



THE COURT OF APPEAL

Record Number: 2021/235

High Court Record Number: 2020/363JR

Neutral Citation Number [2022] IECA 206

**Barniville P.
Noonan J.
Binchy J.**

BETWEEN/

ADRIAN IVERS

APPLICANT/APELLANT

-AND-

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT/RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 18th day of August, 2022

1. In these proceedings, the appellant (Garda Ivers) seeks to quash what is described as a “determination” of the respondent (the Commissioner) that Garda Ivers should be dismissed from the force for an alleged breach of discipline. What is perhaps unusual about this case is that the Commissioner’s “determination” did not follow a disciplinary inquiry but rather was arrived at on a preliminary or provisional basis by the Commissioner without any formal inquiry or indeed consultation with Garda Ivers. In this respect, the Commissioner relies upon the powers conferred on him by s. 14 of the Garda Síochána Act, 2005, (“the Act”), notwithstanding that the conduct the subject matter of his consideration is in dispute. The High Court considered that the exercise by the Commissioner of the power in this case was not ultra vires for reasons set out in the detailed judgment of the court delivered on the 16th July, 2021. The court accordingly dismissed Garda Ivers’ application and it is against that dismissal that Garda Ivers appealed to this court.

Background Facts

2. The appellant has been a member of An Garda Síochána for some 21 years and is said to have an unblemished service record. On the 21st January, 2020, Garda Ivers was the sole garda on duty in Cootehill Garda Station. At about 3:15pm, he received a call from Garda Aisling Walsh who had apprehended a person suspected of drug driving and seized the person's car. Garda Walsh drove the seized car to Cootehill Garda Station by arrangement with Garda Ivers and handed over the keys to him, advising him that the car would not lock. Shortly thereafter, Garda Ivers had to leave the station and checked the car for any property that might be at risk of being stolen while the car and the garda station were unattended. Garda Ivers noticed a Bluetooth speaker and charging cables in the car which he removed and brought into the station. Shortly before, Garda Ivers had collected his daughter from school and brought her to the station before dropping her home. He says that when his daughter saw the speaker, she asked him to play music on it by connecting his mobile phone to it.
3. Garda Ivers left the station with his daughter and the speaker and played the music she had requested on the drive home in his private car. Thereafter he left the Bluetooth speaker in his car. When he returned to the station, the seized vehicle had been towed away by a contracted towing service. In essence, Garda Ivers says he forgot about the speaker in his car thereafter until two days later, on the 23rd January, 2020, when he cleaned his car and noticed the speaker. He says that he decided to call Garda Walsh to see about returning the speaker to its owner, but before he did so he received a call on that day at 14:42 from Inspector Valerie Gahan, who told him that she wished to speak to him at Cootehill Garda Station but did not say why. Garda Ivers rang Garda Walsh seeking contact details of the owner of the car so that he could return the speaker.
4. He then attended at Cootehill Garda Station where he was informed by Inspector Gahan that he was under investigation for the theft of the speaker and was cautioned by her. He denied the charge, offered an explanation and handed over his mobile phone as requested by Inspector Gahan. She had told Garda Ivers that she required the phone to see if it had been connected to the speaker but he volunteered that it had.
5. On the 6th February, 2020, Garda Ivers was suspended from duty on foot of a formal notice served on him pursuant to Regulation 7 of the Garda Síochána (Discipline) Regulations 2007 ("the Regulations"). The notice specified that the suspension arose as a result of an allegation that Garda Ivers took property from an identified motor vehicle which was not his property and he did not have permission to take and further that he failed to store and retain the property in accordance with garda protocol.
6. On the 25th February, 2020, Garda Ivers was served with a notice of investigation pursuant to Regulation 24 of the Regulations, dealing with serious breaches of discipline, and the notice identified the investigating officer as Inspector Anne Marie Lardner. The notice specified the subject of the investigation as being "alleged misappropriation of property belonging to a member of the public at Cootehill Garda Station on the 21st January 2020."

7. It is relevant to note that the investigation under the Regulations was initiated by the Commissioner who is empowered by Regulation 23 to appoint a member of the force to investigate the alleged breach of discipline. Thereafter, an elaborate procedure is provided for in relation to the progress of such an investigation to which I shall return. However, it appears that Inspector Lardner did not in fact proceed to investigate the impugned conduct of Garda Ivers because of the intervention of the Garda Síochána Ombudsman Commission (GSOC). During the course of this appeal, the court was told that GSOC had “taken over” the investigation. In that respect, it would appear that Inspector Lardner swore an affidavit on the 14th May, 2021 which was before the High Court and is referred to at paras. 23-29 of the judgment of the trial judge. While that affidavit was, for some reason, not put before this court, perhaps due to oversight, its content is set out in some detail in the High Court judgment.
8. In the affidavit, Inspector Lardner averred that when she handed the form to Garda Ivers on the 25th February, 2020, she informed him that the criminal investigation had been taken over by GSOC and she says that Garda Ivers agreed to the discipline investigation being placed in abeyance until the criminal investigation was carried out. The reason for this is explained at para. 25 of the judgment:

“25. During the hearing, counsel for the applicant submitted that, in circumstances where a member of An Garda Síochána 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 insofar as disciplinary proceedings are concerned.”
9. Strictly speaking therefore, it is not correct to suggest that GSOC “took over” the investigation but rather utilised its own powers to launch a criminal investigation into the complaint against Garda Ivers. Incidentally, it was not explained how GSOC became involved in this matter, but it may possibly have been as a result of a complaint made by the owner of the Bluetooth speaker.
10. In the course of the GSOC investigation, Garda Ivers made a detailed statement setting out the facts from his perspective and placing emphasis in particular on the fact that it was his intention at all times to return the Bluetooth speaker and his delay in doing so was through inadvertence.
11. The next relevant event occurred on the 8th May, 2020 when the Commissioner wrote to Garda Ivers pursuant to s. 14(2) of the 2005 Act informing him that the Commissioner intended to dismiss him. It must be borne in mind that this letter was written by the Commissioner notwithstanding that the Commissioner had previously initiated an investigation under the Regulations, which was now “parked” pending the separate GSOC investigation, which was ongoing and had reached no conclusions. The Commissioner’s letter of the 8th May is lengthy and is set out in full in the judgment of the High Court so that it is unnecessary to do so again here.

