THE HIGH COURT

[2023] IEHC 648

[Record No. 2023/681P]

BETWEEN

JOHN FRANCIS LAWLESS

PLAINTIFF

AND

TECHNOLOGICAL UNIVERSITY OF THE SHANNON MIDLANDS

FORMERLY ATHLONE INSTITUTE OF TECHNOLOGY,

THE GARDA COMMISSIONER, SINÉAD CASEY AND

WESTMEATH COMMUNITY DEVELOPMENT LIMITED

DEFENDANTS

JUDGMENT of Mr Justice Kennedy delivered on the 27th day of November 2023

Introduction

The First Proceedings

1. In these proceedings (the "First Proceedings"), the Plaintiff seeks a declaration that he is lawfully appointed to a position as assistant to the Fourth Defendant's After Schools Coordinator ("the Position"). He also claims: (a) damages for the First Defendant's alleged negligence, breach of contract, and breach of duty, including statutory duty, in failing to have due regard to the Plaintiff's personal circumstances when admitting him to an accountancy course, causing him irreparable loss and damage; (b) damages for the Second Defendant's alleged negligence and breach of duty, including statutory duty, by negligently conducting and

publishing an incomplete and inaccurate Garda vetting check on him, causing irreparable reputational and financial loss; (c) damages for Third and Fourth Defendants' alleged negligence and breach of contract "*in conducting a flawed interview process offering the Plaintiff a job and then denying him the right to take up that position on a flawed and prejudiced basis thereby causing irreparable stress loss and damage to the Plaintiff*"; (d) exemplary damages for the egregious actions; (e) interest and costs.

The Second Proceedings

2. In separate proceedings (the "Second Proceedings") Record No. 2023/1895P naming the Minister for Social Protection, Ireland and the Attorney General, the Plaintiff seeks; (a) an order to compel the Second and Third Defendants to "*bring into law the Criminal Justice (Rehabilitative Persons) Bill 2018*" ("the Bill"); (b) damages for breach of duty, including statutory duty, against the Second and Third Defendants "*in failing to legislate and bring into law*" the Bill; (c) damages for negligence and breach of duty, including statutory duty, by the First Defendant in negligently implementing the Community Employment Scheme thereby causing irreparable financial and reputational damage to the Plaintiff; (d) exemplary damages for the Defendants' egregious actions; (e) interest and costs.

The Issues in the Litigation

3. In the absence of a Statement of Claim in either proceedings, the issues must be identified from the Plenary Summonses and the affidavits. The litigation concerns the extent to which past convictions may lawfully be disclosed by the Second Defendant or taken into account by the Fourth Defendant in the context of the Plaintiff's application for employment. The applications did not involve (or explain) the claim against the First Defendant in these Proceedings, but as far as the other Defendants in those proceedings are concerned, it appears

that (in addition to factual allegations concerning the conduct of a recruitment process) two key issues arise in the substantive proceedings: (a) the consequences, if any, of the Second Defendant's initial provision of incorrect information to the Fourth Defendant; and (b) the correct application and interpretation of the statutory requirements as to the information to be provided by the Second Defendant. The Second Proceedings concern a broader issue, the Plaintiff's claim that the State has breached his rights by failing to enact the Bill (so as to obviate the need for the disclosure of his criminal convictions).

The four applications

4. The Plaintiff's four applications sought orders: (a) appointing him to the Position pending the determination of these proceedings; (b) requiring the Fourth Defendant to place three of its employees (including the Third Defendant) on administrative leave pending the determination of these proceedings; (c) restraining the Second Defendant from publishing any further information regarding the Plaintiff's Garda vetting pending the outcome of these proceedings; and (d) consolidating the two proceedings. This judgment will consider the first three applications for interlocutory orders before examining the consolidation motion.

The Evidence

5. In summary, the Plaintiff's affidavits state that:

a. The Third Defendant interviewed the Plaintiff and unconditionally offered him the Position, requesting his consent to a Garda vetting report, and telling him that the job would commence two weeks after he cleared Garda vetting. The Plaintiff asked about the vetting procedure and was told that it involved checking his criminal record, if any, and that one only failed Garda vetting if perceived as a danger to women or children. He told her that he had some convictions but that they

were not of that ilk and, as far as he was aware, they were in the process of being spent. He gave her his driving licence to copy so the vetting process could commence, "happy in the knowledge based on our conversation that any potential issues were not referrable to [his] circumstances".

b. When the Plaintiff was sent information to complete for the vetting process he did not disclose two past convictions because he understood (from Seetec and the Citizens Advice website) that the convictions (which did not relate to child safety issues in any event) were spent and did not require disclosure.

c. As a consequence of a flawed Garda Vetting report, the Fourth Defendant refused to offer him the Position, depriving him of work experience necessary to qualify for final Chartered Accountancy examinations. By letter dated 3 February 2023 the Fourth Named Defendant informed the Plaintiff that:

> "*As you are aware from our job advertisement, the position that you applied for is subject to Garda vetting. The results of this vetting make you an unsuitable candidate for the job of assistant to the after schools coordinator*."

d. The vetting was flawed - its outcome should be a "Yes" or "No" confirmation from the Second Defendant as to whether the applicant passed or failed vetting and should get the job. However, rather than simply answering whether or not he "*passed the Garda vetting procedure*", the Second Defendant published inaccurate information about him, thereby causing him irreparable reputational damage.

e. The Second Defendant acted *ultra vires* by wrongfully publishing sensitive information about him to a third party.

f. He was denied the right to appeal the outcome of the vetting process because he was not notified of the outcome within the 14-day appeal period.

g. His failing the vetting process creates the false impression that he was guilty of offences with a sexual element. He was wrongfully denied the Position and had

become the "*subject of a whispering campaign suggesting that [he was] akin to a 'sexual predator', thereby destroying [his] reputation in the local community and occasioning [him] irreparable stress, loss and damage*".

h. The Third Defendant and two other employees of the Fourth Defendant had colluded to publish a flawed Garda vetting decision, to prevent him from appealing, and to deny him the Position he had been offered on the basis of the flawed decision.

i. Although an amended vetting disclosure report was issued by the Second Defendant referencing two rather than three convictions, the amended disclosure still breaches sections 13 & 14 of the National Vetting Bureau (Children and Vulnerable Persons) Acts 2012 – 2016 ("the Acts").

j. He was denied his constitutional entitlement to earn a livelihood as a result of the process and the manner in which the vetting application was published.

6. In a separate affidavit grounding his application to consolidate the actions, the Plaintiff stated that the issues raised in these proceedings concerning Garda vetting procedures require immediate legislation and that, if a proposed bill had been enacted he would not be faced with the issues in this case which left him "*in employment limbo*". Accordingly, he issued the Second Proceedings to compel the immediate enactment of the Bill. Both proceedings, he has averred, should be consolidated to make best use of court time and resources.

7. The Plaintiff confirmed in his replying affidavit (in respect of the Fourth Defendant) and in submissions (in respect of the Second Defendant) his willingness to provide an undertaking as to damages. Although there were doubts as to his ability to honour such undertakings, the Defendants did not heavily press the point that the application for injunctive relief should be dismissed on that ground alone although they would have been entitled to have done so.

