SUPREME COURT

S:AP:IE:2017:000051

O'Donnell J.
McKechnie J.
Dunne J.
Charleton J.
O'Malley J.

Between/

Alan Shatter

Applicant/Respondent

AND

Seán Guerin

Respondent/Appellant

Judgment of O'Donnell J. delivered on the 26th day of February 2019.

Introduction

1 At para. 79 of his judgment in these proceedings, the learned President of the Court of Appeal refers to passage from the judgment in *In re Haughey* [1971] I.R. 217, which must be among the most commonly quoted passages in Irish law in the last half-century:-

> "[i]n 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."

2 The breadth of citation is a testament to the fundamental nature of the proposition established in that famous case. But the fact that the passage has been subject to citation, discussion and analysis in so many cases in the almost 50 years since it was delivered is perhaps also an indicator of the enduring difficulty of applying the fundamental principles identified there in the many different circumstances in which an issue may arise. The present case poses further novel issues for resolution, which are of obvious significance for the participants in the case, but also of more general and widespread importance for the development of public law.

3 The background facts are well known, and have been set out in the careful judgments of the High Court and the respective judgments delivered in the Court of Appeal. Accordingly, a relatively truncated summary will, I hope, suffice for the purposes of deciding the legal issues which remain in controversy in this case.

The establishment of the Guerin Inquiry

4 The applicant for judicial review, Alan Shatter (who is the respondent to this appeal, but who, for consistency, I will call hereafter the applicant) is a well-known solicitor who had a successful political career. As of February 2014, he held office as Minister for Justice in the government. At the time, there was considerable public controversy about allegations made by a member of An Garda Síochána, Sergeant Maurice McCabe, and the manner in which those allegations and complaints had been dealt with. In February 2014, a volume containing complaints made by Sergeant McCabe was furnished by Micheál Martin, T.D., the leader of the opposition, to the then Taoiseach, Enda Kenny, T.D. On 25 February 2014, the Taoiseach made a statement to the Dáil during which he stated:-

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

5 A number of things might be noted at this stage. The manner in which the issue arose, and the statement made by the Taoiseach, are indicators of the scale of public discussion and the seriousness with which it was viewed. The procedure anticipated was intended to be quick and effective. It was to be conducted by an objective, independent person, who in this case held the rank of senior counsel. Its function was to examine *all relevant papers*, and to *recommend further action*. If such action (that is, the establishment of a commission of investigation) was recommended, it would be implemented. Finally, it was clearly anticipated from the outset that the report would be laid before the Oireachtas and published.

6 Two days later, the government published the terms of reference of what it announced as the "Guerin Inquiry". While broadly consistent with what had been indicated to the Dáil, the terms of reference were much more detailed and precise. It is desirable to set them out in full in the terms in which they were announced:-

"Government Announces Terms of Reference for Guerin Inquiry

The Government has appointed Mr Sean Guerin SC to conduct the Independent Inquiry into allegations made by Garda Sergeant Maurice McCabe and related matters.

The Terms of Reference for the Inquiry were agreed by the Government today, on the advice of the Attorney General.

They are as follows.

Terms of Reference

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

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

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

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

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

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

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

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

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

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

7 Plainly, the terms of reference contemplated something more than the purely documentary review outlined by the Taoiseach on 25 February 2014, since it expressly contemplated that Seán Guerin S.C. (the appellant in the present appeal, but who, again, for ease of reference and consistency, I will call the respondent) would interview Sergeant McCabe and any other person considered necessary. However, such interview was in relation to the allegations made of deficiencies in relation to the investigation and prosecution of crime in a particular area of the country. In other words, the purpose of any such interview was to clarify, and perhaps amplify, any allegation. It does not appear that this reference was intended to instruct the respondent to conduct a full oral procedure in which allegations were put to individuals and their response tested. The principal focus of the investigation was directed to the treatment of the complaints made by Sergeant McCabe by An Garda Síochána. Insofar as the Department of Justice was concerned, the sole reference to it was as part of point 3 of the terms of reference, and the requirement was to examine "all documents and data". There was no reference to the applicant, either personally or in his capacity as Minister. In broad terms, therefore, the thrust of the terms of reference appeared sequential: essentially, the respondent was required to review the investigations; consider whether there was a sufficient basis for concern in relation to the steps taken to investigate the complaints; and advise on any further measures necessary, which might include recommending the establishment of a commission of investigation, and, if so, the matters to be investigated. The requirement for speed is also illustrated by the timescale envisaged, which was very short. In addition, the task contained in the terms of reference of reporting to the Taoiseach must be viewed against the commitment by the Taoiseach that any report would be both laid before the Oireachtas, and published generally, and that if a commission of investigation was recommended, it would be set up.

8 It should be noted that McKechnie J. takes a different view of the nature of the tasks set out in the terms of reference, which leads almost inevitably to a different analysis, even if the practical difference between the two approaches is not great, and the outcome is the same. Nevertheless, this difference of approach illustrates a degree of ambiguity in the terms of reference. It may be useful to set out briefly here why I take a different view as to the interpretation of the terms of reference. In my view, the terms of reference do not set out separate, self-standing tasks. For example, the respondent is not required to evaluate any specific report or document on a particular issue. Instead, as I read the terms of reference, he was required to take a sequential approach, and to review a number of matters with a view to expressing a conclusion as to whether further measures were warranted, and, in particular, whether it was desirable in the public interest to establish a commission of investigation. It is not irrelevant that this appears to be how the respondent understood his role.

9 Looked at now with the unforgiving clarity of hindsight, it seems apparent that the terms of reference contained some terms that did not fit so easily within the clear- structure of a report commissioned to review the garda investigations at issue, determine whether there was sufficient basis for concern in relation to them, and, if so, advise on further steps and matters requiring investigation. Some of the language used both in the terms of reference and the statement of the Taoiseach on 25 February 2014, coupled with the promise of formal publication, may have suggested a desire for a more searching report which would reach definitive conclusions. The unresolved tension between these approaches lies at the heart of this case. This ambiguity leads to the different approach taken by McKechnie J., and almost inevitably, therefore, to the availability of a different route to the decision in this case. While the outcome in this case is the same, these differences of analysis in interpretation of terms of reference may be very

significant in other cases. As concerns the drafting of terms of reference, it is accordingly highly desirable that there be absolute clarity both as to the tasks a person is required to perform and the procedures required to be adopted.

The Guerin Report

10 In the event, the respondent delivered a comprehensive report on 6 May 2014, entitled "A review of the action taken by An Garda Síochána pertaining to certain allegations made by Sergeant Maurice McCabe" ("the Guerin Report"). The Guerin Report recommended the establishment of a commission of investigation and identified certain issues to be investigated. A commission of investigation was established thereafter, and Mr. Justice Kevin O'Higgins was appointed to it ("the O'Higgins Commission"). It will be necessary to touch on the outcome of that commission in due course. The Guerin Report is very detailed, containing 20 chapters. However, for present purposes, attention has been focused on a small number of paragraphs in the concluding sections of the report. As observed by Finlay Geoghegan J. in the Court of Appeal, the respondent interpreted the terms of reference in relation to the Minister and the Department of Justice and Equality as confining the factual examination to a review of the documents provided to him by the Department and An Garda Síochána. At paras. 3.3 and 3.4 of Chapter 3 of the report, certain general statements are made on which reliance is placed by both parties:-

> "3.3 Ultimately, all of these matters were brought to the attention of the Department of Justice and Equality in either one or other of the documents referred to above. What happened as a result has also been reviewed by reference to the files of the Department and the files maintained by An Garda Síochána in relation to the complaints forwarded from the Department.
>
> 3.4 It is important to emphasise before embarking upon the review of individual incidents, that it is understood that the purpose of this review is not to make findings of fact or to determine any disputed question either of fact or law. Insofar as any views are expressed on factual matters, those are only facts as they appear from a review of the files that I have received. Any such expression is not an adjudication on any matter effecting the persons named or referred to in this report. It is possible that, with the benefit of an opportunity to interview or hear evidence from the individual members and officers of An Garda Síochána and civilians, including victims of crime, involved in these matters, a different view of the facts would emerge."

It has been pointed out, correctly, that that this passage is contained in a section dealing with the garda investigations, rather than representing a more general statement, but it is reflective of how the respondent understood his task.

11 Chapter 19 of the Guerin Report deals with an analysis of the documentation furnished by the Department of Justice and An Garda Síochána. The passages of which the applicant complained are found almost exclusively between paras. 19.91 and 19.104. The analysis commenced by stating that the Minister had independent investigative functions in relation to An Garda Síochána in certain circumstances, and that he has been invited to exercise two specific statutory functions. These were, respectively, the functions conferred by s. 42 of the Garda Síochána Act 2005 (as amended) ("the 2005 Act"), and those conferred by Regulation 8(2) of S.I. No. 168/2007 - Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007 ("the 2007 Regulations"). Somewhat unusually, both envisage a role for the Minister himself or herself, as distinct from the Department of which he or she is the head.

