THE HIGH COURT

JUDICIAL REVIEW

DIVISIONAL COURT

[2014 No. 431 JR]

The President

Mr. Justice Noonan

Ms. Justice Kennedy

BETWEEN

ANGELA KERINS

APPLICANT

AND

JOHN McGUINNESS, MARY LOU McDONALD, SHANE ROSS, AINE COLLINS, PAUL J. CONNAUGHTON, JOHN DEASY, ROBERT DOWDS, SEAN FLEMING, SIMON HARRIS, EOGHAN MURPHY, GERALD NASH, DEREK NOLAN, KIERAN O'DONNELL, THE CLERK OF DÁIL ÉIREANN, THE CLERK OF THE PUBLIC ACCOUNTS COMMITTEE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of the Court delivered on 31st day of January, 2016.

Introduction

1. This matter arises out of certain proceedings that took place before the Public Accounts Committee of Dáil Éireann ("the PAC") on 27th February, and 10th April, 2014. Arising from those proceedings, the applicant (Ms. Kerins) seeks certain injunctive and declaratory reliefs and damages by way of judicial review. A modular

trial of the applicant's claim was directed by this court and on appeal, the Court of Appeal. Thus the issue of damages does not arise for determination in this module.

The Parties

2. Ms. Kerins qualified as a nurse and midwife and worked in healthcare management positions before taking up employment with the Rehab Group in 1992. In December 2006, she was appointed Chief Executive Officer of the Rehab Group, a position which she held until her resignation in April 2014. The first thirteen respondents were at the relevant times members of the PAC and Dáil Éireann.

3. The Rehab Group (Rehab) is a company limited by guarantee and a registered charity. It was incorporated on 28th July, 1953. It was formerly known as the Rehabilitation Institute and the Rehabilitation Institution Ltd. It is an independent not for profit company.

4. Rehab comprises a mix of charitable and commercial companies and at the relevant times operated in Ireland, England, Scotland, Wales, Poland, the Netherlands and Saudi Arabia. Its total staff amounted to in excess of 3,500. It had some 80,000 service users annually. The income of Rehab is derived from a number of different sources. Among those sources are three which provided public monies. It is important to point out that although public monies were provided to the Rehab Group, it was at all times an independent entity operating in the private sector. Ms. Kerins was a private sector employee. She was not a public servant. She did not enjoy access to the public sector pension scheme.

5. The first element of public funding received by Rehab was as a result of a competitive tendering process whereby it entered into service level agreements (SLA's) with the Health Service Executive (the HSE) pursuant to the provisions of s.

39 of the Health Act 2004. The payment received on foot of those agreements was in consideration of the provision of specified health and social care services by Rehab. Under these SLA's the HSE retained oversight rights in respect of the service and the Rehab Group was obliged to maintain audited accounts and make them available to the HSE.

6. Rehab was also in receipt of payment for services from other State agencies apart from the HSE. Such funding included payments by an entity called Solas which was in respect of services provided by Rehab pursuant to contractual arrangements with Solas.

7. The third source of public funding came via the Department of Justice and Equality. Such payments were made under the Charitable Lotteries Scheme. Those funds were designed to compensate for the restrictive legislation that charity lotteries, including Rehab, operate under when compared to the unrestricted prize fund of the State owned National Lottery.

8. It is right to point out that both the HSE and Solas considered that the services provided by Rehab on foot of the contractual arrangements entered into with both entities represented value for money. This acknowledgment was made by both the HSE and Solas at a meeting of the PAC on 27th February, 2014. Insofar as the monies provided by the Department of Justice and Equality were concerned they were the subject of a detailed report provided to that Department on an annual basis. No complaint has been made by that Department against Rehab concerning how those monies were spent.

9. As Rehab was not within the remit of the Comptroller and Auditor General it was never audited by him.

10. The PAC is a committee of Dáil Éireann.

11. At all material times the first respondent (Mr. McGuinness) was the chairman of the PAC. It is composed exclusively of members of the Dáil. It is defined in s. 2 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 ("the 2013 Act") as meaning "*the committee of Dáil Éireann established under the rules and standing orders of Dáil Éireann to examine and report to Dáil Éireann on the appropriation accounts and reports of the Comptroller and Auditor General*".

The Health Act 2004

12. The bulk of the public funds received by the Rehab Group are paid to it by the HSE pursuant to s. 39 of the Health Act 2004.

13. The HSE funds more than 2,600 agencies which operate more than 4,200 separate funding arrangements to a value of approximately €3.3 billion. A total of 39 of these agencies, accounting for €2.4 billion, are funded under s. 38 of the Health Act 2004. The remaining agencies, of which there are more than 2,500, are funded under s. 39 of that Act. The practical difference between these two statutory provisions is to be found in testimony which was given before the PAC by Mr. Tony O'Brien, the Chief Executive of the HSE. He said:

> "*Under s. 38 the HSE may enter into an arrangement with the service provider for the provision of health and personal social services on its behalf. Under s. 39, the HSE may give assistance to a person or body to provide a service similar or ancillary to a service that the executive may provide. The governance context in which the HSE engages with s. 39 agencies is distinctly different from that which applies in the case of s. 38 agencies. For example, the employees of s. 39 agencies are not public servants, are not members of public service pension schemes and, unlike their s. 38 counterparts, are not*

directly bound by the Department of Health consolidated salary scales. In a situation where a funding arrangement under s. 39 was reclassified as coming under s. 38, the cost to the State of providing that service would likely increase in a material sense in the immediate and long term due to increased public sector numbers, pay rates and pension costs as well as the loss of the current flexibility around development and reorganisational services. No such reclassification has taken place in recent years."

14. His evidence makes clear and indeed it is common case that monies paid to Rehab by the HSE were paid pursuant to the provisions of s. 39 of the Act.

Factual Background and Chronology

15. Prior to February 2014, there was a degree of public controversy about the charity sector in Ireland. The issue of executive pay in the sector was the subject of extensive media coverage. Expenditure by the HSE on the provision of services to persons with disabilities was a matter of public debate. In 2013, Rehab received €86m from the HSE and Solas in respect of SLAs entered into in that year. It received €3m from the Department of Justice and Equality in respect of the Charitable Lotteries Scheme. There appears to have been considerable media interest in Ms. Kerins' salary. By letter dated 22nd January, 2014, the PAC wrote to Ms. Kerins informing her that it was examining the issue of State funding to Rehab. The letter said:

"*The request to both [the HSE and the Department of Justice and Equality] relates, in the main, to oversight and conditions of funding and the Committee has also sought access to any evaluations undertaken of the funding provided by the State to the Rehab Group. The Committee also directed me to make*

contact with you in relation to these matters so as to afford the Rehab Group the opportunity to outline to the Committee the outturn and outcome achieved by Rehab of the funding received from the State."

16. On 24th January, 2014, Ms. Kerins met with Mr. McGuinness privately to discuss her attendance before the PAC. On 17th February, 2014, Rehab issued a press release concerning Ms. Kerins' salary. By letter of 18th February, 2014, the PAC invited Ms. Kerins to appear before it as a witness. The letter said:-

"*I wish to inform you that the Committee has set aside Thursday 27th February 2014…for examination of the following matter:-*

- *Payments made by the HSE to Rehab under s. 39 of the Health Act, 2004.*
- *The operation of the Charitable Lottery Scheme and payments made to Rehab from the vote of the Department of Justice and Equality.*
- *Payments made by Solas to Rehab for the provision of specialist vocational training*."

17. On 26th February, 2014, there was some contact between Ms. Kerins' solicitors and the PAC.

<u>Events of the 27th February, 2014</u>

18. Ms. Kerins attended before the PAC. She was under no legal obligation to do so. She was not accompanied by lawyers although she did have the benefit of prior legal advice. She accepted the invitation of the Committee to make an opening statement in which she dealt with a number of matters concerning Rehab and in particular with her own salary. Ms. Kerins' appearance before the PAC took about seven hours during which she had one short break. She was questioned by members

of the PAC on a wide range of issues, many of which went far beyond those of which she had been notified in the correspondence of 18th February, 2014. For reasons which will be discussed later in this judgment, Ms. Kerins claims that much of this examination was conducted outside the PAC's jurisdiction. Irrespective of that contention, it is evident that much of what was put to Ms. Kerins were matters of which she had no prior notice.

19. She complains not only of this fact but of the manner in which the members of the PAC questioned her. She, through her counsel, has characterised the examination as a witch hunt.

20. As will become apparent, while we have come to the conclusion that the extent to which the court is entitled to make any comment which touches directly on the utterances of any member of the PAC on the occasions in question is limited by the terms of the Constitution, it seems to us that it cannot be gainsaid that much of what was put to her, and said about her, in the course of this meeting was damaging to her reputation personally and professionally. She was criticised for involving her lawyers in the matter. She was accused of being stubborn in maintaining a position that the PAC was not to meddle, interfere or ask questions that Rehab deemed inappropriate. Questions were put to her which inferred that she had no concept of accountability or responsibility in her "public position".

21. She was accused of adopting double standards in her approach to the pay of Rehab staff as distinct from her own – this was described by one member as "shocking". When questioned about her pension, another area about which she received no advance notice, she was told her answers were unreasonable. She was "thanked" for her sympathetic view of those members of the committee who were ignorant of the full magnitude of her role. It was suggested to her that she was grossly

overpaid and was on "a different planet". She was subjected to interrogation about her modes of transport. It was said of her that her salary was having a negative effect on Rehab and other charitable organisations.

