



THE COURT OF APPEAL

Neutral Citation Number: [2026] IECA 164

Record Number: 2025/163

**Binchy J.
Allen J.
Owens J.**

Between/

J.M.

Applicant

-AND-

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE MINISTER FOR JUSTICE, IRELAND
AND THE ATTORNEY GENERAL**

Respondents

**JUDGMENT of the Hon. Mr. Justice Alexander Owens delivered on the 31st day of
July 2026.**

1. I have read the draft judgment prepared by Binchy J. on behalf of the majority of this Court. I agree with their conclusion that this appeal should be dismissed. I have arrived at my conclusions on some of the issues by a slightly different route. This concurring judgment sets out my reasoning in relation to those issues.
2. The core issue in judicial review proceedings of this type is whether there has been maladministration by a decision-maker which requires to be corrected by judicial intervention. Those who engage with administrative decision-makers should bear in mind that these processes require co-operation and constructive engagement.
3. In my experience, judicial review litigation is all too often preceded by an unreasonable ultimatum, provocation, or demand. No real effort is made to persuade the decision-maker that there might be a ground for a favourable decision based on factual merits.
4. Failure by the decision-maker to address the ultimatum is then advanced as the "*casus belli*" and followed by litigation on all fronts, conducted according to a pre-decided "*Schlieffen Plan*." In my view, for what it is worth (very little, I fear), courts exercising judicial review jurisdiction must take a firm line in discouraging these practices which are inimical to sound decision-making.

5. In this case, an application for judicial review was launched on several fronts within three weeks, and perhaps even within two weeks, after a solicitor's letter was received by the Commissioner of the Garda Síochána. This letter contained numerous demands and assertions, including a request for all of the documents relating to several decisions which Assistant Commissioners had taken to suspend J.M. This request was made in the context of a demand in that letter that J.M.'s suspension be lifted and against a background that a decision on the renewal of his suspension was known to be imminent.
6. The absence of a substantive reply to that letter was relied on by J.M. as evidence to support assertions in his statement required to ground his application for judicial review. This was relied on as showing deficiencies in the decision to suspend him with effect from 1 August 2024, and in earlier decisions to the same effect. J.M. claimed that the Commissioner wrongfully refused to provide his suspension file.
7. I do not accept J.M.'s claim that this omission by the Commissioner to respond to a request for the suspension documentation, which was made by a letter dated 18 July 2024, or that the fact that the terms of the decision to extend J.M.'s suspension from 1 August 2024 did not address points raised in that letter, demonstrated failures to afford him fair procedures.
8. At most, the Assistant Commissioner, who made the decision to suspend J.M., which he seeks to have set aside, was obliged to consider any representation from J.M. having factual substance, which might persuade him to conclude that it was not "desirable in the interests of the Garda Síochána" that J.M. should be suspended for a period of 3 months from 1 August 2024. No such material was advanced in the letter dated 18 July 2024.
9. The fact that the solicitors did not get the material requested either prior to 29 July 2024 or prior to 3 or 8 August 2024 (the date of the *ex parte* docket, grounding affidavit of J.M. and statement required to ground his application for judicial review) could not transform what was otherwise a fair decision, taken on 29 July 2024, into an unfair decision. There was no reasonable prospect of the solicitors receiving that documentation within a time frame which would allow a meaningful review and a fact-based response which might persuade the Commissioner that the appropriate course was not to continue J.M.'s suspension.
10. I appreciate that, having regard to the fact that suspension decisions are for three months and are taken by the Commissioner prior to 1 February, 1 May, 1 August and 1 November in each year, it was likely that all of the materials relied on by the Commissioner relating to J.M.'s suspension were likely to be on one file. However, the interval between the date when this material was sought and the date when the

Commissioner was due to next consider renewal of J.M.'s suspension was too short to permit any meaningful engagement.

11. Courts entrusted with judicial review are concerned to ensure administrative fairness. There must be some recognition of the realities of how decision-makers in public administration carry out their functions. They must be given a fair opportunity to respond to requests and demands, particularly those which raise multiple issues and require legal input.
12. I would be reluctant to grant any of the reliefs sought even if J.M. had requested this material in good time prior to the anticipated decision on whether to renew his suspension from 1 August 2024.
13. The range of documents which J.M.'s solicitors sought in relation to his suspensions exceeded any obligation of the Commissioner to provide him with information relating to the "gist" of his suspension, as envisaged by the High Court in *Baynham v. Commissioner of An Garda Síochána and Others* [2023] IEHC 735.
14. With due respect, I also have reservations as to whether *Baynham* was correctly decided in relation to this issue.
15. The extent of the obligation of the Commissioner to provide information to a Garda officer relating to a proposed suspension will depend on the circumstances and issues relevant to that decision. I am not convinced that passage of time is a factor which should increase the rights of the person who has been suspended to information. In light of my other conclusions it is not necessary for me to express a final view on that point.
16. An initial holding suspension of an employee and subsequent renewals of suspensions may be imposed unilaterally. In many cases the gist of the likely basis for a decision to suspend will be already known to the employee. In some cases investigatory considerations may preclude provision of information. An employee who seeks a review of a suspension or to persuade a decision-maker not to renew a suspension has a right to make submissions. In cases where issues arise as to whether to renew or lift a suspension factual issues and employment related considerations may arise. Where those considerations are not already known to the employee, it will be appropriate to signal them and invite a response.
17. In my view, J.M. is not entitled to a declaration that the Commissioner failed to engage with the submissions in the letter or to provide the documents requested in that letter for the reason that J.M. was not entitled to the documents.

18. I consider that the suspension of J.M. from 1 August 2024 was not rendered unlawful because the Commissioner did not provide the documentation specified in the letter dated 18 July 2024. Fair procedures did not require that he get that documentation prior to the suspension decision of 29 July 2024. J.M. had enough information in his possession to know the gist of the material which the Commissioner was likely to rely on in any forthcoming decision to suspend him. He had been suspended on a number of previous occasions and the suspension notices told him why he was suspended.
19. J.M. was not in any respect inhibited in bringing facts to the attention of the decision-makers which might persuade them not to suspend him. The text of the decision of 29 July 2024 was sufficient to provide J.M. with the reason for the decision to suspend him. It was not necessary for that decision to refer to any part of the content of the letter dated 18 July 2024. That letter did not contain any factual material of substance which the Commissioner was required to address in order to make a decision on whether to suspend J.M. J.M. has not demonstrated that the Assistant Commissioner who made that decision engaged in any maladministration which would justify the High Court or this court in intervening to set aside that suspension.
20. I do not propose to set out the detail of the history of this matter. This is to be found in the judgment of Binchy J. From my perspective, the salient facts are as follows.
21. The state of play as of 18 July 2024 was that J.M. had been suspended from his position as a probationary Garda. His initial suspension arose as a result of an incident on 24 August 2020. This suspension had been renewed from time to time at three monthly intervals.
22. The incident which gave rise to the suspension of J.M. became the subject matter of criminal investigation. An allegation was made that he raped a teenage girl. In February 2021 the girl withdrew her complaint and in April 2022 the Director of Public Prosecutions decided that there should be no prosecution.
23. The Garda Síochána Ombudsman Commission then began an investigation under s.95 of the Garda Síochána Act 2005. On 14 November 2022 the Commission sent a report to the Commissioner recommending that disciplinary proceedings be brought against J.M. for discreditable conduct and driving a motor car while intoxicated. Those disciplinary proceedings were initiated in June 2023. At a preliminary hearing before the Board of Inquiry in March 2024 legal representatives for J.M. submitted that they should not be continued because of what was termed "unlawful delay" and for other reasons.