12. I would however set out the following extract which appears to me to be central to the issues that arise in this appeal:

- "6. ... Your conduct on the 21st January, 2020 at Cootehill 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 the 21st January, 2020 at Cootehill Garda Station, undermines the trust of 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 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.
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 at Cootehill 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 which 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.

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..."

13. The letter goes on to invite a response by the 8th June, 2020 which the Commissioner would consider before arriving at a decision whether he is still of the same opinion. It is again important to place some emphasis on the fact that when this letter was written by

the Commissioner, he had not consulted with Garda Ivers or received any representations from him or his solicitors.

14. Garda Ivers' solicitors responded by way of written submissions on the 22nd May, 2020. In those submissions, they raise the preliminary objection that the Commissioner's opinion had predetermined the matter without having sought any statement or explanation from Garda Ivers. The solicitors characterised the Commissioner's letter as amounting to a "determination" arrived at in breach of natural and constitutional justice. They called on the Commissioner to immediately withdraw the letter.
15. Without prejudice to that submission, the solicitors indicated that Garda Ivers had a completely innocent explanation for the events of the 21st January and that he was innocent until proven guilty. They called on the Commissioner to provide all materials relied on to form his opinion. The letter concluded by seeking confirmation by the 28th May, 2020 that the Commissioner would not take any further steps in relation to Garda Ivers failing which he would seek the protection of the High Court. It would appear that no response was forthcoming to these submissions and accordingly, on the 8th June, 2020 Garda Ivers sought leave from the High Court to seek judicial review which was granted together with a stay on the determination subject to the right of the Commissioner to apply to lift the stay. No such application was made.

The Statutory Framework

16. Before considering the provisions of s. 14 itself, it is I think instructive to look at the scheme of the Act insofar as it concerns disciplinary issues arising in An Garda Síochána. Section 123 of the Act conferred on the Minister for Justice, Equality and Law Reform the power to make disciplinary regulations with the approval of the Government. Subsection (3) provides:

"(3) The regulations may also provide for the procedures to be followed if –

- (a) It appears or it is alleged that an act has been done or omission made that may be the subject of disciplinary action ..."

17. As one might expect, the language used here is provisional in its terms in respect of the act "alleged" to have been done or that "appears" to have been done, language which anticipates that a procedure will be devised and followed to determine if the alleged act or omission has in fact occurred. It is notable that the Regulations subsequently made pursuant to s. 123 adopt similar language in the context of conduct which is said to give rise to the disciplinary action. Part 2 of the Regulations is concerned with less serious breaches of discipline and Part 3 with serious breaches of discipline.
18. Part 2 breaches are breaches that may adequately be dealt with by relatively minor punishment, the most serious of which is a reduction in pay not exceeding two weeks' pay. Thereafter the member concerned may be subject to reprimand, warning, caution or advice depending on the relative seriousness of the breach. However, even in the context of Part 2 breaches, a significant level of investigative machinery is provided to ensure the fairness of the process. Under Part 2, an officer not below the rank of Chief Superintendent may

appoint a deciding officer to investigate the alleged breach and interview the member concerned. Regulation 14(6) empowers the deciding officer to undertake any enquiries or adopt any procedures that he or she considers necessary with a view to establishing the facts of the matter under investigation and identifying or resolving any conflicts or differences that may come to light during the investigation. The deciding officer may appoint another officer to conduct these enquiries.

19. Regulation 15 requires the deciding officer to send to the member concerned a notice of interview which shall state, *inter alia*, "the grounds on which it appears that the member may have been in breach of discipline..." again adopting in line with s. 123 provisional and non-determinative language in relation to the breach of discipline concerned. A great deal of other information must be contained in the notice of interview which it is unnecessary to detail and the notice must be accompanied by statements and any other documents relating to the alleged breach of discipline which are in the possession of the deciding officer following his or her enquiries. Various other procedural safeguards are incorporated including the right to require the interview to be conducted by a different deciding officer.
20. Where the breach of discipline is not admitted, there is again detailed provision in Regulation 17 for the manner in which the interview with the deciding officer is to be conducted, including a requirement on the deciding officer to explain in ordinary language to the member concerned "why it appears that the member may have been in breach of discipline" with an opportunity to respond. The member has a right to be accompanied by an official of his representative association or another member of his or her choice. That other person may make oral or written submissions on behalf of the member to the deciding officer. The deciding officer, having come to a conclusion, is then required to prepare a report for onward transmission to the appointing officer and there is a further right on the part of the member to seek a review of the deciding officer's decision by the appointing officer.
21. Part 3 provides for a significantly higher level of procedural protection for the member concerned given the potential gravity of the breach of discipline being one which may lead to serious penalties including, in order of severity, dismissal, a requirement to retire or resign as an alternative to dismissal, a reduction in rank or a reduction in pay not exceeding four weeks pay. Here again, the language used in connection with the breach of discipline is entirely provisional *e.g.* "where it appears that a member may be in breach of discipline" (Regulation 23). Where a serious breach of discipline is alleged such as might potentially attract one of the penalties mentioned, Regulation 23 requires the Commissioner to appoint an investigating officer to investigate the "alleged breach". Clearly, the party to whom it must appear that the member may be in breach of discipline which may attract one of the serious sanctions is the Commissioner.
22. It will be recalled that in the present case, the Commissioner availed of the power conferred on him by s. 23 to appoint Inspector Lardner as the investigating officer who proceeded to serve a notice pursuant to Regulation 24 on Garda Ivers informing him of the grounds "on which it appears that the member may have been in breach of discipline" and other matters.

The investigating officer is required to inform the member that the latter may be accompanied at any interview by an official of his or her representative association, another member or a solicitor or barrister.

