

SUPREME COURT
Respondent's Notice



Supreme Court record number	S:AP:IE:2018:000 <i>138</i>
-----------------------------	-----------------------------

[Title and record number as per the High Court proceedings]

Ciarán MacAirt	V	Minister for Justice and Equality, Ireland and the Attorney General.
----------------	---	-------------------------------------------------------------------------

Date of filing	
Name of respondent	Minister for Justice and Equality, Ireland and the Attorney General.
Respondent's solicitors	Chief State Solicitor's Office.
Name of appellant	Ciarán MacAirt
Appellant's solicitors	MacGeehin Toale

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	Minister for Justice and Equality, Ireland and the Attorney General.
------------------------	----------------------------------------------------------------------

The respondent was served with the application for leave to appeal and notice of appeal on date

7 September 2018

The respondent intends :

to oppose the application for an extension of time to apply for leave to appeal

not to oppose the application for an extension of time to apply for leave to appeal

to oppose the application for leave to appeal

not to oppose the application for leave to appeal

to ask the Supreme Court to dismiss the appeal

to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court

Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:

Respondent's Representation

Solicitor			
Name of firm	Chief State Solicitor's Office		
Email	sinead_finnegan@csso.gov.ie		
Address	Osmond House Little Ship Street Dublin 8	Telephone no.	01 4176202
		Document Exchange no.	186-001
Postcode		Ref.	2018/04634
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)

Counsel			
Name	Remy Farrell SC		
Email	Rfarrell@lawlibrary.ie		
Address	Law Library Four Courts	Telephone no.	
		Document Exchange no.	
Postcode	Dublin 7		

Counsel			
Name	Eoin Carolan		
Email	ECarolan@lawlibrary.ie		
Address	Law Library Four Courts	Telephone no.	
		Document Exchange no.	
Postcode	Dublin 7		

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

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)

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

3. Information about the decision that it is sought to appeal

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)-

- * the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
- * it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court

In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)-

- * the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
- * it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court
there are no exceptional circumstances warranting a direct appeal to the Supreme Court.

Matter of general public importance

Although the Applicant has asserted that the case raises issues of fundamental importance such as the separation of powers and questions of national security no attempt has been made to articulate any legal issue in relation to same. As such the Applicant has conflated the importance of the subject matter of the case with the legal issues in the case. The Respondent does not contest that the appointment of the Commissioner of An Garda Siochana is a matter of significant public importance – however, the Applicant has patently failed to identify any legal issue of general public importance concerning the appointment.

Insofar as it is capable of being discerned from the application for leave to apply for judicial review the thrust of the Applicant's case is that Mr Harris is unsuitable for appointment as Garda Commissioner on the basis that he was previously a Deputy Commissioner of the PSNI and on the basis of certain actions or attitudes imputed to him by the Applicant. It is a remarkable feature of the Applicant's case that it does not engage with, nor even notice, the statutory framework within which the appointment of a Commissioner of An Garda Siochana is made.

The learned trial judge noted as much and went on to recite the elaborate and detailed

provisions of Section 9 of the Garda Síochána Act, 2005 as inserted by Section 8 of the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act, 2015. It would appear from the Statement of Grounds and grounding affidavit that the Applicant was essentially unaware of this statutory framework. As much is evident from the identification by the Applicant as the Minister for Justice as the primary respondent. In fact the Minister has no distinct role in the appointment process.

Rather than actually engage with the statutory framework the Applicant opted to simply assert that Mr Harris could not be appointed Garda Commissioner because, in the eyes of the Applicant, he was unsuitable. Although the Applicant purported to raise a number of distinct legal objections no attempt was made to identify how any of these rendered the appointment unlawful in a manner that might justify its quashing by way of judicial review.

This is reflected in the fact that the Applicant's Notice of Appeal fails to identify any, or any adequate, factual or legal basis for the relief sought. The grounds of appeal outlined in the Notice of Appeal are entirely speculative, being based on bare and unparticularised assertions about the 'fundamental ineligibility' of the appointed Garda Commissioner. The Applicant did not, and has not, adduced any evidence or argument in support of this assertion of ineligibility.

