in *Murphy* did not at all exclude the possibility that the *Roland* principles had wider application. The learned judge, however, made clear that the *Roland* principles did not apply in *Murphy*, having regard to the specific facts in that case. The foregoing is made clear at para. 18 of the court's judgment in *Murphy*, as follows: -

> *"…even if AB is correct and Roland has some sort of general application it cannot apply here. Why? Because Roland 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."

130. The facts in the case before this Court are entirely different to those in *Murphy* and I am entirely satisfied that the situation in the present case is one to which the *Roland* principles apply. When one applies those principles, the inexorable result is that the present application was both precipitate and premature and that it would be entirely inappropriate for this Court to halt a process which is at a relatively early stage, in circumstances where the applicant has not demonstrated that the respondent has acted unlawfully or has acted other than in accordance with an express statutory power conferred on him and where the applicant has not demonstrated that the process has gone wrong, still less irremediably wrong, and where the applicant has not established that the process has gone "off the rails" and this court could not properly hold that the, as yet unknown, outcome in the future of the process, once concluded, is something almost certain to be quashed.

131. The court's attention was also drawn to the judgment of Herbert J. in *Healy v. Commissioner of An Garda Síochána* (High Court, 7th November, 2000). Counsel for the applicant relied, in particular, on the following passage from the judgment in which the termination of a probationer garda was quashed on the basis that the Commissioner had failed to comply with fair procedures:

> *"He was not afforded an opportunity of considering the various other reports, statements and documents then available, of taking legal advice in respect of them and his position generally, or of endeavouring to make contact with any of the persons who had furnished reports or made statements in the hope of securing some concessions, admissions or evidence which he might wish or be advised to put before the Commissioner of An Garda Síochána. In my Judgment, the Commissioner of An Garda Síochána was invited in this case to make a determination whether or not to issue a Preliminary Notice for the purpose of Regulation 16 of the Garda Síochána (Admissions and Appointments) Regulation 1988, on recommendations of his Senior Officers in which allegations made against the Applicant had become accepted as facts and conclusions had been reached which the Applicant had no opportunity of addressing or challenging and in respect of which the Applicant had not been afforded any sufficient or proper opportunity of being heard in his own defence. In my Judgment the procedures adopted in this case were fatally flawed ever before the matter reached the desk of the Commissioner of An Garda Síochána for a decision as regards the issuing of a Preliminary Notice and whatever occurred thereafter could not remedy this deficiency."*

132. The foregoing judgment undoubtedly reflects the proposition that fair procedures are essential, including where the Commissioner seeks to summarily dismiss a probationary garda. The facts in *Healy* are, however, wholly unlike the position in the case before this court. In *Healy*, the applicant had already been dismissed from the force. In *Healy*,

Herbert J. accepted the applicant's evidence that the first time he appreciated that his career in An Garda Síochána was seriously and immediately at risk was when he was handed a Preliminary Notice invoking the provisions of Regulation 16 and asked to respond within a week. Probationary Garda Healy had made reports on the disciplinary matters to his superiors, but he was not advised in advance that, in addition to the truth and falsity of the allegations, the likelihood regardless of those findings, of his becoming an efficient and well conducted member of An Garda Síochána was also an issue. The allegations in the *Healy* case had become accepted as facts and conclusions had been reached which the applicant had no opportunity of challenging, and in respect of which the applicant had not been afforded any proper opportunity of being heard in his own defence. In *Healy*, the period allowed for the making of a submission to the Commissioner as to why the relevant order should not be made pursuant to Regulation 16 of the 1988 Regulations was wholly insufficient being an initially four days, extended to nine days.

133. None of the foregoing factors arise in the case before this court. There is no question of the applicant having been denied the opportunity to consider any material or to take legal advice or, for that matter, to endeavour to make contact with any witness or witnesses or to proffer such evidence as the applicant wishes to proffer, bearing in mind that no operative decision or determination has been made by the respondent, capable of grounding the applicant's dismissal. There is simply no question, in the present case, of the applicant not being afforded a sufficient or proper opportunity of being heard in his own defence. The facts in the present case are that the applicant's detailed submissions have not yet been considered, but there was plainly an opportunity to make such submissions and were the applicant, at a future point, to request an additional period of time to make additional submissions in response, for example, to being furnished with the materials sought in respect of the respondent's first-stage opinion, this court simply cannot hold that this would be unfairly refused at that future point. The court's findings, in *Healy*, that the relevant process was fatally flawed and incapable of being remedied accords entirely with the principles outlined by the Supreme Court in *Rowland* and affirmed in *McKelvey,* namely that if is "clear" that a process could be said to have gone irredeemably wrong, it is appropriate for the court to intervene, but not otherwise. Thus, the decision of this court is not at all at odds with the principles relied upon in *Healy* or in other cases such as *Duffy v. The Commissioner of An Garda Síochána* [1999] 2 IR 81. In short, there can be no doubt about the central importance of fair procedures when the respondent seeks to dismiss, summarily, a member of An Garda Síochána. In the case before this court, however, there has been no breach of fair procedures.

