THE HIGH COURT

[2022] IEHC 106

[Record No. 2021/163 JR]

BETWEEN

PATRICK HYLAND

APPLICANT

-AND-

THE COMMISSIONER FOR AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered electronically on the 18th day of February 2022.

Introduction

1. The applicant is a serving member of An Garda Síochána. He is facing two sets of charges of having acted in breach of the Garda Síochána (Discipline) Regulations 2007 as contained in S.I. 214/2007 (hereinafter 'the regulations').

2. The charges of breach of discipline arise out of an incident that occurred on 28th April, 2019, when the applicant sent a video clip to friends in a Garda WhatsApp group. An opinion was reached by An Garda Síochána that the video constituted child pornography. Two search warrants, pursuant to s.7 of the Child Trafficking and Pornography Act 1997, were obtained. They permitted members of the Gardaí to search the applicant's person and his locker at the Garda station where he worked and also his family home. The search warrants were executed on 14th May, 2019.

3. In June, 2019, the applicant was arrested pursuant to s.4 of the Criminal Justice Act 1984.

4. On 30th August, 2019 the applicant was served with the first notification of an investigation into an alleged breach of discipline by him arising out of his dissemination of the video clip.

5. On 5th May, 2020, the applicant was informed that the DPP had directed that there should be no prosecution against him in relation to the video clip.

6. On 27th July, 2020 the applicant was served with a second notification of an investigation into an alleged further breach of discipline charge concerning material that had been found on his phone, which was alleged to constitute official Garda documentation and material from the PULSE system, together with a charge in relation to a bottle of methadone, which had been found in his locker in the course of the search carried out on 14th May, 2019.

7. The respondent has refused to return the applicant's mobile phone pending the finalisation of the two disciplinary investigations.

8. The applicant has brought the present proceedings seeking a number of reliefs. These can be summarised in the following way: He seeks a number of declarations to the effect that as the criminal investigation into the video clip has been completed, the respondent has no entitlement to retain his mobile phone; that while the respondent was entitled, on foot

of the search warrants, to search the content of his phone for evidence relating to child pornography, he is not entitled to use the fruits of that search as part of a separate disciplinary enquiry, which is a civil law matter between employer and employee; that as the second disciplinary charge was only commenced after the end of the criminal investigation, the respondent probably carried out a search subsequent to the directions of the DPP, which was therefore unlawful and accordingly any evidence obtained as a result of it, is inadmissible against the applicant at any disciplinary hearing before a Board of Inquiry; that the use of material seized by the Gardaí from his phone constitutes a breach of his right to privacy and a breach of the Data Protection Act 2018. The applicant also seeks an order prohibiting any further investigation against him for alleged breach of discipline.

9. In response, the respondent has argued that as the validity of the search warrants had not been challenged, the respondent was entitled, and indeed was obliged, to investigate any breaches of discipline that came to light as a result of these lawful searches. It was submitted that the respondent is entitled to retain the applicant's mobile phone until the investigation into the alleged breaches of discipline has been completed, as the allegations relate to material on the mobile phone, so it is the best evidence in relation to the breach of discipline charges against the applicant.

10. The respondent denied that there was any breach of the applicant's right to privacy, as the material was obtained in the course of a lawful search. It was further denied that there was any breach of the Data Protection Act 2018, as the respondent was entitled to rely on the provisions thereof to process data that had been collected for one purpose even for another purpose within the terms of the Act.

11. The arguments of the parties will be set out in greater detail later in the judgment.

Background

12. The background to the sending of the video clip on 28th April, 2019, was set out in the following way in the applicant's statement of grounds:

> *"(ii) In or about 19th April, 2019, the applicant was added to a WhatsApp chat group called 'Non-Back Breakers' (hereinafter 'the chat group'). The administrator of this group was Garda Alan Miley, who was in the same working unit as the applicant. The chat group was mainly used to forward humorous video clips and images. On occasion, work related information would be disseminated on the group, but there was a parallel work chat group which carried most of that traffic. There were garda members attached to other units in DMR Roads Policing and other garda stations added in the chat group.*
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> *(iii) On 28th April, 2019, the applicant received from another member of An Garda Síochána, a WhatsApp message containing a video clip. He did not watch the video clip at this time. From the still image displayed on his handset, he believed that he recognised the protagonist in the video clip as a person who had featured in numerous other video clips of comedic value, which had been circulated freely and*

accordingly forwarded this message to the chat group. As a result he forwarded the clip without viewing it.

