

**THE HIGH COURT  
JUDICIAL REVIEW**

**[Record No. 2020/428 JR]**

**BETWEEN**

**EMMA ROCHE**

**APPLICANT**

**AND**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**RESPONDENT**

**JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 25<sup>th</sup> of July,  
2022**

**INTRODUCTION**

1. These proceedings arise from the decision of the Respondent made under the provisions of the Garda Síochána (Admissions and Appointments) Regulations, 2013 (S.I. No. 40 of 2013 “the 2013 Regulations”) to dispense with the services of the Applicant as a member of An Garda Síochána. The core issue raised in the proceedings is whether the Applicant was a probationer Garda when the Respondent issued a notice to her pursuant to Regulation 12(8)(a) of the 2013 Regulations stating that he proposed to dispense with her services as a member of An Garda Síochána. The answer to this question turns on whether the Applicant’s probationary period had been lawfully extended at the date of the decision to discharge her from An Garda Síochána.

2. The Applicant contends in reliance on the decision of Barrett J. in *Fahy v. The Commissioner of An Garda Síochána* [2021] IEHC 440 (hereinafter “*Fahy*”), that at the time of receipt of the Regulation 12(8)(a) notice of discharge her probationary period had expired such that the statutory power to dismiss her as a probationer could no longer be exercised. It is the Respondent’s case that the reliance on the decision in *Fahy* is misconceived in circumstances where, on the facts, that case is easily distinguished. It is the Respondent’s case

that the power to extend the Applicant's probationary period under Regulation 12(4) was lawfully exercised in this case.

## **BACKGROUND**

3. In June, 2016, the Applicant entered An Garda Síochána Training College in Templemore as a trainee member. The Applicant successfully completed all modules and training and became a sworn and attested member of An Garda Síochána in April, 2017. The Applicant was subsequently required to undergo a period as a probationer Garda. The significance of the probationary period is that a Garda, in the early stages of their career, can lawfully have their employment terminated by the Respondent if they fail to demonstrate *'during the probationary period the competence to serve as an efficient and effective member.'*

4. From May, 2017 to August, 2018, the Applicant was required to undertake Continuous Professional Development at Store Street Garda Station, Dublin as part of the probationary assessment of the B.A. in Applied Policing [hereinafter the "B.A."]. She attended a physical competence test as a module of the said B.A. On the 23<sup>rd</sup> of October, 2017 for this test the Applicant was required to undergo different movement exercises. The Applicant failed one component known as the *'bleep test'*. Previously, the Applicant had completed this test prior to being accepted into and graduating from the Garda College.

5. The Applicant repeated the entire physical competence test on two further occasions but failed the bleep test component. She was then required to complete a personal development log by an Inspector of the College.

6. On the 2<sup>nd</sup> of August 2018, the Applicant was notified by correspondence that following a meeting of the Examinations Board held on the 20<sup>th</sup> of July, 2018 that she had failed the professional competence module. The Applicant appealed this decision. She was informed on the 24<sup>th</sup> of August, 2018 by Professor Kilcommins of the School of Law, University of Limerick that her appeal had been upheld and that she would be reinstated onto the B.A. programme. She was further informed that were she to fail the repeat assessment, the College would recommend to the Exam Board that her enrolment to the programme would be terminated.

7. The Applicant repeated the physical competence test on the 22<sup>nd</sup> of October, 2018 and failed the bleep test component again. Thereafter the Applicant was informed that she would be removed from the B.A.

8. On the 2<sup>nd</sup> of November, 2018, the Applicant submitted an appeal to the Mitigation Committee, Board of Examiners at the Garda College. Following this appeal, she was granted a further attempt at the physical examinations. She repeated the bleep test on the 7<sup>th</sup> of January, 2019 but failed again.

9. On the 25<sup>th</sup> of January, 2019, the Applicant received correspondence from the Director of Training and Continuous Professional Development at the College advising her that she had been removed from the B.A. programme with effect from the 14<sup>th</sup> of January, 2019. She appealed this decision to the School of Law at the University of Limerick. She was informed on the 14<sup>th</sup> of February, 2019 that the decision of the Garda College had been upheld.