12 Section 42 of the 2005 Act (as substituted by s. 42 of the Criminal Justice Act 2007) conferred on the Minister the following functions:

> "Special inquiries relating to Garda Síochána.
>
> 42.— (1) The Minister, with respect to any matter considered by him or her to be of public concern, may by order appoint a person to—
>
> (a) inquire into any aspect of administration, operation, practice or procedure of the Garda Síochána, or the conduct of its members, and
>
> (b) make a report to the Minister on the conclusion of the inquiry.
>
> (2) A person who, in the Minister's opinion, has the experience, qualifications, training or expertise appropriate for the inquiry may be appointed to conduct the inquiry.
>
> (3) The Minister shall specify the terms of reference of the inquiry in the order under subsection (1) and may, by order, made at any time before the submission of the final report, amend those terms for the purpose of clarifying, limiting or extending the scope of the inquiry.
>
> […]
>
> (10) The Minister may publish all or part of any report received under this section.
>
> (11) This section applies even if the matter considered by the Minister to be of public concern arose before the passing of this Act.
>
> (12) The power to order an inquiry under this Act is additional to any power conferred by this or another Act relating to inquiries or investigations.
>
> […]"

The section has since been amended as of 23 December 2015 by s. 35 of the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015, principally to provide for the involvement of the Policing Authority.

13 Regulation 8 of the 2007 Regulations provided as follows:

> "8. (1) On receipt of a confidential report, the Commissioner shall—

(a) examine the report and, unless he or she has reason to believe that the allegation contained in it was not made in good faith or is false, frivolous or vexatious, investigate the allegation or cause it to be investigated, and

(b) take any other action that is necessary as a result of the investigation.

(2) On receipt of such a report, the Minister, unless he or she has reason to believe that the allegation contained in it was not made in good faith or is false, frivolous or vexatious, shall cause the allegation to be investigated or take such other action as he or she considers appropriate in the circumstances.

(3) In examining or investigating a confidential report or notifying the Ombudsman Commission or the Garda Síochána Inspectorate of a report or taking any other action in relation to it, the Minister or Commissioner, as the case may be, and any person acting on his or her behalf shall take all practicable steps to ensure that the identity of the confidential reporter is not disclosed."

The 2007 Regulations were revoked as of 15 July 2014 by s. 19 (2) of the Protected Disclosures Act 2014.

14 These matters are considered at paras. 19.93 to 19.98 of the Guerin Report. Again, in order to understand the dispute which has arisen in this case, it is necessary to set these out in full:-

"19.93 The options open to the Minister upon receipt of a report under the Confidential Reporting Scheme which makes an allegation against the Commissioner are set out in Regulation 8(2) and were, in fact, stated in the Secretary General's letter of 24 January 2012 to the Commissioner. The first option open to the Minister was to determine that 'He has reason to believe that the allegation … was not made in good faith or is false, frivolous or vexatious'. If the Minister does not have such reason, he has two options. The first is to 'cause the allegation to be investigated'. The second is, instead of an investigation, to 'take such other action as he considers appropriate in the circumstances' which appears to allow the Minister a broad discretion as to how to deal with the matter. There appears to be no question that the allegation having been investigated at the instigation of the Minister. It is not clear however which of the other options the Minister adopted.

19.94 In this case substantial and reasonably detailed allegations of significant misconduct were made in 2011 and 2012. In January 2012 those allegations included an allegation of misconduct by the Commissioner, through the statutory confidential reporting mechanism, for listing a superintendent for promotion despite it being alleged that he was unsuitable for promotion by reason of his alleged involvement in the matters complained of. By September 2012, those allegations included all of the allegations contained in the dossier (although the supporting documentation including PULSE printouts, had not been, and as far as I can tell, never were furnished to the Minister, despite requests to do so). There was also a complaint about the conduct of the existing internal garda investigation, in a number of respects, and an assertion of a loss of confidence in such an internal investigation.

19.95 From the papers I have seen, I have had difficulty finding material which demonstrates the Department identified and understood the significant independent statutory role which the Minister had to perform in respect of those matters. The practice adopted when matters were brought to the Department's attention was invariably to refer the issues that had been raised to An Garda Síochána. While it would, of course, be entirely reasonable to expect that, where a complaint is made, opportunity will be given to the person the subject of the complaint to respond to it, it is a different matter altogether to be entirely satisfied by that response.

19.96 The initial response of the Commissioner in January 2012 was almost entirely lacking in any detailed account of the substance of the allegations or the conduct and findings of the internal investigation. The only exception concerned the allegations arising out of the events in the Hillgrove Hotel on October 2010, which received a somewhat more detailed treatment. The twelve complaints identified in the confidential report of 23 January 2012 were disposed of in a single passage.

19.97 There is no record that I have seen of that response from the Commissioner having been the subject of any submission to the Minister by his officials and there is no record of what decision the Minister made on foot of that information, apart from the contents of the letter to the confidential recipient which appears to have been sent on 7 February 2012. That letter is unclear as to whether the Minister had decided that there was reason to believe that the allegation was 'not made in good faith or is false, frivolous or vexatious' or whether the Minister was not of that view but was satisfied that he has taken such action 'as he consider[ed] appropriate in the circumstances'. Whichever course the Minister was taking, it was clear that the only action taken on foot of the confidential report was to seek a response from the Commissioner.

19.98 That response appears to have been accepted without question (at least until further correspondence from Sergeant McCabe the following December) and the Minister's response to the confidential recipient included express reference to the Commissioner's having advised the Minister of the findings of the internal investigation. In effect the process of determining Sergeant McCabe's complaints went no further than the Minister receiving and acting upon the advice of the person who was the subject of the complaint."

15 As observed in the judgment of Finlay Geoghegan J. in the Court of Appeal (which can I think be treated as the majority judgment), those paragraphs must be considered in the context of the more detailed facts set out in the preceding paras. 19.28 to 19.60. In summary, those paragraphs recited the contents of the confidential report of 23 January 2014; the fact that the reporter wished to make a complaint against the Garda Commissioner and an Assistant Commissioner; and the fact that the confidential report was forwarded to the Garda Commissioner by the Secretary General of the Department on 24 January 2012, drawing attention to the steps the Minister must take under Regulation 8(2), and seeking comments before the Minister decided on his course of action. The report sets out in summary the response from the Garda Commissioner of 27 January 2013, the letter which issued to the confidential recipient, and an internal email from the Minister's private secretary to an assistant secretary on 3 February 2013, which stated that the Minister had read the letter and approved it. At para. 19.60, the report stated, *inter alia*, that:-

"The files that I have received from the Department of Justice, insofar as they relate to the handling of that complaint, consist of the relevant correspondence outlined above. I have not seen any memorandum or submission to the Minister from his Departmental staff, to assist him in the exercise of his functions under Regulation 8(2) of the Garda Síochána (Confidential Reporting of Corruption or Malpractice) Regulations 2007. Nor have I seen any internal departmental minute or memorandum of the Minister's decision. On 11th April 2014, I specifically sought internal departmental documents

> related to the exercise of this function (and other matters). None have been produced relating to this exercise of the Minister's specific function under the regulations."

This, of course, was a specific matter in relation to which the respondent was required to offer an opinion by his terms of reference.

16 No complaint is made about the accuracy of the facts recited in the report or the contents of para. 19.60. The applicant, however, complains in relation to the conclusion at para. 19.100 that the Minister was satisfied by a brief summary of the conclusions of the internal investigation of An Garda Síochána rather than seeking a copy of the investigation report for review. The full terms of para. 19.100 are as follows:-

> "19.100 Again, as had occurred when the Commissioner's initial response was received in January 2012, there does not appear to have been any written submission to the Minister by his officials in relation to the Commissioner's response, and there is no record I have seen of the Minister making any decision or forming any view in relation to that response. Had it been probed and tested in any reasonable way further important questions would have come to light. (These specific issues arising are considered in detail in the relevant chapters of this report.) It is surprising that, having been informed that complaints have been investigated internally by An Garda Síochána, the Minister appears to have been satisfied by a brief summary of the conclusion of the investigation, rather than seeking a copy of the investigation report for review. Indeed, in all the papers furnished by the Department, I can find no evidence of any detailed assessment within the Department of any of the allegations made by Sergeant McCabe, or of the responses received from the Commissioner."

17 At para. 19.101, the respondent commented on what he described as "a near total absence in the papers of any written records of any submission made by or advice given to the Minister by his officials in particular at the times when the exercise of specific statutory functions by the Minister arose." He continued:-

> "Similarly I have seen no written internal records of decisions made by the Minister (in particular between 23 January and 7 February 2012). As a result, this review is unable to shed any light on the reasons for the approach adopted by the Minister to the exercise of those functions. For whatever reason, the approach adopted had the result that there was no independent investigation of Sergeant McCabe's complaints. The absence of the records that one would expect of a careful and reasoned exercise of an important statutory function is a matter of some concern. Insofar as the letter of 7 February 2012 records reasons that are not otherwise apparent, it appears that the Minister acted as he did on foot of advice received from the Commissioner, without that advice being questioned or analysed."