24. The Board reconvened in May 2024 and J.M.'s solicitor made further oral legal submissions. He was requested to provide written legal submissions to the Board in relation to these points. On 19 August 2024 the Board delivered a ruling rejecting those submissions and indicated that it intended to continue with the process.
25. J.M.'s suspension from duty had been renewed on 24 April 2024 for a further period of three months with effect from 1 May 2024. This was due to expire on 1 August 2024. J.M. was provided with a copy of the decision of 24 April 2024. This decision set out the reasons for that suspension. These were "the circumstances surrounding your sexual activity with an intoxicated minor on 24 August 2020" and that "[a] Board of Inquiry has been established to address the discipline matters arising."
26. In essence, the evidence against J.M. which the Garda authorities were relying on before the Board consisted of J.M.'s account of the events of 24 August 2020. That information was set out in the "Section 97 Report" of the Garda Síochána Ombudsman Commission.
27. J.M.'s account to interviewers of the incident, as set out in that document, was sufficient to establish very strong support for any decisions taken by the Commissioner to continue to suspend J.M. from duty until the conclusion of the disciplinary process. In my view, based on the seriousness of the allegations, it was impossible to see how the Commissioner could come to any other conclusion unless there was some radical change in circumstances.
28. On 18 July 2024 the solicitors for J.M. wrote to the Commissioner asserting that the reasons set out in the various suspension notices were inadequate. They asserted that "the suspension has been unlawfully delayed" and was unjustified and that the "entire process", meaning the disciplinary process and the suspension process, was both punitive and disproportionate.
29. This letter asserted that the suspension notices gave inadequate reasons, and "[did] not explain why in the round his suspension is merited." It demanded "a full and complete set of reasons as to why our client's suspension was, and is, continuing, including reasons as to whether and how the criteria in the Commissioner's Policy document (including those relating to long term suspensions), have been met." The letter continued as follows:

"In addition, we require copies of all documents (including the views of his Divisional Officer) which have been considered by you in deciding to extend our client's suspension to date. We are also requesting a copy of all documents (including the views of his Divisional Officer) which might be reviewed by you in

deciding whether his suspension should be further extended. Upon receipt our client intends to address you by way of further submission as to why his suspension should be lifted.

Our client would also request an oral hearing on the question of whether to renew his suspension.

Without prejudice to those submissions, the suspension has gone on for far too long, and is having a serious and detrimental effect on him professionally, personally and financially. You will be aware that the DPP has directed that there be no prosecution to the initial allegations made against our client, yet he remains on probation leaving him in a completely insecure position. We would invite you at this juncture to consider alternatives to suspension. The nature of these allegations (which have been vehemently denied at all times) are scandalising and stigmatising and have been hanging over our client for far too long. This despite the direction from the DPP that there be no prosecution. All of these factors militate strongly in favour of lifting the suspension forthwith, without prejudice to our right to make fuller submissions to you upon receipt of the requested materials."

30. Given that the evidence which was available to the disciplinary inquiry consisted of J.M.'s own account of what happened during the incident in question, there was no basis for the assertion that the activities on his part relied on as "unbecoming conduct" were "vehemently denied at all times". The rape allegation, which J.M. had always disputed, was not being pursued in the disciplinary proceedings.
31. The letter then made claims that the disciplinary process was tainted by unlawfulness and that the keeping of J.M. as a probationer was unlawful. The letter concluded in the following terms:

"In light of the foregoing, we are calling on you to, firstly provide the reasons and materials sought concerning our client's suspensions forthwith, secondly to lift his suspension, thirdly to terminate the disciplinary proceedings and finally bring our client's probationary period to an end. We would ask that all of the foregoing matters are addressed urgently and well in advance of the next review of our client's suspension. Any further extension of our client's suspension while these matters are outstanding will be taken as highly prejudicial and oppressive and may merit an application to the High Court. In the event that all of the concerns heretofore raised are not addressed in a satisfactory and timely manner we reserve the right to make an application for Judicial Review as advised and this letter shall be used to fix you with the costs of such proceedings."

32. Regulation 7(1) of the Garda Síochána (Discipline) Regulations 2007 (S.I. No. 214 of 2007) (the Disciplinary Regulations) specifies the criterion governing whether the Commissioner should suspend a member from duty. This specifies that "[w]here, in the opinion of the Commissioner, the circumstances render such a course desirable in the interests of the Garda Síochána, he or she may suspend a member from duty." By Regulation 7(2), "[a] member so suspended remains suspended until the Commissioner decides that the suspension should cease." By Regulation 7(3), "[t]he Commissioner shall review the suspension of a member every 3 months or at such shorter intervals as he or she considers necessary, but any non-compliance with this paragraph does not of itself invalidate a suspension."
33. It goes without saying that the reputation of the Garda Síochána must be secured by the Commissioner. The Commissioner is responsible for ensuring that the confidence of the public in the integrity of Garda officers is kept at a very high level. That is why the law entrusts the Commissioner with direct responsibility for the very important matter of deciding on whether a Garda officer should be suspended for any significant length of time. This must be decided at Commissioner or Assistant Commissioner level. This also safeguards the position of the Garda officer whose suspension is being considered. Many of these suspensions may arise from workplace relations situations and it may be inappropriate that a decision of that sort is taken by an immediate superior.
34. It appears from the documentation exhibited in this judicial review that the Commissioner does not suspend any member for a period of longer than 3 months. Instead, the Commissioner makes an order suspending the member for 3 months and within that period makes a decision on whether or not to renew that suspension for a further 3 months.
35. The Commissioner has formulated a "Policy Document on the Suspension from Duty of Members of An Garda Síochána under the Garda Síochána (Discipline) Regulations 2007 as amended."
36. This states that a member of An Garda Síochána will normally be suspended "[w]here there is evidence to show that a member has committed acts of such seriousness as would likely result in his/her dismissal from An Garda Síochána if they are proved true but not until such time as the investigation rules out the possibility of the member being subject of a false or malicious allegation."
37. This accords with what would be expected. It sets out what any reasonable person would expect to happen where credible evidence of such conduct comes to the attention of the Commissioner. Any reasonable person would also expect that, absent a very good reason, the suspension of an officer on those grounds would

continue until the conclusion of any disciplinary proceedings arising from such acts. This would obviously be “desirable” “in the interests of the Garda Síochána.” This would be particularly so in cases where the misconduct charged does not stem from issues of workplace relations and discipline and relates to conduct of the sort which adversely affects the public reputation of An Garda Síochána.