10. On the 12<sup>th</sup> of September 2019, the Respondent served the Applicant with a notification (dated the 28<sup>th</sup> of August, 2019) of a proposal to dispense with her services as a member of An Garda Síochána. In this notice the Applicant was allowed a period of 28 days within which to make submissions in respect of the proposal. The Applicant subsequently made submissions to the Respondent dated the 25<sup>th</sup> September 2019.

11. At the time the Applicant received the proposal to dismiss her, she was on a probationary period on foot of an extension which was granted on the 24<sup>th</sup> of July, 2019 pursuant to Regulation 12(4). On this date, the Applicant's probationary period was extended for three months to the 24<sup>th</sup> of October, 2019.

12. On the 21<sup>st</sup> of October, 2019, a further extension was made for a period of three months from the 24<sup>th</sup> of October, 2019 to the 24<sup>th</sup> of January, 2020 pursuant to Regulation 12(4). Similarly, on the 13<sup>th</sup> of January, 2020 the period was further extended for three months from the 24<sup>th</sup> of January, 2020 to the 24<sup>th</sup> of April, 2020.

13. Before the expiry of the extended probationary period, by Notice dated the 26<sup>th</sup> of March, 2020, the Applicant was notified that she was discharged from An Garda Síochána because of her repeated failure (on six separate attempts) to pass the Phase II fitness assessment aspect of the Professional Competence which meant that she could not progress through and

complete Phase 11 of the B.A. in Applied Policing in circumstances where the attainment of the BA in Applied Policing is a necessary requirement to progress through a Garda's probationary period and to become an efficient and effective member of An Garda Síochána.

## **STATUTORY FRAMEWORK**

14. As in *Fahy*, the key legislative provisions at play in these proceedings is Regulation 12 of the 2013 Regulations.

15. Regulation 12(4) of the 2013 Regulations provides as follows:

*“Where a probationer has not demonstrated to the satisfaction of the Commissioner an ability to perform the functions of a member efficiently and effectively or otherwise to conduct himself or herself in a manner befitting a member, the Commissioner may, if he or she considers it necessary or expedient for the purpose of ascertaining whether the probationer concerned will demonstrate such ability, direct, on or before the expiration of the probationer’s probationary period, that the probationer’s probationary period be extended for such further period as may be specified in the direction.”*

16. Regulation 12(8)(a) of the 2013 Regulations provides as follows:

*“(8) (a) The Commissioner may, at any time, subject to the provisions of this Regulation, having assessed the suitability of a probationer for retention in the Garda Síochána, dispense with the services of the probationer if he or she considers that— (i) that probationer is not suited, physically or mentally, to performing the functions of a member, or (ii) having regard to one or more of— (I) the performance of that probationer, (II) the behaviour of that probationer, (III) assessments made by that probationer's Superintendent of the matters specified at (I) or (II) or of matters otherwise relating to that probationer's competence to serve as an efficient and effective member, or (IV) the disciplinary record of that probationer, that probationer has not demonstrated during the probationary period the competence to serve as an efficient and effective member”*

17. Regulation 12(9) of the 2013 Regulations provides that:

*“Where the Commissioner proposes to dispense with the services of a probationer under paragraph (8), (a) the Commissioner shall notify the probationer in writing of the proposal and the reasons for that proposal, and (b) the probationer shall have 28 days from the date of the Commissioner’s notification to make submissions to the Commissioner regarding the proposal”.*

18. Regulation 12(10) provides that:

*“Where the Commissioner proposes to dispense with the services of a probationer under paragraph (8), he or she shall, if he or she considers it appropriate and necessary, for the purpose of enabling the probationer to— (a) make submissions to the Commissioner regarding the proposal, or (b) obtain advice, including professional legal advice in relation to the matter, direct that the probationary period of the probationer be extended for a period not exceeding 28 days, and such period shall be specified in the direction.”*

19. Regulation 12(11) provides that:

*“(11) The period of 28 days referred to in paragraph (10) may be extended by the Commissioner in exceptional circumstances.”*

20. Under Regulation 12(13), a probationary period shall not, save in exceptional circumstances and with the consent of the Minister, exceed a total of 3 years.

