

THE HIGH COURT

JUDICIAL REVIEW

[2023 No. 204 JR]

[2024] IEHC 197

BETWEEN

GAVIN TIERNEY

APPLICANT

AND

GARDA SÍOCHÁNA OMBUDSMAN COMMISSION

RESPONDENTS

Judgment of Ms. Justice Mary Rose Gearty delivered on 22nd of March, 2024

1. Introduction

1.1 The Applicant was arrested in circumstances where he appears to have lied about most events on the day of his arrest. His complaint of assault against an arresting garda was discontinued by the Respondent. That decision was revisited when the main garda witness's account was contradicted in a court hearing. The decision to discontinue the investigation was nonetheless affirmed.

1.2 The language used in the second decision, that the investigator could not be certain as to what had occurred, together with her reasons for this conclusion, combine to persuade me that the decision must be quashed and remitted to the Respondent for consideration as required under the relevant statute.

2. Events on the Road and in the Garda Station

- 2.1 The Applicant alleges that he was arrested for no apparent reason while driving home. He asserts that he was punched in the face three times by one of two arresting gardaí while he was being restrained in the back seat of a garda car.
- 2.2 The two gardaí involved in his arrest were on patrol and, apparently, at a checkpoint. They claim that the Applicant was driving over the speed limit, drove away from their checkpoint at speed, overtook another car and, when they chased his car, stopped only when he arrived at a second Garda checkpoint. The Applicant pulled into the side of the road and had to be wrestled from his car to the ground to be handcuffed. He resisted while one of the gardaí, sitting in the back seat with him, put a face mask on him. The two garda witnesses say that he tried to headbutt that garda. The driver of the car he had overtaken confirms the garda account of his driving, as do the records of the garda radio from that early morning.
- 2.3 The Applicant was aggressive and uncooperative in the garda station after his arrest. He made a complaint of assault in the station and a doctor attended to him. One of the arresting guards claimed that the Applicant had injured his face by knocking his head off a door at the garda station. Later in the station, the Applicant “shoulder barged” the garda whom he had identified as his assailant.
- 2.4 The member in charge of the station noted in the custody record that the Applicant had made an allegation of assault and that he had an injury to his face. He also noted that the Applicant was aggressive at the station and refused to provide samples of blood or urine in respect of the suspected road traffic offences.

3. The Complaint and the First Decision

3.1 The Applicant complained to the Respondent that he had been assaulted by a serving garda. He provided a statement and was interviewed, as were the two gardaí involved in his arrest. The statement from the other driver and the radio records were obtained and considered, as was a medical report of the injury to the Applicant's face.

3.2 The Respondent's initial investigation into this alleged assault was discontinued by a decision dated 6th May, 2017. Therein it was stated that there was insufficient support for the allegations of assault, there was ample evidence to contradict the Applicant's account and further investigation was therefore unnecessary.

4. The District Court Hearing

4.1 The road traffic offence proceedings against the Applicant were heard in the District Court and were dismissed on the 6th May, 2017, the same day as the decision by the Respondent to discontinue its investigation. In the criminal case, the District Judge heard the main garda evidence about a visible injury to the Applicant's face being contradicted, in a significant respect, by another garda witness. The second witness confirmed that the Applicant had a visible injury to his face on arrival at the station. As noted, the arresting garda had suggested that he hit his face while in the garda station. This could not be correct if the custody record was accurate.

4.2 The garda witness, faced with this contradiction, suggested that he may have been wrong about how the injury was caused. The Judge dismissed all the road traffic charges, clearly on the basis that this contradiction affected the credibility of one of the two main garda witnesses.

5. The Second Decision

5.1 The Applicant requested that the Respondent reopen his complaint of assault as a result of these events. The designated officer in the Respondent body listened to the digital audio recording (“DAR”) of the court hearing and decided not to reopen the decision to discontinue the investigation. The Respondent delivered this second decision, which contained a series of reasons, and concluded that it was “not possible to say what had happened with certainty” and that “further investigation was not necessary or reasonably practicable”.

