*Approved*

*No redaction required*

**THE COURT OF APPEAL**

**CIVIL**

**Neutral Citation Number [2021] IECA 26**

**Court of Appeal Record Nos 2020/151**

**Haughton J**

**Murray J**

**Collins J**

**BETWEEN**

**STEPHEN MURPHY**

*Applicant/Appellant*

**AND**

**GARDA SIOCHANA OMBUDSMAN COMMISSION AND GARDA COMMISSIONER AND MINISTER FOR JUSTICE AND EQUALITY AND AMBROSE WHITTY AND DECLAN O' SULLIVAN AND CON CADOGAN AND GER O'MAHONY AND MARTIN BOHANE**

*Intended Respondents/Respondents*

# JUDGMENT of Mr Justice Maurice Collins delivered on 4 February 2021

## PRELIMINARY

1. This is Mr Murphy's appeal from the *ex tempore* judgment and order of the High Court (O' Regan J) of **2 July 2020** refusing his application for leave to seek judicial review.

2. There are many parties named as respondents in the title to these proceedings. However, on the hearing of the appeal the Court was informed that the application for leave had proceeded only as against the First Respondent, the Garda Síochána Ombudsman Commission ("*GSOC*") and the Second Respondent, the Commissioner of An Garda Síochána ("*the Commissioner*") and only those Respondents were represented before us (the application for leave having been directed to proceed on notice to them). Mr Murphy represented himself and presented his arguments forcefully but courteously.

## BACKGROUND

3. The background to the proceedings, and the precise parameters of the proceedings that Mr Murphy seeks to bring, are not as clear from the papers as ought to be the case and there were many gaps in the documents, though many of the missing documents were provided to this Court in the course of the hearing of the appeal.

4. In any event, the proceedings have their immediate origin in an incident that occurred on the late afternoon of **25 August 2017** when a JCB entering onto lands adjacent to lands owned by Mr Murphy and his sister Anne near Drimoleague, Co Cork collided with the phone line, thereby severing the phone and internet connection to the Murphys' residence. According to Mr Murphy, other damage was also caused to their land but the Court is not in a position to form any view on that.

5. The JCB was operated by a third party contractor who had been engaged by the neighbouring land owner, a Mr Dermot McCarthy. Mr McCarthy is married to a member of the Gardai who is stationed in Bantry Garda Station. The papers suggest that there has been *"bad blood"* between the Murphys and the McCarthys going back, it seems, to 1994, which has led to various criminal and civil proceedings, including actions brought by the Murphys that reached the Supreme Court and are the subject of two

reserved decisions given by that Court. I do not think it is necessary to refer to these proceedings in any detail. It is sufficient to note that both Mr Murphy and his sister Anne (along with their father, also Stephen, who is since deceased) were convicted of public order offences arising from incidents also involving the McCarthys which took place in June 1996. Judicial review proceedings to quash those convictions failed. However, the Supreme Court subsequently concluded that certain of the Applicant's convictions were erroneous, though it rejected Mr Murphy's claim of malicious prosecution: [2016] IESC 27.

6. Mr Murphy says that, in addition to the property damage caused by the JCB on 25 August 2017, he observed a number of breaches of the Road Traffic Acts and of Health and Safety legislation on the same date both on the part of the contractor and Mr McCarthy.

7. Mr Murphy says that, following this "*hit and run*" (as he characterises it), he waited for an hour or so to see whether an approach would be made to him. When none was, he contacted Bantry Garda Station and his call was passed to a Garda Whitty, who it seems had responsibility for the Drimoleague area. Mr Murphy spoke with Garda Whitty and he says that the Garda was aggressive, that he referred to his [Mr Murphy's] "*20 year*

*battle with the Guards*" and accused him of causing trouble for the Gardai. According to Mr Murphy, Garda Whitty dismissed his complaints as amounting to a *"civil matter."* Garda Whitty did, however, provide the identity of the owner of the JCB to Mr Murphy later that evening.

8. In reciting these complaints made by Mr Murphy – and the further complaints referred to below – I should make it clear that I am not expressing any view on them whatsoever, still less making any finding that such complaints are justified.

9. Following some further interaction with Garda Whitty, Mr Murphy resolved to make a formal complaint. Section 83(1)(a) of the Garda Síochána Act 2005 ("*the 2005 Act")* enables a member of the public directly affected by and/or who witnesses alleged misbehaviour by a member of the Gardai to make a complaint to GSOC. Mr Murphy made such a complaint in **December 2017**. A copy of the complaint form was provided to the Court in the course of the hearing. It is dated **6 December 2017** and appears to have been received by GSOC on **8 December 2017.** The essence of the complaint was that Garda Whitty had neglected his duty by failing to properly investigate the offences which, according to Mr Murphy, had been committed on 23 August. The complaint drew attention

to the fact that "*the 6 months for DPP prosecution*" would be up on 23 February 2018. In answer to a question in the complaint form as whether he believed that there was a reason for the Garda's behaviour, Mr Murphy stated that it was because of who he (Mr Murphy) was (he had earlier referred to his "*20 year legal battle with the Force*") and also referred to the fact that the Mr McCarthy's wife was a colleague of Garda Whitty in Bantry Garda Station. In answer to a question as to whether he had tried to have the matter dealt with at a Garda station before resorting to GSOC, Mr Murphy stated that he would be "*wasting his time*" contacting Bantry Garda Station because "*the landowner's wife*" was a Garda there and asserted that there was a *"cover-up*".