8. Certain points were undisputed, including that:

a. The advertisement for the Position expressly stipulated that applicants should be prepared to complete a Garda vetting application form.

b. The recruitment process was subject to the Community Employment Procedures Manual which the plaintiff exhibited, and which noted that:

> "*3.1.15* ***Garda Vetting***
> *The statutory obligations for employers, including CE Sponsoring Organisations in relation to Garda vetting requirements for persons working with children and vulnerable adults are set out in the National Vetting Bureau (Children and Vulnerable Persons) Acts 2012 – 2016 or as amended.*
>
> *The CE Sponsoring Organisation must ensure full compliance with all the requirements of the legislation.*
>
> *The decision on the suitability of a CE applicant for a CE place lies with the CE Sponsor, as the employer. The results of vetting form an essential part of the recruitment decision.*
>
> *Applications for positions that require Garda vetting* ***cannot commence work*** *on the project until Garda vetting process is completed*." (emphasis as *per* original)

Paragraph 3.3.8 of the manual also reiterates that the decision on the suitability of a CE applicant for a CE place lies with the CE Sponsor as the employer, that the results of vetting form an essential part of the recruitment decision and that applicants cannot commence work until vetting is completed.

c. Incorrect information was initially provided by the Second Defendant in the original vetting report, suggesting that the Plaintiff had three criminal convictions involving dishonesty (he actually had two). The original vetting record suggested that the Plaintiff had the following criminal record (and the first entry, in relation to 14 June 2012, was wrong):

14/06/2012	Roscommon Town Circuit Court	Handling Stolen Property	Sentence Suspended: 3 years – Sentence: 3 years
19/03/2014	Roscommon Town Circuit Court	Handling Stolen Property	Sentence Suspended: 3 years – Sentence: 3 years
21/05/2014	Cork City Circuit Court	Making Gain or Causing Loss by Deception	Sentence Suspended: 18 months – Sentence: 18 months

9. While the Defendants acknowledge that incorrect information was initially provided by the Second Defendant in its original vetting report, the Defendants dispute the allegation that they caused him reputational or other damage as alleged.

10. The replying affidavit on behalf of the Second Defendant stated that:

a. The Position constituted "*relevant work or activities*" within the meaning of the Acts and the Plaintiff was vetted accordingly.

b. On 15 November 2022 the Garda vetting application was received from the Fourth Defendant in respect of - and with the consent of - the Plaintiff. It wrongly suggested that he had no criminal record.

c. The Second Defendant only learnt that the Plaintiff disagreed with the original vetting disclosure when the Plaintiff served proceedings on 20 February 2023. Rechecks by the Second Defendant (following the issuing of these proceedings) identified a discrepancy which was disclosed to the Plaintiff and to the Court on 20 March 2023. It issued an amended disclosure on 18 April 2023 following further checks, disclosing two (rather than three) criminal convictions.

11. The replying affidavit on behalf of the Fourth Defendant stated that:

a. The Plaintiff failed to show that damages would not be an adequate remedy if his claim succeeded at trial.

b. The advertisement for the Position made clear that successful applicants would have to complete Garda vetting, that the outcome of the application would depend on the results of the vetting and that any application or offer was conditional on the vetting process.

c. The advertisement made clear that the Position was a "*highly sensitive post*" involving important financial duties including the handling of funds.

d. The Third Defendant did offer the Position to the Plaintiff orally "*but, as per the job advertisement, made it clear that it was subject to Garda vetting*". Accordingly, no unconditional offer was (or could have been) made.

e. At all times the Plaintiff knew that the job was only offered subject to Garda vetting. He acknowledged the need for (and consented to) such vetting by completing the Garda vetting form.

f. The Third Defendant relied on the Plaintiff's assurances that his previous convictions were spent but the offer of employment was still subject to vetting.

g. The original Garda vetting report wrongly suggested that the Plaintiff had three (rather than two) previous convictions (two convictions for Handling Stolen Property and one for Making Gain or Causing Loss by Deception).

h. Because of the nature of the convictions and the requirements of the Position, the Fourth Defendant concluded that the Plaintiff was an unsuitable candidate.

i. The Third and Fourth Defendants did not publish the vetting disclosure to anybody apart from the Plaintiff himself.

j. The Plaintiff could have availed of the vetting dispute process. He was not in fact out of time to challenge the vetting disclosure when he was informed of the

decision; he was never precluded from doing so. Instead, he issued proceedings on 16 February 2023.

k. When the matter was first listed on 20 March 2023 the Second Defendant disclosed the "discrepancy" which had been identified. The corrected report was furnished on 18 April 2023, confirming that the Plaintiff had only two convictions.

l. Contrary to the Plaintiff's comments to the Third Defendant, the previous convictions were not spent for vetting purposes. The Plaintiff was also incorrect in suggesting that the outcome of the process "*should be a 'Yes' or 'No'*" decision by the Garda Vetting Bureau. That was not how the statutory process operated.

m. None of the parties were involved in collusion as alleged.

Submissions in respect of an Interlocutory Order appointing Plaintiff to Position

12. The Plaintiff's application for an order requiring the Fourth Defendant to appoint him to the Position pending trial was based on his claims to have received an unconditional offer and his view that the Defendants were continuing to conduct the vetting process incorrectly because his two convictions should be regarded as irrelevant and/or spent.

13. The Fourth Defendant argued that:

a. It had followed and was following the correct procedure. It did not (and could not) make an unconditional offer of employment – it was at all times clear to the applicant that the successful completion of the vetting procedure was required (even if he had a misapprehension as to what that involved).

b. The Plaintiff had admitted that he had informed the Third Defendant that he had convictions and had told her that he thought they were spent. She took him at his word. Unfortunately, they were not spent. The Fourth Defendant was entitled (and, indeed, required) to deal with the application on foot of the vetting results.

c. It was wrong to suggest that the vetting was solely to protect children and vulnerable persons. There was also a fiduciary financial element to the Position.

d. Contrary to the Plaintiff's submissions, there was no unconditional offer. No contract was entered into. The Fourth Defendant followed the procedures provided for in the manual and the advertisement. It placed particular reliance on the requirements set out in section 3.1.15 of the manual as being the process followed.

e. The Plaintiff's desire to secure employment to qualify for the Chartered Accountancy examinations was not a consideration for relief and his difficulty in this instance arose because he had applied for a position which was subject to the statutory vetting procedure. He could apply for other positions where there would be no such requirement. However, as far as the particular Position was concerned, the Fourth Defendant must follow the prescribed procedures.

f. The Fourth Defendant did not accept that the Plaintiff had been wrongfully denied employment or that it had damaged his reputation but if such claims were substantiated then damages would be an adequate remedy.

Motion to suspend two employees of the Fourth Defendant

14. The Plaintiff sought an order requiring the Fourth Defendant to place three employees (including the Third Defendant) on administrative leave pending the determination of the proceedings. This unusual interlocutory relief was justified on the basis of the Plaintiff's submission that they were misusing Garda vetting information or failing to carry out the vetting correctly and in accordance with the legislation, apparently with a view to depriving the Plaintiff of the opportunity to commence employment with the Fourth Defendant. No evidence was tendered to support these claims which appeared to be based on the Plaintiff's belief that his convictions should be disregarded.

15. The Plaintiff submitted that the individuals needed to be investigated before they could continue in their current role. He also raised peripheral criticisms of the way the recruitment and vetting process had been conducted. The basis for these objections was obscure but appeared to include his concern that he was interviewed by one person rather than a panel and his claim that he received inaccurate information as to the background of one of the employees but he did not explain the relevance of either allegation to his claims and the Court was unable to attach any credence or significance to such issues in the context of his claim.

16. The Fourth Defendant submitted that:

a. There was no basis for the application to force it to place its employees on leave. There was no legal basis for a third party in the Plaintiff's position to interfere in the private contractual relationship between it and its employees on any basis, let alone on the basis of his dissatisfied with their approach to his application.

b. There was no basis for the criticism that it or its employees had not followed the correct procedure – the steps taken were as outlined in the applicable manual.

c. The Plaintiff's final affidavit showed that his real complaint was directed at the State's failure to amend the current legislation. The Plaintiff may be dissatisfied with the legislation but his applications to the Court in that regard are misconceived. The Defendants must comply with the current legislation and duly did so. In any event, a genuine issue as to the interpretation of the legislation could not justify the suspension of the employees (or requiring the Fourth Defendant to do so).