6. Is the Respondent subject to Judicial Review?

6.1 While not pressed in oral submissions, it was submitted that the Respondent body was not subject to judicial review and this position was not abandoned. This cannot be correct. Case law provides a line of authority, dating back to *East Donegal Co-operative Livestock Mark Ltd v. Attorney General* [1970] I.R. 317 in the 1970s and strongly endorsed by the Supreme Court in *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297 in 2012, which confirms that every public body must exercise its powers fairly and within well-defined constitutional and statutory limits. It may be the subject of successful judicial review proceedings if it fails to do so.

6.2 In order to be transparent and fair, a public body must give reasons for its decisions. Otherwise, the person adversely affected by the decision cannot understand or challenge it, if she needs to do so. The cases involving this Respondent alone show that this body is certainly subject to judicial review. Just as the Director of Public Prosecutions, and indeed other specialist bodies, must be afforded deference in terms of their expertise and the Respondent, in common with the Director, must be respected as an independent body, both are reviewable by the High Court in certain circumstances.

6.3 *Keegan v. GSOC* [2015] IESC 68 was not cited to this Court (the issue did not appear to be argued there) but contains a dictum that confirms this view. O'Donnell J. (as he then was) commented that the decision to commence the investigation in that case was an exercise of public law power, and thus subject to judicial review. By the same logic, a decision to discontinue an investigation must be reviewable.

7. Legal Framework: Complaints to the Respondent

7.1 The Respondent body was set up to investigate complaints into members of An Garda Síochána. The provisions creating the body and describing and prescribing its powers are set out in the Garda Síochána Act 2005 (“the 2005 Act”).

7.2 It is worth setting out some of the objectives and functions of the Respondent body as this is the context in which the designated officers operate. These include:

“67. — (1) The objectives of the Ombudsman Commission are —

(a) to ensure that its functions are performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations under Part 4 concerning the conduct of members of the Garda Síochána, and

(b) to promote public confidence in the process for resolving those complaints.

(2) The functions of the Ombudsman Commission are —

(a) to receive complaints made by members of the public concerning the conduct of members of the Garda Síochána ...

(d) to report the results of its investigations under Part 4 to the Garda Commissioner and, in appropriate cases, to the Director of Public Prosecutions and, if it reports to the Director, to send him or her a copy of each investigation file ...”

7.3 In respect of this case, a designated officer was assigned and an investigation was opened under sections 90(1)(b) and 92(c). These read, insofar as they are applicable:

“90.— (1) The Ombudsman Commission may issue guidelines providing for the resolution, by mediation or other informal means, of admissible complaints other than — ...

(b) complaints about conduct that appears to constitute an offence ...

92.— *If an admissible complaint ... is a complaint referred to in paragraphs (a) to (c) of section 90 (1), the Ombudsman Commission may, as it considers appropriate—*

...

(c) direct a designated officer of the Commission to investigate the complaint under section 98.” (emphasis added)

7.4 Section 92(c) is applicable here, as the conduct may constitute an offence as described in section 90(1)(c) and a designated officer was appointed to investigate.

7.5 Section 91 provides for a situation in which a complaint concerns the death of, or serious harm to, a person. In such a case, the Respondent shall immediately direct a designated officer to examine the complaint and report to the Respondent.

7.6 Section 98 sets out the powers of the designated officer. It is entitled: *“Powers of designated officers of Ombudsman Commission for purpose of investigating complaints that appear to involve offences.”* These powers are extensive; the officer has all the powers of members of An Garda Síochána, including arrest, search and summons.

7.7 Under section 101(1), on completing an investigation under section 98, the designated officer *“shall report in writing to the Ombudsman Commission the results of the investigation.”* Section 101(2) provides that if the Respondent, after considering the report, is of the opinion that the conduct under investigation may constitute an offence by the member of the Garda Síochána concerned, it shall send a copy of the report and of the investigation file to the Director of Public Prosecutions with the Respondent’s recommendations.

