THE HIGH COURT
JUDICIAL REVIEW

[2026] IEHC 569

Record No. 2026/428 JR

BETWEEN

JOHN MULLIGAN

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 31st day of July, 2026

INTRODUCTION

1. On this application, the Respondent seeks to set aside an order granting leave to proceed by way of judicial review and dismiss the proceedings on the basis that the Applicant failed to pursue an adequate alternative remedy, namely the statutory appeal provided

under Regulation 33 of the Garda Síochána (Discipline) Regulations 2007 (S.I. No. 214 of 2007)("the 2007 Regulations").

2. The proceedings arise from disciplinary proceedings conducted pursuant to the Garda Síochána (Discipline) Regulations 2007 which culminated in a Report of a Board of Inquiry dated the 6th of March, 2026 and a subsequent decision of the Commissioner dated the 18th of March, 2026, directing the Applicant's dismissal from An Garda Síochána. The Applicant challenges both the Board's findings and recommendations and the Commissioner's decision adopting those recommendations.

3. On the 30th of March, 2026, the High Court (Simons J.) granted leave to seek judicial review in respect of:

I. An order of *certiorari* quashing the Report of the Board of Inquiry dated the 6th of March, 2026;

II. An order of *certiorari* quashing the Commissioner's decision dated the 18th of March, 2026.

4. The Court expressly reserved the issue of whether the statutory appeal mechanism under the 2007 Regulations constitutes an adequate alternative remedy to judicial review and permitted the Respondent to raise that issue by way of an application to set aside leave or as a preliminary issue.

5. In the same week that the question of whether the appeal constituted an adequate alternative remedy was reserved in this case, the Supreme Court delivered judgments in *Amariei v. The Chief Appeals Officer* [2026] IESC 22 (*Amariei*) and *A.B. v. Chief International Protection Officer* [2026] IESC 23 (*A.B.*). Given the proximity between the hearing of this application and the delivery of these judgments, it is not surprising that they were not relied upon in argument at leave stage or expressly considered in granting leave. They are, however, centrally relevant to the question of whether it is appropriate for the Applicant to proceed by way of judicial review when a remedy by way of appeal is available.

6. These are the second proceedings by way of judicial review commenced by the Applicant in respect of the disciplinary process. Judgment was delivered in May, 2025, in proceedings bearing record no. 2024/1012 JR in which Bradley J. refused relief on delay grounds in respect of the ongoing process and the Applicant's continuing suspension ([2025] IEHC 297). An appeal was taken to the Court of Appeal against the findings on the lawfulness of the Applicant's suspension only and was heard on the 4th of December, 2025, with judgment yet to be delivered.

BACKGROUND

7. The Applicant commenced training with An Garda Síochána on the 23rd of April, 2019 and was attested as a Garda on the 29th of November, 2019, at which point his probationary period commenced.

8. During his probationary period allegations arose concerning sexual activity with a 17-year-old female and driving whilst over the legal alcohol limit.

9. The Applicant was arrested and interviewed under caution on the 24th of August, 2020. He denied rape but admitted consensual sexual activity and admitted driving after consuming alcohol. The Applicant was suspended on the same date. A complaint was referred to GSOC under s. 102 of the Garda Síochána Act, 2005 ("the 2005 Act").

10. GSOC commenced an investigation under s. 98 of the 2005 Act and on conclusion of the investigation submitted a file to the Director of Public Prosecutions ("the DPP"). The section 97 report noted that the alleged injured party had withdrawn her cooperation from the s. 98 investigation. On the 13th of April, 2022, the DPP directed that no criminal prosecution be brought.

11. Following the DPP decision, GSOC initiated a disciplinary investigation under s. 95 of the 2005 Act and recommended disciplinary proceedings in relation to certain sexual activity with a 17-year-old female and driving while intoxicated. The recommendation in relation to sexual activity was directed towards the resumption of sexual activity as opposed to sexual activity over the entire evening.

12. A Board of Inquiry was established in 2023, pursuant to Regulation 25 of the 2007 Regulations to determine whether breaches of discipline had been committed by the Applicant and, if so, to recommend to the Respondent the disciplinary action to be taken in relation to the member.

13. Four breaches of discipline were raised against the member alleging discreditable conduct arising from admissions under caution to have engaged in sexual activity with a named female knowing or believing or being reckless as to whether she was too intoxicated to engage in same, admitting under caution to having driven while intoxicated and using his position as a member of An Garda Síochána to gain sexual favours from a named female by producing his Garda identification badge. The allegations were broader than recommended by GSOC insofar as the allegations of wrongdoing of a sexual nature were directed towards all sexual activity rather than the resumption of sexual activity and in dealing with an allegation that the Applicant showed a badge to the alleged injured party in order to obtain sexual favours from her.

14. Oral evidence was given during hearings before the Board by members of GSOC and Garda members involved in the investigation. The alleged injured party did not give evidence. It is claimed that it emerged during the hearing that she had withdrawn her complaint from the criminal investigation stating:

> *"The incident did happen. I just don't want to be a part of the investigation. I am happy to withdraw from this process."*

15. While the Applicant objected to the fact that the statement of withdrawal of complaint made in February, 2021, was only provided to him in August, 2025, the Board found that this information was not new information as the fact of withdrawal had previously been disclosed to the Applicant in the context of the GSOC investigation and was referred to in hand delivered disclosure materials given to the Applicant in April, 2022 and in the s. 97 report. In a ruling during the inquiry process on the 1st of December, 2025, the Board determined that the failure to produce the statement of withdrawal itself at an earlier stage did not vitiate the process and proceeded on the basis that the statement confirmed that the alleged injured party withdrew from the investigative process, without withdrawing her allegation. The Board further found that as three of the four breaches were based upon admissions that the Applicant made in the course of cautioned interview and the Board's function was not to re-investigate the alleged sexual assault, the significance of the statement to the inquiry was limited.

16. In addition to oral evidence, the Board had available to it documents created during the investigation process. The Applicant did not give evidence, did not call any witnesses on his behalf but was legally represented during the Board Inquiry. His solicitor examined witnesses and made submissions culminating in discrete rulings throughout the process, including an application that the process had been impermissibly delayed and should be discontinued, which was rejected.

17. Following hearings conducted between March, 2024 and February, 2026, the Board delivered its report on the 6th of March, 2026. The Board found four breaches of discipline proved, namely, sexual activity in an upstairs bedroom with a person believed to be intoxicated, sexual activity in a downstairs room with a person believed to be intoxicated, driving whilst intoxicated and using Garda credentials to obtain sexual favour or advantage. The Board recommended dismissal in respect of each breach.

18. On the 18th of March, 2026, the Commissioner accepted the recommendations and directed dismissal. The Applicant was informed of a right of appeal under Regulation 33 of the 2007 Regulations to be exercised within seven days of notification. The Applicant was also provided with a blank Form I.A. 51 Notice of Appeal.

19. The Commissioner's decision was personally served on the Applicant on the 20th of March, 2026, but he appears to have mistakenly told his solicitors and the Court at leave stage that it had been served on the 23rd of March, 2026, leading to the mistaken belief that when the leave application came before the Court on the 30th of March, 2026, he was still in time to bring an appeal under the 2007 Regulations.

20. The Applicant instituted judicial review proceedings and obtained leave from Simons J. *ex parte* on the 30th of March, 2026.

