**APPROVED** **[2023] IEHC 300**

**THE HIGH COURT**

**JUDICIAL REVIEW**

**Record No.: 2023/24 JR**

**BETWEEN:**

**DESMOND BRANNOCK**

**Applicant**

**-AND-**

**THE COMMISSIONER OF AN GARDA SIOCHÁNA**

**Respondent**

**JUDGMENT of Mr. Justice Rory Mulcahy delivered on the 12th day of June 2023**

**Introduction**

1. In these proceedings, the Applicant seeks an Order quashing the Respondent's decision to suspend him from duty as a member of An Garda Siochána. When the proceedings commenced, the focus of the Applicant's complaint was an allegation that the decision to suspend the Applicant had been made *ultra vires*. However, the main complaint pursued at the hearing of the action was that the Respondent had failed to give any or any adequate reasons for his decision to suspend the Applicant.

**Factual Background**

2. The Applicant has been a member of An Garda Siochána for 29 years and is currently a sergeant based in Store Street Garda Station.

3. On 4 November 2022, the Applicant was arrested and charged with an offence contrary to section 5(4)(a) and 5(5) of the Road Traffic Act 2010. It is alleged that the Applicant was found to be drunk in charge of a vehicle with intent to drive at Kilcullen Road, which is a busy regional road outside Naas, County Kildare. He was not on duty or in a Garda car at the time of the alleged offence. It is alleged that Gardaí from Kilcullen Garda Station responded to a call from a taxi driver regarding a car stopped in the middle of the Kilcullen Road with the engine running. It is alleged that the Applicant was slumped over the steering wheel, asleep. He was arrested at the scene and brought to Naas Garda Station where it is alleged he provided a breath specimen showing an alcohol reading of 81mg per 100 ml. The permissible limit is 22mg per 100ml. He was charged and released on bail.

4. On 17 November 2022, an Inspector was appointed to investigate the matter pursuant to Regulation 23 of the Garda Siochána (Discipline) Regulations 2007 ("**the Discipline Regulations**") as amended. That Inspector identified a potential conflict of interest and on 23 November 2022, a different Inspector, Inspector Brian Norton, was appointed to investigate the matter. Inspector Norton was also requested to conduct a criminal investigation. It appears that the Applicant was not advised of these appointments until after the commencement of these proceedings.

5. The Applicant was required to appear before Naas District Court on 23 November 2022 in relation to this charge. On 18 November 2022, he was served with a Form IA71 Notice of Suspension, notifying him that he was suspended from duty pursuant to Regulation 7 of the Discipline Regulations for the period from 7 am on 23 November 2022 to 7 pm on 23 November 2022, *i.e.* the period during which he was due to appear in Court. No complaint is made about that decision in these proceedings.

6. The Respondent has prepared guidelines on the process for suspension of members, the Policy Document on the Suspension from Duty of Members of An Garda Siochána

under the Garda Siochána (Discipline) Regulations 2007 as amended ("**the Suspension Policy**")**,** which has been updated from time to time. The relevant version for the purpose of these proceedings is the January 2017 version which provides, at part 5, that the *"views of the members Divisional Officer will be sought on the following matters when the issue of a member's long term suspension is being considered"* and sets out six matters which are the "primary considerations for suspension" and seven matters which are the "secondary considerations for suspension".

7. On 1 December 2022, Chief Superintendent Patrick McMenamin, the Applicant's Divisional Officer, prepared a report, addressed to the Chief Superintendent, Internal Affairs, which assessed each of the primary and secondary considerations. Chief Superintendent McMenamin, having considered *"all of the facts of the case utilising the Garda Decision Making Model"* did not recommend suspension of the member. He concluded that:

> *"I do not see any benefit to the suspension either for the organisation or the member. I also considered the impact that the suspension will have on the member and morale generally within this Division and in my capacity as Divisional Officer with responsibility for members welfare and morale generally the suspension of this instance would negatively impact which would far outweigh any perceived benefit of suspension which in my opinion is minimal if at all."*

8. On 7 December 2022, a letter was prepared by Chief Superintendent Margaret Nugent of Internal Affairs, addressed to the Assistant Commissioner, Governance and Accountability. She referred to the report of Chief Superintendent McMenamin, which was sent as an attachment to the letter, and stated that she was in agreement with him that the suspension of the Applicant was not warranted at this time.

9. By letter dated 12 December 2022, Assistant Commissioner Jonathan Roberts replied to this letter. In his letter he expressly references Chief Superintendent Nugent's recommendation and the primary and secondary considerations put forward by Chief Superintendent McMenamin. The letter continued:

> *"The alleged offence in this case is most serious and is particularly concerning bearing in mind the role An Garda Siochána has in relation to protecting lives on the road, and the significant efforts of the organisation in attempting to reduce the annual fatalities that occur as a result of road traffic collisions. The allegation in this case, if proven accurate, indicates a degree of irresponsibility*

*and reckless behavior that ultimately could have resulted in a serious traffic collision.*

*I am not satisfied with the suggested course of action with regard to the member in this case, and I am of the opinion that the alleged breach is of such a serious nature that suspension is considered. Please prepare the necessary paperwork with regard to placing this member on suspension pending the outcome of the investigation into both the offence alleged and the disciplinary matters that arise."*

10. On 14 December 2022, the Applicant was served with a Notice of Suspension, signed by Assistant Commissioner Roberts, suspending him from duty from 9.00 am on that date to 6.00 am on 1 February 2023. The Notice stated that the suspension from duty arose as a result of:

> *"The circumstances surrounding your arrest for being Drunk in Charge of a vehicle at Kilcullen Road, Naas, Co. Kildare on the 4th November 2022, which has resulted in a prosecution before the District Court."*

11. The Applicant was not, at this time, provided with the reports from Chief Superintendents McMenamin and Nugent, or the response from Assistant Commissioner Roberts.

