

THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 374

[2023 No. 106 JR]

BETWEEN

PAUL MURPHY

APPLICANT

AND

THE STANDARDS IN PUBLIC OFFICE COMMISSION, IRELAND &

THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 21st day of June, 2024.

INTRODUCTION

1. This judgment concerns an application for judicial review in relation to two decisions made by the first respondent, the Standards in Public Office Commission (“*the Commission*”), and that are recorded in a written report dated 9 November 2022 (“*the Report*”).

2. The decisions were made in response to complaints that had been made by the applicant and certain other persons about actions taken in April 2019 by Mr. Leo Varadkar TD, at a time when he held the office of Taoiseach, and which gave rise to some level of public controversy. Mr. Varadkar was invited to take part in the proceedings but, as was his entitlement, declined that invitation. Nevertheless, for ease of reference he will be described as “*the notice party*” for the purposes of this judgment. The two impugned decisions in the 9 November 2022 report

were, first, a decision not to appoint an inquiry officer to conduct a preliminary inquiry, and second, a decision pursuant to section 23(1C) of the Ethics in Public Office Act 1995, as amended, not to carry out an investigation.

3. In order to answer the questions posed by the action this judgment will require a consideration of specific aspects of the decision making process that has been mandated by the Oireachtas where the Commission receives complaints that certain office holders are alleged to have done acts or made omissions that are inconsistent with the proper performance by the office holder, with the functions of their office or inconsistent with the maintenance of confidence in such performance by the general public, and where the matter is one of significant public importance.

4. As such it is necessary to consider the decision by reference to its own terms and the relevant statutory provisions in order to assess the claims made. While it would be fair to observe that the oral arguments at hearing on some issues ranged beyond the scope of the leave that was granted, this judgment is concerned with addressing the questions that arose on foot of the grant of leave to apply for judicial review.

5. In terms of the sequence of the judgment, I will commence by setting out the background facts as asserted by the applicant and the matters in respect of which leave to apply for judicial review was granted. I will then summarise the procedural history of matters before the Commission before setting out the decision that was made; and I will then set out the essential aspects of the statutory process under which the Commission is charged to operate. Finally, I will address the specific arguments raised in the case.

6. For the reasons that are explained in detail below, I have found that the applicant should succeed in the application insofar as he has contended that the decision of the Commission does not adequately explain its decision not to carry out an investigation. In very brief summary, this is because it is not explained with sufficient clarity how or why the Commission concluded that its remit did not extend to investigating the matters that were the subject of the complaint, or how that conclusion interacted with or led to a finding under section 23(1C) of the Ethics in Public Office Act 1995, as amended.

BACKGROUND

7. The applicant is a Teachta Dála and has been a member of the Oireachtas since October 2014. The factual grounds asserted by the applicant in his Statement of Grounds are largely uncontested and can be summarised as follows:

- a. Between the 11 and 16 April 2019, the notice party provided a copy of a confidential agreement negotiated between the Department of Health, the Health Service Executive (“*the HSE*”) and the Irish Medical Organisation (“*the IMO*”) to Dr. Maitiú Ó Tuathail, the then president of the National Association of General Practitioners (“*the NAGP*”). At the relevant time, negotiations were at an advanced stage of the “*GP Contractual Reform and Service Development.*” The IMO was a party to the negotiations, whereas the NAGP was not.
- b. On 31 October 2020, the circumstances surrounding the provision of information were published in an article by Village Magazine.
- c. On the same date, the notice party released a statement in which he accepted that he had provided the agreement to Dr. Ó Tuathail. It was asserted that while this was contrary to best practice there was nothing unlawful or improper about

doing so. According to the account in the Statement of Grounds, the notice party suggested in his statement that the fact and substance of the agreement had already been in the public domain as of 6 April 2019. In addition, the notice party stated that he provided the agreement in his capacity as head of Government, with the aim of encouraging boarder acceptance of its terms among the GP community.

- d. On or about 2 November 2020, the applicant made a complaint to the Commission about these matters. *Inter alia*, the applicant contended that the agreement was not in the public domain at the relevant time on bases including that the agreement had been labelled “*confidential*” on its face and that the final agreement was not published until 17 May 2019.
- e. On 18 January 2021, An Garda Síochána informed the Commission that an active criminal investigation was underway into the matters that were the subject matter of the applicant’s complaint.
- f. On 26 January 2021, the Commission confirmed to An Garda Síochána that it would not commence any active inquiry of the investigation until the Garda investigation had concluded. This was notified to the applicant by way of email on 10 March 2021.
- g. At some point in September 2021, the notice party provided a statement to An Garda Síochána in connection with their investigations.
- h. On or about 23 April 2022, An Garda Síochána sent a file to the Director of Public Prosecutions for her consideration.
- i. On 6 July 2022, the Director directed that no criminal charges were to be brought against the notice party in respect of the allegations which were the subject matters of the applicant’s complaint.

- j. On or about 29 September 2022, the Commission requested that the notice party provide a copy of the agreement and an initial response to the applicant's complaints dealing with the same subject matter. According to the Commission, the purpose of the request was to assist in making a preliminary consideration of the complaints in order to determine whether to appoint an inquiry officer.
- k. On or about 3 October 2022, the notice party sent a letter to the Commission by way of reply which was accompanied with a copy of the agreement and his statement to An Garda Síochána, which was dated September 2021. It should be noted that the applicant was not furnished with a copy of the letter or the accompanying statement. However, in the Statement of Grounds, presumably relying on the subsequent decision from the Commission, it is stated that the letter in question asserted that when disclosing the agreement the notice party had been acting in his capacity in his role as Taoiseach and head of Government in furtherance of the policy goals of the government.
- l. On 9 November 2022, the Commission issued its decision on the complaint which was arrived at by three votes in favour and two votes against.

THE PROCEEDINGS

8. The High Court granted the applicant leave to apply for judicial review by order dated 24 July 2023. While the Commission and Ireland and the Attorney General participated in the proceedings and the hearings before this court, the notice party decided not to participate, and this decision was communicated to the parties in a letter dated 9 June 2023.

9. The applicant seeks the following relief in the statement grounding the application for judicial review:

“(i) An Order of Certiorari quashing the decision of the First Named Respondent on 9th November 2022 not to carry out an investigation under Section 23 of the Ethics in Public Office Act 1995.

(ii) A Declaration that the decision of the First Named Respondent of 9th November 2022 was determined in a manner which breached the Applicant’s right to fair procedures and natural and constitutional justice.

(iii) An order remitting the matter back to the First Named Respondent for reconsideration pursuant to Order 84, Rule 27(4).”

10. On 15 December 2023, the solicitors for the applicant wrote to the parties informing them that the applicant no longer was pursuing grounds 2, 3 and 4 under the heading “*Legal Grounds*” in the applicant’s statement of grounds. Accordingly, the remaining legal grounds can be summarised as follows:

- a. First, it was alleged that the decision reached was in breach of fair procedures and due process and made in error of law. In essence the allegation was that the process by which the Commission reached its decisions on whether to appoint an inquiry officer or carry out an investigation was not fair or adequate.
- b. Secondly, it was argued that the Commission erred in law in concluding that it was neither its function nor within its remit to determine the extent of the implicit executive functions of the office of Taoiseach in the furtherance of the policy goals of government. Having regard to the provisions of the Ethics in Public Office Act, 1995 and the Standards in Public Office Act, 2001, and the definitions therein, the applicant sought to argue that the mere assertion that conduct fell within the implicit powers of the office of Taoiseach could not serve as a procedural bar to an investigation by the Commission.

c. Thirdly, it was asserted that the Commission failed to provide adequate reasons for its decision to refuse to appoint an inquiry officer or to carry out an investigation. In this regard, the argument is that the impugned decision makes reference to the Commission having received legal advice on the question of executive powers and on the basis of that advice it concluded that it lacked the power to consider the matter fully. The legal advice was not expressly disclosed, and, in this regard, it is asserted that the decision was not adequately reasoned. The applicant asserts that without knowing the legal basis upon which the Commission purported to act it was not possible to challenge properly the lawfulness of the decision. As put by the applicant, he has been provided with conclusions rather than the reasons which informed those conclusions.

