THE HIGH COURT

[2014 No. 478 JR]

BETWEEN

ALAN SHATTER

APPLICANT

AND

SEAN GUERIN

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 20th day of May, 2015.

Introduction

1. The applicant is the former Minister for Justice and Equality. He resigned that office on the 7th May, 2014. On the 6th May, 2014, the respondent furnished a report to An Taoiseach on a review of the action taken by An Garda Síochána pertaining to certain allegations made by Sergeant Maurice McCabe ("the Report"). The applicant alleges that the Report contains what are described as "conclusions" and "findings" which are critical of him in his ministerial capacity and which have caused significant damage to his political, professional and personal reputation.

2. The applicant claims that these conclusions and findings were arrived at by the respondent without according fair procedures to the applicant. In these judicial review proceedings, the applicant claims the following reliefs:

1. An order of *certiorari* quashing the relevant conclusions.
2. An order of *mandamus* directing the respondent to delete those conclusions from the report.

3. A declaration that the respondent reached those conclusions in breach of fair procedures, constitutional and natural justice.

4. A declaration that the drawing of the conclusions by the respondent was *ultra vires* the powers conferred on him under the relevant terms of reference.

Background Facts

3. Sergeant McCabe became a member of An Garda Síochána in August, 1985, attaining the rank of sergeant in January, 2000. Between October, 2004 and March, 2008, Sergeant McCabe was the sergeant-in-charge at Bailieboro Garda station. Towards the end of that period, Sergeant McCabe became concerned in relation to a range of issues including the manner in which certain incidents were investigated and dealt with by colleagues in the force.

4. These concerns ultimately became the subject of complaint by Sergeant McCabe to a number of different parties including his superiors in An Garda Síochána, the Department of Justice and Equality ("the Department"), the Garda Síochána Ombudsman Commission ("GSOC") and the Garda Síochána Confidential Recipient ("the Confidential Recipient").

5. Sergeant McCabe's interaction with the Department appears to have commenced on the 23rd March, 2009, when he sent an email to the applicant's predecessor, the then Minister for Justice, Equality and Law Reform ("the Minister"). In that email, Sergeant McCabe made a complaint about the conduct of an internal Garda investigation in relation to malpractice and corruption in Bailieboro Garda District and about comments made by a senior Garda officer in the press in relation to that investigation. Sergeant McCabe asked the Minister to provide an independent party to oversee the investigation. There was intermittent contact between the

Department and Sergeant McCabe and his solicitors over the next few years. On the 4th September, 2012, Sergeant McCabe's solicitors wrote to the Minister raising a number of issues and enclosing three volumes of documents setting out details of Sergeant McCabe's complaints. The first of those volumes contained details of ten different incidents which Sergeant McCabe felt were of a serious nature and matters of public concern.

6. On the 19th February, 2014, this volume was furnished to An Taoiseach by Mr Micheál Martin TD. On the 21st February, 2014, a further document was furnished to An Taoiseach which is described as part of a letter understood to be from Sergeant McCabe to the Confidential Recipient dated the 23rd January, 2012.

7. On the 25th February, 2014, An Taoiseach made a statement in the Dáil in relation to the matter. He referred to the material given to him by Mr Martin which contained very serious allegations against members of the Gardaí, many of which had been published in the media. An Taoiseach said:

> "I am, however, acutely conscious that the scale of the public discussion around these matters could have implications for confidence in the administration of justice in our country. There is a need to address these concerns and put in place a process that can do so quickly and effectively. For that reason, the Government has asked an independent and objective legal expert, Mr Sean Guerin SC, to examine and access all the relevant papers and recommend what further action might be taken. If he recommends that a Commission of Investigation should be established, it will be done. The terms of reference for this work are currently being finalised. The report, which we hope will be completed before the Easter recess, will be laid before the Oireachtas by me and published. I believe this is a prudent way to proceed in

view of all the comments, allegations and documents that surround these matters."

8. On the next day, the 26th February, 2014, the applicant made a statement in the Dáil and answered questions from Deputies, to which I shall refer further.

The Terms of Reference

9. On the 27th February, 2014, the following appeared on the website of the Department of An Taoiseach, www.taoiseach.gov.ie:

"27 February 2014

Government announces terms of reference for Guerin inquiry

The Government has appointed Mr Sean Guerin SC to conduct the independent inquiry into allegations made by Garda Sergeant Maurice McCabe and related matters. The Terms of Reference for the Inquiry were agreed by the Government today, on the advice of the Attorney General.

They are as follows.

Terms of Reference

1. To conduct an independent review and undertake a thorough examination of the action taken by An Garda Síochána pertaining to certain allegations of grave deficiencies in the investigation and prosecution of crimes, in the County of Cavan and elsewhere, made by Sergeant Maurice McCabe as specified in:

a) The dossier compiled by Sgt Maurice McCabe and furnished to An Taoiseach on the 19th February 2014 and

b) The letter understood to be from Sgt Maurice McCabe to the Confidential Recipient, Mr. Oliver Connolly, dated 23rd January 2012, part of which was furnished to An Taoiseach on the 21st day of February 2014.

2. To interview Sgt Maurice McCabe and any other such person as may be considered necessary and capable of providing relevant and material assistance to this Review in relation to the aforesaid allegations and to receive and consider any relevant documentation that may be provided by Sergeant McCabe or such other person.

3. To examine all documentation and data held by An Garda Síochána, the Department of Justice and Equality, and any other entity or public body as is deemed relevant to the allegations set out in the documents at 1(a) and (b) above.

4. To communicate with An Garda Síochána and any other relevant entity or public body in relation to any relevant documentation and information and to examine what steps, if any, have been taken by them, to investigate and resolve the allegations and complaints contained in the documentation referenced at 1(a) and (b) above.

5. To review the adequacy of any investigation or inquiry instigated by An Garda Síochána or any other relevant entity or public body into the incidents and events arising from the papers furnished at 1(a), 1(b) and 2 above.

6. To consider if, taking into account relevant criminal, civil and disciplinary aspects, there is a sufficient basis for concern as to whether all appropriate steps were taken by An Garda Síochána or any other relevant entity or public body to investigate and address the specified complaints.

7. To advise, arising from this review, what further measures, if any, are warranted in order to address public concerns including whether it is considered desirable in the public interest for the Government to establish a Commission of Investigation pursuant to the Commissions of Investigation Act 2004 and, if so, the matters to be investigated .

8. At the conclusion of the aforesaid review, within eight weeks of 27th February, 2014 or so soon as may be thereafter, to deliver a Report to An Taoiseach on the matters set out at 1, 5, 6, and 7 above."

Subsequent Events

10. By letter of the 5th March, 2014, the respondent wrote to the applicant in the following terms:

"Re: **Review of action taken by An Garda Síochána relating to certain allegations made by Sergeant Maurice McCabe**

Dear Minister,

As you know, I have been appointed by the Government to review and examine certain matters and report to An Taoiseach thereon. I enclose herewith a copy of my terms of reference.

I understand that the Secretary General to the Government, Mr Martin Fraser, has written to you to request you to nominate a single point of contact with whom I might liaise in relation to these matters. I would be most obliged if you could furnish these contact details to me at your earliest convenience.

I would also be obliged to receive copies of whatever documents you may have in relation to these matters. It would be my preference to receive documents in both electronic format (on disc) and on paper. If, however, such documents, or any of them, are not at present available in electronic format, it would assist me greatly to receive such documents in whatever form they may be available as soon as possible. By "documents" I mean, of course, not just paper documents but any form of document, including computer records or records maintained in any electronic or mechanical storage system, notes,

photographs, videos, etc. I enclose a list of the matters coming within my terms of reference to which this request for documents relates.

Perhaps the individual you nominate as a point of contact would contact me directly to make arrangements for the transfer of these documents.

Thank you for your assistance."

11. This letter was replied to on the 12th March, 2014 by Mr Kevin Clarke, a principal officer in the Garda Division of the Department. Mr Clarke enclosed with that letter a copy of relevant documentation together with a schedule of same. On the 4th and 9th of April, 2014, Mr Clarke forwarded additional documentation to the respondent.

12. On the 11th April, 2014, the respondent replied to Mr Clarke in the following terms:

"Dear Mr Clarke,

I refer to your letters of the 12th March, 4th April and 9th April enclosing documents on foot of the request for documents made in my letter of the 5th March. I am obliged to you for your assistance to date.

Having reviewed the papers furnished by you, it appears that they are almost exclusively in the nature of correspondence with outside parties. There are almost no internal departmental documents and, in particular, no notes or memorandums to the Minister and no notes or memorandums of any decision made by the Minister, whether in respect of the exercise or possible exercise of his statutory power under

1. Section 42 of the Garda Síochána Act 2005; or
2. Regulation 8(2) of the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007,
3. or in respect of any other matter.

I note that I have not been provided with copies of the annual reports (or relevant extracts therefrom) required to be made to the Minister by the Commissioner under regulation 15 of the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007.

My original request for relevant documents was not confined in any way and, in particular, was not confined to external correspondence. Accordingly, I would be obliged if you would now make further enquiries to establish whether all relevant documents have been provided to me. Having regard to the very limited period of time within which to complete my review and report to An Taoiseach thereon, I look forward to hearing from you at your earliest convenience.

Thank you again for your assistance."

13. Mr Clarke responded to that letter on the 14th April, 2014 enclosing further documents. On the 17th April, Mr Clarke forwarded further additional documents and concluded the correspondence by stating that he believed that all relevant documents had now been provided.

14. On the 6th May, 2014, the respondent provided his Report to An Taoiseach, two days short of ten weeks from the 27th February, 2014. In the course of his covering letter to the Secretary General of the Department of An Taoiseach, the respondent said:

"The report has not been furnished within the time period mentioned in paragraph 8 of the terms of reference and I regret that. I hope, however, that, having regard to the volume of material involved and the time it took for various parties to assemble it, the delay will not be considered unreasonable.

I am happy to report that the various parties who provided documentation co-operated fully with the review, and their co-operation is noted in the report.

Unfortunately, I have not received any documentation from the Garda Síochána Ombudsman Commission and I have therefore had to complete the review without reference to any such material, save insofar as copies of it were available on the files of other agencies. This is somewhat unsatisfactory, although it has not impeded the review in relation to other agencies. GSOC has indicated, through its solicitors, that it is willing to furnish documentation and that it has "voluminous" documentation available, but it was unwilling to release it without certain safeguards being put in place. While that is not unreasonable, no indication of these difficulties was given to me until the process of drafting the final report was well underway, and notwithstanding repeated requests to GSOC to furnish relevant documentation. In those circumstances, I had no opportunity to review such documentation with the care required and I have proceeded to finalise my report accordingly.

I am conscious that, although there is no specific reference to publication in the terms of reference, it has been stated publicly by An Taoiseach that it is his intention to lay the report before the Dáil…"

15. On the next day, the 7th May, 2014, the applicant resigned as Minister for Justice and Equality. In his second affidavit sworn herein on the 25th November, 2014, he avers at para. 22:

"While I do not believe that this is of any relevance to the issues for determination in these proceedings, it is important that this Honourable Court understands that I did request of An Taoiseach an opportunity to consider the contents of the report in detail. However, that opportunity was not afforded to me and it was made clear to me by An Taoiseach that, in light of the contents of the respondent's report, he would have difficulty in expressing confidence in me if asked."

16. In his letter of resignation addressed to An Taoiseach, the applicant said:

"Dear Enda

Thank you for furnishing me this morning a copy of the report received from Sean Guerin SC on a "review of the actions taken by An Garda Síochána pertaining to certain allegations made by Sergeant Maurice McCabe". As you know, the report runs to over 300 pages and I have neither had the time to fully read or fully consider the contents of the report. I have, however, fully read chapters 1, 19 and 20 of the report and a copy of the letter accompanying it of the 6th of May 2014 by Sean Guerin SC.

I note that Mr Guerin states that "it is beyond the scope" of the review "to make any determination of the complaints Sergeant McCabe has made". However, having regard to all of the controversy surrounding allegations made by Sergeant Maurice McCabe and the seriousness of the various issues raised by him, I agree with Sean Guerin's conclusion (his having examined the garda files and accessed information not furnished to me) that it is appropriate that these matters be the subject of a statutory inquiry.