38. This is the basis on which employers normally exercise their power to suspend. In this case J.M. was aware of the content of the “Section 97 Report” which set out the allegations which were the subject-matter of the disciplinary proceedings and the supporting “evidence.”
39. This policy goes on to state that “[t]he views of the members Divisional Officer *[sic]* will be sought on the following matters when the issue of a member’s long term suspension is being considered: Primary considerations for suspension: 1. Strength of evidence, 2. Seriousness of allegation, 3. Risk to members of the public, 4. Risk to colleagues, 5. Potential to pervert the course of justice/suborn colleagues, 6. Options of alternatives to Suspension. Secondary considerations for suspension: 1. Likely outcome, 2. Estimated time to conclude investigation, 3. Relevant complaint history, 4. Current performance, 5. impact on police/public relations, 6. Impact on service morale, 7. Risk to officer/welfare considerations.”
40. It does not follow that the element of this provision relating to consultation with a Divisional Officer was inserted for the benefit of the person who may be suspended. Any employer considering whether to impose or maintain a holding suspension pending the outcome of disciplinary proceedings or a decision on dismissal may canvass the views of those to whom that employee reports. They may or may not be favourable to the employee. Furthermore, the factors listed in the guidance are matters which in any given case may not be relevant to the decision of the Commissioner and, where relevant, the weight which they may carry will vary.
41. That policy also sets out the procedure for review of suspension on 1 February, 1 May, 1 August and 1 November in each year. The solicitors for J.M. referred to this guidance in their letter dated 18 July 2024. The author of that letter was therefore fully aware that J.M.’s suspension was due for renewal prior to 1 August 2024.
42. The statement of opposition delivered on behalf of the Commissioner indicates that the letter dated 18 July 2024 was received on 24 July 2024.
43. There was no reality to the request for an oral hearing on the issue of suspension or in the demand to receive the documentation relating to J.M.’s previous suspensions and the upcoming decision prior to the next decision on his suspension. The time

period between receipt of the letter dated 18 July 2024 and the likely date of the next decision on his suspension was too short. No grounds were advanced which might have made it appropriate for the Commissioner to conduct an oral hearing.

44. The issue of whether to continue to suspend J.M. from duty for 3 months from 1 August 2024 was straightforward. Was that course “desirable in the interests of the Garda Síochána”? This decision was made by an Assistant Commissioner, acting on authority delegated by the Commissioner. It was committed to writing. The document records that the decision was made on 29 July 2024. The Assistant Commissioner suspended J.M. from duty pursuant to Regulation 7 from 6.00 a.m. on 1 August 2024 until 6.00 a.m. on 1 November 2024. Annexed to this document was a statement that “[t]he suspension from duty arises as a result of: The circumstances surrounding your sexual activity with an intoxicated minor on 24 August 2020. A Board of Inquiry has been established to address the discipline matters and remains ongoing at this time.”
45. The reasons given by the Assistant Commissioner for J.M.’s suspension could not have been clearer. It was not necessary to set out the detail of the activity in question or the charges which J.M. faced before the Board. It was not necessary to state the obvious point that the Assistant Commissioner had concluded that his suspension was “desirable in the interests of an Garda Síochána.”
46. Both parties can be taken to have known that J.M. had remained on suspension since 2020 and the state of play of the proceedings before the Board. There was now a likelihood that there would be litigation. There was also the prospect that J.M. would appeal in the event that he got an unfavourable decision from the Board. That meant it was most likely that J.M. would receive continued unfavourable decisions on suspensions until the final outcome of the disciplinary process.
47. J.M. did not wait for a reply to the letter dated 18 July 2024. He started judicial review proceedings on either 3 August 2024 or 8 August 2024. He submitted an amended statement required to ground application for judicial review on 9 September 2024. He sought an order quashing the decision of 1 August 2024 to continue his suspension, “including any and all earlier decisions taken to suspend or extend the Applicant’s suspension.”
48. These judicial review proceedings disclose nothing about whether the Commissioner took further decisions to suspend J.M. with effect from 1 November 2024. However he seeks reinstatement and a declaration that his continued suspension is unlawful. In fairness to J.M., his point in relation to refusal by the Commissioner to provide the documents requested, even if not good in relation to the decision by the Assistant Commissioner on 29 July 2024, would hold good in relation to subsequent decisions

to suspend if he were deprived of information to which he was entitled in order to be in a position to make factual submissions on his suspension.

49. I do not believe that J.M. was entitled to this information as of right in order to enable his legal advisers to make legal submissions to the Commissioner, or to pursue a legal challenge to a suspension decision. I think it would be inappropriate to give J.M. any general declaratory relief that he has such an entitlement. His judicial review challenge did not widen out into a claim which attacked the further exercises by the Commissioner of the power to suspend him or demonstrate that any of those decisions were defective.
50. J.M. was out of time to challenge the earlier decisions to suspend him. The order of the High Court giving him leave to apply for judicial review is dated 9 September 2024. He did not obtain any order from the High Court extending the time to challenge those earlier decisions. The only decision on suspension which could be challenged was that made on 29 July 2024. The issue of whether or not his previous suspensions ought to have been renewed could not be entertained.
51. The amended statement of grounds referred to the letter dated 18 July 2024. It then stated that "Despite acknowledging the Applicant's agent's *[sic]* correspondence, the [Commissioner] declined to take any of the steps requested therein and extended the Applicant's suspension from the 1st day of August 2024."
52. A legal ground on which an application for judicial review has been permitted at the leave stage may not be advanced outside the factual parameters established by the evidence presented at the hearing of the substantive application.
53. Irrespective of the fact that the High Court gave leave to bring the proceedings on the grounds specified, any unproved assertions remained to be proved at the hearing of the application for judicial review. The swearing of a brief affidavit, such as that sworn by J.M., which confirms that facts set out in the statement of grounds are true, does not convert assertions in the statement of grounds into proved facts.
54. The materials relied on by J.M. were insufficient in terms of proof to place any obligation on the Commissioner to provide an affidavit showing the materials which were before the Assistant Commissioner when he made the decision to suspend J.M. on 29 July 2024. While J.M. can point to grounds of challenge, the High Court at the hearing of the application for judicial review could only have regard to facts proved by evidence. In this case, the proved facts are that the Commissioner received the letter dated 18 July 2024 on 24 July 2024 and that the Assistant Commissioner made his decision on 29 July 2024.