21. A Form IA.51 appeal notice was lodged on the 31st of March, 2026. By letter dated the 27th of April, 2026, the Applicant was advised that the Respondent had determined that the appeal was out of time and therefore invalid. By letter dated the 19th of June, 2026, the Applicant's solicitor wrote to the Respondent to request an extension of time pursuant to Regulation 50 of the 2007 Regulations. The explanation for the failure to issue the appeal in time and to justify an extension of time was that the Applicant had misinformed his solicitors of the date of receipt of notification of the decision, availability issues of the legal team and the decision not to open the High Court proceedings and seek a stay at an earlier stage. It was indicated that if the Respondent was amenable to exercising a discretion to extend time, the Applicant would agree to adjourn these judicial review proceedings generally. It was stated:

> *"our client is of the view that whilst an appeal does not amount to an adequate remedy to judicial review, it is a remedy which at least could be brought to a conclusion at a much earlier stage…..this concession is made entirely without prejudice to our client's right to fully contest the motion which you have issued in the event that you do not agree to extend time. Should you refuse to extend time it would certainly destroy any possible avenue our client has to exercise an alternative remedy and it may be necessary to raise this issue in the instant proceedings."*

22. By letter dated the 30th of June, 2026, the Respondent replied referring the Applicant to the fact that Regulation 33(1) of the 2007 Regulations provides for an appeal within 7 days and that the Applicant was so informed when notifying him of the decision and determined that in circumstances where the Applicant was personally served with the notification of the decision which detailed the timeframe for appeal, he was not satisfied that the reasons advanced justified an extension of time and refused the request.

23. By return letter dated the 30th of June, 2026, the Applicant's solicitor informed the Respondent that it was considered that the decision to refuse to extend time in order to deem the appeal valid was both unlawful and irrational and that an application would be made to court to amend the Statement of Grounds in these proceedings in order to challenge same.

24. The Applicant exhibited a proposed amended Statement of Grounds in a replying affidavit filed to this application to set aside leave sworn on the 3rd of July, 2026 in which he sought relief in respect of the refusal of an extension of time.

25. By further affidavit sworn on the 14th of July, 2026, the Applicant's solicitor exhibited further correspondence with the Respondent dated the 13th of July, 2026, in which the Commissioner's attention was drawn to Regulation 34(1) of the 2007 Regulations which provide that the Commissioner shall, as soon as practicable after receiving notice of appeal from the member concerned, establish a board to hear and determine the appeal and shall transmit the notice of appeal to it and under Regulation 34(2) the Appeal Board may refuse to consider an appeal where the notice of appeal was not given within the period specified in Regulation 33(1). It was pointed out that under Regulation 50 any time limit provided for by the 2007 Regulations for the doing of anything by the member concerned may be extended by the Commissioner or, where appropriate, by the Appeal Board if the Commissioner or Appeal Board is satisfied that an extension is justified. It was submitted with reference to these provisions that the regulations mandate the Commissioner to establish an Appeal Board on receipt of "*notice of appeal*" and that the Appeal Board is the body empowered to determine whether that appeal is out of time and not the Commissioner.

26. Accordingly, it was contended that the question of whether the time period ought to be extended is a decision for the Appeal Board and not the Commissioner. The Respondent was advised that if he did not confirm within 7 days that an Appeal Board was established in accordance with the regulations, the right to seek protection of the court was reserved. A second draft Amended Statement of Grounds was exhibited in which additional relief was sought by way of mandamus compelling the Respondent to empanel an Appeal Board on the basis that the Respondent is obliged to do so under the 2007 Regulations with the question of extension of time to be determined by the Appeal Board thereafter.

27. Although the Applicant's solicitor averred in this affidavit that in the event that the request that an Appeal Panel be empanelled to determine the extension of time issue was not acceded to that he proposed to apply to amend the Statement of Grounds as per the second draft amended Statement of Grounds exhibited, this application was not moved before me. Instead, counsel for the Applicant indicated that, if necessary, separate judicial review proceedings would be commenced.

APPLICATION FOR LEAVE

28. The application for leave was moved *ex parte* before Simons J. on the 30th of March, 2026. I have the benefit of a written judgment on that leave application.

29. As apparent from his judgment, Simons J. was dealing with an application, *inter alia*, for leave to challenge the Board of Inquiry Report dated the 6th of March, 2026, leave to challenge the Commissioner's decision dated the 18th of March, 2026 dismissing the Applicant from An Garda Síochána and interim relief restraining his dismissal pending determination of the proceedings.

30. Simons J. noted at the outset that the urgency had diminished because there remained an opportunity for the Applicant to lodge a statutory appeal under the Garda Síochána (Discipline) Regulations 2007, which would have the effect of preventing implementation of the dismissal decision. Simons J. noted in his written summary of the background that the Commissioner had issued a notice under Regulation 31 indicating his intention to dismiss the Applicant from An Garda Síochána and that decision followed a recommendation of a Board of Inquiry which had similarly recommended dismissal. He set out that the Applicant alleged that the disciplinary proceedings had been fundamentally unfair and that the findings and recommendations were irrational, unsupported by evidence and disproportionate. Simons J. recognised that the disciplinary process had already reached its conclusion and that dismissal was imminent unless some legal step was taken.

31. The judgment identifies one issue as the central focus of the leave application, namely, that a complaint had originally been made by a young female concerning the Applicant's conduct and a criminal investigation had followed. It was noted that the complainant subsequently withdrew her complaint but the Board of Inquiry nevertheless proceeded on the basis that the withdrawal related only to the criminal investigation process and not to the underlying allegations themselves. In short, the Board treated the position as one where the complainant had withdrawn from participation in the criminal process but had not withdrawn the substance of the allegations and that disciplinary proceedings could therefore continue. The Applicant argued that this approach was unlawful.

32. Simons J. carefully emphasised the limited nature of the leave stage identifying that the question was not whether the Applicant would ultimately succeed but rather whether he had demonstrated an arguable or stateable case. The judge described this as a low threshold test. Having reviewed the materials, the Court concluded that the threshold had been met. In particular, the withdrawal of the complaint was identified as a "*complicating factor*". Simons J. observed that the Board had attempted to address that issue but it was arguable that the Board was not entitled to approach the withdrawal in the way that it did. Simons J. stressed that he was not determining that the challenge was strong, he was not finding that the challenge would succeed, he was only deciding that the issue was sufficiently arguable to justify judicial review proceedings.

33. The Court noted that additional grounds had been advanced. Although the judgment does not analyse those grounds individually, Simons J. regarded them as related to, or complementary to, the principal complaint concerning the treatment of the withdrawal of the complaint. On that basis, leave was granted in respect of all grounds pleaded.

34. The most significant procedural aspect of the judgment concerns the existence of a statutory appeal process which was then expressly addressed. Simons J. observed that under the 2007 Regulations the Applicant had a right of appeal to an Appeal Board. The Court noted the Applicant remained within time to lodge such an appeal, an appeal would automatically prevent implementation of the dismissal and the parties disputed whether the appeal constituted an adequate alternative remedy. The Court had been referred to the Court to *O'Reilly v Commissioner of An Garda Síochána* [2018] IECA 3. Simons J. observed that the Court of Appeal in that case had suggested that the appeal mechanism under the Regulations may amount to something akin to a full rehearing but he considered that the precise scope of the appeal mechanism had not been finally determined, the observations in *O'Reilly* might not be decisive and the alternative remedy issue therefore remained open.

35. The judgment records that the Applicant wished to pursue judicial review rather than rely exclusively upon the appeal procedure. The Applicant's concern was that lodging an appeal might later be characterised as an acceptance that the appeal was the appropriate remedy. Simons J. expressly acknowledged this concern and that the Applicant had indicated that he was willing to lodge the appeal but this would be done solely to avoid immediate dismissal and it would be done without prejudice to his contention that judicial review remained available.

36. The Court regarded the proposed appeal as a practical mechanism that removed much of the urgency from the matter. The consequence of lodging the appeal would be that dismissal could not be implemented and the Applicant's position would be protected pending further litigation thereby avoiding the need immediately to consider an injunction. Importantly, Simons J. stated that lodging the appeal should not be construed as a concession that the appeal represented the appropriate or exclusive remedy.