11. In its Statement of Opposition dated 31 October 2023, the Commission contends that the process it utilised in reaching its decisions was at all times fair, adequate and consistent with statutory functions. In particular, with regard to the contention that it erred in law in connection with its treatment of executive functions, the Commission states that it considered and had regard to the matters identified at para. 6.2 of the Report and that in carrying out its statutory functions it must act in a manner consistent with the Constitution and did so. The Commission also denied that it failed to provide adequate reasons.

12. The opposition statement on behalf of the Commission was verified by an affidavit sworn by Ms. Linda Joyce, Head of the Secretariat to the Commission, who sets out the background to the decision-making process and exhibits a large volume of material.

13. As observed by counsel for the applicant in his oral submissions, while the Statement of Opposition is extensive and somewhat lengthy, it largely consists of denials. Similarly, the statement of opposition filed on behalf of Ireland and the Attorney General largely amounts to denials. It would have been more helpful if those opposition statements expressed themselves in a more expansive manner, but the court was satisfied that the outcome of the pleadings process was that the issues between the parties were relatively clear.

THE COMMISSION DECISIONS OF 9 NOVEMBER 2022

14. The written report runs to four pages. In the first instance, the Report set out the complaints that were received. The Report then explained how the Commission agreed to defer its consideration of the complaints pending the outcome of the Garda investigation. That process concluded in July 2022. The Report also noted that one of the Commissioners had recused herself from consideration of the complaints at an early stage on the basis of prior professional work with the NAGP. The Commission then goes on to explain the process by which it engaged in a consideration of the complaints, stating that while the complaints that were made were considered as part of the same process, they were also considered individually and collectively. On the basis that it had no statutory function to investigate, prosecute or otherwise determine allegations of criminal offences, the Commission decided that it would not investigate complaints of criminal wrongdoing. None of the above aspects of the Commission's process has been challenged.

15. The Commission then noted that none of the complaints specifically alleged a breach of section 4(1)(a) of the Standards in Public Office Act, 2001. Nevertheless, when the Commission took the complaints as a whole, it resolved to treat the complaints made as complaints that the respondent had done a "*specified act*" within the meaning of section 4(1)(a)

of the Standards in Public Office Act, 2001. Again, that aspect of the treatment of the complaint is not challenged. Hence, the Commission had to determine whether a “*specified person... may have done an act... that is, or the circumstances of which are, such as to be inconsistent with the proper performance by the specified person of the functions of the office... or with the maintenance of confidence in such performance by the general public, and the matter is one of significant public importance.*” In that regard the Commission noted that the notice party was a “*specified person*” within the meaning of section 4(6)(a)(i) of the 2001 Act.

16. Part 5 of the Report addressed the steps taken by the Commission in its engagement with the notice party. The Commission noted that as part of its preliminary consideration of the subject matter, and to determine whether to appoint an inquiry officer, on 29 September 2022 it asked the notice party to provide it with a copy of the Agreement and an initial response to the complaints. On 3 October 2022, the notice party provided a reply to that request.

17. The Commission highlighted two aspects of that reply. First, the notice party asserted that the action taken by him in relation to the disclosure of the Agreement was in his capacity and role as Taoiseach and head of Government and was to further the policy goals of the government. Second, the Commission noted that much of the content of the statement that had been provided was prepared in the context of a criminal investigation and was not of direct relevance to the statutory investigation to be undertaken, the scope of the Commission’s remit being significantly narrower in scope than a criminal investigation.

18. Finally, the Commission noted that it had sought the advice of its own legal team and of external senior counsel in light of the assertion about executive power, which it regarded as being of “*fundamental legal importance... in the context of its statutory remit, the explicit and*

implicit powers of the office of Taoiseach, the provisions of the Constitution of Ireland and general administrative law provisions.”

19. Part 6 of the Report sets out the substance of the decision made. As the substantive part of the decision is relatively short and because it was the subject of intense scrutiny at the hearing and in legal submissions it is helpful to set that decision out in full hereunder:

“6.1 On 21 October 2022, a majority of Commissioners present and voting reached a decision on the complaints, with three Commissioners in favour of the decision and two against. The decision of the Commission is set out below.

6.2 In reaching its decision, the Commission considered:

- (i) The specific allegations made in the three complaints under consideration;*
- (ii) The documents submitted by the respondent, including his letter asserting that his actions were carried out in his capacity as Taoiseach and head of Government and to further the policy goals of Government, a copy of his Statement given to An Garda Síochána in the context of their investigation and a copy of the Agreement;*
- (iii) The provisions of the 1995 Act, as amended by the 2001 Act, the provisions of the Constitution of Ireland (in particular Article 28) and the implied executive functions of the office of Taoiseach;*
- (iv) The statutory remit of the Commission; and*
- (v) The legal advice from the Commission’s legal team and external Senior Counsel.*

6.3 It was the opinion of the Commission that the complaints made were legally misconceived, in circumstances where it is not the function of the Commission, nor

within its remit to determine the extent of the implicit executive functions of the office of the Taoiseach in the furtherance of the policy goals of the Government, such as would be required, in accordance with natural and/or constitutional justice to determine whether the act complained of constituted a 'specified act' within the meaning of the 2001 Act. In such circumstances, and in accordance with section 4(4) of the 2001 Act, the Commission decided not to appoint an Inquiry Officer to conduct a preliminary inquiry.

6.4 Having determined the above, the Commission was required to consider whether it was appropriate to carry out an investigation under the 1995 Act. The Commission carefully considered its legal advice and all the evidence before it, including the acceptance by the respondent that he did disclose the Agreement but that it was done pursuant to the functions of the office of the Taoiseach and in furtherance of the policy goals of the Government. In such circumstances, where the Commission is of the view that it has no role and/or remit to consider either the lawfulness of the action or the extent of the powers of the office of Taoiseach, it is the opinion of the Commission that the evidence sufficient to sustain a complaint is not and will not be available, even in circumstances where the disclosure of the Agreement is not in dispute. Accordingly, the Commission had decided in accordance with Section 23(1C) of the 1995 Act not to carry out an investigation.”

20. Hence, as recorded in the Report, the formal conclusions of the Commission were (a) that it decided not to appoint an inquiry officer, and (b) that it decided not to carry out an investigation under section 23 of the 1995 Act.

STATUTORY PROVISIONS

21. The principal arguments in this case focus on the *manner* in which the Commission approached the task set for it by the Oireachtas in the Ethics in Public Office Act 1995 (“*the 1995 Act*”) and the Standards in Public Office Act 2001 (“*the 2001 Act*”). By section 29(3) of the 2001 Act, with an exception that does not apply to this case, both Acts are to be construed together as one and may be cited as the Ethics in Public Office Acts, 1995 and 2001.

22. The Commission was established by section 21 of the 1995 Act. The Commission comprises six members, including a chairperson who is a judge or a former judge of the Superior Courts, together with the Controller and Auditor General, the Ombudsman, the Clerk of Dáil Éireann, the Clerk of Seanad Éireann and a person appointed by the government on foot of resolutions passed by each House approving the proposed appointment.

23. The Commission has a number of functions and various types of complaint may be the subject of investigation. This case is concerned with the form of complaint provided for by section 4 of the 2001 Act; and the manner in which investigation of such a complaint should proceed is provided for in section 23 of the 1995 Act, as substituted by the 2001 Act. As will be discussed further, section 4 of the 2001 Act is concerned *inter alia* with allegations that office holders may have done an act that is inconsistent with the proper performance of the functions of their office or with the maintenance of public confidence in such performance and that the matter is one “*of significant public interest.*” The tasks of the Commission are important and set the ethical requirements of office holders, and the policing of those requirements, on a statutory footing.