23. Following completion of the investigation, Regulation 24(5) requires the investigating officer to submit to the Commissioner a written report "containing his or her recommendation as to whether the facts disclosed warrant the establishment of a Board of Inquiry." This appears to suggest that some determination of the facts is, at least on a *prima facie* basis, required of the investigating officer at that stage of the process. Again, the investigating officer is required to furnish all written statements, information and documents or things of which the investigating officer was made aware during the investigation to the member concerned.
24. The investigating officer's conclusions about the facts are not in any way final or determinative because under Regulation 25, the Commissioner is required to establish a Board of Inquiry "if it appears from the report of the investigation that the member concerned may have committed a serious breach of discipline". The Board of Inquiry is expressly tasked with determining whether such a breach has been committed and if so to recommend the appropriate disciplinary action to the Commissioner.
25. Regulation 25 provides that the Board of Inquiry shall be comprised of three persons, the presiding officer of whom shall be a judge of the District Court or a practising barrister or solicitor of at least 10 years standing. The other two members comprise senior gardaí of the rank of at least Chief Superintendent and Superintendent respectively.
26. Regulation 27 provides for a pre-hearing procedure by which the presiding officer is required to furnish the member with particulars of the serious breach of discipline alleged and a statement of the facts established by the investigation together with any written statements made during the investigation. The presiding officer is also required to inform the member of the range of options open to him or her in relation to the Board of Inquiry, including the right to be fully legally represented at the member's expense. Regulation 27(4) empowers the Board of Inquiry to require the member to submit in writing his or her account of the circumstances giving rise to the alleged breach of discipline.
27. Regulation 28 is of some significance in the context of the instant proceedings in that it provides the Board of Inquiry with the necessary powers to establish the facts by compelling the attendance of witnesses or the production of documents and other evidence. Accordingly, Regulation 28(1) empowers the Board of Inquiry to require any person, including the member concerned, who, in its opinion, possesses information or possesses or controls a document or thing that is relevant to the inquiry to give the information or produce the document or thing to the Board and, where appropriate, require that person to attend the hearing for that purpose. In this regard, s. 123(7) of the 2005 Act makes it an offence for any person without reasonable excuse not to comply with a requirement to attend before a board, or give evidence or produce documents to it, or who gives evidence that he or she knows to be false or misleading, such offence being punishable on summary

conviction by a fine not exceeding €2,500 or imprisonment for a term not exceeding 6 months or both.

28. Regulation 29 deals with the procedure at the hearing before the Board of Inquiry and again, provides a high level of protection of the rights of the member concerned. It expressly acknowledges the member's right to be heard and to respond to any matter raised and the Board must have regard to the rights of the member concerned to challenge and test the evidence of any person. The regulation provides that information at an inquiry shall be given on oath or affirmation and a verbatim record of the proceedings shall be made by a stenographer or by electronic or other means. The inquiry must be held in private.
29. Regulation 30 provides that within 21 days of the conclusion of the inquiry, the presiding officer shall submit a written report to the Commissioner and to the member which must include copies of any statements or documents before the inquiry together with the transcript and the determination of the Board as to whether the member concerned is in breach of discipline and if so, as to the act or conduct constituting the breach and finally, its recommendation as to any disciplinary action.
30. Regulation 31 provides that where the Board recommends disciplinary action, the Commissioner shall within 14 days of receipt of the Board's report decide on the appropriate action or if he decides on a more severe sanction, the Commissioner is obliged under Regulation 32 to so inform the member and request the member to submit any comments within 10 days. Regulations 33 to 38 inclusive provide for appeals by the member concerned of the decision of the Commissioner following the holding of a Board of Inquiry. The appeal must be based on one or more of five specified grounds in Regulation 33(3) which include that the Commissioner has decided on a sanction that is disproportionate to the breach of discipline concerned.
31. Here again, the Appeal Board is comprised of three persons, the Chairperson of whom must again be a judge of the District Court or a practicing barrister or solicitor of not less than ten years standing. The two other members must be either the Commissioner or a deputy or assistant Commissioner and a member selected by the representative association of the member concerned. The proceedings before the Appeal Board do not appear to be a full *de novo* rehearing of the matter before the Board of Inquiry but rather the Appeal Board has, under Regulation 36, discretion to allow any person to give evidence orally or in writing, or not, as the case may be. Again, the member concerned is entitled to full legal representation and to make oral submissions through his or her representatives.
32. Regulation 37 empowers the Appeal Board to arrive at a number of different outcomes including, affirming the determination of the Board of Inquiry, quashing that determination and the Commissioner's decision arising from it, and if satisfied that the member concerned has not committed the breach of discipline alleged but a less serious breach, it may quash the determination and substitute a different disciplinary action or alternatively, remit the matter to another Board of Inquiry to be reheard. Under Regulation 37(5), the

Commissioner is obliged to implement the decision of the Appeal Board within 7 days after it is communicated to the Commissioner.

33. Part 4 of the Regulations is concerned with summary dismissal and Regulation 39 provides in relevant part 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 enquiry under these regulations could not affect his or her decision in the matter...”

34. Clearly the power exercisable under Regulation 39 is limited to very specific circumstances which appear to include that there can be no real dispute as to the facts concerned, *e.g.* where the member concerned has been convicted of an offence involving the same facts which are alleged to constitute the breach of discipline. One can readily appreciate how, in such circumstances, the holding of a Board of Inquiry would be entirely otiose, there being no room for dispute about the facts. Similarly, where those facts are expressly admitted by the member concerned, there will be nothing to be gained by the holding of a Board of Inquiry so that it could not be said in either instance that there had been any denial of fair procedures in all the circumstances.

35. Turning now to section 14 of the 2005 Act, it provides in relevant part as follows:

“(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"

Garda Ivers' claim

36. The essential complaint advanced by Garda Ivers in his Statement of Grounds is that in the Commissioner's letter of the 8th May, 2020, he made a "determination" which contravened Garda Ivers' right to fair procedures, natural justice and the presumption of innocence. He also claims that the determination was made in breach of both s. 14 of the Act and of the Regulations. Before reaching this "determination", the Commissioner failed to conduct a proper inquiry into the matter, in particular by not first advising Garda Ivers of his concerns and inviting a response from him.
37. In response, the Commissioner contends that he has in fact made no determination and has offered Garda Ivers an opportunity to respond before reaching any conclusion in the matter. However, the Commissioner was prevented from proceeding further to that stage by the granting of a stay by the High Court in these judicial review proceedings. Fundamentally, the Commissioner says that the application is misconceived and premature because matters are at a preliminary stage and no binding determination has been made.