It is telling for the purpose of the present application that the learned trial judge was able to dispose of the application by reference to well settled authority. Specific reliance was placed on *G v. DPP* [1994] 1 IR 374 and *AAA v. Minister for Justice* [2017] IESC 80 both of which represent authoritative statements as to the approach to be taken to an application for leave for judicial review. No case would appear to be made by the Applicant on this application to the effect that any different test should have been applied. Rather the Applicant does little more than bluntly contend that the learned trial judge simply came to the wrong conclusion having applied the correct test. Whilst this could arguably form the basis of an appeal to the Court of Appeal it cannot be the basis for an application pursuant to Article 34.5.3° of the Constitution.

In short the essential problem which the learned trial judge identified in relation to the Applicant's case was that, whilst it certainly concerned a matter of considerable importance, the Applicant had failed to set out any coherent basis upon which judicial review could ever be granted. In other words the case made did not actually raise any legal arguments or points – rather it amounted to little more than a series of assertions as to the subjectively held view of the Applicant concerning the suitability of Mr Harris. In such circumstances the Applicant has failed to demonstrate the existence of any point of law, much less a point of law of general importance.

The Applicant has conflated the general importance of the subject matter of the proceedings (the appointment of a Garda Commissioner) with the concept of a point of law of general importance. The importance of the subject matter is essentially irrelevant unless the Applicant can demonstrate that a serious legal argument has been articulated and determined in such a way as to give rise to a point of law of general importance.

Interests of justice

It is a striking feature of the Applicant's case that it never engaged with or even noticed the provisions of Section 9 of the Garda Síochána Act, 2005 as inserted by Section 8 of the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act, 2015. This section contains an elaborate and detailed scheme for the appointment of a Commissioner of An Garda Síochána. As such the case made is entirely artificial and wholly decoupled from the relevant statutory regime. It follows that it would be innately undesirable for questions concerning the appointment of a Commissioner to be considered by the Supreme Court other

than in the context of the relevant statutory provisions.

More fundamentally any party that seeks to invoke the jurisdiction of the Court pursuant to Article 34.5.3° is under an obligation to inform himself of the applicable law and to frame an argument by reference to same. The signal feature of the case made by the Applicant is a total failure to familiarise himself with the relevant statutory regime. Where a case is presented on a wholly ill-informed basis it can rarely, if ever, be in the interests of justice that it could subsequently be the subject of a direct appeal to the Supreme Court.

In addition, it is submitted that the interests of justice would not be served by a grant of leave in circumstances where the appointment of the Garda Commissioner has now taken place. The Applicant did not seek a stay on the appointment of the Commissioner pending the bringing of an appeal.

Exceptional circumstances warranting a direct appeal

The Respondents contend that no actual point of law has been identified by the Applicant. If this is correct then it would seem to follow that it cannot be said that the matter is likely, in any event, to make its way to the Supreme Court. Even if the Applicant were to appeal to the Court of Appeal it is difficult to see how any point of law of general importance could emerge from the case.

Quite apart from this it is clear from the proposed grounds of appeal contended for by the Applicant (in the event of a grant of leave) that they amount to little more than a traverse of the reasoning of the learned trial judge. As such the appeal which the Applicant contemplates has all the appearances of being little more than an ordinary appeal. In *Wansboro v. DPP* [2017] IESCDET 115 the Court observed:

It has been made clear that the Constitution now regards an appeal to the Court of Appeal as being the norm and therefore further requires that there be some particular feature of the appeal which would warrant departing from that norm and allowing a direct appeal to this Court.

There is nothing in the present proposed appeal as formulated that could merit a departure from the norm.

In addition it is a matter of public record that since the determination of the application before the High Court Mr. Harris has been appointed Garda Commissioner. As such it is difficult for the Applicant to contend that there is any urgency to the matter.

**delete where inapplicable*

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

1. This is a repetition of the points made in respect of the application for a 'leapfrog' appeal rather than a ground of appeal in itself. The Respondent restates the points made above.
2. The Applicant has not identified any, or any adequate, basis for the assertion that the person in question is "fundamentally ineligible to hold the role". The plea is wholly speculative and unsustainable.

Moreover, the claim that the separation of powers requires that the appointment of the Garda

Commissioner “can only be properly settled by the Supreme Court” and/or that it is a matter “to be decided by the Supreme Court” is speculative, unparticularised and wholly misconceived. No authority is cited for the proposition that the appointment of a Garda Commissioner is a matter pertaining to the judicial function. To the extent that the constitutional doctrine of the separation of powers is relevant, the appointment is one which is, in the first instance, an executive rather than a judicial function.

3. This is a repetition of the points made in respect of the application for a ‘leapfrog’ appeal rather than a ground of appeal in itself. The Respondent restates the points made above.