24. Before addressing how the Oireachtas has tasked the Commission to carry out investigations of complaints it is helpful to note the position of guidelines and codes of conduct.

GUIDELINES

25. In addition to the statutory provisions concerning the investigation of complaints by the Commission, the applicant also highlighted that there is provision for the drawing up of codes of conduct *“for the guidance of officer holders”* which may be drawn up by the government pursuant to the provisions of section 10(2) of the 2001 Act. According to section 10(6) of the 2001 Act, a code of conduct for the guidance of office holders shall *“indicate the standards of conduct and integrity for the persons to whom it relates in the performance of their functions and in relation to any matter connected with or affecting or likely or appearing to affect such performance and in relation to such other matters (if any) as may be specified in the code.”*

26. Section 10(7) provides that a person to whom a code of conduct relates *“shall, insofar as it is relevant, have regard to and be guided by the code in the performance of his or her functions and in relation to any other matters to which the code relates.”*

27. Section 10(8) provides that a code of conduct shall be admissible in any proceedings before a court or the Commission.

28. In addition to the provisions for codes of conduct for various categories of person, section 10(12) of the 2001 Act permits the Commission to give advice to the office holder, where that is requested by the office holder. For the purposes of office holders, the advice can be given in relation to the application or non-application of a code of conduct to *“any particular case or circumstance specified by the member and affecting or relating to him or her or to any*

conduct or proposed conduct of the member.” By section 10(15) of the 2001 Act, where such advice is furnished to an office holder, it has effect in relation to that person as if it formed part of the code of conduct or guidelines to which it relates.

COMPLAINTS UNDER SECTION 4 OF THE 2001 ACT

29. Section 4(1)(a) of the Act of 2001 permits a person to make a complaint to the Commission, where the person considers that:

“A specified person ... may have done an act or made an omission ... that is, or the circumstances of which are, such as to be inconsistent with the proper performance by the specified person of the functions of the office or position by reference to which he or she is such a person or with the maintenance of confidence in such performance by the general public, and the matter is one of significant public importance.”

30. I have underlined two terms that are defined in the Acts:

- a. First, “*specified person*” is defined by section 4(6)(a) of the 2001 Act as meaning a person who “*is or, at the time to which the complaint relates, was an office holder ...*”. In turn, “*office holder*” is defined by section 2 of the 1995 Act as meaning *inter alia*, “*a person who is a Minister of the Government or a Minister of State*”. It was not disputed that the notice party was a *specified person* for the purposes of the applicant’s complaint.
- b. Second, the term “*functions*” is defined in section 2 of the 1995 Act as including “*powers and duties and references to the performance of functions include, with respect to powers and duties, references to the exercise of powers and carrying out of the duties and, in relation to an office holder, includes functions conferred on him or her by the Government or in pursuance of a decision of the*

Government and functions of the office holder as a member of the Government.”

As noted below, this definition of functions was the subject of argument by the applicant.

31. The main provision dealing with the manner in which complaints should be investigated by the Commission is at section 23 of the 1995 Act (as inserted by section 7 of the 2001 Act). However, section 4 also contains additional provisions that shed light on the investigation process. By section 4(4) of the 2001 Act, the Commission may request an inquiry officer to carry out a preliminary inquiry into any complaint under section 4(1)(a) unless it considers the matter to be frivolous or vexatious. In addition, by section 4(5) of the 2001 Act, where the subject matter of the complaint made or referred to the Commission is not, in the opinion of the Commission of sufficient gravity to warrant investigation by the Commission, the Commission at its discretion, either shall not investigate it or shall refer it to another body.

32. This case is not concerned with decisions either that the complaint was frivolous or vexatious or that there was not sufficient evidence to sustain a prima facie case or that the matter was not of sufficient gravity to warrant investigation. However, the provisions relating to those matters can be considered in order to understand the overall statutory framework within which the Commission must operate.

SECTION 23 OF THE 1995 ACT – HOW A COMPLAINT MAY BE ADDRESSED BY THE COMMISSION

33. Section 23 of the 1995 Act, as substituted by the Act of 2001, addresses investigations by the Commission. This provision was the focus of intense argument at the hearing. It is not a particularly clear piece of drafting and warrants close consideration.

34. The starting position is relatively clear. Section 23(1)(a) of the 1995 Act, as amended, provides that:

“(1)(a) Subject to the provisions of this section, where a complaint is made to the Commission under section 4 of the Act of 2001 or the Commission considers it appropriate to do so, the Commission shall carry out an investigation to determine whether, as appropriate –

(i) the person concerned ... has done a specified act, or

(ii) ...”

35. The apparently mandatory language of section 23(1)(a) – the Commission *shall investigate* where a complaint is made under section 4 - is qualified in a variety of ways.

36. First, as is clear from the language of section 4(5) of the 2001 Act, the Commission has a broad discretion to decide not to investigate a complaint where “*in the opinion of the Commission*” the complaint is not “*of sufficient gravity to warrant investigation by the Commission*”.

37. Second, and here the language used is curious and unusual, by section 23(1)(b) of the 1995 Act, as inserted by section 7 of the 2001 Act, subject to the provisions of section 23, “*where the Commission considers in the case of a person who may have done a specified act ...that it is appropriate to do so, it shall carry out an investigation to determine, whether ... the person ... did a specified act.*” [emphasis added]

38. It is hard to reconcile the language of subsections (1)(a) and (1)(b) of section 23 of the 2001 Act, as amended. Both subsections are framed as “*subject to the provisions of section*”, and as explained shortly below, the remainder of section 23 includes provisions that make clear when an investigation should *not* be carried out. Section 23(1)(a) appears to include a mandatory obligation to carry out an investigation where a section 4 complaint is made, while section 23(1)(b) seems to qualify that mandatory obligation by clarifying that the Commission is required to carry out an investigation where it considers it appropriate to do so, a use of language that clearly contemplates some element of discretion.

39. Third, section 23(1B) makes provision for two scenarios for the purposes of a section 4 complaint. The Commission shall not investigate a complaint by a person *other than a member* under section 4 of the 2001 Act “*if it considers the complaint to be frivolous or vexatious.*” On its face, section 23(1B) would seem to rule out the mandatory prohibition on the investigation of frivolous or vexatious complaints if the complaint emanates from a member. Another way to consider the provision is that it implies a legislative intention that a complaint from a member should not be treated as frivolous or vexatious. However, that provision also needs to be considered in the light of section 4(4) of the 2001 Act, which permits the Commission to request an inquiry officer to carry out a preliminary inquiry *unless it considers the complaint to be frivolous or vexatious.* As such, the Oireachtas was clear that once the Commission forms the view that a complaint is frivolous or vexatious there can be no investigation. Moreover, section 31(2) of the 1995 Act, as amended, provides that the Commission may “*discontinue*” an investigation under section 23 of a complaint made to it under section 4 of the 2001 Act “*if it becomes of the opinion that the complaint concerned is frivolous or vexatious*”.

40. Fourth, section 23(1A)(b) of the 1995 Act provides that the Commission “*shall not carry out an investigation under subsection (1)*” in relation to a complaint under section 4(1)(a) of the 2001 Act “*unless ... the Commission becomes of opinion after consideration by it of any report of an inquiry officer in relation to the matter and any statements or documents accompanying the report, that there is sufficient evidence to establish a prima facie case in relation to the alleged specified act concerned and that, if it was in fact done, it is an act falling within the said paragraph (a).*”

41. Fifth, and this is one of the provisions expressly relied upon by the Commission in its decisions, by section 23(1C) of the 1995 Act, “[s]ubject to subsection (1A)(b), if the Commission becomes of opinion that evidence sufficient to sustain a complaint ... under section 4 ... is not and will not be available, it may decide not to carry out, or to discontinue, an investigation under this section, and, if it does so, it shall prepare a record of the decision and subsection (1) and (4) of section 24 shall apply in relation to such a record as it applies to a report under subsection (1) of that section with any necessary modifications.”