Judgment of the High Court

38. The trial judge's detailed judgment commences with a consideration of the pleadings in the case, the evidence contained in the affidavits and s. 14 of the Act. In analysing the section, the judge was of the view that it required the Commissioner to form an opinion at two different and distinct stages in the process which he describes throughout the judgment as a first stage and second stage opinion. The first stage opinion arises under s. 14(2)(a) and the second stage opinion, arrived at following any representations from the member concerned, is formed under s. 14(2)(c). The judge places emphasis on the fact that these are two different stages of the process and two different opinions. Importantly, the judge's view was that the member concerned is at large under s. 14(2)(b) to respond to the first stage opinion of the Commissioner in any way that the member considers appropriate.
39. The section appeared to him not to exclude any response that the member wished to make up to and including the holding of a full enquiry with oral evidence, cross examination and so forth. He felt that the section was broad enough to extend beyond the mere making of a plea in mitigation but rather could include a full root and branch challenge to the Commissioner's opinion and the facts underlying it. He was of the view that the response of Garda Ivers by way of submissions from his solicitors on the 22nd May, 2020 was misconceived in treating the Commissioner's letter of the 8th of May as a "determination". The judge did not accept that it amounted to a determination in any final sense but rather a first stage opinion only which was subject to challenge and change as he explained.
40. He considered that the solicitor's response ignored the critical difference between the first and second stage opinions required to be formed under s. 14. There was no question of "predetermination" as the solicitors suggested. He felt that the complaint by Garda Ivers

that he had not been provided with the materials underlying the Commissioner's first stage opinion was misconceived and in fact there had been no refusal to furnish that material before the process was stayed by the court.

41. The judge then turned to an analysis of what he considered to be relevant legal authorities including the well-known decision of the Supreme Court in *Rowland v An Post* [2017] IESC, the essence of which is that the court will not intervene at an intermediate stage of a disciplinary process unless it can be demonstrated that the process has, at that stage, already gone irremediably wrong. The judge was of the view that *Rowland* supported the Commissioner's position and it would be premature for the court to intervene at this juncture. The judge posed the hypothetical question "*is it clear that the instant process has gone irremediably wrong?*" and the answer in his view was undoubtedly "*no, that is not at all clear*".
42. The judge also had regard to the judgment of the Supreme Court in *McEnery v Commissioner of An Garda Síochána* [2016] IESC 66 to which I will refer further. At para. 102 of the judgment, the judge referred to a core submission made by Garda Ivers both in the High Court and again in this court:

"102. Among the submissions made on behalf of the applicant is that the respondent can only rely on section 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 section 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)."
43. In the following paragraph, the judge appears to envisage the possibility of some form of hybrid procedure whereby the Commissioner could commence a fact finding process under the Regulations prior to invoking s. 14(2). He appears to consider that the Commissioner could appoint an investigating officer to conduct an investigation and to prepare a report, all pursuant to the Regulations, which would constitute a fact-finding exercise as a prelude to invoking s. 14(2). However, he was of the view that it was not mandatory for the Commissioner to take that step or indeed any specific approach as a prerequisite in terms of his entitlement to rely on s. 14. The judge also referred to the decision of the High Court in *The State (Jordan) v Commissioner of An Garda Síochána* [1987] ILRM 107, another authority considered below.
44. The judge accordingly rejected Garda Ivers' argument that s. 14 provides for no fact finding process and consequently cannot be utilised in circumstances where the facts are, as here, in dispute. He felt this was contrary to the plain meaning of the section as he understood it. The reality from the judge's perspective was that the fact finding process has not yet

concluded in this case. Accordingly, the judge's final conclusion was that Garda Ivers' application was misconceived and premature and accordingly, he dismissed it.

Some Relevant Cases

45. The facts in *Jordan* were that a suspect in custody at a garda station was assaulted, as a result of which he died. Garda Jordan made a statement in the course of a garda investigation into the death in which he said that he had witnessed no assault on the suspect on the night in question. Garda Jordan was subsequently prosecuted for assaulting the suspect and he was acquitted. In the course of the trial, his counsel cross examined a witness for the prosecution, another garda present on the night in question, and put to the witness that he had assaulted the suspect.
46. The High Court subsequently held that this amounted, in substance and effect, to an admission by Garda Jordan that his earlier statement was untrue. The Garda Commissioner then informed Garda Jordan that he proposed to invoke the provisions of Regulation 34 of the Garda Síochána (Discipline) Regulations 1971, a close analogue of Regulation 39 of the Regulations, on the basis that he had made a statement which contained a falsehood or prevarication, a serious breach of discipline for which the Commissioner proposed to dismiss Garda Jordan.
47. Accordingly, the facts alleged to constitute the misconduct were in effect admitted by Garda Jordan in the particular circumstances of the case. The High Court (O'Hanlon J.) held that where a member of An Garda Síochána admitted that he was guilty of a serious breach of discipline, as he considered Garda Jordan had, the Commissioner was entitled to act on such admission without resorting to the inquiry process provided by the Regulations. This did not involve any denial of natural or constitutional justice. In the course of his judgment, O'Hanlon J. said (at p. 7):

"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 of 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."

48. The court then referred to a number of authorities in support of that proposition relied upon by Garda Jordan, and in a subsequent passage appeared to accept in broad terms the proposition advanced on behalf of Garda Jordan (at p. 7):

"I am of opinion that special considerations apply in relation to the power of the State to dispense with the services of members of the armed forces, of the Garda Síochána, and of the Prison Service because it is of vital concern to the community as a whole that the members of these services should be completely trustworthy. For this reason, I take the view that it was permissible to confer on the Commissioner of the

Garda Síochána the exceptional powers contained in Regulation 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 conclusion 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 enquiry machinery in motion before doing so."