Application to restrain the Second Defendant from publishing vetting reports

17. The Applicant also sought orders restraining the Second Defendant "*from further publishing any information regarding the Plaintiff's Garda vetting pending the outcome of the proceedings.*" Once again, he argued that the vetting should only consider child safety issues,

whereas he had no convictions of that nature, and his convictions were spent, in any event. By not confirming that he had passed Garda vetting, the Second Defendant was wrongfully signalling to the public at large that the Plaintiff was a threat to children. He argued that referencing such convictions was contrary to the General Data Protection Regulation ("GDPR"), specifically Article 5 thereof, an argument based on the Commission Paper which he cited as prohibiting the disclosure of convictions more than 7 years old.

18. The Plaintiff responded to the suggestion that he had consented to the vetting process by noting that he had consented to a *lawful* vetting process, not a flawed one. He had no objection to the vetting process if conducted *appropriately* but the Second Defendant should not produce flawed reports about him.

19. The Second Defendant submitted that:

a. The Plaintiff had not alleged that its process contravened any domestic legislative provision although he had asserted in his submissions that it breached GDPR and the European Convention on Human Rights (the "ECHR"). However, the ECHR had no direct application and, in any event, no such ECHR and GDPR claims had been raised by the Plaintiff in the proceedings to date. Such important issues would require to be fully pleaded. Nor was there any obvious breach which would give rise to a remedy in damages. The Plaintiff's contention that the current regime is unlawful appeared to be solely based on the view expressed in the Commission Paper but that document was no more than submissions. It did not establish the current legal position, much less a breach of his rights. They do not purport to reflect the current legal position.

b. The Plaintiff was wrong in his interpretation of the Acts if he considered that the claims did not require disclosure or that the convictions were spent and also

incorrect in his suggestion that the Second Defendant's responsibility was to issue a "pass" or "fail" vetting report or that there was a breach of Sections 13 or 14A.

c. The Position fell within the statutory definition of "Relevant Work", bringing it inside the statutory framework. While Section 14A does provide that certain District Court convictions should be disregarded, the Plaintiff's convictions were Circuit Court convictions and were therefore convictions which required disclosure under the Acts (the Plaintiff did not take issue with this conclusion).

d. It is clear from the provision that a full criminal record is required (the disclosure is not restricted to offences of a sexual or predatory nature) (again, the Plaintiff's submissions did not take issue with this analysis).

e. No vetting can take place without the relevant individual's consent. The Plaintiff had consented to the process.

f. It appeared that the real thrust of the Plaintiff's complaint was his understandable concern that the current legislation required the disclosure of convictions which he regarded as irrelevant or spent. However, the Second Defendant must apply the law as it stands.

g. In view of the unusual nature of the public law relief sought, to restrain a public body from performing its statutory functions, it was relevant to subject the strength of the substantive claim to greater scrutiny than in a private law context, meaning a more rigorous application of the "arguable case" test. The Plaintiff had not established a sufficiently arguable case.

h. The error in the original report had been addressed and the Plaintiff had at most a damages claim, subject to factual and legal defences (such as qualified privilege).

i. There was no suggestion that an ongoing issue so as to justify injunctive relief, nor any basis to suggest that future communications were likely to defame him.

j. In terms of the balance of convenience the Court was required to consider where the greatest risk of injustice lies. There was a heavy burden on any application seeking to suspend the law of the land and a strong public interest in not using the courts to interfere with processes mandated by the Oireachtas.

k. The essence of the claim against the Second Defendant concerned damage to reputation, if any, arising from the initial incorrect report and a civil claim if the Plaintiff could show that he was wrongly denied employment. Damages would be an adequate remedy for any such claim whereas it would be impossible to measure, let alone recover, any damage to the Second Defendant or to the public interest if the relief was granted in respect of a claim which was not sustained at trial.

l. In summary, the Second Defendant had statutory duties to perform, and exceptional circumstances and a strong case would be required to interfere with the exercise of such statutory functions. There was no such strong case here and the discretion should be exercised against granting such relief in any event.

The Law

20. Before reaching conclusions on the three injunction applications, it is necessary to summarise key legal principles including: (a) the provisions of the current legislation; (b) the principles pertaining to the argument that the State should be compelled to introduce legislative reforms; and (c) the principles governing the granting of injunctive relief.

The Current Legislation

21. The key provisions in the Acts[1] are as follows:

a. The long title identifies the purpose of the legislation as being:

"*to make provision for the protection of children and vulnerable persons and, for that purpose…to provide for the establishment of procedures that are to*

[1] The National Vetting Bureau (Children and Vulnerable Persons) Act 2012 was amended by the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016.

apply in respect of persons who wish to undertake certain work or activities relating to children or vulnerable persons or to provide certain services to children or vulnerable persons."

b. Section 2 defines key terms in the Act, and it was common ground that the Fourth Defendant is a "*relevant organisation*", and the Position constitutes "*relevant work or activities*", bringing it within the framework of the legislation.

c. Section 7 provides for relevant organisations to make vetting applications in respect of vetted persons or vetting subjects.

d. Section 7(2) stipulates that it is the function of the Garda National Vetting Bureau ('GNVB') to provide "*vetting services to relevant organisations in respect of relevant work or activities*".

e. Section 12(2) makes it a criminal offence (for the Fourth Defendant) to employ or enter a contract for services with a person to undertake "*relevant work or activities*" unless it receives a vetting disclosure from the GNVB in respect of that person.

f. Section 13 sets out a detailed procedure for the vetting process. In particular, and significantly as far as the application for injunctive relief against the Second Defendant is concerned, Section 13(4)(e) requires any vetting application to include the vetted person's declaration of consent to the making of a vetting application and to the disclosure of information by the Second Defendant under the Acts.

g. Section 14(4)(a) specifies what is required in a vetting disclosure including:

"*particulars of the criminal record (if any) relating to the person*"

h. Section 14A specifies that certain District Court offences need not be included in the vetting disclosure (but has no application in this case because the Plaintiff's convictions were in the Circuit Court).

i. Section 16 confirms that only the relevant organisation (the Fourth Defendant) has access to the information. The information is disclosed in a secure procedure to a designated and trained liaison person and information in a vetting disclosure can only be used in accordance with the Acts or as otherwise authorised by law. It is a criminal offence to breach those provisions of the Acts (there is no evidence in the current proceedings of any such misuse of the information or breach of the Acts).

j. Although the Plaintiff suggests that it is a matter for the Second Defendant to indicate whether an applicant "passed" or "failed" vetting, that is not what the Acts provide. The effect of the provisions was to require the Fourth Defendant to obtain a vetting report and, as Section 16(2) made clear, to allow the Fourth Defendant to:

> "*consider and take into account…the information disclosed in the vetting disclosure when assessing the suitability of the person who is the subject of the vetting disclosure…to undertake relevant work or activities*".

Accordingly, while it is necessary for the Fourth Defendant to obtain and have regard to the vetting report before offering the Position to the Plaintiff, the decision remained with the Fourth Defendant as to whether or not any criminal record identified in any such vetting report was of such a nature as to render a candidate such as the Plaintiff unsuitable for the particular position. The fact that the Fourth Defendant retained the power to determine the candidate's suitability notwithstanding the existence of prior convictions is highly significant both in terms of the reliefs sought in both proceedings and in the context of the interlocutory applications, but the Plaintiff's applications appear to have been brought under a fundamental misapprehension of the legal position in this regard.

The argument that the State should be compelled to introduce legislative reforms

22. As submissions proceeded, it became clear that the Plaintiff's primary concern was not whether the current legislative provisions were being correctly applied by the Defendants so

much as whether the current provisions were themselves flawed. Indeed, in the affidavit grounding his application to consolidate the proceedings the Plaintiff stated that:

> "*the issues raised in these proceedings concerning the Garda vetting procedure require the immediate introduction of the Criminal Justice (Rehabilitative Persons) Bill 2018…if this Bill had been introduced in a timely fashion I would not be faced with the issue arising in this case, which leaves me in employment limbo*".