I would, however, be less than honest if I did not also record my concerns and reservations with regard to his report and, in particular, certain conclusions reached by him. I was surprised to learn that he received no documentation from the Garda Síochána Ombudsman Commission (GSOC) and, as he states in his letter, that "the process of drafting the final report was well underway" when he learned of "difficulties" being expressed by GSOC with regard to the furnishing of documentation to him. Complaints made to GSOC and GSOC's dealings with those complaints and the statutory role of GSOC were all, amongst other matters, of relevance to the consideration given by me to issues raised by Sergeant McCabe. Under the terms of reference furnished to Mr

Guerin, he was requested to conclude his review within eight weeks of the 27th Feb 2014 "or as soon as maybe thereafter". In his letter, he notes that GSOC was willing to release what is described as its "voluminous" documentation subject to certain safeguards which he stated to be "not unreasonable". I would have expected that, prior to finalising his report, he would have agreed reasonable safeguards with GSOC and obtained and considered documentation held by it with regard to the matters under review prior to formulating his conclusions. Moreover, I note that, under the terms of reference, Mr Guerin was authorised to "interview Sergeant Maurice McCabe and any other person as he considered necessary and capable of providing relevant and material assistance".

At no time did he ask to interview me and I would have expected, if it was his intention to reach a conclusion or form an opinion with regard to my approach or the extent of my concern with regard to issues raised by Sergeant McCabe, that he would have done so.

I am anxious that any controversy that may arise on publication of the report does not distract from the important work of the Government or create any difficulties for the Fine Gael or Labour parties in the period leading into the European and local government elections. It is my judgment that the only way in which such controversy can be avoided is by my offering you my resignation from Cabinet…"

The Report

17. The respondent's report runs to 336 pages covering twenty chapters. Chapter 1 consists of an introduction in which the applicant's terms of reference are set out. The documents referred to in paragraph 1 relate to sixteen individual incidents, events or

matters about which complaint was made by Sergeant McCabe. Chapter 1 also gives details of all documents received from the various agencies concerned including the Department. Reference is also made to the fact that no documentation was received from GSOC although it expressed a willingness to provide it, late in the day, subject to conditions. The respondent felt that it was by then too late to engage meaningfully with GSOC regarding the "voluminous" documentation in its possession. The respondent also referred to the fact that he had interviewed Sergeant McCabe on four separate occasions for a total of just under nineteen hours. No other person was interviewed save in relation to the operation of the Garda PULSE system.

18. Chapter 2 sets out the factual background and chapter 3 the structure and method adopted by the respondent. At para. 3.4, he states:

> "It is important to emphasise before embarking upon the review of individual incidents, that it is understood that the purpose of this review is not to make findings of fact or to determine any disputed question either of fact or law. Insofar as any views are expressed on factual matters, these are only facts as they appear from a review of the files that I have received. Any such expression is not an adjudication on any matter affecting the persons named or referred to in this report. It is possible that, with the benefit of an opportunity to interview or hear evidence from the individual members and officers of An Garda Síochána and civilians, including victims of crime, involved in these matters, a different view of the facts would emerge."

19. Chapter 19 considers the role of the Department and is central to the issues that arise in this case. In this chapter, the respondent sets out a detailed chronology of all correspondence between the Department and other parties regarding Sergeant McCabe's complaints including Sergeant McCabe, his solicitors, his wife, the Garda Commissioner, the Confidential Recipient and the Office of the Attorney General.

The concluding section of this chapter contains an analysis of the correspondence and relevant documents from para. 19.91 to 19.104. It is to this analysis that the applicant takes objection and in particular, he alleges that it contains seven "Conclusions" or "Findings" which are adverse to his interests as follows:

1. that the applicant did not cause the allegations of Sergeant McCabe to be investigated.

2. that the response of the Commissioner of An Garda Síochána to the confidential report was accepted without question by the applicant.

3. that the process of determining Sergeant McCabe's complaints went no further than the applicant receiving and acting upon the advice of the Commissioner of An Garda Síochána, the individual who was the subject of the complaint.

4. that the applicant was satisfied by a brief summary of the conclusions of the internal investigation by An Garda Síochána rather than seeking a copy of the investigation report for review.

5. that in the light of the absence of written internal records made by the Minister (in particular between the 23rd January and the 7th February) meant:

   (i) that Mr Guerin was unable to shed any light on the reasons for the approach adopted by me as Minister to the exercise of those (statutory) functions;

   (ii) that he could only conclude that the approach adopted by me had the result that there was no independent investigation of Sergeant McCabe's complaints;

   (iii) that the absence of records "that one would expect of a careful and reasoned exercise of an statutory function was a matter of some concern";

(iv) it appeared that the applicant acted on advice received from the Commissioner without that advice being questioned or analysed.

6. that as a consequence of the above there was sufficient basis for concern as to "whether all appropriate steps had been taken by the Minister for Justice and Equality to investigation and address the specified complaints."

7. that the applicant failed to heed the voice of Sergeant McCabe in relation to his complaints.

20. The final chapter of the report, chapter 20, contains the respondent's conclusion and recommendations. He said:

"20.11 No complex organisation can expect to succeed in its task if it cannot find the means of heeding the voice of a member whose immediate supervisors held him in the high regard in which Sergeant McCabe was held. Ultimately, An Garda Síochána does not seem to have been able to do that. Nor does the Minister for Justice and Equality, despite his having an independent supervisory and investigative function with specific statutory powers. The same appears to be true of GSOC, although this review is hampered in making any assessment in that regard by the fact that GSOC has not made documentation available.

20.12 In my opinion, having regard to the number, range and importance of the issues arising, it is desirable in the public interest that a comprehensive Commission of Investigation be established pursuant to the Commissions of Investigation Act 2004 to investigate the issues that remain unresolved arising out of the complaints made by Sergeant Maurice McCabe and examined in this report. Such commission is, in my opinion, desirable in the public interest to ensure continuing confidence in the institution of An Garda Síochána and the criminal justice system.

20.13 If that recommendation is accepted, I suggest that the terms of reference might usefully include the following definite matters of urgent public importance:…

j. the investigation by An Garda Síochána and the Minister for Justice and Equality of the complaints made by Sergeant Maurice McCabe in relation the above matters, and such other like matters as may seem appropriate;"

The Proceedings

21. By order of the 30th July, 2014, Baker J. granted leave to the applicant to seek the reliefs referred to above on the following grounds set out in the applicant's statement required to ground the application:

1. The respondent drew the Conclusions in circumstances where he did not interview the applicant prior to making the Findings nor did he engage in any substantive communication with the applicant on the issues on which he drew the Conclusions.

2. The respondent drew the Conclusions in circumstances where he did not in any fashion put the Conclusions and Findings to the applicant prior to embodying them in the report.

3. The respondent drew Conclusions in circumstances where he did not furnish the applicant with a draft of the Conclusions nor afford the applicant an opportunity to make such submissions as deemed necessary to the respondent.

4. The respondent's terms of reference did not empower him to draw the said Conclusions.

5. The respondent erred in the exercise of his discretion and/or acted unreasonably and/or unfairly, contrary to the principles of fair procedures, natural and constitutional justice in that:

(a) the respondent did not seek to obtain any relevant information from the applicant by way of interview, statement or other means.

(b) The respondent did not obtain and consider documentation in the possession of the Garda Síochána Ombudsman Commission (GSOC) and failed to fully consider the statutory role of GSOC and its relevance to the approach taken by the respondent.

(c) The respondent felt compelled to conclude his review within a fixed time frame and failed to take such additional time as permitted under his terms of reference and as was required to consider all documentation and information of relevance to ensure that his findings and conclusions were reached on the basis of all available information relevant to his terms of reference.

6. The respondent erred in fact and in law in his consideration of the advices of the Office of the Attorney General dated the 18th of December 2013 and in his consideration of the conduct of the applicant in that context.

7. The drawing of the conclusions by the respondent in the following circumstances gives rise to a reasonable apprehension of bias;

(a) the respondent was a member of Professional Practice Committee which engaged in criticism of the applicant as Minister in respect of the Legal Services (Regulation) Bill 2011, which bill the applicant was centrally involved in promoting through the legislature;"

22. In his grounding affidavit, the applicant sets out details of his qualifications and experience from which it is clear that he is both an extremely accomplished and experienced politician and an eminent and distinguished practising lawyer.

22. He exhibits the relevant correspondence and documents including the two letters from the respondent to the Department. He avers that during the course of the respondent's review and preparation of the Report, he was given no notice whatsoever by the respondent that he intended to examine and pass judgment on his actions as Minister. He says that at no time did the respondent raise any issues with him or his Department regarding that handling of Sergeant McCabe's complaints. He says he believed that it was appropriate to ensure that there was public confidence in the process that the respondent was engaging in and thus to avoid even the slightest perception of inappropriate interaction with the respondent.

23. He complains of the fact that conclusions were drawn by the respondent without the applicant being given any opportunity to respond to them. Had he been given such an opportunity, he believes that he could have provided the respondent with relevant information which may well have resulted in different conclusions being drawn. He avers that he would have been able to inform the respondent, if asked, of a number of difficulties that arose in relation to Sergeant McCabe's complaints. One of the difficulties identified by the applicant is the failure of departmental officials to furnish him with correspondence of relevance of which he only became aware following the publication of the Report.

24. He refers to a letter of advice from the Office of the Attorney General of the 18th December, 2013, upon which the respondent incorrectly relied. He says that the respondent misread that letter with significant consequences for him. Furthermore, the content of the letter was never brought to his attention by officials in his own Department and he only learned of its existence for the first time following receipt of

the Report. He says that in reaching his Conclusions, the respondent failed to take account of relevant provisions of the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007.

25. The applicant avers that the drawing of the Conclusions by the respondent has caused him severe and irreversible reputational damage both as a public official and as a lawyer. He expresses concern that the issues dealt with in the report will unnecessarily and unfairly fall to be considered by a Commission of Investigation.

26. In para. 39 of his grounding affidavit, the applicant avers that whilst the respondent was conducting his review, he was a member of the Professional Practices Committee of the Bar Council which was involved in public criticism of the Legal Services Bill relating to reform of the legal profession and with which the applicant was closely identified. He expresses concern as to the possibility that the respondent was biased in drawing the Conclusions although says that he is not asserting actual bias.

27. The respondent delivered his statement of opposition on the 28th October, 2014. The grounds include the following:

1. The respondent provided an expert professional opinion which is not amenable to judicial review.

2. The applicant as a private citizen does not have standing to seek judicial review of a report relating to the Minister for Justice and Equality.

3. The only party entitled to litigate the issue as to whether the respondent exceeded the terms of reference or was biased is the Government who commissioned the report.

4. These proceedings amount to a collateral attack by the applicant on decisions of the Government of which he was a member and in effect the applicant seeks to judicially review himself.

5. The report is not justiciable at the suit of the applicant and does not give rise to a requirement for fair procedures or natural justice.

6. Any damage allegedly suffered by the applicant arises from the Government's decision to publish the report.

7. The applicant took no steps to either prohibit publication of the report or address any issues arising therefrom prior to publication. These proceedings constitute a collateral attack on the decision of the Government to establish a Commission of Investigation which in any event provides the applicant with an alternative appropriate remedy.

8. The applicant is not entitled to discretionary relief because he failed to keep himself informed of the respondent's correspondence and has made an allegation of bias without establishing that it is factually sustainable.

9. The applicant had the opportunity to furnish any comments, explanations or submissions that he wished to the respondent who accorded the appropriate level of fair procedures.

10. Fair procedures and natural justice do not apply to a report which is legally sterile and makes no findings of fact or law but merely expresses opinions.

11. The terms of reference did not require the applicant to be interviewed by the respondent.

28. The respondent's principle replying affidavit was sworn on the 28th October, 2014. In it, the respondent identifies the core task of the review as being an examination and assessment of all relevant papers and the making of recommendations for further action. He avers that the terms of reference required him to review the adequacy of any investigation or enquiry not just by An Garda Síochána but any other relevant entity or public body which included the Department. Having

done so, he was required to consider whether there was a sufficient basis for concern as to whether all appropriate steps were taken by those bodies to address the complaints of Sergeant McCabe. The respondent was required to conduct a limited exercise expeditiously to assess what further measures might be warranted in order to address public concerns. The review had no legal effect.