- 7.8 If the report reveals a breach of discipline, the report goes to the Garda Commissioner rather than to the DPP. It is only if the conduct, in the opinion of the Respondent, *“may constitute an offence,”* to repeat the words of the section, that the Respondent is required to send a report to the DPP. The language of the section is the mandatory *“shall”*. This was not done here as the investigation was discontinued under section 93.
- 7.9 Under section 93, the Respondent may discontinue an investigation if it is frivolous or vexatious, if the complainant knowingly misled the investigator or if, *“having regard to all the circumstances, the Respondent considers that further investigation is not necessary or reasonably practicable.”*
- 7.10 In the case of an admissible complaint against a serving garda, there are a number of avenues which the Respondent may pursue but the only relevant path in this case is the one that was deployed here, namely, the power under section 92(c) to direct a designated officer to investigate the matter and the Respondent’s power to discontinue that investigation.
- 7.11 This first decision to discontinue was revisited and later confirmed, but at this point a new reason was articulated, many of the original reasons were repeated and, with a reference to the standard of certainty, the conclusion was that a further investigation was not necessary *or* reasonably practicable.

8. The First Decision

8.1 The grounds on which the investigation was closed were set out clearly in the written decision of the Respondent's investigator: two guards and an independent witness gave statements, the garda radio records were examined. All other sources of evidence appeared to contradict the account given by the Applicant. The injuries sustained by the Applicant did not match his description of the incident, not being as severe as one would expect, given his description of three punches. All these factors led the Respondent to conclude that, in the circumstances, further investigation was not necessary.

8.2 In the first decision, dated 6th May, 2021, the evidence gathered by the designated officer was outlined in detail and was described as being insufficient to support the allegations made. It is difficult to argue with this conclusion. The account of an independent witness and of the member in charge of the station appeared to confirm that the Applicant was lying about significant aspects of these events.

8.3 Before turning to the second decision, it is worth considering this one by way of contrast. An attempt to review this decision would not succeed, in my view. It was reasoned and within the jurisdiction of the Respondent. All of the evidence gathered contradicted the allegations of the Applicant and, in those circumstances, it appears that it was *intra vires* for the Respondent to discontinue, albeit there was no finding that the complaint was frivolous, knowingly misleading or false.

8.4 There must be a meaning to the third category in section 93(1) by which the Respondent can discontinue an investigation which is no longer "*necessary or*

reasonably practicable." While the decision was stated to be taken on the basis that further investigation was no longer necessary, and this is a reasonable view in that every piece of evidence at that point appeared to contradict the Applicant's story, it could also have been said to be impracticable at that point to go further. There was nothing to support the Applicant's account and several factors suggested that a designated officer would be justified in finding that he was lying.

8.5 Insofar as it was submitted to me that section 93(1)(c), which permits the Respondent to discontinue an investigation, only applies in situations where a witness has died or there is a permanent bar to further investigation, this cannot be correct. The statute does not confine itself to such eventualities, allowing for an officer to discontinue when further investigation is no longer necessary or reasonably practicable. There is no reference in the statute to the investigation being impossible or inevitably fruitless; the bar is not set that high.

9. The Second Decision

9.1 On the very day of the first decision by the Respondent, 6th May, 2021, the final District Court hearing took place. That Court heard evidence which permits the conclusion that one of the only two gardaí present in the garda car at the time of the alleged assault lied about how the Applicant got his injury. Either that, or he was mistaken. Recall the applicable test: the designated officer is trying to determine if the conduct of a serving garda "*may constitute an offence.*" There was another serving garda who had known since the Applicant arrived at the garda

station, after leaving the garda car, that he was alleging an assault by his colleague while he, the witness, was driving the garda car. It is now accepted that the Applicant already had a visible injury on his nose when he arrived at the station.

9.2 After the first decision, there was a lengthy period during which the parties corresponded. This period is no longer relevant to this decision other than to note that the issue of whether the application for review was within time was not pressed. This was a reasonable concession in circumstances where the Respondent clearly, and reasonably, did in fact review the evidence in the case before issuing a second decision, albeit couched in terms that it would not reopen the complaint.

9.3 The second decision, dated 15th December, 2022, states that the Respondent found that there were no grounds to reopen the investigation. The letter outlines the new evidence, namely the events in the District Court, and confirms that Respondent investigators listened to the contents of the DAR of that court hearing, so it is clear that the Respondent considered the new matters arising. The precise wording in the decision is: *“notwithstanding the contents of the DAR, GSOC has concluded that it is impossible to say with certainty how the injury to your client was caused”*.