In the Second Proceedings the Plaintiff seeks to direct the State to introduce amending legislation. Such proceedings could raise constitutional issues as to the circumstances in which the Courts can (or should) seek to direct the Government or the Oireachtas in their respective powers and the jurisprudence highlights the significant obstacles facing any such claim.

23. In *TD v. Minister for Education* [2001] 4 IR 259 ("*TD*"), the Supreme Court reversed the High Court's decision to grant a mandatory injunction directing the respondents to implement a Government policy (in respect of the accommodation and treatment of children with special needs) which had been formulated but which had not been implemented in a timely manner. The Court held that such an order involved the High Court "*effectively determining the policy which the Executive are to follow in dealing with a particular social problem*" (at p. 287) and that this would breach the doctrine of separation of powers. Keane C.J. cited (at p. 284) the observations of Griffin J. in *Boland v. An Taoiseach* [1974] IR 338, at p. 370, that:

> "*… these Articles demonstrate that the Oireachtas, and the Oireachtas alone, can exercise the legislative power of government; that the Government, and the Government alone, can exercise the executive power of government…*."

24. Keane C.J. acknowledged that, in some circumstances, the courts may intervene to secure compliance by the Government with constitutional requirements, if it has been established that the Government has acted in contravention of the Constitution (at p. 284). However, the Court did not consider that it was dealing with such a case. Denham J. (as she was) agreed (at p. 298):

"*The sole and exclusive power of making laws for the State is vested in the Oireachtas: Constitution of Ireland, Article 15.2.1°. The executive power of the State is exercised by or on the authority of the Government: Constitution of Ireland, Article 28.2. Justice is administered in courts established by law by judges appointed in the manner provided by the Constitution: Constitution of Ireland, Article 34.1.*"

25. She also cited (at p. 301) the summary of the courts' powers by Hamilton C.J. in *McKenna v. An Taoiseach (No. 2)* [1995] 2 IR 10, at p. 32:

"*1. The courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions provided that it acts within the restraints imposed by the Constitution on the exercise of such powers.*
2. If, however, the Government acts otherwise than in accordance with the provisions of the Constitution and in clear disregard thereof, the courts are not only entitled but obliged to intervene.
3. The courts are only entitled to intervene if the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution."

26. Referring to *Sinnott v. Minister for Health* [2001] 2 IR 545, Denham J. emphasised (at p. 306) that such court interference will only be merited in "*rare and exceptional cases*".

27. The Plaintiff's first two applications seek mandatory reliefs against the Fourth Defendant. Accordingly, a key criterion for each application as a matter of Irish law (*Maha Lingham v. Health Service Executive* [2006] ELR 137) is that the Plaintiff must show a strong arguable case that he will establish an entitlement to the relief at trial.

28. Clarke C.J. explained the court's reluctance to grant mandatory injunctions in *Charleton v. Scriven* [2019] IESC 28, at para. 4.8:

"*The reason why a higher standard is applied is not because of some technicality but because of the greater risk of injustice which I have sought to identify. But that greater risk is a function of the substance of the order sought and the consequences which it might have for an individual who became bound to obey the interlocutory injunction but ultimately succeeded. It is clear that, at least in general terms, requiring someone to do*

something which, it may ultimately transpire, they were not required to do may give rise to a greater risk of injustice than simply requiring someone to refrain from doing something which they may ultimately be found to be entitled to do."

Fundamentally, the objective of interlocutory injunctions is to preserve the *status quo* pending trial. The Court will be concerned that the reliefs being sought by the Plaintiff would not be preserving the status quo but would be seeking to put Plaintiffs in the Position which they might aspire to obtain if they ultimately succeeded at the trial of the action.

29. The Courts have recognised that, in addition to the criteria applicable to any application for pre-trial injunctive relief, particular issues arise with applications to restrain the discharge by public bodies of their statutory functions. For example, in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 IR 152 ('*Okunade*'), Clarke J. (as he then was) stated (at p. 193) that, in considering whether to grant an interlocutory injunction in the context of a judicial review, the Court should apply the following considerations:

"*(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;*

(b) the court should consider where the greatest risk of injustice would lie. But in doing so the court should:-

(i) give all appropriate weight to the orderly implementation of measures which are prima facie valid;

(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and

(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;

but also

(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) in addition the court should, in these limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,

(d) in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

30. Simons J. applied those principles in *Friends of the Irish Environment Limited v. The Minister for Communications* [2019] IEHC 555 ("*Friends*") in an application for an interlocutory injunction to restrain the operation of ministerial regulations. Simons J noted the "*heavy burden*" on an applicant who, in effect, sought to suspend the law of the land. He noted that the jurisdiction to grant an injunction which would have the effect of preventing the operation of legislation pending the determination of proceedings is a jurisdiction which must be "*most sparingly exercised*" (*per MD (An Infant) v. Ireland* [2009] 3 IR 690).

Findings on Applications for Injunctive Relief

31. Whether any of the Plaintiff's claims in either proceedings succeed (and, if so, any relief to which he may be entitled) can only be determined at trial, after all evidence has been heard and full legal submissions have been made. This judgment is solely focussed on the Plaintiff's applications for certain reliefs pending trial and for the consolidation of the two actions. It is not the Court's function at this stage to reach a final determination on the substantive issues in either proceeding. The Court will only consider the substantive issues to the extent necessary to determine the four applications. Any such consideration is limited to that purpose and is preliminary or provisional, reflecting the limited evidence and submissions.

32. In considering the plaintiff's applications, it should be noted that many of his averments as to the Defendants' processes being flawed or as to the damage suffered to his reputation and other irreparable harm are expressed in bald terms without sufficient detail to substantiate such

assertions. Such assertions on the face are generally not sufficient to satisfy the court of the existence of an arguable case let alone a strong one and the absence of concrete evidence to substantiate the Plaintiff's assertions may also go to the balance of convenience and the Court's discretion.

Interpretation and Application of the Current Provisions

33. As far as the current legislation is concerned, the Plaintiff has failed to establish an arguable case that the Defendants are wrong in their ongoing interpretation and application of the Acts. There was no dispute about the fact that the Position was subject to Garda vetting. The application concerned a position which fell within the statutory definition of "*relevant work or activities*", bringing it inside the statutory framework. The Court considers that: (a) section 14A excludes certain District Court convictions but the Plaintiff's convictions were Circuit Court convictions. Accordingly, his convictions required disclosure; (b) the Plaintiff is not correct in his assertion that the Second Defendant's function was to inform the Fourth Defendant whether the Plaintiff had "passed"; and (c) it is clear that a full criminal record is required (the disclosure is not restricted to offences of a sexual or predatory nature).

34. Accordingly, the Court is satisfied that, on their face, the Acts require disclosure of the Plaintiff's convictions and the Second Defendant must proceed accordingly. Nor had the Plaintiff demonstrated any ongoing breach of sections 13 or 14A of the Acts. The Plaintiff has accordingly not identified any respect in which the Second Defendant's ongoing process contravened the domestic legislation save for his argument that that legislation was invalid by virtue of the failure to enact amending legislation.

35. There is no credible evidence before the Court to suggest that the Defendants are failing to apply the current legislation or that they are likely to do so. The error in the original vetting report was rectified. The Second Defendant will doubtless have taken steps to prevent similar mistakes in future in respect of applications concerning the Plaintiff (or, indeed, other parties).

Original Vetting Report

36. The Plaintiff's strongest point is the admitted – but resolved - error in the original vetting report. This should not have happened. It was potentially detrimental to the Plaintiff. However, that does not of itself establish a basis for interlocutory relief nor is that unfortunate issue logically relevant to the Plaintiff's current applications.