10. GSOC acknowledged the complaint by return, enclosing an *Information Leaflet* about the initial steps in the complaints process. That *Information Leaflet* is of some relevance having regard to the issue that arises about Order 84, Rule 21 RSC. It clearly indicated that Mr Murphy's complaint (if found to be admissible) would be investigated by a Garda Síochána Investigating Officer (GSIO), usually a Superintendent, who would be not a line manager of the Garda the subject of investigation and who would not be from the same Garda District but who could be from the same Garda Division. The leaflet referred to Protocols between GSOC and the

Commissioner which set out other principles about the appointment of the GSIO.[1] It also indicated that the GSIO would have 4 months to complete their investigation from the date of their appointment. When the GSIO completed their investigation, the Gardai would tell Mr Murphy "*the results*". The leaflet also referred to the right of complainants to request a review of those results.

11. In due course GSOC determined that the complaint was admissible and on **31 January 2018**, it notified An Garda Síochána of that determination and referred the complaint to the Garda Commissioner for investigation under the 2005 Act.

12. I should explain that where an admissible complaint is made, which is not resolved informally, GSOC has different means of securing its investigation: section 92 of the 2005 Act. "*As it considers it appropriate*", GSOC may (1) refer the complaint to An Garda Síochána to be dealt with in accordance with section 94 [section 92(1)(a)]; (2) in respect of certain complaints – ones which relate to conduct which does not appear to constitute a criminal offence – it may conduct its own investigation under

[1] While these Protocols were referred to during oral argument, they were not produced to the Court.

section 95 [section 92(1)(b)] or (3) it may direct a designated officer of GSOC to investigate the complaint under section 98 [section 92(1)(c)].

13. Here, GSOC decided to refer the complaint to An Garda Síochána for investigation in accordance with section 94 on the basis of its assessment that the complaint was suitable for such investigation (para 6 of the Affidavit of Johan Groenewald sworn on 10 February 2020). Section 94 permits GSOC to supervise the investigation of a complaint so referred but it was confirmed in the course of the hearing before us that GSOC did not exercise its supervisory power here.

14. Section 94(1) of the 2005 Act provides that on referral of a complaint under section 92(1)(a) the Garda Commissioner shall:

> *"appoint a member of the Garda Síochána to investigate the complaint under the Disciplinary Regulations."*

15. The relevant *Disciplinary Regulations* here appear to be the Garda Síochána (Discipline) Regulations, 2007 (SI 214 of 2007) *("the Regulations*") and on **5 February 2018** Chief Superintendent Cadogan appointed Superintendent O'Mahony to investigate Mr Murphy's

complaint against Garda Whitty pursuant to Regulation 14 of the Regulations. Chief Superintendent Cadogan was the officer in charge of the Cork West Garda Division and was based in Bandon Garda Station. Superintendent O'Mahony was based in Clonakilty Garda Station. Bandon, Clonakilty and Bantry Garda Stations are all in the same Garda Division (the Cork West Division) but each are in different Garda Districts. Drimoleague Garda Station is in Bantry District. It follows that the appointment of Superintendent O'Mahony complied with the policy outlined in the GSOC *Information Leaflet* to which I have referred above. It also complied with section 94(1)(b), there being no suggestion that Superintendent O'Mahony had had any prior involvement in the events giving rise to Mr Murphy's complaint.

16. In passing, I observe that the Regulations refer to an officer appointed under Regulation 14 to carry out an investigation as the "*deciding officer*" and to the officer making the appointment as the "*appointing officer*". Mr Murphy made a point that the Respondents appear to have inconsistent understandings as to who was the "*deciding officer*" here. There is no doubt that, in his Affidavit, Mr Groenewald refers to Chief Superintendent Cadogan as the *"deciding officer."* However, the position under the Regulations appears to me to be quite clear. Chief Superintendent Cadogan

was the "*appointing officer*" and Superintendent O'Mahony was appointed by him as "*deciding officer"* for the purposes of the Regulations. Nothing at all turns on this point in my view.

17. On **6 March 2018,** GSOC wrote to Mr Murphy notifying him of the appointment of Superintendent O'Mahony to investigate his complaint. The letter indicated clearly that Superintendent O'Mahony was based in Clonakilty Garda Station.

18. Superintendent O'Mahony then undertook that investigation. On its face, the limited material before the Court suggests that the investigation was a thorough one, involving at least two meetings between the Superintendent and Mr Murphy, including a visit to the Murphys' house and an inspection of the scene of the incident. In addition to taking statements from Mr Murphy and his sister, Superintendent O'Mahony appears to have taken statements from Garda Whitty, Mr McCarthy, the JCB contractor and an employee of *eir*.

19. Mr Murphy says in this context that, until he issued these judicial review proceedings, he was unaware of who Superintendent O'Mahony met with in the course of his investigation (other than himself and his sister). He has

never seen the statements made by those other persons (though he says he has asked for copies of them) and expresses concern that they may contain false and inaccurate assertions about him and his sister.