9.4 The author goes on to discount the evidence of the DAR and states several grounds for the decision not to reopen the matter. Referring specifically to the DAR, the Respondent *“cannot say if Garda Needham lied or was simply mistaken in his recollection...”* Therefore, the written decision continues, the Respondent:

“cannot interpret Mr. Tierney’s acquittal in the District Court as probative evidence that [his] injury was caused by three punches from [Garda] Byrne particularly as there

is also evidence the injury could have occurred in other circumstances and as your client was intoxicated, uncooperative and violent himself on the day.”

9.5 The decision then repeats the conclusion that the injury was not consistent with the allegation, not being sufficiently severe, and concludes that there is no probative evidence to support the Applicant’s contention that the guard “*punched him in the face three times*”. The decision ends with the following line: “*GSOC has concluded that further investigation of your client’s complaint is not necessary or reasonably practicable.*”

10. Ermakov Errors

10.1 In *R. v. Westminster City Council Ex p. Ermakov* [1996] 2 All E.R. 302, the English Court of Appeal set out principles which have been adopted by the Court of Appeal in Ireland in *M.N.N. v. Minister for Justice & Equality* [2020] IECA 187. The effect of the *Ermakov* case is that a court, presented with stated reasons for a decision, may not conduct an *ex post facto* rationalisation.

10.2 In *M.N.N.*, an application for naturalisation was refused on stated grounds: the nature of two road traffic incidents and a referral under the Childcare Acts 1991. The Court of Appeal remitted the application to the Minister as it was not revealed, on the face of the decision as communicated to the applicant, whether the decision-maker had considered the explanations offered by the applicant for both events, and the fact that the latter allegations referring to the children were withdrawn.

- 10.3 In this case, by contrast, it is clear that the DAR was considered by the decision-maker. The problem in *M.N.N.* was the lack of evidence that the decision-maker himself had read the submissions made by the applicant. Even if one of the officers involved had done so, there was no suggestion that the relevant decision maker had. He cited three criminal allegations, two of which were explained by the applicant but he did not refer to this explanation, and he did not acknowledge that the third allegation was withdrawn. The Court held that, considering the applicant's explanations, it was out of all proportion to consider that he was not of good character on the basis outlined. This case is somewhat different; there are many problems with the narrative provided by this Applicant.
- 10.4 However, according to the principles outlined in *Ermakov*, the Court must confine itself to the words of the decision delivered, although later correspondence may clarify and provide more context insofar as this may assist a reader in evaluating its fairness or transparency. There is no such correspondence here.
- 10.5 It is worth considering the facts in *Ermakov*. That applicant was from Uzbekistan and recounted a harrowing tale of harassment by his in-laws in Greece. He was refused accommodation by the respondent Council in London on the stated basis that “[t]he Authority is not satisfied that you and your family experienced harassment”. In its replying affidavit, in a direct contradiction of this stated basis for the decision, the respondent averred that the decision-maker did not disbelieve the applicant but considered it reasonable that he would stay in his then accommodation.

- 10.6 That Court held that there was no justification for accepting affidavit evidence which indicated that the real reasons were wholly different from the stated reasons. If no reasons or wholly deficient reasons were given, the applicant was *prima facie* entitled to have the decision quashed. That respondent accepted that the decision, on its face, gave an incorrect reason and sought to rely on the real reason, not the one transcribed in error. The situation here is not identical; there is no admitted error in the statement of reasons for the decision.
- 10.7 The Court of Appeal in *Ermakov* went on to describe the purpose of the requirement to give reasons as being to enable the applicant to assess whether he had any ground for challenging an adverse decision and that “*wholesale amendment or reversal of the stated reasons would be inimical to this purpose.*” The Court also anticipated practical difficulties that would inevitably follow if wholesale amendment was permitted, such as applications for cross-examination and further discovery, which are generally inappropriate in proceedings for judicial review.
- 10.8 The phrase used in the decision under review here was as follows: “*it is impossible to say with certainty how the injury was inflicted.*” This is, in my view, an error reminiscent of the *Ermakov* case, though it refers to the standard of proof apparently being applied, as opposed to the facts of the case.
- 10.9 There is no meaning for this phrase other than to suggest that the designated officer viewed her function as being to assess whether the truth could be ascertained, and not just as a probability but with a degree of certainty or confidence. There was no language to temper this comment. The Respondent urges me to consider it in its

overall context but that does not assist its case. Nowhere else is the standard of proof referred to, nor is there a reference (in either the first or the second decision) to the statutory requirement that the designated officer investigate with a view to ascertaining whether there is evidence that *"an offence may have been committed."*

10.10 The Respondent adopted the language of the decision without qualification. If the Respondent noticed that there was an error on the face of the decision, no person corrected the mistake. In submissions, the Respondent continues to stand over this statement, submitting that the Respondent cannot be certain how this incident occurred. It was conceded only that the language was *"infelicitous"*.