18 As observed by Finlay Geoghegan J. in the Court of Appeal, the views expressed by the respondent here are for the most part expressions of opinion based upon the absence of documents. Those documents had been specifically sought in a letter dated 11 April 2014. The applicant did not, and does not, dispute the factual accuracy of what is stated in that paragraph. At para. 19.103, the respondent reached a conclusion on one of the issues upon which he was required to report, that is, whether there was sufficient cause for concern to justify further inquiry.

19 Para. 19.103 states:-

> "In all the circumstances, I am of the opinion that there is cause for concern as to the adequacy of the investigation of the complaints made by Sergeant McCabe to the Minister for Justice and Equality and a sufficient basis for concern as to whether all appropriate steps were taken by the Minister for Justice and Equality to investigate and address the specific complaints."

20 Pausing at this point, it is, I think, clear that however described, whether as comment, opinion, finding or conclusion, some of the language as set out above is critical of the applicant in his role as a Minister. Looked at in hindsight through the lens of the issue that has arisen in this case, it is apparent that passages in the report are suitably cautious statements qualified by reference to what appears from the documentation available to the respondent. At other points, however, the respondent draws more definite conclusions. For example, at para. 19.100, it is implied that the Garda Commissioner's response was not probed or tested in any reasonable way, and surprise is expressed that the Minister was apparently satisfied with a brief summary of the conclusions of the investigation, rather than seeking a copy of the report of the investigation itself. However, the basis of these comments is also very clear from the text: they are based upon an absence of documentation. Insomuch as the terms of reference required the respondent to consider the conduct of the Department of Justice, it was in the context of a documentary review. Furthermore, certain documents, the absence of which gave rise to the comments made, were specifically sought by the respondent from the Department by a letter of 11 April 2014, in which the respondent noted that there were no notes or memoranda of any decision made by the Minister, in particular under s. 42 of the 2005 Act (as amended) and/or Regulation 8(2) of the 2007 Regulations, or of any request by the Minister to the Department to make further inquiries in that regard. Finally in this regard, the respondent was obliged to come to some conclusion as to whether there was "cause for concern" sufficient to justify the establishment of a commission of investigation. It seems possible that if the issue was limited to these observations, or if even more guarded or qualified language had been used, no complaint might have been made about the preceding paragraphs. However, the applicant lays particular emphasis on the concluding remarks. At para. 20.11, the respondent said:-

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

21 No one who is required to write a report, adjudication, or, indeed, a judgment, is likely to be unaware of, or entirely immune from, the temptation to pontificate, and few, as perhaps this sentence itself illustrates, entirely succeed in resisting it. There is no doubt that here the respondent made general observations, and that they reflect in some way upon the applicant's good name, although probably more wounding things are said on an almost daily basis in political exchanges and media commentary. The legal significance of these comments lies not so much in the language used, as in the fact that they were made by an independent person appointed by the government to inquire and report upon these matters, and whose report would be laid before the Oireachtas, published generally by the government, and acted upon.

22 However, Finlay Geoghegan J. took the view that these comments, in the course of a lengthy and comprehensive report, were not central to the issues on appeal. It will be necessary to consider the comments later in this judgment. She took a different view of the conclusion the respondent came to in respect of the matters set out at points 6 and 7 of the terms of reference, in that he

concluded that there was sufficient basis for concern as to whether all appropriate steps had been taken by the Minister to investigate and address the complaints made, and was accordingly of the opinion that it was desirable that a commission of investigation be established, suggesting that among the matters to be investigated was the question of "the investigation by An Garda Síochána and the Minister for Justice and Equality of the complaints made by Sergeant Maurice McCabe in relation to the above matters, and such other like matters as may seem appropriate". These were, of course, matters upon which the respondent was obliged to express his opinion by the terms of reference. Accordingly, the applicant's case can be stated most clearly as a contention that the respondent could not carry out the task assigned to him by the terms of reference (or, at a minimum, could not come to a conclusion that there was sufficient cause for concern in relation to any matter to justify the establishment of a commission of investigation), without affording what are described as fair procedures to the applicant, and, it must follow, to all other persons affected by the report.

Events which followed the delivery of the Guerin Report

23 Before turning to the complex legal issues in this appeal, it is necessary to outline briefly the dramatic events that followed on the delivery of the respondent's report. When the report had been delivered to the Taoiseach, but before it was published or laid before the Oireachtas, the applicant was summoned to the Taoiseach's office, where the Taoiseach pointed to certain passages in the report and indicated that, in the light of those passages, he would have difficulty expressing confidence in the applicant. The applicant at the time did not read or have the opportunity of reading the entire report. The applicant thereafter wrote a detailed letter on 7 May 2014, offering his resignation as Minister. In doing so pointed out in relation to the respondent:-

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

The proceedings

24 These proceedings were commenced on 30 July 2014, almost 3 months after delivery of the report, and leave to seek judicial review was granted by the High Court (Baker J.) on that day. Thereafter, the terms of reference of the O'Higgins Commission were finalised. The applicant, through his solicitors, engaged in significant correspondence, in the first place with the Taoiseach, and also with the Ceann Comhairle, contending that pending the determination of these proceedings, it was not permissible to include the term of reference set out at para. 21 above, since it was contended that if these proceedings were successful, the legal basis for such an inquiry would fall away. In relation to the Oireachtas, it was also contended that the subject matter of the report could not be the subject of debate because of the principle of the separation of powers, and the fact that proceedings were then pending in the courts. In the event, however, the O'Higgins Commission was established, and reported in due course. It is important to record that Mr. Justice O'Higgins' report ("the O'Higgins Report") exonerated the applicant from any criticism in respect of his dealings with the complaints made by Sergeant McCabe. Understandably, the applicant now points to this fact as illustrating the substantive merit of his complaints in these proceedings. If the respondent had given him the opportunity afforded to him by Mr. Justice O'Higgins, then, the applicant argues, the respondent would have come to the same conclusion, in which case he would not have made the comments challenged, or, indeed, would not have come to the conclusion that there was sufficient cause for concern to establish a commission of investigation, and the applicant would not have resigned, bringing to an end his ministerial career.

25 The High Court dismissed the applicant's claim on all grounds (*Shatter v. Guerin* [2015] IEHC 301, Unreported, High Court, Noonan J., 20 May 2015). The Court of Appeal (Ryan P., Finlay Geoghegan and Irvine JJ.) allowed the appeal, agreeing as to the result, but with significant differences of approach and emphasis (*Shatter v. Guerin* [2016] IECA 318, Unreported, Court of Appeal, 10 November 2016). Their views also diverged on the question of the appropriate remedy. In the event, the court made declarations that the conclusions in the Guerin Report which were critical of the applicant were reached in breach of fair procedures and constitutional and natural justice, but refused to make the further orders requested by the applicant, which included certiorari of the conclusions, an order requiring the respondent to deliver to the Taoiseach a copy of the report, and an order requiring the respondent to amend the report and deliver the amended copy to the Taoiseach. The unusual nature of some of the reliefs sought, and the difference of approach in the various judgments in the Court of Appeal, are a further indicator of the relative novelty and difficulty of the issue arising in this case.

26 This court granted leave to appeal on a limited number of grounds, as follows:-

> (a) Whether Mr. Shatter's claim is justiciable in the circumstances in which and/or at the point in time at which it was initiated.
>
> (b) The applicability and scope of fair procedures and constitutional justice to the task of the kind undertaken by Mr. Guerin, and the nature of the requirements imposed thereby. Whether or not the judicial review amounted to a collateral attack on the decision to establish a commission of investigation, and in particular, an attempt to have Mr. Shatter excluded from the terms of reference of such commission.
>
> (c) Whether or not the duty to make a full disclosure when seeking leave for judicial review continues to have force as a legal principle, and if so was it breached in this case by the allegation of bias against Mr. Guerin.

Although the grounds are set out under three headings, the issues raised are probably four in number, and fall naturally into two categories. The first is concerned with issues of principle relating to justiciability and the applicability of fair procedures to the task conducted by the respondent, and the second involves consideration of discretionary grounds for refusal of relief by way of judicial review, namely collateral attack and non-disclosure. It is convenient to deal with the latter discretionary issues first, before turning to the issues of principle.