37. The Court's (preliminary and provisional) conclusions in respect of the error in the original vetting report are as follows:

a. The Plaintiff is justifiably concerned by the Second Named Defendant's provision of wrong information in the context of its discharge of its statutory function in respect of his application. There is no evidence that this error was other than inadvertent or that it impacted on the outcome of the employment application.

b. The Second Defendant could perhaps have moved more quickly to identify and correct what it (euphemistically) described as the "discrepancy" in the original vetting report once proceedings were issued. It was alerted to the issue by the service of the proceedings but two months elapsed before the original report was corrected. There was no need to wait until the first return date of the proceedings or to take another month to confirm the correct position. The reason for the original "discrepancy" is not clear, nor is it clear whether the Plaintiff has received an apology or explanation.

c. To minimise any potential impact on the Plaintiff's good name and his right to earn a livelihood, the Second Defendant should have rectified the error without any avoidable delay once it became aware of the issue. That said, the Second Defendant would first have needed to check the position and to take advice.

d. Furthermore, there is no credible evidence before the Court to suggest that the "discrepancy" was deliberate or that there was collusion or deliberate wrongdoing or that the issue was likely to recur.

38. As appears from the Plenary Summons, the Plaintiff will seek damages at trial. However, any such claim based on the error in the original vetting report will face legal hurdles. For example, the Defendants may seek to invoke the statutory defence of qualified privilege pursuant to s. 18 of the Defamation Act 2009. The damages claim could also face factual hurdles, such as the need to demonstrate that error actually impacted his application (as the Defendants may contend that the two undisputed convictions would have had the same result in any event). There will also be issues as to the extent to which the Plaintiff's reputation was damaged (given the minimal circulation and subsequent correction of the original report).

39. At this stage the Court is not required to resolve such issues. However, even if such a claim was to succeed at trial, the remedy is likely to be damages. For that reason alone, the original vetting error would not justify the interlocutory reliefs sought by the Plaintiff.

40. The Plaintiff did not contend in his affidavits or oral submissions that he would have secured the position if the original vetting report had been limited to the two actual criminal offences as per the revised report. The thrust of his objection was that no offences should have been disclosed, because, in his view, the offences were either spent or they were not relevant or responsive in the context of a procedure which he saw as being solely designed to protect children and other vulnerable persons from sexual predators, and that the process was flawed to the extent that it referenced such convictions. Accordingly, the appropriateness of the current disclosure requirements will now be considered.

Failure to Enact Amending Legislation

41. According to its long title, the legislation is directed towards protecting children and other vulnerable people. The plaintiff is understandably frustrated and concerned that the Acts require disclosure of offences which - in his view - are not obviously related to that objective because he considers that only offences of a sexual or predatory nature would be relevant in that context. However, the legislation is not limited to offences of that nature nor is it obvious that they would be the only serious offences which would be relevant in the context of individuals appointed to positions of trust and responsibility and dealing with children and young persons. The Oireachtas was entitled to take the view that other serious offences, including, in this case, convictions giving rise to significant terms of imprisonment (albeit suspended) for fraudulent conduct should be disclosed to relevant organisations considering appointments, such as the Position in this case. The explicit language of the legislation appears to be the consequence of such a policy decision. While there are clearly arguments for reform, such as those articulated by the Plaintiff, there may be countervailing policy considerations and it is primarily the responsibility of the Oireachtas rather than the Courts to determine where the balance lies between competing policy considerations.

42. Irrespective of its own views as to the policy choices, the Court would have no basis to intervene unless a particular provision was unconstitutional or contrary to the law of the European Union. The *TD* decision (referenced above) demonstrates the reluctance of the Irish Courts to seek to direct the implementation of Government policy – in that case the Supreme Court determined that it would be contrary to the doctrine of separation of powers for the Court to direct the Government to implement the relevant policy, even though the particular policy had already been formulated and endorsed by the Government itself for the purpose of securing the interests of a vulnerable group.

43. The basis for the Plaintiff's repeated assertions that the vetting process was flawed was not clearly articulated in his various affidavits. In his oral submissions the Plaintiff did not

identify any respects in which the Defendants could fairly be accused of misinterpreting or misapplying the Acts. At the hearing of the applications, the Plaintiff's primary focus became the State's failure to enact the Bill rather than the correct interpretation and application of the current provisions. The gist of the plaintiff's oral submissions on the "failure to enact" claim was that, even if the Defendants were complying with the current legislation, that legislation and the associated procedures were flawed because they breached his rights under the Constitution, the ECHR and the law of the European Union. His submissions on this central issue essentially relied upon a 20 November 2020 paper by the Irish Human Rights and Equality Commission: "Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016" (the "Commission Paper").

44. It is important to note the context in which the Commission Paper was produced. It was submitted as part of a public consultation process for the review of the Acts. The Court has no visibility in respect of the other papers which were presumably submitted as part of that process, possibly taking similar positions as the Commission Paper or possibly taking alternative views. Nor has the Court any visibility as to the outcome of that consultation process save to the extent that it has not resulted in amending legislation (as of yet, at least).

45. It is invidious for the Court to be presented with one contribution to such a public consultation process as if it was the beginning and end of the argument. Indeed, the Court is not the correct body to be weighing the policy considerations for or against proposed legislative changes – those are quintessentially policy matters for the Government and, ultimately, the Oireachtas, rather than the Courts. It is not the Court's role to second guess the outcome of the public consultation process at all but particularly on the basis of an incomplete record.

46. The Commission Paper is deserving of respect both in view of the quality of its research and scholarship as well as its institutional authorship, an independent and highly respected statutory body. However, such a paper cannot determine the validity of legislation. Nor does it

assert a definitive conclusion that the current legislation is legally invalid. Nor does it constitute a legal precedent.

47. In any event, the plaintiff has misunderstood and overstated the views expressed in the Commission Paper. It certainly articulates the case for policy changes and legislative reform which the authors endorse and advocate both on policy grounds and in legal terms (including arguments as to why such reforms would be consistent with the requirements of the Irish Constitution, the ECHR and the law of the European Union). However, the document does not establish that the current legislation is unconstitutional or otherwise unlawful because of any failure to make the proposed changes. Even leaving aside the fact that any such determination could only be made by a court of competent jurisdiction, the authors certainly did not make such bold claims. In any event, while the learned authors' views are certainly worthy of respect, any such legal determination could only be made by the Courts. The Commission Paper cannot justify such a conclusion, nor did it purport to do so. It simply made the policy case for legislative reform, an issue for the Oireachtas, rather than the Courts.

48. The Court considers that, properly construed, the Commission Paper was advocating changes rather than suggesting that they were obligatory in order to comply with GDPR. Furthermore, the Commission Paper expressly recognised that there were competing policy considerations to be considered by the Oireachtas. It noted at p. 3 that:

> "*The prospect of rehabilitation is inextricably linked to human dignity and promoting equality. Legislative and policy reform in this area requires the correct balance to be struck between an individual's right to respect for private life and freedom from discrimination and the broader societal interest of public safety and the prevention of disorder and crime with regard also for victims of crime*."

49. The Plaintiff placed particular emphasis on observations at p. 4 of the Commission Paper (including the associated footnotes) to the effect that:

> "*According to Council of Europe standards, the use of information on criminal records outside of criminal proceedings must be as limited as possible, so not to compromise the chances of social rehabilitation of the convicted person and should therefore be restricted "to the utmost". Also, the European Court of Human Rights…has linked the concept of human dignity to the prospect of rehabilitation, holding that this includes "meaningful" access to employment, education and vocational training*."

However, those observations do not justify the Court concluding that the current legislation is invalid. For example, the State may well argue that the existing legislation does allow for rehabilitation, strikes the correct balance and allows for meaningful access to employment, educational and vocational training because, for example; (a) the vetting procedure is not generally applicable to employment applications but only applies in appropriate contexts such as when dealing with children and vulnerable persons; (b) less serious (District Court) offences are excluded; and/or (c) the legislation requires relevant organisation to consider the result of the vetting report but does not dictate the determination as to suitability – it is still open to the relevant organisation to deem the candidate suitable for a particular position notwithstanding the prior criminal record, but this would depend very much on the circumstances.