(iv) Later that day, he checked his phone and saw a message posted to the chat group from the group administrator, advising all members of the group to leave the group and wipe the chat group from their phone. This advice was given due to a post made earlier that day. The applicant then realised that the post in question may have been the one he had sent out. He viewed the clip for the first time at this stage and realised that it was not the person he believed it to be and that the clip featured what appeared to be a fully clothed male teenager and another person. That other person was in a position potentially suggestive of interaction of a sexual nature. There was no sound or audio in the clip."

13. While the video clip in question was not shown to the court; nor had it been viewed by counsel for either the applicant or the respondent, the court was informed that all of the people shown in the video clip were fully clothed. Counsel for the applicant stated that his understanding was that the video clip possibly showed the female engaging in an act of fellatio with the male.

14. On 14th May, 2019, two search warrants were obtained pursuant to s.7 of the Child Trafficking and Pornography Act 1998, authorising the Gardaí to search the applicant, his place of work, his car and his family home. The two search warrants were executed on 14th May, 2019. In the course of the searches, the applicant's mobile phone was seized and he volunteered the password to that device. A bottle of methadone was seized from his locker at the Garda station. The following items were also seized as part of the searches: two laptops, a tablet, mobile phones, a power bank USB charger, a dictaphone and three dictaphone tapes. Among the items seized, was the applicant's wife's work laptop.

15. On 17th May, 2019, the applicant was suspended from duty. In June 2019 he was arrested and detained pursuant to s.4 of the Criminal Justice Act 1984. He was questioned in relation to possession of child pornography and methadone. On 11th July, 2019, the applicant attended at Finglas Garda Station and provided a voluntary cautioned statement in which he denied any wrongdoing.

16. On 6th August, 2019, Superintendent Paul Costello was appointed by Chief Superintendent Peter Duff to act as investigating officer pursuant to reg. 23 of the 2007 Regulations in respect of the breach of conduct alleged against the applicant as follows: "*That Garda Hyland utilised a recently set up unit WhatsApp group to distribute images that included what appeared to be two minors involved in a form of sexual activity*." On 30th August, 2019 a formal notice of investigation pursuant to reg. 24 of the 2007 Regulations was served on the applicant giving the same details of the alleged breach of discipline. The applicant consented to the investigation into the alleged breach of discipline being put on hold pending the ongoing criminal investigation.

17. On 5th May, 2020 the applicant was informed that the DPP had directed that there be no prosecution in respect of any offence contrary to the 1998 Act.

18. On 18th May, 2020, the applicant's solicitor wrote to the investigating Garda seeking return of the material that had been seized on foot of the search warrants on 14th May, 2019. That correspondence was sent to Inspector Thomas Gormley of Store Street Garda Station and to Assistant Commissioner Pat Clavin at Garda Headquarters in the Phoenix Park, Dublin 8.

19. On 1st June, 2020 the applicant's suspension from duty was lifted.

20. By email dated 18th June, 2020, Superintendent Paul Costello responded to the correspondence from the applicant's solicitor, stating that he did not have possession of, nor access to, any property belonging to the applicant. He went on to state that he did not expect to have any role to play in the future of the property referred to. He stated that he had passed the solicitor's letter to the Internal Affairs Division for their information. One can pause here to note that it was somewhat unusual that Supt. Costello stated that he did not have possession of, or access to, any property belonging to the applicant, nor did he expect to have any role to play in the future of the property referred to, considering that he had been appointed to investigate the existence of the video clip on the mobile phone as far back as 6th August, 2019.

21. On 30th June, 2020, D/Supt. Martin Creighton was appointed by Chief Supt. John Gordon to carry out an investigation into further alleged breaches of discipline, which were described in the following terms: -

> *"It is alleged that Patrick Hyland, 33610F in or about May 2019 had inappropriately in his possession, on mobile devices, images which appear to be racist, misogynistic, anti-homosexual, anti-Semitic, or support either Nazi ideology or 'rape culture'.*
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> *It is alleged that Garda Patrick Hyland, 33610F, in or about May 2019 had in his possession on mobile devices images which may amount to breaches of the Garda Síochána Code of Practice relating to the use and retention of data, including: images which appear to be of CCTV images relating to garda investigations and practices; images which appear to be garda computers, including images of suspects, PULSE incidents and Command and Control incidents; images which appear to show garda related documents, garda members, or garda station interiors.*
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> *It is alleged that Garda Patrick Hyland, 33610F, failed to adhere to established protocols in accordance with the Property and Exhibits Management System in relation to the proper management and storage of controlled drugs, namely a bottle of methadone."*

22. A notice of investigation in relation to these alleged breaches of discipline was served on the applicant on 27th July, 2020. Prior to that, on 14th July, 2020, following an exchange of correspondence between the applicant's solicitor and members of An Garda Síochána, all property seized on 14th May, 2019 had been returned to the applicant, save for the applicant's personal mobile phone.