37. Rather than deciding the issue of whether the appeal constituted an appropriate remedy, Simons J. deliberately left the question open. The Court ordered that leave be granted without any determination on whether the appeal constituted an adequate alternative remedy expressly stating that the issue remained open and the Respondent was entitled to argue that point later. He specifically preserved the Respondent's right to raise the issue by application to set aside leave or preliminary issue or by argument at the substantive hearing.

38. As an appeal could still be lodged and because such an appeal would prevent dismissal, Simons J. considered that it was unnecessary to grant a stay or interlocutory injunction at that stage. The Court preferred not to make such an order without hearing the Respondent and therefore declined to grant immediate interim relief. Although declining immediate relief, the Court provided a procedural mechanism for the Applicant to return to court. The judge granted liberty to issue a further motion seeking an interlocutory injunction restraining implementation of the dismissal decision.

39. The Court proceeded to make an order granting leave to seek *certiorari* quashing the Board of Inquiry report and *certiorari* quashing the Commissioner's dismissal decision.

40. The judgment is notable both because the Court found that the Applicant had an arguable challenge concerning the Board's treatment of the complainant's withdrawal and granted leave on that basis and because the Court deliberately avoided deciding whether the statutory appeal process constituted an adequate alternative remedy. Instead, the question was expressly reserved for future determination. The Order of the Court as perfected expressly stated:

> *"the leave granted by the Court pursuant to the Order herein is without the Court having made a determination on whether the right of appeal to an Appeals Board under the Garda Síochána (Discipline) Regulations, 2007 represents an adequate alternative remedy to judicial review ...and that the said issue remains open.*
>
> *the Respondent is entitled to raise the alternative remedy point either*

(i) *at the full hearing of these proceedings or*

(ii) *at an earlier date by way of an application to set aside the leave granted herein or*

(iii) *by way of a preliminary issue in advance of the trial of the action."*

41. This reservation ultimately prompted the Respondent's subsequent motion seeking to set aside leave and dismiss the proceedings for failure to pursue the appeal procedure which is now before me for determination.

LEGISLATIVE PROVISIONS

42. The disciplinary process in this case originates in the statutory framework established under the 2005 Act. Section 102 of the 2005 permits GSOC to undertake investigations in the public interest. Following the allegations made in August 2020, GSOC commenced a Public Interest Investigation under s.102(4). The investigation led to the compilation of a criminal investigation file and referral to the DPP.

43. Following the conclusion of the criminal investigation and the DPP's direction not to prosecute, the matter proceeded as a disciplinary investigation under Part 4 of the 2005 Act. Under that part, s. 95 empowers GSOC (now Fiosrú) to investigate whether a member of An Garda Síochána may have committed a breach of discipline. The section requires that before any report is finalised, the member concerned must be afforded an opportunity to be heard and to make submissions.

44. Under s. 97 of the 2005 Act the GSOC disciplinary investigation report and recommendations are submitted to the Commissioner. In the present case, the GSOC investigator completed a Section 97 Report on the 22nd of November, 2022. The report recommended disciplinary proceedings in relation to alleged inappropriate sexual activity with an intoxicated 17-year-old female; and driving whilst intoxicated.

45. The central legislative instrument governing the process at the heart of these proceedings is the Garda Síochána (Discipline) Regulations 2007 (SI No. 214 of 2007)("the 2007 Regulations"), as amended. Virtually every stage of the proceedings, from the Board of Inquiry through to the Commissioner's decision and appeal procedures, occurred pursuant to these Regulations.

46. Regulation 5 of the 2007 Regulations identifies conduct constituting disciplinary breaches and incorporates the Schedule to the Regulations. As summarised above, the Applicant was charged with four alleged breaches of "*Discreditable Conduct*", namely:

I. Sexual activity in an upstairs bedroom whilst knowing or believing the complainant was intoxicated.

II. Sexual activity in a downstairs room whilst knowing or believing the complainant was intoxicated.

III. Driving whilst intoxicated.

IV. Using his Garda identification badge to obtain sexual favour or advantage.

47. The Board ultimately found each allegation proven and determined each constituted "*Discreditable Conduct*" within the meaning of Regulation 5. "*Discreditable Conduct*" is not separately defined in a detailed narrative form. Rather, it is identified in the Schedule to the Regulations as a breach of discipline. The relevant entry provides that a member commits a disciplinary offence where he or she:

> *"Acts in a disorderly manner or in any manner prejudicial to discipline or likely to bring discredit on An Garda Síochána."*

48. Regulation 25 of the 2007 Regulations provides for establishment of a Board of Inquiry where serious disciplinary allegations arise. A Board established in respect of the Applicant was constituted in September, 2023. Regulation 29 regulates the conduct of Board of Inquiry hearings. Particularly significant are the Board's powers to hear evidence, receive documentary evidence, determine procedural matters and make findings of fact.

49. Regulation 30 of the 2007 Regulations provides that following completion of its inquiry, the Board must determine whether breaches of discipline occurred and what recommendation should be made concerning sanction. In this case, as set out above, the Board found all four breaches proven and recommended dismissal in respect of each breach.

50. Regulation 31 of the 2007 Regulations provides for consideration by the Commissioner of the Board's findings and recommendations. Pursuant to Regulation 31, the Commissioner considered the Board's report and accepted the recommendations. A Form IA.37 decision issued on the 18th of March, 2026, directing dismissal. This decision is one of the measures challenged in these proceedings.

51. Regulations 33–37 of the 2007 Regulations set out the appeal process and are central to the Respondent's preliminary objection and "*adequate alternative remedy*" argument.

52. Under Regulation 33 a member may appeal against the Board's determination, the Commissioner's disciplinary decision or both. The appeal must be lodged:

> *"not later than seven days after receiving notification of the decision of the Commissioner".*

53. The Respondent relies on this provision to argue that the Applicant had an available remedy and, while the Applicant failed to avail of it in time, judicial review should therefore not proceed.

54. The breadth of Regulation 33(3) is particularly important because it demonstrates the extensive scope of the appeal process. An appeal may be based on a range of grounds including non-compliance with the Regulations, findings not justified by the evidence, failure to ascertain or consider facts, failure to afford an opportunity to be heard and disproportionate sanction.

55. Once a valid appeal is lodged, Regulation 34 requires establishment of an Appeal Board. The Board functions independently and is empowered to determine its own procedures subject to the Regulations. This feature of independence is relied on by the Respondent when contending that the appeal process constitutes an adequate alternative remedy.

56. Regulation 36 gives the Appeal Board extensive powers. Under Regulation 36, the Appeal Board may receive oral evidence, receive written evidence, invite additional evidence, hear submissions and permit representation and accompaniment of the member concerned.

57. The Respondent argues that these powers demonstrate that the appeal process is not merely supervisory but constitutes a substantive adjudicative mechanism capable of correcting factual and procedural errors.

58. Regulation 37 confers broad remedial powers. The Appeal Board may affirm findings, quash findings, substitute lesser disciplinary sanctions and direct establishment of a new Board of Inquiry. These powers are highly significant because, on the Respondent's case, they permit effective remedies without requiring recourse to judicial review. The Respondent relies heavily upon Regulation 37 in arguing that the statutory scheme provides a complete, effective and adequate remedy.

59. Regulation 33(4) provides that where no appeal is lodged within the prescribed period, the Commissioner shall proceed to implement the disciplinary sanction concerned.

60. Regulation 45 provides for the process to apply where there has been referral by GSOC of a report under s. 97 containing a recommendation in relation to disciplinary action in respect of less serious breaches of discipline. Disciplinary sanction is not decided by GSOC but is determined on foot of a new process under the 2007 Regulations, albeit in reliance on the statement of facts established by the GSOC investigation and included in the s. 97 report.