42. In addition to the provisions governing the investigatory options available to the Commission, there are further provisions that address how those options are to be exercised, and which shed some light on the issues in this case.

43. Section 18 of the 2001 Act provides the Commission with the power to direct that any person makes discovery on oath of documents and a power for the Commission to apply to the High Court for orders to ensure compliance with such orders. The overall powers of the Commission in relation to the conduct of an investigation are set out in section 32 of the 1995 Act. It is not necessary to address those powers in detail. The powers generally allow for the

Commission to hold sittings, to compel attendance at the sittings, and to provide for privileges and immunities in respect of witnesses. The procedure to be adopted in an investigation is a matter for the Commission, but provision is made in section 32(6) of the 1995 Act to ensure basic fair procedures. That includes providing for prior notification of the names of the witnesses that will be called and statements as evidence along with indications in writing of the nature and source of any potentially exculpatory information that has come to the attention of the Commission.

44. Notably, section 32(6)(a) of the 1995 Act requires the Commission to notify the complainant of the date, time and place of the relevant sitting of the Commission. While section 32(6)(c) makes clear that the complainant or their representative is entitled to attend at the relevant sitting of the Commission, there is no indication that the complainant or their representative is entitled to participate by way of examination or cross examination. Nonetheless this suggests a legislative intention that the role of a complainant is not restricted merely to initiating the complaint and providing statements or documents, but that such a person has a more extended role and some entitlement to remain involved in the process after making any statement or providing any documents. That role is also evidenced, as set out later, by the requirement on the Commission to provide information to a complainant when an investigation is concluded or discontinued.

45. There does not appear to be any provision allowing for a form of statutory appeal from a decision of the Commission. In the premises, a person affected by and unsatisfied with a decision of the Commission appears to be restricted to seeking to agitate that issue by way of judicial review.

THE ROLE OF INQUIRY OFFICERS

46. Section 6 of the Act of 2001 makes provision for “*inquiry officers*”. As the Act makes clear, there is no express obligation on the Commission to utilise the services of an inquiry officer. Hence, this is not a legislative scheme that requires the complaint to go through an initial filtering process before it can be considered by the Commission.

47. Section 4(4) of the 2001 Act sets out that the Commission may request an inquiry officer to carry out a preliminary inquiry into any complaint made under section 4(1)(a) of the 2001 Act – which is the form of complaint with which these proceedings are concerned. The only restriction on the exercise of the section 4(4) power is that the inquiry officer cannot be requested to carry out a preliminary inquiry if the Commission already considers that the complaint is frivolous and vexatious.

48. Subject to the above, the role of the inquiry officer and the nature of that officer’s powers are provided for in the remainder of section 6 of the 2001 Act, as follows:

- a. The purpose of an inquiry officer is to assist the Commission in the performance of its functions (section 6(2)).
- b. The inquiry officer carries out a “*preliminary inquiry*” into a complaint (section 6(2)).
- c. The inquiry officer is entitled to request statements of the evidence that a complainant or any other relevant person would give to the Commission in an investigation (section 6(2)(a)).
- d. Those statements are provided to the subject of the complaint, who is entitled to furnish their own statement (section 6(2)(b)).

- e. In either of the two above scenarios the inquiry officer may also conduct interviews (section 6(2)(c)).
- f. The inquiry officer may also request the production of relevant documents (section 6(5)).
- g. The provision of statements, documents or the attendance at interviews is not compulsory and there is an unqualified statutory entitlement to refuse to comply with such a request (section 6(7)).
- h. When the inquiry officer carries out a preliminary inquiry, the officer must prepare a report in writing of the results of the inquiry and furnish the Commission with any statements or documents that were submitted (section 6(3)).
- i. The report must not contain any determinations or findings but can include “*an expression of the opinion of the officer as to whether there is prima facie evidence to sustain the complaint concerned.*” (section 6(3)).

49. Having regard to the overall structure and language of section 6, the use of an inquiry officer is optional, the purpose is to assist the Commission, the inquiry is carried out on the basis of voluntary cooperation of all concerned, there are no determinations or findings, but the officer may express an opinion as to whether the complaint is supported by prima facie evidence.

REPORTS

50. In any case in which there is an assertion that a public body has failed to give reasons one consideration is whether, and, if so, the extent to which, the statutory scheme under which the body operates requires the provisions of written reasons. In relation to the Ethics in Public

Office Acts 1995 to 2001, the extent to which the Commission is required to set out a reasoned report on its deliberations depends on how far an investigation has progressed. In that regard, the Acts contemplate a number of potential scenarios.

51. Where the Commission has carried out an investigation under section 23 of the 1995 Act, as substituted, it is required by section 24(1) to prepare “*a report in writing of the result of the investigation*”. That report must be furnished to the person who was the subject of the investigation, and, if the investigation followed a complaint under section 4 of the 2001 Act, it must also be furnished to the complainant.

52. According to section 24(3) of the 1995 Act, a report under subsection (1) must set out the findings of the Commission and its determinations in relation to certain matters. If there is a determination that the person has done a specified act, the Commission must report the following:

- a. whether the act is continuing;
- b. if the specified act is continuing, the steps required to secure the discontinuance of the specified act and the period of time within which those steps should be taken;
- c. whether the act was done inadvertently, negligently, recklessly or intentionally;
- d. whether the act was in all the circumstances a serious or a minor matter; and
- e. whether the person acted in good faith and in the belief that his action was in accordance with guidelines published or advice given by the Commission under section 25.

53. Section 24(3)(b) of the 1995 Act addresses situations in which the Commission determines that the person has not done a specified act. In that scenario the Commission must

set out whether it was of the opinion that the complaint was frivolous or vexatious or that there were no reasonable grounds for it.

54. There is also provision under section 24(2) of the 1995 Act for the Commission to prepare a report for the Director of Public Prosecutions if either during or at the conclusion of its investigation it forms the opinion that the person concerned may have committed an offence.

55. It can also be noted that under section 23(1C) of the 1995 Act, as amended, the Commission may decide not to carry out or to discontinue an investigation into a section 4 complaint if it becomes of the opinion “*that evidence sufficient to sustain a complaint ... is not and will not be available.*” In that scenario, the Commission is obliged to prepare “*record of the decision*” and “*subsection (1) and (4) of section 24 shall apply to in relation to such a record as it applies to a report under subsection (1) of that section with any necessary modifications*”. Hence the record of the decision, as opposed to the report of the result of the investigation, shall be furnished, *inter alia*, to the person who made the complaint and the person who was the subject of the complaint.

56. According to section 31(2) of the 1995 Act, as amended, if the Commission decides to discontinue an investigation under section 23 into a complaint made under section 4 of the 2001 Act, because it has formed the opinion that it is frivolous or vexatious, the Commission has to furnish “*a statement in writing of the reasons for its decision*” to the complainant and the person who was the subject of the complaint.

57. As noted above, under section 23(1B), the Commission is prohibited from carrying out an investigation *unless* it becomes of the opinion, after consideration of a report by an inquiry

officer, that there is sufficient evidence to sustain a prima facie case in relation to an alleged specified act. Where the Commission forms the opinion that there is insufficient evidence to sustain a prima facie case, there is no statutory requirement to set out reasons in writing. This is somewhat anomalous but does not require any detailed consideration in this case.

THE DUTY TO GIVE REASONS

58. The obligations of an administrative body or tribunal to give reasons has been considered on numerous occasions by the Supreme Court in recent years. The *breadth* of the duty is variable, and depends on a number of contextual factors relating to the nature of the decision in question and the statutory framework in which the decision arises. However, the *purpose* of the duty to give reasons is clear. In *Connelly v. An Bord Pleanála* [2021] 2 IR 752, the Supreme Court provided two main reasons why a body should provide reasons. First, a person affected by a decision is entitled to know at least in general terms why a decision was made. Second, the person affected should have enough information to be in a position to consider whether they can or should seek to appeal or to seek judicial review of a decision. The information required should be such that the court dealing with the appeal or judicial review should be able to engage properly in the appeal or review.