The allegation of bias

27 Among the grounds upon which the applicant sought and obtained leave to seek judicial review was an assertion that the report was vitiated by objective bias on the basis that the respondent had been a member of the Professional Practices Committee of the Bar Council, which committee had openly criticised provisions of the Legal Services Regulation Bill, which had been promoted by the applicant in his capacity as Minister for Justice and Equality, and with which legislation he contended he was publicly identified. The respondent pointed out in reply that this was simply factually incorrect: the Professional Practices Committee had not made submissions in relation to the Legal Services Regulation Bill, and he personally had no involvement in any submissions or public comment related to the provisions of that Bill. This is confirmed in a supporting affidavit sworn by the Director of the Bar Council. The

applicant did not address these matters in his comparatively lengthy affidavit in reply to the respondent's affidavit. In correspondence, his solicitors indicated, however, that the allegation was withdrawn. The respondent's representatives complained that this was inadequate, and demanded that the applicant address the matter on affidavit. Finally, it was dealt with in the following way:-

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

28 The High Court (Noonan J.) criticised the approach of the applicant and would have treated it as a ground sufficient in itself to disentitle the applicant from relief. The Court of Appeal considered that the High Court was entitled to be critical of the applicant, that the applicant "reached too quickly" for the allegation of bias, and that its withdrawal could have been more gracious. However, the learned President considered that this was not in itself a ground for refusing relief, observing at para. 100 of his judgment that:-

> "[w]hatever legitimate criticism may be levelled at Mr Shatter for jumping to unfair and unjust conclusions, a court should be very reluctant to withhold the protection of human rights as guaranteed by common law and the Constitution because the person was too ready to jump to an unfair conclusion in order to explain how or why another person is alleged to have committed a wrong. Yes people should have behaved fairly, reasonably and moderately, but that is not always the case. Law and justice and protection of human rights do not exist only for those who are moderate, careful and reasonable or ready to apologise when they should do so."

29 I fully agree with the learned President that the obligation to do justice is not limited to those who are moderate or reasonable. To paraphrase the distinguished historian A.J.P. Taylor, history (and I would add law) would be easier if the victims of injustice were not sometimes unreasonable and unfair. But the purpose of the administration of justice is not simply to identify a successful party: the obligation to hold the balance of justice between the parties may mean that it is necessary to identify the extent to which a party is entitled to succeed, and what, if anything, may be said in favour of the losing party.

30 Here, there is no doubt that the applicant's behaviour deserved criticism, at a minimum. The court was entitled to expect much more from a distinguished citizen who had held high office, who, as a solicitor, had been an officer of the court, and who, moreover, was complaining about the damage done to his own reputation because of a lack of care and fairness in the approach of the respondent. An allegation of bias against a decisionmaker or other person performing a public function is one which should not be lightly made. Bias is an ugly allegation, and the label can cling once applied. Care should be taken to establish that there is a sufficient factual and legal basis to make the claim, in particular given the divergence between the colloquial understanding of the term, and, for example, the sometimes subtle distinctions in the law relating to objective bias. Here, the allegation was not made in the heat of the moment shortly after the delivery of the report on 6 May 2014, and the traumatic events for the applicant which succeeded it, but in an affidavit sworn nearly three months later, on 29 July 2014. As was observed in the Court of Appeal, the allegation was carelessly made and gracelessly and belatedly withdrawn. But even if there had been a factual basis for the assertion relating to the respondent's membership of the committee, it was a flimsy matter upon which to mount such a serious allegation. In a democracy, it must surely be possible to criticise legislation proposed by a government without thereby becoming disentitled from reporting or adjudicating on a matter involving a member of the government in relation to an issue which had no connection to the subject matter of the proposed Bill. Litigants should not feel that they are entitled, without penalty, to include unsubstantiated allegations in their case, particularly those which combine the maximum offence with the minimum merit. In my view, this was something that required to be clearly addressed, and which could perhaps justify the court in withholding some portion of the costs from the applicant, if he had been otherwise successful.

31 However, the fundamental question is whether this conduct on the part of the applicant disentitled him to relief to which he was otherwise entitled. There are cases in which conduct is so egregious that it can be said that a party is no longer entitled to seek relief from the court. However, these cases are extreme, and involve conduct which is so duplicitous that it can be said that it is tantamount to abusing the court's process. There are, however, few examples of cases in which a court has taken the extreme step of refusing relief on such grounds. Even if a court considers that conduct must be deprecated, it should consider whether other steps may suffice to mark such conduct, short of dismissal of proceedings. Such steps might include a penalty in costs, or setting aside *ex parte* relief while allowing the case to proceed. The obligation to make a balanced judgment may mean allowing a party relief to which they are entitled as a matter of law, while identifying clearly those areas in which their behaviour deserves criticism. Here, I am quite satisfied that the Court of Appeal was correct to conclude that, however unworthy the allegation, and however tardy and graceless its withdrawal, it was not in itself grounds for refusing substantive relief that was otherwise required as a matter of law. There was no suggestion that the allegation was deliberately made for a collateral and improper purpose; the allegation was not a central feature of the claim; it is plain that the applicant was entitled to seek relief; no order was obtained altering the status quo on foot of this allegation, or indeed by the application more generally, since it was only an application seeking leave to seek judicial review and thus commence proceedings; and, finally, the allegation was withdrawn and was not proceeded with. It does not, in my judgment, amount to a ground upon which relief should be denied, and I would uphold the decision of the Court of Appeal on this point. In this regard also, I agree with the judgment of Charleton J.

Collateral attack

32 The respondent contends that the proceedings ought to be dismissed because they represent a collateral attack on the establishment of the O'Higgins Commission. This contention is based on the provisions of para. 38 of the applicant's grounding affidavit, in which he complained that a consequence of the report was that the issues would "unnecessarily and unfairly" form part of a commission of investigation, and on further correspondence between the applicant's solicitor and the then Taoiseach, in which the applicant sought to prevent the inclusion of the term of reference referred to in para. 21 above in the terms of reference of the O'Higgins Commission by asserting that respect for the separation of powers required the government to avoid an inquiry on that issue while the proceedings were pending. Subsequently, the applicant also sought to prevent the matter being debated in the Dáil in correspondence with the Ceann Comhairle, on grounds, once again, that the proceedings were before the courts and could not be discussed in the Oireachtas. These were both extraordinary claims, particularly coming from a parliamentarian and a former member of the executive, since they sought to restrain both those organs from performing their constitutional functions. Furthermore, the claims were, in my view, wholly misconceived. It cannot be said that the government's decision to establish a commission of investigation and set its terms could be said to be legally contingent upon the validity in law of the Guerin Report, or aspects of it. Indeed, if that were the case, then ironically the applicant's success in the Court of Appeal might, as a consequence, be said to have undermined

the validity of the O'Higgins Report, which vindicated him. However, as the debate in the Court of Appeal on the remedy showed, there was a significant limit to the consequences of even a successful claim, and even if it was established that the respondent had not afforded sufficient fair procedures, this would not undermine the validity of any decision to establish a commission of investigation.

33 However, no attempt was made to restrain either the executive or the legislature from proceeding. It is not the first time that more extravagant claims have been made in correspondence than are pursued in litigation. Furthermore, whatever comment may be made on the correspondence on the applicant's behalf with the Taoiseach and the Ceann Comhairle, I do not think it can be said that the proceedings can be characterised as an impermissible collateral attack on the establishment of the O'Higgins Commission. Rather, it might be said that the proceedings*, bona fide* and justified in themselves, were sought to be used to further protect the applicant's position by seeking to inhibit other constitutional organs from performing their functions. However, I do not think that the correspondence, misguided though it was, could itself disentitle the applicant from relief. I would therefore uphold the decision of the Court of Appeal on this point.

34 The issues of justiciability, amenability to *certiorari* and the other prerogative writs, and fair procedures more generally, are all closely connected, and the considerations involved under each heading tend to blur. However, it does seem to me that Finlay Geoghegan J. was correct to exclude from any consideration the matters related to the political fallout (dramatic though it was) which followed upon the delivery of the report, including the resignation of the applicant. While the applicant is fully entitled to feel aggrieved (particularly in the light of his exoneration by the O'Higgins Commission) and to make reference to these events by way of background, they cannot in themselves determine the legal issue. The respondent's report was not sought as either a legal or even factual precursor to any question in relation to the applicant's position. A minister holds office only so long as the Taoiseach of the day wishes him or her to do so. Politics is a notoriously unpredictable business, where focus moves quickly from one issue to the next. Criticism of office holders is the standard currency of public discourse. It is not for the court to assess the significance of the references in the Guerin Report of which the applicant complains or the appropriateness of any steps taken by any of the parties thereafter. As a matter of law, the report must be justiciable, and fair procedures would have been required equally if no step was taken on foot of it, or if, for example, the government had maintained the position that the matter was one to be fully investigated by the O'Higgins Commission then being set up. It is indeed a useful test to consider whether, if that had occurred but the applicant had nevertheless sought to institute these proceedings, how they might have been analysed. Accordingly, I agree that the subsequent events outlined above should not be allowed to affect the legal analysis under these headings one way or another.