22. She was subjected to questioning about a company in which her family members were involved and which had business dealings with Rehab. It was suggested to her that there was an extraordinary opaqueness about the accounts of Rehab. She was criticised for making "a song and dance" about her appearance before the PAC and giving evasive answers to questions. She was deemed to be not forthcoming enough and told that she needed "to get a grip on herself". It was said that information had to be dragged out of her and that she was doing more damage than good to the charitable sector. It was described as "incredible" that her solicitors should correspond with the PAC in advance to advise it of the extent of its remit.

Subsequent Events

23. The evidence of Ms. Kerins is that she was significantly traumatised as a result of her appearance before the PAC. She says that this caused her to become acutely ill in the immediate aftermath to the point where she attempted to take her own life on 14th March, 2014. Prior to that she had been admitted to hospital from 2nd to 11th March, 2014. By letter of 11th March, 2014, electronically signed on behalf of Ms. Kerins while she was still in hospital, Rehab wrote to the PAC giving further detailed information in relation to matters raised during the course of the hearing on 27th February. On 13th March, 2014, the PAC wrote to Ms. Kerins asking her to again attend before the Committee on 10th April, 2014, to resume examination of the issues previously notified to her on 18th February, 2014, with the addition of payments made by other Government Departments to companies of the Rehab group. On 4th April,

2014, Ms. Kerins resigned her position as Chief Executive Officer of Rehab. She alleges that this was the result of the wrongful conduct of the PAC on 27th February, 2014.

24. On 9th April, 2014, Ms. Kerins' solicitors wrote to the PAC confirming that due to ill health and following medical advice, she would be unable to attend the hearing. The letter went on to make complaint about the manner in which Ms. Kerins had been dealt with on her previous appearance. The letter was responded to on the same date by the PAC saying:

> "*The Committee notes that your client, Ms. Kerins, is unable to attend the Committee hearing at this time due to ill health. On her full recovery, and if required, the Committee hopes that your client will be in a position to continue to assist it in its examination of the use by Rehab of approximately €83m of tax payers monies annually*."

25. It will be noted that the characterisation of the examination being conducted by the PAC was now being described in radically different terms to those notified to the applicant in February. The letter went on to rebut the other complaints made.

The PAC Meeting of 10th April, 2014

26. The meeting of the PAC proceeded on this date in the absence of Ms. Kerins. It was however attended by the chairman, three members of the board of Rehab and a Rehab executive. The meeting was opened by Mr. McGuinness, noting the correspondence from Ms. Kerins' solicitors of the previous day and that she was too ill to attend. He wished her a speedy recovery. However, having done so, Mr. McGuinness went on during the course of the meeting, to describe the applicant's non attendance as being "*unacceptable and beyond common sense"* and "*deplorable*".

Indeed, despite the fact that no issue was taken about the *bona fides* of the applicant's inability to attend, she was subjected to strident criticism by a number of members of the PAC for not doing so. This was described by one member as an attempt to defy the Committee.

27. What followed was, by any standards, extremely damaging to Ms. Kerins' reputation. The court, as well as having the transcripts available to it, had the opportunity of seeing a video recording of certain parts of the PAC's proceedings on that day. It would appear that almost every facet of Ms. Kerins' involvement with the Rehab Group was subjected to criticism. Negative comment was made on the fact that Ms. Kerins' family was involved in an enterprise that had business dealings with Rehab and it was suggested that this was improper.

28. The appropriateness of her directorships of companies within the Rehab Group was questioned. Disclosures made by her to the board of Rehab about Complete Eco Solutions Ltd, a company in which her family members have an involvement, was described as "bizarre" and it was alleged that she had misled the board of Rehab about that company. It was suggested that she had an inappropriate business relationship with a former chief executive officer of Rehab, Mr. Frank Flannery. She was accused of wrongly stating to the PAC that she was not paid by the tax payer and that she misled the PAC about her pay.

29. Members of the PAC sought to establish from the members of the board of Rehab in attendance that internal complaints had been made about Ms. Kerins, the nature of these complaints and whether she had damaged Rehab. It was stated that she had obstructed the Committee during her appearance on 27th of February and had prevaricated. It was said of her that she regarded Rehab as her personal fiefdom

where she could break rules with impunity. It was said that Rehab had "come to a pretty pass" under her leadership.

30. This is not in any sense an exhaustive tally of the many reputationally damaging things that were said of Ms. Kerins at this meeting.

31. At a subsequent meeting of the Committee held in private session on 8th May, 2014, it would appear that there was a discussion about seeking compellability powers under Part 2 of the 2013 Act to compel Ms. Kerins' attendance before a further meeting of the PAC.

The Aftermath

32. On 15th April, 2014, the PAC wrote to Ms. Kerins' solicitors inviting her to re-attend before the Committee and advising her that if the invitation was declined, the Committee would consider seeking compellability powers under Part 7 of the 2013 Act. On 30th April, Ms. Kerins through her solicitors declined the invitation. The PAC replied on 8th May, 2014, stating that it would now seek compellability powers. An application was duly made by the PAC for such powers to the Committee on Procedure and Privileges ("CPP"). The latter committee gave its decision on 16th July, 2014. It said:-

> "*The main issue in this application is whether the PAC will be acting ultra vires in pursuing this matter. The powers of all committees are derived from Standing Orders, the Inquiries Act, the Constitution and case law. In its submission of 1st July, the PAC accepts that Rehab is not audited by the C&AG. However the Committee argued that it is implicit in the PAC's role to make enquiries of bodies in receipt of public money.*
>
> *It is clear to the CPP, and this position is corroborated by the independent*

legal advice provided both internally and externally, that under S.O. 163 (1) the PAC is only empowered to proceed with the examination of an account or a report after it is presented to Dáil Éireann. As no such account or report exists or has been presented to Dáil Éireann, the examination into the internal affairs of Rehab is ultra vires the PAC. The PAC does not have the implied power to investigate the use of monies by any person or company or other body simply because they are in receipt of money from a body that is itself lawfully subjected to scrutiny by the PAC." (Emphasis in original).

33. It is common case that the effect of this determination was to bring to an end the further pursuit by the PAC of matters relating to Rehab or Ms. Kerins' role therein.

Ms. Kerins' Claim

34. Nine substantive reliefs are claimed by Ms. Kerins in these proceedings. However, five of the reliefs sought relate to potential ongoing activities of the PAC in relation to the applicant which, in the light of the foregoing, are now moot. What remains, therefore, are two claims for declarations that the PAC's activities complained of were unlawful and tainted by bias, one claim seeking to remove from the record of the PAC all reference to Ms. Kerins and finally a claim for damages. The declaratory reliefs sought are of little value to Ms. Kerins on their own but, as her counsel submitted during the course of the trial, are a necessary prerequisite to her claim for damages. The amendment of the record claimed was substantially ancillary to these claims.

35. The primary remedy sought by Ms. Kerins therefore is damages. By order of the Court of Appeal made on 12th October, 2015, that court directed that a modular

trial should take place with any issue as to damages being deferred until the determination of this module.

The Scope of this Judgment

36. This case concerns important questions of freedom of speech in Parliament, the separation of powers and the extent to which the court may intervene in the affairs of the Oireachtas.

37. Having regard to the plethora of issues arising from the pleadings and the voluminous submissions of the parties, in the course of pre-trial case management, the President directed that an issue paper containing ten questions should be put before this court for determination. Having heard the parties' submissions, we have come to the conclusion that it is neither necessary to answer all these questions to decide the case, or in any event appropriate that we should do so.

Order 163 of the Standing Orders of Dáil Éireann

38. The major part of Ms. Kerins' claim concerns the jurisdiction of the PAC which she alleges is to be found, and only found, in Dáil Standing Order 163. It is therefore appropriate to set it out in full:

> "163. (1) There shall stand established, following the reassembly of the Dáil subsequent to a General Election, a Standing Committee, to be known as the Committee of Public Accounts, to examine and report to the Dáil upon—
>
> (a) the accounts showing the appropriation of the sums granted by the Dáil to meet the public expenditure and such other accounts as they see fit (not being accounts of persons included in the Second Schedule of the Comptroller and Auditor General (Amendment) Act, 1993) which are audited by the Comptroller

and Auditor General and presented to the Dáil, together with any reports by the Comptroller and Auditor General thereon:

Provided that in relation to accounts other than Appropriation Accounts, only accounts for a financial year beginning not earlier than 1 January, 1994, shall be examined by the Committee;

(b) the Comptroller and Auditor General's reports on his or her examinations of economy, efficiency, effectiveness evaluation systems, procedures and practices; and

(c) other reports carried out by the Comptroller and Auditor General under the Act.

(2) The Committee may suggest alterations and improvements in the form of the Estimates submitted to the Dáil.

(3) The Committee may proceed with its examination of an account or a report of the Comptroller and Auditor General at any time after that account or report is presented to Dáil Éireann.

(4) The Committee shall have the following powers:

(a) power to send for persons, papers and records as defined in Standing Order 83(2A) and Standing Order 85;

(b) power to take oral and written evidence as defined in Standing Order 83(1);

(c) power to appoint sub Committees as defined in Standing Order 83(3);

(d) power to engage consultants as defined in Standing Order 83(8); and

(e) power to travel as defined in Standing Order 83(9).

(5) Every report which the Committee proposes to make shall, on adoption by the Committee, be laid before the Dáil forthwith whereupon the Committee shall be empowered to print and publish such report together with such related documents as it thinks fit.