23. Thereafter, protracted correspondence was exchanged between the applicant's solicitor and the Garda authorities seeking return of the applicant's mobile phone, or in the alternative an explanation of why it was being retained by the Gardaí. Ultimately, by letter dated 19th November, 2020, Chief Supt. Margaret Nugent replied to the applicant's solicitor. Having referred to the two ongoing disciplinary investigations, she stated as follows: -

> *"It should be noted that there is no general rule preventing the use of material obtained in the course of a criminal investigation being utilised in a subsequent disciplinary hearing, once the criminal investigation has come to a conclusion. Additionally, under s.71(5) of the Data Protection Act 2018, data obtained for one purpose can be lawfully processed for a second purpose where the controller is authorised by law to process it and the processing is necessary and proportionate. Furthermore, under the Garda Síochána (Discipline) Regulations 2007, the Commissioner is authorised by law to process the data for a second purpose, namely the disciplinary investigation and that such processing is necessary and proportionate.*
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> *I can confirm that all property was returned to Garda Hyland (except his personal mobile phone). This item has been retained for the purpose of the discipline investigation."*

24. A letter in broadly similar terms was sent by Chief Supt. John Gordon to the applicant's solicitor on 11th January, 2021, in which he stated that he was satisfied that all matters were obtained and retained legally. He stated that the disciplinary investigation remained ongoing.

25. Finally, by letter dated 19th January, 2021, Inspector Peter Woods wrote to the applicant in the following terms:

> *"I am directed by Chief Superintendent DMR Roads Policing to formally put you on notice that your mobile phone, originally seized on foot of a warrant issued under s.7 of the Child Trafficking and Pornography Act, 1998 by Detective Sergeant Mike Smyth, for the investigation of an alleged criminal matter, has been further retained by Detective Superintendent Martin Creighton for the lawful purpose of a subsequent discipline inquiry.*
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> *Forwarded for your information and attention, please."*

26. On 8th March, 2021, the applicant obtained leave to proceed by way of judicial review in relation to the retention of his mobile phone and in respect of the other reliefs set out in his statement of grounds.

Submissions on behalf of the Applicant.

27. Mr. Harty SC on behalf of the applicant stated that his client was not challenging the validity of the search warrants that issued on 14th May, 2019. Counsel accepted that if a search warrant was granted for one purpose, e.g. to search for drugs at a premises, the Gardaí were entitled to conduct a criminal investigation if evidence of another crime became apparent when the search warrant was executed, e.g. by finding firearms on the premises. It was accepted by counsel that evidence obtained on the search would be admissible if charges were brought against a person in respect of either offence.

28. Counsel submitted that the situation was different where a criminal matter had come to an end, because the DPP had directed that there should be no prosecution. At that stage, it was submitted that the respondent was not entitled to use the material found on the search pursuant to a search warrant issued in the context of the criminal investigation, as evidence in a purely civil matter between an employer and an employee.

29. Counsel submitted that the key issue in this case was whether the Garda Commissioner, having obtained the mobile phone for one purpose, was entitled to retain it for other reasons. It was submitted that he was not entitled to do so.

30. Counsel submitted that under the 2007 Regulations, where an investigation had been directed into an alleged breach of discipline, the respondent did not enjoy any powers of seizure of material at that stage. At a later stage in the investigation process, when the matter came before a Board of Inquiry, they alone had the power to compel production of documents and other material. Accordingly, it was submitted that the respondent had no power to retain the mobile phone, as the two disciplinary investigations that were ongoing, had not yet gone before any Board of Inquiry. The net position was that the criminal investigation had come to a conclusion with the direction of the DPP that there should be no prosecution and the respondent had no power to seize and retain material at the initial stages of the disciplinary investigations. Accordingly, it was submitted that the applicant was entitled to a declaration that the phone should be returned to him.