59. Often, and as occurred in this case, an applicant for judicial review will identify a number of grounds for challenging a decision, including an assertion that the decision was not supported by adequate reasons. While this is not an invariable proposition, in many cases if there is a finding that a decision was not properly reasoned it may not be necessary or appropriate for the court to engage with the remaining questions, or all of them, as it may be that the decision will have to be remitted to the decision-maker for fresh consideration and a properly reasoned decision. Accordingly, the question of the adequacy of the reasons

underpinning a decision often will have to be addressed prior to addressing other legal issues that arise: if the reasons are not ascertainable with reasonable clarity it will not be possible to understand if the decision-maker engaged properly with the legal or factual issues that presented.

60. The general obligation to give reasons recently was reiterated by the Supreme Court in *Naisiúnta Léictreach Contraitheoir Éireann (NECI) v. Labour Court* [2022] 3 IR 515. In that judgment MacMenamin J. identified the following from prior Supreme Court decisions in *Connelly v. An Bord Pleanála* [2021] 2 IR 752, *Meadows v. Minister for Justice* [2010] 2 IR 701, *Rawson v. Minister for Defence* [2012] IESC 26, *EMI Records (Ireland) v. Data Protection Commissioner* [2014] 1 ILRM 225, *Oates v. Browne* [2016] 1 IR 481, and *Balz v. An Bord Pleanála* [2020] 1 ILRM 367:

- a. There is a fair process question of the affected person knowing why a decision was made. The affected person is entitled to know that justice has been seen to be done and that the decision-maker has directed its mind properly to the issue before it.
- b. The person affected must be able to know that decision was lawful and to consider whether an appeal or judicial review should be taken. This is a function of the constitutional right of access to the court to have the legality of an administrative decision judicially reviewed. For that right to be effective, the court must also have sufficient information to be able to engage properly in any such appeal or review.
- c. There is a further obligation – which appears to be somewhat context dependent – that the decision-maker must engage with significant submissions and explain why an argument is not accepted. This emanates not only from the fair

procedure rights of the affected person, but also from a broader public interest in maintaining public trust in decision making that affect the broader public.

- d. The reasons, generally, should be capable of being ascertained from the terms of the decision or capable of being inferred from its terms and context. It may be possible to infer reasons from other documents referred to in the decision, where those documents are identifiable and available.
- e. Ordinarily it is not enough for the decision-maker simply to state that it has considered everything that it was obliged to consider, as, without more elaboration, that may defeat the underlying requirement that the decision should be capable of being understood.
- f. How the general principles apply to a particular case will depend on a range of factors including the type of the decision in question and the context of the issues that may be the subject of challenge.

61. There was some debate at the hearing of this case as to whether the court should consider materials outside the report itself, and in particular the statements provided by the notice party to the Commission, in order to seek to understand the reasons that were given. I consider that this is something I cannot do. The statements in question were furnished in response to requests made by the Commission. They were not furnished to the applicant and were not appended to the report or otherwise available to the applicant or the public. It seems to me that, as explained further below, where one of the purposes of the duty to give reasons is to enable an affected person to understand the decision, referring to a document that is not made available to the affected person does not assist in understanding the reasons. The case law makes clear that persons in the position of the applicant ought to be able to ascertain the

reasons for a decision from the decision itself. As noted by Clarke J. (as he then was) in the *EMI Records* case at paragraph 6.8:

“ ... There should be no 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.”

62. In the *NECI v. Labour Court* judgment, for the purposes of considering a decision of the Labour Court making a sectoral employment order under the provisions of the Industrial Relations (Amendment) Act 2015, MacMenamin J. identified, at para. 156, the questions that had to be asked in order to determine whether there was compliance with the duty to give reasons, as follows:

- “(a) Could the parties know, in general terms, why the recommendation was made?*
- (b) Did the parties have enough information to consider whether they could, or should, seek to avail of judicial review?*
- (c) Were the reasons provided in the recommendation and report such as to allow a court hearing a decision to actually engage properly in such an appeal, or review?*
- (d) Could other persons or bodies concerned, or potentially affected by the matters in issue, know the reasons why the Labour Court reached its conclusions on the contents of a projected SEO, bearing in mind that it would foreseeably have the force of law, and be applicable across the electrical contracting sector?”*

63. It follows from the above authorities, that when a court is considering an argument about the duty to give reasons in a situation involving the exercise of statutory powers it will be necessary to understand how the statutory scheme has been designed to operate. For instance, many statutory schemes require decision making to proceed in a particular sequence or to proceed from specific determinations. In the absence of adequate reasons, it will not be possible to ascertain whether the determinations have been made or whether the proper sequencing has been observed.

64. In addressing the extent of the duty to give reasons specific to the decisions under consideration in these proceedings, the following factors are important.

65. First, the decision here concerned a complaint made by a member of the Oireachtas and that was treated, without dispute, as a complaint under section 4(1)(a) of the 2001 Act.

66. Second, inherent in such a complaint, and one of the matters to be determined by the Commission, is a concern around the maintenance of public confidence in the performance of office holders in their functions. Hence the decision is of relevance not just to the complainant and person who is the subject of the complaint but to the general public.

67. Third, the role of the complainant extends further than simply initiating a complaint. When an investigation leads to a sitting of the Commission, the complainant has a statutory entitlement to be present and to be represented at the sitting.

68. Fourth, the statutory scheme provides for a process that is more inquisitorial than adversarial. I mean this in the sense that the Commission does not operate as an adjudicator as between the complainant and the person who is the subject of the complaint. Instead, having received a complaint, the Commission decides whether or not to investigate, and, if an investigation proceeds, the Commission is charged not only with gathering the evidence but also with conducting the hearings, including the examination of witnesses. While there may well be an adversarial element to the hearings that take place, this occurs within an inquisitorial framework.

69. Fifth, the Oireachtas has provided a statutory framework for the Commission to approach complaints. Within that framework the Commission is empowered with discretions to make certain decisions, and the discretion is evident from the use of language such as “*becomes of the opinion*” or “*where the Commission considers ... it appropriate to do so ...*”. No discretion is unfettered, however, and where a discretion has been afforded and exercised, some element of explanation must be forthcoming so that affected parties can understand and form a view on whether the exercise of the discretion was lawful and, particularly, that discretionary decisions were made in accordance with the correct statutory framework.

70. Sixth and finally, the Oireachtas requires the Commission to provide reasons for most of its decisions. The extent of the reasons and the way those reasons are expressed depends on the decision in question. As noted above, the 1995 Act sets out a series of situations in which reasons must be given.

- a. Where an investigation takes place and reaches a full conclusion, section 24 of the 1995 Act requires the Commission to prepare a report in writing setting out the findings and the determinations on the matters referred to at section 24(3).

That report must be furnished to the complainant, the person who was the subject of the complaint, and – depending on the outcome – to the Committee on Members Interests of Dáil Éireann.

- b. Where under section 23(1C) the Commission becomes of the opinion that there is insufficient evidence and it decides not to carry out or discontinue an investigation, it is required to prepare a “*record of the decision*”, and that record must be furnished to the complainant and the person who was the subject of the complaint.
- c. Where the Commission under section 31(2) of the 1995 Act discontinues an investigation because it has formed the opinion that it is frivolous or vexatious, it must furnish a “*statement in writing of the reasons for its decision*” to the complainant and the person who was the subject of the complaint.

71. This case does not involve a scenario where the Commission made a finding that the complaint was frivolous or vexatious. However, the fact that the Oireachtas has required the Commission to provide reasons for such a decision is material to the overall consideration of the extent to which the Commission is required to provide reasons when it concludes its consideration of a complaint.

