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Appendix FF

Order 58, rule 15

No. 1

SUPREME COURT

Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal	S: AP: IE: 2018: 000138
Subject matter for indexing	

Leave is sought to appeal from	<input type="checkbox"/> The Court of Appeal	<input checked="" type="checkbox"/> The High Court
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[Title and record number as per the High Court proceedings]

Ciaran MacAirt	V	Minister for Justice, Ireland & the AG	
High Court Record Nr	2018 No 696 JR	Court of Appeal Record Nr	N/A
Date of filing	7-9-2018		
Name(s) of Applicant(s)/Appellant(s)	Ciaran MacAirt		
Solicitors for Applicant(s)/Appellant(s)	MacGeehin Toale Solicitors		
Name of Respondent(s)	MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL		
Respondent's solicitors	Chief States Solicitors Office		
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?			
<input type="checkbox"/> Yes		<input checked="" type="checkbox"/> No	
If yes, give [Supreme Court] record number(s) N/A			

IONCAIM  
 STAMP OFFICE  
 250.00  
 11:25 AM  
 31-09-2018

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		
N/A		

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Mr. Justice Denis McDonald
Date of order/ Judgment	August 22 <sup>nd</sup> 2018



## 2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Ciaran MacAirt
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Original status

<input type="checkbox"/>	Plaintiff
<input checked="" type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party

<b>Solicitor</b>			
Name of firm	MacGeehin Toale Solicitors		
Email	legal@mgtlaw.ie		
Address	10 Prospect Road Glasnevin Dublin 9	Telephone no.	01 830-7799
		Document Exchange no.	
Postcode		Ref.	

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

<b>Counsel</b>			
Name	Gerard Humphries BL		
Email	ghumphreys@lawlibrary.ie		
Address	Law Library Four Courts Dublin 7	Telephone no.	087 259-6187
		Document Exchange no.	813100
Postcode			

<b>Counsel</b>			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Applicant / Appellant is not legally represented, please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

### 3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL
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Original status	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant	Is this party being served with this Notice of Application for leave?			
	<input type="checkbox"/>	Applicant	<input checked="" type="checkbox"/>	Respondent				
	<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party				
	<input type="checkbox"/>	Petitioner	<input type="checkbox"/>					
					Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>

Solicitor			
Name of firm	Chief States Solicitors Office		
Email			
Address	Osmond House Ship Street Little Dublin 8	Telephone no.	
		Document Exchange no.	
		Ref.	
Postcode	D08 V8C5		

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Remy Farrell SC		
Email			
Address	Suite 237 The Capel Building Mary's Abbey Dublin 7	Telephone no.	01-817 5222
		Document Exchange no.	810037
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented, please complete the following

Current postal address	
e-mail address	

Telephone no.	
---------------	--

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange
<input type="checkbox"/>	Post

<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Other (please specify)

#### 4. Information about the decision that it is sought to appeal

The Applicant is appealing **the entire decision** to refuse to grant leave for judicial review.

We are seeking:

1. A declaration that the Respondents and each of them are obliged by Article 40.3.2 of the Constitution of Ireland, article 2 of the European Convention on Human Rights, article 2 of the Charter of Fundamental Rights of the European Union, 2003 and section 7 of the Garda Síochána Act, 2005 to protect as best they may from unjust attack and, in the case of injustice done, to vindicate the life of every citizen.
2. A declaration that the Respondents are under a continuing obligation to conduct an independent and effective investigation into the murder of Irish citizens where there is credible evidence of collusion on the part the RUC or other agencies of the British state in the murders, in accordance with the obligations arising under article 2 of the European Convention on Human Rights.
3. A declaration that by reason of the ongoing obligations of Deputy Chief Constable Harris of the PSNI, under the United Kingdom Official Secrets Act, his role in the protection of the PSNI and its predecessor, the RUC and other agencies of the United Kingdom, from allegations of collusion in the murder of Irish citizens, and his frustration of the effective investigation of those murders, that Deputy Chief Constable Harris would be incapable of directing or controlling an independent and effective investigation into the murder of those Irish citizens, as required by 2 of the European Convention on Human Rights.
4. A declaration that, by reason of the foregoing, the decision to appoint Deputy Chief Constable, Harris, of the PSNI to the position of Commissioner of Garda Síochána, is in breach of the Respondents' obligations under the Constitution of Ireland and in particular article 40.3.2 thereof and in breach of the Respondents' obligations under

section 2 of the European Convention on Human Rights Act, 2003, the European Convention on Human Rights, and in particular article 2 thereof.

