

**THE HIGH COURT  
JUDICIAL REVIEW**

[2020] IEHC 710  
[2020 No. 187 JR]

**BETWEEN**

**AIDAN BRACKEN**

**APPLICANT**

**AND**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**RESPONDENT**

**JUDGMENT of Mr. Justice Meenan delivered on the 13th day of November, 2020**

**Background**

1. The applicant joined An Garda Síochána in 1994. Originally, he was stationed in Dublin but was then transferred to the Kildare Division in 2004 being stationed in Carbury, a small rural substation. However, not long after being stationed in Carbury, the applicant became aware of the activities of organised criminal gangs operating in the area. The applicant became involved in the investigation of a particular gang who were running an extortion racket. Following investigation and prosecution, five members of this gang were convicted and received lengthy prison sentences. Subsequently, the applicant stated that this gang targeted himself and other colleagues also stationed in Carbury and that they were warned of a serious threat to their safety.
2. Following the conclusion of the investigation, and the subsequent convictions of members of the gang referred to, the applicant became involved in the investigation of local criminals who had been involved in crime in the area for a number of years. This particular gang also had a violent reputation in the area and a history of intimidating witnesses. The applicant maintained that this criminal group made threats towards himself and other Gardaí stationed in the area. These threats were both personal threats and also threats directed against his wife and family. In the few years before 2015, these threats escalated and the applicant received a number of formal notices from his superiors in An Garda Síochána to the effect that his life was in danger. The result of these ongoing serious threats was that the applicant suffered psychiatric injuries.
3. Following consultation with his GP, on 2 September 2015, the applicant was admitted to St. Edmundsbury Hospital due to a risk of suicide. A detailed and comprehensive report was prepared by Dr. Noel Kennedy, Consultant Psychiatrist, dated 17 July 2018, and forwarded to the respondent. From as early as August, 2015, there was correspondence between the various medical professionals who were treating the applicant and the Garda Chief Medical Officer. However, despite this, the respondent never prepared a report on the applicant's injuries.
4. The applicant successfully took judicial review proceedings against the respondent concerning the failure on the part of the respondent to respond to his application to be considered "*injured on duty*". Leave in respect of these proceedings was granted on 21 October 2019 and, thereafter, a motion seeking an injunction to prevent the respondent from ceasing TRR payments was issued. The respondent consented to the injunction and re-instated the said payments. These proceedings came on for hearing on 14 February

2020. Following discussions between the parties, the respondent conceded and it was agreed that a decision would be provided to the applicant before the end of June, 2020 together with payment of his costs.

5. Arising out of the said threats and intimidation, the applicant made a number of reports to the Gardaí, but also made a false report of threats. Arising out of this false report, the applicant was charged in the Circuit Court with an offence contrary to s. 12 of the Criminal Law Act 1976 (making false reports regarding threats to a person's safety) in respect of an alleged threat of 20 July 2015.
6. Directions were received on 21 September 2016 from the DPP to prosecute the applicant with one count of making a false report, the prosecution to proceed on indictment. The applicant was arrested by appointment on 2 February 2017. On 6 March 2017, the applicant failed to appear before Bray District Court, as required, to receive a book of evidence. On 13 March 2017, the applicant also failed to appear before Bray District Court to receive a book of evidence in respect of the charge against him.
7. On 9 October 2018, the applicant was arraigned before Wicklow Circuit Court and pleaded guilty. The applicant's sentencing hearing took place on 14 January 2020 before His Honour Judge Quinn. The Order of the Circuit Court states, *inter alia*, as follows: -

"DPP v. Aidan Bracken

...

This matter coming into the list for sentence on this day and the accused Aiden Bracken having been arraigned and having pleaded to count no. 1 on the indictment proffered against him, ...and the court having heard the evidence tendered and the submissions on behalf of the respective parties doth order.

...

The court finds the charge on count no. 1 proven but being of the opinion that having regard to the extenuating circumstances under which the offence was committed it is inexpedient to inflict any punishment. Dismiss the charge under the Probation of Offenders Act 1907, section 1(2). Enter into a €100 bond to keep the peace and be of good behaviour for a period of three years and to remain under medical supervision during this period. Bond entered in open court."

8. By a letter dated the next day, 15 January 2020, and received by the applicant on 24 January 2020, the respondent sought to summarily dismiss the applicant from An Garda Síochána in accordance with Regulation 39 of the Garda Síochána (Discipline) Regulations 2007 (S.I. No. 214/2007), as amended. The grounds for such dismissal were what the respondent described as being "*criminal conduct*" arising out of said prosecution in the Circuit Court, and also "*discreditable conduct*" arising out of the failure of the applicant to appear before Bray District Court on 6 March 2017 and 13 March 2017, as required, to receive a book of evidence in respect of the said charge. This letter concluded by referring

to para. (4)(c) of Regulation 39, giving the applicant an opportunity of advancing to the respondent, on or before 6 February 2020, reasons against the proposed dismissal.