(6) The Committee shall present an annual progress report to Dáil Éireann on its activities and plans.

(7) The Committee shall refrain from—

(a) enquiring into in public session, or publishing, confidential information regarding the activities and plans of a Government

Department or office, or of a body which is subject to audit, examination or inspection by the Comptroller and Auditor General, if so requested either by a member of the Government, or the body concerned; and

(b) enquiring into the merits of a policy or policies of the Government or a member of the Government or the merits of the objectives of such policies.

(8) The Committee may, without prejudice to the independence of the Comptroller and Auditor General in determining the work to be carried out by his or her Office or the manner in which it is carried out, in private communication, make such suggestions to the Comptroller and Auditor General regarding that work as it sees fit.

(9) The Committee shall consist of thirteen members, none of whom shall be a member of the Government or a Minister of State, and five of whom shall constitute a quorum. The Committee and any sub Committee which it may appoint shall be constituted so as to be impartially representative of the Dáil."

The 2013 Act

39. The long title to the 2013 Act reads:

> "An Act to provide for the exercise by either House or both Houses of the Oireachtas (or by a Committee of either House or both Houses) of a power to conduct an inquiry into specified matters, to provide for matters relating to compellability, privilege and procedure in the Houses (and in Committees of either House or both Houses), and to provide for related matters."

40. This statute was enacted in the wake of the judgment of the Supreme Court in *Maguire v. Ardagh* [2002] 1 I.R. 385 ("*Abbeylara*") and the constitutional referendum in October 2011 concerning Oireachtas inquiries. It replaced the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997.

41. Part 2 of the Act makes provision for five types of inquiry that may be conducted. These include inquiries into the conduct of certain persons, the exercise of legislative functions and inquiries limited to recording and reporting evidence and making findings of uncontested fact or of relevant misbehaviour – the latter relating to non-cooperation with an inquiry. Part 3 provides for the machinery for observing fair procedures in Part 2 inquiries. Part 6 relates to, *inter alia*, compellability and empowers a committee in certain circumstances to send for persons, papers and records. Part 7 provides for compellability, privileges and immunities in relation to other committee business, being defined as any business that is not a Part 2 inquiry.

42. It is common case that the meetings of the PAC under consideration were not a Part 2 inquiry and were thus "other committee business" to which Part 7 applied. In that regard, s. 77 subs. 1 provides as follows:

> "77. — (1) Subject to subsection (2), Chapters 2 and 3 apply only to a committee whilst it is conducting other committee business and on which a power to send for persons, papers and records has been conferred by the House and shall only so apply subject to the extent of the power so conferred and any conditions imposed by the House on its exercise."

43. As we have seen, the CPP refused the PAC's application for compellability powers. Accordingly Chapter 2 dealing with privileges and immunities of witnesses and Chapter 3 dealing with the power of committees to obtain evidence did not apply.

44. Part 8 of the Act deals with the privilege and immunities of committees and members of the Houses. This applies to all committees of whatever kind. Section 92 is central to the issues herein:

> "92. — (1) A member of a House shall not, in respect of any utterance in or before a committee, be amenable to any court or any authority other than the House.

(2) Subject to sections 36 (2) and 37 (2), [*not relevant here*], the following are privileged wherever published:

(a) the documents of a committee and the documents of committee members connected with the committee or its functions,

(b) all official reports and publications of a committee, and

(c) the utterances made in proceedings of a committee…"

The Arguments

45. Although the court received extensive submissions, both oral and written, in our view the issues to be resolved are relatively net. Ms. Kerins' case is that the PAC, in treating her as it did, acted outside its jurisdiction. That jurisdiction is to be found solely in the provisions of S.O.163, which in this instance empowered the PAC to enquire into payments made by relevant state and semi-state bodies to Rehab but not payments made by Rehab. Virtually all of the matters complained of by Ms. Kerins relate to the latter.

46. Counsel made the alternative submission that even if it could be said that the PAC had jurisdiction to enquire into the matters in dispute, it lost that jurisdiction by virtue of the following factors:

(1) There was a failure to identify in advance the terms of reference for the examination to be conducted;

(2) There was a failure to notify Ms. Kerins of the subject matter for examination;

(3) There was bias on the part of certain members of the Committee;

(4) There was no evidence to substantiate the findings made and opinions expressed;

(5) There was a total failure to comply with the requirements of constitutional justice in arriving at findings and opinions critical of Ms. Kerins and damaging to her reputation;

(6) Matters were put to Ms. Kerins in a manner which did not allow for rebuttal or an answer other than the proposition asserted.

47. In support of these contentions, Ms. Kerins primarily relied upon the judgment of the Supreme Court in *In Re Haughey* [1971] I.R. 217 and also on *Abbeylara*. In support of the alternative submission that jurisdiction was lost by virtue of the matters enumerated above, the applicant relied upon *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147.

48. Counsel placed particular emphasis on a number of passages from the well known judgment of Ó Dálaigh C.J. in *Haughey* to which we shall return. In dealing with the issue of inherent jurisdiction, counsel relied on two passages in the judgment of Murray J. in *Abbeylara*, the first at p. 603:

> "*As I have pointed out earlier, when the Constitution gave specific and special powers to the Oireachtas to adjudicate on the conduct of its own members and on other persons and office holders who were not members, it did so explicitly. I think it can be fairly said that if the Constitution intended to confer far reaching powers on the Oireachtas to inquire and make findings of fact or express opinions as to the personal culpability of individual citizens for serious wrongdoing, it would have also done so in an explicit manner*."

49. The second passage is at p. 605:

> "*The respondents sought to establish that in distributing powers of government among the various organs of state, the Constitution conferred an implied or inherent power on the Oireachtas to conduct inquiries which may*

make findings or reach conclusions impugning the good name of the citizens. For the reasons stated above, in particular having regard to the express powers actually conferred on the Oireachtas and the specific protection afforded to the good name of the citizen by Article 40, I conclude that had it been intended that the Oireachtas, as part of the political process, should exercise such far-reaching powers of inquiry the Constitution would have explicitly said so. I do not find in the provisions of the Constitution itself any basis for concluding that the existence of an inherent power to conduct such inquiries is either an appropriate or mandated interpretation."

50. Dealing with the same issue, Hardiman J. said (at p. 700-701):

"*Apart from the inherent power which the respondents assert, no citizen, whether he holds office in the public service or not (except possibly a member of the staff of the Oireachtas), is personally accountable to the Oireachtas or any member, committee or sub-committee thereof. All citizens are accountable to the law and their rights and liabilities in this regard will be determined by the courts. Additionally, citizens may have different areas of responsibility or accountability arising from their status or occupation…*

But I cannot see that either as a private citizen or as a member of An Garda Síochána any of the applicants are directly and individually accountable to the Oireachtas at common law or by statute. If a member of An Garda Síochána were so accountable I do not see why any individual public servant would be exempt from this individual accountability or, in a suitable case, any ordinary citizen. If any citizen, garda or otherwise, is to be directly accountable in general or in some circumstances, to the Oireachtas, I believe such accountability must be imposed by statute. I do not believe that the

people, in adopting a constitution in 1937, had before them the view that it contained the seeds of such responsibility. I do not believe that it does. If the Oireachtas were enabled to send for any citizen and to reach findings of fact or conclusions which could be adverse to him and affect his reputation and his employment, it would indeed be functioning as a 'High Court of Parliament' and its members would indeed be 'general inquisitors of the realm', to use the archaic language employed by the English courts to describe the former powers of the Westminster parliament."

51. The submissions of the first to fifteenth respondents ("the Oireachtas respondents") are premised on the cornerstone of Articles 15.10, 15.12 and 15.13 of the Constitution. They make the case that it is clear from these that any utterances in Parliament by members of the Oireachtas, or a committee thereof as here, are absolutely privileged and members cannot be made amenable to the courts in respect of them. They say that this is precisely what the plaintiff seeks to do in claiming damages arising out of these utterances. They rely on a number of authorities which will be considered below. They submit that s. 92 of the 2013 Act in any event provides for the same privilege but is simply declaratory of the position already obtaining under the Constitution.

52. They contend that the authorities establish that the effect of the privilege is to oust the jurisdiction of the courts insofar as utterances in Parliament are concerned. That is not to say that a party aggrieved by such utterances is without remedy – the Oireachtas itself provides the remedy. They argue that the contentions of Ms. Kerins would, if correct, affect at a fundamental level the right to free speech in Parliament. Article 15 guarantees that freedom of speech and it cannot be trumped by the constitutional right to one's good name provided by Article 40. They characterise the

applicant's case as an attempt to sidestep the Constitution. They submit that Ms. Kerins is forced to describe the utterances complained of as findings and determinations to engage the *Abbeylara* principles when they are merely expressions of opinion by individual members.

53. As an alternative position, the Oireachtas respondents make the case that the PAC did in any event have jurisdiction to conduct the examination it did. It was entitled to examine the expenditure of monies received from the State by the bodies who received it, including Rehab. Reliance was also placed on two reports of the Comptroller and Auditor General in 2005 and 2009 which were said to deal with the issues under scrutiny. A further alternative submission was advanced to the effect that the PAC had the inherent power to conduct examinations of this nature and this could be ascertained from an historical analysis since its establishment in 1695.