49. It will be seen therefore that the court concluded that in circumstances where the facts constituting the breach of discipline were not disputed, or could not be so disputed, there could be no unfairness to the member concerned in not holding an inquiry to establish those facts. The corollary of course is that where there is such a dispute, an inquiry must be held. The power of the Commissioner to dismiss a member in the absence of an inquiry is therefore exceptional and very limited and can only arise in the presence of undisputed, or undisputable, facts.
50. *Jordan* was subsequently approved by the Supreme Court in *McEnergy*. Sergeant McEnergy was convicted of assaulting a member of the public and received a suspended sentence of four months imprisonment. The Commissioner subsequently invoked Regulation 39 of the Regulations and proposed to dismiss Sergeant McEnergy. She sought judicial review to challenge the Commissioner's decision to summarily dismiss her on a number of grounds, which included that the Commissioner was not simply entitled to rely on the fact of her conviction but was required to enquire into the facts behind the conviction before reaching his decision.
51. The High Court dismissed Sergeant McEnergy's application and rejected the argument that the Commissioner was required to go behind the conviction. The Court of Appeal took a different view on this point and allowed Sergeant McEnergy's appeal. However in a further appeal, the Supreme Court found this conclusion to be erroneous but quashed the decision on different grounds relating to a failure to give reasons. The sole judgment of the Supreme Court was given by Laffoy J. with whom the other members of the court agreed.

52. In a passage in her judgment entitled "Legislative Structure", Laffoy J. referred to both Regulation 39 of the Regulations and s. 14 of the Act (at para. 14 onwards):

"14. The 2007 Regulations, including Regulation 39, were made by the predecessor of the Minister, the Minister for Justice, Equality and Law Reform, in exercise of the powers conferred by s. 123 of the Garda Síochána Act, 2005 (the Act of 2005), which authorises the making, with the approval of the Government, of regulations concerning the maintenance of discipline in An Garda Síochána. Section 14 of the Act of 2005, which is addressed because it is referred to by counsel for both parties, gives the Commissioner power to appoint persons to the ranks of Garda, Sergeant and Inspector in An Garda Síochána and to dismiss a member within those ranks. Subsection (2) of section 14 deals with dismissal and provides (expressly 'notwithstanding anything in this Act or the Regulations' the Regulations, by definition including the 2007 Regulations) that the Commissioner may dismiss a member within those ranks subject to compliance with the four conditions then set out. The first condition is that –

'(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...'

The other conditions set out in paras. (b) to (d) of subsection (2) are that the member must be informed of the basis of the Commissioner's opinion and be given an opportunity to respond, that the Commissioner consider any such response, and that the Government consents to the member's dismissal. Subsection (3) of section 14 provides that subsection (2) is not to be taken to limit the power to make or amend 'disciplinary regulations', which expression is defined in section 3 as meaning the specific regulations then in force for so long as they should continue in force and any regulation in force under section 123. Regulation 39 is expressed to be 'without prejudice to section 14(2)' of the Act of 2005.

15. The power invoked by the Commissioner in relation to Sergeant McEnery is the power contained in Regulation 39, which is a specific regulation dealing with summary dismissal, the authority for which is section 123 of the Act of 2005. While no issue has arisen between the parties as to any connection between section 14 and Regulation 39, and each party simply refers to the provisions of section 14, albeit that counsel for the Commissioner points to the recognition by the Oireachtas in enacting that provision that in certain circumstances it is for the Commissioner to determine what amounts to conduct sufficient to warrant a dismissal, it seems to me that each of these provisions is an independent 'standalone' provision and section 14 has no specific relevance to the proper interpretation or application of Regulation 39."

53. Laffoy J., in considering the judgment of the Court of Appeal, delivered by Kelly J. (as he then was) referred with approval to some observations made by Kelly J. She said (at para. 25):

“25. Before addressing the principle point pursued on behalf of Sergeant McEnery 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 section 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 a judgment of the High Court (O’Hanlon J.) in *State (Jordan) v Commissioner of An Garda Síochána* [1987] ILRM 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’ ”

54. Laffoy J. went on to cite with approval some of the passages from *Jordan* to which I have referred above including that the Commissioner’s power of dismissal is exceptional and very limited in character.

55. The provisions of s. 14 were the subject of recent consideration by the High Court in *Hegarty v Garda Commissioner* [2022] IEHC 183. There, Garda Hegarty had been subject to a disciplinary procedure under Part 3 of the Regulations. Garda Hegarty admitted the breaches of discipline before the Board of Inquiry who recommended that he be required to retire or resign as an alternative to dismissal together with a two-week reduction in pay. The Commissioner accepted the recommendation. Garda Hegarty appealed and the Appeal Board found that the penalty of resignation was disproportionate and instead substituted a reduction of four weeks’ pay. However, despite that finding by the Appeal Board, the Commissioner subsequently purported to invoke s. 14(2) to dismiss Garda Hegarty. Garda Hegarty applied for judicial review and an order quashing the decision of the Commissioner first to suspend him and second to dismiss him.

56. As in the present case, the application was made after the formation of what is described in this case by the High Court as the “first stage opinion” but before the second stage had been reached. The Commissioner opposed the application in relation to s. 14 on the basis, as here, that it was premature for the same reasons. In the course of his judgment, Ferriter J. considered the interaction between s. 14 and the Regulations. He analysed two recent judgments of the High Court, one being in the present case and the second being *Keane v Commissioner of An Garda Síochána* [2021] IEHC 577. Garda Keane underwent a disciplinary process under Part 3 of the Regulations, the result of which was that a Board of Inquiry recommended a financial penalty.
57. The Commissioner declined to accept the recommendation and instead required Garda Keane to resign as an alternative to dismissal. The Commissioner’s decision was overturned by an Appeal Board which substituted a financial penalty. As in *Hegarty*, the facts were admitted by Garda Keane. Following the determination of the Appeal Board, the Commissioner invoked s. 14(2) indicating his intention to dismiss Garda Keane on the basis of having formed the opinion required by the section. However, unlike the present case and *Hegarty*, Garda Keane proceeded to make submissions pursuant to s. 14(2)(b) and the Commissioner went on to confirm his opinion under s. 14(2)(c).
58. Heslin J. quashed the Commissioner’s decision as having been arrived at in breach of Garda Keane’s rights to constitutional justice. He held that in invoking s. 14(2), the Commissioner was in effect seeking to nullify the decision of the Appeal Board. Heslin J.’s judgment was not appealed.
59. Having examined these decisions, Ferriter J. turned to the question of whether s. 14(2) could have any application in circumstances where there was a prior process under the Regulations. In short, he answered that question in the affirmative being satisfied that s. 14 could be invoked even in the presence of such a prior process under the Regulations. In reaching that conclusion, he relied on the following passage from the judgment of Heslin J. in *Keane* where the latter said (at para. 156):