12. The Applicant's solicitor wrote to the Assistant Commissioner by letter dated 22 December 2022. The letter raised a number of issues. It stated that "contrary to the reason provided" the Applicant had not been convicted of any offence, noting that he had only been charged at that time. It was stated "*the reason for [the] suspension is "clearly misguided*". In addition, the letter raised a query about the power of the Assistant Commissioner to suspend the Applicant for a period exceeding 10 days. The letter claimed that this was *ultra vires* the Regulations.

13. The letter further stated that the suspension of the Applicant "without an inquiry" was:

> *"[A]n exceptional and disproportionate response to the charges. The failure by An Garda Siochána to consider all circumstances and the record of Sergeant Brannock, is contrary to fair procedures and natural justice and a discharge and/or failure of the duty of An Garda Siochána."*

14. The letter pointed out that although the Applicant had been suspended on full pay, due to the loss of allowances and overtime, he had lost approximately half the take home

pay he would otherwise have received. The letter posed a number of queries seeking to enable the Applicant to compare the exercise by the Assistant Commissioner of his powers under Regulation 7 in this case with other cases. The letter demanded the reinstatement of the Applicant and a reply to the letter within seven days and stated that if not satisfied with the response, it was their intention to challenge the decision in Court.

15. The Respondent replied with a holding letter on 3 January 2023, the same day as the Applicant's solicitor sent a further letter seeking a reply as a matter of urgency.

16. On 16 January 2023, the Applicant commenced the within proceedings before any reply was forthcoming.

17. Separately, the Respondent replied to the letter of 22 December 2022 by letter dated 23 January 2023. The letter gave details of the number of other members facing disciplinary proceedings. At the time of the letter, there were 116 members suspended, 44 of whom had been charged with a criminal offence, including eight suspended in relation to drink-driving offences. A further 50 members are suspended who are the subject of criminal investigations, including two in relation to drink-driving offences. The letter acknowledged a delay in responding.

18. In addition, on 19 January 2023, Inspector Norton hand delivered a letter dated 11 January 2023 notifying him of the alleged breach of conduct and seeking his consent to put the disciplinary proceedings in abeyance pending the determination of the criminal prosecution. Following further requests dated 29 January 2023 and 2 February 2023, the Applicant consented to this course of action on 15 February 2023.

**Procedural Background**

19. On 16 January 2023, the Applicant sought leave to apply for judicial review of the Respondent's decision to suspend him. In brief terms, his complaint was that the Respondent had acted in breach of Regulation 7(4) of the Discipline Regulations by purporting to suspend the Applicant for a period in excess of ten days. In addition, the Applicant complained of the Respondent's failure to respond to the queries raised in

his solicitor's letter of 22 December 2022 regarding the proportionality of the decision, and of the failure of the Respondent to consider the Applicant's individual circumstances in accordance with the Suspension Policy.

20. The Court (Meenan J.) directed that the application for leave be made on notice to the Respondent and the application was adjourned to 19 January 2023. On 18 January 2023, the Applicant's solicitors sent a letter noting that the judicial review papers had omitted to refer to the amendment to Regulation 7(4) of the Discipline Regulations introduced by Regulation 2 of the Garda Siochána (Discipline) Regulations 2011. It was stated that this did not affect most of the substantive grounds of judicial review including the failure to reply to the solicitors' letters and the proportionality of the suspension.

21. On the return date, the parties agreed a timetable for the exchange of affidavits.

22. The Respondent delivered a replying affidavit sworn on 10 February 2023 together with an intended Statement of Opposition. The replying affidavit explained the course of events set out above, exhibiting relevant documentation, relating to the commencement of an investigation in November 2022 and the exchanges regarding the proposed suspension in December 2022.

23. On 22 February 2023, the Applicant delivered a replying affidavit exhibiting an amended Statement of Grounds. The amended Statement of Grounds included a new claim that the Respondent had failed to provide reasons for the decision to suspend the Applicant.

24. The application for leave was fixed for hearing and the parties agreed that the application for leave would proceed by way of telescoped hearing, *i.e.* the application for leave and the substantive application would be heard together and the Court would first consider the question of whether the threshold for the grant of leave had been met, before, if satisfied that it had, going on to consider whether to grant relief by way of judicial review.

25. When the matter came on for hearing, the Court acceded to the parties' request that the hearing be treated as a telescoped hearing but directed that the amended Statement of

Grounds be filed by the Applicant and that the Respondent file its Statement of Opposition in response thereto.