72. Finally, as noted above, there is a potentially anomalous situation where, under section 23(1B) the Commission does not form the opinion that there is sufficient evidence to sustain a prima facie case, there is no *statutory* requirement to set out reasons in writing. This is somewhat anomalous, but does not require any detailed consideration in this case, and does not lead to any conclusion that an independent duty to give reasons may not be present by reference to the ordinary principles of administrative law.

73. Overall, it is clear that in parallel with the general administrative law requirement for reasons to be given for a decision, in the case of the 1995 to 2001 Acts, the Oireachtas expressly requires the Commission to explain its decisions in writing. This can be taken as a reflection of the public interest considerations engaged by the Commission's work, particularly in relation to section 4 complaints.

THE REASONS FOR NOT APPOINTING AN INQUIRY OFFICER

74. In my view, it is both notable and significant that although the Oireachtas has required the Commission to provide reasons – in a variety of formulations – for decisions that it makes about *investigations*, there is no such requirement in relation to the decision whether to appoint an inquiry officer. Section 6 of the 2001 Act clearly contemplates the Commission exercising a discretion as to whether or not it would assist the Commission to have an inquiry officer carry out a preliminary inquiry. There is nothing in the legislation that suggests that a complainant or the person who is the subject of a complaint can require the Commission to utilise the assistance of an inquiry officer. The inquiry officer makes no decision that is binding on the Commission. It is an optional preliminary step in the investigative process. That preliminary inquiry can only lead to an expression of opinion by the officer, where this is requested by the Commission, as to whether there is *prima facie* evidence to sustain the complaint concerned. It follows that where the Commission is satisfied that it does not require the assistance of an inquiry officer, this simply means that the Commission itself will carry out the preliminary part of the investigative functions. As such, within the investigative framework, the decision whether or not to appoint an inquiry officer is not a decision that has any appreciable legal effect on a complainant or on the person who is the subject of the complaint.

75. In those premises, it seems to me that to the extent that there is any obligation on the Commission to give reasons for a decision not to appoint an inquiry officer – and I am not satisfied that reasons are required – this is only as a part of a broader obligation to give reasons for or to explain a final decision. This is of course a separate matter to the lawfulness of a decision to appoint an inquiry officer in the sense that the inquiry officer must be properly authorised and a request for assistance made, or the question of whether an action by an inquiry officer – if properly appointed – was *intra vires*.

76. In this case the Commission has explained why it decided not to appoint an inquiry officer at paragraph 6.3 of the Report. The reasons given were that it considered that the complaint legally misconceived where the Commission was of the view that it had no function to determine the extent of the executive functions of the Taoiseach in the furtherance of the policy goals of the government.

77. In all the circumstances, I consider that these reasons – whether they were right or wrong – provide an adequate explanation to the applicant why an inquiry officer was not appointed. The applicant may disagree with the reasons, but I consider that the report furnishes sufficient reasons to allow the applicant to understand in general terms why the decision was made. Furthermore, the reasons are adequate to allow the applicant, as he has done, to seek to review that aspect of the decision and to permit the court to engage with the issues.

THE LAWFULNESS OF THE INQUIRY OFFICER DECISION

The interpretation question

78. The applicant contended in argument that the Commission erred in law in not appointing an inquiry officer. That contention was made by reference to the language used in

section 4(4) of the 2001 Act. It can be recalled that section 4(4) provides that the Commission may request an inquiry officer to carry out a preliminary inquiry unless it considers the complaint to be frivolous or vexatious. As noted, there is some confusion as a result of the wording of section 23(1B) of the 1995 Act – which was inserted by the 2001 Act. That provision suggests that the prohibition on investigating frivolous or vexatious complaints does not apply if the complaint is made by a member of the Oireachtas. However, the applicant’s argument does not require that issue to be resolved. Rather, the applicant contends that the use of the word “*may*” in section 4(4) in fact takes on a mandatory character when it is considered by reference to the words “*unless it considers the complaint to be frivolous or vexatious*”. Hence, on the applicant’s case the provision means that if the Commission does not consider the complaint to be frivolous or vexatious it must request the inquiry officer to conduct the preliminary inquiry.

79. That argument relies on the observations of Murray J. in the Supreme Court decision in *Heneghan v. The Minister for Housing* [2023] IESC 7, at paragraphs 130 – 132. In those paragraphs, Murray J. noted that normally the word “*may*” implies a power not an obligation, but that when viewed in context it may describe a mandatory obligation.

80. The argument was made that by carrying out what amounted in effect to its own preliminary inquiry the Commission in some sense overreached section 4, and ought to have proceeded with the appointment of an inquiry officer because it allowed for a more coherent process. Further, it was argued that even though the Commission deprived itself of a report from an inquiry officer it was still required to consider if there was sufficient evidence that a *specified act* occurred.

81. The Commission argued that in many respects the applicant was seeking to agitate an argument that fell outside the scope of the leave granted in this case. According to the Commission there was no challenge to the decision not to appoint an inquiry officer. It is correct to observe that the primary relief sought by the applicant is an order of *certiorari* quashing the decision not to carry out an investigation under section 23 of the 1995 Act. However, the applicant also seeks a declaration that the decision of the Commission of the 9 November 2022 was determined in a manner that breached the applicant’s right to fair procedures. In that regard, the legal grounds relied upon include contentions about the decision not to appoint an inquiry officer, and there is particular reference to the adequacy of the reasons underlying that decision. Clearly the complaint about the adequacy of reasons relating to the decision not to appoint an inquiry officer is one of the issues in respect of which leave to apply for judicial review was granted. However, it is not clear that the statutory interpretation question agitated by the applicant falls within the scope of the grant of leave. At best, it is adverted to in a claim in paragraph E(1) of the Statement of Grounds addressing legal grounds that include a broad reference to an error of law. Despite my real scepticism as to whether the issue was in fact a matter in respect of which leave was granted, I consider that the arguments were ones that the Commission was in a position to argue comprehensively, and for the avoidance of doubt I will address the arguments below.

82. The Commission asserted that the legislature at various stages used both mandatory and discretionary language in the 1995 to 2001 Acts, and that there were considerable areas of discretion built into the Acts. On the question of the appointment of an inquiry officer, the Commission argued that it was clear that the word “*may*” in section 4(4) must imply a discretion. There was no mandatory requirement to appoint an inquiry officer. Effectively, the Commission described the inquiry officer as a filtering mechanism for the assistance of the

Commission. The inquiry officer is an evidence gatherer and may not be necessary in every case even if the complaint is not frivolous or vexatious.

83. I consider that the Commission is correct in its construction of section 4(4) of the 2001 Act. As noted by the Supreme Court in *Heather Hill Management Company CLG & McGoldrick v. An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43; [2022] 2 ILRM 313, context is critical in the interpretation of statutes, and in my view, properly construed, section 4(4) of the 2001 Act provides clearly for a discretion. I have already set out the basic structure of section 4 and section 6. In my view the language of section 4(4) of the 2001 Act in and of itself clearly operates to confer a power on the Commission to request an inquiry officer to carry out a preliminary inquiry. That power is not unfettered. On the express language of the statute, if the Commission considers that the complaint is frivolous or vexatious then it may not utilise the inquiry officer. But the converse – the absence of a finding that the complaint is frivolous or vexatious – does not convert the “*may*” into a “*shall*”.