61. Regulation 46 establishes further procedures that apply in respect of allegations of serious breaches of discipline and is the Regulation relied upon in the disciplinary action against the Applicant. As under Regulation 45, the decision to pursue a disciplinary process is not a decision for GSOC. Regulation 46 vests the Commissioner with a discretion to convene a formal Board of Inquiry to investigate disciplinary breaches where, as in this case there has been a GSOC investigation under s. 95, and the report under s. 97 includes a recommendation that disciplinary proceedings should be instituted against the relevant member under these regulations. This power is exercisable by the Commissioner only where it also is apparent to the Commissioner, having regard to the statement of facts established by the GSOC investigation and included in the s. 97 report, that the member may have been in breach of discipline and may be subject to a disciplinary sanction as referred to in Regulation 22.

62. Regulation 50 provides that any time limit that is provided for by the 2007 Regulations by the member concerned may be extended by the Commissioner or, where appropriate, by the relevant Appeal Board, if either the Commissioner or Appeal Board is satisfied that there is justification for extension.

SUBMISSIONS

63. The Respondent submits that the Applicant had a comprehensive statutory right of appeal available under Regulation 33 of the 2007 Regulations. The appeal mechanism is broad and allows challenges on grounds effectively mirroring the complaints raised in the judicial review proceedings, including procedural irregularity, failures in fact finding, evidential sufficiency, and proportionality of sanction. It is submitted that the

Appeal Board possesses significant adjudicative powers, including hearing witnesses, receiving fresh evidence and setting aside findings. As judicial review should not be invoked where a specialist statutory appeal mechanism exists and has not been exhausted, the Respondent contends that the order granting leave should be set aside.

64. The Respondent further contends that as the Commissioner's decision was served on the 20th of March, 2026 and the Form IA.51 appeal was not lodged until the 31st of March, 2026, the appeal was outside the seven-day period prescribed by Regulation 33 and is invalid. Nonetheless, it is the Respondent's position that the Applicant should not be permitted to bypass the statutory appeal process through judicial review.

65. In resisting the application, the Applicant contends that the disciplinary process was fundamentally unfair. The principal complaint made is that the Board improperly relied on allegations connected to a complainant who had withdrawn from the process. It is further contended that the Board's findings were irrational, unsupported by evidence and disproportionate.

66. The Applicant's position is that the judicial review challenges extend to the legality and fairness of the process itself and are not adequately addressed through the disciplinary appeal scheme. Furthermore, the appeal lodged was expressly stated to be without prejudice to the judicial review proceedings.

APPLICABLE PRINCIPLES

67. On an *ex parte* application for leave to apply for judicial review, the governing test remains that set out by the Supreme Court in *G v DPP* [1994] 1 IR 374, as repeatedly applied in subsequent cases including *Gordon v DPP* [2002] 2 IR 369 (set-aside application).

68. An applicant for leave must satisfy the Court, on a *prima facie* basis, that:

I. the facts averred, if proved, would support the relief sought.

This means that the affidavit evidence must disclose facts which are capable, if ultimately established, of supporting the relief claimed. Mere assertion or speculation is insufficient.

II. There is an arguable or stateable case in law.

This means the applicant must show an arguable or stateable case and the threshold is deliberately low. The applicant is not required to show that he or she will succeed, merely that there is a legal argument worthy of consideration at a substantive hearing.

III. Judicial review must be an appropriate remedy.

This means that the applicant must demonstrate that judicial review is the appropriate procedure and that there is not another effective remedy which should ordinarily be pursued instead. This includes consideration of statutory appeals, alternative procedures and other remedies which might be equally or more effective.

69. In the normal course, therefore, deciding that judicial review is an appropriate remedy because there is no other effective remedy available is part of the test governing the grant of leave and a decision to grant leave reflects a decision by the leave judge that he or she is satisfied in this regard. This was recently reiterated in *Amariei* where, at para. 101 of the judgment, the Supreme Court took the opportunity to reframe the test to be met by an applicant who seeks leave to apply for judicial review confirming that the applicant for judicial review must satisfy the court that they have arguable grounds (or substantial grounds where the law so requires) to establish that they come within one of the exceptions to the general rule that the alternative remedy must be exhausted prior to judicial review. The Supreme Court added:

> *"where it is clear from an assessment of the principles and their application in existing precents that a remedy is adequate and alternative one, the facts and*

circumstances of the specific case will only rarely require that the court's discretion be exercised in the exigencies of justice in favour of the availability of judicial review."

70. The Supreme Court repeated the obligation to consider any possible alternative remedy when deciding on a grant of leave in its statement of principles at para. 105 of the judgment (particularly viii thereof). Reference was made in this context to the power of the court to adjourn the application for leave until an appeal is determined or the time for appealing has expired, albeit that the Court determined that there was nothing to be gained in *Amariei* from taking such a course as the appellant would have his case fully determined by the Tribunal and the resulting decision would not be dependent on anything that occurred before the IPO.

71. The applicable test to an application to set aside the grant of leave to proceed by way of judicial review is authoritatively derived from *Adam & Iordache v Minister for Justice* [2001] 3 IR 53 and *Gordon v DPP* [2002] 2 IR 369, and is summarised succinctly in the more recent decisions of *Kelly v An Bord Pleanála* [2022] IEHC 238 and *Doyle v Amatrek Ltd v Dublin City Council* [2025] IEHC 441, but these are all cases where the Court granted leave *simpliciter* without a caveat that it was leaving over an issue which arises for determination as part of the test for the grant of leave.

72. It is established that once leave has been granted, the High Court has an inherent jurisdiction to set aside that leave. However, it is further established that the jurisdiction is to be exercised very sparingly, only in exceptional cases, and only where it is a very plain case that leave should never have been granted. On an application to set aside, it is clear from the jurisprudence that the court is not asking whether it would itself have refused leave at the *ex parte* stage. Rather, it asks whether the grant of leave was plainly wrong and whether the proceedings are clearly unmeritorious or unsustainable.

73. A critical feature of the jurisprudence is that the burden lies on the party seeking to set aside leave. As stated by Fennelly J. in *Gordon v DPP*, the applicant for leave only had to show an arguable case and the party seeking to set aside leave must establish the negative proposition that leave should never have been granted. Accordingly, the burden on the moving party is heavier than the burden initially borne by the applicant at leave stage.

74. The authorities repeatedly warn against allowing a motion to set aside leave to become a rehearsal of the substantive hearing. The Supreme Court in *Gordon v DPP* emphasised that to permit such motions to operate as a pre-emptive hearing of the substantive proceedings would defeat the purpose of the judicial review machinery. Similarly, Holland J. in *Kelly v An Bord Pleanála* stressed that these applications should not become mini-trials which increase costs and delay.

75. The jurisdiction to set-aside is not confined to non-disclosure cases. Leave may be set aside where it is demonstrated, for example, that the proceedings are plainly unsustainable, there is no arguable case, the application is frivolous or vexatious, there has been material non-disclosure, there has been bad faith or lack of utmost good faith, a clear absence of standing, a clear and dispositive alternative remedy exists or subsequent facts show the proceedings cannot succeed. But even in these situations, the court must still be satisfied that this is an exceptional and very clear case.

76. In my view, *Amariei* and *A.B.* do not alter the applicable test on a motion to set aside leave. The jurisdiction remains that identified in *Gordon v. DPP*, namely that leave should be discharged only in exceptional circumstances and only where it is clear that leave ought not to have been granted. What *Amariei* and *A.B.* do alter, however, is the substantive assessment of whether a statutory appeal constitutes an adequate alternative remedy and the circumstances in which judicial review may be invoked notwithstanding the existence of such a remedy. In this case, therefore, the question is not whether I would have granted leave had I been hearing the application after *Amariei* and *A.B.*, but whether, viewed through the lens of those subsequent authoritative statements of principle, it is now clear that the Applicant had no arguable basis for bypassing the statutory appeal process. If that is so, then the high threshold identified in *Gordon* is met.