9. By letter dated 6 February 2020, the Solicitors for the applicant wrote to the respondent to the effect that the proposed dismissal was disproportionate and without a fair or proper inquiry and had been done without seeking or considering appropriate medical reports concerning the condition of the applicant. The letter concluded: -

“The decision to dismiss a member of An Garda Síochána who has severe mental health problems caused by the performance of his duty, without any inquiry, and without ascertaining all the material facts is contrary to fair procedures and an abuse of Regulation 39...”

There was no response to this letter from the respondent.

10. A further letter from the applicant’s Solicitors was sent on 18 February 2020 contesting the proposed dismissal. Yet a further letter in similar terms was sent by the applicant’s Solicitors on 26 February 2020. Neither of these letters were replied to by the respondent. It should also be noted that the proposed dismissal by the respondent of the applicant and the subsequent correspondence, which was ignored, took place in the context of the earlier ongoing judicial review proceedings.

#### **Judicial Review Proceedings**

11. In March, 2020, the applicant was granted leave to seek by way of judicial review a number of reliefs, which included: -
- (i) An order of *mandamus* requiring the respondent to furnish replies to the applicant regarding his correspondence of 6 February 2020, 18 February 2020 and 26 February 2020;
  - (ii) An order of *mandamus* requiring the respondent to provide adequate reasons for his decision to dismiss the applicant, communicated by letter dated 15 January 2020; and
  - (iii) An order of *certiorari* quashing the decision of the respondent, taken in or around 15 January 2020 and notified to the applicant on 24 January 2020, to dismiss, subject to consent of the Policing Authority, the applicant from An Garda Síochána.
12. In his Statement of Opposition, the respondent maintains by way of preliminary objection that the only step which the respondent has taken to date is a proposal to dismiss the applicant, which proposal is no more than a first step in an ongoing process in which the applicant has been invited to make submissions.
13. The applicant relies on the provisions of Regulation 39 of the Garda Síochána (Discipline) Regulations 2007 which refer to “*summary dismissal of member*”. The respondent refers to the Order of the Circuit Court in the following terms: -

"The court order records that the court found the charge on count no. 1 proven. Probation orders made in the Circuit Court under the provisions of the Probation of Offenders Act 1907 are recorded convictions."

The respondent considers that the admitted act and criminal conduct of the applicant constitutes one of the breaches of discipline, within the meaning of Regulation 5, upon which the respondent was entitled to, and did properly, make his proposed decision to dismiss the applicant.

14. The respondent also referred to the applicant's failure to appear before Bray District Court, on 6 March 2017 and 13 March 2017, "*without good and sufficient cause*" when he was obliged to do so in the following terms: -

"On the two said occasions, the applicant was obliged to attend the said court for the purposes of receiving the book of evidence in respect of the above charge against him and on the occasion of his second nonattendance a bench warrant was issued by the District Judge for the applicant's arrest."

**Regulation 39**

15. The respondent relies upon the terms of Regulation 39 of the Garda Síochána (Discipline) Regulations 2007 in dismissing the applicant. Regulation 39 has the heading "*Summary dismissal*" and the relevant sections are as follows: -

"39.(1) Notwithstanding anything in these regulations and without prejudice to section 14(2), the Commissioner may, subject to this regulation, dismiss from the Garda Síochána any member (not being above the rank of inspector) whom he or she considers unfit for retention in the Garda Síochána.

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

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

...

(4) The power of dismissal conferred by this regulation shall not be exercised -

(a) ...

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

16. The schedule to the said Regulations is entitled "*Acts or Conduct constituting Breaches of Discipline*". This provides, inter alia: -

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

### **Consideration of Issues**

17. The application of Regulation 39 was considered in detail by the Supreme Court in *McEnergy v. Commissioner of An Garda Síochána* [2016] IESC 66. In giving the judgment of the Court, Laffoy J. considered the earlier judgment of Kelly J. in the Court of Appeal ([2015] IECA 217). Laffoy J. stated: -