29. Any relevant comments made by the respondent related to the Office of the Minister for Justice and Equality and not to the applicant in his capacity as a private citizen. The Report draws no conclusions of fact or law. The decision of the applicant to resign was a political one of which the respondent has no knowledge beyond what is in the public domain. There has been no complaint about the Report from either An Taoiseach or the Government.

30. The respondent says that insofar as his contact with the Department was through a nominated point of contact, Mr Kevin Clarke, he considered that to be contact with the applicant in his official and only relevant capacity. He had no knowledge of the decision not to bring correspondence to the personal attention of the applicant. He expresses particular surprise that the letter of the 11th April, 2014 was not brought to the applicant's attention.

31. At no time did the respondent purport to pass judgment on the applicant and he takes issue with the applicant's averment that he had no notice whatsoever that he intended to examine and pass judgment on his actions as Minister. He avers that he cannot understand how the applicant could have been unaware that the report would involve consideration of the performance of the ministerial functions which were his responsibility as Minister. His letter of the 11th April, 2014 makes perfectly clear that this was being considered. There was no need to interview the applicant in circumstances where the Department files spoke for themselves and would be

expected to record any information relevant to the exercise of the Minister's statutory functions.

32. However, if there was information known to the applicant relevant to the exercise of his statutory powers which was not recorded in the Department files, the applicant was free to communicate that information to the respondent and there would have been nothing improper about such communication.

33. The respondent further avers that there is no reality to the suggestion that in addition to reviewing the voluminous documentation, interviews with the various concerned parties should also have been conducted as part of the review given the urgency of the situation. The purpose of the review was to conduct a preliminary analysis of the available information which was almost entirely in documentary form, to identify matters of concern and advise what further measures might be warranted. Each of the alleged conclusions and findings of which the applicant complains were simply a narrative account and summary of the documents provided. Insofar as he expressed an opinion on what the documents demonstrated, the terms of reference required him to do so. He deals with each alleged conclusion and finding of which complaint is made in turn.

34. The respondent avers that nothing in the applicant's affidavit could have justified any material amendment to those parts of the report of which the applicant complains. With regard to the letter of advice from the Attorney General, the respondent says that paragraph 19.89 of the report contains an inadvertent typo insofar as it refers to the relevant booklets from Sergeant McCabe being forwarded to the Minister without further ado. The word "Commissioner" should have appeared instead of "Minister" but he says read in context the meaning is perfectly clear.

35. With regard to the applicant's complaint that the respondent misunderstood GSOC's statutory role and the fact that GSOC had power to independently investigate

complaints received through the confidential recipient, all of which might be relevant considerations for the exercise by the Minister of his statutory functions, the respondent says that there was nothing in the Department files to indicate the existence of any such investigation by GSOC or whether the Minister took any such matter into account with regard to his own statutory functions.

36. With regard to the time taken to complete the report, the respondent avers that he cannot understand how the applicant, as a member of the Government that appointed him and as an experienced practising lawyer, could possibly have expected a report to be completed within eight weeks, or anything like it, if the full panoply of procedural arrangements contended for were to be applied to him and every other person mentioned in the report.

37. With regard to the allegation of bias, the respondent avers that whilst he was at the material time a member of the Professional Practices Committee of the Bar Council, neither he or the Committee had any involvement in making submissions or public comment regarding the Legal Services Regulation Bill, which would in any event be entirely outside the scope of the work of that committee which is concerned with matters of professional practice and ethics. The respondent's averments in this regard are confirmed in a separate affidavit sworn by the Director of the Bar Council, Mr Jerry Carroll.

38. In his second affidavit sworn on the 25th November, 2014, the applicant avers that the work done by the respondent was not in the nature of the provision of legal advice by a senior counsel which would be private and privileged but was to be published publicly. He says that the respondent was not limited to examining and assessing relevant papers as suggested. He says that the respondent was required to interview or at least correspond with him and he ought to have furnished the applicant with a draft of any findings he intended to make against the applicant and afford him

an opportunity to make submissions in relation to such draft findings. He says he would have been able to provide significant additional information beyond that contained in the documentation which information may have altered the respondent's findings.

39. The applicant refers to media coverage of the report to demonstrate that its effect was very damaging personally and professionally to him. He contrasts the procedures adopted in other enquiries with those adopted by the respondent. He avers that when he obtained the report, he requested of An Taoiseach an opportunity to consider the contents of the report in detail. However, that opportunity was not afforded to him and it was made clear to him by An Taoiseach that, in the light of the contents of the report, An Taoiseach would have difficulty in expressing confidence in the applicant if asked. He says that if the respondent had not reached conclusions in relation to him, those would not have formed part of the terms of reference of the proposed Commission of Investigation. Much of what is contained in this affidavit is in the nature of argument and submission.

40. Prior to this affidavit being sworn, the applicant's solicitors wrote to the respondent's solicitors on the 18th November, 2014 referring to the affidavit of Mr Carroll and stating that in the light of same, the applicant was withdrawing the ground in the statement of grounds that the drawing of the Conclusions by the respondent gave rise to a reasonable apprehension of bias. In an affidavit sworn on the 8th December, 2014, the respondent's solicitor Ms Alison Fanagan of A & L Goodbody, refers to this letter and states that the allegation of bias having been made on affidavit must be withdrawn on affidavit. She refers to the fact that although the applicant's second affidavit post dates this letter, he makes no reference to the bias allegation in this affidavit. She avers that the respondent is maintaining the ground of opposition that the applicant is not entitled to discretionary remedies by way of judicial review

by reason of his conduct in making this allegation without conducting the minimum enquiries to establish whether it is factually sustainable.

41. Consequent upon Ms Fanagan's affidavit, the applicant swore a third affidavit on the 15th December, 2014 in which he formally withdrew the allegation of bias and acknowledged that he was mistaken in his belief, held at the time of swearing the grounding affidavit, that the Professional Practices Committee of the Bar Council of which the respondent was a member criticised the Legal Services Bill.

42. In his fourth affidavit sworn on the 10th February, 2015, the applicant revisits the issue of the establishment of a Commission of Investigation and the fact that by virtue of the respondent's challenged conclusions, the applicant would now wrongly be faced with participation in such commission. The applicant avers that he is concerned about the overlap between the work of the Commission of Investigation and the within proceedings. In that regard, the applicant considered it necessary to write to An Taoiseach and the Ceann Comhairle of the Dáil highlighting his concerns in this regard. He exhibits the relevant correspondence to which I shall refer further. He says that the Minister for Justice and Equality publicly announced on the 19th December, 2014 the establishment of a Commission of Investigation with the proposed terms of reference including all of those recommended by the respondent. The terms of reference were confirmed by Dáil Eireann on the 28th January, 2015. The terms of reference of the Commission of Investigation are exhibited in a second affidavit of Alison Fanagan sworn on the 4th March, 2015.

43. In his final affidavit sworn on the 24th March, 2015, the applicant refers to the fact that he had made a request under the Freedom of Information Act 2014 addressed to the Secretary General of the Department of An Taoiseach for copies of all correspondence and material pertaining to the respondent's inquiry. He exhibits relevant correspondence in that regard.

The Arguments

44. The applicant's case is relatively simple. The primary contention advanced by Mr Sreenan SC on behalf of the applicant is that if the respondent was going to draw conclusions critical of the applicant in circumstances where the respondent must have known that such criticism was potentially very damaging to the applicant, he had a duty to consult with the applicant and put the matters giving rise to concern to him so as to afford the applicant an opportunity to respond before the conclusions were drawn. It is contended that this is a matter of basic fair procedures and natural justice. The applicant further argues that in any event, the drawing of the conclusions by the respondent was *ultra vires* the terms of reference. The applicant referred to a number of well known authorities which deal with the concepts of natural and constitutional justice including *International Fishing Vessels Ltd v. Minister for the Marine (No. 2)* [1991] 2 I.R. 93 and *McAuley v. Commissioner of An Garda Síochána* [1996] 3 I.R. 208. Counsel also referred to the applicant's constitutionally protected right to his good name and relevant authorities in that regard including *Maguire v. Ardagh* [2002] 1 I.R. 385 and *State (Quinn) v. Ryan* [1965] I.R. 70.

45. The applicant also relied on a number of cases involving determinations by inquiries and tribunals and the well settled jurisprudence regarding the necessity to afford fair procedures to any party in respect of whom adverse findings or orders were to be made. These included *Haughey v. Moriarty* [1999] 3 I.R. 1, *Bailey v. Flood* [2000] IESC 11, *Prendiville and Murphy v. The Medical Council* [2007] IEHC 427 and *O'Callaghan v. Mahon* [2009] IEHC 428.

46. The applicant submitted that the principles of natural and constitutional justice require the respondent to adopt one or more of the following courses of action before embodying the conclusions in the report:

(a) If the respondent had queries arising from the documents concerning the applicant's conduct, he ought to have furnished that documentation to the applicant who should then have been given a fair opportunity to consider it and reply to the respondent's queries.

(b) Insofar as may be further necessary that the respondent should have interviewed the applicant in relation to the matters of concern to him.

(c) The respondent should have furnished the conclusions in draft form to the applicant and afforded him an opportunity to make written submissions.

(d) The applicant's responses should have been either reflected or reproduced in the report.

47. The applicant further submitted that the respondent was in breach of his duty to comply with fair procedures in failing to obtain the GSOC documentation. The respondent appears to have fallen into error in considering that he did not have sufficient time to obtain these documents because of the eight week deadline without having regard to "or so soon as may be thereafter". The respondent misinterpreted the provisions of the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007 and in particular Regulation 10 in concluding that there had been no investigation of Sergeant McCabe's complaints because the relevant provisions of the Garda Síochána Act 2005 do not permit complaints to be made to GSOC by a member of An Garda Síochána. However, it was contended that the respondent clearly overlooked Regulation 10, which obliges the Garda Commissioner to notify GSOC of every confidential report which may then be investigated by GSOC. It was further submitted that the respondent made a significant error in relation to the advice of the Attorney General's Office referred to above and this caused further damage to the applicant.

48. In support of the contention that the conclusions were arrived at *ultra vires* the terms of reference, the applicant placed reliance on *Caldwell v. Mahon* [2011] IESC 21 as authority for the proposition that the terms of reference should be construed strictly as against the respondent.

49. In dealing with the grounds raised by the respondent regarding the non justiciability of the report, the applicant submitted that the fact that it was "legally sterile" could not be taken to mean that it was not amenable to judicial review. Reliance was placed on *Becker v. Duggan* [2009] 4 I.R. 1 and *De Burca v. Wicklow County Manager* [2009] IEHC 54 and the authorities therein referred to. The fact that no legal consequences flow from the report is immaterial. The essential question is whether or not it has the potential to affect the applicant's good name and all that goes with it. If the report were not amenable to judicial review, it would set the applicant's constitutional rights at nought, contrary to all authority.

50. It was further submitted that the applicant could not be precluded from relief because he was a member of the Government at the time of the respondent's appointment and relied on *Ahern v. Mahon* [2008] 4 I.R. 704 in that regard. A number of other authorities involving tribunals were cited. In answer to the contention that the applicant had failed to challenge the decision to publish the report and thus could not now challenge it, reliance was placed on *De Róiste v. Minister for Defence* [2001] 1 I.R. 190, *State (Vozza) v. O'Floinn* [1957] I.R. 227 and *McGrath Limestone Works Ltd v. An Bord Pleanala* [2014] IEHC 382. On the alternative remedy point, the applicant referred to *McGoldrick v. An Bord Pleanala* [1997] 1 I.R. 497. On the point of discretionary relief, reference was made to *GD v. Minister for Justice Equality and Law Reform* [2006] IEHC 344 and *Carr v. Minister for Education and Science* [2001] 2 I.L.R.M. 272.

51. With regard to the issue of justiciability, the applicant relied upon the very helpful analysis by Barrett J. in *Grange v. Commission for Public Service Appointments* [2014] IEHC 303.