55. J.M.'s affidavit did not carry the matter any further. These documents did not prove that the Commissioner or the Assistant Commissioner had declined to do anything or failed to give due consideration to anything prior to the institution of the judicial review proceedings. The absence of any reference to the letter of 18 July 2024 in the decision of the Assistant Commissioner did not establish that this letter was not before him when he made his decision to suspend J.M. The fact that the Assistant Commissioner did not address on affidavit whether he had considered the letter did not prove that he did not do so or that this document was not before him when he made his decision. The Assistant Commissioner was not obliged to disprove unproved assertions.
56. The most that a court might be justified in inferring was that because the decision did not address the letter, the Assistant Commissioner failed to give due consideration to its content. That inference would not be justified if the letter contained nothing of substance. Decision-makers are not obliged to address issues which are irrelevant to their decisions and points which lack any substance.
57. In his grounds for relief, J.M. asserts that the Commissioner acted in breach of fair procedures in failing to disclose the materials and reasons requested by the letter dated 18 July 2024. He also asserts that the Commissioner, in failing to evidence the reasons for his suspension, deprived him of his lawful opportunity to challenge same before the courts and/or to make fulsome submission in relation to same.
58. He also asserts that the Commissioner, by failing to provide full and proper reasons for his continued suspension, and its protracted nature, unlawfully deprived the courts of the material necessary to adjudicate on the lawfulness of same. He also asserts that an alleged failure by the Commissioner to provide "clear evidence of the reason for same and the reasons for the protracted nature of same" made the suspension unlawful. He asserts that it was incumbent on the Commissioner to provide clear evidence of the basis on which the power was exercised and clear and cogent reasons.
59. He asserts that the notice was unlawful because it failed to disclose adequate reasons. He asserts that the Commissioner failed to engage with the submissions made on 18 July 2024 and that the decision to suspend was disproportionate having regard to the totality of the evidence before the decision-maker.
60. J.M. advanced two points in support of his contention that the Assistant Commissioner did not give relevant material due consideration. The first of these relied on the fact that the Commissioner did not respond to his solicitor's demand for documents relating to suspensions prior to initiation of the judicial review proceedings. The argument here was that J.M. was entitled to this information to

enable him to make submissions in relation to the forthcoming decision on suspension and to challenge its validity in proceedings. He also complained that the reasoning in the text of the decision of Assistant Commissioner dated 29 July 2024 was inadequate and failed to address issues raised in the letter dated 18 July 2024.

61. The grounds on which judicial review was sought, as set out in paras. [48]-[58] of J.M.'s statement of grounds, did not make any specific allegation of failure by the Assistant Commissioner to consider the matters set out in the guidance, or to consult J.M.'s Divisional Officer, or that the decision of the Assistant Commissioner was vitiated by failure to include content which addressed this point.
62. The letter from J.M.'s solicitors did not raise any issues referred to in the guidance other than "alternatives to suspension." In fact, the guidance refers to "options of alternatives to suspension." It was obvious from the terms of the letter that the estimated time to completion of the disciplinary process would be likely to be further delayed by judicial review proceedings. "Estimated time to conclude investigation" is referred to in the guidance. The guidance contains nothing specific in relation to time to conclude other activities such as criminal investigations conducted by external bodies, criminal prosecutions or disciplinary proceedings.
63. Even if an argument that the terms of the decision by the Assistant Commissioner failed to address the criteria in the circular could be considered, in my view there was no necessity for the Assistant Commissioner to refer to criteria in the guidance document or the issue of whether or not J.M.'s Divisional Officer was consulted. In my view it was not necessary for the Assistant Commissioner to address the issues in the policy document or to consult J.M.'s Divisional Officer before taking his decision in relation to suspension of J.M.
64. While the guidance envisages that the decision-maker will seek the views of the member's Divisional Officer by reference to a number of criteria prior to deciding on suspension, I do not see this as imposing a general obligation on the decision-maker to consult with the Divisional Officer or even to consider the listed criteria where these can have no relevance. Clearly, there will be circumstances where the matter which gives rise to a suspension is sufficiently serious to justify the decision-maker in disregarding this part of the guidance.
65. For instance, if J.M. was facing a criminal prosecution on a charge of rape it would be unnecessary for the Commissioner to consider the guidance or canvass his Divisional Officer before taking decisions to suspend him pending the outcome of the prosecution. On the other hand, if the disciplinary issue arose from performance at work, it might be appropriate to receive the views of the Divisional Officer on the

likely behaviour and performance of the officer if permitted to remain on or resume duty.

66. It must be borne in mind that the effect of any decision not to suspend a Garda officer faced with an allegation which is so serious as to result in likely dismissal in the event that it is upheld will be to override the "normal" or default position set out in the guidance. This is that a Garda officer will be suspended where there is evidence to show that the officer has committed acts which, if proved true, are of such seriousness as would likely result in dismissal.
67. It is very difficult to see how the courts can interfere in this type of exercise, which involves making a judgment to protect the interest of the employing organisation. The overall criterion, which is set out in the Disciplinary Regulations, is that any decision taken by the Commissioner on suspension must be that which is "desirable in the interests of the Garda Síochána." That formulation places the interests of the organisation before those of the officer whose suspension is being considered. Is suspension of the individual officer advisable in the interests of the organisation? Can the organisation live with continued active performance by the suspended officer of Garda functions while the underlying disciplinary process is progressing?
68. It is for the Commissioner to decide whether it is possible to continue to have a level of trust and confidence in an officer who is the subject of disciplinary action in relation to serious allegations which appear to have substance, and, if made out, are likely to result in dismissal.
69. The Commissioner was entitled to adopt that general policy. It follows as a matter of common-sense that the Commissioner only ought to depart from that "normal" or default position for a clear reason which is based on factual material which justifies making an exception.
70. I consider that the matters listed in the guidance are factors which may be relevant to a consideration by the Commissioner for the purpose of assessing whether he can have a level of trust and confidence in an officer which would justify a decision not to suspend, notwithstanding the seriousness of the allegations. This type of assessment involves a degree of subjectivity.
71. It was for the Assistant Commissioner to decide whether or not to consider the factors referred to in the guidance and to evaluate the weight, if any, to be given to these criteria. He was not obliged to provide explanations of his reasoning on these matters as part of his decision to suspend. If there were focused submissions on the issue of suspension renewal which invited the Assistant Commissioner to consider

facts relevant to a particular element of the guidance which could be demonstrated to be relevant to the circumstances of a Garda officer, the position would be different.

72. Having regard to the nature and seriousness of the conduct by J.M. which was the subject matter of the report by the Garda Síochána Ombudsman Commission relating to J.M., I am of the view that the Assistant Commissioner was entitled to treat the factors listed in the guidance as inapplicable. He owed no duty to J.M. to consult with his Divisional Officer prior to taking a decision. Fair procedures did not require that.
73. I do not accept the submission that because the guidance document sets out criteria, the decision-maker must have regard to those criteria in all cases. Some or all of these criteria may be irrelevant. Nor do I consider that it was necessary for the Assistant Commissioner to include a justification for any disregard by him of this part of the guidance in the text of his decision to suspend J.M. The criteria were clearly irrelevant in light of the reason for the suspension and the only matter which the letter dated 18 July 2024 asked him to address was "alternatives to suspension." The letter did not put forward any submission relating to J.M.'s circumstances which sought to demonstrate that an option of some "alternative to suspension" would be appropriate.
74. I have already expressed my view that the fact that the Commissioner did not provide the documents sought in the letter dated 18 July 2024 did not prove conduct which justified initiation of the judicial review proceedings in early August 2024. These proceedings were instituted before the Commissioner had a sufficient opportunity to respond.
75. I am not persuaded by the submission that the fact that the Commissioner did not produce the documents requested subsequent to the institution by J.M. of these judicial review proceedings can be used to support an inference that the Commissioner had decided to refuse this request prior to the institution of these proceedings. Any such inference would also be improper because the request for documents went well beyond that contemplated by the judgment of the High Court in *Baynham*.
76. Nor do I accept that the subsequent refusal by the Commissioner to respond to this request could retrospectively excuse premature judicial review proceedings, or invalidate the decision of the Assistant Commissioner on 29 July 2024.