## **CHRONOLOGY**

21. In terms of the pertinent facts relevant to the principal legal issue before me, the Applicant’s probationary period was extended on four occasions between April, 2019 and January, 2020 in reliance on the powers conferred by Regulation 12(4) of the 2013 Regulations as follows:

- i. On the 18<sup>th</sup> of April, 2019, for a period of three months from the 24<sup>th</sup> of April, 2019 to the 24<sup>th</sup> of July, 2019;
- ii. On the 4<sup>th</sup> of July, 2019 for a period of three months from the 24<sup>th</sup> of July, 2019 to the 24<sup>th</sup> of October, 2019;
- iii. On the 21<sup>st</sup> of October, 2019, for a period of three months from the 24<sup>th</sup> of October, 2019 to the 24<sup>th</sup> of January, 2020;
- iv. On the 13<sup>th</sup> of January, 2020, for a period of three months from the 24<sup>th</sup> of January, 2020 to the 24<sup>th</sup> of April, 2020.

**22.** On the occurrence of each extension, the Applicant was notified of the reasons for same, being that she had not completed her B.A. in Applied Policing and that her *“performance, behaviour and competence to serve as an efficient and effective member is currently being assessed, as she cannot complete the BA in Applied Policing”* with a view to determining if the Applicant *“can perform the functions of a member efficiently and effectively or otherwise to conduct herself in a manner befitting a member of An Garda Síochána”*.

**23.** A Notice under Regulation 12(9) of the 2013 Regulations was signed by the Respondent on the 28<sup>th</sup> of August, 2019, which put the Applicant on notice that the Respondent proposed to dispense with the Applicant’s services as a member of An Garda Síochána. As required by the provisions of the 2013 Regulations, the Applicant was afforded 28 days within which to make submissions in response to the said Notice. Crucially, in terms of the facts of this case when compared with the *Fahy* case, when the Regulation 12(9) Notice was served, the Applicant’s probationary period had already been extended for a period which expired later than 28 days after the service of the Regulation 12(9) Notice such that no further extension of probation was required to allow for the making of submissions in response to the Notice. It is of some further importance that the submissions made in response to the Regulation 12(9) Notice were duly made within the period of the extension already in place. Thereafter, the Applicant’s probation period was extended for the purpose of considering the Applicant’s submissions and allowing the Respondent to exercise his function in ascertaining the suitability of the Applicant to remain a member of An Garda Síochána.

**24.** It is recalled that the Regulation 12(4) extension power is unlimited as to time (subject to a maximum period in probation of 3 years) and is expressed to be available to the Respondent

to permit the exercise of his function in ascertaining the suitability of the Applicant to remain a member of An Garda Síochána, whereas the Regulation 12(10) extension power is limited to permitting an opportunity to the member who has received a Regulation 12(9) Notice to make submissions in response or seek legal advice and is time limited.

## **DECISION IN FAHY V. THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**25.** There are a number of features of the decision in *Fahy* which warrant special note as follows:

- i. The issue as to the lawfulness of the extensions of time, while open for argument on the pleadings, had not been pursued by the parties during the hearing but was raised by the Judge in an interim judgment following which an opportunity for submissions was afforded;
- ii. The Respondent took a tactical position, found by the Court to be wrong, that the issue was not properly before the Court and did not advance submissions on the point of statutory interpretation which arose leaving the Judge without the benefit of those submissions albeit at the Respondent's own election;
- iii. The factual circumstances regarding the extensions made as recorded in the judgment (paras. 32 and 36) make it clear that there were four extensions in that case and that the notice of discharge under Regulation 12(9) was served at a time when there was less than 28 days remaining in the extended period of Ms. Fahy's probation as follows:
  - a. On 1st November 2018, Ms Fahy's probationary period was extended by a 3-month period from 17th November 2018 to 17th February 2019 (Extension #1).
  - b. On 5th February 2019, Ms. Fahy's probationary period was extended by six months from 17th February 2019 to 17th August 2019 (Extension #2).
  - c. A Regulation 12(9) Notice of Discharge was served on 25th July 2019 in which a period of 28 days for submissions was allowed;

- d. On 7th August 2019, Ms Fahy's probation was extended by three months from 17th August 2019 to 17th November 2019 (Extension #3).
- e. On 15th November 2019, the Minister for Justice and Equality consented to Ms Fahy's probationary period being extended by three months from 17th November 2019 to 17th February 2020 (Extension #4).