31. Furthermore, it was submitted that while the Gardaí could use all the material found on the phone under a search conducted under a search warrant for any criminal investigation, they could not use that evidence for a disciplinary enquiry between an employer and an employee, which was a purely civil matter.

32. It was submitted on behalf of the applicant that this flowed from the nature of the right to privacy and the nature of material that is stored on mobile phones. In this regard counsel referred to the Canadian decision of *R. v. Fearon* [2014] SCC 77, where it was recognised that mobile phones store a huge amount of information, much of which is highly personal to the owner of the phone.

33. It was submitted that the right to privacy in respect of electronic data was clearly recognised in Irish law. In this regard, counsel referred to the decision in *CRH v. CPCC* [2018] 1 IR 521. Counsel also referred to the Supreme Court decision in *CAB v. Murphy* [2018] 3 IR 640, where the rationale for the exclusionary rule was set out in the judgment of O'Malley J. at paras. 125 *et seq*. It was submitted that in this case there had been a violation of the applicant's right to privacy which occurred after the cessation of the criminal investigation. The court did not have evidence that the material, the subject of the second disciplinary charge, was identified before the cessation of the criminal investigation. There was no evidence before the court when the respondent had identified the material that constituted the subject matter of the second set of disciplinary charges. It was submitted that given the importance of the right to privacy, which had been recognised in Irish law in cases such as *Norris v. The Attorney General* [1984] IR 36, and having regard to the lack of evidence as to when the material was actually retrieved by the respondent, the court should declare that any evidence found on foot of a search carried out after the conclusion of the criminal investigation, should be excluded as having been obtained on foot of an unlawful search.

34. It was further submitted that the applicant had a large amount of personal data on the mobile phone. The respondent, as a processor of that data, having obtained it for one reason, was not entitled to use it for the purposes of its own disciplinary investigation, which was a purely civil matter between the respondent and the applicant in the capacity of employer and employee. It was submitted that the phone seized from the applicant and the data contained thereon, were his property. No prosecution had been directed for an offence relating to ss. 3, 4, 5 or 6 of the 1998 Act, or for any offence, arising from the examination of the applicant's phone. It was submitted that there was no basis on which it could be said, that s.7 of that Act, which explicitly allowed the interference with constitutional, convention and charter rights where criminal offences were suspected, vested some implied right in the respondent to continue to perpetuate the interference with the applicant's right to privacy, when the criminal investigation had been completed and no offence had been disclosed.

35. It was submitted that in the present case, the phone content had been reviewed and had been found not to contain any criminal material. The failure of the respondent to return the phone to the applicant left him in precisely the situation envisaged by Laffoy J. in the *CRH* case, when she spoke of data which was not relevant, was not being "retained lawfully", but was still capable of being analysed and used by the investigating authorities. It was submitted that once the decision had been made by the DPP that there should be no prosecution in respect of any material found on the phone, the applicant was *prima facie* entitled to the return of his phone and to the return of his information stored on the phone.

36. It was submitted that the data in this case had been collected in order to investigate the possible commission of offences contrary to ss. 3, 5 and 6 of the 1998 Act. No such offences had been disclosed. Accordingly, it was submitted any further processing of the data should not take place.

37. It was submitted that while s.41 of the Data Protection Act 2018 allowed for the processing of information in certain circumstances including the preventing, detecting, investigation and prosecution of criminal offences, that section did not have any application in the present case. Similarly, insofar as the respondent claimed that further processing was justified by ss. 70 and 71 of the 2018 Act, it was submitted that that contention was misconceived. Those sections were contained within Part V of the 2018 Act, which related to "processing of personal data for law enforcement proceedings". It was submitted that internal Garda disciplinary matters were not law enforcement proceedings. Accordingly, it was submitted that there was no legal basis on which the respondent could claim to be entitled to continue processing the applicant's personal data stored on his mobile phone.

38. Insofar as there was a claim in the statement of grounds and in the grounding affidavit that the search warrant had not been produced to the applicant at the time that his person and his locker were searched in the Garda station on 14th May, 2019, counsel accepted that that had been denied by Sergeant Smyth in his affidavit and that the court could not determine such a conflict of fact on affidavit evidence. As the search warrant had been exhibited to the affidavit sworn by Sergeant Smyth, he was not pressing this ground of challenge.

39. It was submitted that in all the circumstances, the applicant was entitled to the reliefs sought in the statement of grounds.