**Legislative Framework**

26. Regulation 7(1) of the Discipline Regulations gives to the Commissioner the power to suspend a member where, in the opinion of the Commissioner, the circumstances render such a course desirable in the interests of An Garda Siochána. The original Regulation 7(4) provides that where the power of suspension is delegated to a member by the Commissioner, that person may not suspend a member for in excess of 10 days.

27. Regulation 7(4) was amended by Regulation 2 of the Garda Siochána (Discipline) Regulations 2011. It now provides:

> *(4) Where the function of suspending a member is delegated by the Commissioner to a member of the rank of Chief Superintendent, the member of that rank may not suspend a member for a period exceeding 10 days, but the Commissioner may extend the suspension.*

28. Accordingly, there is no restriction on the length of a suspension imposed by a member of the rank of Assistant Commissioner.

29. A curious feature of Regulation 7 is that, although contained within Regulations relating to disciplinary matters, it does not expressly confine the power of suspension to members who are the subject of disciplinary proceedings. It is noteworthy, however, that the disciplinary actions available under Regulations 14 and 22 of the Regulations do not include a power to suspend. Put otherwise, a suspension is not a disciplinary measure available to the Respondent under the Regulations.

30. The Suspension Policy relied on in these proceedings appears to be a non-statutory policy prepared by the Respondent regulating the manner in which decisions on whether to suspend a member the subject of a pending disciplinary investigation. The document distinguishes between 'short term suspension' which is suspension for not more than 10 days, and 'long term suspension' which appears to refer to any suspension longer than 10 days. The document explains that the power to impose a short terms suspension has been delegated to all members of the rank of Chief Superintendent.

31. The criteria applicable to long term suspensions make clear that they relate to suspensions pending a disciplinary investigation:

> ***Primary considerations for suspension;***
>
> *1. Strength of evidence,*
> *2. Seriousness of allegation,*
> *3. Risk to members of the public,*
> *4. Risk to colleagues,*
> *5. Potential to pervert the course of justice/suborn colleagues,*
> *6. Options of alternatives to Suspension.*
>
> ***Secondary considerations for suspension;***
>
> *1. Likely outcome,*
> *2. Estimated time to conclude investigation,*
> *3. Relevant complaint history,*
> *4. Current performance,*
> *5. Impact on police/public relations,*
> *6. Impact on service morale,*
> *7. Risk to officer/welfare considerations.*

32. The Suspension Policy expressly provides that *"in all cases where a member of An Garda Siochána is suspended they will be informed of the reason(s) for his/her suspension."*

**Duty to give reasons**

33. The obligation of administrative bodies to give reasons for their decision is now well established. In **Connelly v An Bord Pleanála [2018] IESC 31, [2021] 2 IR 752** the Supreme Court reviewed the developing jurisprudence on the duty to give reasons and, in particular, the purpose behind the giving of reasons.

34. Having reviewed recent case law, including the decisions of that Court in **Mallak v Minister for Justice, Equality and Law Reform [2012] IESC 59, [2012] 3 IR 297** and **Meadows v Minister for Justice, Equality and Law Reform [2010] 2 IR 701**, the Court (Clarke CJ) summarised the position as follows:

> *"6.15 Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a*

*decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review.*

*6.16 However, in identifying this general approach, it must be emphasised that its application will vary greatly from case to case as a result of the various criteria identified earlier which might distinguish one decision, or decision making process, from another."*

35. In **Connelly** the Court also considered the question of where reasons can be found, or, as stated by Clarke CJ *"identifying the materials which may be considered appropriate or acceptable in determining the reasons for a decision"*.

*"7.4 In this context it is also worth returning to the decision of Fennelly J. in Mallak. As noted above, at para. 66 of his judgment, Fennelly J. stated:-*

> "The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."

*7.5 Therefore, it is possible that the reasons for a decision may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion. However, as is clear from the above analysis, this is always subject to the requirement that the reasons must actually be ascertainable and capable of being determined. In this regard, I refer to my judgment in EMI, where I stated at paragraph 6.8:-*

> "While the comments made in Christian related to the specific circumstances of that case and derived from the context of a development plan, it seems to me that there is a more general principle at play. Legal certainty requires, as was pointed out in Christian, that it must be possible to accurately determine what the reasons were. There should not be doubt as to where the reasons can be found. Clearly, an express reference in the decision itself to some other source outside of the decision document meets that test. Where, however, it is suggested that the reasons can be found in materials outside both of the decision itself together with materials expressly referred to in the decision, then care needs to be taken to ensure that any person affected by the decision in question can readily determine what the reasons are notwithstanding

the fact that those reasons do not appear in the decision itself or in materials expressly referred to in the decision."