52. Mr Gallagher SC for the respondent submitted that the applicant's primary complaint is that he was denied an opportunity to consult with the respondent when the converse is in fact the case. The fact that any of the respondent's correspondence was not brought to the applicant's attention is entirely a matter for the applicant. Counsel contended that there has been a very significant change in the applicant's position with regard to the Commission of Investigation that has now been established. The applicant initially sought to prevent his role as Minister being examined by the Commission on the basis that it would be an unwarranted interference with the function of the court in these proceedings whereas the applicant now says that the terms of reference of the Commission were entirely a matter for the Government. This was in fact the reason for the institution of these proceedings but it has now been overtaken by events, thus rendering this claim moot.

53. The respondent argued that what was now being contended for by the applicant in these proceedings is that the respondent should have carried out the task which the Commission is now carrying out. In circumstances where it is clear that the respondent was required by the Government of which the applicant was a member to carry out a review of the documents supplied by the applicant himself, the applicant knew that his role was to be examined on the basis of those documents and he was free to make any submissions he wished if there was information not contained in the documents of relevance to the respondent's enquiry.

54. Counsel submitted that the respondent arrived at no determinations and made no "findings". His Conclusions, insofar as they could be described as such, were

simply narrative recitals of what the documents disclosed on their face and what any educated reader of the documents would conclude from reading them.

55. The Report, as described by An Taoiseach, was in the nature of a scoping report carried out by a private expert retained by the Government on a contractual basis to carry out an exercise which was preliminary and urgent in nature. The Report was no different from any opinion that might be sought by the Government from a member of the Inner Bar and the only distinguishing feature was that the Government decided to publish it, which was a purely political decision. Counsel said that all of the applicant's complaints in reality stemmed from purely political decisions: the decision to publish, the alleged loss of confidence expressed by An Taoiseach in relation to the applicant, the decision to establish a Commission of Investigation and the applicant's own decision to resign.

56. It was submitted that the applicant's contention that the respondent's failure to obtain document from GSOC somehow amounted to a denial of fair procedures was fundamentally misconceived. If there was a failure in that regard, or the respondent had acted in some way *ultra vires* the terms of reference, the only party who could complain about that was the Government who commissioned the report, not the applicant as a private citizen. The GSOC documents could only be relevant to the Minister's role if they were part of the Department's file. There was no suggestion being made that there was somehow information communicated to the Department by GSOC which did not appear on the files. The suggestion that the respondent misunderstood the statutory architecture was incorrect as was the alleged mistake regarding the Attorney General's advice.

57. The applicant's complaint that he was denied the opportunity to vindicate his good name would in fact now be entirely addressed by the Commission of

Investigation where every such opportunity would be afforded him including the full panoply of fair procedures.

58. With regard to the allegation of bias, the respondent contended that this was a very serious allegation made against a professional person that never had any factual basis which when challenged, was eventually withdrawn. The basis upon which it was made was never explained by the applicant and as a matter of discretion, the applicant should be refused relief on this ground alone. It was said that the applicant's change of position regarding the Commission of Investigation was also something going to the court's discretion.

59. The according of natural and constitutional justice is not an absolute but dependant on the particular circumstances that gave rise to the Report in this case. The respondent relied on *Mooney v. An Post* [1998] 4 I.R. 288. The applicant as a private citizen was not entitled to challenge any determinations in relation to the office of Minister for Justice and Equality and only the holder of that office could bring such a claim. The decision in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 was cited in support. Given that the applicant was a member of the Government that commissioned the report, drew up its terms of reference, received it and published it, the applicant could not on the basis of collective cabinet responsibility in effect judicially review himself. It was further argued that no benefit could accrue to the applicant if the reliefs sought were granted to him on the basis that the role of the minister was now to be examined by the Commission of Investigation, something he had sought to prevent. Reliance was placed on *Somjee v. Minister for Justice* [1981] I.L.R.M. 324, *Todd v. Murphy* [1999] 2 I.R. 1, *Kelly v. Minister for Justice* [2015] IEHC 218, *G. v. Collins* [2005] 1 I.L.R.M. 1 and *W. v. HSE* [2014] IESC 8 in that respect.

60. The respondent submitted that the report was not justiciable at the suit of the applicant but only at the suit of the Government who made no complaint about it. Further, the report was limited in scope and nature and had no legal effect. All of the political considerations central to the case are non justiciable. The cases relied upon by the applicant were not applicable to the facts herein.

61. In support of the contention that there was no justiciable controversy arising in this case, counsel relied on *Ryanair v. Flynn* [2000] 3 I.R. 240 and *Murtagh v. Board of Management of St. Emer's National School* [1991] 1 I.R. 482. It was submitted that the reality of the applicant's case was an attack on the merits of the report which the court could not engage in and *Bailey v. Flood* (Unreported, High Court, 6th March, 2000), *Kenny v. Judge Coughlan* [2008] IEHC 28 and *O'Callaghan v. Mahon* [2008] 2 I.R. 514 were referred to.

The Nature of the Report

62. In order to determine what level, if any, of fair procedures were the applicant's due, it is necessary to analyse the task given the respondent by the Government. The respondent was identified by the Government as a senior counsel of standing with particular expertise in the areas to which Sergeant McCabe's complaints related. The respondent's standing and independence were of course critical to the integrity of his review and there is no dispute about that. The respondent is a private citizen and as a member of the Inner Bar, he was instructed to provide a service to the Government on a contractual basis. His expert opinion was sought. He had no statutory or other powers and those who interacted with him in relation to his review did so on a purely voluntary basis.

63. His instructions were contained in the terms of reference. The matters in issue were of national public concern and there could be no doubting the urgency of the situation.

64. The review was to be carried out within eight weeks of the 27th February, 2014 "or so soon as may be thereafter." Whilst therefore the eight week deadline could be extended, such extension must be construed by reference to the initial eight week period. Thus, it seems to me that the phrase "or so soon as may be thereafter" must be taken to refer to a period of some weeks as distinct from months or years. Indeed, An Taoiseach, in his address to the Dáil on the 25th February, 2014, expressed the hope that the report would be completed before the Easter recess.

65. The only party that the respondent was specifically mandated the interview was Sergeant McCabe, although he was free to interview any other such person "as may be considered necessary and capable of providing relevant and material assistance to this review in relation to the aforesaid allegations" (emphasis supplied). Those allegations are referred to in para. 1 of the terms of reference as being of grave deficiencies in the investigation and prosecution of crimes in the county of Cavan and elsewhere as specified by Sergeant McCabe in the documents referred to. One assumes that the Minister would not have been in a position to provide any assistance regarding those allegations. Presumably, the importance of interviewing Sergeant McCabe arose from the necessity for the respondent to be satisfied that the allegations were credible since clearly if they were not, there was little point in proceeding further.

66. Beyond interviewing Sergeant McCabe and any other person who might be able to assist regarding the allegations, it would appear that the respondent's review was to be largely confined to the examination of documentation held by any relevant

entity or public body, two of which were specifically identified namely An Garda Síochána and the Department.

67. Even at that, it is clear from even a cursory perusal of the Report that this was a mammoth undertaking to be completed within eight weeks or shortly thereafter. Indeed, the time span in itself is a clear indication of the nature of the review required of the respondent.

68. There is a significant number of people identified in the report as having an involvement in the many events of which Sergeant McCabe made complaint. If the respondent were in fact tasked with interviewing all of these parties and affording them the full gamut of fair procedures such as contended for by the applicant, there would be no remote possibility of the permitted time scale being in any way realistic. Recent experience of tribunals of inquiry would suggest that a timeframe for such an exercise would be measured in terms of many months if not years.

69. Quite apart from that, I am satisfied that the respondent was entitled to interpret his terms of reference in the way that he did regarding his remit being confined to a documentary review – see *Redmond v. Flood* [1999] 3 I.R. 79.

70. Paragraph 5 of the terms of reference mandated the applicant to review the adequacy of any investigation or inquiry instigated by An Garda Síochána or any other relevant entity or public body into the events in question. Such other relevant entity or public body clearly included the Minister and his Department, whose documentation the respondent had been directed to examine. Having examined the documents and reviewed the adequacy of any investigation or inquiry, para. 6 then required the respondent to express a view as to whether there was a sufficient basis for concern as to whether all appropriate steps were taken by An Garda Síochána or any relevant entity or public body, which included the Department, to investigate and address the specified complaints. Following that, para. 7 required the respondent to

advise whether further measures were warranted in order to address public concerns including whether the establishment of a Commission of Investigation was considered desirable in the public interest.

71. Accordingly, it seems to me that whether one could appropriately describe the report as a "scoping" report or not, it was intended as a preliminary exercise to assist the government in determining whether further steps required to be taken.

72. The respondent was not required to make definitive findings of fact but rather to express an opinion on the basis of what the documents disclosed. The applicant submits that the respondent arrived at "Conclusions" which are to be equated with "Findings". They are not necessarily the same thing. When one speaks of "findings", in the normal way one has in mind the determination of some issue in controversy between opposing sides or perhaps arising from conflicting evidence on a particular topic. "Findings" tend to be determinations of facts that are not otherwise self evident. Conclusions are somewhat different. To take an example, if a dispassionate observer was asked to read A's file of correspondence which showed a letter from B but no copy of a reply from A, then it would be reasonable to conclude that A had not replied to B's letter. That could be described as a conclusion but is hardly a finding of fact. It is no more than a conclusion that any reasonably intelligent reader might draw but of course does not exclude the possibility that A might have telephoned B or met B in the street and responded verbally without keeping a note of that response on the file.

73. What the applicant here contends for is that it was not open to the respondent to draw such a conclusion without consulting him first. I do not think that this is what the respondent was required to do by his terms of reference which was in the nature of expressing a preliminary view based on what the documents disclosed. The respondent was asked to look at the documents and offer an opinion as to whether

cause for concern existed and if so, what should be done about it. The expression of such an expert opinion could not to my mind be reasonably described as a finding of fact or in any sense a final determination of an issue. The respondent did not purport to make such determinations and expressly said so in the report.

74. It seems to me that the unreality of the position being adopted by the applicant here is drawn into focus by the list of rights he says ought to have been accorded to him before any conclusion could be drawn which was potentially critical of him in his capacity as Minister. That list of rights as set out above at para. 46 is virtually a facsimile of the rights that will be accorded to him pursuant to the provisions of the Commissions of Investigation Act 2004 arising from his participation in the Commission of Investigation now established by the Government. To suggest that the applicant or any other party mentioned in the Report as being potentially the subject of a critical opinion by the respondent ought to have been accorded these rights would transform the respondent's review into something radically different from that envisaged by the terms of reference.

75. The applicant in effect is contending that the respondent should have done what the Commission of Investigation is now doing. That proposition is untenable.

Justiciability

76. The applicant contends that his constitutionally protected right to his good name has been infringed by the report which is thereby rendered justiciable. He says that the fact that the report does not determine any rights and is "legally sterile" does not alter the position. He says that the fact that the respondent's enquiry or review was non statutory and carried out on a private basis is neither here nor there.

77. In *De Róiste*, the applicant was a member of the Defence Forces who had been involuntarily retired in 1969 on the grounds that he was suspected of associating

with persons engaged in subversive activities. The Minister for Defence, the second respondent asked the Judge Advocate General, the first respondent, to carry out a statutory review of the circumstances surrounding the applicant's retirement. In conducting the review, the first respondent had access to documents but such access was denied to the applicant. He was invited to make written submissions but said he could not make any informed submissions in the absence of access to the documentation which was the focus of the inquiry. He sought to have the ensuing report quashed. The respondents claimed that the report was not justiciable because it was legally sterile and interfered with no legal right of the applicant. In the light of the foregoing facts, it is perhaps unsurprising that the court did not accept that proposition and quashed the report, holding that it was justiciable insofar as it affected the applicant's reputation and right to his good name. The court held that the procedure adopted was patently unfair as the applicant was deprived of an effective opportunity to make representations which could have affected the first respondent's conclusions.