54. The sixteenth and seventeenth respondents ("the State") broadly adopted the submissions of the Oireachtas respondents. Counsel for the State submitted that having regard to the separation of powers and the respective functions of the organs of government, the court should adopt a cautious approach and decide only issues essential to adjudicate on this application. Like the Oireachtas respondents, the State placed particular emphasis on the provisions of Articles 15.12 and 15.13 of the Constitution.

55. The State says that the claim for damages sought to be advanced in these proceedings is excluded in the clearest terms by those Articles. The point was further taken that the question of the PAC's jurisdiction to examine the internal affairs of Rehab was in any event moot as it had already been decided by the CPP in advance of the commencement of these proceedings. Both the Oireachtas respondents and the State relied in particular on the voluntary nature of Ms. Kerins' attendance before the

PAC in the legal sense. No powers of compellability were involved. The State, in common with the other parties, accepted that it was for the court to determine the extent of the PAC's jurisdiction. However, there was no warrant for the court to intervene in circumstances where the same issue had already been determined by the CPP.

56. Without prejudice to that contention, if jurisdiction does arise for consideration, the State submitted that it was to be found within the terms of Standing Order 163. It did not accept the proposition advanced by the Oireachtas respondents that there was an inherent power of inquiry outside the parameters of the standing order. However, it was contended that the issue of jurisdiction, properly understood, could not arise in the absence of the engagement of any compellability powers by the PAC. In a similar vein to the Oireachtas respondents, the State drew attention to the fact that the proceedings of the PAC of which complaint is made did not involve any form of adjudication or binding decision making, in contrast with *Re Haughey* and *Abbeylara*.

Does the PAC's Jurisdiction truly arise?

57. The exercise of jurisdiction involves the exercise of a power. Jurisdiction and *vires*, or power, are of course synonymous.

58. When Ms. Kerins attended before the PAC, she did so voluntarily. It has been argued on her behalf that her attendance was not in reality voluntary. She had no choice but to attend, or as described by her counsel, it was "Hobson's choice". If she chose not to attend, she risked being publicly criticised for failing to do so. Ms. Kerins may have felt compelled to attend for myriad reasons. These could, for

example, have included defending the commercial interests of Rehab and answering criticisms publicly levelled against her in the media.

59. For the same reasons, she may have felt unable to refuse to answer questions that she considered unfair and outside the PAC's remit. She may have felt that she could not walk out without incurring the wrath of the PAC and attendant media. All of these things may well be true. However, none can alter the undisputed fact that she was under no legal compulsion to attend, to answer questions or to remain if she did not wish to. Her attendance was purely voluntary in the legal sense and was not secured by the exercise of any legal power by the PAC. Had she chosen not to attend, as did her predecessor Mr. Flannery, or having attended not to answer certain questions or indeed to walk out at any stage, the PAC was legally powerless to prevent her doing so.

60. Had the PAC been granted compellability powers by the CPP, then the situation would have been significantly different. She would have been obliged to attend as a matter of law and to answer such questions as were within the remit of the PAC. A refusal could incur a legal sanction. Of course none of that arose because compellability powers were refused on the basis that prospectively, the PAC had no power to enquire into payments made by Rehab, as the CPP determined.

61. This is of critical importance to the claim of Ms. Kerins which makes jurisdiction the centrepiece of her case. However it seems to us that in reality, the issue of jurisdiction, when properly analysed, simply does not arise because none was being exercised. This is what distinguishes this case from *Haughey* and *Abbeylara* where the court's jurisdiction was engaged by virtue of the adjudicative and determinative processes being undertaken in those cases pursuant to powers purportedly vested in the relevant committees.

62. The facts in *Haughey* are well known but bear brief repetition. On the 1st of December, 1970, the PAC was ordered by Dáil Éireann to examine the expenditure of a certain grant-in-aid for Northern Ireland relief and any monies transferred by the Irish Red Cross Society to a bank account into which monies from the grant-in-aid were lodged. On the 23rd of December, 1970, the Oireachtas passed the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act 1970. Section 3, subsection 4 of that Act provided:

> "*(4) If any person—*
>
> *(a) on being duly summoned as a witness before the committee makes default in attending, or*
>
> *(b) being in attendance as a witness before the committee refuses to take an oath or to make an affirmation when legally required by the committee to do so, or to produce any document in his power or control legally required by the committee to be produced by him or to answer any question to which the committee may legally require an answer, or*
>
> *(c) fails or refuses to send to the committee any document in his power or control legally required by the committee to be sent to it by the person, or*
>
> *(d) does anything which would, if the committee were a court of justice having power to commit for contempt of court, be contempt of such court,*
>
> *the committee may certify the offence of that person under the hand of the chairman of the committee to the High Court and the High Court may, after such inquiry as it thinks proper to make, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the High Court.*" (Our emphasis).

63. In *Haughey* the Committee heard evidence from a Garda Chief Superintendant which included very serious allegations against Mr. Haughey. The Chief Superintendant indicated that this information had come from confidential sources which he was not at liberty to reveal. Mr. Haughey was duly served with a summons pursuant to the Act to appear before the Committee. When he did so, he refused to

answer any questions and instead, read out a written statement. The evidence of the Chief Superintendant was plainly hearsay. The Committee certified to the High Court that an offence under the section had been committed by Mr. Haughey by his refusal to answer questions. The High Court directed him to show cause why he should not be punished under the terms of the Act. The matter proceeded before a divisional court of the High Court and evidence on affidavit was received following which Mr. Haughey was sentenced to six months imprisonment. He appealed to the Supreme Court.

64. The court delivered two judgments, the first being the sole judgment of the court as required by the Constitution in determining the constitutionality of the Act. The court found it to be invalid. The second set of judgments dealt with the other issues in the case. In his celebrated judgment, O'Dalaigh C.J. accepted the submission of Mr. Haughey's counsel that:

> "*…the minimum protection which the State should afford his client was (a) that he should be furnished with a copy of the evidence which reflected on his good name; (b) that he should be allowed to cross-examine, by counsel, his accuser or accusers; (c) that he should be allowed to give rebutting evidence; and (d) that he should be permitted to address, again by counsel, the Committee in his own defence*." (at p. 263).

65. Counsel for the Committee submitted that if Mr. Haughey were a witness in proceedings before the High Court, he would not be entitled to these rights and he could be in no better position before the Committee. The Chief Justice disagreed (at p. 263):

> "*In my opinion counsel is right in his submission that Mr. Haughey is more than a mere witness. The true analogy, in terms of High Court procedure, is*

not that of a witness but of a party. Mr. Haughey's conduct is the very subject matter of the Committee's examination and is to be the subject matter of the Committee's report."

66. The Chief Justice went on to note that while the Committee did afford the protections at (a) and (c), Mr. Haughey was not afforded those at (b) and (d). In this regard the Chief Justice said (at p. 264):

"*…a person whose conduct is impugned as part of the subject matter of the inquiry must be afforded reasonable means of defending himself. What are these means? They have been already enumerated at (a) to (d) above. Without the two rights which the Committee's procedures have purported to exclude, no accused - I speak within the context of the terms of the inquiry - could hope to make any adequate defence of his good name. To deny such rights is, in an ancestral adage, a classic case of clocha ceangailte agus madraí scaoilte. Article 40, s. 3, of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness, and it is the duty of the Court to underline that the words of Article 40, s. 3, are not political shibboleths but provide a positive protection for the citizen and his good name… in proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution the State, either by its enactments or through the Courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights*."

67. Counsel for Ms. Kerins unsurprisingly placed particular emphasis on these passages. He said that Ms. Kerins is in the same position as Mr. Haughey in reality. He described the remarks to which we have already referred as "accusations against Angela Kerins" and described her as an "accused". He listed these "accusations" and asserted that she was deprived of the rights enumerated by Ó Dálaigh C.J. She could not cross examine her accusers or give rebutting evidence.

68. It seems to us that this analogy is misplaced. Mr. Haughey's attendance before the PAC was under legal compulsion. He was legally obliged to answer the Committee's questions but only such questions as were within their jurisdiction to lawfully ask. In the event, that never became relevant as he refused to answer any questions.

69. There is therefore no true analogy between the position of Ms. Kerins and Mr. Haughey. As we have already explained, she was not legally compelled to either attend or answer any questions if she did not wish to do so. She could be subject to no legal sanction if she refused. The question of her being afforded *Haughey* rights to defend herself could never therefore arise when she already had the right to decline cooperation at any stage.

70. In *Callely v. Moylan* [2014] 4 I.R. 112, the applicant was a member of Seanad Éireann about whom complaints of impropriety were made concerning certain claims for expenses submitted by him. These complaints were referred to the Committee on Member's Interests of Seanad Éireann, the first seven respondents being the members of that committee. Having investigated the matter, the Committee concluded in a report that Senator Callely had misrepresented his normal place of residence for the purposes of claiming expenses.

71. On foot of this report, Seanad Éireann censured Senator Callely, suspended him from the house for a period of 20 days and directed that his salary not be paid during the period of suspension. He sought *certiorari* in the High Court to quash the Committee's report. On appeal to the Supreme Court, the order of the High Court was overturned by a 4 to 3 majority. The majority judgment was given jointly by O'Donnell and Clarke JJ. ("the joint judgment") with whom Denham C.J. and Fennelly J., in part, agreed. It is important to note that the case primarily concerned Article 15.10 of the Constitution rather than Articles 15.12 and 15.13 which only became relevant in the context of interpreting Article 15.10.