77. I am also unpersuaded by a submission that judgments of the High Court based on refusals by the Commissioner to produce documentation relating to suspensions in other cases can be relied on as showing that as of the date of institution of the judicial review proceedings the Commissioner had adopted a policy of refusal to make this material available. That inference would be doubly improper in the circumstances of this case because the request for documents went well beyond that contemplated by the judgment of the High Court in *Baynham*.
78. I am also unpersuaded by the argument ably and tenaciously advanced by counsel on behalf of J.M. in this Court that a distinction should be drawn in this case between a decision in which the decision-maker gives a reason and a decision which discloses the reasoning of that decision-maker, and that the Assistant Commissioner failed to provide the latter. In my view, the text of the decision of 29 July 2024 was sufficient to explain both reason for that decision and the reasoning of the Assistant Commissioner.
79. Some decisions require that the decision-maker engage with factual material advanced by or on behalf of the person affected by those decisions. The degree of detail which a decision-maker must include in a decision depends on the nature of the decision.
80. There was no need for a decision on this simple issue relating to the reasons for J.M.'s suspension to go into detail. That issue was whether it was appropriate to continue to suspend J.M. Absent proof to the contrary, J.M. and the decision-maker were both taken to know the background. J.M. was facing disciplinary proceedings relating to his admitted sexual activity with an intoxicated teenager and was before a disciplinary Board which was expected to hold a hearing. This would make findings and recommend a sanction. The Assistant Commissioner was obliged to decide on further suspension for a period of up to three months on the assumption that the Board would proceed. The Assistant Commissioner was only concerned with whether continued suspension was appropriate for that 3 month period.
81. The terms of the decision made by the Assistant Commissioner were more than sufficient to explain to J.M. what was decided and why that decision was made, for the reasons which I have already explained.
82. I agree with the conclusion of my colleagues that the suspensions of J.M. remained holding suspensions. The power conferred on the Commissioner to continue the suspension of J.M. with effect from 1 August 2024 was not vitiated by "delay." J.M. was entitled to whatever fair procedures were appropriate to decisions to "renew" his holding suspensions for three months. First, he had a right to put factual material before the decision-maker to show that further renewal of suspension was not

warranted in the circumstances. Second, if the Commissioner intended to consider material which J.M. was not already aware of, he had a right to be told of this material so that he could make an appropriate submission in light of that material. Third, he had the right to an oral hearing if circumstances relating to the proposed decision warranted that course. For example, an officer facing disciplinary proceedings relating to serious insubordination might be given an oral hearing on an issue of whether return to work in a different area or on an undertaking not to engage in particular conduct would be acceptable as an alternative to suspension.

83. The Garda system of renewal of suspensions at the expiry of every 3 months allows suspended officers to advance factual grounds which might persuade the Commissioner not to suspend.
84. I do not accept the submissions that the failure of the Commissioner to respond to the letter from J.M.'s solicitor dated 18 July 2024 and the omission of any reference to that letter from the text of the decision to suspend him from 1 August 2024 invalidate that decision.
85. Most of the content of the letter dated 18 July 2024 relating to the suspension issue comprised submissions on the claimed legal effect of delay as preventing the Commissioner from exercising the power to suspend and requests for documents. The solicitors also asserted that the suspension was having an adverse effect on their client personally and professionally and asked that "alternatives to suspension" be considered.
86. It is inevitable that where a person is suspended from employment, that person will suffer significant adverse personal and professional consequences. The letter dated 18 July 2024 invited the decision-maker to consider whether J.M. should be allowed to resume duty in some unspecified capacity.
87. The issue for the Commissioner and Assistant Commissioner in relation to that matter remained the same at all stages since 2020. This was whether it would be appropriate to make an exception for J.M. or to continue to suspend him, having regard to what was desirable in the interests of the Garda Síochána.
88. The letter dated 18 July 2024 did not advance any new factual information. I do not consider that the solicitors raised any issue of substance which the Assistant Commissioner was required to address in his decision on suspension.

89. It was not necessary for the text of that decision to specifically refer to the generic complaint about the effect of the suspensions on J.M., or to respond to the vague suggestion that some “alternatives to suspension” be considered.
90. The Assistant Commissioner can be taken to have known that J.M. had been suspended for a significant period of time and that he was before the Board.
91. The term “options of alternatives to suspension” is taken from the Garda guidance document. The “alternative to suspension” is active duty. The role of the Assistant Commissioner was to decide either to suspend or not suspend. Those were the only scenarios available for consideration. The Regulations do not contemplate partial suspension which precludes an officer from some duties, though it might be that an officer who has been suspended arising from workplace relations issues would, on resumption of duties following suspension, be moved to a different role. This can be considered.
92. J.M. submitted in argument to this Court that the Assistant Commissioner failed to consider fashioning a decision which would allow him to return to duty in some role where he would not come into contact with the public. This was clearly inappropriate. The issue related to an allegation of serious misconduct which, if proved, brought An Garda Síochána into disrepute. The part of the guidance which refers to “options of alternatives to suspension” was clearly inapplicable to J.M.’s suspension. It was not necessary for the Assistant Commissioner to explain this.
93. Even if this course were possible, in my view the suggestion that the decision-maker consider “alternatives to suspension” was so vague as not to warrant any consideration by or specific response from the Assistant Commissioner. No circumstances were put before the Assistant Commissioner which demonstrated that it would be an appropriate alternative to suspension to give J.M. some back-office role.
94. Although I consider that it is not necessary to decide this issue in the circumstances of this application for judicial review, I have difficulty with the proposition that the law says that there comes a point where, because of delay or passage of time, a “scale-tipping” takes place so that the law confers extra rights on the person who has been suspended in order to secure fair procedures to them.
95. In this context it is not very productive to conduct an analysis of whether time has passed because of “delay” by investigatory or disciplinary authorities in order to determine whether the Commissioner is adhering to such obligations relating to fair

procedures as apply to decisions to suspend. Any such approach confuses two separate issues.

96. If an investigation or disciplinary procedure is beset by delay which is considered to be the responsibility of the employer, then the right of the employer to continue to suspend the employee ceases to be exercisable. This issue of whether the power to suspend has been lost as a result of delay is a separate issue to that of whether a decision-maker who is considering whether to renew or lift a suspension is acting fairly. The effect of passage of time on the officer is a factor which the Commissioner can take into account in deciding whether to continue a suspension in any case where that power continues to be exercisable.
97. In my view, passage of time while an investigation or disciplinary process is in train should not result in the Commissioner becoming subject to an obligation to permit a Garda officer to go on a fishing expedition within the suspension file to see if there is any basis on which the suspension can be challenged in legal proceedings.
98. It is useful to analyse the suspension process. A number of propositions are clear.
99. First, the issue is whether the matter under investigation or subject to disciplinary process is sufficiently serious to justify a decision to suspend. The core rules are the same in the law governing employment of public officials and private employees.
100. Second, assuming the matter is sufficiently serious, it is usually appropriate to continue the suspension until the termination of an investigative or disciplinary process, though circumstances may change and continuation of suspension may become inappropriate.
101. Third, suspension is an issue on which an employer or decision-maker is entitled to prefer the interests of the employer organisation. In the case of J.M., the decision-maker was obliged to determine whether each suspension "was desirable in the interests of the Garda Síochána." The purpose of a term in the engagement of an office-holder or employee which confers on an employer the right to impose a holding-suspension is to protect legitimate interests of the employer. That right cannot be used for any other purpose.
102. Fourth, courts exercising jurisdiction in judicial review or to give injunctive relief will not interfere with decisions on holding suspensions, so long as the power to suspend is exercised for a legitimate purpose and there is material which, considered objectively, would justify an employer in exercising the power. The courts cannot

intervene by substituting their own views on a matter which is in essence one of employer judgment of whether suspension is in the best interests of the employer.