10.11 Section 98 requires the Respondent body to find if the conduct complained of may constitute an offence. There is a real difficulty in this case as the Respondent has endorsed an ostensible finding, on the wording of the decision itself, that it is *"impossible to say with certainty"* how this incident occurred. This is not the statutory test, nor does it sit comfortably within the section 93 exception *"that further investigation wasn't necessary or reasonably practicable"*.

10.12 The Court in *Ermakov* concluded that, as judicial review is a discretionary remedy, relief may be refused in cases where, even though the ground of challenge is made out, it is clear that on reconsideration the decision would be the same. It seems to me that the *Ermakov* principle applies here to the extent that the standard of proof referred to in the decision appears very different to the standard expressed in the empowering legislation. This creates concern about the basis for the decision to discontinue the investigation. Due to other problems with the stated decision, set

out below, it does not appear to me to be appropriate to refuse the remedy on the basis that the Respondent will inevitably reach the same decision again.

11. Three Problems: Punches, Belligerence, Practicability

- 11.1 There are three issues of concern in the second decision. The first matter of concern is that there are repeated references in the second decision to the specific allegation that there were three punches to the Applicant's face. The narrative of these events, once the District Court events are considered, reveals a plausible account in which the Applicant has lied about many things, and perhaps even exaggerated the force of the assault, but he may not be lying when he says he was punched in the face. This is far from a finding that he was probably assaulted nor is it an attempt to influence the decision maker in this case. This comment refers to one of several possibilities. A man under arrest may lie about possible wrongdoing on his own part. He is less likely to be lying if he alleges an assault, particularly if he repeats the allegation consistently. Exaggeration of the injury is also a relevant factor.
- 11.2 Where a significant witness changes his account as to a material circumstance relating to the injury, the evidence changes complexion. There are obvious reasons to lie about being drunk, to lie about driving dangerously and to lie about being belligerent. Reasons to make up a story about an assault are less obvious, but it may of course be fabricated.
- 11.3 By contrast, the garda witness has no apparent reason to change his story. While he may be mistaken, of course, the suggested change of venue for this injury was

significant and bore further investigation. The conclusion expressed in the second decision was that *“the injury could have occurred in other circumstances.”*

11.4 It is difficult to identify these other circumstances as the first explanation was that a door in the station was the source of the injury, which must be incorrect. Neither garda witness suggested the Applicant was injured in the garda car, whether in putting on a mask or in an attempt to headbutt the garda sitting beside him. I also note that the Applicant is said to have attempted a headbutt, not that he actually made contact with the garda or caused any injury which might explain his own injury. The facts do not appear to support an injury inflicted otherwise.

11.5 This garda, and his colleagues, knew within moments of his arrival at the garda station that the man under arrest was alleging that he had been assaulted by one of the arresting gardaí. He had an injury. Any garda with moderate experience would immediately know that all material about his arrest and custody would be relevant to this allegation. All had garda notebooks to record what they had done, and there was a contemporaneous custody record, filled in by the member in charge of the station who had not been present at the arrest. The evidence of the two gardaí in the car was clearly going to be crucial in the circumstances.

11.6 Hypothetically, I do not expect a drunk, belligerent arrestee to be accurate or reliable but this does not mean that one can dismiss everything he says. It is the most vulnerable who must be protected when in the power of state actors. One need not have much sympathy with the Applicant to hold the view that even an uncooperative suspect should not be punched in the face.