26. At para. 36 of his interim judgment Barrett J. stated:

*“36. Regulation 12(9) provides that a notice can only issue thereunder in circumstances “[w]here the Commissioner proposes to dispense with the services of a probationer under paragraph (8)”. In this case the regulation 12(9) notice issued on 25th July 2019. At first glance, that would seem to mean that if the Commissioner was minded to make an extension to Ms Fahy’s probation period thereafter, he should have proceeded under reg.12(10). However, Extension #3 (on 7th August 2019) proceeds by reference to reg. 12(4). How can that be so? At first glance it would seem that it could only be so if the following logic applies: reg.12(4) applies generally and its application is not ousted by reg. 12(10); while an extension can always be made under reg.12(4) it can also be made in the special circumstances detailed in reg.12(10). But that logic is arguably mistaken as there would seem to be no reason for reg.12(10) if the Commissioner could always proceed under reg.12(4). Arguably the more logical reading is that reg.12(10), to use a colloquialism, ‘does what it says on the can’. In other words it applies “[w]here the Commissioner proposes to dispense with the services of a probationer under paragraph (8)” as the Minister did here on and from 25th July 2019, the date of issuance of the reg.12(9) notice. If that is so, then when the Commissioner came to issue his extension of 7th August 2019, he ought to have proceeded under reg.12(10) (he in fact proceeded under reg.12(4)), and, if he had proceeded under reg.12(10) he could only have granted an extension for a period of 28 days. All of this would have a knock-on effect. Regulation 12(11) anticipates building on an existing 28-day period established under reg.12(10). And reg.12(13) anticipates the Minister extending an existing probationary period. But if the probationary period has not previously been extended to the point from which the Minister proposes to extend it (as would be the case here if the Commissioner erroneously invoked reg.12(4) on 7th August 2019) then the probationary period of the affected member would by that time have come to an*



*end. In Ms Fahy's case this would seem to mean that she was proceeded against as a probationer when she ought otherwise to have been proceeded against."*

**27.** A key factual difference between the facts of this case and those in *Fahy* emerges from the foregoing. When the Regulation 12(9) Notice was served in this case there was no requirement for an extension of time under Regulation 12(10) as the 28 days envisaged for the making of submissions occurred before the expiry of the extant Regulation 12(4) extension. In *Fahy*, on the other hand, the probationary period was due to expire during the 28 days prescribed for submissions. In such circumstances, Regulation 12(10) provided for the grant of an extension to allow for the filing of submissions and the taking of legal advice. In *Fahy* the Court was not required to consider whether the Garda Commissioner, having received submissions, had a power to extend time under Regulation 12(4) to consider those submissions in circumstances where Regulation 12(10) only envisaged an extension for the purpose of making submissions but not considering them as this did not arise on the facts in that case.

**28.** The issue determined by the Court in *Fahy* regarding the power to extend time arose squarely in circumstances where the third extension of time occurred during the period allowed for the making of submissions for which special regulatory provision was made. These difference in facts juxtaposed against the different purposes for which the Regulation 12(4) and 12(10) extension powers were prescribed prompts a question as to the breadth of the ratio in *Fahy* and whether it applies to prevent further extension under Regulation 12(4) following the service of a Regulation 12(9) discharge notice as contended on behalf of the Applicant or merely to require the making of an extension under Regulation 12(10) where the 28 days prescribed for submissions under Regulation 12(9) was due to expire during the currency of the period of probation, as the Respondent contends. It is acknowledged by the Respondent that the judgment is capable of being read as having a wider application than that which is urged by him as flowing from the particular facts and circumstances of that case but that the true ratio of the judgment requires to be understood in the particular context of the judgment.