134. In stressing to the court that the applicant has sworn on affidavit that his version of events is correct and that, therefore, for the purposes of the present application, his averments represent uncontroverted evidence, counsel for the applicant also emphasises that the respondent did not seek to have the applicant cross-examined in these proceedings. With regard to that issue, counsel for the respondent helpfully drew the court's attention to the relevant extract from "*Civil Procedure in the Superior Courts*," wherein Delaney & McGrath made clear that leave to cross-examine will only be granted if there is a conflict of fact the resolution of which is necessary in order for the court to

determine the issue before it. This simply does not arise in the present case. This court is not asked, in the present application, to adjudicate on the applicant's conduct. The principle was underlined by Clarke J. as he then was in *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4, wherein the learned judge referred to leave to cross-examine being sought *"in respect of any point of fact material to the court's final determination"*. This is not, however, a trial court in respect of the issue of the applicant's conduct and it is uncontroversial to say that, had the respondent brought an application to cross-examine the applicant, such an application would have been refused, and properly so. I am entirely satisfied that the issue which this court has to determine would not be advanced in the least by this court having heard the applicant's evidence by way of a cross-examination conducted by the respondent's counsel in respect of the contents of his affidavits. It should also be kept in mind that many of the facts are not at all in dispute. The applicant acknowledges that he took the speaker and charging cables in question from the seized vehicle and drove away from the station with same, making use of the speaker via his own phone. None of these facts are disputed. The applicant avers, *inter alia* that the seized vehicle from which he took these items could not be locked and he avers to his intention at all times to return the material. It is wholly unnecessary and indeed *inappropriate* for this court to attempt to make any determination in respect of the foregoing for the purposes of deciding the issue which this court is required to decide having regard to the case for which leave was granted.

135. Among the submissions made on behalf of the applicant is that if it is necessary to form firm opinions in order to invoke s. 14, the section cannot be invoked at all and the respondent should never have invoked it. The flaw in the applicant's argument seems to me to be the proposition that "*firm opinions"* have been formed - the applicant's contention being that there is no possibility that the respondent's first-stage opinion pursuant to s. 14 (2) (a) can or will ever change. The foregoing is a submission which ignores the process mandated by s. 14 (2) (b) and (c) and ignores the reality that, to use the language deployed on behalf of the applicant, the only opinion which could fairly be called a "*firm opinion*" for the purposes of dismissing the applicant is the second-stage opinion which the respondent has not yet formed and which he can only form after a process which has not yet concluded (being an as yet unknown s. 14 (2) (c) opinion which would, at that future point, be operative and could fairly be called a determination only at that stage). For this reason, I cannot accept the applicant's submission that this is a process or procedure which went "*immediately wrong".*

136. On behalf of the applicant it is accepted that the respondent "*must have the power to hire and fire*" members of An Garda Síochána. The applicant goes on to submit, however, that the respondent "*doesn't have the power to hire and fire as he decides to do it".* With respect, I disagree. The respondent has had conferred upon him precisely that power, but it is important to stress that it is a power which comes with explicit duties designed to ensure fairness and, in the present case, there is no evidence of either a breach of any statutory provision or a breach of the applicant's constitutional right to fair procedures.

137. For the reasons outlined in this judgment I must also reject the submission on behalf of the applicant that there is *"no process"* in the present case and I reject the submission that s. 14 does not envisage that there should be any process. On the contrary, there is indeed a process in the manner I have explained and, for similar reasons, I reject the proposition that *"other mechanisms outside s. 14 must determine the facts first"*. This is not so, and were this court to take that view, it would be to cut across and undermine what the Oireachtas plainly intended when enacting s. 14. It would be to import into s. 14 pre-invocation obligations which the Oireachtas did not intend that the respondent be subject to and which, I am entirely satisfied, the Commissioner is not subject to as a prerequisite for the invocation of section 14.