103. Fifth, a decision on whether there should be a holding suspension, while affecting important employee rights, cannot be equated with a decision to dismiss unless there is proof that suspension is being misused. This may happen if there is no basis on which a reasonable employer would have imposed the suspension or because, on objective assessment, delay in the underlying investigatory or disciplinary process is such that the employer has ceased to be entitled to exercise the power to suspend pending termination of that process.
104. Sixth, the circumstances which are relevant to continued exercise of discretion to suspend or to maintain a suspension might change. The person who has been suspended has a right to bring factual material which is relevant to the decision to suspend to the attention of the decision-maker and request a reconsideration. The decision-maker is obliged to consider any submissions by the employee or office holder relevant to continuation of suspension, provided that they were made in good time. There might be a need to permit an oral hearing relating to a particular issue.
105. Seventh, whether or not an employer, who may also be the decision-maker, is in such default in proceeding with an underlying investigatory or disciplinary process as to cease to be entitled to continue a suspension is an objective matter on which a court may be asked to rule. Decision-makers entrusted with determining whether to impose a suspension are not obliged to entertain submissions on this or make quasi-judicial rulings that they are no longer empowered to suspend.
106. In this case the Assistant Commissioner was not obliged to consider or rule on legal submissions relating to whether the power to suspend had terminated as a result of delay, or on the validity of the proceedings before the Board. The premise on which the Assistant Commissioner was obliged to act was that the Board would proceed to a decision on the disciplinary matter and that he had power to make decisions on whether or not to suspend J.M. until the conclusion of the disciplinary process.
107. An issue of likely passage of time into the future might be relevant to a decision on renewal of a suspension. The solicitors for J.M. signalled their intention to challenge the disciplinary process by way of judicial review. Any such proceedings were likely to delay the conclusion of the disciplinary proceedings. Whether continued suspension was appropriate did not depend on who was responsible for passage of time or activities which might postpone the eventual resolution of the process. The issue was whether it continued to be appropriate to suspend J.M. for a further three months.

108. In my view, the line of reasoning which posits that at some moment during employment-related disciplinary proceedings a so-called "balance" may be found "to have tipped" so that the officer who is the subject of the decision becomes entitled to review material on which the Commissioner acted when making decisions to suspend, is unconvincing. It may well be that the officer is entitled to some of this material on foot of a "data" or "freedom of information" request, or even because it is necessary to provide an officer with an opportunity to meet material relevant to consideration of further suspension which that officer is not otherwise aware of. However, I do not agree that as a result of passage of time, or because of some delay which is the responsibility of An Garda Síochána, there comes a particular moment when fair procedures flowing from employment rights require that the Commissioner provides this information.
109. A holding suspension is either being used for a proper purpose or it is not. Delay in an underlying investigation or disciplinary process has either resulted in the complete or temporary loss of the right to exercise the right to suspend or it has not. Those issues can be objectively determined by the courts if there is a dispute as to whether an employer may exercise power to suspend.
110. Employers, including those in the public sector, have a duty (whether it be categorised as a public-law duty or as founded on an implied term in the contract of employment) to their employees to proceed with investigation and disciplinary processes with reasonable expedition. If these are not processed with reasonable speed there comes a point where the right of the employer to maintain the suspension ceases to be exercisable. This delay may be as a result of a deliberate misuse of holding suspension as a substitute for disciplinary suspension, or caused by neglect and dilatory behaviour. In the latter case the law looks at the effect rather than the intention. Is the delay such that the law considers that the power to suspend may no longer be invoked?
111. Even where there has been some degree of failure by an employer to proceed with an investigation or disciplinary proceedings with due diligence, it will not always follow that the consequence of this maladministration must be that the power to impose a holding suspension has been lost or that such a suspension will cease to be valid. For example, it might be appropriate to reinstate a suspension after a finding by a Board which recommends dismissal of a Garda officer. Doubtless, the officer affected by such a course would be afforded the opportunity to make representations as to why that course should not be adopted.
112. In cases where outside or semi-independent agencies or disciplinary adjudicators such as the Director of Public Prosecutions, the Garda Síochána Ombudsman

Commission and semi-independent boards of inquiry and appeal are involved in the process, there is only so much that the employer can do to expedite that process.

113. I am not persuaded by the argument that the reasoning of Baker J. in *Canavan v. The Commissioner of An Garda Síochána* [2016] IEHC 225 has the effect contended for by J.M. The first point is that Baker J. considered in *Canavan* that the suspension ceased to be a “holding suspension” so that fair procedures came to be relevant.
114. Only two types of suspension are contemplated by the terms of engagement of public office-holders and contracts of employment. The first is what is usually referred to as a holding suspension. That suspension applies where the person is being investigated and where disciplinary proceedings are taken which may result in dismissal. The other type of suspension is disciplinary suspension which is imposed as a punishment for breach of employee or office holder obligations.
115. Regulation 7 of the Disciplinary Regulations only contemplates “holding suspensions” pending resolution of investigations, prosecutions or disciplinary proceedings; not suspensions which can no longer be justified on grounds that those underlying processes are proceeding. If the rationale for a holding suspension has come to an end because the Garda authorities were not actively pursuing an investigation or disciplinary process, as was found in *Canavan*, the issues identified by Baker J. about giving a reason for continuation of a suspension could not arise. In such circumstances the invalidity in the suspension does not flow from an error in decision-making or breach of the rules of natural justice relating to the reasons for suspension, but from underlying circumstances which resulted in loss of the power to suspend. There was no necessity for the court to get into the issue of whether the Commissioner should state the reason “why continued suspension was considered necessary.”
116. The reasons for the renewal will normally be obvious. In this case the reason, which was obvious, was that J.M. faced a serious allegation which was before a disciplinary Board. If that allegation was sustained, it was likely to result in a recommendation for his dismissal. The subject matter of the charge he faced made it inappropriate that he be allowed to serve in any capacity pending the conclusion of the process.
117. Given that there was an active Board of Inquiry in the case of J.M., the justification for a continued holding suspension remained. While there is a requirement for the Commissioner to re-engage every 3 months with whether it is appropriate to continue with the holding suspension, this does not mean that the reasons given for a suspension must state the reason “why continued suspension was considered necessary.” So long as the Commissioner retains the power to suspend, “suspension” and “continued suspension” are often one and the same thing. The

reason for the suspension will often remain the same or much the same throughout the process.