50. The Plaintiff emphasised the observation at p. 5 of the Commission Paper, citing *Cox v. Ireland* [1992] 2 IR 503 ('*Cox*'), that:

> "*The Irish courts have recognised that unjustified less favourable treatment because of the person's previous conviction will amount to unlawful discrimination*."

That decision was doubtless considered when the Acts were drafted and it is clear that the current provisions are very different from the situation in *Cox*, which concerned a blanket exclusion from all civil service employment for seven years, a provision which was deemed too wide and indiscriminate. In this case the exclusion of certain District Court cases, the restriction of the vetting procedure to relevant areas and the fact that the relevant organisation retained a discretion to disregard the convictions and employ the individual when appropriate would all be potential grounds to distinguish the current legislation.

51. It is clear from the foregoing, that neither the Council of Europe, nor the Commission, nor the Courts have gone so far as to conclude that all recourse to criminal records is unlawful or discriminatory. There are competing policy considerations at play and a balance must be struck between such compelling competing considerations. Although the Plaintiff (and, it seems, the Commission) considers that the legislation should go further in terms of rehabilitation, the Commission acknowledged this policy dilemma observing at p. 8 that:

> "*Measures taken to seek the rehabilitation and reintegration of convicted persons must be balanced against the broader societal interests of public safety and the prevention of disorder and crime, as well as due regard for victims*."

52. The State would presumably defend the non-enactment of the Bill on the basis that the existing legislation struck this balance by allowing limited use of vetting reports in limited circumstances and with controlled safeguards and by making clear that the final decision as to suitability rested with the relevant organisation.

53. The Plaintiff placed particular reliance on an opinion expressed at p. 11 of the Commission Paper to the effect that:

> "*Moreover, the current periods of rehabilitation are arguably disproportionate to the legitimate aims of public safety, preventing disorder or crime. In line with the principle of proportionality and maximise the aim of rehabilitation, the Minister should consider applying shorter periods proportionate to the sentence imposed, and that approaches in the UK and other jurisdictions might be instructive in this regard…*
> *The lengthy rehabilitation period touches on a separate but concerning issue regarding data retention. The retention of a person's conviction records for a period of 7 years (or indefinitely, where a person is excluded from the scheme), particularly for relatively minor offences, is likely to be inconsistent with the State's obligations under GDPR and the European Convention of Human Rights*".

Clearly the references to the objections being "arguable" reflect the Commission's acknowledgement that it is not expressing a definitive view of the actual legal position. Its assertion in respect of GDPR is expressed in somewhat stronger terms ("likely") but the basis

for this suggestion is not clearly explained by the authorities referenced in the footnote in support of this view, suggesting that the position may be more nuanced than that quotation might suggest. The Plaintiff has not suggested that either the Data Protection Commissioner or the Commission has concluded that the current legislation breaches GDPR.

54. In summary, while the Commission Paper does not on its face establish a basis for judicial intervention on the basis that the current regime is unlawful. It certainly identifies policy arguments in favour of further legislation but there may well be countervailing policy considerations and it the function of the Oireachtas rather than the Courts to strike that balance.

55. No circumstances have been shown which could justify the Court seeking to interfere in the legislative process. The Plenary Summons in the Second Proceedings invites the Court to direct the initiation and outcome of a legislative process. The Plaintiff is seeking an order to compel Ireland and the Attorney General to enact legislation. Clearly the enactment of legislation is a multi-stage process that requires actions by both Houses of the Oireachtas (rather than the Attorney General) followed by the Presidential signature. Accordingly, any such injunction would purport to direct the actions of both Houses of the Oireachtas (and presumably their individual members of both houses) and the President and would involve the Court directing the Oireachtas with regard to the drafting of legislation. This would be an extraordinary and unprecedented judicial intervention with enormous constitutional overtones.

56. For completeness it should be noted that the "failure to enact" claim is primarily articulated in the Second Proceedings rather than in these proceedings, so in any event it is very difficult to see how it could form part of the basis for injunctive relief in these proceedings. However, even disregarding that point, the Court is not satisfied on the basis of the materials submitted to date that there is an arguable basis, let alone a strong arguable basis, for such extraordinary reliefs, even if it lay within the Court's powers to grant such reliefs, but those issues would need to be further ventilated at the trial of the Second Proceedings. Accordingly,

while the Plaintiff is fully entitled to develop his case and pursue the proceedings if he chooses to do so, the Court is not satisfied that he has established an arguable case, let alone a strong arguable case, that the current legislative regime is itself unlawful or invalid or that the Court would or could direct the legislative process in any event.

Arguable Case – Appointment to the Position

57. The Plaintiff's claim to have been unconditionally offered the Position is inconsistent with his own consent to (and participation in) the vetting process. It is also inconsistent with his own acknowledgment (at paragraph 12 of his 24 March 2023 affidavit) that the Third Defendant told him the job would commence two weeks after he had cleared Garda vetting. These comments (and the vetting procedure itself) would make no sense unless any offer of employment was conditional on the outcome of the Garda vetting.

58. The factual dispute as to what was said at interview (and its legal consequences) can only be resolved by an oral hearing. However, it is difficult to see any basis on which the Plaintiff could have reasonably believed that he had received an unconditional offer given: (a) the reference to the vetting procedure; (b) the terms in which the Position was advertised; and (c) the terms of the associated manual relied upon and exhibited by the Plaintiff.

59. For example, while paragraph 3.1.14 of the manual notes that the applicant's suitability for and interest in the position should be ascertained during the interview, it also expressly stipulated that the selected candidates should be formally offered a place in writing:

> "*subject to their final eligibility being confirmed. If Garda vetting is required for the position, the Sponsor must immediately commence the Garda Vetting process with the selected applicant(s)*".

60. The claim for appointment to the Position pending trial could not be described as strong since the legislation required vetting, including the disclosure of the two criminal convictions. Such an unconditional offer could not lawfully have been made (nor could the Plaintiff

reasonably have believed that to have been the position) since the vetting procedure was a statutory precondition to an offer of employment. Furthermore, requiring the Fourth Defendant to make such an appointment in contravention of not only its normal procedures but also its statutory obligations with regard to the vetting procedure would appear an unlikely remedy even if the Plaintiff were to succeed on some of his claims at the trial of the action.

61. The Court is satisfied by the evidence and submissions on behalf of the Defendants (which was not seriously challenged by the Plaintiff) to the effect that:

a. The Plaintiff did in fact have two (rather than three) convictions; for handling stolen property and making gain or causing loss by deception, and those two convictions were required to be included in the vetting report.

b. The vetting disclosure was not published to anybody apart from the Plaintiff himself (making it difficult to understand the basis for the Plaintiff's claims to reputational damage).

c. The advertisement made clear that the Position was a "*highly sensitive post*" involving important financial duties including the handling of funds and, because of the nature of the convictions and the requirements of the Position, the Fourth Defendant concluded that the Plaintiff was an unsuitable candidate.

d. The Plaintiff can contest these points at trial. He has sought a declaration in relation to his entitlement to be appointed to the Position and he may or may not demonstrate at trial that he should have been offered the Position. However, there is no justification for anticipating the outcome of the substantive proceedings.

e. Even if the Plaintiff was correct in his claim to have been offered an unconditional contract, the Court would not necessarily order his appointment to the Position (a damages award may be more appropriate).

f. Since the Plaintiff has not discharged the onus of demonstrating a strong arguable case that there was an unconditional contract, there is no possible basis for requiring the Fourth Defendant to appoint him to the Position pending the hearing of the action. However, even if the interviewer had made an unconditional offer, any such offer would appear to have been unlawful, being in contravention of section 12(1), which means that (unless the claim in the Second Proceedings is successful) it is difficult to conceive of circumstances in which a Court would order the appointment of the Plaintiff to the Position and his sole remedy, if any, would likely lie in damages.