- 11.7 The issue of whether or not the Respondent, or any decision-making body, could act on this Applicant's word, given his credibility problems, is beside the point; it was not this decision-maker's function to decide what had happened at the stage in the investigative process when there was evidence supporting both narratives.
- 11.8 The Respondent is not required to find that the circumstances exactly as described by the complainant are supported. The designated officer must report on the question of whether an offence *may* have been committed. While there may be more than one reasonable answer to this question in this case, it is difficult to agree with the apparent conclusion that the case is impossible to resolve and that it is not necessary or reasonably practicable to continue with the investigation.
- 11.9 My second concern is that both decisions also appear to ascribe weight to the point that the Applicant was belligerent in the garda station. In respect of this evidence, the Respondent considers his being angry as supportive of the garda evidence. However, it is equally compatible with the narrative that he was furious because he had just been hit in the face. The Applicant's version of events is also, arguably, compatible with the account of his having shoulder barged his alleged assailant.
- 11.10 A final issue was raised in submissions: that the second decision employed language not used in the first, namely, that further investigation is "*not necessary or reasonably practicable.*" The last three words did not appear in the first decision.
- 11.11 Even if Garda Needham admits he was lying, or one of the gardaí remembers another version of how the injury was caused, further investigation is only unnecessary if the Respondent considers that, no matter what they say, the conduct

in question can never constitute an offence. That does not appear to me to be reasonable and even without the additional stated reason that investigation would be reasonably impracticable, the decision may have been fundamentally flawed on that basis alone.

11.12 The second factor confirms my view that the decision should be revisited. It remains reasonably practicable to ask the garda witnesses to clarify the situation and to put the matters in the DAR to both witnesses and assess their responses. It may also be reasonably practicable to put the conclusions in respect of his injuries or the garda responses to the Applicant. These are matters for the Respondent.

11.13 Even considering my concerns as to the heavy reliance of the Respondent on the exact nature of the alleged assault and the aggression being consistent only with the garda account of events, hypothetically speaking, the second decision is not necessarily one that was so unreasonable in itself as to warrant an order of *certiorari* quashing the decision. I do not have to decide that hypothetical case but this one: the language describing a higher standard of proof, the reasons outlined, and the stated conclusion that further investigation is not necessary or reasonably impracticable. This combination of factors forms the basis for my decision to remit the matter to the Respondent body for further consideration.

11.14 In the context of the 2005 Act, the person who is not acting lawfully is the person most likely to come into contact with a serving garda. And every person, even one who is drunk and aggressive, even one who is lying about how he came to be arrested, is entitled to be arrested without being punched in the face. It appears to

me to be unreasonable to discontinue an investigation into a complaint because the complainant has lied if there is other evidence which may support his account. A key witness changing his evidence in respect of the injury can provide support to such a complainant, but it is a matter for the Respondent what weight to attach to the evidence of the various witnesses.

11.15 The drunk and aggressive suspect has every incentive to lie about his own behaviour, somewhat less to lie about an assault on his person. Nonetheless, the Respondent body has significant expertise and is entitled to deference in terms of its approach to decision-making. That said, when the combination of events as described here are coupled with language which can only suggest a standard of certainty, the decision must be revisited.

12. Conclusions

12.1 It was not the function of the relevant investigator, at that stage of the process, to resolve the complaint or assess the weight of the evidence, but to decide if there was evidence that an offence may have been committed. That is a low bar. In this case, there clearly was an allegation and, if there was any credible evidence to support it, this would be evidence that an offence may have been committed. The issue of its weight is a different matter. The second decision, which is that under review, was tantamount to saying “we’ll never get to the bottom of this,” which is an inadequate explanation for discontinuing an investigation. The Respondent body affirmed this decision, effectively adopting its reasoning and language.

12.2 It is difficult to see how this designated officer, and the Respondent in turn, could conclude that further investigation was not necessary, or was not reasonably practicable or both. When this is added to the stated basis for the second decision, that the Respondent could not be certain of the facts, this leads me to the view that the decision must be quashed. The reference to certainty is so far from being the standard applicable and this, together with the significant change in the available evidence and the apparent weight attached to aspects of the evidence which may not bear that weight, or at least admit of reasonable alternatives, combine to persuade me that this decision must be quashed and remitted for further consideration.

12.3 My provisional view is that the Respondent should pay the costs of these proceedings. If either party would like to make submissions to the contrary, they should email the Registrar and the other party on or before the 8th of April.