20. Mr Murphy was orally informed by the Gardai on a number of separate occasions over the summer of 2018 - while Superintendent O' Mahony's investigation was ongoing - that no prosecution was to be taken arising from the August 2017 incident. It appears that this prompted further correspondence from Mr Murphy to Chief Superintendent Cadogan and to the Commissioner. Mr Murphy attaches importance to a letter of **23 November 2018** from Chief Superintendent Cadogan responding to a letter from Mr Murphy of 20 November 2018 (which the Court has not seen) and indicating that "*the matter is receiving attention."*

21. Superintendent O' Mahony appears to have completed his report on **19 February 2019** (no such report was put before the Court). I note that that was more than 12 months after his appointment and thus significantly outside the 4 month timeframe indicated in the GSOC *Information Leaflet* but no point has been made about that. On **25 February 2019**, Chief Superintendent Cadogan wrote to Mr Murphy advising him that Superintendent O' Mahony had "*found the member not to be in breach of*

*discipline."* That letter bears a second date (5/2/2018) under the Chief Superintendent's signature. Mr Murphy argued that this revealed that the decision to reject his complaint was made back in February 2018, prior to any investigation being undertaken. The evidence makes it clear that this is plainly not so and it seems clear that this second date is an artefact from earlier correspondence used as a template for the letter sent on 25 February 2019, which ought to have been deleted but was inadvertently overlooked.

22. At this point of the narrative I should refer again to section 94 of the 2005 Act, sub-section (10) of which provides as follows:

> *"If dissatisfied with the results of an unsupervised investigation or with any disciplinary proceedings instituted as a result of that investigation, the complainant may request the Ombudsman Commission to review the matter."*

Section 94(11) then provides that, following such a review, GSOC may request the Garda Commissioner to review the investigation and to report back to it on any further action proposed [sub-section 11(a)] or investigate the complaint under section 95 or direct an officer of GSOC to investigate it under section 98 [sub-section (11)(b)].

23. Where – as was the case here – a complaint is referred by GSOC to An Garda Síochána for investigation on an unsupervised basis, review under section 94(10) appears to be the only mechanism that allows for a measure of independent oversight of such investigation. That serves to highlight the important role of section 94(10) review within the architecture of Part 4 of the 2005 Act.

24. On **15 March 2019,** GSOC wrote to Mr Murphy confirming that the GSIO had decided that no breach of discipline on the part of Garda Whitty had been disclosed. The letter reminded Mr Murphy of his entitlement to ask GSOC to review the investigation, while also making it clear that any such review would focus on the manner in which his complaint had been investigated by the GSIO and would not involve a second or further investigation of the complaint.

25. Mr Murphy wrote seeking such a review on **27 March 2019.** In his letter, he expressed the view that Superintendent O'Mahony was biased, referring to the fact that he was based in the same Garda Division as Garda Whitty and Sergeant O' Sullivan (wife of Mr McCarthy). He asserted that the investigation carried out by Superintendent O' Mahony was a sham and

had been decided before it started. It was "*all a local affair*" with *"no independence."*

26. On **18 July 2019** GSOC (in the person of Mr Groenewald) wrote to Mr Murphy informing him of the outcome of the review. Having noted that the review had been requested because Mr Murphy was not satisfied with the outcome of the investigation, the letter continued:

> *"The review considered two issues:*
>
> *.. The standard of the investigation undertaken and*
>
> *.. Whether the findings of the investigations are supported by the available evidence*
>
> *The review was focused on the investigation which was conducted and was not a re-investigation of your complaint.*
>
> *Having reviewed the file, I am satisfied that the investigation undertaken was appropriate and that the available evidence supports the finding of no breach.*

*The decision is consistent with the facts disclosed/evidence gathered.*

*GSOC will take no further action in relation to your complaint and now considers the matter concluded."*

## THE JUDICIAL REVIEW PROCEEDINGS

27. Mr Murphy then sought to bring these judicial review proceedings. The timing is of some relevance. The Statement of Grounds and the Affidavits sworn by Mr Murphy and by his sister are all dated **11 October 2019**. They were filed in the Central Office on **14 October 2019** and it appears that Mr Murphy sought to move the application for leave *ex parte* on **14 October 2019**. On that date the High Court (Meenan J) directed that the leave application be made on notice (a power now expressly conferred by Order 84, Rule 24(1)) and Notice of Motion issued on **12 November 2019**, returnable for **14 January 2020**. [2]

28. The relief sought in the Statement of Grounds is in the following terms:

[2] As already noted, only GSOC and the Commissioner were put on notice of the application, which suggests that Meenan J did not permit Mr Murphy to pursue his intended application against the other named respondents.

*"I seek to have the decision of GSOC/Garda Commissioner/Superintendent Ger O' Mahony quashed/set aside as they are breaches of my constitutional rights, my human rights, data protection, my rights as a victim of crime under EU directive of victims of crime (sic). I also seek damages and costs."*

The grounds set out in the Statement of Grounds are as follows:

*"The Grounds that I seek the relief are that of Bias by An Garda Síochána towards me because of previous issues the denial of natural justice and fair procedures the denial of a proper independent investigation of my complaint that the appoint[ment] by the Commissioner of a local Superintendent in the same division is flawed and incompatible with constitutional and human rights and that there is no proper independent appeal system by GSOC this is a local Garda [investigation] done to the paper as the statements that were taken were on Garda paper I am entitled to the services of the Garda force the same as anyone else they can't [discriminate] or deny me they have a duty under both common law and statute."*