72. As in *Haughey* and *Abbeylara*, the applicant in *Callely* was subjected to a compulsory determinative process which affected his rights. Unlike Ms. Kerins, he could not opt out of that process. Thus, it seems to us that the issues decided by the Supreme Court in *Callely* are not directly relevant to the questions that this court must decide. It is, however, worth noting that all parties to these proceedings accepted that it is the function of the court to determine the boundaries of justiciability. The joint judgment makes this clear at para. 196:

> "*It is an important part of the principle of government by separation of powers that it falls to the least powerful and dangerous branch to define the proper area of functioning of each of the branches of government. In entrusting this task to the judicial branch, the Constitution places considerable trust in the courts to identify and maintain the proper areas of activity of each branch including their own. But the obligation to respect the legitimate sphere of activity of each branch of government is not reserved to the judiciary. It applies equally to each of the other branches. As McLachlin J. observed in*

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly) [1993] 1 S.C.R. 319 , at p. 389:-

> '*It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other*.' "

73. The point is again emphasised at para. 248:

> "*It is important to note that this reasoning does not mean that all the proceedings of the Oireachtas are immune from scrutiny or that members lose their constitutional rights. As already observed, it is emphatically the function of the courts to determine the proper boundaries of the exercise of the legislative power in each case, which, pursuant to the separation of powers requires that their proceedings be non-justiciable. This cannot be a matter for the Oireachtas, or either House*."

74. Counsel for the applicant also placed considerable reliance on the judgments of the divisional High Court and the Supreme Court in *Abbeylara*. On the 20th of April, 2000, John Carthy was shot dead by the Gardaí at Abbeylara, Co. Longford. A report into the incident was prepared by a Garda Chief Superintendent for submission to the Minister for Justice, Equality and Law Reform. The Minister placed the report before the Oireachtas which referred it to a joint committee of both Houses. The joint committee established a sub-committee to consider the report and submissions thereon and to report back to the joint committee.

75. Compellability powers were granted to the sub-committee to send for persons, papers and records. The sub-committee, as the High Court found, transmuted its instruction into one requiring it to "*inquire into the Abbeylara incident*". The court

found that this was a self-written brief which went beyond what was asked of it. The sub-committee purported to hear evidence from witnesses and to address any conflicts of fact and make such findings and determinations as it considered appropriate. Such findings could include a finding that one or more members of An Garda had unlawfully killed John Carthy. Both the High and Supreme Courts held that the conduct of such an inquiry was *ultra vires* the powers of the Oireachtas.

76. The High Court granted a declaration that:

> "*the conduct of a public enquiry, with the aid of the power of the State and conducted by members of the Oireachtas under the aegis of the Houses of the Oireachtas and with the authority thereof, liable to result in findings of fact or expressions of opinion adverse to the good name, reputation and/or livelihoods of persons not members of such houses, is ultra vires the powers of such Houses*."

77. The Supreme Court granted somewhat narrower declaratory relief which was:

> "*the conducting by the sub-committee of an inquiry into the fatal shooting at Abbeylara on the 20th April, 2000, capable of leading to adverse findings of fact and conclusions (including a finding of unlawful killing) as to the personal culpability of an individual not a member of the Oireachtas so as to impugn his or her good name was ultra vires in that the holding of such an inquiry was not within the inherent powers of the Houses of the Oireachtas*."

78. It will be noted therefore that the reference to "expressions of opinion" contained in the High Court declaration was excluded from that granted by the Supreme Court. In *Callely*, the issue arising in *Abbeylara* was described in the joint judgment thus (at para. 70):-

"*…The fundamental issue raised by the plaintiffs in that case was their contention that, on a true interpretation of the Constitution, the powers of the Oireachtas did not extend to making inquiries having as their object the finding of facts in relation to the affairs of individual citizens*."

79. This point was emphasised by the Divisional Court in *Abbeylara* (at p. 433):

"*It must be made clear at the outset that the objection which is raised concerns the conduct of an enquiry which has adjudicative functions and can make findings of fact adverse to the good name and reputation of a citizen. There is no doubt that the present sub-committee sees itself as having just such a role*."

80. In contrast here, the PAC had no adjudicative function nor did it purport to make any findings of fact in relation to Mrs. Kerins, despite the characterisation that counsel for the applicant sought to place upon the utterances complained of. As in *Haughey*, the jurisdiction issue only came into play by virtue of the compulsory nature of the Committee's proceedings. The Divisional Court said (at p. 415):

"*The judgment of the Supreme Court in Re Haughey [1971] I.R. 217 is supportive of the notion that persons can only be compelled to attend and take part in parliamentary enquiries, be subjected to cross-examination and the possibility of adverse findings, if and only if the committee in question is acting within jurisdiction.*

It follows that the court must be able to determine the jurisdiction in question and the procedures which were followed. Submissions made to the effect that the court does not have any jurisdiction to entertain these questions appear to be in the teeth of what the Supreme Court actually did and decided in Re Haughey [1971] I.R. 217."

81. Another passage in the judgment of the Divisional Court relied upon by the applicant is to similar effect. The court, having analysed the views of academic commentators Professor Gwynn Morgan and Professor Kelly, went on to say (at p. 419):

> "*Both of these works therefore appear to accept that when the Oireachtas is not exercising legislative power, decisions made by committees are justiciable in circumstances where a person external to the Houses is compelled to attend and made subject to such decisions. The court's power is not confined merely to a consideration of fairness of procedures but extends to other constitutional rights, rulings, issues of vires and entitlement*."

82. These passages again serve to emphasise that the issue of jurisdiction can only arise where compellability powers are being exercised, a feature which is absent in this case. This underpins the court's ultimate conclusion (at p. 445):

> "*We have therefore come to the conclusion that the applicants' argument is correct, namely that there is no inherent power in parliament to conduct an enquiry involving adjudicative functions of the type which were sought to be exercised by the sub-committee in this case. Such a power is not inherent under the present constitutional regime governing the National Parliament nor did it exist in the Parliament established under the Constitution of the Irish Free State, 1922*."

83. We conclude therefore that the jurisdiction issue does not arise.

Freedom of Speech in Parliament

84. Article 15 of the Constitution deals with the constitution and powers of the National Parliament, to be known as the Oireachtas. The sections of Article 15 that are relevant to this case are as follows:

> "*Article 15…*
>
> *10. Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties …*
>
> *12. All official reports and publications of the Oireachtas or of either House thereof and utterances made in either House wherever published shall be privileged.*
>
> *13. The members of each House of the Oireachtas shall, except in case of treason as defined in this Constitution, felony or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of, either House, and shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself*."

85. One of the forbears of Article 15 is Article 9 of the Bill of Rights 1689 which provides:

> "*That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament*."

86. Article 9 has been considered in several judgments of the High Court of England and Wales. In *Church of Scientology of California v. Johnson-Smyth* [1972] 1 QB 522, the plaintiffs brought a libel action against a member of Parliament in which they sought to rely on certain statements made by the defendant in Parliament for the purpose of showing malice to defeat a defence plea of fair comment on a

matter of public interest. Browne J. refused to permit this. He said (at p. 529-530) that the plea of the plaintiffs in reply –

> "*…must involve a suggestion that the defendant was, in one way or another, acting improperly or with an improper motive when he did and said in Parliament the things referred to in those sub-paragraphs. I accept the Attorney-General's argument that the scope of parliamentary privilege extends beyond excluding any cause of action in respect of what is said or done in the House itself, and I accept his proposition, which I have already tried to quote, that is, that what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House. In my view this conclusion is supported by both principle and authority*."

87. The dicta of Browne J. were subsequently considered and approved in *R. v. Secretary of State for Trade ex parte Anderson Strathclyde Plc*. [1983] 2 All ER 233. In the course of judicial review proceedings seeking to quash the respondent Minister's decision, the applicant sought to rely upon statements made by the Minister in Parliament in support of its claim. Dunn LJ. held that the applicant could not do so. He referred to Article 9 of the Bill of Rights and said that (at p. 238):

> "*That article has been widely construed, as Browne J showed in Church of Scientology of California v Johnson-Smith* [1972] 1 All ER 378 at 381, [1972] 1 QB 522 at 530. *He said:*
>
> > *'It will be observed, and indeed the Attorney-General said, that the basis on which Blackstone puts it is that anything arising concerning the House ought to be examined, discussed, and adjudged in that House and not*

> *elsewhere (1 Bl Com (17th ed., 1830) 163). The House must have complete control over its own proceedings and its own members. I also accept the other basis for this privilege which the Attorney-General suggested, which is, that a member must have a complete right of free speech in the House without any fear that his motives or intentions or reasoning will be questioned or held against him thereafter. So far as the authorities are concerned it will be seen that the words used are very wide. In the Bill of Rights (1688) itself the word is 'questioned': 'freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.' Blackstone uses the words 'examined discussed or adjudged': they ought not to be examined discussed or adjudged elsewhere than in the House.'*

In my judgment there is no distinction between using a report in Hansard for the purpose of supporting a cause of action arising out of something which occurred outside the House, and using a report for the purpose of supporting a ground for relief in proceedings for judicial review in respect of something which occurred outside the House. In both cases the court would have to do more than take note of the fact that a certain statement was made in the House on a certain date. It would have to consider the statement or statements with a view to determining what was the true meaning of them, and what were the proper inferences to be drawn from them. This, in my judgment, would be contrary to Article 9 of the Bill of Rights. It would be doing what Blackstone said was not to be done, namely to examine, discuss and adjudge upon a matter which was being considered in Parliament. Moreover, it would be an invasion by the court of the right of every Member of Parliament to free

speech in the House with the possible adverse effects referred to by Browne J."