“The plain meaning of the words which the Oireachtas chose to use was to indicate that the power available to the respondent pursuant to s.14 was exercisable without reference to the 2007 Regulations. By that I mean, there could conceivably be situations where a decision is reached at the conclusion of a process which has been conducted pursuant to the 2007 Regulations, yet the powers of the respondent pursuant to s.14(2) would still be available. If the Oireachtas intended that the respondent be deprived of the power to rely on s.14(2) in circumstances where a decision had been reached under a process governed by the 2007 Regulations, I am entitled to take the view that the Oireachtas would have said so in the legislation. They did not.”

60. Commenting on these observations, Ferriter J. said (at para. 50):

“50. Quite apart from the fact that the plain words of s. 14(2) would not permit the importation of words to the effect *‘notwithstanding anything in this Act or the*

Regulations (save where a decision was previously taken under the Regulations in relation to the same matter)...' (added words underlined), or some other such formulation, it can readily be seen that the Commissioner could have valid grounds to seek the dismissal of a member pursuant to s. 14(2) where a decision relating to that member had previously been taken under the Regulations e.g. where the matter the subject of the prior decision, coupled with some new matters, led to the Commissioner forming the necessary opinion under s. 14(2) or, perhaps, where a series of adverse decisions had been taken against the member, each of which fell short of warranting the sanction of dismissal, but which taken together might validly ground the formation of the necessary opinion under s. 14.

51. Accordingly, in my view, it is appropriate to characterise s. 14 as a self standing provision in the sense that, as a matter of statutory interpretation, it is in principle capable of being invoked notwithstanding anything contained the Regulations. However, just as Heslin J. took the view that that was not the end of the matter on the facts of *Keane*, it seems to me that it is not the end of the matter on the facts of this case. That is because it is common case that the invocation of s. 14 must itself comply with constitutional justice."
61. Ferriter J. gave an example of how it might be contrary to constitutional justice to invoke s. 14 where to do so would unfairly put a member at peril of the sanction of dismissal for the very same conduct in respect of which the Commissioner had previously invoked a disciplinary procedure under the Regulations, contended for dismissal but where the Appeal Board had taken the view that such a sanction was disproportionate. He went on to consider the Commissioner's argument that the invocation of s. 14 was premature, on the same basis as advanced in the present case. In that respect he said (at para. 53):
 - "53. While I accept that no final determination has been made by the Commissioner under s. 14(2), that seems to me not to answer the fundamental objection to the invocation of the section 14 process here which is that for precisely the same conduct which was the subject of the disciplinary process instituted by the Commissioner, the Commissioner now seeks the removal of the applicant from the force by different means, so that the applicant is now in peril of a second (and very grave) sanction for the same conduct."
62. Ferriter J. then referred to the first instance decision in *Ivers* (at para. 54):
 - "54. While the applicant seeks to contend that the decision in *Ivers* was wrong, it does not seem to me that I have to take a view on that contention as *Ivers* was decided in a very different context. The critical distinction between the facts in *Ivers*, and the facts before me, is that in *Ivers* the member in question had not been the subject of any disciplinary process under the Regulations which culminated in a decision of the Appeal Board (he had been the subject of a criminal investigation and a GSOC investigation but neither of those matters were disciplinary processes instigated by the Commissioner under the Regulations)."

63. While the court was of course correct to say that in the present case, Garda Ivers has not been the subject of a disciplinary process under the Regulations which culminated in a decision of the Appeal Board, he has nonetheless been subject to such a process, albeit one that has been paused at an early stage as a result of the GSOC intervention, as already explained. On the prematurity issue, the court concluded that Garda Hegarty's challenge was not premature in circumstances where the invocation of s. 14 by the Commissioner exposed Garda Hegarty to the peril of being removed from the force when he had already successfully faced down that peril in a prior process which the Commissioner instigated and in which he fully participated.
64. In effect therefore, Ferriter J. concluded that in the circumstances obtaining in *Hegarty*, the Commissioner was not entitled to invoke s. 14 at all. This is similar to the conclusion reached by Heslin J. in *Keane* where what was sought to be achieved by the Commissioner invoking s. 14(2) was a nullification or cancelling of the entire disciplinary procedure invoked by the Commissioner himself. Both *Hegarty* and *Keane* turned in significant measure on the broad concept of "double jeopardy" insofar as each member had been subjected to a procedure under the Regulations at the instigation and with the participation of the Commissioner who appears to have found the outcome unsatisfactory and resorted to s. 14(2) in consequence. In one of the concluding sections of his judgment, Ferriter J. noted that the parties had addressed a number of arguments as to the nature of the s. 14 process, very similar to those arising in this appeal, and the judge declined to address these on the basis that it was unnecessary to do so having regard to his prior conclusions and the fact that the judgment in *Ivers* was under appeal (paras. 76 – 77).