Submissions on behalf of the Respondent.

40. Mr. O'Callaghan SC on behalf of the respondent, submitted that the key fact that was not disputed in this case was that there was no challenge to the search warrants that had issued on 14th May, 2019, nor was there any challenge to the searches that had been conducted on foot of those warrants. It was submitted that in these circumstances, there was no basis to suggest that any material evidence that had been lawfully obtained on foot of those searches, could not be used in the subsequent disciplinary investigations.

41. Counsel submitted that once material came to the attention of the Garda authorities as a result of a lawful search of a mobile phone belonging to a member of An Garda Síochána, the respondent was not only entitled to investigate same, but was obliged to do so under the regulations. Once the material had been lawfully obtained on foot of a search warrant, there was no rule that would prevent its production as evidence in subsequent disciplinary inquiries.

42. It was submitted that the respondent could not "un-know" the evidence that had come to his attention in the course of carrying out the lawful searches. Nor was it permissible for him to ignore that evidence. He was obliged to conduct an investigation into the alleged breaches of discipline, so as to ensure the maintenance of discipline and morale within An Garda Síochána.

43. Counsel stated that the position was analogous to the situation where Gardaí attended at a premises on foot of a search warrant searching for drugs, and there found evidence of

the commission of another criminal offence *e.g*. possession of a firearm. There was nothing to prevent the use of the material found on a search in relation to one suspected criminal offence, being used in relation to a prosecution for another offence. That was specifically provided for in s.9 of the Criminal Law Act 1976, as amended by the 2006 Act. The applicant had accepted that proposition in relation to the investigation of criminal offences, but sought to draw a distinction preventing the use of evidence found in the course of a criminal investigation, as evidence in the subsequent disciplinary investigation. It was submitted that there was no basis at law for that distinction.

44. In relation to the order sought by the applicant compelling return of the mobile phone and the contention that inadequate reasons had been provided for retention of the phone; it was submitted that the reason given by the respondent was that it was premature to return the phone and that access to the phone (or a mirror copy) would be given to the applicant when the disciplinary proceedings reach that point. It was submitted that the respondent was entitled to retain the phone for the purpose of the disciplinary enquiry. It was further submitted that regulation 28 of the 2007 Regulations gave a power to the Board of Inquiry to require a Garda to furnish information, documents and other material. It was submitted that if the Board of Inquiry could require production of the phone, similarly the Garda Commissioner must enjoy a similar power.

45. In relation to the argument based on the Data Protection Act 2018, it was submitted that under Art. 6 of the General Data Protection Regulation, a data controller must have a valid legal basis for processing personal data. In Art. 6(1)(e) of the Regulation, it is provided that processing is lawful if it is necessary for the performance of a task carried out in the public interest, or in the exercise of official authority vested in the controller.

46. Furthermore, Art. 6(4) of the Regulation provided that where processing of personal data was carried out for a purpose other than that for which the data was initially collected, that was only permitted where that further processing was compatible with the purposes for which the personal data were initially collected. It was submitted that in this case there was an obvious link between the purposes for which the data had been collected and the purposes of the intended further processing. It was submitted that it was self-evident that the investigation of crime was intrinsically linked to members of the Gardaí and their adherence to the obligations of membership of the police force.

47. It was further submitted that the applicant had provided implicit consent to consideration of his phone by the disciplinary investigation by virtue of his membership of An Garda Síochána, the phone constituting a limited sub-category of his property, being material that had already formed part of a criminal investigation by the Gardaí.

48. In addition, counsel referred to s.71(2) and (5) of the 2018 Act as justifying the further processing of personal data where it was connected to the prevention, investigation, detection or prosecution of criminal offences. It was submitted that the circumstances of this case came within those statutory provisions.

49. In the circumstances it was submitted that the applicant was not entitled to the relief claimed in his statement of grounds, or to any relief.

Conclusions.

50. The first issue which the court must determine in this application is whether the respondent is entitled to use the material obtained on foot of the execution of the search warrants as evidence in a subsequent breach of discipline investigation into the conduct of the applicant. In determining this question, it is important to note that the validity of the search warrants and the execution thereof, were not challenged in these proceedings.

51. The applicant accepted that if evidence was found on the execution of a search warrant which indicated the commission of further, or different criminal offences, material found in the course of the search could be used in any subsequent prosecution in respect of those offences. The applicant argues however that material that was uncovered as a result of a lawful search on foot of a search warrant issued in the course of a criminal investigation, cannot be used in a subsequent disciplinary investigation.