*7.6 Again, it is worth emphasising the point made earlier. The range of persons who are able to challenge a particular decision will vary from case to case, as will the extent of their involvement in the process. Thus, as a consequence of the above analysis, the requirement that reasons given for a decision must be adequate necessitates that, where the reasons are not included in the text of the decision itself, they must be capable of being readily determined by any person affected by the decision. Clearly, the ability of a person who was not involved in the process, but who is nonetheless entitled to challenge the decision, to identify the reasons for a decision, where those reasons are to be derived from a diffuse range of sources, will differ greatly from the ability of a person who was involved in the process to do so."*

36. The Applicant also relied on the decision of the Supreme Court in **McEnery v Commissioner of An Garda Siochána [2016] IESC 66**. In that case, the Court (Laffoy J.) considered the question of whether adequate reasons had been given for the respondent's decision to dismiss the applicant. The Court considered the nature of the particular decision at issue:

*"56. Having regard to the legislative structure embodied in Regulation 39, the first stage in the process thereby created is the determination by the Commissioner as to whether he or she considers that the member is unfit for retention in An Garda Síochána, which determination, having regard to the facts in this case, requires to be made in accordance with the provisions of Regulation 39(1) and (2)(a). Once that determination is made and it is to the effect that the Commissioner considers the member unfit for retention and proposes to dismiss the member, the Commissioner is obliged to inform the member of the material facts and the relevant breach of discipline in accordance with Regulation 39(4)(b). Up to that point, the summary dismissal process provided for in Regulation 39 is governed by the provisions of Regulation 39. The second stage is that, the member having been given an opportunity of submitting to the Commissioner reasons against the proposed dismissal and having availed of that opportunity, the Commissioner conclusively determines whether the member is unfit for retention. Although not expressly provided for in Regulation 39, it is clearly implicit that the Commissioner, before making the conclusive determination as to the proposed decision, will have regard to any submissions made by the member. In any event, clearly the principles of natural and constitutional justice require the Commissioner to do so. The final stage is that, if the Commissioner determines that the member should be dismissed from An Garda Síochána, the consent of the Minister is necessary to the giving effect of such determination."*

*emphasis added

37. Having considered the reasons given by the Commissioner – which merely recited the breach of the Regulations in issue, being the fact of a criminal conviction for assault contrary to section 2 of the Non-Fatal Offences Against the Person Act 1997 – the Court concluded that the reasons were inadequate:

> *"65. Obviously, as with the decision to dismiss, the reasons for the decision must be consistent with the proper application and interpretation of Regulation 39. Notwithstanding that the submission made by Sgt. McEnery as to what constitutes material facts for the purpose of Regulation 39(2)(a) in this case has been rejected in this judgment, there remains a void as to the basis on which the Commissioner rationalises the conclusions outlined in the next preceding paragraph and, in particular, the reasons for his conclusions as to the gravity of the breach of discipline and that Sgt. McEnery is unfit for retention in An Garda Síochána. As with the circumstances in the Kelly case, it cannot be said that the issue involved in this case is so self-evident and narrow that the mere fact of the decision discloses the reason. Accordingly, I consider that the decision of the Commissioner to dismiss Sgt. McEnery should be quashed on the ground of failure to give adequate reasons for the decision."*

38. As made clear in **Connelly**, not all administrative decisions impose equivalent obligations regarding the extent to which the reasons for a decision need to be explained. In this regard, the extent of fair procedures which a decision to suspend a member of An Garda Siochána attracts was expressly addressed by the High Court in **Canavan v Commissioner of An Garda Siochána [2016] IEHC 225**, in which the Court (Baker J.) emphasised the distinction between 'holding suspensions' on the one hand and 'lengthy suspensions' on the other. She referred to the decision of Keane J. (as he then was) in **Gavin v Minister for Finance [2000] IESC 8**:

> *"18. Guidance can be taken from the decision of the Supreme Court in Gavin v. Minister for Finance [2000] IESC 8, a decision made in the broader context of the suspension of a member of the Civil Service. Keane C.J., delivering the judgment of the Court made it clear that the principles of natural or constitutional justice or fair procedure cannot be imposed on a decision to invoke a holding suspension. With regard to whether such procedure do apply, he said as follows:-*
>
> > "But they do not apply to suspensions which are made, as a holding operation, pending enquiries. Very often irregularities are disclosed in a Government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of

> defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once."
>
> *19. That dicta shows the reason why the full panoply of natural or constitutional justice requirements cannot apply as a matter of good sense and logic to a decision by an employer to impose a holding suspension."*

39. Baker J. went on to consider whether the suspension at issue in **Canavan** was a holding suspension or not.

> *21. The distinction between a holding or summary suspension on the one hand, and a lengthy suspension on the other hand, was made by Barr J. in the decision of Quirke v. Bord Luthchleas na hÉireann [1988] 1 I.R. 83 where he identified the latter type of suspension as follows:*
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> > "On the other hand, a suspension may be imposed not as a holding operation pending the outcome of an inquiry, but as a penalty by way of punishment of a member who has been found guilty of misconduct or breach of rules. The importance of the distinction is that where a suspension is imposed by way of punishment, it follows that the body in question has found its member guilty of significant misconduct or breach of rules."
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> *22. Kearns J. in Morgan v. Trinity College Dublin & Ors. [2003] IEHC 167; [2003] 3 I.R. 157 quoted that passage with approval and held that the open-ended suspension in that case had to be seen as a form of punishment "and a severe one at that". He identified a distinction in the approach that the court should take to the two types of suspension as follows:*
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> > "An open-ended suspension, particularly one without pay, can only be seen as a form of punishment, and a severe one at that. In contrast, a short period of suspension with pay against a clearly defined backdrop of consecutive steps to resolve the disciplinary issue is less likely to warrant the court's intervention on the basis that the procedures, or their application, is unfair to the person concerned."
>
> *23. Henchy J. in Flynn v. An Post suggested that the right to suspend cannot be treated as a "one way street" and went on to say as follows:-*
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> > "Where (as happened here) the employee has been suspended without pay, that suspension should in all fairness be disposed of, either by raising the suspension or by dismissing the employee, as soon as is reasonably practicable. But when it is reasonably practicable to do so is something that a court cannot decide without also taken into account the considerations put forward by the employer as being basic to his needs. It is only when the claims of both parties have been set against one another and duly balanced that a court can decide what is needed to satisfy the fundamental requirements of justice." at p. 76