ANALYSIS AND DECISION

The Effect of the Leave Judgment of Simons J.

77. An unusual feature of this case is that while it is necessary to be satisfied that judicial review is the appropriate remedy when granting leave, in the present proceedings, this is the very issue reserved by Simons J., namely whether the appeal mechanism under Regulations 33–37 of the 2007 Regulations constituted an adequate alternative remedy. There is an obvious tension, and perhaps even a contradiction, in asserting on the one hand that the question is being left over, whilst at the same time granting leave to proceed by way of judicial review because leave should only be granted when the court is satisfied that an arguable basis for contending that there is no effective, alternative remedy available has been demonstrated.

78. The question which arises for me is what implications, if any, flow from the fact that Simons J. seemed to leave over this question for determination on a set-aside application or as a preliminary issue or during the proceedings, for the test which I must apply on this application. On the one hand there is a suggestion that the issue has not been decided, whereas on the other hand it is implicit that in granting leave, the Court has decided for leave purposes that it is arguable that there is no adequate, alternative remedy.

The Applicable Test on an Application to Set Aside Leave

79. Very few of the authorities identified to the Court concern cases where the application to set-aside was advanced on the basis that an adequate alternative remedy existed. *Gordon v DPP* [2002] 2 IR 369 concerned an application to set aside leave where the respondent argued that the applicant should have pursued an appeal rather than judicial review. Although the case arose in the criminal context, the Supreme Court dealt expressly with the interaction between the grant of leave, the existence of an alternative remedy and a subsequent application to set aside leave.

80. In *Gordon*, leave had been granted to challenge a District Court conviction by way of judicial review. The respondents successfully applied in the High Court to set aside leave on the basis that the matters could be resolved by way of appeal to the Circuit

Court and judicial review was therefore inappropriate. The Supreme Court reversed that decision. Fennelly J. stated that the existence of an alternative remedy is one of the matters which should be considered at the leave stage, but the existence of an appeal does not automatically preclude judicial review. The Court relied on *State (Abenglen Properties) v Dublin Corporation* [1984] IR 381 and emphasised that there may be circumstances where c*ertiorari* remains available notwithstanding an appeal. Most importantly for present purposes, the Supreme Court held that the respondents had not shown that leave plainly should not have been granted, even though there was an available appeal.

81. *Gordon* is therefore authority for the proposition that the mere existence of an alternative remedy is not enough, on an application to set aside leave, to satisfy the threshold required for the discharge of leave. The respondent must show that leave plainly should never have been granted.

82. Given that Simons J. expressly identified the alternative-remedy issue, discussed *O'Reilly*, and deliberately reserved the point for later determination, it seems to me that Simons J. recognised the issue of whether the appeal was an adequate, alternative remedy as genuinely arguable. I have concluded that his decision must be understood, therefore, as a finding that it is arguable that there is no adequate, alternative remedy but that a court, on further hearing and consideration and with the benefit of submissions from the Respondent, could conclude that an adequate, alternative remedy existed disentitling the Applicant to relief by way of judicial review on a set aside application, as a preliminary issue or in a decision following a full hearing.

83. It is clear from the case law that even if a Court were ultimately to conclude that the Regulation 33 appeal was an adequate alternative remedy, this does not automatically mean that leave should have been set aside on a preliminary application of this nature. Under *Gordon*, the question on a motion to set aside is whether it is a very plain and exceptional case in which leave plainly ought never to have been granted. As clear from *Kelly v An Bord Pleanála* [2022] IEHC 238, leave should be set aside only in exceptional cases, only where it is a "*very plain case*" and where it is clear that leave should not have been granted. I have therefore concluded that on this application the Respondent must establish that the leave granted by Simons J. was plainly and clearly wrong and this is one of those rare cases in which the Court should exercise its inherent jurisdiction to set aside leave. The burden rests upon the Respondent and is heavier than the burden borne by the Applicant at the *ex parte* leave stage. A motion to set aside leave should only succeed where the absence of an arguable case is clear.

The Impact of Amariei and A.B.

84. Despite the careful consideration of the alternative remedy issue in this case by Simons J. at leave stage, the argument that leave should plainly never have been granted is open having regard to the Supreme Court judgments in *Amariei v. The Chief Appeals Officer* [2026] IESC 22 (*Amariei*) and *A.B. v. Chief International Protection Officer* [2026] IESC 23 (*A.B.*) which preceded the application for leave in this case by days only and which were not opened to the Court at leave stage nor considered by Simons J. in granting leave. Although not applications to set aside leave, these Supreme Court authorities are the most recent statements of the alternative remedy doctrine itself, and they reflect an important recalibration of the law in this area.

85. In *Amariei* and *A.B.* the Supreme Court stressed that the statutory appeal mechanism is ordinarily the appropriate remedy for errors occurring during a decision-making process. Judicial review before completion of the appeal process will generally only be available where there is a fundamental denial of justice, a systemic defect or an appeal is incapable of curing the identified defect. The central principle emerging from *A.B.* and *Amariei* is that judicial review ordinarily should not interrupt a statutory appellate process capable of correcting the alleged defect. Intervention by way of judicial review before exhaustion of the appellate process should be exceptional and judicial review is generally not available where a full merits appeal remains available.

86. The decisions also clarified the test at leave stage as *A.B.* expressly states that the court hearing an *ex parte* leave application has an obligation to consider any possible alternative remedy at the leave stage. The Supreme Court further states that where there is an alternative remedy the applicant must satisfy the court that there are arguable (or substantial depending on the applicable threshold) grounds for bringing himself within an exception to the general rule requiring exhaustion of that remedy. Thus, after *A.B.*, the leave judge cannot simply ask if there is an arguable judicial review ground, the judge must also ask whether there is an arguable basis for saying judicial review remains available despite the existence of an appeal.

87. The key holding in *A.B.* appears at paragraphs 72–98 where the Supreme Court reaffirms the default position is that the appeal should be pursued, expressly stating:

> *"The default position is that a party should pursue a statutory appeal or review rather than initiate judicial review proceedings."*

88. The Court reiterated that judicial review is exceptional where an alternative remedy exists and that cases where judicial review will be permitted are exceptions to the general rule. The Court rejected the proposition that merely alleging a breach of fair procedures allows a litigant to bypass a statutory appeal. Indeed Donnelly J. expressly held that the default position applies even to breaches of natural and constitutional justice. That is a stronger statement than had traditionally been understood from some earlier authorities.

89. The exceptions are very narrow post *A.B.* where the Supreme Court stated that judicial review may remain available despite an adequate appeal only where the alleged breach amounts to "*a fundamental denial of justice*" such that the hearing cannot properly be regarded as a hearing at all or where a fundamental requirement has been ignored. At paragraph 92 the Court explained that the relevant concepts are default of fundamental requirements, fundamental denial of justice and fundamental flaw in the decision-making process. The Court deliberately rejected any sliding scale based on "*degrees of unfairness*." The Court expressly disapproved a broad reading of *Stefan* cited as authority for the proposition that a fair appeal does not cure an unfair hearing, stating that this proposition "*did not and does not represent the position at law*."

The Appropriate Approach in this Case

90. There is little doubt that these recent Supreme Court decisions strengthen the Respondent's adequate-alternative-remedy argument and would have weighed heavily against the grant of leave if considered at leave stage. As summarised above, under the 2007 Regulations the Appeal Board may consider non-compliance with the Regulations, evidential sufficiency, failure properly to ascertain facts, denial of a reasonable opportunity to be heard and proportionality of sanction. The Appeal Board may hear evidence, receive further material, quash findings, substitute sanctions and direct a fresh Board of Inquiry. Viewed through the lens of *Amariei* and *A.B.*, this is precisely the kind of specialist statutory mechanism which the Supreme Court appears to regard as ordinarily requiring exhaustion before judicial review is entertained.