29. In his Affidavit, Mr Murphy describes the incident in August 2017 and his

subsequent interactions with Garda Whitty and, subsequently, with Superintendent O' Mahony. He makes complaints about double standards in the Garda Síochána and asserts that the investigation carried out by Superintendent O' Mahony lacked independence, characterising it as a *"flawed investigation"* and a *"box ticking exercise with [the] main aim to circle the wagons."* That Affidavit concludes as follows:

> *"I ask the court to quash the decision of GSOC dated 18th July 2019 and Superintendent Ger O' Mahony and the Garda Commissioner on the grounds of Bias denial of natural justice and fair procedures denial of legitimate [expectations] Irrationality failure to give reasons. I also ask the court to declare that the appointment of investigators by the Garda Commissioner is unlawful and in breach of natural and constitutional justice and not compatible with human rights in particular the appointment of Superintendents from the same division as the Guard that [is] being complained [about] raises serious questions as does that its in the Commissioner's gift to appoint this should be the GSOC call…"*

Anne Murphy also swore an Affidavit setting out her observations on the events of 25 August 2018 and subsequent dealings with the Gardai.

30. Affidavits were subsequently sworn by Mr Groenewald on behalf of GSOC and by Brian Murphy, a Garda Inspector based in Bandon Garda Station, on behalf of the Commissioner. Both Affidavits complain about the lack of clarity as to precisely what decision or decisions Mr Murphy was seeking to challenge and the nature of the complaints by him – complaints which have obvious force – and also assert that the proceedings are out of time having regard to Order 84, Rule 21 RSC.

## THE DECISION OF THE HIGH COURT

31. The leave application came on for hearing before O' Regan J in the High Court on 2 July 2020. After hearing the parties, the Judge gave an *ex tempore* ruling refusing the application for leave.

32. In her ruling, the Judge dealt firstly with the complaints against GSOC. She understood the central issue to relate to GSOC's decision to refer Mr Murphy's complaint for investigation by the Gardai. She stated that decision had been made on 5 February 2018 and therefore any challenge to it was clearly outside the three-month limit under the Rules. The Judge then referred to the fact that a "*review decision*" had been made by GSOC

on 18 July 2019 but observed that the Statement of Grounds did not refer to that decision or set out any complaint in relation to it. Thus, while a challenge to that decision would not have been out of time, the Judge was of the view that no such challenge had been made.

33. As regards the case against the Commissioner, the Judge noted that suggesting bias does not actually identify bias, which was not an easy hurdle to establish. In any case, any such challenge was out of time in circumstances where Mr Murphy had been notified in early July 2018 that the Gardai did not intend to bring any prosecution(s) arising from the incident on 25 August 2017.

34. At the conclusion of that ruling, Counsel brought to the Judge's attention that she had inadvertently referred to a decision in February 2018 whereas in fact the relevant decision was made in February 2019. The Judge then observed that any challenge to a decision in February 2019 was also out of time. At that point Mr Murphy intervened to state that the judicial review was against "*the final decision that was made"* and went on to refer specifically to GSOC's letter of July 2019. However, the Judge confirmed her decision and proceeded to make an order for costs in favour of each respondent.

35. There appears to have been a significant degree of confusion in court on 2 July 2020, no doubt contributed to by the terms of the Statement of Grounds and the Affidavit of Mr Murphy but also perhaps by the failure of either GSOC or the Commissioner to put before the Court a clear narrative of what had occurred between August 2017 and July 2019 (the Affidavit sworn on behalf of GSOC did not refer to the statutory review it had itself undertaken) and/or to exhibit a full set of relevant documentation and correspondence.

36. In her ruling, the Judge referred to a decision of GSOC made on 5 February 2018. It seems clear that the Judge had in mind the decision of GSOC to refer Mr Murphy's complaint to An Garda Síochána for investigation rather than directing its investigation by a GSOC officer. It is not apparent from the papers when precisely that decision was made but it is evident that it was made somewhat earlier than 5 February 2018 as the reference itself was made on 31 January 2018. That does not of course undermine the Judge's evident conclusion that any challenge to *that* decision of GSOC was out of time.

37. If I have correctly understood the Judge's ruling, it follows that Counsel's

suggestion that her reference to a decision of February *2018* was mistaken and she must instead have intended to refer to a decision of February *2019* was – unintentionally – misplaced. The only decision made in February 2019 was one made by Superintendent O' Mahony as "*deciding officer*" under the 2007 Regulations to the effect that Garda Whitty had not been in breach of discipline. That was not a decision of GSOC and it was in law distinct from any decision made by the Gardai relating to the bringing of a prosecution(s) arising from the August 2017 incident. The Judge's ruling does not specifically address that February 2019 decision.

38. It may be said that any challenge to that February 2019 decision was in any event out of time as of October 2019. However any assessment of that issue is complicated by the fact that, in the interim, Mr Murphy exercised his statutory entitlement to have that decision reviewed by GSOC under section 94(10) of the 2005 Act. However, the Judge's ruling did not address any issue concerning the interaction of the Garda decision of February 2019 and the GSOC decision of July 2019 as the only Garda decision expressly referred to in the Judge's ruling was the legally distinct (and earlier) decision not to bring any prosecutions in relation to the August 2017 incident.