4. The Applicant has not identified any, or any adequate, basis for the assertion that the person in question is “incapable of having been lawfully appointed to the role” of Garda Commissioner. The plea is wholly speculative and unsustainable. The Applicant has not identified any legal or statutory provision which would preclude the appointment. The appointment was made in accordance with the process established by the Garda Síochána Act 2005, as amended, and the criteria which were publicly advertised prior to the announcement of the successful candidate. The Applicant has not claimed and/or identified any basis for a claim that the appointment was inconsistent with these matters. Furthermore, the Applicant did not seek to impugn the legality or validity of the statutory process and/or of the criteria announced, whether at the time of the announcement of the process or subsequently. On the contrary the Applicant notably failed to engage with same at all.

5. It is denied that there has been any interference with the Applicant’s access to justice. The Applicant exercised his right of access and received a full hearing and determination of his claim. Furthermore, his stated desire to minimise costs cannot alone justify the grant of leave given that similar considerations would arise in almost all applications for a ‘leapfrog’ appeal.

6. It is denied that the High Court judge erred in law and/or failed to address his mind to the issues, as alleged. The notice of appeal does not identify any aspect of the learned judge’s reasoning to ground this generalised claim. It is speculative and unsustainable.

7. It is denied that the learned High Court judge erred in law and/or in fact in his consideration of the Government’s role in the appointment process. The process established by the 2005 Act is one which confers a specific role on the Government and which, as observed by the High Court judge, enjoys a presumption of constitutionality. The Applicant has not identified any factual basis for the claim that the Government did not address its mind to any relevant issues. It is impermissible as a matter of law and of fact to seek to impugn a decision of a public body on the basis of a claim that the body acted unlawfully, the sole ground of which is that “there is no evidence” that it did not.

Moreover, in circumstances where the Applicant pointedly failed to engage with or even notice the terms of the statutory scheme it is not now open to him to dispute the learned High Court judge’s analysis of same.

8. It is denied that the learned High Court judge erred in law or in fact in the manner alleged. It is unclear precisely what claim is being made in ground of appeal 8. Nonetheless, insofar as the learned High Court judge found that the fact that a person may be subject to a pre-existing obligation of confidentiality in respect of certain matters did not constitute an automatic bar on his or her appointment as Garda Commissioner, the Court did not err.

9. It is denied that the learned High Court judge erred in law in the manner alleged. The Applicant did not identify any factual or evidential basis for the claim that there is a constitutional issue arising from the asserted incapacity of the appointed Commissioner to oversee the investigation of the killing of the Applicant’s grandmother. There is no evidence

of an existing or intended Garda investigation of that matter.

Furthermore, there is no evidence of any investigation into this or any other matter in which the appointed Commissioner had any alleged involvement.

The Applicant has not demonstrated standing and/or identified any factual basis for the making of a claim in respect of the investigation of other matters.

Furthermore, the Applicant did not identify any precedent in support of the asserted Article 40. 3. 2 obligation to “effectively” investigate killings. To the extent that reliance is placed on Article 2 ECHR, the Notice of Appeal does not dispute or impugn the High Court’s finding that Article 2 does not provide any support for the argument that An Garda Síochána have an obligation to conduct an investigation into matters that occurred in Northern Ireland.

10. It is denied that the learned High Court judge erred in law in his consideration of the Government’s role in the appointment process and/or its competence under section 9 of the 2005 Act, as amended. The process established by the 2005 Act is one which confers a specific role on the Government and which, as observed by the High Court judge, enjoys a presumption of constitutionality. The Applicant has not identified any factual basis for the claim that the Government did not address its mind to any relevant issues.

11. It is denied that the learned trial judge erred in law and in fact in finding that the Applicant had not satisfied the requirements of Order 84, rule 21 (2) in respect of the time limit for the bringing of an application for leave. The Applicant’s claims are grounded in fact and in law on the claim that there is an extant and subsisting obligation on An Garda Síochána to investigate certain matters, which obligation has – on the Applicant’s account – existed for more than three months prior to the bringing of these proceedings.

12-14. The grounds identified are denied in full. The findings referred to are ones which the learned High Court judge was entitled to make on the arguments and the evidence before him. The Applicant’s notice of appeal does not identify any error or other basis to dispute these matters other than his disagreement with them.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

Remy Farrell SC
Eoin Carolan

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

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:

Signed: *Chief State Solicitor*
(Solicitor for) the respondent

Please submit your completed form to:

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

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.