*24. I consider that this dicta of Henchy J. points me to a view, that while a holding suspension may be justified without giving the member the benefit of procedural fairness, the balance is tipped towards a requirement of such fairness when the suspension has been a lengthy one, and when no substantive progress has been made in the investigation.*

*25. The delay in the present case has been of almost two years. Some part of the delay is said to be justified on the grounds that a criminal investigation was underway and the decision of the DPP whether to prosecute was awaited. That accounts at best for three months. The suspension, in my view, had ceased to be a holding suspension long before this and the delay, in my view, is unwarranted.*

*26. The applicant has suffered prejudice, he had been suspended for eighteen months at the time the judicial review was commenced, and it now almost two years since the first suspension occurred. He has made representations to the Commissioner that the reduction in pay be no longer imposed, and notwithstanding this, he continues to be subjected to the onerous requirements of his suspension, including a reduction in pay and a limitation on his capacity to earn an additional income during ordinary working hours."*

40. The Suspension Policy applicable at the time the Applicant was suspended in **Canavan** was the 2014 Policy which was replaced in September 2015. Neither Policy included a requirement to give reasons for a suspension.

**Arguments of the Parties**

41. As noted above, the Applicant did not pursue his complaint that his suspension was *ultra vires* Regulation 7(4). Nor did he pursue his claim that the Respondent failed to conduct any inquiry into the Applicant's circumstances before deciding to suspend him. The claim about failure to reply to his solicitors' letter was overtaken by events, the reply to the letter on 23 January 2023 and therefore was not pursued at the hearing.

42. Rather, following receipt of the Respondent's replying affidavit, he re-formulated his case in light of the new information then available to him. In particular, he amended his grounds to include a complaint that the Respondent had not given adequate reasons for his decision to suspend him.

43. In so doing, the Applicant pursued two distinct complaints. Firstly, he argued that the Respondent was confined to relying on the reason given when he notified the Applicant

of his suspension and could not rely on reasons expressed in internal communications which were not conveyed to the Applicant at the time of his suspension, or to matters which subsequently came to the Respondent's attention but were not relied on by him in imposing the suspension. In particular, the Applicant contended that the Respondent could not rely on the reasons expressed in the letter from Assistant Commissioner Roberts of 14 December 2022. Nor could he rely on the précis of evidence prepared by the arresting Gardaí which were not available to the Respondent at the time that the decision was made to suspend the Applicant.

44. Secondly, the Applicant contends that the Respondent has failed to give reasons which adequately explain why Assistant Commissioner Roberts suspended the Applicant notwithstanding the recommendations from Chief Superintendents McMenamin and Nugent that suspension was not warranted. In this regard, the Applicant characterises the Chief Superintendents as 'experts' for the purpose of making decisions on whether to suspend a member.

45. The Applicant contends that his suspension cannot be regarded as the type of short-term suspension to which, as Baker J. put it in **Canavan** *"the full panoply of natural or constitutional justice requirements cannot apply."* He disputes the Respondent's characterisation of the suspension as a "holding" suspension. Rather, he argues, having regard to its length, its impact on him and the failure to progress the disciplinary investigation, it should be regarded as a long term suspension where the requirements of constitutional justice were engaged. Assessed against that standard, he argues, the reasons given for the suspension fell short of what was required.

46. The Applicant also touched on a separate argument that the decision was disproportionate, referring in his submission to **Meadows** and **Efe v Minister for Justice, Equality and Law Reform [2011] 2 IR 298**. In that case, Murray CJ described the principle of proportionality thus (at p. 727):

> *"I am of the view that the principle of proportionality is a principle that may be applied for the purpose of determining whether, in the circumstances of a particular case, an administrative decision may properly be considered to flow from the premises on which it is based and to be in accord with fundamental reason and common sense. In applying the principle of proportionality in this context I believe the court may have regard to the degree of discretion conferred on the decision-maker. In having regard to the degree of discretion a margin of*

*appreciation should be allowed to the decision-maker in choosing an effective means of fulfilling any legitimate policy objectives."*

47. The Respondent, for his part, argues that the reasons communicated with the notice of suspension were adequate and points out that no claim was made regarding lack of reasons in the proceedings as initially formulated. He claims that the decision to suspend was not a disciplinary measure, but rather a "holding suspension" pending the conclusion of disciplinary proceedings and therefore the Applicant was entitled to very limited fair procedures regarding that decision. He further claims that the reasons given in the letter of 14 December 2022, which were known to the Applicant before he amended his claim, were consistent with and supplemented the reasons initially communicated and meet the standard required for this type of decision. He disputes the characterisation of the Chief Superintendents as experts.