88. The courts in Ireland have considered the breadth of the privilege afforded by Article 15 to be no less extensive. In *Garda Representative Association v. Ireland* [1989] I.R. 193, Murphy J., speaking of Article 15.13 observed (at p. 204):

"*This provision is expressed in wide terms and obviously it is desirable that it should be interpreted in such a way as to permit and encourage members of the Oireachtas to engage in debate on matters of national interest without having to restrict their observations or edit their opinions because of the danger of being made 'amenable to any court or any authority' at the suit of some person who may feel aggrieved by the statements made in the course of debate.*"

89. In *Callely*, McKechnie J. was of a similar view regarding the extent of the immunity (at para. 105):

"*There can be no doubting the enormity of the immunities which are provided for by the provisions of Article 15.10, Article 15.12 and Article 15.13 of the Constitution. In argument, counsel on behalf of the respondents described them as 'awesome', saying that even in the face of injustice, the courts were required to step back in the interest of good governance. They are conferred on one body of citizens only, namely parliamentarians: their exercise may have the potential of inflicting grave damage and creating even life threatening consequences for third parties who, despite the circumstances, must remain without legal redress as the justice system is left powerless to intervene.*"

90. In *Attorney General v. Hamilton* (No. 2) [1993] 3 I.R. 227, some of the notice parties were members of Dáil Éireann who made allegations in the Dáil of certain irregularities in the beef processing industry. A Tribunal of Inquiry was established by the Oireachtas to enquire into the matter which became known as the "Beef Tribunal". Statements were made by the members to the Tribunal based on their speeches in the Dáil. In evidence before the Tribunal, one of the notice parties indicated that he was reluctant to disclose the identity of the persons who had furnished him with the information on which his Dáil speech was based.

91. The respondent ruled that by virtue of Article 15 of the Constitution, a member of the Oireachtas could not be obliged to explain utterances made by him in the House and where a statement of evidence was made in which those utterances were repeated, he could not be obliged to reveal the source of the information upon which they were based. The Attorney General sought to judicially review this ruling. The application was partly successful in the High Court but on appeal to the Supreme Court was dismissed. In the course of his judgment, Finlay C.J. examined the provisions of Articles 15.12 and 15.13 and said (at p. 260):

> "*After a comprehensive review of the authorities dealing with the question of what might be broadly described as parliamentary immunity, and having carefully analysed the provisions of Article 15, s. 12 and Article 15, s. 13 of the Constitution, the learned trial judge, at p. 250 of the report, came to the following general conclusion*:—
>
> > '*I am satisfied, therefore, that a member of the Dáil or Seanad cannot be forced, either directly or indirectly to give evidence at any tribunal in relation to any utterance made by him in either House, and this would include any questions relating to the disclosure of the sources of*

information on foot of which the utterances were based. In my view the Constitution recognises that it is of the utmost importance that members of the Oireachtas should be entitled to raise matters within either House, based on confidential information given to them, without any fear of having to break that confidence, or be otherwise answerable in respect of their utterances in the House, at the insistence of any court or outside authority. The protection applies to each and every utterance. In the course of a speech in the Dáil there may be many statements or allegations made and each of them is a separate utterance. The T.D. enjoys the protection of the Constitution in respect of those utterances.'

This was in my view a correct and comprehensive analysis of the Constitutional position which arises under Article 15, s. 12 and Article 15, s. 13, and I am satisfied to accept it in its entirety for the purpose of my judgment in this case."

92. Later in his judgment, the Chief Justice returned to the analysis of Article 15.12 and Article 15.13 (at p. 268):

"*In order to decide those issues, it is, in my view, necessary to analyse with some particularity the provisions of Article 15, s. 12 and Article 15, s. 13 of the Constitution.*

With regard to Article 15, s. 12, the provision therein contained dealing with utterances made in either House, as distinct from the provisions dealing with official reports and publications, is that they shall be privileged wherever published. It was suggested in the judgment of McCarthy J. in The Attorney General v. Hamilton [1993] 2 I.R. 250, at p. 283, and accepted in the course of his judgment by the learned trial judge in this case, that 'the word

'privileged' has the same connotation as in the law of defamation'. In so far as it is possible to construe this expression of opinion as confining the privilege provided for in Article 15, s. 12 to claims for defamation I am unable to follow it.

McCarthy J. in the course of his judgment refers specifically to the phrase in the Irish version of the Constitution, namely, 'táid saor ar chásaí dlí'. This would appear, literally, to be translatable as: 'free from legal proceedings', yet an analysis of the consequences of making an utterance in the Houses of the Oireachtas which are dealt with by the combined effect of Article 15, s. 12 and Article 15, s. 13 of the Constitution would very clearly indicate that there are a great variety of legal proceedings which could follow upon the making of an utterance over and beyond a claim for damages for defamation, were it not for the privilege and immunity granted by these Articles.

It seems to me, therefore, that the proper construction of Article 15, s. 12 is that an utterance made in either House of the Oireachtas cannot attract or be the subject matter of any form of legal proceedings, wherever it may be published. The broad and absolute contention, therefore, which was part of the case submitted on behalf of the respondents in this appeal, that a dual statement - one made inside the House and repeated outside the House, that is to say, published outside the House - immediately destroyed all form of immunity or privilege does not seem to me to be correct.

With regard to the provisions of Article 15, s. 13, it is necessary, in my view, to consider a number of examples, though not necessarily a comprehensive list of examples, of ways in which a member of either House, were it not for the provisions of Article 15, s. 13, could be made amenable to a court or any

authority other than the House itself, in respect of an utterance in the House. Such examples are:—

That a member could be made liable

(1) as a defendant in a claim for defamation;

(2) as an accused on a charge of criminal libel;

(3) as a person charged with contempt of court, consisting of having made either

(a) a statement scandalising a court, or

(b) a statement prejudicing pending proceedings in a court;

(4) as a person charged with a criminal offence in respect of which it was alleged that the utterance could be adduced in evidence as proof of an admission;

(5) as a person sued for a civil remedy not arising from the utterance, but in respect of which the plaintiff sought to tender the utterance as relevant evidence;

(6) as a person charged with some criminal offence of which the necessary constituents are the making of the utterance concerned; and

(7) as a person compellable by a court or other authority, such as a tribunal, to explain or expand the utterance, including indicating the sources of information upon which it was based, for the purpose of an issue to be tried by the court or tribunal concerned.

The effect of Article 15, s. 13 on each of these potential instances in which a member might be made amenable to a court or other authority is, as a matter of law, in my view, an ouster of the jurisdiction of the court or other authority, rather than a privilege to be raised in bar by the member of the House, either

as a party or, in the case of the example set out above at No. (7), as a witness, even though it is an ouster which can be waived – see Dillon v. Balfour (1887) 20 L.R. Ir. 600. Although in his judgment in that case Palles C.B. is dealing with the parliamentary privilege then recognised in the common law applicable at that time in Ireland, in my view, the reasoning of his judgment is equally applicable to the immunity from amenability contained in Article 15, section 13."

93. In a further passage which is of particular significance in the context of the applicant's claim in these proceedings, Finlay C.J. said (at. p. 270):

"*With regard to the claim made for an extended interpretation of Article 15, s. 13 so as to include statements made to this Tribunal, having regard to its origin derived in part from the resolutions of the Houses of the Oireachtas, I am satisfied that it is not a submission which can be accepted. The provisions of Article 15, s. 12 and Article 15, s. 13 of the Constitution are explicit and definite in their terms, though the application of them may be a matter of complexity in certain instances. They constitute a very far-reaching privilege indeed to members of the Houses of the Oireachtas with regard to utterances made by them in those Houses. They represent an absolute privilege and one which it is clear may, in many instances, represent a major invasion of personal rights of the individual, particularly, with regard to his or her good name and property rights.*"

94. The limitation on access to the court imposed by Parliamentary privilege was considered by the European Court of Human Rights in the context of an alleged violation of the European Convention on Human Rights in *A. v. United Kingdom*

(Application no. 35373/97 of 17 December, 2002). The complaint of the applicant as appears from the headnote was as follows:

> "*Relying on Articles 6.1, 8, 13 and 14 of the Convention, the applicant complained that the absolute parliamentary immunity which prevented her from taking legal action in respect of statements made about her by an M.P. in Parliament as well as the unavailability of legal aid in defamation proceedings violated her right of access to court. She further complained that her right to privacy had been breached and that she had been discriminated against as compared to a person about whom equivalent statements had been made in an unprivileged context. She also contended that she had enjoyed no effective remedy in respect of her complaints.*"

95. The applicant and her family were described in Parliament by the M.P. for her constituency as being neighbours from hell. The M.P. published her name and address. She was accused of a range of anti-social activities. There was widespread newspaper coverage of the M.P.'s speech. As a result, the applicant was the subject of racist abuse to the point where it was felt that she was in considerable danger and consequently required urgent re-housing which obliged her children to change schools. The applicant's solicitors complained to the Speaker of the House of Commons and to the Prime Minister. The reply was that the M.P.'s remarks were protected by absolute parliamentary privilege and it was a matter for Parliament. She complained to the European Court of Human Rights that the rule of Parliamentary privilege violated her right of access to the court and was thus a breach of Article 6.1 of the Convention. On this issue, the court said (at para. 66):

> "*The Government regarded it as a fundamental constitutional principle that statements made in Parliament should be protected by absolute privilege.*

They stated that such a privilege served the dual public interests of free speech in Parliament and the separation of powers. They indicated that such legitimate aims were of sufficient importance to outweigh any harm to the rights of individuals which might result from words spoken in Parliament. Absolute privilege was designed not to protect individual members, but Parliament as a whole, and operated only where it was strictly necessary, namely within Parliament itself. They drew attention also to the fact that Parliament had its own internal mechanisms for disciplining an MP who deliberately made a false statement during a debate. [67.] The Government submitted that all Contracting States to the Convention, together with most other democracies, have some system of parliamentary immunity, although the precise features of such systems vary, showing that it was a virtually universal principle. They referred also to the immunity enjoyed by members of various international institutions, including the Parliamentary Assembly of the Council of Europe and the European Parliament (see paras. 33-36 above)."