91. When granting leave in this case, Simons J. recognised the existence of the Regulation 33 appeal, discussed whether it might be an adequate alternative remedy, expressly declined to determine the issue and granted leave while reserving the point for later determination. The difficulty is that the decisions in *Amariei* and *A.B.* were not before him when he delivered judgment on the 30th of March 2026. It is worthy of note that in his more recent decision in *H v H* [2026] IEHC 402, Simons J. considered the question of adequate alternative remedy on a leave application in the light of the decisions in *Amariei* and *A.B.* in refusing leave on some grounds and granting it on others. In his judgment he referred to the principles established or restated in those judgments to the effect that the default position is that statutory appeals should be exhausted but exceptions exist where there is a fundamental defect such that the statutory jurisdiction was not lawfully exercised as intended.

92. In *H v. H*, Simons J. granted leave only in respect of those grounds, established to a threshold of arguability, which concerned the alleged failure to comply with the statutory participation and representation safeguards for the relevant person and related grounds on the basis that the grounds pleaded allege a fundamental defect in compliance with the statutory process. He observed that the Circuit Court's jurisdiction under the Assisted Decision Making (Capacity) Act, 2015 is conferred on the premise that the relevant person's participation will be permitted, encouraged and facilitated so far as practicable and that his or her will and preference will be addressed in the manner required by the Act such that a failure to comply with those core requirements is capable of amounting to a fundamental defect in the statutory process. He also had regard to the public importance of the issues raised which concerned the operation of a relatively new statutory regime. The issues raised in respect of which leave was granted were identified as transcending the facts of the case and supporting the conclusion that judicial review is, at least arguably, available.

93. The analysis conducted in *H v. H* with regard to the requirement to exhaust alternative remedies, on application of the principles restated in *Amariei* and *A.B.,* is very materially different to the analysis of the issue in this case and was clearly informed by the more stringent requirements on the court at leave stage in the light of these two recent decisions.

94. I am satisfied that the decisions delivered days earlier on the 25th of March, 2026, heighten the obligation on the court to analyse the alternative-remedy issue directly at the leave stage and require that leave should be refused where it is clear that an effective statutory appeal exists and no arguable exception is shown. The decisions in *A.B.* and *Amariei* significantly strengthen the Commissioner's argument that the Regulation 33 appeal was an adequate alternative remedy and that judicial review should not proceed. There is therefore substance to the Respondent's argument that on an application of *A.B.* and *Amariei*, leave ought never to have been granted because the Applicant had a comprehensive Regulation 33 appeal and no arguable case of fundamental denial of justice which means that it is now necessary to engage in a careful consideration of whether grounds remain in the judicial review proceedings in respect of which the appeal is arguably not an appropriate or effective remedy.

95. As already set out above, the test on a motion to set aside leave remains that from *Adam & Iordache* and *Gordon* which means that leave may be set aside only sparingly, only in exceptional cases and only where it is plain that leave should not have been granted. The relationship between *Gordon* on the one hand and *Amariei* and *A.B.* on the other requires careful attention. The latter decisions do not alter the applicable test on an application to set aside leave. The jurisdiction remains that identified in *Gordon v. DPP*, namely that leave should only be discharged in exceptional circumstances and only where it is clear that leave ought not to have been granted. What *Amariei* and *A.B.* do affect, however, is the substantive assessment of whether a statutory appeal constitutes an adequate alternative remedy and the circumstances in which judicial review may properly be invoked notwithstanding the existence of such a remedy.

96. Accordingly, the question before me is not whether I would have granted leave had I been hearing the application in the light of *Amariei* and *A.B.* Rather, the question remains whether, applying the principles now authoritatively stated by the Supreme Court in those decisions, it is clear that the Applicant had no arguable basis for proceeding by way of judicial review instead of pursuing the statutory appeal provided under the 2007 Regulations. If that is so, then the demanding threshold identified in *Gordon* is met. If, on the other hand, it remains arguable that the Applicant's case falls within one of the limited exceptions identified in *A.B.* and *Amariei*, then leave should not be set aside.

97. Accordingly, even if *A.B.* and *Amariei* strengthen the substantive alternative-remedy argument, the Respondent must still overcome the higher set-aside threshold. Afterall, this is not a case where the leave judge did not consider the appeal issue, he deliberately left it open recognising that it was not a clear-cut issue. The real question post-*A.B.* and *Amariei*, becomes whether the Applicant's complaint is that the Board made legal, factual or procedural errors or errors that may arguably be characterised as a fundamental denial of justice/fundamental defect. Only the second category survives the alternative-remedy doctrine under *A.B.* Otherwise stated the question for me is whether, viewed through the lens of those authoritative statements of principle in *A.B.* and *Amariei*, it is now clear that the Applicant had no arguable basis for bypassing the statutory appeal process.

98. Ultimately, therefore, the question is whether the Applicant can identify a ground which arguably discloses the type of fundamental denial of justice, default of fundamental requirements or fundamental flaw identified in *A.B.* and *Amariei* as justifying recourse to judicial review notwithstanding the availability of a statutory appeal. If such a ground arguably exists, then it cannot be said, in the sense intended by *Gordon*, that leave plainly ought not to have been granted. If no such ground exists and the matters complained of fall within the corrective scope of the appellate process, then the Respondent will have established the exceptional circumstances necessary to justify setting aside leave.

The Scope of the Statutory Appeal under the 2007 Regulations

99. The starting point in any consideration of whether the appeal constitutes an adequate remedy must be a consideration, firstly, of the scope of the appellate jurisdiction prescribed under the 2007 Regulations and, secondly, the nature of the complaints advanced in the Statement of Grounds to identify if the legal grounds identified are capable of being addressed on appeal under Regulation 33.

100. The provisions of the 2007 Regulations in relation to the appeal process from Regulation 33 to Regulation 37 are summarised above. Broad grounds of appeal are set out at Regulation 33. Regulation 36 dealing with the proceedings before the Appeal Board provides the Appeal Board with powers associated with a substantive adjudicative function, including hearing evidence and discretion to invite evidence orally or in writing. The member is entitled to accompaniment and to make oral submissions. Under Regulation 37 the Appeal Board may affirm, quash, substitute a less serious sanction or direct that another board of inquiry be established.

101. In *Kelly v. Commissioner of An Garda Síochána* [2013] IESC 47, the process was described as a "*self-contained process for dealing with allegations of breaches of discipline*" and it was considered significant that among the powers of the Appeal Board under the 2007 Regulations are the power to quash the determination and to substitute another disciplinary action, or quash the determination and decide that another Board of Inquiry should be established to determine whether the member committed a breach of discipline.

102. In similar vein, in *O'Reilly v. Commissioner of An Garda Síochána* [2018] IECA 34, Irvine J. commented, albeit *obiter*, that an appeal under the 2007 Regulations is a full rehearing of the complaint made. Likewise, in *Ivers v. Commissioner of An Garda Síochána* [2022] IECA 206, the Court of Appeal observed that while the appeal is not a full de novo hearing, the Board has discretion to allow any person to give evidence orally or in writing, and the member concerned is entitled to full legal representation and to make oral submissions through his or her representatives.

103. Finally, in Hegarty v. *Commissioner of An Garda Síochána* [2022] IEHC 183, the High Court described the 2007 Regulations as providing an elaborate and delicately worked out set of checks and balances to ensure that a fair process, with independent oversight, is in place to have allegations of breach of discipline fairly determined and punished.

104. I am satisfied having regard both to the terms of Regulations 33-37 and the jurisprudence that the scope of an appeal under the 2007 Regulations is wide and the Appeal Board's powers are extensive, allowing a correction of flawed findings based on the evidence, credibility assessments, interpretation of the interview notes, proportionality of dismissal, delay and procedural complaints.