**29.** In the Addendum to his judgment, the learned Judge recorded the submissions made on behalf of the Applicant on the point of statutory interpretation but in the absence of any engagement with the arguments on behalf of the Respondent, he did not revisit his preliminary

findings in respect thereof save insofar as his reasoning is further apparent from the manner in which he fashioned the relief ordered at para. 54 of the judgment where he stated:

*“54. For the reasons stated in this addendum and elsewhere in its judgment, the court shall grant Ms Fahy (i) an order of certiorari quashing the respondent’s decision given on or about 7th February 2020, whereby the respondent, in purported compliance with the powers conferred by Regulation 12 of the Garda Síochána (Admissions and Appointments) Regulations 2013, determined the applicant’s employment; (ii) a declaration that the Commissioner misapplied and/or misconstrued the relevant provisions of the Garda Síochána (Admissions and Appointments) Regulations 2013; (iii) a declaration that through his misapplication of the Regulations of 2013 the Commissioner did not act lawfully when he proceeded under reg.12(4) of those Regulations instead of under reg.12(10), following upon his issuance of the reg.12(9) notice, thus unlawfully using Ms Fahy’s purported probationary period to facilitate a purpose or objective not authorised by the Regulations of 2013, viz. her dismissal as a probationer Garda when she was no longer a probationer.”*

**30.** Accordingly, it appears that it was key to the Judge’s interpretation of the Regulations and the proper exercise of a power to extend the period of probation that the power be used for a purpose or objective authorised by the 2013 Regulations and not in a manner which permitted the dismissal as a probationer Garda when the garda in question was no longer a probationer.

## **DISCUSSION AND DECISION**

**31.** It seems clear from the terms of Regulation 12(4) and 12(10) that they are directed to different purposes.

**32.** The Regulation 12(4) power is directed to a situation where the Respondent requires further time in the case of a probationer who has not demonstrated to the satisfaction of the Commissioner an ability to perform the functions of a member efficiently and effectively or otherwise to conduct herself in a manner befitting of a member, to ascertain if the member will be able to demonstrate such ability. The power to extend time is discretionary and the Commissioner “*may*” extend the period of probation but only where the conditions of

Regulation 12(4) are met. The conditions prescribed are “*if she or she considers it necessary or expedient for the purpose of ascertaining whether the probationer concerned will demonstrate such an ability*”. Accordingly, an extension under Regulation 12(4) must be for the purpose of ascertaining whether the probationer concerned will demonstrate an ability to perform the functions of a member efficiently and effectively or otherwise to conduct herself in a manner befitting of a member and not for any other purpose.

**33.** The Regulation 12(10) power, on the other hand, is crafted in different terms and using different language. It applies only where the Commissioner proposes to dispense with the services of a probationer under Regulation 12(8) and provides in mandatory rather than in permissive terms (“*shall*”) for the granting of an extension where it is appropriate and necessary to do so for the purpose of enabling the probationer to make submissions regarding the proposal to dispense with the services of the probationer notified under Regulation 12(9) or to obtain advice, including professional legal advice, in relation to the matter. The fact that the power is tied strictly to ensuring that the probationer is afforded 28 days within which to make submissions as envisaged in Regulation 12(9) is underlined by the terms in which the power to extend is expressed under Regulation 12(10) as being limited to a period not exceeding 28 days.

**34.** The following emerges from a comparison of the two provisions and the terms in which the power to extend is expressed in each of them:

1. The Regulation 12(4) discretion is wide and does not require the Commissioner to extend time at all. The Commissioner has a power to do so but may not be obliged to do so. He may do so for the purpose of considering whether a probationer who has failed to demonstrate an ability to perform her functions as prescribed could still be able to do so.
2. The Regulation 12(10) discretion is narrow. The extension must be given where it is necessary and expedient to ensure that the probationer is afforded the prescribed 28 days to make submissions before a decision is taken, but the power may only be exercised for the limited purpose of affording an opportunity to make submissions and take advice.

**35.** Obvious questions are prompted by the foregoing when juxtaposed against the decision in *Fahy* and different fact scenarios which were suggested in argument before me including, what happens where submissions are received within 28 days, perhaps on the last day of 28 days, but the Commissioner requires time to consider them and, further, what happens where an extension is not required to allow for the making of submissions within 28 days because there is already an extension in place before the Regulation 12(9) notice is served and it is of sufficient duration to permit the making of submissions before the end of the probation period as already extended.