5. An order of *certiorari* quashing the decision to appoint of Deputy Chief Constable Harris to the position of Commissioner of An Garda Síochána.
6. In the alternative an order of prohibition restraining the Respondents from appointing Deputy Chief Constable Harris to the position of Commissioner of An Garda Síochána.
7. In the alternative, an order restraining the Deputy Chief Constable Harris from having any involvement in the direction or control of the Garda Síochána investigation into the murder of Irish citizens where there is credible evidence of collusion on the part the RUC or other agencies of the British state in the murders.
8. Further and other Order
9. Costs

McDonald J., in The High Court, ordered:

1. That this application for leave to apply for Judicial Review for the aforesaid reliefs do stand refused.
2. That the Applicant do pay to the Respondent the Costs of this Motion and Order.
3. That execution on foot of said Costs Order be Stayed in the event of an Appeal.

## 5. Reasons why the Supreme Court should grant leave to appeal

1. This case involves a matter of “general public importance” and thus meets the Constitutional threshold under Article 34.5.4, for an appeal to lie directly from the High Court to the Supreme Court and/or it involves a matter whereby it is “in the interests of justice” for the matter to be heard by the Supreme Court, and meets the Constitutional threshold. It also meets the “exceptional circumstances” requirement under Article 34.5.4. as it pertains to the functioning of the Separation of Powers, as independent pillars of State, a matter which cannot be properly settled by any Court other than the Supreme Court: Specifically, it deals with issues of national intelligence and international conflicts of interests with respect to national security.
2. It raises issues of both national security and of international intelligence, in particular because the putative appointee to the role of Commissioner of An Garda Síochána has held a number of previous roles (with the RUC, the PSNI, and as a liaison to MI5), working for Britain, in capacities which conflict directly with what would be his duties to the Irish State, and its citizenry, in the role of head of our national police force and our national security service, An Garda Síochána.
3. The appropriate forum for the matter to be heard is the Supreme Court, as the criteria set out in the *Fox* determination (*Fox v. Mahon & Others* [2015] IESCDET 2) and the *Barlow* determination (*Barlow v Minister for Agriculture Food and Marine* [2015] 2 JIC 2609) apply because this is a case in which “an appeal to the Supreme Court is likely to arise anyway” and the case would “look the same” having woven its way through the Court of Appeal.
4. The case pertains to the putative appointment of a person fundamentally ineligible to hold the role, to the role of the Commissioner of An Garda Síochána, a matter which is clearly of general public importance, in the context of Ireland being a sovereign, independent and democratic State, and/or a matter which it is clearly “in the interests of justice” for the Supreme Court to resolve : Specifically, the matter pertains to Ireland’s ongoing duty to investigate “effectively” the murder of Irish citizens, as part of a pattern of atrocities committed against civilians, including the Applicant’s grandmother, under Article 2 & 3 of the ECHR and the obligation of Ireland to vindicate the right to life and right to good name of its citizens under Article 40.3.2 of Bunreacht na hÉireann, (in circumstances where) there is “credible evidence” of collusion by members of the British police force (RUC) and army, in respect of those murders.
5. The “exceptional reasons” which merit leave for this direct appeal to the Supreme Court being granted, thereby leapfrogging the Court of Appeal, are that the issues are unlikely to narrow following a determination from the Court of Appeal. Furthermore, the benefits of a ruling by the Court of Appeal are outweighed by the delays involved in reaching this determination and the additional costs and additional potential costs involved in that additional step. Furthermore, a final resolution of the matters raised in this case is not only a matter of “general public importance” but is also “in the interests of justice.”
6. Further, there is an access to justice issue both in terms of delay and in terms of the very real obstacle of costs. Given that this case falls within the criteria set out in the *Fox* determination and the *Barlow* determination, the issue of substantial additional costs, the