**Discussion**

48. Although not pursued by the Applicant, it is worth confirming that there was and is no basis for the claim that there has been a breach of Regulation 7(4) of the Discipline Regulations. The Discipline Regulations do not impose a restriction on the persons to whom the Commissioner can delegate his power to suspend, and only impose a temporal restriction on suspensions imposed by members of the rank of Chief Superintendent. There is no dispute but that the decision to suspend the Applicant was made by a member of the rank of Assistant Commissioner, to whom the power to suspend had been delegated: the decision to delegate was made on 19 August 2022 and was exhibited in the Respondent's affidavits. In the circumstances, the decision to suspend the Applicant was clearly *intra vires* the Respondent's powers under Regulation 7.

49. The remaining complaint pursued by the Applicant are that inadequate reasons were given for the decision to suspend. In order to consider the merits of this complaint, it is necessary to consider, first, what is the nature of the decision at issue and, in particular, to what extent do the requirements of fair procedures apply to that decision, and second, what can the Respondent rely on in identifying the reasons for his decision.

i. Nature of Decision

50. Although the debate at hearing was concerned with the question of whether the suspension in this case was a 'holding suspension', which would not be subject to a requirement for fair procedures, or a 'long-term' suspension, which would. It seems to me that use of these labels tends to cloud rather than illuminate the nature of the decision, and the extent of fair procedures which must be afforded.

51. The case law illustrates that the extent of fair procedures which must attend any decision to suspend falls along a spectrum depending on the circumstances. Relevant considerations include the length of the suspension, whether it is open-ended, whether it is with or without pay, whether it occurs in the context of clearly defined investigative or disciplinary procedures, whether or not it is intended to be punitive. In this latter regard, it seems that a suspension, even if not intended to be punitive may have to be regarded as such if it continues for a sufficiently long period, especially if there is no progress in an investigation or disciplinary proceedings.

52. In the particular context of the suspension of a member of An Garda Siochána, regard must also be had to the Suspension Policy in determining the fair procedures to which a member is entitled. Although the Policy does not have statutory force, the Commissioner has adopted a policy which provides that particular steps will be taken before suspending a member. It would be difficult for the Commissioner to argue that a decision taken without following the steps set out in that policy was in accordance with fair procedures, nor did he seek so to do. To make a decision in accordance with the Suspension Policy required the taking of the views of the Divisional Officer in relation to particular considerations. It also required the giving of a reason for the decision.

53. As noted above, the suspension of a member is not a sanction available to the Commissioner under the Discipline Regulations. Accordingly, any suspension under the Discipline Regulations must be understood not as a punitive measure but as a procedural step in disciplinary proceedings. Nonetheless, the Applicant sought to argue that in his case, as in **Canavan**, the balance had 'tipped' such that fair procedures required that the Commissioner was now required to provide reasons sufficient to justify his 'long-term' suspension. In particular, the Applicant argued, the

Commissioner was required to provide reasons capable of explaining how he had formed the view that the Applicant's suspension was necessary notwithstanding the views of the two Chief Superintendents that suspension was not required.

54. I do not agree that the situation in the Applicant's case is analogous to that of the applicant in **Canavan**. In **Canavan**, the applicant had been suspended for a period of two years pending the conclusion of a criminal investigation. The Court characterised the position regarding the series of three-month suspensions to which he had been subjected as follows:

> *"37. None of the notices of suspension prior to that of the 30th October, 2015 contained a reason for which the applicant was suspended, nor why continued suspension was considered necessary. There has been no interview or other form of engagement between the applicant and the disciplinary bodies. The delay of two years in progressing the investigation is not explained."*

55. In the Applicant's case, by contrast, he had been suspended for a period of 5 weeks at the time of institution of the proceedings. That suspension was renewed once prior to the hearing (on 1 February 2023) and again subsequent to hearing (on 1 May 2023).

56. Moreover, the Applicant has agreed that the disciplinary proceedings could be held in abeyance pending the determination of the criminal proceedings. As the Respondent's counsel explained, there was good reason for so doing. In particular, Regulation 8(2) of the Discipline Regulations provides that disciplinary proceedings may have to be discontinued in the event that the Applicant is acquitted on the criminal charges. This is so notwithstanding that the criminal proceedings need to be proved to a higher standard than the disciplinary proceedings (see Regulation 9).

57. In the circumstances, therefore, in my view, no heightened obligation was imposed on the Commissioner in respect of the procedural fairness which he was required to afford the Applicant. That is not to say, however, that the Respondent was not required to afford any fair procedures at all. The decision to suspend involves the exercise by the Commissioner of an important discretion. The exercise of that discretion cannot be capricious, arbitrary, or irrational. It must, therefore, be reasoned. As a corollary, the Respondent must, in my view, as a matter of fair procedures state what that reason is. The Suspension Policy put in place regarding the imposition of suspensions over ten

days in length which requires the giving of a reason is merely a recognition of this requirement.

ii. Where can the reasons be found?