**36.** As regards the first scenario, it seems to me that time cannot be extended under Regulation 12(11) to allow for consideration by the Commissioner of the submissions received from the probationer because Regulation 12(11) is predicated upon an extension, in exceptional circumstances, of the 28 days period which is required for submissions to be made and advice taken (within the terms of Regulation 12(10)) but not for a consideration of submissions received by the Commissioner. On the other hand, the Regulation 12(4) power is clearly directed towards enabling the Commissioner to extend the period of probation where he needs time to consider whether a probationer who has failed thus far to demonstrate an ability to perform her functions as prescribed could still be able to do so in the light of submissions made. From its express terms it would appear clear that where the Commissioner requires time to consider whether a member may yet demonstrate the ability to serve, the power to extend the period of probation is that contained within Regulation 12(4). This being the case, had an extension been granted under Regulation 12(10) to allow for the making of submissions or the taking of advice but had additional time been required for the Commissioner to consider those submissions, it would appear to follow that time could be extended under Regulation 12(4) for this purpose notwithstanding that time had previously been extended under Regulation 12(10). The inevitable conclusion must be that the previous exercise of a power to extend under Regulation 12(9) does not preclude the subsequent exercise under Regulation 12(4). This fact scenario was not addressed in *Fahy*.

**37.** Turning then to the second scenario, that which occurred in this case, namely an extension of probation had been made for a period of more than the 28 days prescribed to make submissions or take advice at the time the Regulation 12(9) Notice was served. When the Regulation 12(9) Notice was served on the 25<sup>th</sup> of July, 2019, the period of probation stood

extended to the 24<sup>th</sup> of October, 2019 by the terms of the extension made and duly notified. The 28 days for submissions, as duly specified on the face of the Regulation 12(9) Notice, expired in August, 2019, at a time still within the currency of the already extended probation period. As the probation period extended beyond the prescribed 28 days, a further extension was not required to allow for submissions to be made or advice taken. That being the case the conditions allowing for the exercise of the Regulation 12(10) power were not present as it was not “*appropriate and necessary*” within the meaning of Regulation 12(10) to further extend time for the purposes of making submissions or taking advice. This was because the probationary period had already been extended for a period well exceeding the 28 days provided for under Regulation 12(9) and no extension was necessary to ensure that the Applicant would be afforded 28 days for submissions.

**38.** Thus, when time was further extended in October, 2019 it was not for the purpose of making submissions or taking advice, as provided for under Regulation 12(9), but to enable the Commissioner to consider the submissions received. The Commissioner was considering those submissions in the context of deciding whether the Applicant, who had failed to demonstrate an ability to perform her functions as prescribed up to that point, could still be able to do so. So, whilst in the *Fahy* case the extant extension of the probationary period expired during the period of 28 days prescribed for the making of submissions thereby necessitating an extension for that purpose within the terms of Regulation 12(10), no such necessity arose in this case and submissions were made before the previous extended period of probation had expired.

**39.** It seems to me that what a consideration of the two factual scenarios above demonstrates is that Regulations 12(4) and 12(10) have two different purposes and fall to be utilised in different circumstances. In *Fahy* the Court was considering the facts in that case and was not invited to consider these other possible scenarios. It is not the case that there is no need for the Regulation 12(10) power because of the general power in Regulation 12(4). The Regulation 12(10) power is couched in terms intended to vindicate the probationer’s right to make submissions and to have a period of 28 days to do so. This right is vindicated through the mandatory language deployed in Regulation 12(10) which is absent from the more widely drawn discretion in Regulation 12(4). However, while the power in Regulation 12(4) is more widely drawn, it too may only be exercised for the prescribed purpose set out in Regulation 12(4) and provided time is not extended such that the term of probation exceeds three years.

40. Applying accepted canons of statutory interpretation as articulated by the Supreme Court in cases including *Bookfinders Ltd. v. the Revenue Commissioners* [2020] IESC 60, I am satisfied that Regulations 12(4) and 12(10) fulfil entirely different purposes. I am so satisfied having regard to the express terms of the two provisions and the difference in the language used as between each.

41. The expressed object and purpose of Regulation 12(4) is to maintain for the Respondent the ability to extend the probationary period when, in his view, it is necessary or expedient to do so for the purpose of ascertaining whether a particular probationer will demonstrate an ability to perform the functions of a member efficiently and effectively or indeed to otherwise conduct him or herself in a manner befitting a member. In ascertaining whether a probationer will demonstrate such an ability, a wide discretion is bestowed on the Respondent under Regulation 12(4) both in terms of determining whether an extension is necessary and as to the length of any extension to be granted.