39. The Judge was not entirely correct in stating that GSOC's "*review decision*" was not referred to in the Statement of Grounds. Reference is in fact made in narrative to Mr Murphy having "*forwarded*" Superintendent O' Mahony's finding that there had not been any breach of discipline "*to GSOC review [but I received] the same answer."* The relief sought refers compendiously (and confusingly) to "*the decision of GSOC/Garda Commissioner/Superintendent O' Mahony*" and the grounds make complaint (*inter alia)* of the absence of a "*proper independent appeal system by GSOC*" which appears to be a reference to the GSOC review, though it may refer to the complaints system under the 2005 Act generally.

## THE APPEAL

40. In his notice of appeal, Mr Murphy complains about the use of "*local officers*" for the purposes of investigations under the 2007 Regulations and repeats his allegations of bias and cover-up. There is a bare reference to a failure to give reasons and an assertion that the decision of GSOC was irrational. It is not entirely clear what GSOC decision is being referred to here but, as I read it, the reference is to the decision of GSOC to refer Mr Murphy's complaint to the Gardaí for investigation, though it may be intended to refer to GSOC's decision under section 94(10). Mr Murphy

asserts that the Judge failed to address his complaints about the decision-making process, specifically referring to the various statements which he has not seen. In his written and oral submissions he developed these arguments. In his written submissions he argues that his challenge to the GSOC decision of 18 July 2019 is not out of time (a point since accepted by GSOC). Both in his written and oral submissions, he asserts that it was unfair that he had not seen the statements taken by Superintendent O' Mahony or been given an opportunity to respond to them. He reiterated his concerns at the investigation by Gardaí of complaints against other members, especially when they were members in the same locality. The investigation here, according to Mr Murphy, simply had GSOC's name attached to it but was totally controlled by the Gardai. That indeed was Mr Murphy's fundamental complaint – that his complaint had been referred for investigation by the Gardaí who were, as an organisation, biased against him.

41. In its submissions, GSOC made it clear that it was not contending that any challenge to its review decision was out of time. Counsel explained that the Affidavit of Mr Groenewald had inadvertently omitted any reference to that decision. GSOC criticised Mr Murphy's pleadings, saying that the Statement of Grounds failed to comply with the requirements identified in

decisions such as the decision of this Court in *AR v Child and Family Agency* [2019] IECA 323 and the earlier decision of the Supreme Court in *AP v Director of Public Prosecutions* [2011] 1 IR 729. In answer to a question from the Court, Counsel confirmed that Mr Murphy's complaint had been referred to An Garda Síochána for investigation on an unsupervised basis and that GSOC had not exercised its power under section 94(2) of the 2005 Act to require its prior approval to the appointment of the GSIO. Counsel said that the appointment of Superintendent Murphy was consistent with section 94(1)(b) and the Protocols in place between GSOC and the Commissioner.

42. The Commissioner also complained about the lack of clarity in the Statement of Grounds. He relied on the time point. Counsel for the Commissioner observed that a number of different decisions were arguably made by the Gardai, including the decision not to prosecute (any challenge to which was out of time), the decision to appoint Superintendent O' Mahony as to carry out the investigation (which, it was said, was also beyond challenge having regard to Order 84, Rule 21 and which Mr Murphy had not objected to at the time) and the decision to effect that Garda Whitty had not been in breach of discipline.

43. In his reply, Mr Murphy said that he had not objected to Superintendent O' Mahony's appointment because he not been aware of any entitlement to do so. He had asked for the statements taken by the Superintendent but they had not been provided. In answer to a question from the Court, Mr Murphy made it clear that the gravamen of his complaint of bias was that the complaint he had made was investigated by the Gardai at all, rather than the fact that the investigation was conducted by a member within the Cork West Division. He had, he said, no confidence in the Guards.

## DISCUSSION

### The Threshold Test for Leave

44. What is before the Court is an application for leave to seek judicial review. The threshold test is that set out by the Supreme Court in *G v Director of Public Prosecutions* [1994] 1 IR 374. That is so, it appears, notwithstanding the fact that the application for leave here was heard on notice to GSOC and the Commissioner: *DC v Director of Public Prosecutions* [2005] IESC 77, [2005] 4 IR 281, per Denham CJ at para 9.

45. The test in *G v Director of Public Prosecutions* is set out in the judgment

of Finlay CJ (Blayney and Denham JJ concurring) at pages 377-378, as follows:

> *"It is, I am satisfied, desirable before considering the specific issues in this case to set out in short form what appears to be the necessary ingredients which an applicant must satisfy in order to obtain liberty of the court to issue judicial review proceedings. An applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:*
>
> *(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).*
>
> *(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.*
>
> *(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.*

*(d) That the application has been made promptly and in any event within the three months or six months time limits provided for in O. 84, r. 21 (1), or that the Court is satisfied that there is a good reason for extending the time limit. .*

*(e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."*

Finlay CJ emphasised that, in addition to these "*conditions or proofs"*, the court had a general discretion: page 378.

46. While the *G* threshold is a relatively low one, it is nonetheless real and the filtering function of the High Court (and of this Court on appeal) is an important one.