62. For completeness it should be noted that the plaintiff claims to have been misled that the vetting procedure was only concerned with sexual or predatory offences but it was open to him to have mentioned his actual offences in the course of the interview in order to obtain more definitive clarification. If he had concerns in that regard he should have been more explicit because a more fulsome reference to his convictions by him may have elicited a different response. Leaving that aside, even assuming for present purposes that the third named defendant wrongly described the vetting process to him, that could not change the statutory requirement which applied to the employment process. Nor is it obvious that the plaintiff was prejudiced in any way. If explanation of the process have been tendered he would still have had to consent to the vetting procedure if he wished to proceed with his application.

Arguable Case – Suspension of Employees

63. The Plaintiff sought an order requiring the Fourth Defendant to place three employees, one being the Third Defendant, on administrative leave pending the determination of the proceedings. Sadly, the Third Defendant had died prior to the hearing.

64. In any event, this unusual interlocutory relief was justified on the basis of the Plaintiff's submission that the employees were misusing Garda vetting information or failing to carry out the vetting process correctly and in accordance with the legislation, apparently with a view to depriving the Plaintiff of the opportunity to commence employment with the Fourth Defendant. This submission was not grounded in any evidence before the Court and appeared to be based on his belief that his convictions should be disregarded as spent or irrelevant in the context of the particular Position. This submission was evidently based on the "failure to enact" claim, but, as noted above, the Plaintiff has not demonstrated an arguable case in respect of that claim.

65. The Plaintiff considered that the individuals' role should be investigated before they could continue in their current role. It should be noted that the Plaintiff did not respond to the Fourth Defendant's submissions that it and its employees had in fact followed the correct procedure in relation to his application, taking all steps outlined in the relevant manual. The Court has not identified any evidence suggesting that there is any basis to criticise the individuals. The Plaintiff's real complaint appeared to be the Defendants' institutional position as to the meaning of the legislation, or, more precisely, the State's failure to amend it.

66. For completeness it should be noted that the Plaintiff also raised peripheral criticisms of the way the recruitment process was conducted. The basis for these objections was somewhat obscure but appeared to include his concern that he was interviewed by a single person rather than a multi-person panel and his claim that he received inaccurate information as to the background of one of the employees. However, the Plaintiff did not explain the relevance of either allegation or how they were supposed to have impacted him and the Court is not inclined to attach any weight to such issues.

67. There is no arguable case for the application to require the Fourth Defendant to suspend individual employees. Even if the Plaintiff were to succeed at trial on all of his current claims, the evidence before the Court does not suggest that the Fourth Defendant would itself have a

basis to take such action against such individuals. There would certainly be no basis for the Plaintiff to seek such a relief at trial. Nor could for the Court make such an order on the basis of the evidence before the Court. There is no basis to force the Fourth Defendant to suspend its employees or for a third party in the Plaintiff's position to demand such a relief.

68. While the Plaintiff is entitled to challenge the legislation, the Defendants and their employees cannot be faulted for complying with what, on their face, appear to be its lawful requirements; there is no basis to argue that the Plaintiff's objection to the appropriateness of the current domestic legislation could justify the suspension of the employees.

Arguable Case – Publication of Further Vetting Reports

69. The Plaintiff sought orders restraining the Second Defendant from publishing further vetting reports about him. As noted above, the original vetting error has been rectified and could not justify such relief. There is no evidence before the Court to suggest that there is any reason to anticipate future issues, so there is no necessity or justification for such injunctive relief. In particular, there is no evidence before the Court to suggest that the Second Defendant is seeking to discharge its duties other than in good faith and the Court is satisfied that it is correct in its interpretation and application of the current statutory provisions.

70. It should also be noted that the Plaintiff's submission that he had no objection to "lawful" vetting reports is inconsistent with the relief which he is seeking. The broad terms of the application would prohibit the Second Defendant from undertaking its functions even when those functions were indisputably being exercised lawfully. Accordingly, to that extent alone the Notice of Motion would be inappropriate because there could be no arguable case for preventing the lawful discharge of the Second Defendant's statutory functions.

71. Furthermore, the Plaintiff's application for this relief against the Second Defendant appears not to be based on the Second Defendant's interpretation and application of the current

statutory requirements so much as on his challenge to the validity of the regime, the claim advanced against the State in the Second Proceedings rather than the claim in these proceedings. The Court has noted that decisions of the Irish Courts in cases, such as *Okunade* and *Friends,* highlight the particular concerns which arise when seeking to restrain the exercise of statutory functions. As Clarke J. observed in *Okunade* at para. 93, it is:

> "*appropriate to take into account the importance to be attached to the operation of the particular scheme concerned or the facts of the individual case in question which may place added weight on the need for the relevant measures to be enforced unless and until it is found to be unlawful*".

72. Likewise, in *Friends,* Simons J noted that, even where the legislation in question was secondary legislation, there was a heavy burden on an applicant who sought to suspend the operation of legislation. The jurisdiction to suspend the operation of a legislative measure was one that had to be most sparingly exercised. The Court would respectfully endorse those remarks and would add that it was Ministerial regulations which were in issue in *Friends* – clearly the burden on the applicant is far greater in cases such as the present when the applicant is essentially seeking to suspend primary legislation.

73. In the circumstances, the Court does not consider that that claim offers an arguable basis for such injunctive relief. The Second Defendant must comply with the current legislation and the Plaintiff has not shown an arguable case (let alone a strong one) that the Act is invalid.

74. The Court also considers that the Plaintiff has failed to demonstrate a strong arguable case against the Second Defendant sufficient to justify the relief sought because, in any event, the legislation requires the Plaintiff's consent before any vetting process can take place in respect of him. The Plaintiff has no need to seek an order restraining the Second Defendant; he can simply refuse his consent. There can never be an arguable basis for the making of an order which is self-evidently unnecessary.

Balance of Convenience (including Adequacy of Damages)

75. Even if the Plaintiff had established an arguable case in support of any of the reliefs sought, the Court would have to consider whether the balance of convenience favoured the granting of such orders and, specifically, whether damages would be an adequate remedy in the event that the Plaintiff were to succeed at trial. The Plaintiff has not adduced any plausible evidence to suggest that damages would not be an adequate remedy and the Court would have dismissed the applications on this ground alone, even if the Plaintiff had otherwise been able to demonstrate a case for such reliefs.

76. Furthermore, even leaving aside the question of adequacy of damages, the Court is not satisfied that the balance of convenience or the justice of the situation would justify making such orders in favour of the Plaintiff:

a. In summary, in respect of the first application, there is no basis for an order requiring the Fourth Defendant to appoint the Plaintiff to the Position pending trial. This was in fact a key relief sought in the plenary summons and exceptional circumstances (and proof of strong case) would be required to justify such an order on an interlocutory basis. No such circumstances or strong case had been shown by the Plaintiff. While it is not unusual for a Court to prohibit the termination of an employment contract pending the hearing of an action, it would be highly unusual for a Court to require a party to appoint an individual to a position before their substantive entitlement to such an appointment had been ascertained, particularly in circumstances in which there were legitimate concerns that the employer was required to vet the employee and the employee's suitability for the position had been called into question. The Court would have to weigh the employer's legitimate concern to follow the prescribed procedure, including the vetting, against the

Plaintiff's interests and the Court is not satisfied that it would be just or appropriate to make such an unusual order in the current circumstances.

b. In any event, the Court is satisfied that the Plaintiff could be compensated by an appropriate award of damages if he establishes at trial that he should have been offered the position. It would be wrong to pre-empt the outcome of the proceedings in that respect. The balance of convenience does not justify the relief sought.

c. The balance of convenience could not justify an order suspending two individuals who were not party to the proceedings, not on notice of the application and who had not been shown to have acted wrongfully.