42. By contrast, the object and purpose of Regulation 12(10) is to ensure that a probationer is not dismissed without having had an opportunity to make the submissions specified in Regulation 12(9) in respect of his or her proposed dismissal or without having had an opportunity to take legal advice. Significantly, the power to extend a probationary period under Regulation 12(10) shall be exercised where “*appropriate and necessary*” for the specific purpose of enabling the probationer to make submissions to the Commissioner or to obtain advice in relation to the proposal to dispense with their services. In those circumstances, and in those alone, it appears from the wording of Regulation 12(10) that the Commissioner shall direct the extension of the probation period. The power to extend time for the purpose of receiving submissions and advice, while mandatory where necessary to ensure that a probationer has 28 days within which to take advice and make submissions, is a controlled power and a further extension for this purpose should only be entertained in “*exceptional circumstances*” in accordance with the terms of Regulation 12(11). This contrasts with Regulation 12(4) where there is no such strict restriction of the further exercise of the Regulation 12(4) power so long as it falls to be exercised for a purpose contemplated within Regulation 12(4) and subject to the 3-year restriction prescribed under Regulation 12(13).

43. Notably Regulation 12(10) does not provide that if the specific purpose or objectives for which that power exists do not arise there are no other circumstances in which the discretionary power bestowed under Regulation 12(4) may be exercised. Nor was this the issue which was the subject of consideration by the Court in *Fahy* on the facts of that case. When Ms. Fahy was notified of an intention to dispense with her services there were less than 28 days remaining in her probationary period. Accordingly, an extension to Ms. Fahy's probationary period in order to ensure she had 28 days within which to make submissions to the Commissioner was required. As an extension was appropriate and necessary in order to enable her to make her submissions within the 28 days allowed, the Commissioner had no discretion as to whether to extend her probationary period or not. The Commissioner was obliged to give an extension of time.

44. In this case, the Applicant's probationary period had substantially more than 28 days remaining when the Regulation 12(9) Notice issued (an extension having already been lawfully granted pursuant to Regulation 12(4) on 24<sup>th</sup> of July, 2019 for a period of three months until the 24<sup>th</sup> of October, 2019). I am satisfied that in such circumstances an extension pursuant to Regulation 12(10) on the 21<sup>st</sup> October, 2019 was neither appropriate nor necessary on the facts of this case. Furthermore, I am satisfied that the subsequent extensions to the Applicant's probationary period were lawfully executed in compliance with the provisions of Regulation 12(4) as same were for the purpose of considering the Applicant's submissions and allowing the Respondent to exercise his function in ascertaining the suitability of the Applicant to be a member of An Garda Síochána.

45. I am satisfied that this case is properly to be distinguished from *Fahy*. The conclusion of the Court in that case was based on the fact that as the Regulation 12(9) notice issued on the 25<sup>th</sup> of July, 2019, when the Commissioner came to issue his extension on the 7<sup>th</sup> of August, 2019, he should have proceeded under Regulation 12(10). This finding is entirely in keeping with an interpretation of Regulation 12(10) which provides that an extension to the probationary period is mandatory where appropriate and necessary for the purpose of enabling the probationer to make submissions to the Commissioner on the proposal to dispense with her services. Unlike the circumstances that arose in *Fahy*, it was not appropriate or necessary in the Applicant's case for there to be an extension to her probationary period on the 21<sup>st</sup> of October, 2019 under Regulation 12(10) for the purposes of enabling her to make submissions

to the Respondent. This is because there were substantially more than 28 days remaining from the date of the letter of the 28<sup>th</sup> of August, 2019 to the conclusion of the Applicant's probationary period. Moreover, as the Applicant had obtained legal advice and, through her solicitors, delivered submissions to the Respondent on the 25<sup>th</sup> of September, 2019, the subsequent extension of her probationary period from the 24<sup>th</sup> of October, 2019 was not for the purpose of enabling her to take legal advice or make submissions but in order to facilitate the Commissioner in exercising his function of ascertaining whether the probationer would demonstrate an ability to perform the functions of a member efficiently and effectively or otherwise so conduct herself in a manner befitting a member. Accordingly, an extension at that time pursuant to Regulation 12(4) was in keeping with the scheme of the 2013 Regulations.