84. That understanding is reinforced, first, in my view by the provisions of section 6 of the 2001 Act. There are two matters of note that suggest there is no mandatory requirement to involve an inquiry officer in a preliminary inquiry. First, section 6(2) provides that the inquiry officer conducts a preliminary inquiry “[*w*]henever so requested by the Commission.” This suggests that use of an inquiry officer is triggered only when there is a request from the Commission. Second, it is clear from section 6(2) that the work of the inquiry officer is “*for the purpose of assisting [the Commission] in the performance of its functions*”; and from, section 6(3), that the assistance can lead to no more than “*an expression of the opinion of the officer as whether there is prima facie evidence to sustain the complaint*”. Those provisions show that the appointment of an inquiry officer is a tool that can be used by the Commission

to assist it by carrying out some preliminary evidence gathering. Clearly, depending on the circumstances, the Commission may legitimately decide that it does not need the assistance of the inquiry officer.

85. Second, the overall structure of the Acts makes it clear that at all times the decision making power rests with the Commission. There is no sense in the Acts that the Commission's powers depend on a preliminary inquiry taking place.

86. Third, in my view section 23(1A) of the 1995 Act, is phrased in a way that suggests the optional nature of the preliminary inquiry. That provision prohibits the Commission from carrying out an investigation unless it is of the opinion that there is sufficient evidence to establish a prima facie case. The provision is framed with the following phrase – “*after consideration by it of any report on an inquiry officer in relation to the matter and any statements or documents accompanying the report*” [emphasis added]. It seems to me that the critical word in that phrase is “*any*”. The use of the word “*any*” implies that there may not be a report. If there was a mandatory requirement to appoint an inquiry officer before an opinion could be formed on whether there was a prima facie case, it is more likely that the draftsman would have referred to “*the report*” from an inquiry officer instead of “*any report*”.

87. In the circumstances, I consider that the primary obligation on the Commission having received a complaint and engaged in some form of preliminary consideration is to form a view on (a) whether it is frivolous or vexatious, or (b) whether there is sufficient evidence to establish a prima facie case. The use of the inquiry officer is, upon request, to assist the Commission in coming to a view on the prima facie question. Therefore, I agree with the Commission that

properly construed there is no mandatory requirement or obligation to request the assistance of an inquiry officer at the preliminary stage of its consideration of a complaint.

The exercise of the discretion

88. The applicant framed his argument solely on the basis that section 4(4) of the 2001 Act imposed a mandatory obligation on the Commission to request the assistance of an inquiry officer. Nevertheless, I should make clear – as this is relevant to the question of the reasons given by the Commission for not appointing an inquiry officer – that there does not appear to be any basis for impugning the manner in which the Commission exercised that discretion. This also is relevant to the next section of the judgment.

89. The Acts of 1995 to 2001 combine mandatory and discretionary provisions directed towards the work of the Commission. Generally speaking, the mandatory provisions are directed to establishing the framework within which the Commission carries out its work. For instance, when the Commission carries out an investigation there are mandatory provisions governing the treatment of participants at its sittings. Likewise, the Commission in certain circumstances must prepare reports or records in writing and must furnish those documents to identified parties. There also are provisions that govern when investigations must not be carried out, for example if the Commission forms the opinion that a complaint is frivolous and vexatious. Those provisions combine mandatory and discretionary elements. The Commission must form a view and the view taken will dictate the course to be adopted; however, the content of the view is a matter for the Commission.

90. It seems clear that where the Oireachtas has empowered the Commission to form a view or reach an opinion on a substantive matter or where the course of action to be adopted depends

on whether the Commission considers it appropriate, those views should attract a considerable level of deference. That holds true not just for procedural decisions, such as whether to request the assistance of an inquiry officer but also for substantive decisions on the evidence, such as the outcome of a section 4 complaint. As noted by Hedigan J. in *Dublin City County v. Standards in Public Office Commission* [2014] IEHC 89, at para. 12, and as approved by Simons J. in *McElvaney v. Standards in Public Office Commission* [2019] IEHC 633:

“In determining what might or might not be reasonably regarded as an interest too remote or insignificant, it is hard to imagine a body more qualified than the Commission. It is an ideal composition of experience, both legal, popular and political. It is likely to be a very rare case where this court in judicial review would find its conclusions irrational or unreasonable.”

91. It seems to me that those observations are readily applicable to a decision under section 4 of the 2001 Act as to whether an act or omission is compatible with the proper performance of the functions of an office or the maintenance of public confidence in such performance.

THE DECISION NOT TO CARRY OUT AN INVESTIGATION

The adequacy of the reasons

92. When it came to the decision made by the Commission not to carry out an investigation it can be recalled that the decision was structured as follows:

- a. The Commission decided determining whether the act complained of constituted a “*specified act*” would require, as a matter of natural justice, the Commission determining the extent of the implicit executive functions of the office of Taoiseach in the furtherance of the policy goals of the government.

The Commission decided that such a determination was not a function of the Commission or within its remit.

- b. Flowing from that decision, the Commission noted that the notice party accepted that he disclosed the agreement but asserted that this was done as Taoiseach in furtherance of the policy goals of the government.
- c. In those premises, the Commission decided that evidence sufficient to sustain the complaint is not and will not be available, and it was not appropriate to carry out the investigation.

93. It can be observed that the central proposition grounding the decision is that the Commission has no statutory power or function to determine the extent of the implicit executive functions of the office of Taoiseach in the furtherance of the policy goals of the government. However, the statutory basis identified for the decision was section 23(1C) of the 1995 Act: that “*evidence sufficient to sustain a complaint is not and will not be available*”. It seems to me that there is a significant potential tension between those bases.

94. The applicant makes two arguments. First, by reference to the provisions of the Ethics in Public Office Acts 1995 to 2001, and particularly the definitions therein, that the Commission erred in law in finding that it was not empowered to investigate a matter that involved consideration of the implicit executive powers of the Taoiseach. Second, that there was a failure to provide reasons. In that regard the applicant did not seek disclosure of the legal advice furnished to the Commission, but contended that it was necessary for the Commission to explain the legal basis for the decision in more detail. As noted, the applicant succinctly framed the issue as one where he was provided with conclusions but not the reasons that

informed those conclusions. The Commission and the Attorney General stood over the decision.

95. For the reasons set out below, I have concluded that the report of the decision is not adequately reasoned. I should make clear at the outset that the court fully rejects the suggestion by the applicant in oral argument that the Commission found the underlying issues “*too hot to handle*”. There was no basis for that contention. The Commission is made up of extremely experienced persons of the highest integrity. There is no doubt that the Commission was faced with a novel and difficult series of issues and endeavoured to resolve those issues properly. As I explain, the court’s finding is that the reasons that were given were not adequate to explain the decision, having regard to the potential complexity of the issues that had to be resolved and the framework of the legislation.

96. In order to explain that conclusion it is necessary to revisit the statutory terms. These have been set out in the earlier parts of the judgment, but it may be helpful to set them out again. I want to make clear that the purpose of what follows is to highlight what I consider to be the questions begged by the decision of the Commission. Insofar as it is necessary to refer to and express tentative views on the interpretation of those provisions, this is to explain why I consider that the decision is inadequately reasoned. The proper resolution of the ultimate question of how the Commission addresses complaints that involve the exercise of executive powers by members of the government is not a matter for this judgment because the issue will have to be remitted to the Commission for further consideration.

97. Section 4(1)(a) of the Act of 2001 permits a person to make a complaint to the Commission, where the person considers that:

“[A] specified person ... may have done an act or made an omission ... that is, or the circumstances of which are, such as to be inconsistent with the proper performance by the specified person of the functions of the office or position by reference to which he or she is such a person or with the maintenance of confidence in such performance by the general public, and the matter is one of significant public importance.” [emphasis added]

98. It was common case that the notice party was an “*office holder*”, and therefore a “*specified person*” for the purposes of the Acts. It was common case that the notice party disclosed the documents in question. The question therefore was whether the act of disclosure was inconsistent with the proper performance by the notice party of the function of his office or with the maintenance of confidence in such performance by the general public.