58. At the time the proceedings were instituted, the only reason which had been provided to the Applicant for the decision to suspend him was the reason given in the Notice of Suspension, that it resulted from the circumstances of his arrest for being drunk in charge of a vehicle.

59. By the time the matter came on for hearing, however, it was clear that there was documentation in existence which explained in further detail why the Respondent considered the suspension was necessary, in particular, the letter of 12 December 2022 from Assistant Commissioner Roberts which referenced the reports from each of the Chief Superintendents.

60. Had the Applicant challenged the decision to suspend him on the basis that inadequate reasons had been given from the outset, an interesting issue would have arisen as to whether the Respondent could rely on the reasons given in Assistant Commissioner Roberts' letter. Although a decision-maker will typically not be permitted to supplement a decision by the giving of reasons after a decision is challenged, it seems to me that there is a clear distinction between a situation where reasons are recorded prior to a decision but not communicated with the decision, and a situation where reasons are advanced for the first time after a decision is challenged. In this regard, the Respondent clearly cannot rely on the material included in the replying affidavits which he argues tends to support his decision, but to which regard was not had when the decision was made. In my view, different considerations arise in relation to the letter from Assistant Commissioner Roberts. Since that clearly evidences the reasons for the decision and pre-dates the decision, it is difficult to see any justification for disregarding those reasons when considering the question of whether *certiorari* of the decision is warranted. There might, of course, be costs consequences for failing to have provided it in advance of any challenge.

61. However, it is not necessary to reach a final view on that issue because the Applicant did not challenge the absence of reasons until he had been provided with the documents,

as a result of which he amended his pleadings. The complaint now made, therefore, is by reference to those documents and just as the Applicant can now point to them and argue that the reasons contained within them are inadequate, so must the Respondent be able to rely them and argue for their adequacy. It is true that they are not expressly referenced in the Notice of Suspension, but by the time that the Applicant sought to challenge the adequacy of reasons for the decision, it was absolutely clear to him that the reasons for the decision could be found in these documents.

iii. Were the reasons adequate?

62. Having regard to the nature of the decision in issue, I am quite satisfied that the reasons given by the Respondent were adequate.

63. Although the initial reason given, that it resulted from the circumstances of his arrest which resulted in his prosecution, was very brief, it is telling that the Applicant was in no doubt why he had been suspended and did not query the reasons for the decision in his letter of 22 December 2022, nor challenge the adequacy of reasons in the proceedings as initially instituted.

64. Rather he claimed in his letter that that the "reason for [the] suspension is misguided" and claimed that it was disproportionate on the mistaken assumption that the Respondent had not considered the matters set out in the Suspension Policy.

65. In truth, it is not surprising that the Applicant did not complain about the absence of reasons at this stage. Regulation 7 permits the suspension of a member where the Commissioner considers it "desirable in the interests of An Garda Siochána".

66. The Applicant does not contend that he is not aware of the circumstances of his arrest. Although he avers in an affidavit sworn on 22 February 2023 that the expression "circumstances surrounding your arrest" is vague and unclear, he did not seek any clarification of it in his letter of 22 December 2022. He has been charged with a criminal offence, being drunk in charge of a vehicle. Of course, he is entitled to the presumption of innocence in relation to the criminal offence with which he has been charged, but I do not see how it can seriously be contended that the Notice of Suspension was not sufficient notice to the Applicant that the Commissioner considered that his arrest and

prosecution for being drunk in charge of a vehicle rendered it desirable in the interests of An Garda Siochána that he be suspended.

67. The Applicant first complained about the adequacy of reasons when he became aware that the decision had been made to suspend him notwithstanding the recommendations that suspension was not required. This leads to the anomalous position of the Applicant complaining about the absence of reasons for the first time when he is provided with a *more* detailed explanation of the decision to suspend him. This reveals the Applicant's true complaint – that the Commissioner did not follow the advice given to him by the Chief Superintendents.

68. The Applicant accepts that the Commissioner was under no obligation to follow that advice but argues that the Commissioner was under an obligation to explain his reasons for not so doing, particularly where the advice was that of 'experts'.

69. The difficulty for the Applicant is that the Respondent *has* given reasons for not following the recommendations of the two Chief Superintendents. Assistant Commissioner Roberts' letter of 12 December 2022 shows that he clearly has had regard to and understand the advice which has been given to him by the Chief Superintendents, expressly referencing the analysis of primary and secondary considerations by Chief Superintendent, but that he disagrees with that advice. Moreover, it is clear that his disagreement is by reference to factors which are expressly referred to in the Suspension Policy, in particular, the seriousness of the offence alleged and the potential risk to the public the alleged incident posed.

70. The Applicant does not dispute that the considerations set out in the Suspension Policy are relevant considerations when deciding on a potential suspension. A number of factors are identified, all of which must be weighed in the balance. The Chief Superintendents, asked to make recommendations, can weigh those factors as they see fit but it is for the Commissioner, or the person to whom the Commissioner has delegated the authority to make a decision having weighed those factors. In this case, the letter of 12 December 2022 makes clear that Assistant Commissioner Roberts considered that the seriousness of the offence alleged outweighed those factors identified in the recommendations to him militating against a suspension.