118. In this case the core reason did not change. The only real changes concerning the seriousness of the allegations and the strength of the potential evidence related to the withdrawal of the rape allegation and the content of the "Section 97 Report." While the Commissioner could weigh any factual information provided to him on change of circumstances of J.M. and adverse effects flowing from passage of time, he could not be asked to entertain and rule on a legal submission that the legal effect of delay was to deprive him of his power.
119. In *Baynham*, Phelan J. at para. 158 gave the following possible rationale for a wider entitlement of suspended Garda officers to information relating to the reasons for their suspension:
- "I consider, however, that the Applicant is entitled, where possible, to information which allows him to be satisfied that relevant matters have been considered in respect of decisions to extend his suspension. These decisions are being made on an ongoing basis every three months. The information necessary to ensure that fairness is preserved in the decision-making process surrounding the periodic extension of his suspension notwithstanding investigation delays has been withheld in this case in breach of the Applicant's rights to fair procedures."
120. How would this play out in private employment law where issues relating to suspension are usually the subject-matter of applications for interlocutory injunctions rather than judicial review?
121. In my view, where the power of suspension may still be lawfully exercised there does not come a point where because of passage of time or an event a "scale-tipping" takes place so as to entitle a Garda officer who has been suspended to, in effect, go on a fishing expedition within the Commissioner's file to see if there is any basis on which his suspension can be challenged in legal proceedings. With respect, I would query the rationale of Phelan J. at para. 71 of her judgment in *Baynham* that a holding suspension "loses some of its character as such for the purpose of a consideration of the requirements of fair procedures where there is a failure to progress the process for which suspension has been triggered."
122. Even the use of the word "failure" in this passage causes difficulties. If apportionment of blame is to be part of the matrix of a decision on whether the so-

called “balance” has been “tipped,” this will become yet another point of contest to be decided in the courts.

123. This right is said to be necessary to secure the constitutional right to a good name of employees who have been suspended for a period of time which the law considers excessive. Many types of employment disciplinary procedures drag out for lengthy periods. There may be delays on the part of one side or the other or on the part of independent decision-makers at various stages in the process.
124. If an employee who has been suspended is subject to a criminal investigation or a serious disciplinary process, termination of that suspension while the underlying process continues will not vindicate the constitutional right to a good name.
125. The so-called “full panoply” of fair procedures does not apply to employment decisions. The decision-makers charged by public or private law with taking decisions on suspension will often have a management role in the employer organisation. The rule of “*nemo iudex in causa sua*” has limited application, and decision-makers on holding suspension are entitled to prefer the interests of the employer. Decision-makers on suspension are not best-placed to make a judgment call on who is to blame for passage of time which might trigger an obligation to open the suspension file to the employee, or on when passage of time gives rise to this obligation.
126. Nor do I accept the soundness of the rationale that the files must be opened up because disclosure is necessary to enable a suspended officer or employee to make “representations.” Insofar as representations relate to factual matters, any changes in factual circumstances which ought to be considered by the decision-maker will usually be known by both parties.
127. If the decision-maker, in the context of coming to a decision on whether to continue a suspension or lift a suspension proposes to consider matters which the employee is not aware of, that employee should be informed of the concerns and given an opportunity to respond. It is not necessary for Garda officers facing suspension to get a peep into the Commissioner’s file to be able to advance factual material which might persuade the decision-maker to decide in their favour. If there are particular policy or workplace relations considerations which the officer who seeks to make representations is not aware of, they should be disclosed.
128. In my view there is no duty based on procedural fairness which obliges the Commissioner and his delegates to open their files to a Garda officer who has been suspended so that the officer can be “satisfied” that the decision-maker has acted fairly and applied correct criteria in making the decision or to enable the making of

representations. No private employer has any such obligation to an employee who has been suspended either.

129. If delay in investigation or disciplinary proceedings is not considered sufficient to prevent exercise of the power of suspension on the basis that it has become a misuse, it is difficult to see why some undefined shorter passage of time should trigger rights of the person suspended to see even part of the suspension file? How much time should pass in any given case before the law confers this right? Why not from the outset of the process?
130. Phelan J. expressed the view at para. 113 of her judgment in *Baynham* that where disclosure is mandated as a fair procedure right, a blanket refusal to provide this material is unlawful because it may be "possible to put in place a mechanism which balances operational reasons with the Applicant's rights by informing the Applicant of the gist, if not the full detail, of the material relied on."
131. The rationale of the suggested right is to allow the person suspended "to be satisfied that relevant matters have been considered in respect of decisions to extend his suspension." If, as contemplated by the rationale for the suggested right, the person suspended has a right to see if a challenge can be brought to the suspension by showing that the decision-maker failed to act properly, inevitably, as in the case of J.M., the employee will look for the whole file.
132. I accept as a general proposition that a person affected by a decision in public law is entitled to be informed of any material which might adversely affect the decision-making process: see *Kiely v. Minister for Social Welfare* [1977] I.R. 267.
133. However, this general principle must be subject to some qualifications in the case of decisions on holding suspensions. The issue of whether a holding suspension should be imposed on an office-holder or employee is different in nature to other employment-related decisions to which the rules of natural justice apply.
134. Any consideration of the question of whether an employee or office holder facing a serious allegation or disciplinary procedure ought to be suspended may involve the decision-maker canvassing views within the employer organisation. These views may be expressed in terms which are hostile to the person whose suspension is being considered. Because the issue involves an assessment of trust and confidence in the context of an employment relationship these views can and must be received.
135. The law should not inhibit the expression of subjective views and frank exchanges on the issue of whether it is appropriate to have a person back in the workplace prior to

the conclusion of investigations or disciplinary proceedings. In my view, a ready right of employee access to this type of information will inevitably lead to suppression of candid discussion within employer organisations relating to holding suspensions.

136. I do not think that Phelan J. was suggesting in *Baynham* that employees who have been suspended should gain access to this type of material. However, the real purpose of many enquiries relying on the authority of *Baynham* will not be to discover the “gist” of the material relied on in deciding to suspend; a matter which will be usually known already. It will be an effort to get into the file to see if there is any basis for a legal challenge.
137. In this type of case the employee or office-holder will usually already know the reason why suspension is prima facie appropriate and the only issue will usually be whether there are facts which justify the making of an exception.
138. It is significant that J.M. did not confine his request to documents or information to “gist” of the material which the Commissioner would rely on in making the forthcoming decision on suspension. His letter dated 18 July 2024 demanded everything which the Commissioner held relating to all of his suspensions to date. This was clearly a bid to see whether the file contained anything which would enable him to challenge the suspensions in legal proceedings. I have difficulty in accepting that Phelan J. in *Baynham* considered that the law confers rights on employees to engage in this type of speculative trawl.
139. In this respect, J.M. was in the same position as the applicant in *Harrison v. Commissioner of An Garda Síochána* [2025] IEHC 303. He did not need any material from the suspension file to put a timely factual submission to the Commissioner as to why he should not be further suspended from 1 August 2024. He already knew that the “gist” of this material consisted of the materials grounding the disciplinary proceedings before the Board.
140. I also think that the “balance-tipping” test which determines by reference to “delay” or even by reference to passage of time the stage at which an employer or public-law decision-maker becomes obliged to provide the qualified disclosure of underlying materials relating to suspension is unworkable. It puts an onus on the suspension decision-maker to come to a view on whether this “balance” has been “tipped” with the risk that if the material is refused, a court will take the view that the wrong “call” was made and invalidate a suspension, without it being necessary for the person who was suspended to demonstrate that the decision-maker made an error which would justify setting the suspension aside.