The Nature of the Applicant's Grounds of Challenge Whether the Grounds Fall Within the Appellate Jurisdiction

105. Turning then to the grounds of complaint advanced in these proceedings, it seems to me that the Statement of Grounds may be distilled into four overarching propositions, namely:

I. The disciplinary process was procedurally unfair, involving breaches of natural justice, delay and failures to comply with statutory requirements.
II. The Board unlawfully and irrationally relied upon allegations connected to a complainant who had withdrawn from the process, thereby tainting the findings.
III. The findings of fact and disciplinary conclusions were irrational, unsupported by evidence and unreasonable.
IV. The recommendation and decision to dismiss the Applicant were disproportionate and unlawful.

Whether the Grounds Fall Within the Appellate Jurisdiction

106. Having regard to the structure of Regulation 33 and the nature of the Appeal Board's powers, it seems to me that in the main the Applicant's complaints fall squarely within the statutory appeal process.

107. Under Regulation 33(3)(a), the appellant may argue mandatory provisions were not followed. This overlaps with complaints of procedural irregularity advanced in the judicial review proceedings.

108. Regulation 33(3)(b) permits an appeal on the ground that:

> *"the determination is not justified having regard to the evidence heard by the Board of Inquiry."*

109. That encompasses arguments that the Board wrongly accepted evidence, the Board drew irrational factual conclusions, the findings regarding intoxication were unsupported and the findings concerning use of the Garda badge were unsupported. Specifically, therefore, Regulation 33(3)(b) permits an appeal where findings are not justified by the evidence. This ground mirrors the Applicant's contention that the Board's findings concerning the complainant and withdrawal statement were irrational and unsupported.

110. Regulation 33(3)(c) provides for broad grounds of appeal and permits an appeal where there had been a failure to properly ascertain or consider facts and an appeal may be brought where, relevant facts were not ascertained, were not considered or were not considered reasonably. This would cover complaints concerning the treatment of the withdrawal statement, the Board's assessment of evidence and failures in fact-finding. Regulation 33(3)(c) allows a challenge to the factual reasoning process itself.

111. Regulation 33(3)(d) permits an appeal where the member was not given a reasonable opportunity to be heard. This is broad enough to encompass most procedural complaints advanced before the Board, including disclosure issues, natural justice complaints, inability to challenge evidence and procedural unfairness during the investigation.

112. Finally, Regulation 33(3)(e) provides for an appeal against a disproportionate sanction and enable an appellant to challenge the severity of punishment. This ground is especially significant in the present case because the Applicant received the most severe sanction available, dismissal. Dismissal as an excessive sanction is plainly an appeal issue.

113. Post-*Amariei* and *A.B.*, the Commissioner's adequate-alternative-remedy argument is materially stronger than it would have been under earlier authorities alone. I am satisfied that leave would not have been granted by Simons J. on application of *Amariei* and *A.B.* in respect of most of the grounds pleaded had those authorities been available for consideration at leave stage because the Applicant falls foul of the default position restated in *Amariei* or *A.B.* as being complaints relating to the insufficiency of evidence, factual findings concerning intoxication, credibility assessments, the Board's interpretation of the interview notes, proportionality of dismissal, delay and procedural complaints capable of being addressed under Regulation 33(3)(a)–(d). These are all classic appellate issues.

The Withdrawal-of-Complaint Issue and Whether Any Ground Discloses a Fundamental Denial of Justice

114. There are elements of the Applicant's case as pleaded which at first glance appear more borderline. The characterisation of the withdrawal of the statement issue as a fundamental legal error going to the validity of the disciplinary process itself, rather than a mere error capable of correction on appeal is the primary issue which gave me pause for thought. This issue was identified by Simons J. when granting leave when he described the principal challenge as the Board's treatment of the complainant's withdrawal. He accepted that it was arguable that the complaint had been withdrawn and the Board treated the withdrawal as merely a withdrawal from the criminal investigation process but that the Board may not have been entitled in law to adopt that approach.

115. I have considered whether the withdrawal of statement ground identified by Simons J. as the principal issues remains a basis on which the Applicant can argue that this case falls within the exception recognised in *A.B.* for fundamental legality or jurisdictional error. I note in this regard that the Respondent does not accept that any point arises which cannot be addressed by the Appeal Board having regard to the range of appeal grounds provided for in Regulation 33. From its perspective, the withdrawal issue is simply another challenge to the correctness of the Board's reasoning and therefore falls within the appeal process.

116. Where the Appeal Board's function is primarily appellate and corrective and Regulation 33(3) is directed towards factual findings, evidential sufficiency, procedural compliance and proportionality, it seems to me that a question arises as to whether this provides for a challenge that the entire disciplinary process proceeded on a misunderstanding of law going to jurisdiction. If the Applicant's case is analysed as being that once the complainant withdrew, the Board was legally incapable of proceeding as it did, then such a complaint is closer to a classic judicial review ground of jurisdictional error, error of law and acting outside statutory powers. These are matters traditionally supervised by the High Court rather than resolved through an internal disciplinary appeal.

117. I have concluded that properly analysed the case as pleaded is not a case challenging the jurisdiction of the Board at all. In this regard I note the Board of Inquiry’s position that the disciplinary breaches alleged were principally grounded on the Complainant’s own admissions under caution and not a complaint from the alleged injured party. I also note that the GSOC investigation which led to this disciplinary process arose from a referral to GSOC under s. 102 of the 2005 Act which is in no way dependent on the existence of a complaint and is expressed under s. 102(4) as permitting of an investigation of a matter without receiving a complaint.

118. Similarly, I see nothing in the terms of the 2007 Regulations which ties the conduct of the disciplinary process to the existence of a complaint and in this case the process has been commenced under Part 5 of the Regulations of the 2007 Regulations as a matter referred by GSOC where, under Regulations 45 or 46, the Regulations are applied on foot of a report under s. 97 of the 2005 Act which includes a recommendation relating to disciplinary action to be taken against a member under the regulations and not on foot of an individual complaint.

119. Accordingly, to the extent that the Applicant has sought to characterise the matter as jurisdictional rather than a matter of evidential weight (and the argument was not clearly expressed as such), the fact that the statutory scheme does not make continuation of disciplinary proceedings dependent upon the existence or maintenance of a complaint by the injured party renders this contention untenable.

120. Separately, while it is pleaded that the Board erred and acted *ultra vires* in expanding the allegations against the Applicant beyond what featured in the report issued by GSOC on foot of its s. 95 investigation, under Regulation 46, the disciplinary matters for investigation arise from the statement of facts established by the GSOC in its report and not the recommended disciplinary sanction. Under Regulation 46, which applied in this case, where the Respondent, having regard to the statement of facts established by the GSOC investigation and included in the report, considered that the member may have been in breach of discipline and may be subject to one of the disciplinary sanctions mentioned in Regulation 22, then the Respondent was required to establish a board of inquiry to determine whether a breach of discipline has been committed by the member concerned, and if so, to the disciplinary action to be taken in relation to the member. Under the 2007 Regulations, the disciplinary breach is framed by reference to the statements of fact established and the Respondent's opinion as to whether a potential breach of discipline is disclosed, not the terms of any breach identified by the GSOC investigator.

121. Accordingly, while it is open to the Applicant to contend that the allegations for disciplinary investigation expanded beyond what was justified by the statement of facts in the GSOC report under s. 97 of the 2005 Act and to argue that the evidence does not support findings in respect of such breaches and these arguments could well lead to a different decision on appeal, the fact that the breaches identified in the Notification served under Regulation 27 is framed in different terms to the recommendations contained in the s. 97 report is not a jurisdictional issue which warrants recourse to judicial review instead of exhausting the statutory appellate remedy.