Justiciability

35 This case has been strongly contested on both sides, with a large range of arguments deployed. Sometimes the arguments overlap, or the factual matters are deployed to support different but closely related arguments. As I understand it, 'justiciability' in this context really means the amenability to judicial review of the respondent's report. It is clear, for example, that the Guerin Report is justiciable in the sense that it could be the subject of private law litigation, for instance in relation to defamation. However, the preliminary question sought to be raised here is whether the report comes sufficiently within the field of public law so that judicial review might be sought, and some or all of the remedies available might be invoked. This is an important threshold issue, because it is a necessary starting point for any argument that fair procedures applied. In the judgment he delivers today, McKechnie J. makes certain observations on the broader concepts of justiciability, and what he describes as judicial restraint. I do not think it is necessary to consider these matters here, since they do not arise for consideration in this case, and, accordingly, I hesitate to express any views upon them. However, judicial restraint, like justiciability, is a term which can be used to convey a number of very different meanings. In my view, where it may be properly applied, it is not the exercise of some broad discretion derived from some ill-defined judicial sense of propriety, but rather a constraint to be deduced from the terms and structure of the Constitution.

36 The respondent argues that the retention of independent senior counsel to furnish a report of this type is akin to the retention of counsel or other experts to advise on matters and even report upon them. It is a relationship in private law, and the fact that the executive or a government department may often be the client does not make any such relationship the subject of public law and judicial review. Furthermore, the respondent argues that the government would simply be unable to perform its functions if it was not in a position to ask for reports on matters, whether from civil servants or others. None of that is or ought to be justiciable in public law. Such reports may be the subject of litigation in private law in the same way as reports commissioned by private bodies may be the subject of litigation. The citizen's right to a good name is protected by the general law of defamation. If a report was also amenable to judicial review, and was in that sense justiciable, it would not only have consequences for the review of reports actually undertaken, but also for the procedures to be adopted in advance, so that it would be difficult, if not impossible, to carry out the work of the departments of government.

37 In my view, it is necessary to address something which has not been discussed at length in the judgments to date, or indeed in the submissions of the parties: that is, the legal nature of the task which the respondent was set. His function is not created or regulated by statute, and nor is there any developed case law on the nature in law of his function. To that extent, the inquiry can be correctly described as *ad hoc*. Although not mentioned in the text of the terms of reference or the Guerin Report, the exercise was described in argument as a 'scoping exercise'. This is a term which has become much used in recent years, but which has no defined meaning in law.

38 The roots of that exercise may be found perhaps in the developments which followed the landmark decision in *In re Haughey* [1971] I.R. 217. The requirement to establish an inquiry, whether a tribunal under the Tribunals of Inquiry (Evidence) Act 1921 to inquire into matters of urgent public importance, or under broadly similar bespoke provisions such those contained in the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act 1970 at issue in *In re Haughey*, can give rise to a number of conflicting requirements. There is a need for an independent, comprehensive report, which will, it is hoped, definitively address a matter of public controversy. But since the matter is one of urgent public importance, there is also a desire that it should do so speedily. These demands pull in different directions. As Ó Dálaigh C.J. observed in the introductory words of the passage at pp. 263 and 264 of the report of the judgment in *In re Haughey* cited above, no court is unaware that the right of an accused person to defend himself (or herself) may add to the length (and, it might be added, the cost) of the proceedings. The procedure required for a tribunal of inquiry under the Tribunals of Inquiry (Evidence) Act 1921, which is perhaps the most elaborate and important form of public inquiry, can sometimes lead (and as a matter of history has led) to hearings which are both lengthy and costly. The rationale for the requirement for the fundamental fair procedures identified in *In re Haughey* was the constitutional protection of the right to a good name, and the fact that a public accusation would be made by witnesses under privilege, which meant that they would not be amenable to an action in defamation. It followed that by the same token, a person could not be criticised or condemned in a report on the basis of any such evidence without also being entitled to the procedures identified in that case, namely to be supplied with the evidence in advance, to be permitted representation, to give evidence and to cross examine. This much was clear, but the procedures necessary could give rise to collateral difficulties. The development of commissions of investigation under the Commissions of Investigation Act 2004 was intended to minimise to the greatest degree possible the amount of evidence which it was necessary to give in public, and therefore allow a more streamlined procedure. One purpose of a report such as that which the respondent was requested to undertake is, as I

understand it, to provide a precise focus and reduce the risk of long-running, expensive and unsatisfactory hearings, sometimes involving evidence on matters which are not truly in controversy. If the limited matters which need to be the subject of an inquiry can be identified, and assistance in the nature of focussed terms of reference can be provided, it may be possible to limit the scope, and therefore the length and cost, of a commission of investigation, or indeed a public inquiry.

39 Declan Costello J. explained at pp. 554 and 555 of the judgment of the High Court in *Goodman v. Hamilton (No. 1)* [1992] 2 I.R. 542 that the appointment of a person by the government to inquire is an exercise of the executive power which does not require any other action, and can be carried out without reference to any statutory provision. However, only the Oireachtas, as the representative of the people, can clothe an inquiry with powers of compulsion akin to those enjoyed by courts. Statutory authorisation, whether under the Commissions of Investigation Act 2004, by a resolution of the Oireachtas under the Tribunals of Inquiry (Evidence) Act 1921, or specifically provided for in particular areas (for example, inquiries by inspectors under the Companies Acts) is necessary before a witness can be compelled to attend and give evidence, before an oath can be administered with the consequence that any evidence given can be subject to the possibility of prosecution for perjury, before the production of documents is compelled, and before there can be any mechanism for punishing a party, even indirectly, for behaviour which, if it occurred in court, would constitute a contempt. All of these mechanisms are tools developed in court proceedings which have been found useful in ensuring a full investigation. It follows, therefore, that part of the function of a preliminary inquiry is to consider whether the issues which remain in dispute are matters which require the powers of either a tribunal of inquiry, a commission of investigation, or some other mechanism, or might indeed benefit from such a course, for example, by permitting the hearing of evidence in public. At the same time, such an inquiry also permits an independent approach to the terms of reference, which assists in limiting and focussing an inquiry on those issues for which may be necessary to deploy powers of compulsion in order to be able to provide a definite report. A further important aspect of a preliminary inquiry or report is to identify those issues which are truly in dispute, if any, so as to provide focus for any inquiry, if such is recommended. Those functions, which can often be complex and difficult, in my view, were what in essence was involved here.

40 It must be recognised that the public interest, the demand for specific and urgent answers, and the fact that almost inevitably the issues involved are the subject of real-time political controversy, can mean that there is a tendency for a preliminary inquiry to be presented as something more definitive. This difficulty can be particularly acute where the exercise itself clarifies that there is, in truth, no dispute on the facts. Where this conclusion is arrived at and removes suspicion from a person, no legal difficulty may arise. But caution must be exercised if it is proposed to report a conclusion which is adverse to a person where it is considered that there is no controversy as to the relevant facts. In such a case, there will be no further, more formal inquiry, and the legal character of the report may alter. If, in reality, the report is, either in whole or in part, the final determination on a matter and is adverse to an individual, then it must be established clearly that there is no dispute on the facts before a final adverse conclusion can be fairly reported.

41 It follows from this analysis that the appointment of a person to inquire and report is an exercise of the executive power. Furthermore, in this case, it had been announced by the Taoiseach that the report would be published by the government, and, moreover, would be laid before the Oireachtas. I agree with the observation by Charleton J. at para. 9 of the judgment he delivers, where he concludes that the decision as to whether or not a commission of investigation should be recommended was clearly a matter of public moment. This, therefore, was not merely an exercise by the executive or a department thereof in informing itself or obtaining independent advice. Rather, it was a significant exercise of power, intended to inform the legislative branch, and, indeed, the public. I do not agree that there is any true analogy between a private transaction carried out by the executive branch seeking advice, and the appointment of a person to advise, inform, analyse and report publicly in this manner. The performance of that task comes, in my view, within the field of public law, and is accordingly, at least in principle, justiciable. In *Maguire v. Ardagh* [2002] IESC 21, [2002] 1 I.R. 385, Murray J. observed at pp. 591 to 592 that the Houses of the Oireachtas derived their standing from the Constitution, and an inquiry conducted on behalf of the Oireachtas "deploys a concentrated authority that derives from its role as one of the great organs of government". Accordingly, a committee acting under the aegis of that authority and exercising extensive powers can make an enormous impact on the name and reputation of citizens against whom it makes findings of wrongdoing. While the context is markedly different, nevertheless I do not think that the impact of a report under the aegis of the government and published by it can be discounted. It may not be appropriate to speak in terms of an inquiry of this kind operating *ultra vires*, since it has no *vis*, at least in the sense of a power to compel and, if necessary, secure punishment. However, I consider that a court would be entitled to hear and determine a controversy relating, if required, to the scope of any such inquiry with regard to its terms of reference, and, in a clear case, even to restrain an inquiry which plainly exceeded those terms. It follows that the exercise being conducted by the respondent came within the field of public law, and was, in that sense, justiciable. While it would be a matter to be determined on the particular facts of any case, I would not be inclined to agree that the fact that the subject matter of the report related to the actions or affairs of public bodies such as An Garda Síochána or the Department of Justice, or that the matters were otherwise of public controversy, would of itself bring the matter within the field of public law, or indeed have any real weight in determining that issue. The critical test is the source, rather than the object, of the exercise of any powers. That is what, in my view, justifies the conclusion that the act is amenable to judicial review.