96. The court continued at para. 78:

"*[78.] The Court must next assess the proportionality of the immunity enjoyed by the MP. In this regard, the Court notes that the immunity concerned was absolute in nature and applied to both criminal and civil proceedings. The Court agrees with the applicant's submission that the broader an immunity, the more compelling must be its justification in order that it can be said to be compatible with the Convention*."

97. The court expressed its conclusion in the following terms commencing at para. 85:

"[85.] The absolute immunity enjoyed by MPs is moreover designed to protect the interests of Parliament as a whole as opposed to those of individual MPs. This is illustrated by the fact that the immunity does not apply outside Parliament. In contrast, the immunity which protects those engaged in the reporting of parliamentary proceedings, and that enjoyed by elected representatives in local government, are each qualified in nature.

[86.] The Court observes that victims of defamatory misstatement in Parliament are not entirely without means of redress. In particular, such persons can, where it is their own MP who has made the offending remarks, petition the House through any other MP with a view to securing a retraction. In extreme cases, deliberately misleading statements may be punishable by Parliament as a contempt. General control is exercised over debates by the Speaker of each House. The Court considers that all of these factors are of relevance to the question of proportionality of the immunity enjoyed by the MP in the present case.

[87.] It follows that, in all the circumstances of this case, the application of a rule of absolute Parliamentary immunity cannot be said to exceed the margin of appreciation allowed to States in limiting an individual's right of access to a court.

[88.] The Court agrees with the applicant's submissions to the effect that the allegations made about her in the MP's speech were extremely serious and clearly unnecessary in the context of a debate about municipal housing policy. The MP's repeated reference to the applicant's name and address was particularly regrettable. The Court considers that the unfortunate consequences of the MP's comments for the lives of the applicant and her

children were entirely foreseeable. However, these factors cannot alter the Court's conclusion as to the proportionality of the parliamentary immunity at issue, since the creation of exceptions to that immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued."

98. The extent of the privilege conferred by Article 15.13 was directly in issue before a Divisional Court of the High Court in *Ahern v. Mahon* [2008] 4 I.R. 704. The relevant issue is described in the head note:

"*The applicant was a member of Dáil Éireann. The respondents were the members of the Tribunal of Inquiry into Certain Planning Matters and Payments ('the Tribunal'). Two issues were considered by the court. The first issue for consideration was whether the Tribunal was entitled to examine the applicant in respect of statements made by him in Dáil Éireann. The Tribunal were inquiring into the nature and source of certain lodgements that were made into the bank accounts of the applicant and persons with whom he was associated. Publicity arose due to the unauthorised disclosure of certain confidential material gathered during the Tribunal's private inquiries. The applicant made statements to the media and in Dáil Éireann on the issue. The Tribunal sought to draw the applicant's attention to inconsistencies between statements made outside the House and/or evidence tendered to the Tribunal and statements made in Dáil Éireann.*"

99. The court's unanimous judgment was delivered by Kelly J. (as he then was). He noted an important concession made by counsel for the Tribunal in argument (at p. 710):

"*[19.] Counsel for the Tribunal made it clear that it does not contest the existence of the privilege. The Tribunal will not call into question the statements made by the applicant in the Dáil. It accepts that it can ask no questions in relation to those statements which call into question their veracity or motivation. In other words, the statements made by the applicant in the Dáil are immune from criticism by the Tribunal as to their truthfulness or motivation. Likewise, the Tribunal accepts that he is immune from being asked questions in respect of them*."

100. The court then analysed the development of parliamentary privilege (at p. 711):

"[23.] Parliamentary privilege, of the type enunciated in Article 15.13, has a long pedigree. It is to be found in article 9 of the Bill of Rights 1689, and to some extent in the earlier common law. Article 15.13 repeats, with small modifications, the provisions of Article 18 of the Free State Constitution. Indeed, the thrust of its provisions are reflected throughout the common law world. The judgments of Geoghegan J. in the High Court and Finlay C.J. in Attorney General v. Hamilton (No. 2) [1993] 3 I.R. 227 are instructive as they set out the history of the provision."

101. The court then set out some of the quotations from the judgment in that case already referred to above. The court continued (at p. 712):

"[28.] The proper interpretation of Article 15.13 has to be informed by the history of parliamentary privilege as understood at common law and in the Free State Constitution. As Geoghegan J. observed in Attorney General v. Hamilton (No. 2) [1993] 3 I.R. 227 at p. 250:-

> *'... I think that the provisions in that Constitution [the Free State Constitution] must be interpreted in the light of the history of the privileges of parliament as understood in the common law jurisdictions at that time. If it was intended by the Constitution of Ireland, 1937, to qualify those rights, one would reasonably expect that there would be an express provision to that effect, bearing in mind that otherwise the natural assumption must be that they have the same meaning as their equivalents had in the Constitution of 1922.'*

[29.] In the absence of an Irish authority which is precisely on point, it is appropriate to examine other common law decisions touching upon the question of parliamentary privilege as an aid to the proper interpretation of Article 15.13.

[30.] Both sides have referred to a decision of the Privy Council in Prebble v. Television New Zealand Ltd. [1995] 1 A.C. 321 in support of their respective positions.

[31.] In that case, the Privy Council considered a claim by the defendants in a libel action brought by a member of the New Zealand parliament that they were entitled to refer to statements made by the plaintiff in that parliament in support of a plea of justification. Those pleas were to the effect that the plaintiff made statements in parliament calculated to mislead it or which were otherwise improperly motivated. In the High Court, Smellie J. struck out the allegations and particulars of justification which he held might impeach or question proceedings in parliament in contravention of the article 9 of the Bill of Rights 1689. He was upheld by the Court of Appeal. The matter then went to the Privy Council.

[32.] That Council's advice to the Queen was contained in the opinion of Lord Browne-Wilkinson. At p. 332 of the report, he identified alternative interpretations which were sought to be given to article 9 of the Bill of Rights 1689. He pointed out that in addition to the actual wording of article 9 itself, there is a long line of authority which supports a wider principle of which that article is merely one manifestation. That principle is that the courts and parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned, they will not allow any challenge to be made to what is said or done within the walls of parliament in performance of its legislative functions and protection of its established privileges. He said at p. 332:-

> *'According to conventional wisdom, the combined operation of article 9 and that wider principle would undoubtedly prohibit any suggestion in the present action (whether by way of direct evidence, cross-examination or submission) that statements were made in the House which were lies or motivated by a desire to mislead. It would also prohibit any suggestion that proceedings in the House were initiated or carried through into legislation in pursuance of the alleged conspiracy. However, it is the defendant's case that the principle has a more limited scope. The defendant submits, first, that the principle only operates to prevent the questioning of statements made in the House in proceedings which seek to assert legal consequences against the maker of the statement for making that statement. Alternatively, the defendant submits that Parliamentary privilege does not apply where it is the member of Parliament himself who brings proceedings for libel and Parliamentary privilege would operate so*

as to prevent a defendant who wishes to justify the libel from challenging the veracity or bona fides of the plaintiff in making statements in the House.'

[33.] In a statement rather reminiscent of the observations made by Finlay C.J. in Attorney General v. Hamilton (No. 2) [1993] 3 I.R. 227 concerning the way in which parliamentary privilege may trench upon other rights, Lord Browne-Wilkinson said at p. 336:-

'*Their Lordships are acutely conscious (as were the courts below) that to preclude reliance on things said and done in the House in defence of libel proceedings brought by a member of the House could have a serious impact on a most important aspect of freedom of speech, viz. the right to the public to comment on and criticise the actions of those elected to power in a democratic society: see Derbyshire Council v. Times Newspapers Ltd. [1993] A.C. 534. If the media and others are unable to establish the truth of fair criticisms of the conduct of their elected members in the very performance of their legislative duties in the House, the results could indeed be chilling to the proper monitoring of members' behaviour. But the present case and Wright's case, 53 S.A.S.R. 416 illustrate how public policy, or human rights, issues can conflict. There are three such issues in play in these cases: first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts. Their Lordships are of the view that the*

law has been long settled that, of these three public interests, the first must prevail.'

[34.] The Privy Council was unequivocal in concluding as follows at p. 337:-

'*… their Lordships are of the view that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House …*'

[35.] Whilst that case was, of course, dealing with litigation properly so called, the position is no different in respect of a tribunal of inquiry.

(D) Conclusions

[36.] A consideration of the terms of Article 15.13 and the relevant case law demonstrate that the Article protects a member of the national parliament from both direct and indirect attempts to make such a person amenable to anybody other than the Houses themselves in respect of any utterance made in such Houses.