78. Under the heading of "justiciability", Quirke J. considered *Ryanair* and said (at p. 507)

> "The principle identified by the High Court in *Ryanair Ltd v. Flynn* [2000] 3 I.R. 240 is not in dispute. The courts will only intervene by way of judicial review (a) in matters where there is a public law dimension, and (b) in respect of a decision, act or determination which will affect some legally enforceable right or a right so close to such a right that 'a probable, if not inevitable, next step' will be 'that some legal right will, in fact be infringed".
>
> In *Ryanair Ltd v. Flynn* the court was satisfied that no decision, act or determination had been made by the respondent which affected any such right or contingent right then vested in the applicant. In that case the respondents

had been commissioned as submit to the Minister a "mere fact finding report"…

In the instant case the position is different…"

79. Quirke J. went on to explain in some detail why the position was different from that obtaining in *Ryanair*. He said (at p. 508):

"The process undertaken by the first respondent was significantly more than a review of documentation for the purpose of submitting to the second respondent a 'mere fact finding report'. It was a process which required the first respondent to reach conclusions and make findings of fact and recommendations to the second respondent."

80. And further in the same vein at p. 509:

"The process conducted by the first respondent was investigative in nature. It was focussed entirely and exclusively upon matters directly concerned with the applicant's reputation and good name. It addressed four specific questions, including a question which the courts had, in 2001, declined to address (*i.e.* the provision of fair procedures for the applicant in 1969). It reached conclusions. It made findings of fact. It made recommendations to the second respondent which resulted from those findings of fact…

The second respondent established this investigative process, on behalf of the Government, by assigning to the first respondent a "duty" which entitled her to reach conclusions and make findings of fact and recommendations. The assignment was effected pursuant to the provisions of s. 15(3) of the Defence Act 1954. The conclusions, findings and recommendations of the first respondent directly and almost exclusively concerned the applicant's reputation and good name. The applicant was invited to participate in the process by making representations to the first respondent. Those

representations were, presumably, intended to influence the outcome of the process and to have an impact upon the conclusions findings and recommendations of the first respondent."

81. The applicant placed specific reliance on the following passage in the judgment (at p. 512):

> "It is inescapable that the findings and conclusions resulting from the process had the capacity to affect the applicant's reputation and good name whether favourably or adversely. He enjoys the right to right (sic) to a reputation and a good name. That right is constitutionally protected.
>
> I am satisfied that since the process undertaken directly concerned matters relating to the applicant's reputation and good name, its findings and outcome affected his constitutionally protected right to his reputation and good name. Accordingly, he had a legitimate, fundamental significant interest in the process and is entitled to seek the relief which he has sought in these proceedings."

82. In *De Burca*, the applicant was a member of Wicklow County Council. The respondents were the County Manager and Chairperson of the Council respectively and the notice party was also a member of the Council and a local solicitor.

83. At a meeting of the County Council held for the purpose of discussing the county development plan, the notice party proposed rezoning certain lands and this proposal was adopted. The applicant made a complaint to the council's ethics registrar against the notice party on the basis that the notice party's firm represented the owner of the lands that had been rezoned and the notice party had failed to declare an interest in the matter in contravention of Part XV of the Local Government Act 2001. The respondents investigated the complaint pursuant to s. 174 of the 2001 Act. When the report was published, it made findings critical of the applicant which appear

to have attracted negative media reporting about her. However, the applicant's complaint was not that she had not been accorded natural justice or fair procedures but rather that the respondents had made a fundamental error of law in misconstruing their function under Part XV of the 2001 Act and accordingly their findings were *ultra vires*. The issue of justiciability arose in the context of a submission by the respondents that their determination was not amenable to review by the court essentially because it was "legally sterile". Hedigan J. rejected this proposition saying (at para. 50):

> "**(b) Justiciability**
>
> 50. It is well established that formal reports or other investigative determinations reached by public bodies may be subject to judicial review in certain circumstances. The fact that a report such as that in the present case is portrayed as a mere fact-finding exercise does not, of itself, prevent it from impacting upon the rights of the parties involved. In *Maguire v. Ardagh* [2002] 1 IR 385, Hardiman J. was unconvinced by the argument that an Oireachtas Committee Inquiry into a fatal shooting by members of An Garda Síochána was 'legally sterile' and therefore immune from judicial review. He stated at page 670:-
>
> > 'I have to say that I find the phrase 'legally sterile' extremely unattractive in any realistic human context. Counsel for one of the respondents, on being asked whether he would repeat the phrase without the qualifying adverb said, very naturally, that he could not do so. One is therefore left with an entity described as a 'finding of fact or conclusion' which, it is agreed, could in practice have an adverse affect on an individual. But that, the respondents contend, does not take away from the central truth that 'in law' it is of no effect at all. I do not find

> appealing a line of argument which sets up a distinction between a universally accepted state of fact in real life and a quite contrary state of law. If this is the law then it can only be described as a legal fiction. No ordinary person, such as one of the applicants, on receiving the letter of directions to attend, could possibly interpret it in the artificial sense suggested. Even more significantly, no ordinary person hearing that a parliamentary committee had found as a fact that a named person had unlawfully killed another would be expected, by anyone other than a small minority of lawyers, to reflect that that of course was merely a matter of opinion. It is true that even the most adverse imaginable finding of fact or conclusion by the sub-committee will not amount to a conviction and will not determine any persons rights and liabilities in civil law and will not expose him to any penalty or liability. But that is not the same as saying it has 'no' effect. Not merely is it conceded that it would have effects: these effects would sound, *inter alia*, in the area of the affected person's constitutional rights. When, later in this judgment, I consider the United States cases on the House un-American Activities Committee, it will be seen that many persons have been economically ruined and socially outcast by virtue of decisions which are 'legally sterile'.'

51. A similar approach was taken by Quirke J. in *De Róiste v. Judge Advocate General* [2005] 3 IR 494. In that case, the High Court held that an inquiry into the reasons for the applicant's dismissal from the Defence Forces could not be regarded as a simply inquisitive process and therefore unamenable to judicial review. In particular, Quirke J. placed emphasis on the aspersions which could be cast on the conduct and character of an individual in such a report…

53. As a public representative, the reputational rights guaranteed to the applicant by Article 40.3.2º of the Constitution maintain particular importance. It seems to me that, following the publication of the report, much of the criticism which was levelled against her in the print and audiovisual media was unfair and vitriolic. The findings of the report, especially its criticisms of her, were at the foundation of this assault on her reputation.

54. The fact that the criticisms contained in the report now form part of the public record of the State serves only to amplify the ramifications for her, in particular should she wish to continue her career in public office. To allow such undue criticism of a conscientious local councillor to go unconsidered on the basis that it is of no consequence, or that it has no implications, would in my view involve a kind of legal fiction with potentially far-reaching consequences for the public service as a whole. In my view, therefore, the report did have material implications for the applicant."

84. In *Ryanair*, following the temporary enforced closure of Dublin Airport the Minister for Enterprise and Employment ordered a statutory inquiry into a dispute between the applicant and a trade union. The respondents were appointed to conduct the inquiry. The report of the inquiry made a number of findings of fact which contradicted certain assurances given by the applicant to its staff. The applicant sought to quash to the report on the basis that the conclusions drawn were unreasonable, irrational, based on manifest error and arrived at in breach of natural and constitutional justice. The respondents argued that the report was not amenable to judicial review. In dealing with issue, the High Court (Kearns J., as he then was) said:

"I am satisfied in the instant case that the matter raised before this court is not justiciable because there is no decision susceptible to being quashed in the sense that no legal rights of the applicant are affected by what is a mere fact

finding report. The inquiry team had an extremely limited function as was expressly recognised by the applicant's solicitor by letter dated the 13th March, 1998. At the applicant's own insistence, the inquiry could not attempt mediation or dispute resolution. It could not impose duties, penalties, liabilities or consequences of any sort.

Accordingly, it seems to me that the application fails both because there is 'no decision' and secondly, even if there was, 'no legal right of the applicant was thereby affected'.

My conclusion would be in no way different even if I were to adopt the views expressed by Diplock L.J. in *R. v. Criminal Injuries Compensation Board ex p. Lain* [1967] 2 QB 864 where he expressed at p. 884 recognition for legal rights which would be sufficiently comprehensive to include 'merely one step in a process which may have the result of altering the legal rights or liabilities of a person to whom it relates'.

Insofar as the supposed rights contended for by counsel for the applicant are concerned, the only possible legitimate concern would be the imposition of some adverse requirement on the applicant by the Minister on foot of the findings contained in the report. However, any such connection is entirely speculative. It can in no sense be described as a 'probable consequence or next step'.

I do not accept that the word 'report' is not conclusive if, of course, some decision is nonetheless made which imposes duties or liabilities.

However, it must also be stated that there can be decisions with adverse implications for the person affected thereby which nonetheless fall short of infringing their legal rights. In *Murtagh v. Board of Management of St. Emer's National School* [1991] 1 I.R. 482, the Supreme Court found that a

three day suspension of a pupil from a national school was an ordinary application of disciplinary procedures inherent in the school authorities which did not involve an adjudication or determination of rights and liabilities and therefore the remedy of certiorari did not lie.

Hederman J. stated at p. 488:-

> "Judicial review is a legal remedy available on application to the High Court, when any body or tribunal having legal authority to determine rights or impose liabilities and having a duty to act judicially in accordance with the law and the Constitution acts in excess of legal authority or contrary to its duty.
>
> A three day suspension of a pupil from a national school either by the principal or the board of management of that school is not a matter for judicial review. It is not an adjudication on or determination of any rights, or the imposing of any liability. It is simply the application of ordinary disciplinary procedures inherent in the school authorities and granted to them by the parents who have entrusted the pupil to the school."

It follows from the foregoing that there are, quite apart from the public law dimension (which was not an issue in *Murtagh*), two other requirements which must be fulfilled before the court can intervene by way of judicial review, namely, there must be a decision, act or determination *and* it must affect some legally enforceable right of the applicant. If the right is not a "legally enforceable right", it must be a right so close to it as to be a probable, if not inevitable, next step that some legal right will, in fact, be infringed."

85. These and a number of other relevant decisions are very helpfully summarised in the judgment of Barrett J. in *Grange.*

86. The report in issue here clearly comes within the description of "legally sterile" insofar as it does not purport to, and could not in fact, confer any rights or liabilities or make an final determinations of fact or law. That is not of course conclusive. Indeed, when one analyses the authorities above referred to, it would appear that they all concerned decisions or determinations that were intended to be final, whether they affected legal rights or not. The Report here was not the precursor to some further inevitable or probable step that might affect such rights. It appears to me that it comes back to the question of the nature of the task embarked upon by the respondent.

87. The applicant appears to concede that if the Government or one of its departments sought an opinion from senior counsel on a legal issue and that opinion were critical of the actions of one or more parties, that could not give rise to a right to a public law remedy at the suit of the party criticised. The applicant says that the situation here is entirely different given the nature of the assignment and the fact that it was known in advance that the report would be published. The nature of the distinction sought to be drawn is not obvious. In reality, the complaint appears to be of the publication and the subsequent political consequences.

88. Reverting to the terms of reference, the respondent was required to identify concerns arising from his review of, *inter alia*, the Department's documents. Concerns could only arise if there were potentially criticisms of actions taken or not taken. If there was no criticism, there could be no concern. The applicant submits that the respondent should have abstained from expressing any critical opinion, in the absence of consulting the applicant, and simply said that there were concerns. It is difficult to understand how the requirements of the Government could be satisfied by a report which simply said "I have reviewed the documents and there are concerns".

That would have amounted to a total abdication of the respondent's professional obligation to explain why such concerns arose.

89. Far from being *ultra vires* the terms of reference, it seems to me that the respondent was required and mandated by those terms to express the views described as "Conclusions". However, none of these were more than a narrative account of what the documents disclosed and where views were expressed, these were no more than expressions of opinion based on those documents. They were not findings of fact or final determinations of anything. They were not the precursors to an inevitable next step which would infringe any right of the applicant. On the contrary, they were the precursor to the establishment of a Commission of Investigation in which the applicant has a statutory guarantee that his rights will be fully respected.

90. Accordingly, I am of the view that the terms of the Report cannot give rise to any justiciable controversy between the parties and does not attract an entitlement to a public law remedy.