47. Significant changes have been made to Order 84 since *G v Director of Public Prosecutions.* Order 84, Rule 20(2)(a)(ii) now requires a statement of grounds to include *"a statement of each relief sought and of the*

*particular grounds upon which each such relief is sought"* and Rule 20(3) states that the "*assertion in general terms of the ground concerned"* will not be sufficient and requires the applicant to "*state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground.*" Important changes have also been made to Order 84, Rule 21. As a result of amendments made in 2011, Rule 21(1) now requires applications for leave to be made within a *three* month period, regardless of the specific relief(s) sought. While a power to extend that period remains, it is now expressed in terms that, at least on their face, appear materially more restrictive terms than was the case prior to the 2011 amendments.

**The Statement of Grounds**

48. There is no doubt that there is significant force in the criticisms that GSOC and the Commissioner have directed at the Statement of Grounds here. Having regard to the observations of Murray CJ in *AP v Director of Public Prosecutions,* as well as the express provisions of Order 84, Rule 20, it certainly would not be appropriate to grant leave to apply for judicial review here on the basis of the Statement of Grounds in its current form.

49. In his judgment in AP, Murray CJ observed that *"if, in the course of the hearing of an application for leave, it emerges that a ground or relief sought can or ought to be stated with greater clarity and precision then it is desirable that the order of the High Court granting leave, if leave is granted, specify the ground or relief in such terms."* That jurisdiction is one clearly available to this Court also and is reflected in the terms of Order 84, Rule 20(4) RSC:

> *"(4) The Court hearing an application for leave may, on such terms, if any, as it thinks fit:*
>
> *(a) allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise,*
>
> *(b) where it thinks fit, require the applicant's statement to be amended by setting out further and better particulars of the grounds on which any relief is sought."*

50. That jurisdiction is to be borne in mind when assessing the Statement of Grounds here. At the same time, however, it is not any part of the function of the High Court, or of this Court on appeal, to redraft an applicant's Statement of Grounds or to reconstitute the application for leave so as to make a case that might have been made but which has not in fact been

made by the applicant. Both the observations of Murray CJ in *AP*, and the provisions of Order 84, Rule 20(4), appear to presuppose that the Statement of Grounds discloses an arguable ground or grounds, even it is one that "*can or ought to be stated with greater clarity and precision"*. If the Statement of Grounds fails to identify arguable grounds for seeking judicial review, supported as necessary by a sufficient evidential foundation, leave must be refused.

51. That Mr Murphy is a lay litigant does not of itself justify the Court disregarding the clear requirements of Order 84 and/or applying different rules to the application for leave he has made.

**The Complaints made by Mr Murphy**

*Lack of Independence//GSOC Decision to Refer Complaint to an Garda Síochána for Investigation*

52. These issues can be dealt with together.

53. As I have explained, the 2005 Act provides for complaints to be made to GSOC and permits GSOC to refer such complaints for investigation to An Garda Síochána. No doubt there is scope for different views as to

appropriateness of such a structure but that is a matter of policy for the Oireachtas, at least in the absence of any challenge to the 2005 Act. No such challenge is made here. The scope of GSOC's role in reviewing the results of an investigation by the Gardai is similarly prescribed by the 2005 Act and the relevant provisions of the Act have not been challenged.

54. In argument, Counsel for GSOC accepted that, in principle, GSOC's decision to refer Mr Murphy's complaint for investigation by An Garda Síochána was subject to judicial review, though also submitting that the threshold for challenge was a high one.

55. That decision was made in late **January 2018**. Mr Murphy was aware of it at least from March 2018, when he was notified of Superintendent O' Mahony's appointment under the 2007 Regulations. If Mr Murphy wished to challenge GSOC's decision to refer his complaint to An Garda Síochána, he could and should have done so at that stage. It was far too late to do so in **October 2019**, after Superintendent O' Mahony had concluded his investigation. No basis for any extension of time to allow a late challenge to GSOC's decision was identified in the papers or in submission. I agree with the High Court Judge that this aspect of the intended proceedings is out of time.

56. I would add that, in my view, the Statement of Grounds and the Affidavit of Mr Murphy disclose no arguable basis for impugning GSOC's decision to refer the complaint to An Garda Síochána in any event. The fact that Mr Murphy objects to any involvement by officers of An Garda Síochána (wherever based) in the investigation of his complaint – however sincere that objection may be – does not suffice, even in the context of the relatively low threshold test applicable under *G v DPP*. GSOC clearly considered that Mr Murphy's complaint was one that could appropriately be investigated by An Garda Síochána and there is no material before the Court on which it could properly or fairly conclude that that decision was even arguably unlawful or unreasonable.

*Appointment of Superintendent O' Mahony as "deciding officer"*

57. The position is the same as regards the appointment of Superintendent O' Mahony. Mr Murphy was notified of that appointment in March 2018 and was aware at all times that Superintendent O' Mahony was based in Clonakilty Garda Station. If he wished to challenge that appointment, the time to do so was then. He did not do so and, so far as the material before the Court discloses, raised no issue regarding Superintendent O' Mahony's

appointment until March 2019 when seeking a review of the investigation under section 94(10) of the 2005 Act. No basis for an extension of time is disclosed in the papers.

58. In any case, no arguable basis for impugning the appointment of Superintendent O' Mahony is disclosed in my view. That appointment was consistent with section 94(1)(b) and, it appears, with the Protocols in place between GSOC and the Commissioner. That Superintendent O' Mahony was based within the Cork West Division is not, in itself, a sufficient basis for impugning his appointment, particularly in circumstances where GSOC had previously made it clear to Mr Murphy that such an appointment was possible (in the *Information Leaflet).* No other basis for challenging Superintendent O' Mahony's appointment was identified. Thus, even in the absence of any time bar, I would not have been persuaded to give leave to Mr Murphy to challenge the appointment.