52. The court does not see any difference between a subsequent criminal prosecution on different charges based on material found in the course of a lawful search and a subsequent disciplinary charge arising out of material found in the course of a lawful search.

53. The applicant sought to rely on the dicta of O'Malley J. in the *CAB v. Murphy* case in relation to the rationale for the exclusionary rule and its scope. However, the court is of the view that those dicta are not of great relevance to this case, for the simple reason that the search warrant in the *Murphy* case was an invalid warrant, whereas in this case it was accepted that the search warrants were validly obtained and validly executed. On this basis, the *Murphy* decision does not assist the applicant's arguments.

54. The court accepts the submission made by counsel on behalf of the respondent that once material came into the possession of the respondent as a result of the execution of the search warrant, which suggested a possible breach of the discipline regulations, the respondent had to act on it. He could not ignore the material that had been found on the phone, due to the fact that the search had been carried out to look for evidence of accessing, possessing or distributing child pornography.

55. The court is satisfied that once evidence became available to the respondent due to the execution of the search warrant, which suggested that the applicant may have acted in breach of the discipline regulations, the respondent was obliged to investigate the matter. Had he not done so, discipline within An Garda Síochána would have been adversely affected. It would also have constituted a breach of the respondent's own duty as Commissioner of An Garda Síochána.

56. The applicant relied on the decision in *CRH v. CCPC* in support of the proposition that where a search warrant was issued for one purpose, those executing the search warrant were effectively corralled within the four walls of the search warrant in relation to what

material may be looked at and thereafter used. That case involved the exercise of powers of investigation, search and seizure enjoyed by the respondent in that case in respect of offences under the Competition Act 2002. The search warrant had been issued pursuant to s. 37 of the Competition and Consumer Protection Act 2014. It was a totally different type of search warrant to the warrants that were issued in this case. As was pointed out in the judgments of the court, the search warrant issued in that case, authorised the respondent to enter and search documents and electronic devices for evidence of anti-competitive practices. However, the judgments noted that the search of material could be properly achieved by entering keyword searches into various computers and other devices the subject matter of the search. It was for that reason, when the search warrant was granted for a very specific purpose and when it was possible to do an effective, yet targeted, search by means of the appropriate keywords, that the Supreme Court held that a trawl of one-hundred thousand emails belonging to the third named applicant was unwarranted and was therefore unlawful.

57. In the circumstances of the present case, it was not possible to do a keyword search, or other limited form of search, when looking for evidence of either pictures of child pornography, or for evidence of possessing or distributing child pornography. In order to carry out a proper search, it was necessary for the Gardaí to look at all images on the phone to see if they demonstrated either minors in a state of undress, or if clothed, engaged in sexual activity.

58. Similarly, a keyword search would not be possible, because if a person was dealing in child pornography, they are unlikely to use these terms when communicating with others, either for accessing, or distributing such material. Accordingly, it was necessary for the Gardaí to read all text and other messages on the mobile phone, to see if there was any material indicating that offences had been committed by the owner of the phone under the 1998 Act.

59. In terms of the temporal extent of the search, the court is satisfied that once the search warrant was obtained, those members of An Garda Síochána who executed the warrant, had to look at all the material on the phone. There would be no logical basis to limit the search of the material on the phone to any specific time period. For these reasons, the court finds that insofar as members of An Garda Síochána looked at all material on the applicant's mobile phone when executing the search warrant issued pursuant to s.7 of the 1998 Act, they acted entirely lawfully.

60. The court is further satisfied that as material in relation to the alleged breaches of discipline was obtained on foot of a valid search warrant, the respondent is entitled to use that material in any disciplinary investigation in relation to the applicant's conduct.

61. The court holds that as the material that was found on the applicant's mobile phone, was obtained lawfully, there is no reason why it should be excluded as evidence in any disciplinary enquiry.

62. As a secondary argument, the applicant argued that in relation to the second set of charges of breach of discipline, as contained in the notice of investigation served on him on 27th July, 2020, that because that disciplinary investigation commenced after conclusion of the criminal investigation, the search which led to the uncovering of the material the subject matter of that disciplinary charge, must have been conducted after the conclusion of the criminal investigation. While the applicant is correct in relation to the date of conclusion of the criminal investigation, which concluded when the directions from the DPP were issued in May 2020, and the commencement of the second disciplinary investigation, which commenced with the appointment of D/Supt. Creighton on 30th June, 2020, this does not necessarily mean that the search which revealed the material the subject matter of that disciplinary charge, was only obtained as a result of a search carried out subsequent to May 2020.