**46.** It seems to me that properly understood having regard to its context and the particular facts of that case, that the ratio of *Fahy* does not extend to preclude the exercise of the Regulation 12(4) power to extend time following the service of a Regulation 12(9) discharge notice in all cases but is a decision which is entirely referable to the facts and circumstances of that case.

**47.** If I am wrong in this and the ratio has a broader application than understood by me, then it seems to me that I am still not bound to follow the decision in *Fahy* having regard to the significantly different facts in this case and the manner in which *Fahy* was argued and decided. In this regard I rely on authorities such as *Tanat v. The Medical Council* [2013] IEHC 223, *In the Matter of McNamara* [2019] IEHC 622, *Noone v. Residential Tenancies Board* [2019] 1 IR 205 and *Re Worldport Ireland Ltd. (In Liquidation)* [2005] IEHC 189.

**48.** In *Tanat*, O' Neill J. found that he was free to depart from an earlier decision where the issue of law was the same as that decided in a previous case but the facts were entirely different and different case-law was opened, as follows (para. 77):

*"77. 48. Thus, the court must examine closely the transactions concluded between the plaintiff and defendant in this case to ascertain with precision what existing rights and obligations are changed, beneficially or detrimentally by the operation of s. 132(3) of the Act. If the court concludes that existing rights or obligations are impaired materially by the potential operation of s. 132(3), then the court must construe the term*



*"agreement for suck lease" as used in s. 132(2) in a manner that excludes such material interference with existing rights and obligations."*

49. Similarly, in the Matter of *In Re McNamara*, the Court (McDonald J.) was prepared to revisit an earlier decision made by the same judge on the basis of a point conceded and not argued. The Court ruled (para. 26):

*"In this case, having regard to the fact that the point was conceded in Ahmed Ali and was not argued, it seems to me that the first of the exceptions identified by Clarke J. (as he then was) in Worldport applies – namely that the decision in Ahmed Ali was not based upon a review of significant relevant authority."*

50. In *Noone*, Noonan J. departed from a decision of Baker J. in *Keon v. Gibbs* [2015] IEHC 812 on the basis that the precise issue had not been considered by Baker J. stating, in reliance on *Re Worldport Ireland Ltd. (In Liquidation)* and *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 that (para. 28):

*"The fact that the court was not invited to, and did not in fact, consider this issue in arriving at its conclusion seems to me to provide a strong reason why I should not follow the implicit underlying rationale that the court possesses jurisdiction to extend the 21 day period limited by s. 123 of the 2004 Act."*

51. In *Worldport*, Clarke J. underlined the strong reluctance of a judge to depart from a previous decision of a judge of the same court unless there are strong reasons, in accordance with jurisprudence, for so doing. He identified as amongst the circumstances where it may be appropriate for a court to come to a different view a situation where:

*"it was clear that the initial decision was not based upon a review of significant relevant authority..."*

52. It is clear that in *Fahy* no authority was opened by the Respondent on the point in issue and the Respondent elected to address no submissions to the Court. While one might express a negative view as to the wisdom or appropriateness of the Respondent adopting such a

position, this does not alter the fact that in consequence of the position taken by the Respondent, the Court was deprived of the benefit of argument thereby justifying a judge who has the benefit of argument adopting a different position when persuaded by fuller argument to do so. It seems to me that had the Court had the benefit of fuller argument in *Fahy*, the ratio of the judgment would likely have been expressed in terms either clearly referable to the facts in that case as the Court would have been alerted to other potential factual scenarios or clearly of wider application, thereby dispelling any question as to whether the ratio extended beyond the facts of that case. Insofar as I may be wrong in my conclusion that the ratio in *Fahy* is confined to the facts in that case, I consider that I am nonetheless entitled on the particular facts and circumstances and having regard to the manner in which *Fahy* was decided, to arrive at a different conclusion. Not only were the facts different in *Fahy* but the Court appears to have heard no argument with regard to the limits of the scope of application of Regulation 12(10) and this was not fully considered by the Court because of the approach adopted by the Respondent in that case.

## **CONCLUSION**

**53.** I am satisfied that this case is distinguishable from *Fahy* and that there was no unlawfulness in the extension of the probation period and therefore no unlawful termination of the Applicant's employment on the basis that she was no longer a probationer. Accordingly, I refuse the relief sought and dismiss the proceedings.