“25. Before addressing the principal point pursued on behalf of Sgt. McEnergy on the appeal, Kelly J., in his judgment made some general observations, with which I agree, in relation to the power given to the Commissioner to summarily dismiss a member of the force. He pointed out (at para. 32) that the exercise of the power under s. 14 of the Act of 2005 is not subject to the unfair dismissal legislation and that members have no recourse open to them in that regard save by way of judicial review. The same limitations apply to the power to summarily dismiss under Regulation 39. Referring to a passage from the judgment of the High Court (O’Hanlon J.) in *State (Jordan) v. Commissioner of An Garda Síochána* [1987] I.L.R.M. 107 (*Jordan*), which he had quoted (at para. 21) and which had been quoted in part by Kearns P. in his judgment, Kelly J. stated that the power of summary dismissal, as was stated by O’Hanlon J., is an exceptional one and it is one which may only be used in ‘very limited’ circumstances. He also adverted (at para. 34) to the procedure provided for in Part 3 of the 2007 Regulations as being the normal method for dealing with serious breaches of discipline. He noted (at para. 35) that the only check on the exercise of the power of summary dismissal by the Commissioner is the fact that he is required to seek the consent of the Minister before giving effect to a decision to dismiss. Having regard to the foregoing matters, Kelly J. stated (at para. 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.’ ”

18. In the *McEnergy* case, the respondent exercised powers given under Regulation 39 in circumstances where there had been a conviction of the applicant under s. 2 of the Non-Fatal Offences Against the Person Act 1997. The applicant had been charged with a more serious offence under s. 3 of the said Act. In respect of this conviction, the applicant had received a suspended sentence. In the instant case, as to whether or not there was a conviction at all is open to question.

19. The terms of Regulation 39 provide that the respondent may summarily dismiss from An Garda Síochána a member of the force (not being above the rank of Inspector) who, in the view of the respondent, was in breach of discipline “*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*". Thus, a member who is being dismissed under Regulation 39 does not have the benefit of fair procedures or the holding of an inquiry. Clearly, a member dismissed from An Garda Síochána in these circumstances would not only suffer economically but would clearly suffer serious reputational damage making further employment problematic. Therefore, 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. I am satisfied that that is not the case here.

20. In this case, the respondent in his decision of 15 January 2020 refers to: -

"Certificate of conviction dated 14 January 2019 (Tab A) issued by the Wicklow Circuit Criminal Court, certifying that at a sitting of the Wicklow Circuit Criminal Court, the Courthouse, Bray, County Wicklow, on 14 January 2019, you Aiden Bracken, were duly convicted of one count of false report tending to show that an offence had been committed contrary to section 12(a) of the Criminal Law Act 1976."

"Tab A" was the Order of the Circuit Court, which reads as follows: -

"The court finds the charge on count no. 1 proven but being of the opinion that having regard to the extenuating circumstances under which the offence was committed it is inexpedient to inflict any punishment. Dismiss the charge under the Probation of Offenders Act, 1907, section 1(2). Enter into a €100 bond to keep the peace and be of good behaviour for a period of three years and to remain under medical supervision during this period. Bond entered in open court."

The term "[d]ismiss the charge" would indicate that, in fact, there was no conviction. There may well be arguments that there was a conviction given the terms of s. 1(2) of the Probation of Offenders Act 1907. However, what cannot be doubted is that the terms of the Order of the Circuit Court are ambiguous and, for the purposes of Regulation 39, raise a serious question as to whether there was in fact a conviction. It seems to me, that if the respondent was going to rely on the Order of the Circuit Court of 14 January 2019, an application ought to have been made to the Court to clarify the terms of the Order. This was not done.

21. The respondent's decision of 15 January 2020 also refers to "*discreditable conduct*" on the part of the applicant in that on two occasions, "*without good and sufficient cause*", he failed to appear before the District Court, as required, to receive a book of evidence. The use of the term "*without good and sufficient cause*" would imply that there may be good reasons why the applicant did not appear before the District Court on the two occasions. This would suggest, at the very least, that the respondent ought to have made some inquiries and, without having done so, could not reasonably be of the view that holding an inquiry "*could not affect his or her decision in the matter*".

22. The respondent submitted that the applicant's application for judicial review was premature in that there was an ongoing process which had not concluded. I do not accept that this is the case. The fact that the respondent repeatedly ignored correspondence both from the applicant and his Solicitor could only lead to the reasonable conclusion by the applicant that the process had been completed with the only step remaining being the consent of the Policing Authority.

**Conclusion**

23. By reason of the foregoing, the applicant is entitled to an Order of *certiorari* quashing the decision of the respondent, taken in or around 15 January 2020 and notified to the applicant not before 24 January 2020, to dismiss, subject to the consent of the Policy Authority, the applicant from An Garda Síochána.
24. As this judgment is being delivered electronically, I will hear the parties as to any further appropriate orders that may be made. The parties have fourteen days to submit written submissions in respect of this.