63. On the balance of probabilities, the court is satisfied that a complete search of the content of the applicant's mobile phone was probably carried out prior to the arrest of the applicant in June 2019. Given the extent of such search and the time when it was carried out, there is no basis to suggest that the material the subject matter of the second set of charges only became available as a result of a search of the phone carried out after May 2020. Accordingly, the court rejects this ground of challenge.

64. The second issue which the court must determine is in relation to whether the respondent is entitled to retain the applicant's mobile phone. The respondent submits that notwithstanding that the criminal investigation has been at an end since May 2020, the respondent is entitled to retain possession of the applicant's mobile phone for the purpose of the disciplinary investigation. The court does not agree with that assertion.

65. *Prima facie,* once criminal proceedings are at an end, either because the matter has been concluded at a trial, or where they are at an end due to no prosecution being directed by the DPP, the owner of the property which is in the possession of An Garda Síochána, is *prima facie* entitled to its return. The necessary application can be made to the District Court pursuant to the Police Property Act 1897, as amended by s.25 of the Criminal Justice Act 1951; see generally *The King (Patrick Curtis) v. The Justices of County Louth* [1916] 2 IR 616*, Mansfield v. Superintendent Peter Duff* (Unreported, Dublin District Court, Judge O'Shea, 16th April, 2018) and *Donoghue v. His Honour Judge O'Donoghue & Ors.* [2018] IECA 26.

66. The court accepts the submission by Mr. Harty SC on behalf of the applicant that the respondent has no power of compulsion in relation to documents or other material at the preliminary investigation stage in a disciplinary investigation pursuant to the regulations. That power is only given to the Board of Inquiry.

67. The respondent has not pointed to any statutory or other authority giving him the power to seize and retain property as part of a disciplinary investigation. The court is satisfied that he does not have that power. The court holds that in general, the respondent is not entitled to retain property for the purposes of a disciplinary investigation, once a criminal investigation has come to an end.

68. However, that does not mean that the applicant is entitled to return of all the material on the phone. The fact that material is on a person's mobile phone, does not make it that person's property. For example, if I go into my employer's office and take a photograph on my mobile phone of his confidential client list, or of his confidential manufacturing processes, such unauthorised photographs of the employer's confidential commercial information does not become my property, merely because it is on my mobile phone. The fact that there may be other material on the mobile phone, which is my lawful property and some of which may even be my personal data, is not sufficient to give me any entitlement to retain possession of the unauthorised material photographed in my employer's office.

69. Thus, insofar as it is alleged by the respondent that the applicant has a number of photographs of the interior of Garda stations, copies of Garda documents and copies of entries on the Garda PULSE system, the respondent would be entitled to object to the return of these items to the applicant.

70. Insofar as it may be argued that the respondent could delete from the phone, the relevant documents which he maintains belong to An Garda Síochána and return the remainder of the data to the applicant, that may not be technically possible. The court did not hear any evidence on that aspect. However, from other cases involving desktop computers and emails, the court is aware that "deleting" material on one's computer does not remove it from the computer. It merely removes it from one area of the computer's memory, which is generally accessible and searchable, and places it in another area of the computer's memory, which is not generally accessible or searchable. However, with the right technical knowhow and equipment, it is possible to retrieve "deleted" material.

71. This means that it may not be possible in a practical sense to remove the disputed material from the applicant's phone, while returning the remainder of the material on the phone to him, because the disputed material would in effect remain on the phone. It is possible that the court is wrong in its understanding in this regard. No evidence was heard on this aspect. The court is satisfied that this issue will have to be determined in the course of a police property application in the District Court. The court will confine itself to holding, that insofar as any of the material on the phone is Garda documentation or data, which the applicant is not authorised to have on his mobile phone, then he is not entitled to the return of such documentation or data.