Fair Procedures

91. The concepts of fair procedures and natural justice are not absolute and whether and to what extent they apply to a given set of circumstances depends on those circumstances. As Keane J. (as he then was) remarked in *Mooney* (at p. 116):

> "the next question that accordingly arises is as to what the requirements of natural justice were in the present case. As has often been pointed out, the concept is necessarily an imprecise one and what its application requires may differ significantly from case to case. The two great central principles – *audi alterem partem* and *nemo iudex in causa sua* – cannot be applied in a uniform fashion to every set of facts."

92. Similar sentiments were expressed by Hamilton C.J. delivering the judgment of the Supreme Court in *McAuley* were he said (at p. 217):

> "The requirements in relation to basic fairness of procedures and the rules of natural justice have been dealt with in many cases and in this connection it is sufficient to refer to the judgment of Henchy J. in *Kiely v. The Minister for Social Welfare* [1977] I.R. 267 when he stated as follows at p. 281: -
>
> > "This Court has held in cases such as *In re Haughey* [1971] I.R. 217 that Article 40, s. 3 of the Constitution implies a guarantee to the citizen of basic fairness of procedures. The rules of natural justice must be construed accordingly. Tribunals exercising quasi-judicial functions are frequently allowed to act informally - to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures and the like - but they may not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do for, to quote the frequently-cited *dictum* of Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 All E.R. 109, 'There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend upon the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth'."

95. It is thus important to examine the factual background that led to the respondent's review. I have already referred to An Taoiseach's statement to Dáil Eireann on the 25th February, 2014. On the following day, the 26th February, 2014,

the applicant made his own statement to the Dáil and answered Deputies' questions, the transcript of which was put in evidence during the trial. At page 93 of the relevant Dáil debates, the applicant said:

> "I wish to commence by stating that initially, Deputy Martin was entirely right to hand over to the Taoiseach last week material he had received from a member of An Garda Síochána, Sergeant Maurice McCabe. The Taoiseach acknowledged that they were serious matters and undertook to review them. Had Deputy Martin's primary motivation been to have these allegations examined, the proper course of action would have been to let the Taoiseach, who made it clear that he was treating the matter as one of the utmost seriousness, proceed with that examination and respond to the Deputy. Instead, Deputy Martin came into this House last Thursday brandishing a document he states was in my possession for two years. What the Deputy's allegations amounted to was that serious allegations against the Garda had not been addressed, that I had done nothing about them and that I had not responded to correspondence from Sergeant McCabe."

96. The applicant continued at page 397:

> "This brings me to the question of contacts between Sergeant McCabe and my Department and, in particular, the allegation that I took no action in regard to correspondence received from him."

97. And further on the same page:

> "I should explain that reports from the confidential recipient are only forwarded to me where an allegation is made against the Commissioner. I took the letter so seriously that on 24 January, the following day, my Secretary General, at my request, wrote to the Garda Commissioner seeking an urgent report… The assurances I received were essentially to the effect that these

matters had been fully investigated in accordance with the law in place at the time. On 7 February, I wrote to the confidential recipient and informed him of the response of the Garda Commissioner."

98. The applicant continued on page 400:

"What is clear is that I did everything possible to try to move this issue forward, taking into account Sergeant McCabe's position on the matter. I very much welcome the fact that I will be able to provide this documentation to Mr. Sean Guerin SC."

99. The applicant concluded his remarks on page 402:

"I hope that the processes we have put in place will deal effectively with any wrongdoing, but also avoid clouds of suspicion being allowed linger unfairly. I look forward to the report of Mr. Sean Guerin and, like my colleagues in Government, I am fully committed to our taking any action necessary on foot of that report."

100. In response to the Minister's statement, Deputy Martin addressed the House and in the course of his reply said (at page 403):

"While the Minister believes he has been smeared because others had the nerve to question him, he should remember that the Taoiseach explicitly stated that I have handled this matter responsibly. He must also face the inconvenient fact that while he announced today that he has reviewed the matter and found he was right in everything he has done, the Cabinet stated yesterday that the matter needed to be reviewed externally. That is a significant point, as it is the view of the Cabinet, in particular, the Taoiseach, having read the dossier."

101. Arising from these statements in Dáil Eireann, it seems to me that it could not possibly be suggested by the applicant that he was unaware that his role in relation to Sergeant McCabe's complaints was to be examined by the respondent. Serious

allegations had been made against the Minister by the opposition concerning his alleged failure to respond to correspondence from Sergeant McCabe. This moved the applicant to give a very detailed explanation to the House as to what steps he took regarding those contacts and it is clear from Mr Martin's response that, perhaps unsurprisingly, the explanation was not accepted and was now to be the subject matter of external scrutiny. It is therefore somewhat surprising, to say the least, to find the following averment contained in para. 20 of the applicant's first affidavit grounding this application:

> "During the course of his review and preparation of the report, I was given no notice whatsoever by Mr Guerin that he intended to examine and pass judgment on my actions as Minister."

102. That carefully worded averment is undoubtedly strictly speaking correct but it is a very different thing from saying that the applicant was unaware that his actions as Minister would be examined. I do not believe that the applicant could credibly make such an assertion in the light of his statement to Dáil Eireann. Yet, in the very next sentence of para. 20 he goes on to say:

> "Secondly, not once in the correspondence does Mr Guerin raise any queries regarding my department's handling of the complaints of Sergeant McCabe."

103. Again this may be strictly true but insofar as it purports to convey an impression of ignorance on the part of the applicant that his involvement in the entire matter was being considered, it cannot be correct.

104. If there was any doubt about the matter, and I believe there was none, it was laid to rest by the content of the respondent's letter of the 11th April, 2014 to Mr Clarke referred to above.

105. In the second paragraph of that letter, the respondent drew attention to the fact that there appeared to be virtually no departmental documents relating to any

consideration of the Minister's statutory powers to investigate the complaints that had been made by Sergeant McCabe. The respondent was saying in effect that not only was there no evidence of any investigation being carried out by the Minister pursuant to his statutory powers but there was no evidence of it ever having been even considered. Indeed, this is the very first "finding" that the applicant complains of. To suggest in the light of this correspondence that the conclusion drawn from the documents, or lack of them, that there had in fact been no investigation or consideration of one came as a surprise to the applicant is hardly credible.

106. Indeed, any reasonably intelligent person reading this letter would immediately appreciate that a "conclusion" was going to be drawn in the absence of any further evidence or explanation being forthcoming from the Minister. Yet, we have the applicant stating on affidavit that no queries were raised by the respondent regarding the department's handling of Sergeant McCabe's complaints.

107. The applicant's response to the issue of this correspondence is somewhat curious. He says he knew nothing of it. It is curious because in the light of all that had recently transpired, the applicant says on affidavit that there was no need for any such correspondence to be brought to his attention because it only related to the provision of documents. In paras. 25 and 29 of his affidavit, he blames officials in his department for failing to bring correspondence to his attention, including the advice from the Attorney General's Office of the 18th December, 2013.

108. Accordingly, the applicant as the former Minister for Justice and Equality and an eminent lawyer says he bears no responsibility for correspondence addressed to his Department not specifically brought to his attention. That proposition is as extraordinary as it is unstatable. The Minister as a corporation sole is legally identified with his Department and correspondence with the Department *is* correspondence with the Minister.

109. The applicant says in his grounding affidavit that he was constrained from making contact with the respondent to avoid any hint of impropriety. However, on the other hand the applicant complains that the respondent did not make contact with him. It seems to me that if the applicant had an explanation to offer for the absence in his Department of any documents relevant to an investigation of Sergeant McCabe's complaints, he ought to have proffered it at the outset of the respondent's review and in any event no later than following receipt of the letter of the 11th April, 2014. In my view, he cannot have failed to appreciate that the absence of documentation called for explanation and could only be construed in one way in the absence of such explanation. Yet, he offered none and when the inevitable and obvious conclusion is drawn, complains that had he been consulted he could have explained matters. What is notable about this is that nowhere in his evidence does the applicant identify what the explanation is nor indeed does he appear to actually say that any of the so called "Conclusions" and "Findings" are in fact wrong and if so, why they are wrong.

110. Thus, whilst the applicant complains extensively of damage to his reputation and career as a result of the conclusions of the report, he singularly fails to explain why those conclusions are manifestly wrong and how that has resulted in damage to him.

111. A significant part of the applicant's case that he was not accorded fair procedures centres on the alleged failure of the respondent to obtain the GSOC documents. It was also said that the respondent failed to correctly appreciate the statutory architecture with the result that he was unaware of GSOC's statutory power to conduct investigations in relation to complaints received through the Confidential Recipient. It was suggested that the respondent was labouring under the misapprehension that GSOC could not investigate complaints made by members of An Garda Síochána. Thus, if the documents had been obtained, the applicant says that

they may well have disclosed the existence of an investigation of Sergeant McCabe's complaints by GSOC and this in turn could have impacted on the Minister's consideration of the exercise of his own statutory powers regarding the initiation of an independent investigation.

112. However, the applicant has not explained how his approach was or might have been affected when there are in fact no documents from GSOC or relating to GSOC on the files of the Department to indicate the existence of such an investigation or that one was being considered or indeed of any event relative to GSOC that could have influenced the Minister in discharging his own statutory functions. If there was relevant information available in this regard which was not recorded on the Department files, in itself an unlikely scenario, the applicant was free to pass it on to the respondent. Here again, the applicant does not allege that any such information did in fact exist or if so, how it might have influenced any conclusion arrived at by the respondent. I fail to see therefore how the alleged failure to obtain the GSOC documents could be viewed as a denial of fair procedures to the applicant.

113. In summary therefore on this issue, I am satisfied on the evidence that the applicant knew that part of the respondent's review would involve an examination of the role of the Minister in relation to Sergeant McCabe's complaints. The applicant was aware that the review was being conducted for the purpose of identifying concerns that might require investigation. He knew that the review was being conducted by reference to the documents he himself furnished and not by reference to any third party allegations which needed to be put to him for a response. If there was information not contained in the Department's documents which had a bearing on the applicant's role, he was perfectly free to submit that information in circumstances where he must have known that the documents on their own would give rise to conclusions reasonably obvious to any intelligent reader.

114. A further matter of which a complaint is made by the applicant is the alleged misunderstanding or misreading by the respondent of the letter of advice from the Attorney General's Office of the 18th December, 2013. The Attorney's advice was that two of Sergeant McCabe's files should be forwarded to the Commissioner "without further ado". In para. 19.89 of the report, the respondent said:

> "The advice was to forward the two booklets relating to the complaints of malpractice and corruption to the Minister 'without further ado.' "

115. The report goes on to state that it is unclear whether or not the documents were ultimately forwarded to the Commissioner. The applicant submitted that the clear inference to be drawn from this mistake is that notwithstanding the Attorney General's advice that the documents be furnished to the Minister without further ado, it wasn't clear whether the Minister had done anything with those folders or whether they simply remained sitting on his desk.

116. In response to this criticism, the respondent says that the reference to the Minister was simply a mistake and should have been a reference to the Commissioner. As previously stated, chapter 19 of the report sets out details of all correspondence with the Department regarding Sergeant McCabe's complaints including the fact that his solicitors wrote to the Department on the 4th September, 2012 enclosing the three booklets which were the subject of the Attorney's advice over a year later. The correspondence between Sergeant McCabe's solicitors and the Department from September, 2012 onwards was concerned, *inter alia*, with requesting the solicitor's consent to the documents being sent to the Commissioner. Paragraph 19.88 immediately preceding the paragraph of which complaint is made refers to these facts and that the Minister had sought agreement to his sending the three booklets to the Commissioner. The subsequent paragraph, 19.90, says that it is unclear whether the documents were in fact forwarded to the Commissioner.

117. Therefore, the reference to forwarding booklets to the Minister which were already in his possession for over a year is a patent error, the true meaning of which is obvious to anybody reading the Report. It could not in my view be reasonably suggested that anybody would be misled by this, less still would form some adverse impression of the applicant as a result.

118. Accordingly, even if the Report could be regarded as justiciable, I am satisfied that there was no want of natural justice arising here and that the applicant was accorded fair procedures entirely commensurate with the nature of the review being undertaken by the respondent.