Fair procedures

42 Both Finlay Geoghegan and Irvine JJ. in the Court of Appeal were plainly concerned by the implications of a decision which might expand an obligation to comply with what was described as fair procedures at a preliminary inquiry stage, particularly where the outcome of the process was the establishment of a commission of investigation entailing an entitlement to a full and elaborate range of procedural protections. It is also plain that if fair procedures had to be afforded to the applicant, then they were not afforded to any other person who was named in the report and in relation to whose conduct a commission was recommended, including those referred to by implication. It also seems clear that, although the respondent interviewed Sergeant McCabe as contemplated and directed by point 2 of the terms of reference, he did not do so by putting to him any adverse evidence, or offering him the opportunity to make submissions.

43 It seems clear that a decision that some (unspecified) procedures were required before the preliminary report was issued could mean that it would be extremely difficult to carry out the task set in any reasonable timescale; would tend to duplicate the task of any commission established pursuant to the recommendations of the report; and would provide significant opportunity for delay and obstruction of the report, and, consequently, any investigatory process. However, Finlay Geoghegan J. was persuaded that some procedures were necessary because she considered that the proceedings affected the citizen's good name. Applying, therefore, the language of Hederman J. in *Murtagh v. The Board of Management of St Emer's National School* [1991] 1 I.R. 482, at p. 488:-

> "Judicial review is a legal remedy available on application in the High Court, when any body or tribunal having legal authority to determine rights or impose liabilities, and having a duty to act judicially in accordance with the law and the Constitution acts in excess of legal authority or contrary to its duty,"

44 Finlay Geoghegan J. considered that the process undertaken here satisfied the test because it affected the applicant's right to a good name and reputation, and it represented a determination of that right as the "final view formed by the respondent on the matters he was required to examine, review and assess". Later, she said "the report finalised the process the respondent was asked to undertake. It was final in that sense." If it was not amenable to judicial review and the declaration sought and granted in the Court of Appeal, the applicant would be left without a remedy in relation to his good name. Thus, at para. 33 of her judgment, she concluded that this justified the finding that the proceedings were amenable to judicial review in the "limited and perhaps exceptional circumstances of the case". She continued:-

> "It is of course necessary that judicial restraint is exercised in any expansion of the type of inquiries, processes or resulting reports which may be the subject of judicial review. However the above approach requires that both the process and its outcome are directly concerned with and have the ability to directly affect the constitutionally protected rights of an applicant to his good name and reputation. It is in those limited and perhaps exceptional circumstances that it appears to me correct to accept as amenable to judicial review the Report herein. If it is not so then the appellant, if he is correct in the claim that he seeks to make is left without a remedy to vindicate his good name as is required by Article 40.3.2 of the Constitution. This would be contrary to the well know dicta of Ó Dálaigh C.J. in *State (Quinn) v. Ryan* [1965] I.R. 70 at 122, that the courts are the custodians of the rights assured to individuals by the Constitution with the necessary powers to vindicate the rights."

The right to a good name

45 The good name of the citizen is one of the personal rights the State is obliged to defend and vindicate. However, there is no rule that before any statement is made which is critical of an individual, and which may be thought to reflect on their good name, he or she must be afforded a hearing and an opportunity to make representations. In most contexts, the legal protection of a person's good name as required by the Constitution is to be found in the law of defamation. A media organ, no matter how immense its power, is not required to afford a person *Haughey* rights, or an opportunity to comment on a draft before publication. Some commentary which is damaging to a citizen's good name may not be actionable without proof of malice, or even at all, such as a statement made on an occasion of absolute privilege. It is not the case, therefore, that the Constitution requires that even false comments which are damaging to a person's reputation should always give rise to a remedy at law. When, however, steps are taken by the State or one of its organs, in public or otherwise, which result in a determination adverse to the reputation of a citizen in a manner which is immune from action, then it may be said that the Constitution requires certain procedures to be followed before the State or anybody exercising power under or by authority of the State comes to a conclusion and makes a determination adverse to a person's good name. It is well to recall also that in *In re Haughey* [1971] I.R. 217, the evidence intended to be called amounted not merely to criticism, but to an accusation alleging the commission of a serious criminal offence. The question is whether the obligation to adopt *Haughey* procedures (or some less elaborate version thereof) is triggered here by the comments referred to above, the conclusions arrived at in respect of points 6 and 7 of the terms of reference, or perhaps both.

46 As often occurs, difficulty may arise as a result of the manner in which the question is posed. The question of whether 'fair procedures' are required instinctively suggest a positive answer. Who can object to being fair? But fair procedures in legal terms has come to signify a portmanteau description of certain sometimes elaborate procedural protections akin to court procedures, such as prior notification of evidence, legal representation, cross examination of witnesses, and the opportunity to give evidence on one's own behalf. The true question might be whether constitutional fairness requires that certain procedures are afforded before a preliminary inquiry recommends the establishment of a commission of investigation into some aspect of the conduct of a person. This must be viewed in the context that any commission of investigation will itself be obliged to afford elaborate procedural protections to the individual before coming to its conclusion.

47 In this regard, I agree with the approach of those members of the Court of Appeal who tended to discount what was merely commentary and focus upon the conclusions of the report, and, in particular, the recommendation of a commission of investigation. If even isolated comments can trigger a requirement of procedural steps, and invalidate a report for a failure to provide such procedures in advance, this would set a very low bar, and it would become easy for the potential subject of an inquiry to obstruct it. But it must be recognised that even the more cautious approach of the Court of Appeal may have surprising consequences, which should give pause for thought. It would seem to follow for example that if the respondent had emphasised the entirely preliminary nature of the exercise, even more than he did at paras. 3.3 and 3.4, and had furthermore refrained from any commentary, merely expressing his conclusion that on a review of the documentation there was cause for concern as to the response of the Department of Justice to Sergeant McCabe's complaints, and that accordingly a commission of investigation should be established, it would seem to follow that that report would still be amenable to judicial review, and, more importantly, to a conclusion that it was reached without fair procedures as required by the Constitution. The logic of the decision of those judges in the Court of Appeal who approached the case in this way is that a *recommendation* that a tribunal or commission of investigation be established, which itself must accord full procedural fairness, may nevertheless reflect on a person's reputation in a manner that itself requires unspecified fair procedures. This in itself is a troubling conclusion.

48 I recognise that it can sometimes be a useful exercise to attempt to isolate the legal issue so as to allow a decision to be made as a matter of principle. Here the Court of Appeal proceeded on the basis that, since no formal procedures had been afforded to the Minister before the recommendation was made, the only question here was whether some such procedure was required by constitutional fairness, and it was not necessary to determine the exact procedures required, noting, indeed, that the applicant's case altered in this respect. Thus at para. 58 of her judgment, Finlay Geoghegan J. observed:-

> "Further it is not necessary to decide what would have constituted fair procedures but simply to observe that the cornerstone of the appellant's submission on appeal was that he ought to have been given notice of the intention to include in the Report such critical statements or given a draft of same and an opportunity to make representations thereon. He appears to have contended for additional rights in the High Court."

49 While I recognise the merit of this analytical approach in certain circumstances, I do not think, with respect, it is helpful here. If this court were to conclude that certain procedural protections were required before, for example, a recommendation was made for the establishment of a commission of investigation, then the court ought to be in a position to identify precisely what is required. That would allow the conclusion to be tested in a more comprehensive way. But it is also something that it might be thought the public body or entity involved is entitled to know. If it is established merely that some unspecified procedural protection is required, then somebody retained to report in the future would almost inevitably become embroiled in a dispute as to the nature of the procedures required. In those circumstances, the only safe way to proceed would be to afford the greatest range of procedural protections available, since anything less would not remove the possibility of challenge created by uncertainty as to the extent of the procedures required. For reasons of practicality, but also because it is a useful way to test the conclusion of the Court of Appeal that

the respondent was obliged to afford the applicant (and anyone else) a right to be heard, the procedures required ought to have been identified. Indeed, in this regard, the failure of the applicant to identify clearly the procedural steps required is telling.

50 In this case, it is necessary to be very clear both as to the precise procedures alleged to be required and the reasons for those procedures. The applicant puts his case, as he is entitled to, on an alternative basis. On the one hand, it is contended that in making the comments in the body of the report already referred to, the respondent acted *ultra vires*, and beyond the scope of the inquiry he was required to carry out. In this regard the applicant, with perhaps some merit, contrasts the report delivered by the respondent with the studiously constrained report into complaints of unlawful surveillance of the Garda Síochána Ombudsman Commission delivered by Mr. Justice John Cooke on 4 June 2014, a copy of which is exhibited in the applicant's grounding affidavit. On this basis, it is said that the respondent was entitled to come to conclusions as to the desirability of a further inquiry, but exceeded the limits of his authority in making the comments referred to. On the other hand, it was suggested, and, in due course, accepted by the Court of Appeal that the comments made and conclusions arrived at were within the scope of the inquiry, but could not be arrived at lawfully without affording to the applicant, and any other person affected, opportunities to be interviewed, make submissions, see a copy of the draft report in advance, and perhaps more.