99. There is no doubt that the executive power expressed in Article 28 of the Constitution is extensive, and the extent of those powers is not expressly defined. In addition, having regard to the provisions of the Constitution, decisions of policy at government level and steps taken to further that policy must be approached with a significant margin of appreciation by the courts, see for instance *Burke v. The Minister for Education and Skills* [2022] IESC 1; [2022] 1 ILRM 73. However, as noted in *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) at para. [5.1.02], one formulation of the extent of powers can be described as that which is left when the legislative and judicial powers are subtracted. In the case of the Acts of 1995 to 2001, there is at least an argument that if the Oireachtas – exercising its exclusive right to legislate under Article 15.2.1^o of the Constitution – has provided that the ethical performance of executive functions should be subject to oversight, an office holder

cannot seek to disapply that regulation by relying on the nature of the very power or function that is the subject of the legislation.

100. The question then is whether there is any indication that the definition of “*functions*” in relation to an office holder excludes express or implicit executive functions. In this regard, the term “*functions*” is defined in section 2 of the 1995 Act as including “*powers and duties and references to the performance of functions include, with respect to powers and duties, references to the exercise of powers and carrying out of the duties and, in relation to an office holder, includes functions conferred on him or her by the Government or in pursuance of a decision of the Government and functions of the office holder as a member of the Government.*” [emphasis added]

101. Prima facie, the definition of *functions* provided by the Oireachtas has every appearance of placing the functions of the notice party as a member of the government within the remit of the Commission.

102. As noted by the applicant, the general proposition that the performance of the powers and duties of a member of the government may be the subject of a complaint and investigation under the legislation appears to be supported by the provisions of the Acts that deal with guidelines or codes of conduct. In that regard, section 10(2) of the 2001 Act requires the government to draw up codes of conduct “*for the guidance of office holders*”. The scope of such a code of conduct potentially is very wide indeed. By section 10(6) of the 2001 Act, a code of conduct “*shall indicate the standards of conduct and integrity for the persons to whom it relates in the performance of their functions, and in relation to any matter connected with or affecting or likely affecting such performance*” [emphasis added]. The person to whom the code is directed is required by section 10(7) of the 2001 Act to “*have regard to and be guided by the*

code in the performance of [their] functions”. The code of conduct is admissible in any proceedings before the Commission. Finally, an office holder can seek advice from the Commission on the question of whether the code of conduct applies to a particular proposed course of conduct, and where the Commission gives advice, it is to be treated as if it forms part of the code of conduct.

103. It is not at all clear that the provisions concerning codes of conduct support a proposition that the Oireachtas intended that acts taken under the aegis of the executive power of the Taoiseach are excluded.

104. With regard to the legal advice obtained by the Commission, the applicant argued that he was not seeking to access that legal advice or to look behind any privilege that could be asserted. Rather they wished to understand the basis for the decision made by the Commission and, in that regard, it was necessary for the Commission to set out the legal propositions upon which they were relying. In particular, it was argued that insofar as there had been an implicit assertion that any investigation by the Commission would have trespassed on executive powers exercised pursuant to Article 28 of the Constitution, the very least that was required was knowledge of what the Commission understood those implied executive functions to be. The applicant went on to suggest that a case could not be made on the basis of the decision that the Commission erred in law in finding that any investigation would trench on an implied executive function of the Taoiseach without knowing what the Commission considered those functions to be. According to the applicant if there was a genuine constitutional hurdle preventing the Commission from considering if an act fell within section 4(1)(a) of the 2001 Act, that could be a matter that could be addressed by the Superior Courts.

105. There is always a concern about the extent to which a decision-maker can or should disclose its own legal advice. There was no argument made, and it is hard to see what argument could be made, that the Commission could not seek or obtain legal advice. However, in this case I consider that without waiving privilege it would have been open to the Commission to summarise the legal propositions that informed its decision on the executive powers issue. It simply is not clear how the Commission reached a conclusion that the matters that were the subject of the complaint fell outside its remit. This leaves the applicant in a position where he is unable to understand the decision and whether or not a full and proper challenge can be brought in respect of the findings on the extent of the Commission's powers. Moreover, as explained briefly above, the absence of proper reasons has the further effect of disabling the court from engaging properly with the potential legal issues that arise.

The reliance on section 23(1C) of the 1995 Act

106. I have already found that the reasons given by the Commission were not adequate to explain why it considered that the complaint fell outside its remit. There is a further difficulty insofar as there is a potential tension between, on the one hand, finding that the complaint was outside the remit of the Commission - which suggests a conclusion that the matter was simply inadmissible – and, on the other hand, a decision that there would not be sufficient evidence to permit the Commission to carry out the investigation. Moreover, there are no clear reasons given why the Commission was concerned that sufficient evidence would not be available.

107. With regard to section 23(1C), the Commission argued that in this case it did not appoint an inquiry officer but took steps to investigate the matter by writing to the Taoiseach and asking questions on foot of the complaint by the applicant. That was the start of an investigation, but no further evidence would be available to sustain the complaint. The reason

for that contention was that the Commission had formed the view that the very nature of the act was so intimately bound up with the policy of the government and the Taoiseach that it simply did not form part of their remit and they could not investigate without interfering with government policy. The Commission also argued that the definition of “*functions*” in the legislation does not refer to matters of government policy. The Commission found there was no need to assemble further evidence. It had to decide what to do at that point. As no relevant evidence would be available to advance the matter further, it was submitted that the decision not to proceed was made within the Commission’s discretion, was lawful, and showed a respect for the separation of powers.

108. With respect, that argument goes further than, or at least is framed in a different way to, the written report of the decisions. The Report does not address in any direct way the definition of “*functions*” in the 1995 to 2001 Acts, and does not explain the Commission’s understanding of the extent of that definition and its impact on its remit. The Commission does not explain whether it is making a fundamental finding that investigating acts done by a member of the government in furtherance of government policy is beyond its remit, either because of an insurmountable Constitutional obstacle or simply as a matter of the proper interpretation of the relevant provisions. Alternatively, there is no clarity on whether it was the view of the Commission that the investigation was legally valid, but could not proceed because the evidence it needed to gather related to matters of government policy and would not be available, and, if so, why that was so.

Summary

109. Accordingly, it can be seen that the approach adopted by the Commission appears to rest on a broad proposition that the Commission’s statutory remit does not extend to a consideration of complaints that require the investigation of acts taken by the Taoiseach which

are stated to have been done in furtherance of the executive functions. It is not clear, but it would appear to follow that a similar reasoning would also rule out investigations of the acts of members of the government acting in furtherance of the executive power of the State. That proposition was not based or certainly not based expressly on a contention that this is required by the Constitution. Rather, it is presented as flowing from the terms of the statute. It can also be observed that if the issue is one of statutory powers, then it is not clear why the Commission needed to rely on section 23(1C) of the 1995 Act. If the complaint as made required the Commission to act outside its statutory remit, it was prima facie inadmissible. On the other hand, if the complaint was admissible then it is not clear why the Commission considered that it would be unable to obtain sufficient evidence. It may be that there was a concern about the entitlement of the Commission to gather evidence that may be found in the confidential discussions of the cabinet. However, this was not stated by the Commission. Ultimately it is not for this court to fill in the blanks in a decision or to propose understandings that are not apparent on the face of the Report, the Report must stand or fall on its own merits by reference to its own terms.

CONCLUSION

110. The court has concluded therefore that the decision of the Commission regarding the appointment of an inquiry officer was lawful, and that the applicant was incorrect in asserting either that this aspect of the Commission's decision was erroneous or inadequately reasoned. However, for the reasons explained the court has concluded that the decision not to carry out an investigation was inadequately reasoned. In the premises, the applicant is entitled to an order quashing the decision of 9 November 2022 and the matter should be remitted to the Commission for further consideration.

111. As this judgment is being delivered electronically, I express the preliminary view that the applicant should be entitled to his costs. I will list the matter on 28 June 2024 at 10.30am for further arguments on the question of the formulation of final orders and to address any contested issue in relation to costs. The parties are invited to seek to reach agreement on those final matters in advance of that listing.