72. Insofar as it was submitted that the respondent required the applicant's mobile phone, as the charge specifically related to his having unauthorised Garda material on his mobile phone and therefore production of the phone would be the best evidence at any hearing before a Board of Inquiry; the court cannot accede to that submission. The court is satisfied that once the criminal investigation had ended, *prima facie* the applicant was entitled to return of his property. The respondent does not enjoy any power of seizure, or compulsion at the preliminary investigation stage. However, once the material was found on the phone, even if the phone is returned to the applicant, those who conducted the

search of the phone, are entitled to give evidence of what they found on his phone. That evidence would be admissible before any Board of Inquiry that may be established.

73. Insofar as any Garda documents and screenshots of entries on the Garda PULSE system were found on the phone, the Gardaí are entitled to retain these and produce them at any subsequent disciplinary hearing. Thus, I do not think that the respondent will be prejudiced in producing evidence of the material found on the phone, as a result of a search thereof at any subsequent Board of Inquiry hearing.

74. Insofar as the applicant claimed that there was a breach of his right to privacy, the court is not satisfied that there was any actionable breach in this regard. The material that was obtained by the respondent, was obtained on foot of valid search warrants which have not been challenged in these proceedings. Insofar as there was an invasion of the applicant's privacy by the search of the mobile phone, that was not a breach of his right to privacy, because it was an invasion that was authorised on foot of the search warrant.

75. The applicant argued that in using the material that had been found on foot of the searches conducted under the search warrants, the respondent was processing his personal data in an unlawful manner, contrary to the provisions of the 2018 Act. "Personal data" is defined in s.1 of the Data Protection Act 1988 as meaning data relating to a living individual, who can be identified either from the data or from the data in conjunction with other information in the possession of the data controller. This provision of the 1988 Act, was not repealed by virtue of s.7 of the 2018 Act. It is not necessary for the court to adjudicate on whether the respondent is entitled to rely on the provisions of s.71(5) of the 2018 Act, because the court is not satisfied that any of the material the subject matter of either of the disciplinary charges constitutes "personal data" within the meaning of either the 1988 Act, or the 2018 Act. The video clip does not constitute personal data of the applicant. The court is satisfied that the documentation which is described in the second disciplinary charge, which may be described in general as official Garda documentation, does not constitute personal data of the applicant. Accordingly, his challenge on foot of the 2018 Act is not arguable.

76. The applicant's main reason for wanting return of his mobile phone as set out in his solicitor's letters, was to enable him to conduct his own technical examination of the phone and the material on it, in order to prepare his defence for the disciplinary hearing. The court accepts that the applicant is entitled to carry out his own examination of the phone in order to properly defend himself at any hearing before a Board of Inquiry. Even if the phone is retained by the Gardaí, due to the impossibility of removing material from the phone, the applicant should still be afforded inspection facilities, whereby he, his legal advisers, and such technical experts as may be retained by him, should be given the opportunity to carry out non-invasive tests on the material, which tests can be carried out under the supervision of the Gardaí. This is to ensure that the applicant will be able to properly defend himself at any subsequent disciplinary hearing.

77. Finally, in relation to the bottle of methadone that was found during the search of the applicant's locker, the court can see no basis on which to prevent any evidence being

given in relation to the finding of this material in the applicant's locker. In the absence of any assertion of ownership of the methadone by the applicant, there would appear to be no basis for its return to him.

Proposed Order of the Court.

78. Having regard to its findings herein, the court would propose to make an order providing for the following:

- A declaration that the respondent is entitled to use the material found by the Gardaí as a result of the execution of the search warrants issued on 14th May, 2019 in any disciplinary investigations that may be brought into the conduct of the applicant;

- A declaration that the respondent is not entitled to retain property seized during a search conducted as part of a criminal investigation, after the conclusion of that investigation, on the grounds that such material would be of relevance to an ongoing disciplinary investigation against the Garda who owns the property;

- A declaration that, in general, a person is entitled to return of their property once criminal proceedings have been concluded, subject to the proviso that where material is on a computer or a mobile phone, the applicant must be in a position to establish ownership or at the least, a right to possession of all the material on the computer, or phone, prior to it being returned to them; any application for return of property seized in this case can be made to the District Court in the ordinary way pursuant to s.1 of the Police Property Act 1897 (as amended);

- Other than as outlined herein, the court refuses all of the other reliefs sought by the applicant in his notice of motion;

- The court will lift the stay on the disciplinary investigations on foot of the notice of investigation served on the applicant on 30th August, 2019 and 27th July, 2020.

79. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the form of the final order and on costs and on any other matters that may arise. The making of such submissions will be without prejudice to either party appealing any aspect of the final order when perfected.