The Scope of Section 14(2)

65. As the authorities demonstrate, it cannot be doubted that s. 14(2) is what has been described as a free standing provision that may be availed of, where appropriate, without reference to the Regulations. That much is clear from the express wording of the section itself ("notwithstanding anything in this Act or the regulations ..."). That seems to be further supported by the terms of Regulation 39 of the Regulations concerning summary dismissal, which power is expressed to be "without prejudice to s. 14(2)". That is however quite a different thing from saying that s. 14(2) exists or can be operated in a vacuum without any regard to anything that may have occurred pursuant to the Regulations. The decisions to which I have referred make it clear that this is not so.
66. The obvious tension that exists between s. 14 on the one hand and the operation of the Regulations on the other came into very sharp focus in both *Hegarty* and *Keane* and in both cases, the resolution of that tension was achieved in large measure by reference to the constitutional rights of the members concerned and their entitlement to fair procedures in the operation of both s. 14(2) and the Regulations.
67. Clearly neither *Keane* nor *Hegarty* provide an exact analogue with the present case. In both of those, the disciplinary process under the Regulations continued to a conclusion, a conclusion which the Commissioner attempted to nullify by invoking s. 14(2). While precisely the same thing has not occurred here, there are certain parallels. As in those cases, the Commissioner here invoked the provisions of the Regulations to set in train an

investigation potentially to be followed by a Board of Inquiry. He appointed Inspector Lardner to conduct that investigation and to establish the facts, even on a provisional basis, on the obvious premise that there were facts to be established. This immediately engaged the elaborate machinery under the Regulations that I have described which are expressly designed to protect and vindicate Garda Ivers' constitutional rights at all stages of the process.

68. Clearly if the Commissioner had been of the view that there was nothing to inquire into, and thus any investigation would have been unnecessary, it would have been open to him to move under Regulation 39 to summarily dismiss Garda Ivers. He did not do so, correctly in my view, presumably on the basis that the requirements of that regulation could not be satisfied. However before the investigation and inquiry could run its course, it was "taken over" by GSOC which has its own extensive investigative powers under the Act. It is clear that GSOC's investigation was concerned, in the first instance, with establishing whether or not a potential criminal offence may have been committed by Garda Ivers, *i.e.* stealing the speaker and having gathered the relevant evidence, including a voluntary statement from Garda Ivers, GSOC submitted the file to the DPP who directed that there should be no prosecution in the matter.
69. GSOC then advised Garda Ivers' solicitors that it would consider whether a s. 95 disciplinary investigation should commence. A s. 95 investigation is one in respect of complaints that do not appear to involve offences. Accordingly, the clear outcome of the GSOC investigation was that no basis had been established for making the case that Garda Ivers had dishonestly taken the speaker.
70. Before the latter point was reached, the Commissioner pre-empted matters in his letter of the 8th May, 2020. It is important to note that the Commissioner makes what appear to be clear findings of fact in that letter that are not merely matters of opinion, or expressed on some sort of preliminary or provisional basis. He refers throughout to the conduct of Garda Ivers as though it were an established fact. He says in clear terms that "it was an act of dishonesty" to remove the speaker and cables and it is inappropriate that a member "who has committed such serious misconduct" should remain on the force. These are clear statements of fact made by the Commissioner in his letter prior to stating his opinion as to the consequences of these facts.
71. What is more, the Commissioner evidently continues to stand over the content of this letter irrespective of the subsequent outcome of the GSOC investigation or indeed the paused disciplinary process under the Regulations. The terms of the Commissioner's letter are such as to leave no doubt that he considers that the facts establish that the speaker was dishonestly taken, or stolen, by Garda Ivers, a conclusion which is now clearly in the teeth of the opposite conclusion reached by GSOC. Indeed, it would seem to me that if and when the disciplinary inquiry ultimately resumes, if at all, it must be bound by the GSOC conclusion as were it otherwise, it would amount to Garda Ivers being "vexed twice" in the same matter to borrow the expression adopted by Ferriter J. in *Hegarty*. Whether the disciplinary process does or does not resume therefore, it must follow that the

Commissioner seeks to invoke s. 14(2) on the basis of a conclusion materially different to that of an independent investigation, as he did in both *Keane* and *Hegarty*.

72. The High Court took the view that s. 14(2) and in particular subsection (2)(b) could be construed in such a way as to admit of a full inquiry into the facts being conducted after the "first stage opinion" had been reached and this effectively amounted to a sufficient guarantee of fair procedures for Garda Ivers before any final determination is made.
73. In my judgment, a close reading of the section, when construed in the context of the Act as a whole, does not support that construction. The High Court judge found that a full inquiry into the conduct concerned can be undertaken after a decision has been made that first finds that the conduct occurred and second that it is such as to require dismissal to avoid undermining public confidence. There are thus two component parts to the formation of the requisite opinion. The first is that there has been conduct. This is a finding of fact that does not constitute a matter of opinion. The second component is the formation of the opinion concerning public confidence arising from that found conduct and it is important to emphasise that this is not an opinion or belief that the conduct occurred.
74. The language of the section can in my view only be consistent with that construction. In contrast to s. 123 and the Regulations, s. 14(2) does not refer to "alleged conduct" or that "it appears that there may have been conduct" or similar expressions. It must follow in my view that the conduct which is referred to in s. 14(2) is conduct which has already been established on the basis of facts found. Where those facts are contested, that must in turn mean that there has to be a process for finding facts which complies with the requirements of constitutional justice and fair procedures. There is none in the section.
75. The High Court considered that such a fact-finding process must be implicit in the section because it is not excluded. Garda Ivers remains free to request an oral hearing, if appropriate, and call any evidence he wishes to call at such a hearing which, the judge believed, guaranteed him fair procedures. I cannot agree. If such a process were to be implicit in the section, it would have to be a process that would enable an effective investigation of the facts to take place. That would of necessity involve conferring on the Commissioner powers precisely analogous to those vested in the Board of Inquiry under a disciplinary process to compel witnesses to testify and to compel the production of evidence by way of documents and so forth.
76. The trial judge proceeded on the assumption that as long as Garda Ivers remain free to lead whatever evidence he wanted, that was sufficient. Thus, he said (at p. 21):

"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."
77. That statement, with respect, entirely overlooks the fact that there may be evidence which Garda Ivers wishes to lead but which is unavailable to him. To take perhaps a hypothetical

example, the central issue in this case is whether Garda Ivers took the speaker dishonestly or not. Garda Ivers claims to have telephoned Garda Walsh to arrange for the return of the speaker before he was made aware of any suggestion that he had taken it dishonestly. Another critical issue is the fact that Garda Ivers says that he removed the speaker from the car because it could not be locked. It was Garda Walsh who informed him of that fact.