*The Decision not to Prosecute*

59. Again, any challenge to the decision by An Garda Síochána not to bring any prosecutions arising from the August 2017 incident is clearly out of time. In this context, I do not accept that Chief Superintendent Cadogan's

letter of 23 November 2018 (in which he indicated that "*the matter is receiving attention*") had the effect of suspending time or otherwise excuses Mr Murphy's failure to challenge that decision until October 2019.

60. I would add that the material before the Court does not, in any case, provide a basis on which it could properly conclude that there was even an arguable basis for challenging that decision. The Court is essentially asked to infer that the decision was made for improper reasons and/or by reason of bias against Mr Murphy. In my view, here is a complete absence of any evidence capable of giving rise to any such inference.

*Alleged Bias on the part of GSOC and/or An Garda Síochána*

61. No basis for any complaint of bias on the part of GSOC in its dealings with Mr Murphy is made out on the papers. That is the position regarding the investigation of Mr Murphy's complaint by An Garda Síochána also. No arguable basis for alleging bias on the part of Chief Superintendent Cadogan or Superintendent O' Mahony is disclosed. Allegations of bias are, in any circumstances, a serious matter. Such allegations should not be made absent some minimum threshold of supporting evidence. No such evidence has been put before the Court.

*Fair Procedures/Reasons – The Garda Investigation and the GSOC Review*

62. It is common case that any challenge to GSOC's review decision of **18 July 2019** is not out of time.

63. While evidently made some days earlier, the decision of Superintendent O' Mahony finding Garda Whitty not to have been in breach of discipline was first communicated to Mr Murphy by letter of 25 February 2019. Any application for leave to challenge that decision was therefore required to be made not later than 25 August 2019. The application here was not made until October 2019 and was therefore outside the time-limit provided for in Order 84, Rule 21(1) RSC. However, in the interim, Mr Murphy had sought a review of the investigation by GSOC, whose decision on the review was, as just noted, given on 18 July 2019. The judicial review papers were filed within 3 months of that date.

64. Mr Murphy was entitled to seek a GSOC review under section 94(10). The Gardai must have been aware of his request for a review as GSOC would have had to arrange access to their investigation file and therefore must

also have been aware that Mr Murphy was dissatisfied with the Garda investigation If, having sought a review, and before GSOC had an opportunity to complete it, Mr Murphy had sought to bring judicial review proceedings challenging Superintendent O' Mahony's decision, it appears very likely that he would have been met with the objection that any such proceedings were premature pending the outcome of the GSOC review.

65. In these circumstances, it would appear harsh and unfair to hold that Mr Murphy is precluded from challenging the February 2019 decision on time grounds. The High Court (and this Court on appeal) has power to extend the time for making an application for judicial review under Order 84, Rule 21(3). While, as I have mentioned, that sub-rule is now expressed in (apparently) restrictive terms by reason of the addition of sub-rule (3)(b), that sub-rule was the subject of close analysis by the Supreme Court in *M O' S v Residential Tenancies Redress Board* [2018] IESC 61, [2019] 1 ILRM 149. Though divided as to the outcome, all members of the Supreme Court agreed that its wording was "*unhappy*" and all appeared to agree that it ought not to be construed as a significant constraint on the power of the court to extend time where satisfied that *"there is good and sufficient reason for doing so."* In the circumstances here, it appears to me that Mr Murphy has a compelling basis for seeking an extension of time so as to

enable him to challenge Superintendent O' Mahony's decision of February 2019. As a matter of principle, a litigant who avails of a statutory review or appeal should be entitled to expect that having done so, time will (if necessary) be extended so as to allow a judicial review challenge to the decision the subject of review. It is clearly in the public interest that litigants are encouraged in the first instance to pursue alternative remedies, such as the review provided by section 94(10) here, before having recourse to the Courts. That policy is reflected in the provisions of Order 84, Rule 20(6) as well as in very many decisions of the Superior Courts. It would be wholly unfair, as well as practically counter-productive, to apply Order 84, Rule 21 in a manner which effectively penalised litigants for pursuing available alternative remedies before coming to Court.

66. However, in light of the conclusion I reach below that no arguable grounds have been established for challenging that decision, it is not necessary to reach a definitive view on this point.

*The Garda Investigation*

67. In his submissions to this Court, Mr Murphy complains that he was not informed of who else Superintendent O' Mahony met as part of his

investigation (though he has that information now as a result of bringing these proceedings) and is not aware of, and has not been afforded any opportunity to respond to, what may have been said by such persons about him in the statements they apparently made to Superintendent O' Mahony. This complaint is not, in terms, made in the Statement of Grounds though it is articulated in Mr Murphy's Affidavit and in his Notice of Appeal. While Mr Murphy stated in his submissions that he had requested copies of these statements, no evidence of any such request, or the timing of it, was put before the Court.