138. In a purely hypothetical scenario, things would be otherwise if s. 14 comprised merely a one-stage process as opposed to the three stages it contains. In other words, if the section entitled the respondent merely to form an opinion, being the operative opinion or determination, and to dismiss the applicant on foot of that opinion, this court would have no difficulty with the proposition that other mechanisms, outside s. 14, must determine the facts first. There is not, however, merely one stage to the section 14 process. There are, in broad terms, three very distinct stages. The first is the forming of an opinion. The second reflects the principle of *audi alteram partem* and the third involves the respondent looking at matters afresh in the wake of such response as the applicant may make and coming to a second stage opinion, being the only determinative one. For the sake of completeness there is a fourth stage, in that no dismissal can take place without the consent of the policing authority.

139. For the reasons detailed in this judgment, I must reject the submission that this court is being asked to give its imprimatur to a process which involves a complete disregard for any fact-finding mechanism. Such a submission ignores the explicit wording of s. 14 (2) (b) and (c) and ignores, too, the latitude afforded by same for procedures to be developed, in any given case, which reflect the particular issues and needs arising in those cases, the foregoing subsections not being at all prescriptive as regards what can or cannot constitute the applicant's response. Thus, it seems to me that fair procedures have been "baked in" to the wording used in s. 14, in particular the *audi alteram partem* principle.

140. In a recent decision of this Court (Meenan J.) in *Bracken v. Commissioner of An Garda Síochána* [2020] IEHC 710, which concerned the operation of the power to summarily dismiss under Regulation 39 of the 2007 Regulations, the court made clear that: - *"Regulation 39 ought to be used sparingly and only in circumstances where the facts are entirely clear to the point that the holding of an inquiry would be pointless".* In my view, reliance on Bracken cannot avail the applicant in the present case. There is no dispute about the foregoing principle but, aside from the material difference that this case is one which concerns s. 14, not the operation of Regulation 39, there is no question of the respondent having decided to dismiss the applicant. Nor is there any question of the respondent having made any such decision or determination without inquiring into the facts, by means of the specific invitation made on 08 May 2020 for the applicant to

challenge in any way the applicant wishes, the basis for the respondent's first–stage opinion.

141. To approach matters from another perspective, even if this Court accepts entirely the proposition that, regardless of whether the respondent's power arises under Regulations or Statute, the power of summary dismissal is reserved for circumstances where the facts are beyond doubt, this Court cannot hold that, at a future point in time, the respondent will exercise the power of summary dismissal in circumstances where the facts are in doubt. The reality, as matters stand, is that the fact-finding process has not concluded, in circumstances where the applicant obtained a stay on the process before the respondent could even consider the applicant's submissions and before the respondent had an opportunity to address the applicant's request for the materials which formed the basis for the respondent's first–stage opinion, a request bound up with an ultimatum that the entire process be halted and there being no evidence before the court of any intention on the part of the respondent to refuse to provide such materials, being materials which, of course, relate to the first–stage opinion not any future second–stage opinion which the respondent has yet to reach.

142. Insofar as the applicant submits that there is no mechanism, in s. 14, to challenge the findings made that the applicant's conduct was dishonest, I reject that submission in circumstances where any such finding comprises the basis for what is a first-stage opinion only, which opinion is not an operative determination upon which a decision to dismiss the applicant has been based, can be based or is purportedly based. The foregoing submission also ignores the process, which has yet to be followed to a conclusion, as mandated by s. 14 (2) (b) and (c). The foregoing provisions mean the there is no restriction as regards the content or manner in which the applicant may wish to respond to the first-stage opinion and that response can certainly be one in which a challenge is made to the proposition that the applicant's conduct was dishonestly. Clearly, if the ultimate outcome of the process, in the future (i.e. namely a second-stage opinion adverse to the applicant) is one which the applicant maintains is tainted by alleged illegality or unfairness, nothing in the judgment of this court prevents the applicant from challenging the conclusion of the process in any way he may wish. For present purposes, this court simply cannot take the view that the inevitable outcome of the process will be averse to the applicant, nor can this court take the view that the respondent shall act unlawfully in the future.