51 A case can often be put on alternative bases, and here the argument could be neatly encapsulated in a plausible way in contending that the respondent ought not to have commented upon or made conclusions in relation to the applicant, but if he did so, he was obliged to afford him certain fair procedures in advance. But it is important to distinguish these arguments. In essence, the difference is highlighted by the question whether a lawful boundary was exceeded when the respondent made certain comments in the body of his report, perhaps most obviously at para. 19.100 ("it is surprising that the Minister appears to have been satisfied by a brief summary ...") and para. 20.11 ("No complex organisation can expect to succeed if it cannot find the means of heeding the voice of a member whose immediate supervisors hold him in the high regard in which Sergeant McCabe was held. Ultimately, An Garda Síochána does not seem to have been able to do that. Nor does the Minister for Justice, despite his having an independent supervisory and investigative function with specific statutory powers ...."), or was only exceeded when he arrived at the conclusion that there was sufficient cause for concern to merit a further inquiry, without affording the applicant the opportunity of contesting such a conclusion in advance, through some procedural steps not precisely identified. Ultimately, however, a claimant must elect for one of these options, and if he or she does not, the court must come to a conclusion on which of the analyses is to be accepted, if the applicant is to succeed. There are serious difficulties here with either course. As already observed, if the Court of Appeal was correct to consider that the making of the recommendation alone reflected sufficiently on the applicant's good name as to trigger a requirement for advance procedural guarantees, then that would have very far-reaching ramifications, and, indeed, would arguably make any preliminary inquiry redundant, since it would be obliged to conduct itself in the same, or similar, manner as any formal commission of investigation or tribunal of inquiry. It would not, therefore, carry out the function intended of delivering a speedy report on whether there was sufficient basis for concern to establish a formal inquiry. On the other hand, if a conclusion was permissible without triggering procedural requirements, then it is implicit that an otherwise permissible and lawful exercise changes its nature because of certain statements made in a lengthy report, which also contains qualifying comments such as those contained at para. 3.3, and comes to a conclusion merely that a further inquiry (involving significant procedural protections) is necessary. This necessarily involves an evaluation of the comments themselves, having regard, in particular, to the overall context of the report. It follows, therefore, that if such a boundary exists, it is one which is difficult to identify, and, moreover, on which readers may reasonably differ. It is also one which, in any event, can only be determined in retrospect. It may be a counsel of prudence to avoid commentary which may give rise to this test, but that itself cannot answer the question whether in any given case a comment alters the nature of the report so as to trigger the procedural requirements. It is in part because of these difficulties that it is, in my view, necessary to consider carefully the legal nature of the exercise here, which, as already adverted to, is not a simple task.

52 Where a preliminary inquiry is established to consider if a further formal inquiry is necessary, and suggests the terms of that formal inquiry, the closest analogy in law may be those cases which consider whether the procedural steps are necessary before a decision is made which has the consequence of initiating a process which itself is required to be conducted in accordance with elaborate procedural guarantees. Some examples include a decision by the Director of Public Prosecutions as to whether or not to initiate a prosecution, or the decision of a regulatory or disciplinary body that there is a sufficient basis to commence disciplinary proceedings. Such a decision can in itself be said to be damaging to a person's reputation, but it is understood to be only part of a process which will include proceedings which offer an opportunity to the affected person to have a full hearing, with all attendant procedural guarantees, and therefore a comprehensive opportunity of vindicating their reputation. A decision is made that an inquiry, trial, or some other procedure is necessary. I consider that the general principle is well expressed at para. 8-055 of the latest edition of *De Smith's Judicial Review* (8th edn., Sweet & Maxwell, 2018):-

> "[a] person conducting a preliminary investigation with a view to recommending or deciding whether a formal inquiry or hearing (which may lead to a binding and adverse decision) should take place is not normally under an obligation to comply with the rules of fairness."

This statement was adopted with approval in the recent decision of this court in *Crayden Fishing Company Ltd. v. Sea Fisheries Protection Authority* [2017] IESC 74, [2017] 3 I.R. 785, at p. 804, which emphasised, however, that where there are a number of related procedural steps, the fundamental question is whether the overall process is fair.

53 Here, it is true that the Guerin Report could not of itself trigger a formal inquiry or hearing: that required a governmental decision. However, the respondent was publicly authorised to conduct the inquiry with a view to recommending whether a commission of investigation was necessary, and, as set out at para. 4 above, it had been stated that, if recommended, such a commission would be established. Furthermore, as noted in the extract from *De Smith* quoted above, the principle identified is capable of application where the preliminary investigation is "with a view to recommending…whether a formal inquiry should take place" (Emphasis added). This clearly implies that it is not necessary that a body be fixed with a legal power to decide that an inquiry should be set up, or have the power to set up such an inquiry. In this case, the respondent was charged with advising whether a further inquiry should be established. That fixed the nature of the task he was to carry out and set its limits. I do not agree, moreover, that the official public statement by the Taoiseach that a report would be published and laid before the Oireachtas, and that if a commission of investigation was recommended would be established, is to be ignored or treated as merely political, as McKechnie J. would. It is noteworthy that McKechnie J. would take account of these matters in considering if the matter fell within the field of public law, and whether it constituted a "determination", and I see no reason to discount it in considering other aspects of the exercise, in particular the nature of the task the respondent was to perform, and the procedures which were applicable. The Taoiseach's statement was relevant to the task, and therefore to its legal nature and what was required as a matter of law. If, of course, the government did not comply with its promise, then that might have had consequences for the report: in that situation, it might have been said that the report was no longer preliminary, and this may have rendered it more vulnerable to judicial review, since the procedures adopted might not have been suitable for a final report. However, that would flow from the subsequent failure of the executive to establish the inquiry, rather than any a priori breach of procedures on the part of the respondent. The test, however, of the nature of the task (and consequently the procedures which should be applied) must be capable of being determined at the outset, on the respondent's appointment. Here,

a commission of investigation was recommended, and was established. Once it is accepted, as it must be, that different procedures apply to a preliminary report with a view to recommending or establishing a full inquiry on the one hand, and those appropriate to a final report on the other, it would be strange to hold that a preliminary inquiry recommending the establishment of a commission of investigation (which was in turn established), and adopting procedures appropriate to such an exercise, could nevertheless be invalidated because it might have been (but was not) a final report.

54 One useful test applied in the Court of Appeal as to whether a particular process falls into this category, or rather is a form of inquiry which itself requires the procedural guarantees, is whether the process can be said to be 'decisive' or 'determinative'. This has more precise application to the question of the availability of the remedy of *certiorari*, but I agree it can cast useful light on this issue. Where a process makes a binding decision in relation to some rights or interests, it will be clear that the test is satisfied. It is more difficult, however, in the context of the right to a good name of a citizen. It is rare to seek to impose upon a bare report the procedural obligations which are familiar where determinative decisions are made. However, where the report resolves a dispute of fact which, as a matter of law, or even practicality, involves a determination of rights, whether by a statutory or other decision-maker, as in *The State (Shannon Atlantic Fisheries Ltd.) v. McPolin* [1976] I.R. 93, the report may be subject to the requirement of fair procedures and will be amenable to judicial review if it fails to afford them. The same conclusion may also perhaps be arrived at where the report has the status of a 'determination' by reason of being, and being intended to be, the only official and accepted account of a disputed matter. This appears to be the basis of the High Court decision in *De Róiste v. Judge-Advocate General* [2005] IEHC 273, [2005] 3 I.R. 494.

55 Here, the Court of Appeal found that, notwithstanding the terms of reference and the statements contained at paras. 3.3 and 3.4, this report was itself determinative of rights, that is, the applicant's right to a good name. This was because it was said to be final as far as the respondent was concerned, and because, in consequence, the applicant would have had no other method of vindicating his constitutional good name. If correct, then the conclusion that procedural guarantees in advance of a determination were required must follow. However, I respectfully disagree. In most if not all the cases contemplated in the extract from *De Smith* set out at para. 50 above, the preliminary investigation or report will be the final action of the investigator involved. The further formal inquiry may, and often will, be conducted by a different person or body. The impugned report or decision is not, however, determinative in the sense required, because it is not the last word, and accordingly does not determine or define the rights of the individual as far as the State, a judicial authority, or a regulatory body, is concerned. The reason why the Guerin Report was considered capable of affecting the applicant's reputation was that it came with the authority of the State. But it was not, and was not intended to be, final or determinative as far as the State was concerned. If indeed the Guerin Report was itself to be the final word, then whatever pressures of time, and however limited the scope of a review, it would have been required to adopt sufficient procedural steps to comply with the requirements of fairness to the applicant and any other party affected. But the final and, in that sense, determining word was to be that of the commission of investigation, and not the Guerin Report. That indeed is apparent from the express terms of paras. 3.3 and 3.4, and the qualified language used even in the challenged paragraphs, which refers to what "appears" to be the case "from the papers I have seen". Indeed, it is implicit in the very finding which is the subject matter of the declaration granted by the Court of Appeal: the respondent did not purport to find that the investigation into the complaints made by Sergeant McCabe by either the applicant or the Department of Justice was inadequate: rather, it was concluded (at para. 19.103) that there was "cause for concern" as to the adequacy of the investigation, and (at para. 19.104) that the matter "warranted further inquiry in the public interest".