[37.] Drawing the applicant's attention to statements made by him in parliament which are inconsistent with statements made outside it, may incorporate a suggestion that the words spoken in parliament were untrue or misleading. That is not permissible.

[38.] I do not accept the contention of the Tribunal that the purpose of such an exercise is to ensure that the evidence before the Tribunal is complete. Rather, there is a clear suggestion which imputes impropriety to the applicant

in respect of utterances made in parliament. The court cannot permit the Tribunal to engage in such activity.

[39.] Before departing from this topic, and so there can no doubt about it, I repeat that the applicant's counsel accepts that the Tribunal may record in its report that statements were made by him in parliament. It may reproduce those statements in whole or in part in its report. It may not, however, suggest that such words were untrue or misleading or inspired by improper motivation. It will be for the reader of the report to draw his own conclusions. He or she will decide on whether the applicant was or was not 'factually erroneous' in the statements which he made in the Dáil. If the statements were erroneous, a reader may decide whether such inaccuracies were deliberate or accidental. To put it another way, the applicant may be judged by the court of public opinion in respect of his parliamentary utterances but not by the Tribunal."

102. In *Callely,* as previously indicated, Articles 15.12 and 15.13 were not directly in issue. However, aspects of the joint judgment touched upon them. In those proceedings, Senator Callely sought orders of *certiorari* quashing both the report of the committee in question and any resolution of Seanad Éireann on foot of it. Treating of this claim, the joint judgment said (at para. 52):

"*[52.] It is difficult to reconcile the reliefs sought with the explicit terms of Article 15.12. It appears to be generally accepted that the report of the Committee of the House is entitled to the same status and privilege as the report of the House itself. See Casey, Constitutional Law in Ireland (3rd ed., Round Hall, 2000), p. 134 and Kohn, The Constitution of the Irish Free State (Allen & Unwin, London, 1932), p. 229. Thus the report sought to be quashed*

was a report of the House itself entitled to privilege under Article 15.12. In any event, in this case the report was adopted and acted upon by the Seanad itself. Furthermore, it has been held that the privilege conferred by Article 15.12 is an extensive one and is not limited to privilege from defamation. The Irish text makes it clear that privilege here means privilege from <u>any legal proceedings</u> (táid saor ar chúrsaí dlí cibéáit a bhfoilsítear) and as observed by Finlay C.J. in Attorney General v. Hamilton (No. 2) [1993] 3 I.R. 227 , at p. 268, in rejecting an argument that the privilege in Article 15.12 was limited to defamation:-

> '*[The relevant subsections of Article 15] very clearly indicate that there are a great variety of legal proceedings which could follow upon the making of an utterance over and above a claim for damages for defamation, were it not for the privilege and immunity granted by these Articles.*'

[53.] Furthermore, Senator Callely in these proceedings has sought relief against individual members of Seanad Éireann and in doing so has relied upon statements made by them in the course of proceedings in Seanad Éireann. However, under Article 15.13 such persons are not amenable to any court or authority other than the House itself for utterances made. This is an individual privilege in addition to the privilege attached to the utterance itself wherever published, pursuant to Article 15.12. It is clear that, in the words of Article 18 of the Constitution of Ireland 1922 from which this provision is drawn, a member shall not 'in respect of any utterance in either House, be amenable to any action or proceeding in any court other than the House itself'.

[54.] The statement of opposition on behalf of the appellants did not raise either Articles 15.12 or 15.13 and accordingly the parties were invited by the court to return to make submissions on the impact, if any, of those Articles on these proceedings. Consistent with the posture of their pleadings, the appellants did not seek to rely on Articles 15.12 and 15.13 in defence of these proceedings. That may be so as a matter of pleadings between the parties but there remains a fundamental difficulty for this, or any court established under the Constitution, when the relief sought appears to be precluded by the terms of the Constitution itself. Accordingly, even if persuaded that the proceedings before the Committee and in the Seanad were justiciable, we would not be prepared to make orders in the form sought by the respondent and would have required careful argument as to the relief which it would be appropriate to have granted without contravening the Constitution.

[55.] But even apart from this point, Articles 15.12 and 15.13 are also relevant to the question of the interpretation of Article 15.10 and the separation of powers more generally. Any theory that the internal operation of a House of the Oireachtas dealing with its own members must be justiciable because the constitutional right to a good name of a member may be affected, must explain how the Constitution could contemplate such justiciability when it expressly protects from legal action of any sort, any individual utterance by a member, and any collective report by either House."

103. It seems to us that the latter observations by O'Donnell and Clarke JJ. must in principle be equally applicable in the case of a non-member such as arises in these proceedings. The fact that utterances in themselves trench upon the good name of a

citizen who is not a member of the Oireachtas cannot of itself render that issue justiciable in the face of the clear constitutional prohibition.

104. Counsel for the applicant submitted that while Article 15.13 applied to utterances "in either House" this was a reference to the chamber of the House, rather than to a committee of either or both Houses. In Professor Casey's article, approved in the joint judgment, he offers the following view:

> "*Article 15.13 is also regarded as covering utterances in official Oireachtas Committees, whether established by one House or jointly by both; this is on the basis that any such committee is essentially the alter ego of the House which established it and must consequently share the privileges of that House. The position has now been clarified by the committees of the Houses of the Oireachtas (Privilege and Procedure) Act 1976. This Act applies to Committees appointed by either House or jointly by both. It provides that a member of either House shall not, in respect of any utterance in or before a committee, being amenable to a court or authority other than the House or Houses by which the Committee was appointed; section 2(1).*"

105. Section 2(1) of the 1976 Act is a direct analogue of s. 92 of the 2013 Act above referred to. In *Attorney General v. Hamilton* (No. 2), Geoghegan J. speaking of the immunity provided by the 1976 Act said (at p. 253):

> "*Hamilton P. in his ruling notes that the Oireachtas itself considered that the privileges contained in ss. 10, 12 and 13 of Article 15 related only to official reports and publications of the Oireachtas or of either House and utterances made in either House because it caused to be enacted the Committees of the Houses of the Oireachtas (Privilege and Procedure) Act, 1976. I think it equally likely that the Oireachtas simply had a doubt about the matter and for*

safety enacted that Act. It is interesting that the Act follows precisely the wording of the Constitution. In my view s. 13 would probably have covered utterances before committees of Houses of the Oireachtas irrespective of whether the Act of 1976 had been passed or not."

106. It seems to us that, consonant with the views of Professor Casey and Geoghegan J., s. 92 of the 2013 Act is merely declaratory of the position that already obtained under Article 15.13, namely that the privilege applies to committees of either House in the same way as it applies to the Houses themselves.

Conclusions

107. While Ms. Kerins' case is couched in largely jurisdictional terms, as we have explained, we do not believe that the issue of jurisdiction is one that properly arises in these proceedings at all. In order to make that case, Ms. Kerins asserts, as she must, that the utterances complained of amount to some form of adjudication or determination. True it is that some of the Oireachtas respondents express themselves in terms which suggest that conclusions were being arrived at by the individuals concerned. In reality however, these were clearly expressions of opinion by the relevant members devoid of any legal force. They were no more than utterances and as such Article 15.13 has the effect of ousting the court's jurisdiction. The essence of the applicant's case is a claim for damages arising from those utterances which seeks to make the Oireachtas respondents amenable to the jurisdiction of the court. That cannot be done.

108. To adopt the words of Johnston J. in *Cane v. Dublin Corporation* [1927] I.R. 582 (at p. 601):

"*It would be strange, indeed, if a Court of law were to have the power to pass under review the evidence and the proceedings before a Parliamentary Committee*."

109. Ms. Kerins has in various ways invited the court to analyse the utterances in terms of tone and content and to test them for bias, propriety and more. This is to invite the court to examine, discuss and adjudge words used in parliament, the very thing that Blackstone said was not to be done.

110. It would be wrong however to categorise this as a denial of the constitutional rights of the applicant. In this instance, the custodian of those rights is not the court but the Oireachtas itself. This is explained in the joint judgment in *Callely* (at para. 81):

"[81.] Furthermore, the fact that the Constitution requires that there remain an area of activity in the legislature which is non-justiciable does not mean that that area is beyond the reach of the Constitution. The Oireachtas is itself required to uphold the Constitution and to respect the rights of citizens, whether members or not. This indeed, is no doubt why the Oireachtas has adopted rules to protect individuals in the context of the exercise of freedom of speech within the Oireachtas which is guaranteed by the Constitution and why there is elaborate provision for fair procedures in the legislation providing for committee hearings under the ethics in public office legislation. The fact that there cannot be immediate recourse to the courts places, if anything, a heavier onus on the Oireachtas to ensure that constitutional rights are respected in proceedings which are themselves non-justiciable."

111. For upwards of four centuries it has been recognised in common law jurisdictions throughout the world that the courts exercise no function in relation to

speech in parliament. This is fundamental to the separation of powers and is a cornerstone of constitutional democracy. The Constitution guarantees freedom of speech in parliament, not to protect parliamentarians, but the democratic process itself. The constitutional order requires that speech in parliament remain unfettered by considerations such as jurisdiction. If members of either House were constrained in their speech in the manner contended for by the applicant, the effective functioning of parliament would be impaired in a manner expressly forbidden in absolute terms by the Constitution.

112. Thus the privilege conferred by Article 15.13 is not merely one that provides a litigation defence as for example, a plea of privilege in a defamation action; rather utterances in parliament are in an area of non-justiciability ordained by the Constitution.

113. For all of these reasons therefore, the court is of the opinion that this claim must fail.