potential exposure to substantial additional costs and the barrier to accessing justice in a timely manner, those additional costs and potential exposures produce for an Applicant whose case is one in which “an appeal to the Supreme Court is likely to arise anyway” and the case would “look the same” having gone to the Court of Appeal, really amounts to a disproportionate barrier to justice and a very real obstruction to access to justice and to access to the Courts.

7. Finally, there is the issue of urgency in light of the fact that the national security of a sovereign, democratic, independent State is in issue in circumstances where the chief policing and security role is currently being putatively occupied by a person incapable of having been lawfully appointed to the role or of lawfully carrying out the duties of the office, as head of a key organ of State, something which is precluded by his pre-existing and ongoing conflicts of interest and pre-existing and ongoing legal and oath-bound loyalties to another sovereign State. These are truly “exceptional circumstances” and thus, the Supreme Court is the proper forum for the matter to be heard, as a matter of urgency.

8. It is simply not satisfactory from a public point of view that the validity of the appointment of the Commissioner should be at issue for a prolonged period.

## 6. Ground(s) of appeal which will be relied on if leave to appeal is granted

### Grounds of appeal

1. This case involves a matter of “general public importance” and thus meets the Constitutional threshold under Article 34.5.4 (i), for an appeal to lie directly from the High Court to the Supreme Court. Further, this case involves a matter whereby it is “in the interests of justice” for the matter to be heard by the Supreme Court, and meets the Constitutional threshold, under Article 34.5.4 (ii).
2. This case encompasses the “exceptional circumstances” required under Article 34.5.4, as it pertains to the Separation of Powers, the independent pillars of State, a matter which can only be properly settled by the Supreme Court. Specifically, it deals with issues of national intelligence and international conflicts of interests with respect to national security and An Garda Síochána, an organ of State. The case pertains to the putative appointment of a person fundamentally ineligible to hold the role, to the role of the Commissioner of An Garda Síochána – a role which places the putative appointee as head of the national police force and head of the national security service, it is properly a matter of general public importance, to be decided by the Supreme Court.
3. The appropriate forum for the matter to be heard is the Supreme Court, as the criteria set out in the *Fox* determination (*Fox v. Mahon & Others* [2015] IESCDET 2) and the *Barlow* determination (*Barlow v Minister for Agriculture Food and Marine* [2015] 2 JIC 2609) apply because this is a case in which “an appeal to the Supreme Court is likely to arise anyway” and the case would “look the same” having made its way through the Court of Appeal.
4. Further, there is a reality to the urgency surrounding this case. There is a real-world clock ticking, in circumstances whereby the national security of a sovereign, democratic, independent State is in issue as the chief policing and security role is currently being putatively occupied by a person incapable of having been lawfully appointed to the role or of lawfully fulfilling the role, or indeed even of having been vetted appropriately as part of his application for the role, something precluded by his pre-existing and ongoing conflicts of interest and pre-existing and ongoing legal and oath-bound loyalties to another sovereign State. These are truly “exceptional circumstances” which pertain to both a matter of “general public importance” and one which it is “in the interests of justice” for the Supreme Court to hear the appeal.
5. There is an “access to justice” issue in terms of both the potential delay of having to bring the case through the Court of Appeal and the very real obstacle of costs. Given that this case meets the criteria set out in the *Fox* and *Barlow* determinations, the potential exposure to substantial additional costs and the barrier to accessing justice those realities represent, makes access to justice in a timely manner more difficult.
6. The learned High Court Judge erred in law in failing to address his mind to the issues and in failing to consider that the Irish State cannot do anything which flies in the face of its constitutional obligations and its obligations under the European Convention.