d. The balance of convenience would not, in the Court's view, justify an order restraining the Second Defendant from performing its statutory function in circumstances in which the challenge to the current statutory regime appeared speculative and because any such order would be unnecessary (since the Plaintiff could simply refuse to consent to vetting in any event).

e. Furthermore, whatever redress the Plaintiff may or may not be entitled to in respect of the error in the original vetting report, there is no evidence before the Court to suggest that there is any reason to anticipate future issues with regard to the way the Defendants deal with their respective obligations pending the hearing of these proceedings, meaning that there is no necessity or justification for injunctive relief at this stage.

f. The Defendants argued that the Plaintiff acted prematurely in issuing these proceedings rather than invoking the available procedure to take issue with the contents of the vetting report and that this was relevant to the balance of convenience and to the exercise of the Court's discretion. The Plaintiff had concluded, wrongly in the Court's view, that he was out of time to do so, by reason

of the timing of the Fourth Defendant's disclosure to him of the vetting report. The Court considers that the Plaintiff misunderstood the position in that regard and that he could and should have sought to have the report corrected before issuing proceedings. However, the Court does not attach great weight to that issue because the Plaintiff's confusion as to the position is entirely understandable given the way in which the matter was communicated to him and the complex terms of the correspondence from the Fourth Defendant and of the legislation itself.

g. Even if his inability to secure the Position impacts his ability to obtain the work experience necessary to complete his accountancy qualifications, that would not be a sufficient factor to outweigh the significant competing considerations but, in any event, the Fourth Defendant has noted that it is open to the Plaintiff to apply for positions in his area of expertise where there would be no such vetting requirement.

Findings - Motion to suspend employees of the Fourth Defendant

77. There is no basis for the proposed order requiring the Fourth Defendant to place employees on administrative leave pending the determination of the proceedings. Neither individual was on notice of the application, nor are they parties to the proceedings. The evidence does not show that they had acted wrongfully or that they were likely to do so in future (since there was no suggestion that they could have been aware that the initial vetting report was erroneous). The fact that the Plaintiff disagreed with the Fourth Defendant's interpretation of the legislative requirements and the appropriate procedure would not be a rational basis to suspend the two individuals. Even if, which was not the case, the evidence suggested a basis on which the Fourth Defendant could suspend the individuals, any such action would need to be at its instigation. The Plaintiff had no basis to seek the suspension of the

individuals. In any case, there was no evidence before the Court to justify such a draconian step even if the court had any jurisdiction in that regard.

Application to restrain the Second Defendant from publishing vetting reports

78. Although the Second Defendant has acknowledged an error in relation to the original vetting report, which it has remediated, the Plaintiff has not demonstrated an arguable case, let alone a strong arguable case, that he would be entitled to such an order at the conclusion of the proceedings on the basis of the Second Defendant's ongoing actions. The basis for the application appears to be the Plaintiff's view that the vetting reports should be limited to convictions involving child safety issues, but the Second Defendant must comply with the current statutory requirements and the Plaintiff has not shown an arguable case that it is failing to do so on an ongoing basis. The Court agrees with the defence submission that exceptional circumstances and a strong case were required to interfere with the exercise of such a statutory function. There is no such strong case here and no basis to restrain the Second Defendant from complying with its statutory obligations. Such an application is redundant in any event since an application may only be made for a vetting report with the Plaintiff's consent – his ability to avoid vetting reports by refusing his consent obviates the need for the application.

Conclusion – Injunction Applications

79. Accordingly, the Court is not disposed to grant the Plaintiff's three injunction applications seeking orders pending the determination of these proceedings. Such reliefs are inappropriate because the Plaintiff has not demonstrated a strong arguable case which would justify the granting of such reliefs and because damages would be an adequate remedy if the Plaintiff were to succeed at trial. Furthermore, the evidence before the Court does not satisfy

the Court that the balance of convenience would justify the making of such orders in the circumstances, in any event.

Consolidation Motion

80. The remaining issue is the application to consolidate the actions. The Plaintiff argued that the proceedings should be consolidated because they were closely interlinked. His desire for employment was being frustrated by the way the current legislation was being applied by one arm of the state and by the failure of another arm of the state to introduce proposed changes to that legislation. Accordingly, both actions were connected and should be consolidated.

81. Ms Moore, who represented the State in the Second Proceedings, submitted (with the support of the Second and Fourth Defendants in these Proceedings) that consolidation was not appropriate because:

a. The claims in the two proceedings and against the various Defendants were very different and raised very different legal and factual issues.

b. There was no evidence that consolidation would reduce costs or save time – the converse was more likely, especially for the Defendants in the First Proceedings where the issues were more limited than the issues in the Second Proceedings.

c. Even if the Plaintiff were correct in his argument that the legislation should have been changed, the Defendants in the First Proceedings cannot be faulted for applying the current legislation; any challenges to the current regime are matters for the Defendants in the Second Proceedings alone.

d. The "failure to enact" claim is novel, raising far-reaching questions of constitutional law including the doctrine of separation of powers. That argument between the Plaintiff and the State is entirely separate from his criticism of the First

Proceedings' Defendants' actions under current rules in respect of the recruitment and vetting actually performed in his case.

82. The power to consolidate proceedings pursuant to O. 49, r. 6 of the Rules of the Superior Courts was considered by the Supreme Court *in Duffy v. News Group Newspapers Limited & Ors.* [1992] 2 IR 369 ("*Duffy*"). It confirmed (at p. 376) that the relevant factors were:

"*(1) Is there a common question of law or fact of sufficient importance?*
(2) Is there a substantial saving of expense or inconvenience?
(3) Is there a likelihood of confusion or miscarriage of justice?"

83. The Court is satisfied that (as was submitted by the Defendants) none of the *Duffy* criteria have been shown to be met in this case:

a. As far as the first question is concerned, both proceedings were initiated by the Plaintiff and impact him because they relate to the question of the scope of vetting reports in his case. However, the two cases do not depend on common questions of law and fact. In the First Proceedings he seeks damages and declarations confirming that he was lawfully appointed to the Position; in the Second Proceedings he challenges the State's failure to enact legislation. The latter would involve complicated and time-consuming issues of constitutional and public law and would be significant High Court proceedings. The alleged obligation to legislate is very different from the question in the First Proceedings (concerning the application of the existing rules). The issues in the Second Proceedings are not relevant to the issues of alleged negligence and breach of contract in the First Proceedings (or vice versa). Likewise, the issues in the First Proceedings about how the recruitment and vetting processes were actually undertaken are not relevant to the Second Proceedings. These are entirely separate and distinct legal issues. The facts which would ground each claim are fundamentally different.

b. As for as the second factor, there is no evidence that there would be a cost savings (particularly to the Defendants) or that a consolidated hearing would be more convenient. It is hard to see how that could be the case in the absence of common questions of law or fact and there was no suggestion that it would be the same witnesses or legal teams on both sides in both cases. Accordingly, there was no evidence of any basis to anticipate cost savings or greater convenience. Indeed, there was no averment in the Plaintiff's part that consolidation would lead to such cost savings. To the contrary, the Court considers that the profound constitutional issues involved in the Second Proceedings could involve a lengthy hearing and extensive legal argument. It would be unfair to the various Defendants to require them to participate in the litigation of issues from the other proceedings which did not concern them. Consolidation would accordingly lead to increased costs for the various Defendants rather than a cost saving. As the Defendants observed, any crossover between the cases can be addressed by case management. It would be inconvenient and unreasonable to require all Defendants to participate in both actions.

c. As far as the third prong of *Duffy* is concerned, the litigation would be more confusing if consolidated (and this was certainly demonstrated by the confusion of issues between the two proceedings in dealing with the interlocutory applications even though those applications solely concerned the First Proceedings).

84. Accordingly, the Court is not satisfied that it is necessary or appropriate to consolidate the two actions. That application must also be refused accordingly.