Can the Applicant Mount this Challenge?

119. Article 28.4.2 of the Constitution provides:

> "The Government shall meet and act as a collective authority, and shall be collectively responsible for the Departments of State administered by members of the Government."

120. Accordingly, all members of the Government are collectively responsible for decisions of the Government. The Government instructed the respondent on a private contractual basis to conduct a review and prepare a report. The Government drafted the respondent's terms of reference which included a direction to examine the documents of one of its Departments and review the adequacy of any investigation or inquiry by, *inter alia*, that Department. The Government directed the respondent to consider if there was a sufficient basis for concern as to whether all appropriate steps were taken by, *inter alia*, that Department to investigate and address the specified complaints and advise whether further measures were warranted.

121. The Government further decided to accept the Report, to publish it to the general public, to accept the recommendations contained in the Report and to

establish a Commission of Investigation. These are all decisions for which the applicant bears responsibility as a member of the Government that made them.

122. To take an analogy, if the board of a company resolved to instruct a private consultant to review the management and governance of the company and such consultant offered the view in a report that there were shortcomings in the manner in which one or more of the directors had acted, could such director seek to judicially review the consultant's report? I think not.

123. It is not easy to see in principal how the applicant's position is any different. If he were still a member of the Government and sought to bring these proceedings it is difficult to escape the conclusion that he would, in effect, be seeking to judicially review himself. He can hardly improve his position by resigning and then bringing proceedings as a private citizen.

124. In my view, most if not all of the consequences of which the applicant makes a complaint arose from purely political decisions. These included the matters already identified but in addition the alleged determination of An Taoiseach not to allow the applicant an opportunity to consider the report before it was published, the alleged decision by An Taoiseach that he would be unable to express confidence in the applicant if asked and ultimately the applicant's decision to resign.

125. All of these matters are quintessentially political decisions which, having regard to the separation of powers, the court cannot consider less still adjudicate upon.

Collateral Attack

126. The within proceedings were commenced on the 30th July, 2014 when leave to seek judicial review was granted by Baker J.

127. On the 9th September, 2014, the applicant's solicitors wrote to An Taoiseach in relation to the proposed establishment of a Commission of Investigation as

recommended in the respondent's report. In the course of that letter, the solicitors drew attention to the High Court proceedings which had been initiated and said:

> "Our client is gravely concerned that the terms of reference of such commission of investigation set pursuant to part 2 of the Act of 2004 would include the matters expressed in the Guerin report in respect of his conduct and his understanding as to the statutory functions of the office of Minister for Justice and Equality and concerning his challenge to certain aspects of the report of Mr Guerin.
>
> In the court proceedings, our client is seeking to quash and to have erased from the record certain conclusions/expressions of opinion made by Mr Guerin in respect of our client's conduct as Minister for Justice and Equality and in respect of his understanding of the statutory duties of the Office of the Minister for Justice and Equality. These conclusions can usefully be found at the schedule attached to the statement of grounds in the proceedings. For ease of reference, we attach a copy of this schedule to this letter.
>
> It seems to us that the inclusion of these issues in the terms of reference of any commission of investigation under the Act of 2004 to be established has the potential inter alia to interfere with extant court proceedings and therefore risk a breach of the *sub judice* rule. Furthermore, in the light of the fact that there are currently proceedings touching upon and concerning the above issues, it appears to us that an order establishing a commission of investigation containing terms of reference which seeks to investigate and determine the above issues concerning our client may well constitute an unwarranted interference by the Oireachtas with the judicial function…
>
> In plain terms, unless and until the proceedings issued by our client are conclusively determined, the matters in the Guerin report of which our client

complains ought not form part of the terms of reference of any such commission of investigation.

I am therefore seeking your assurance as Taoiseach that the matter is the subject of challenge in the High Court will not form a part (s) of the terms of reference of any commission of investigation to be established in respect of the matters referred to in the report of Mr Guerin, directly or indirectly.

In the event that you cannot and/or will not give this assurance, we will be forced to bring this issue to the attention of the High Court. In particular, but without limitation, the issue of a potential risk to the sub judice rule will be raised."

128. The private secretary to An Taoiseach replied to this letter on the 7th November, 2014 saying:

"The decision to establish a commission of investigation is for the Government under the provisions of the Commissions of Investigation Act 2004 and the content of the earlier report from Sean Guerin S.C., which was in the nature of a scoping exercise, as well as the conduct by him of that exercise and his procedures or methodologies, cannot have any bearing on the investigation to be undertaken by a commission under that Act.

The commission process is wholly independent, separate and distinct and is governed by statute in all material respects.

The Taoiseach has asked me to reassure you that the concerns raised in your letter of 9th September have been considered carefully. Nonetheless, the government intends to proceed shortly to initiate the necessary steps under the Commission of Investigation Act 2004 to establish a commission of investigation. He will arrange a copy of the proposed terms of reference to be provided to your firm, for information, when approved by Government."

129. Matters did not however rest there and the applicant's solicitors again wrote to An Taoiseach's private secretary on the 17th November, 2014 in the following terms:

> "Accordingly, should the issues raised by Mr Guerin, touching upon and concerning our client, in any sense, form part of either or both the matter(s) of public concern as determined under s. 3 of the Act of 2004 and the terms of reference of any such commission of investigation, it is our clients contention that same would constitute an unlawful and unjustifiable trespass on court proceedings issued by him and would tend to interfere with the proper administration of justice…
>
> We suggest that it would be bizarre, utterly unconstitutional and in breach of the European Convention right to an effective remedy were our client precluded, on the one hand, from challenging the Guerin report and on the other, were forced to become involved with a commission of investigation undeniably arising in the first instance from conclusions contained in the same report, we unhesitatingly suggest that such a scenario is Kafkaesque.
>
> It is our client's considered view that as a consequence of the above, the issues raised in the Guerin report concerning our client ought not now form part of such commission as may be established. We will ask for confirmation within a period of seven days from the date of this letter that this will be so. Absent such confirmation, our client intends to bring these matters to the attention of the High Court and due to the highly exceptional circumstances as so patently arise from the above to seek such relief as may be appropriate."

130. Accordingly, An Taoiseach was now being advised by the applicant's solicitors in clear and unequivocal terms that if the applicant was not excluded from the terms of reference of the Commission of Investigation, the applicant would be applying to the High Court to prevent that happening. An Taoiseach's private secretary responded

on the 21st November, 2014 advising the applicant's solicitors that the Government at its meeting of the 19th November, 2014 had approved a draft order to establish a Commission of Investigation and a copy of the draft was attached to the letter. This draft made clear that despite the applicant's correspondence, his role as Minister would be included in the terms of reference of the Commission of Investigation.

131. Rather than apply to the High Court presumably to injunct the Government from proceeding on foot of the draft terms of reference of the Commission of Investigation, as he had threatened to do, the applicant instead on the 25th November, 2014 wrote directly to the Ceann Comhairle setting out details of these proceedings. He referred to the fact that the draft order sent to him by the Taoiseach's private secretary on the 21st November, 2014 establishing a Commission of Investigation included at para. 1 (j) reference to his role as Minister. In the course of the letter, the applicant said:

> "Should the Dáil include unamended within the terms of reference of the commission para. 1 (j) and , in particular, the express reference therein to 'the Minister for Justice and Equality', it will be a direct and overt encroachment and interference by Dáil Eireann in judicial proceedings that are presently before the courts and will be a dangerous and unprecedented encroachment by the Dáil on the function of the courts.
>
> I appreciate that the draft order enclosed with the letter received from the Taoiseach's office at the time of my dictating this letter may not yet have been tabled but I expect it will be tabled shortly and I felt it important to bring it to your attention. Dáil Standing Order 56 (3) prescribes that a 'matter should not be raised in such an overt manner so that it appears to be an attempt by the Dáil to encroach on the functions of the Courts or a Judicial Tribunal'. I am asking that the reference to the 'Minister for Justice and Equality' insofar as it

refers to my occupying that office contained in para. 1 (j) of the draft order be ruled out of order as raising in an overt manner a matter that is presently before the courts and as encroaching on the function of the courts. I also wish to draw to your attention Order 56 (5) which states the onus on members 'to avoid, if at all possible, comment which might in effect prejudice the outcome of proceedings.' It is inevitable that if the ruling I am seeking herein is not made that comment will be made in the Dáil which 'might in effect prejudice the outcome' of the above mentioned proceedings…

In simple terms, it is my view that the rule of law and the Constitutional principle of the separation of powers should be upheld and respected and that the Dáil should not take to itself a part to subvert or override the outcome of proceedings which are properly before the courts and await hearing."

132. This letter appears not to have been immediately replied to and a further letter was written to the Ceann Comhairle, this time by the applicant's solicitors, on the 8th January, 2015. The previous correspondence with the office of An Taoiseach and with the Ceann Comhairle was referred to. The solicitors stated that the purpose of the letter was to ask the Ceann Comhairle to rule out of order para. 1 (j) of the order to establish a Commission of Investigation. A detailed account was given of the High Court proceedings and the request to rule para. 1 (j) was repeated. The solicitors said:

"The specific principle we envoke is the principle of judicial independence, an integral part of the constitutional separation of powers. The effect of Article 6 and of Articles 34 to 7, inclusive, of the Constitution is to vest in the courts the exclusive right to determine justiciable controversies between citizens or between citizens and the State. In bringing his proceedings our client is exercising a constitutional right and he is entitled to have the matter in dispute determined by the judicial organ of the State. Dáil Standing Orders 56 (3)

and 56 (5) are anchored in this constitutionally paramount principle. By reference to Standing Order 56 (3), we submit that para. 1 (j) of the draft order by mentioning our client's role as Minister for Justice and Equality in relation to Sergeant McCabe's complaints overtly raises a matter that falls to be adjudicated upon by the High Court and appears to encroach on the functions of the High Court. Moreover, by reference to Standing Order 56 (5) we submit that it is impossible to debate para. 1 (j) of the draft order without comment that might in effect prejudice the outcome of the proceedings … we respectfully submit that the order will interfere with our client's legal proceedings before the High Court and will prejudge the outcome of those proceedings…because para. 1 (j) of the terms of reference for the Commission of Investigation prejudged the issues of which the High Court is seised, a decision to proceed with them in their present form would constitute an invasion of the constitutional separation of powers and, more specifically, the independence of the courts."

133. The letter concluded in the following terms:

"You are not only entitled, but, we believe, obliged, to rule out of order either the entirety of para. 1 (j) of the order, or the reference therein to the Minister for Justice.

In conclusion, it is our strong view that to set up the Commission of Investigation with a remit under para. 1 (j) would be to force our client to submit to a legally tainted inquiry process that amounts to an unwarrantable interference by the Oireachtais with the operations of the High Court in a purely judicial matter."

134. The Ceann Comhairle replied separately to both the applicant and his solicitors on the 27th January, 2015 setting out his ruling in the matter. The Ceann Comhairle

indicated that he would rule out of order any debate on the issues raised in the applicant's correspondence but that there was no provision for the House to amend or delete the terms of reference in the draft order laid before it.

135. In yet a further letter of the 28th January, 2015 from the applicant personally to the Ceann Comhairle, he sought to again persuade the Ceann Comhairle to reconsider the ruling he had already given. The Commission of Investigation was established on the 3rd February, 2015 by S.I. No. 38 of 2015 entitled Court Commission of Investigation (Certain Matters Relative to the Cavan/Monaghan Division of the Garda Síochána) Order 2015. The schedule to the S.I. sets out the terms of reference of the commission which include the controversial para. 1 (j).

136. The foregoing correspondence clearly demonstrates that following the institution of the within proceedings, the applicant was making the case in the strongest possible terms that the inclusion of para. 1 (j) in the Commission's terms of reference would be unlawful and unconstitutional and any attempt to do so would be met by proceedings to injunct such inclusion. Yet no such proceedings were initiated either against the Government or the Commission itself. On the contrary, when these proceedings came before the court at a the time when the applicant's complaints about the inclusion of 1 (j) had been overtaken by events, no mention at all is made of this issue in the applicant's written submissions and in oral submissions, counsel for the applicant said that the setting up of the Commission was entirely the prerogative of the Government and essentially an executive decision. It had nothing to do with these proceedings or the relief being sought by the applicant.