7. The learned High Court Judge erred in law and in fact in determining that the Government had addressed its mind to the issues of the putative appointee's ongoing conflicts of interests, and inability to lawfully fulfil the duties of the Office, and prior failure to comply with ECHR Article 2, in circumstances where there is no evidence to that effect. In particular there was no evidence that the Respondents had considered the applicant's pre-existing, ongoing, indefinite and unknown duties to the British State under the U.K. Official Secrets Act, and no submission has been made to that effect.
8. The learned High Court Judge erred in law and in fact in equating this applicant for the position of Commissioner of An Garda Síochána, with a hypothetical lawyer applicant who would be bound by legal privilege in an instant case, in circumstances where this applicant, DC Harris is bound by his pre-existing oaths and ongoing duties to another sovereign State, on pain of penal sanction and with no time limit. The UK Official Secrets Act does not constitute any form of privilege as a matter of Irish Law.
9. The Judge erred in law in failing to have any or any adequate regard for the mandatory obligation requiring the State to vindicate the rights of every citizen pursuant to Article 40.3.2 of the Constitution including the right to life and good name of every citizen, and the ongoing duty to "effectively" investigate the killings of citizens, including that of the Applicant's grandmother and the Dublin-Monaghan victims, under Art. 2 ECHR.
10. The learned High Court judge erred in law by failing to determine adequately the exercise of the Government's discretion in respect of the matter. The Government may not abdicate its responsibilities in areas of fundamental Human Rights and the Courts are the appropriate arbiter to review such an appointment, made by the Government, in respect of an organ of State. He further erred by determining that the government had no discretion in respect of Section 9 of the Garda Síochána Act 2005 (as amended by the Garda Síochána Misc. Provisions Amendment Act 2015).
11. The learned Judge erred in law and in fact in finding that the Applicant had failed the promptness test in circumstances where Counsel for the Respondents confirmed to the Court that the appointment was formally announced on July 24<sup>th</sup>, 2018 and the Applicant sent his initiating letter on July 26<sup>th</sup>, 2018 and where he did, in fact, act promptly at all times. Further, it was not submitted by or on behalf of the Respondents that the application had been made out of time.
12. The Judge erred in law and in fact in making a determination that the applicant's case was un-stateable and in making a determination that there was no prospect of success.
13. The learned High Court judge erred in law and in fact in characterising the grounds on which the Applicant relied as merely "an opinion" or "a view" when, in point of fact, the High Court in Northern Ireland had made a finding of fact, uncontroverted by the Respondents in *Re Barnard* [2017] NIQB 82, which strongly supported the Applicant's case.
14. The learned High Court judge erred in law in the threshold he applied to the application for leave to apply for judicial review and in determining the application for leave and in particular misapplied the *AAA v The Minister for Justice* [2017] IESC in conjunction with the new rules Order 84, Rule 21.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:  
Gerard Humphreys BL

**7. Other relevant information**

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

High Court 2018/696 JR

References to Law Report in which any relevant judgment is reported

**8. Order(s) sought**

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

Reversing, McDonald J., in The High Court:

1. That this application for leave to apply for Judicial Review for the aforesaid reliefs is granted.
2. That the Respondent do pay to the Applicant the Costs of this Motion and Order and of the Motion and Order of The High Court.

What order are you seeking if successful?

Order being appealed: set aside  vary/substitute

Original order: set aside  restore  vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

**Are you asking the Supreme Court to:**

depart from (or distinguish) one of its own decisions?  Yes  No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?  Yes  No

If Yes, please give details below:

Will you request a priority hearing?  Yes  No

If Yes, please give reasons below:

It is a matter of public importance. See paragraph 5 above reasons why Supreme Court should grant leave to appeal.

Signed: *MacGeehin Toale*  
(Solicitor for) the applicant/appellant

MACGEEHIN TOALE  
SOLICITORS  
10 PROSPECT ROAD  
GLASNEVIN, DUBLIN 9

**Please submit your completed form to:**

The Office of the Registrar of the Supreme Court  
The Four Courts  
Inns Quay  
Dublin

**together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.**

**This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.**