143. For the reasons set out in this judgment I am satisfied that the respondent has not "*wrongfully invoked*" the provisions of s. 14. Nor has the applicant made any operative determination or decision as regards the applicant's conduct. Insofar as the respondent formed a first-stage opinion based on dishonesty, this is clearly something which is subject to challenge by the applicant, in the manner provided for in s. 14 (2) (b) and (c). There has been no breach of the presumption of innocence as regards the first-stage opinion formed by the respondent. Nor has there been any refusal on the part of the respondent to provide any materials to the applicant. In view of the architecture of s. 14, the respondent was neither required to engage in a separate fact-finding process as a

prerequisite of or precursor to invoking his power pursuant to s. 14. The s. 14 procedure allows for a fact-finding exercise having regard to the provisions of s. 14 (2) (b). The said subsection is not prescriptive as to what response the applicant may wish to make but, in my view, it is undoubtedly wide enough, not only to allow the applicant to set out his response in writing, but also to furnish such evidence as the applicant wishes to furnish, in whatever form that evidence may be. It also seems to me to be a subsection which is drafted widely enough to permit, for example, the applicant's response to include a request to make his case at an oral hearing or to view evidence (e.g. in this case, CCTV footage), or to call witnesses in aid of his position and to request that they be heard. The foregoing are simply examples. My point is a simple one, namely that s. 14 (2) (b) and (c) seems to me to be a statutory reflection of the principle of *audi alteram partem* but the provisions themselves do not limit how that principle is given effect to, in practice, in any given situation.

144. In other words, there seems to me to be a very significant latitude insofar as the development of an appropriate procedure is concerned. At a level of principle, it does not seem to me that s. 14 (2) (b) disentitles the applicant from proffering or requesting anything. It is not for this court to determine what the outcome of any request, if made by the applicant, might be. Plainly, the response to a request must meet the requirements of natural and constitutional justice. To take up a hypothetical example, if the applicant were to say that the basis for the Commissioner's first-stage opinion can be entirely undermined if the Commissioner hears evidence from Mr. X or Mr. Y and calls for the opportunity for such evidence to be presented at an oral hearing as part of the applicant's response, a decision to refuse this would be at the Commissioner's peril insofar as the validity of the ultimate conclusion of the process, were that conclusion to be adverse to the applicant. This is merely to give examples by way of illustrating that, not having set out a specific process in granular detail, s. 14 (2) (b) seems to me to rule nothing out by way of a potential procedure which may be appropriate in any given case.

145. The fact that s. 14 does not set out in exhaustive detail a specific procedure which must be applied, does not, however, mean that any unfairness or illegality has arisen in the present case or necessarily will in the future. The applicant's submission that the "*genie*" of the findings detailed in the respondent's 08 May 2020 letter cannot be "put back in the bottle" because it amounts to a *"determination"* of the applicant's guilt is a submission which ignores the distinction between the first-stage opinion and the second-stage opinion (with a process underpinned by the *audi alteram partem* principle intervening between those two). It is a submission which ignores the reality that the only operative opinion for the purposes of dismissing the applicant is one provided for in s. 14 (2) (c). It is entirely unknown whether the respondent will, or will not, reach such a second-stage opinion, adverse to the applicant, in the future, but what is perfectly clear is that the only opinion the respondent has come to is one pursuant to s. 14 (2) (a).

146. Among these submissions made on behalf of the applicant is that "*there is no process here that somehow has been stopped, because it is bad from the start"*. For the reasons detailed in this judgment, I must disagree. The applicant has not demonstrated that the

respondent has deviated from either the express provisions of s. 14 or from the principles of natural and constitutional justice. There is undoubtedly a process and it is one set out in s. 14, but it is a process which has been arrested by virtue of the *ex parte* application brought. It is a process which has not yet run its course, in circumstances where it was halted before the vital principle of *audi alteram partem* had been given effect to. The proposition that the process is "*bad from the start"* to my mind ignores the reality of what s. 14 (2) (b) and (c) requires. It ignores the vital distinction between the first-stage opinion and any future operative determination, by way of a second-stage opinion. It ignores the commitment on the part of the respondent to consider any and all representations and responses by the applicant.

147. There is no doubt about the sophistication, skill and subtlety with which a range of submissions were made, written and oral, on behalf of the applicant. This case however, falls to be determined in light of the evidence before this court, having regard to a proper interpretation of the provisions of s. 14 and the relevant legal authorities. In my view, and for the reasons detailed in this judgment, the present application is misconceived and premature. The applicant has not established that there has been any breach of his constitutional rights to fair procedures natural justice or the presumption of innocence and the applicant is not entitled to an order of *certiorari*. For the reasons set out in this judgment, I am bound to dismiss the applicant's claim in full.

148. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate." Having regard to the foregoing, the parties should correspond with each other, forthwith, with regard to the appropriate costs order to be made. In default of agreement between the parties on that issue, short written submissions should be filed in the Central Office within 14 days.*