71. In my view, therefore, having regard to the nature of the decision at issue, the reasons for the Assistant Commissioner's decision to impose the suspension are sufficiently clear to meet the requirements of fair procedures.

72. Nor does the characterisation of Chief Superintendents McMenamin and Nugent as 'experts' change matters. This is not to denigrate the expertise of either one, but insofar as they can be regarded as experts, it is equally clear that their superior officer, Assistant Commissioner Roberts must equally, at least, be regarded as an expert and entitled to form his own expert opinion. More importantly, the decision was that of the Assistant Commissioner. The Assistant Commissioner has explained why he disagreed with his colleagues and that, in my view, is sufficient.

73. Finally, insofar as the Applicant advances a separate argument regarding the proportionality of the decision, it doesn't seem to me that this has been adequately pleaded; it is only introduced by reference to the complaint contained in the letter of 22 December 2022. In any event, I do not consider that the decision can be impugned on proportionality grounds. The original complaint of lack of proportionality was premised on the mistaken assumption that there had been no regard to the criteria specified in the Suspension Policy. It is clear that those matters were considered. Leaving aside that no issue of fundamental rights comparable to those at issue in **Meadows** was engaged by the decision to suspend the Applicant in this case, the decision clearly "*flows from the premises on which it is based"* and is "*in accord with fundamental reason and common sense."* There is no basis in my view for regarding it as legally infirm for being disproportionate.

**Decision**

74. It would have been preferable had the Respondent communicated more effectively with the Applicant prior to the commencement of the proceedings. In particular, it seems to me that the Applicant should have been told that disciplinary proceedings had been commenced as soon as that occurred, and certainly by the time the decision came to suspend him.

75. Moreover, the Respondent, having taken the steps required of him by the Suspension Policy might usefully have communicated that fact and the outcome thereof when advising the Applicant of the decision to suspend him. It is also unfortunate that the Respondent did not respond sooner to the Applicant's correspondence of 22 December 2022.

76. It must be noted, however, that once the Applicant had been furnished with all of the above, when the Respondent delivered its replying affidavits, the Applicant elected to amend his Statement of Grounds and continue with the case.

77. None of the grounds advanced by the Applicant in his original Statement of Grounds have been pursued by him, albeit he did not pursue his claim regarding the failure to reply to correspondence because he has received a reply since the proceedings commenced.

78. In his amended Statement of Grounds, the Applicant pleads that inadequate reasons were given for the decision to suspend him. Although the argument in relation to absence of reasons is sufficient to meet the threshold of arguability to justify the grant of leave, it is little more than that, and for the reasons explained above, I consider the decision to be lawful.

79. Accordingly, I propose making an Order granting leave to seek judicial review of the relief sought at D(1) and D(3) of the Amended Statement of Grounds filed on 9 May 2023, on the grounds set out at E(19) to E(36).

80. However, I refuse the application for judicial review.

**Proposed Order as to Costs**

81. At the time that that the Applicant commenced proceedings, he was labouring under a number of misapprehensions. In particular, as appears from his solicitor's letter of 22 December 2022 and the original Statement of Grounds, the Applicant seemed to believe that the Respondent lacked jurisdiction to suspend him for a period in excess of 10 days, that disciplinary proceedings had not been commenced against him, and that the opinion of his Divisional Officer on whether he should be suspended had not been sought,

contrary to the Suspension Policy. Save for the error in relation to the *vires* to suspend him, these errors are attributable to the Respondent's failure to communicate to the Applicant in a timely manner the fact of his suspension, and of all matters relevant to the decision to suspend him. In addition, the Respondent delayed in responding to the letter of 22 December 2022.

82. Although I am not entirely convinced that the Respondent was under an obligation to reply to the Applicant's letter of 22 December 2022, or, at least, to have replied by the time that the Applicant instituted proceedings, the Applicant does appear to have obtained some benefit by instituting these proceedings insofar as he has been given a reply to that letter. More importantly, since instituting proceedings, he has been furnished with additional documentation regarding the disciplinary proceedings and the reasoning regarding the decision to suspend him.

83. The Respondent may have arguments that the Applicant was not entitled to this documentation at all, or that he could have obtained the documentation without the necessity for instituting proceedings, but it seems to me that it would not be a productive use of the Court's resources to allocate further hearing time to that argument having regard to the form of Order I propose. In light of how matters developed, I am prepared to accept that the Applicant was justified in commencing these proceedings.

84. Whatever about the Applicant's justification when commencing these proceedings, in circumstances where I have rejected his claim, it is clear that following receipt of the Respondent's replying affidavit of 10 February 2023 and allowing some period of time to consider it his decision to seek to amend his claim and pursue that amended claim has not been vindicated.

85. In the circumstances, therefore, I propose making an Order for the Applicant's costs, to be adjudicated in default of agreement up to 21 February 2023, *i.e.* the day before the Applicant filed his first replying affidavit, and an Order for the Respondent's costs, to be adjudicated in default of agreement, from 22 February 2023 onwards.

86. If either side wishes to contend for a different form of costs order than that proposed, they should file written submissions in the Central Office of the High Court within ten

days of today's date. A copy of the written submissions should be sent to the other side and to the Registrar. The other side will then have a further ten days within which to file written submissions in reply.