141. Counsel for the Commissioner, in an effort to distinguish *Baynham*, submitted to this Court that *Canavan* was decided as it was because Baker J. concluded that there was "no ongoing criminal investigation." If this was Baker J.'s rationale for treating the suspension as invalid, it was an orthodox application of the law which made it unnecessary to investigate whether the Commissioner applied the rules of natural justice in deciding to impose a suspension. This was because the consequence of absence of any present or imminent criminal or disciplinary proceeding against the Garda officer deprived the Commissioner of power to make a holding suspension.
142. Bradley J., whose decision is being appealed by J.M., found himself in the position of being asked to give effect to the judgment in *Baynham*. He was asked to come to a view on when the so-called "balance" had "tipped." Bradley J. found that the so-called "balance" which entitled an officer being suspended to enhanced fair procedure rights had not "tipped" in favour of J.M. He arrived at this conclusion because the Commissioner retained the right to suspend.
143. It is difficult to see how a court could decide on what passage of time could result in this "tipping" of the "balance."
144. If J.M. were correct in his argument, a person who has been suspended from office or employment would, after some undefinable period had elapsed, be entitled to rely on refusal by a public decision-maker or a private employer to make the suspension file available as itself being a failure to provide due process in the taking of a decision on continuing a suspension.
145. Absent a challenge supported by proof of wrongdoing, public administrative bodies are assumed to have acted fairly and in accordance with their objectives and to only consider materials which are proper. In the case of private employers, the employee who wishes to challenge a suspension must provide proof that the power was incorrectly exercised or maintained in place.
146. An officer or employee who is contesting the legality of a decision to impose a holding suspension must prove that the decision-maker who has decided to impose that suspension has not acted lawfully. The challenger does not get to see the file in advance of the decision and a refusal to hand it over does not turn a lawful suspension into an unlawful suspension.
147. While I agree that Bradley J. did not make specific findings relating to other issues canvassed by J.M., I do not consider that these have any merit. This is because I consider that the reasons given by the Commissioner were sufficient in law and because what J.M. himself described in written legal submissions in the High Court

as the “limited submissions” contained in the letter of 18 July 2024, did not contain anything which merited an express response.

148. At the oral hearing before this Court, counsel for J.M. posited that High Court ought to have been provided with all of the material which was before the Assistant Commissioner when he made his decision. Counsel asserted that without that information there was no way of knowing whether the Assistant Commissioner signed a pre-prepared document without bothering to review any material. Counsel submitted that it was not clear whether the letter dated 18 July 2024 in which the solicitors complained was considered.
149. Given that the Assistant Commissioner was probably making a number of decisions on suspension of Garda officers in anticipation of expiry of their current suspensions, it may well have been the case that these documents were prepared in draft by subordinates in anticipation of his decisions. However, this would not have invalidated his decisions, so long as he considered the underlying material.
150. Counsel for J.M. submitted that the Commissioner was obliged to put in an affidavit setting out what materials were considered by the Assistant Commissioner in coming to his decision. He cited *R. v. Lancashire County Council, ex parte Huddleston* [1986] 2 All E.R. 941 at pp. 945-947 as authority for this. The observations of members of the English Court of Appeal on this issue were *obiter dicta*.
151. Donaldson M.R. considered that where the High Court has given leave to institute judicial review against a public authority, it becomes the duty of that authority to make full and fair disclosure. He considered that this duty flowed from a relationship of partnership between the courts, and bodies which derive their authority from public law, to maintain the highest standards in public administration. Parker J. was more circumspect on this. He considered that where leave was given the authority would “normally” have to explain what it did or did not take into account. He used the word “normally” because “applications for leave and the grounds on which they are granted vary enormously. So too do the answers which an authority may properly make.”
152. With respect to those judicial observations, an applicant for judicial review must make out a prima facie evidential case in relation to any relief claimed. It is a feature of many applications for judicial review that the statements of grounds, which are supposed to identify the precise ground on which a decision is being challenged and verify the factual basis for the challenge, are far from clear and do not verify the factual basis for the challenge.

153. The fact that leave has been granted does not alter this obligation of proof, which subsists during the hearing of the substantive application for judicial review. The mere fact that grounds of challenge based on assertions have been permitted by the terms of the order granting leave, does not cast an onus on a respondent to contradict unproved assertions.
154. An assertion which has not been substantiated by evidence does not become proved by virtue of the fact that the High Court has granted leave for judicial review, nor does it become substantiated by reason of the fact that the respondent chooses not to engage with it. This is especially so where the assertion is vague, and does not “pin the colours of the Applicant to the mast” on the case which is being made. Were matters otherwise, the proof required to support an application for judicial review would be reduced to making a claim that a decision by a public body should be set aside, based on vague assertions.
155. I would therefore place less reliance on the circumstance that leave has been given to challenge a decision by a public body as imposing an obligation on that body to positively establish that the decision was lawful. I am not convinced that the rationale, which is based on “reason to inquire” arising from the grant by the High Court of leave to bring the application for judicial review, is correct. In the present proceedings the allegations were very general. It was difficult to know what the Commissioner was being asked to respond to.
156. I am therefore not prepared to infer that the Assistant Commissioner did not consider the content of the letter dated 18 July 2024 or other materials merely because the Assistant Commissioner did not put in an affidavit dealing with these issues. I am only prepared to consider arguments that the content of that letter merited mention in the written decision on the assumption that he had it available to him. I am not prepared to speculate, as was suggested by counsel, that he was inadequately briefed or that he signed a document prepared by a subordinate without considering the underlying materials.
157. Irrespective of whether the Assistant Commissioner had that letter before him, he was not obliged to give a legal ruling on whether his power to suspend J.M. was vitiated by procedural delays. It follows that on that issue it was irrelevant whether he considered that or even saw the letter. His omission to mention that element of the letter in his decision, and his failure to reject the submission that he was not empowered to suspend J.M., was legally irrelevant.
158. Finally, even if I am incorrect in my conclusions on the absence of any legal consequences arising from the omission by the Assistant Commissioner to address the claims in the letter dated 18 July 2024 in his decision to suspend J.M., I would

not be prepared to set aside that suspension. I regard this as one of the exceptional cases where the decision would necessarily and inevitably have been the same. That J.M. should not remain suspended until the conclusion of the disciplinary proceedings against him, which were active in July 2024, would be a truly alarming result.

159. I would not be prepared to give any declaratory relief either. I take the view that there is a clear countervailing public interest in not quashing this suspension.
160. Furthermore, in my view, even if this point about prematurity in relation to the decision of the Assistant Commissioner on 29 July 2024 is not dispositive in relation to subsequent suspensions, there is no sound basis in fact or law for granting J.M. a declaration that the Commissioner acted unlawfully in failing to produce the documents sought. The judgment of the High Court in *Baynham* does not in fact support J.M.'s claim to be entitled to sight of the extensive documentation which he sought.