122. This being the case it seems to me that there appears to be no basis for contending that the withdrawal of a complaint by the alleged injury party or the different framing of the disciplinary breach in the inquiry under the 2007 Regulations renders the process *ultra vires*, questions which might arguably be more appropriately dealt with by way of judicial review. The real heart of the Applicant's arguments, properly analysed, relate to the treatment of the complaint of the alleged injured party as evidence in the process in circumstances where it had been withdrawn from an early stage in the process and the alleged injured party was not available to be examined and whether the facts and evidence support a finding of disciplinary breach in the terms found. These, it appears to me, are complaints which may very well be advanced on appeal and do not ground a conclusion that a remedy by way of judicial review is appropriate notwithstanding the availability of a remedy by way of appeal.

123. It seems to me that even if the Board's interpretation of the withdrawal statement was legally erroneous, the appellate jurisdiction vested in the Board expressly extends to failures properly to ascertain and consider facts, findings not justified by the evidence, and failures to afford a reasonable opportunity to be heard. Thus, the alleged error remains one capable of correction within the statutory scheme.

124. It should also be recalled that where defects going to jurisdiction are identifiable in a decision ultimately issuing from an Appeal Board following exhaustion of a remedy by way of appeal or were procedural or legal errors have not been cured during the course of the appeal process, then if it can be argued that the decision of appeal is unsustainable in law by reason of an identifiable error amenable to judicial review, a remedy by way of judicial review may arise at that point, all statutory appeal remedies having been exhausted.

Whether Leave Was Plainly Wrongly Granted

125. All complaints made by the Applicant in relation to fair procedures, evidential insufficiency, factual findings and proportionality could have been raised before an Appeal Board and might have been addressed by the Appeal Board following a reconsideration of the case and having regard to the submissions made on behalf of the Applicant. As I see no legal ground which is more appropriately a matter for judicial review than appeal, it seems to me that on an application of the recalibrated test in *Amariei* and *A.B.* and with the benefit of submissions for the Respondent, I am satisfied that the decision to grant leave in this case was plainly wrong. None of the pleaded grounds amount, even at the level of arguability, to a contention that the disciplinary process cannot properly be regarded as a hearing at all.

126. Logically, where I reach the conclusion that the grant of leave on identified grounds is plainly wrong based on an application of the recalibrated test in *Amariei* and *A.B.*, then it would seem to follow that I should set aside the order granting leave. As the set aside jurisdiction is exceptional, I have also reflected on whether there are circumstances in this case which mean that I should not exercise that discretion on this application.

127. In this context, I have considered whether the fact that the Applicant may not now have an appeal open to him by reason of a failure to invoke the appeal procedure provided under Regulation 33 in time and in the event of a sustained refusal to extend time to permit an appeal, should have a bearing on the exercise of my power to set aside such as might lead me to refuse to set aside the leave order despite my conclusion that it was wrong not to require the statutory remedy to be pursued before recourse to judicial review was permitted in this case. It seems to me, however, that the adequacy of an alternative remedy must be assessed at the point at which that remedy was available. A litigant cannot convert an adequate remedy into an inadequate one by failing to invoke it within time.

128. While the court has a power to adjourn a leave application to await the determination of an appeal under Order 84 rule 20(6) of the RSC, I do not see this as an indication that the court in deciding on a leave or set aside application should adopt a "*wait and see*" approach and adjourn the proceedings on the basis that there may remain an issue amenable to judicial review at the conclusion of the process, depending on the decision on appeal. I am supported in this conclusion by the refusal of the Supreme Court to adjourn the proceedings in *A.B.* until such time as the appeal had been determined on the basis that nothing would be gained from such an adjournment.

The Significance of the Failure to Pursue the Appeal in Time

129. On the factual matrix in this case, the true position (albeit unknown to the legal practitioners and the judge at leave stage) was that the appeal was already out of time when the leave application was presented before the High Court. At the time of hearing of the set aside application before me on the 21st of July, 2026, an application for an extension of time stood refused and the prospect of an appeal being available was more than uncertain, albeit it was indicated that the refusal of an extension of time is likely to be the subject of separate challenge by way of judicial review if the refusal is maintained. If the Applicant is not granted an extension of time within which to appeal and the order granting leave in these proceedings is also set aside, this would have the effect of leaving the Applicant without any remedy in respect of the legal frailties he has identified in the decisions sought to be impugned in these proceedings.

130. In circumstances where the intention of the applicable statutory rules was not to deprive the Applicant of an appellate remedy but rather to regulate access to remedies, this is a very regrettable situation. It was, of course, avoidable and the Respondent clearly notified the Applicant of the restricted time for an appeal in ensuring personal service on him of the decisions he seeks to challenge.

131. Whether the Commissioner has lawfully declined to treat the Form IA.51 as a valid appeal and whether an Appeal Board ought to have been established are analytically distinct questions from whether an adequate alternative remedy existed on the 20th of March, 2026. Even if the Applicant is correct on those issues, that would not alter the fact that the statutory appeal process constituted the prescribed remedy.

Exercise of the Court's Discretion

132. There was no complexity involved in filing the appeal, even on a precautionary basis pending fuller advice on whether it constituted an adequate remedy in his case. While I acknowledge the difficulties presented for the Applicant in the event that he is to find himself without a remedy consequent upon my decision on this application and any other decisions in respect of his extension of time application, it seems to me that at a level of principle, it cannot be the case that the existence of an alternative remedy is only an impediment to judicial review if the applicant is still in time to pursue that remedy. To conclude otherwise would allow the statutory appeal process to be circumvented by the simple expedient of allowing the prescribed time for an appeal to expire. It would then be open to applicants to seek leave to proceed by way of judicial review by simply electing not to appeal within the strictures of the appeal process provided for. This cannot be an appropriate basis upon which to exercise a discretion to permit proceedings by way of judicial review even though there was a perfectly adequate appeal process available.

133. Accordingly, I am satisfied that the test must be that leave to proceed by way of judicial review should not be granted and should be set aside where an adequate, alternative remedy was available and accessible, even if it was not availed of. The grant of leave to proceed by way of judicial review does not depend on whether an appeal has been pursued or remains open, provided it was available and would have been an adequate and effective remedy upon a proper engagement with the statutory process and compliance with lawfully imposed conditions.

134. As I am satisfied that all complaints made by the Applicant in relation to fair procedures, evidential insufficiency, factual findings and proportionality could have been raised before an Appeal Board and as I see no legal ground which is more appropriately a matter for judicial review than appeal such that the decision granting leave was plainly wrong, I will make an order setting aside the order granting leave.

CONCLUSION

135. On this application, the Respondent seeks an order setting aside the leave granted on the 30th of March, 2026 and an order dismissing the judicial review proceedings based on an adequate alternative remedy.

136. For reasons expanded on above, I am satisfied that the statutory appeal mechanism provided an extensive corrective jurisdiction capable of addressing every complaint advanced by the Applicant. I am further satisfied that none of the pleaded grounds arguably disclose the type of fundamental denial of justice, default of fundamental requirements or fundamental flaw identified in *A.B.* and *Amariei* as justifying recourse to judicial review in advance of, or in substitution for, the statutory appeal process. Viewed through the lens of *Amariei* and *A.B.*, the complaints advanced by the Applicant are complaints concerning factual findings, evidential sufficiency, procedural fairness and proportionality, all matters falling squarely within the appellate jurisdiction conferred by the 2007 Regulations.

137. In those circumstances, and notwithstanding the demanding set-aside threshold identified in *Gordon*, this is one of those exceptional cases in which it is now clear that leave ought not to have been granted. Accordingly, I have decided that I should make an order setting aside the order granting leave.

138. I will list the matter for the purposes of making final orders on this application upon the expiry of fourteen days from the electronic delivery of this judgment unless the parties confirm the terms of a consent order in writing to the Registrar and confirm that a listing is not required.