137. That is, by any standards, an extraordinary change of position that is entirely unexplained by the applicant. In the light of that, it seems to me that it is very difficult to resist the conclusion that these proceedings were initiated by the applicant

with a view to preventing his role in the matter being examined by the Commission of Investigation.

138. It would appear that the applicant still hopes to achieve this aim. Mr. Sreenan SC said in argument that if the applicant's claim succeeds, it would be open to the Government or the Commission to amend its terms of reference by a form of consensual procedure to exclude the applicant from its remit. Despite that contention, it is clear that a conscious decision was made by the applicant not to join either the Government or the Commission in these proceedings.

139. That is, it seems to me, a matter that goes to the court's discretion in deciding whether or not to grant relief by way of judicial review. Judicial review is of course a discretionary remedy. In *State (Abenglen Properties Limited) v. Corporation of Dublin* [1984] I.R. 381, O'Higgins C.J. observed (at p. 393):

> "In the vast majority of cases, however, a person whose legal rights have been infringed may be awarded certiorari ex debito justitiae if he can establish any of the recognised grounds for quashing; but the Court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief or, I may add, if the relief is not necessary for the protection of those rights. For the Court to act otherwise, almost as of course, once an irregularity or defect is established in the impugned proceedings would be to debase this great remedy."

140. The great remedy of judicial review is a powerful weapon in the armoury of the court deployed to vindicate the constitutional rights of the citizen and protect them against unjust attack. It does not exist to facilitate the adoption of stratagems or tactical positions designed to achieve a different purpose. The court ought not permit its process to be used in this way.

The Allegation of Bias

141. In his statement of grounds, the applicant alleged at para. E7 that the drawing of the Conclusions by the respondent gave rise to a reasonable apprehension of bias. Six separate grounds were listed as underpinning this plea, the first of which was that the respondent was a member of the Professional Practices Committee of the Bar Council which had criticised the applicant as Minister in respect of the Legal Services (Regulation) Bill 2011 in which the applicant was centrally involved. This pleading was supported by the following paragraph in the applicant's grounding affidavit:

> "39. Since publication of the report, I have become aware that whilst conducting his review, Mr Guerin was a member of the Professional Practices Committee of the Bar Council, which committee has openly criticised the provisions of the Legal Services Bill, and the approach taken in the Bill to a number of reforms that will impact on the legal profession. Until my resignation as Minister on May 7th 2014, I was singularly associated with progressing this Bill through the legislature. Accordingly, I am concerned as to the possibility that Mr Guerin was biased in drawing the conclusion as to my apparent (and denied) lack of action/communication with regard to Sergeant McCabe's complaints. I wish to make it clear that I am not asserting what is legally termed '*actual bias*' on the part of Mr Guerin."

142. The application for leave was made *ex parte* in the normal way and might reasonably have been expected to attract considerable media attention having regard to the subject matter. Leave was granted by Baker J. on ground E7 (a) but refused in respect of the subsequent five.

143. A number of things emerge from para. 39 of the applicant's affidavit. The first is that the facts alleged therein are said to be matters of which the applicant has

become aware since publication of the Report. It would thus appear that the applicant was unaware of these matters prior to publication of the Report and one assumes that following its publication, the applicant caused enquiries to be made in the context of the within proceedings in relation to matters which might be relevant to this claim. Those enquiries apparently disclosed that the respondent was a member of the Professional Practices Committee. They further disclosed that the committee had openly criticised the provisions of the Legal Services Bill. By "openly", I take the applicant to mean that the criticism was made publicly in the media. Indeed, one assumes that the applicant must not have been aware of any of these matters before the respondent's appointment having regard to the fact that he was a member of the Government that appointed the respondent having, through the Taoiseach, described him as "an independent and objective legal expert." Of course, the respondent could have been neither independent nor objective if what was sworn in para. 39 were true. Although the applicant was at pains to say that he was not asserting actual bias, he nonetheless averred that he was concerned as to the possibility that the respondent was biased. It is thus far from clear if the applicant was asserting subjective or objective bias contrary to what is stated in the affidavit.

144. In his first replying affidavit sworn on the 28th October, 2014, the respondent makes clear that there was never any basis for the allegation of bias which is simply factually wrong and in that respect, he is supported by an affidavit sworn on the same day by the Director of the Bar Council.

145. The first response of the applicant came in a letter of the 18th November, 2014 from his solicitors. This letter was written in response to a letter of the 12th November, 2014 from the respondent's solicitors which had requested copies of certain correspondence passing between the applicant's solicitors and the Chief State

Solicitor's office. After that issue is dealt with, and almost as an afterthought, the applicant's solicitors said:

> "We refer to the affidavit of Jerry Carroll sworn the 28th October 2014 herein. In the light of same, the applicant withdraws the ground, in the statement of grounds, that the drawing of the conclusions by the respondent gives rise to a reasonable apprehension of bias."

146. No apology was offered or even any expression of regret. Indeed, quite to the contrary, in his next affidavit sworn on the 25th November, 2014, despite that correspondence, the applicant does not even refer to the issue of bias so that his sworn position remained as before.

147. Exception was taken to this, rightly in my view, in a subsequent affidavit sworn by the respondent's solicitor on the 8th December, 2014, in which Ms Fanagan averred that the allegation of bias having been made on affidavit must be withdrawn on affidavit.

148. This finally prompted the applicant to swear a third affidavit on the 15th December, 2014 withdrawing the allegation of bias, four and a half months after it had been publicly made and some six weeks after it had been demonstrated to be entirely without foundation. In this affidavit, the applicant swore:

> "4. I acknowledge that the Professional Practices Committee, of which the respondent was a member, did not criticise the Legal Services Bill and I acknowledge that I was mistaken in my belief, held at the time of swearing my grounding affidavit that it had done so. Accordingly, I am no longer pursuing my challenge to the report of the respondent on the ground of bias. I reiterate that, as I believe is clear from para. 39 of my grounding affidavit, the challenge was only ever on the ground of objective bias. I never sought to challenge the report of the respondent on the ground of actual bias, nor was it

ever asserted by me that the respondent had personally criticised the Legal Services Bill."

149. Accordingly, there is again no hint of apology or regret but rather, almost an attempt to excuse the applicant on the basis that it was only ever an allegation of objective bias and thus, presumably, of little significance in any event. Furthermore, there is not the slightest attempt to explain how this very serious error was made by the applicant.

150. The allegation of bias, objective or subjective, made by the applicant against the respondent was of the utmost gravity. If it were true, it meant the respondent had accepted instructions from the Government in relation to a matter in which he knew, or ought to have known, that he could potentially be regarded as objectively biased. If he appreciated this fact, then he would clearly be acting unethically, a serious matter for any barrister but particularly one who was a member of a committee charged with overseeing the ethics of the Bar. On the other hand, if he failed to appreciate the possibility of a perception of bias, then as a minimum this would be a matter going to his professional competence and judgment. Furthermore, it would potentially taint his entire Report and be a matter of enormous embarrassment for the Government who appointed him on the basis of his independence and objectivity. In addition to all that, to have this allegation made very publicly by the former Minister for Justice, himself an eminent lawyer, could hardly be more serious with all the implications it carried for the respondent's professional reputation and future career.

151. In *Adams v. DPP* [2000] 4 JIC 1201, this court (Kelly J.) considered the relevant principle applicable to disclosures by applicants in *ex parte* applications. In the course of his judgment dealing with this issue, he said (at page 8):

"APPLICATIONS MADE EX PARTE

Whilst the St. George's Healthcare case which I have just mentioned is not authority for the proposition which was made, it is of relevance to an aspect of this case which I find very troubling. That is the obligation on the part of counsel in seeking orders *ex parte*. In the course of the judgment of the court delivered by Judge L.J. he said (at page 966):

> 'An interim injunction is granted *ex parte* only in exceptional circumstances, and then only subject to the triple safeguards of (i). the duty of full and frank disclosure; (ii). the cross undertaking in damages which is required as a matter of course and (iii). the right of the party enjoined to apply to vary or discharge the *ex parte* order. If an interim declaration were a remedy known to English law it could hardly be obtainable without the same safeguards being put in place.'

Reference is there made to the duty of full and frank disclosure. That is reminiscent of the statement made by Kennedy C.J. in *Brennan v. Lockyer* [1932] I.R. 100 at 107, where he said in relation to the order in question there:

> 'That, in my opinion, is one of the very matters to which on an *ex parte* application of this kind, the long established rule requiring *uberrima fides* on the part of the applicant ought to be strictly applied.'

On any application made *ex parte* the utmost good faith must be observed, and the Applicant is under a duty to make a full and fair disclosure of all of the relevant facts of which he knows, and where the supporting evidence contains material misstatements of fact or the Applicant has failed to make sufficient or candid disclosure, the *ex parte* order may be set aside on that very ground. One such fact which ought to have been disclosed was that the Applicant had unsuccessfully sought judicial review of the certificate in suit in the High

Court of Northern Ireland. That was made known only during the course of this hearing.

The obligation extends to counsel. There is an obligation on the part of counsel to draw the judge's attention to the relevant Rules, Acts or case law which might be germane to his consideration. That is particularly so where such material would suggest that an order of the type sought ought not to be made."

152. That any applicant, never mind one in the applicant's position, could make such a serious allegation without even the most basic attempt to verify the facts is a matter of significant concern. When the applicant is taken to task and an explanation called for, there is a somewhat grudging withdrawal of the allegation and no attempt to offer an explanation or apology to the respondent or the court which merely serves to heighten that concern.

153. The situation is compounded by the following statement in the applicant's written submissions:

"6.40 In relation the allegation of bias, this was an allegation of objective bias based on information available to the applicant at the time the proceedings were issued. Once the applicant was apprised of the full facts, that allegation was immediately withdrawn. In the circumstances, there can be no basis for the suggestion that this disentitles the applicant to relief."

154. I beg to differ. The applicant had a duty to apprise himself of the full facts before swearing on oath that those facts were true. It is not in dispute that the true position could have been easily established and yet when called upon to explain the basis for his mistaken belief, the applicant chooses to say nothing.

155. In my view, the applicant's approach to this issue is entirely unacceptable.

Summary and Conclusions

156. I am satisfied that the nature of the exercise undertaken by the respondent was, where the applicant was concerned, limited to a consideration of documents of the Department for the purposes of advising the Government, of which the applicant was a member, whether concerns existed regarding the investigation of Sergeant McCabe's complaints such as would warrant further action. The respondent was required to express a view and he did so. His report was in the nature of an expert opinion from an independent senior counsel obtained by the Government on foot of a contractual arrangement privately entered into. It does not in my view give rise to any justiciable controversy between the parties such as would permit the applicant to seek judicial review. The preliminary nature of the Report did not attract the requirements of natural justice but even if it did, there was in fact no denial of fair procedures to the applicant. I cannot see how the applicant as a member of the Government that decided to obtain and publish the report can complain of the consequences. It is clear that the applicant is very dissatisfied with the contents of the Report and what he alleges is a denial of the opportunity to tell his side of the story. However, that opportunity together with the full panoply of fair procedures will be afforded him by the Commission of Investigation now established.

157. Many, if not all, of the matters which form the basis for the applicant's complaints occurred as a result of purely political decisions of the Government and indeed the applicant himself. It is not the function of the court to adjudicate on any of these matters having regard to the constitutionally enshrined separation of powers.

158. It is clear from the evidence that the principle focus of these proceedings following their commencement was an attempt by the applicant to prevent the Commission investigating his role in relation to Sergeant McCabe's complaints. That is now a fait accompli yet the applicant still seeks to curtail the statutory investigation

by undermining the conclusions on which he says it is based. In that respect, I am of the view that the applicant seeks to mount a collateral attack on the Commission where a conscious decision was made not to join either the Commission or the Government in these proceedings. That cannot be permitted. It is a matter that goes to discretion as does the totally unwarranted allegation of bias publicly made against the respondent at the *ex parte* stage. Thus, even in the absence of the foregoing conclusions, I would exercise my discretion against granting relief.

159. For these reasons, I must dismiss this application.