68. Other than a generic reference to the requirements of fair procedures, Mr Murphy did not identify any legal basis for the proposition that, in carrying out an investigation into a complaint under the 2007 Regulations, a deciding officer is obliged to inform the complainant of who else they have interviewed and what those persons have said in their statements and/or give the complainant a right of response to those statements. The decision of the Supreme Court in *Flood v The Garda Síochána Complaints Board* [1999] 4 IR 560 would appear to be direct authority to the contrary. While the statutory regime was different (involving a complaint made under the Garda Síochána (Complaints) Act 1986), the effect of the decision at issue in *Flood* was precisely the same as that here, namely that the complaint

made failed. *Flood* was not referred to in argument and thus no argument was addressed to the Court as to why it might not apply in the circumstances here. It is not for the Court to try to make a case for Mr Murphy and, in the circumstances, I am driven to the conclusion that Mr Murphy has not established an arguable ground for challenging Superintendent O' Mahony's decision on fair procedures grounds.

69. As regards any issue concerning the reasons for Garda O' Mahony's decision, no such issue is pleaded in the Statement of Grounds. Though *"failure to give reasons"* is recited, in bald terms, in his affidavit (and his notice of appeal), the issue was not addressed by Mr Murphy at all in his submissions before this Court or (so far as appears from the Judge's ruling) in the High Court either. Thus, counsel for GSOC and the Commissioner did not have any occasion to make submissions on the issue. Furthermore, there is no evidence that Mr Murphy ever requested any further explanation from Superintendent O' Mahony as to why he had concluded that Garda Whitty had not been in breach of discipline. In the circumstances, it does not appear to me that any such issue is properly before the Court or could properly be the subject of leave to apply for judicial review.

70. I would add that, in any case, existing authority indicates that Superintendent O' Mahony was not obliged to give reasons for his decision: see the decision of the High Court (Costello P) in *McCormack v The Garda Síochána Complaints Board* [1997] 2 IR 489 as well as the Supreme Court's decision in *Flood*. The Court is of course aware that in the period since the decisions in *McCormack* and *Flood*, there has been a number of significant decisions on the issue of the obligation to give reasons for administrative decisions, including that of the Supreme Court in *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59, [2012] 3 IR 297. However, in light of the conclusion reached above, and having regard to the fact that none of these decisions were canvassed in this appeal, it is not neither necessary or appropriate to say anything further about them.

71. In light of the discussion above, it follows that I would not grant leave to Mr Murphy to challenge Garda O' Mahony's decision on the basis of an alleged failure to give reasons.

*The GSOC Review*

72. This leaves the GSOC Review. Insofar as Mr Murphy contends that the

GSOC's decision was irrational, no basis for any such contention is disclosed by the papers (and that is equally true of Garda O' Mahony's earlier decision). The complaint concerning the failure to provide statements to Mr Murphy appears to be directed to the Gardaí rather than GSOC and has been addressed in that context above. In any event, it seems clear from section 94(10) of the 2005 Act that the role of GSOC is, at least in the first instance, one of review only and such a review does not involve the re-opening of the Garda investigation. A review may lead to a further investigation under section 94(11) of the 2005 Act but that sub-section has no relevance here in light of GSOC's conclusion that the investigation undertaken had been appropriate.

73. No submission was made to this Court by Mr Murphy to the effect that he had any entitlement to any greater involvement in the GSOC review or was entitled to a more detailed statement of reasons for its conclusion than was set out in GSOC's letter of 18 July 2019.

74. For completeness, I would note section 103 of the 2005 Act, which came to my notice after the hearing here. Section 103(1) provides that GSOC shall provide the complainant (inter alia) *"with sufficient information to keep them informed of the progress and results of an investigation under*

*this Part".* By virtue of section 103(2), however, such duty does not extend to the provision of information which would, in the opinion of GSOC, *"(a) prejudice a criminal investigation or prosecution, (b) jeopardise a person's safety, or (c) for any other reason not be in the public interest*." It is not clear whether section 103(1) applies to an investigation carried out by An Garda Síochána on a referral from GSOC, as opposed to an investigation carried out by GSOC or a GSOC-appointed investigator. It is also unclear what the extent of the duty under section 103(1) may be. No reference was made to section 103 before this Court and so none of those issues were explored.

75. In any event, as will be evident from the discussion above, I would not grant leave to Mr Murphy to seek judicial review of GSOC's decision of 18 July 2019.

76. This judgment addresses a number of issues relating to Part 4 of the 2005 Act, insofar as they properly arise in this application for judicial review. The availability of an effective Garda complaints mechanism that commands public confidence (and in which the Garda Síochána may also have confidence) is obviously a matter of very significant public importance. As already noted, the design of such mechanism is, at least in

the first instance, a matter for the Oireachtas but, whatever its structure, it must operate fairly and in accordance with applicable principles of natural and constitutional justice. There are, no doubt, many issues of importance relating to the operation of Part 4 that may require to be addressed on another day. Mr Murphy has, however, failed to establish any arguable basis for asserting a breach of those principles here.

77. It follows that I would refuse Mr Murphy's appeal and affirm the order made by the High Court.

78. As Mr Murphy's appeal has been unsuccessful, it appears to follow that he should be directed to pay the costs of GSOC and the Commissioner in opposing the appeal. It also appears to follow that the order for costs made by the High Court against Mr Murphy should be affirmed. If Mr Murphy wishes to contend for a different order, he will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, Mr Murphy may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

*In circumstances where this judgment is being delivered electronically, Haughton and Murray JJ have authorised me to record their agreement with it.*