78. Clearly therefore, the evidence of Garda Walsh is potentially critical in the context of any fact-finding inquiry the Commissioner might initiate under s. 14(2), assuming that such power exists. Garda Walsh might however decline to give evidence in the matter and the Commissioner has absolutely no power to compel her to do so. Were the matter being dealt with by a Board of Inquiry, the position would be entirely different. One can conceive of numerous other examples of evidence that may be essential to any inquiry designed to establish the facts but which may not be available to Garda Ivers as I have explained.
79. Since therefore there is no machinery contained in s. 14(2), either expressly or by implication, which admits of a fact finding exercise that respects the rights of Garda Ivers, it can only be the case that the conduct referred to in s. 14(2) is either conduct that has been established by virtue of some constitutionally compliant process, for example an inquiry under the Regulations, conduct which is admitted (as in *Jordan*) or conduct which cannot be disputed (*e.g.* because of a criminal conviction as in *McEnergy*).
80. I am further satisfied that this is the correct construction of the section because were it to be construed in the manner suggested by the Commissioner, it would turn the presumption of innocence on its head. It would require the garda concerned to face into a purported inquiry from the starting point of an assumption of guilt, but without any adequate means of displacing that assumption. Clearly such a process would offend the most basic concepts of constitutional justice and fair procedures and any construction of the section which would support that approach cannot therefore be legitimate. Any other interpretation of the section would be inconsistent with the Regulations as it would enable the Commissioner to entirely bypass the elaborate fact finding machinery contained in the Regulations and instead simply substitute his own determination of the facts constituting the conduct concerned, without any reference to the garda concerned. It need hardly be stated that this cannot have been the intention of the legislature in enacting s. 14(2).
81. The wording of s. 14(2)(b) is also consistent with this construction of the section. As noted above, the Commissioner must, before forming the opinion described as a "first stage opinion" by the trial judge, find that the conduct in issue occurred. He then goes on to form the opinion based on that finding of fact. S. 14(2)(b) does not permit the member concerned to challenge the first component, namely the finding of misconduct, but rather the opinion that that misconduct would undermine public confidence. That is the only opinion that the member is entitled to respond to. He or she is not entitled to contest the very conduct itself that must exist as a prerequisite to the formation of the opinion. Thus the member may address arguments to why the conduct would not undermine public confidence or why a dismissal is not necessary in the particular circumstances of the case.

It is, as was submitted by counsel for Garda Ivers, little more in reality than a plea in mitigation.

82. The Commissioner submits that he has in fact reached no final conclusion on the issue of dishonesty and remains open to be persuaded that his initial view is wrong. As I have already explained, how Garda Ivers can surmount that hurdle, and a significant hurdle it is, is unclear, if not indeed impossible, in the absence of any powers on the part of the Commissioner that would normally be essential for the purpose of finding facts.
83. It is difficult to conceive of any clear rationale for a construction of s. 14(2) which implies into it some form of fact finding process lacking any effective powers or safeguards for the rights of the member concerned, in vivid contrast to what the Oireachtas has provided for in the Regulations enacted under s. 123. Were such a radical departure from all the norms of constitutionally acceptable fact finding to have been intended by the Oireachtas, one would have expected it to be explicitly stated. It is certainly not in my view to be found in the words “notwithstanding anything in this Act or the Regulations” as those words are consistent with the operation of the section in the limited way I have described. The section also enjoys the presumption of constitutionality and were it to be operated in the manner suggested by the Commissioner, it is difficult to see how it could be viewed as consistent with the requirements of the Constitution. Further, the expansive construction of the section advanced by the Commissioner is at odds with the tenor of all the authorities to which I have referred. The power of dismissal in s. 14(2) is by any standards exceptional, very limited in character and falls to be construed narrowly.
84. I must also disagree with the finding of the High Court that it may in some undefined manner be open to the Commissioner to, as it were, borrow the fact finding process available under the Regulations for the purposes of s. 14(2). There is simply no warrant in either the section or the Regulations for such a procedure and in my view the Commissioner would have no power to adopt such a process.
85. In *Bracken v Commissioner of An Garda Síochána* [2020] IEHC 710, the High Court (Meenan J.) observed in relation to Regulation 39 of the Regulations 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 enquiry would be pointless.”
86. It seems to me that similar considerations apply to s. 14(2). As Kelly J. pointed out in the passage in *McEnergy* cited above, and subsequently approved by the Supreme Court, members of An Garda Síochána are excluded from the normal protections of the unfair dismissal legislation in consequence of the special considerations described by O’Hanlon J. in *Jordan* as applicable to them, members of the defence forces and the Prison Service. Accordingly, the exceptional and limited power of dismissal to be found in s. 14(2) falls to be carefully scrutinised by the court on judicial review to ensure its exercise is lawfully undertaken.

Conclusion

87. I am satisfied that where the conduct in question is genuinely in dispute, s. 14(2) has simply no application. For that reason, arguments about prematurity based on the *Rowland* jurisprudence fall away and are immaterial to the issues in this appeal. In my view, the Commissioner had no power to invoke s. 14(2) in the circumstances of the present case and acted *ultra vires* in doing so. The issue of prematurity does not therefore arise for consideration.
88. For these reasons therefore, I would allow this appeal, set aside the order of the High Court and quash the terms of the Commissioner's letter of the 8th May, 2020 insofar as it purports to invoke s. 14(2) of the Act.
89. As Garda Ivers has been entirely successful in this appeal, my provisional view is that he is entitled to his costs in this court and in the High Court. If the Commissioner wishes to contend for a different order, he will have liberty to seek a short supplemental hearing on the issue of costs by notifying the Office of the Court of Appeal accordingly within 14 days of the date of this judgment. If such hearing is requested and does not result in a different order, the Commissioner may be additionally liable for the costs of the supplemental hearing.
90. As this judgment is delivered remotely, Barniville P. and Binchy J. have authorised me to record their agreement with it.