56 A closely related issue arises in relation to question of the opportunity for vindicating the applicant's good name. Of course, if the Guerin Report was the State's final word on the applicant's reputation, then it could also be said that he did not have the opportunity of vindicating his good name. But the O'Higgins Commission, recommended by the respondent and established by the government in due course, not only offered the possibility of vindicating the applicant's good name, but provided a more comprehensive and complete remedy than anything that could be provided by way of judicial review of the report for failure to follow particular procedures. This is true in theory, but is also illustrated vividly by the facts of this case. If fair procedures were indeed required, as found by the Court of Appeal, then the remedy provided was a declaration that the conclusion reached had been arrived at in breach of fair procedures. Such a remedy could never address the merits of the conclusion, and, in theory, it would be open to the respondent or some other decision-maker to revisit such proceedings and still come to the same conclusion. It could be said that the error was procedural rather than substantive. It is one of the ironies of this case that, had the proceedings removed the basis for any commission of investigation, at least concerning the applicant, the applicant would not have received the exoneration on the merits that the report of the O'Higgins Commission contained. That, of course, was the outcome in this case, but it illustrates clearly, in my view, why it cannot be said that the applicant had no other means of vindicating his good name. I cannot agree, therefore, that these factors have application here, or justify what was accepted to be the unusual outcome that the report was impugned for failure to afford fair procedures to the applicant.

Conclusion on procedures required for a preliminary report

57 I conclude, therefore, that a person charged with conducting a preliminary inquiry with a view to making recommendations as to the establishment of a more formal inquiry, which itself will be conducted in accordance with fair procedures, is not required to afford such procedures, whether by way of legal representation, submission, cross-examination, or some process of submitting a draft report to interested parties and receiving comments thereon before delivery. This is not to say that it is not a counsel of prudence to take steps to engage with all interested parties as fully as possible before making any conclusion in relation to them, not least with a view to strengthening any factual findings. A failure to do so may undermine the cogency and persuasiveness of the report as a matter of fact. But it is not the case that, before concluding such a report, in the normal course, the person charged with making such a preliminary inquiry is obliged as a matter of law to observe certain procedural steps, whether by way of permitting submission, representation, cross-examination, hearing or otherwise, before coming to that conclusion. If this is so because of the nature of the report, and having regard to the legal nature of the task undertaken, then it cannot subsequently become necessary because of the events which occurred in the political arena thereafter.

58 However, it must be recognised that this outcome depends in part on an analysis of the nature of the task the respondent was asked to undertake. As already observed, there was no pre-existing clarity in either statute or administrative practice which showed that the legal nature of that task was clearly established and understood. It is easy for the terms of reference to blur the legal distinctions, and invite, or at least encourage, findings which are essentially final in nature, without the full range of fair procedures that should be necessary before a final conclusion is published to the world with the authority of the State. Furthermore, the task of identifying those issues which are not in dispute assumes a clear dividing line between issues which are contested and those which are not, which may more obvious in theory than in reality. It is important that it is understood that the final, public reporting of adverse conclusions requires that fair procedures are accorded to the person the subject matter of the report. In some cases, that may have to be addressed at a preliminary stage. However, where it is clear that the preliminary recommendation is to do no more than recommend the establishing of a commission of investigation, then that process does not require any particular procedures in advance of such a recommendation. This, as I understand it, is also the view taken by Charleton J.

59 It is necessary now to turn to the question whether the comments made by the respondent of which the application complains were nevertheless outside the proper boundaries of the function the respondent was required to perform. In the first place, I consider that some considerable latitude should be afforded to the respondent or any other person in a similar position in the interpretation of their task and the manner in which they perform it. However, in my view, on a careful construction of the terms of reference, much assisted by the extensive consideration given to them in these proceedings, the respondent was required to review, investigate and report his conclusion as to whether there was sufficient cause for concern as to whether all appropriate steps were taken to investigate and address the complaints made by Sergeant McCabe, and, if so, to recommend what further action in the nature of a further inquiry was necessary. While this therefore set the boundaries of the task assigned to him, it does not follow that the court would condemn any statement which in hindsight may have appeared to go further. That would be a both impractical and undesirable exercise in micromanaging in retrospect a task which was intended to be carried out at considerable speed. It is to be expected, moreover, that the authors of reports may express views and make comments without thereby giving rise to subsequent review by the High Court. Many judgments contain commentary and statements not necessary or central to the task of resolving the particular dispute inter partes, and it is rarely the case that an appellate court would address such matters. The test must be a broad one and should consider what, when taken cumulatively, has been said which shows that the respondent went decisively beyond the boundaries of the task set, and, moreover, whether it has been expressed in a way which has adversely affected the name of a citizen. Even then, a court should rarely, if ever, intervene where it is apparent that the interested party has been afforded an opportunity of addressing the issue and that his or her views or contentions are reflected in the report.

60 That is a difficult test to apply in this particular case. It is apparent from the extracts set out earlier in the judgment that the respondent was careful to express himself with appropriate caution and qualification on number occasions in the course of his report. Furthermore, no complaint is made about the vast majority of what was said by the respondent what was a lengthy and comprehensive report. Even in the passages of which the applicant complains, the respondent is often careful to observe that his report is made on the basis of documents obtained (and, where appropriate, the absence of identified documents). At para. 3.4, in the context of the Cavan-Monaghan segment, it is expressly stated that any views expressed on factual matters are only on the facts as they appear to the respondent from the files that he received. At para. 19.99, the commentary is qualified by saying "so far as I can tell". Para. 19.95 contained the qualification "from the papers I have seen", and this formulation, whether by reference to papers or records, is repeated at paras. 19.97 and 19.98. In relation to the issue which is of most significance from the applicant's point of view, the respondent was careful to state at para. 19.60 that he had not seen any memorandum or any internal departmental minute. Again, at para. 19.101 it is recorded that he has not seen any internal record of a decision made and was "unable therefore to shed any light on the reasons for the approach adopted".

61 In my view, it cannot be a case of simply taking one or two statements out of context and inviting a court to express a conclusion in the hope of obtaining a determination adverse to the report, no doubt with a view to undermining the credibility of the entire report. It is necessary, therefore, that the court should only intervene when it can be said that the report has clearly exceeded the boundaries set in a manner which was unfair to the individual who was the subject of the commentary. In exercising its discretion, this may be an appropriate point at which to take into account the consequences which followed in fact.

62 Applying that approach, it appears that sometimes alongside suitably qualified statements, and sometimes within the same paragraph, the respondent expressed more apparently definitive conclusions. Thus, at para. 19.95 it is said that it is a "different matter to be satisfied by that response", which, I think, necessarily implies that the Department and the Minister were satisfied by the response of An Garda Síochána, and, furthermore, ought not to have been. In the same paragraph it is said "it was clear that the only action taken on foot of the confidential report was to seek a response from the Commissioner". Again, at para. 19.96, a conclusion is stated to the effect that the process of determining Sergeant McCabe's complaint "went no further than the Minister receiving and acting upon the advice of the person who was the subject of the complaint". At para. 19.100, it is stated that, had the Commissioner's response "been probed and tested in any reasonable way, further important questions would have come to light", which again implies that it was not probed or tested in a reasonable way. In the same paragraph, surprise is expressed that, having been informed that that complaints had been investigated internally by An Garda Síochána, "the Minister appears to have been satisfied by a brief summary of the conclusion of the investigation rather than seeking a copy of the investigation report for a review". Again, at para. 19.101, the conclusion is stated that "for whatever reason the approach adapted had the result that there was no independent investigation of Sergeant McCabe's complaint". Finally, para. 20.11 contains the conclusion of which the applicant most complains, that, in effect, the Minister, despite having an independent supervisory investigative function with specific statutory power, did not appear to have been able to hear the voice of a member of An Garda Síochána such as Sergeant McCabe.

63 I appreciate that these matters have been scrutinised minutely in three courts, at a level of detail and with a degree of precision which is far beyond the attention paid by even the most conscientious reader. Yet even looked at through the eyes of a person encountering the report for the first time, I think that the overall thrust of these passages would be understood as expressing conclusions. Furthermore, the conclusions expressed were, in my view, sufficiently beyond the scope of the preliminary inquiry which the respondent was to carry out to warrant a determination by the court. The conclusions expressed, and the impression thereby created, were damaging to the reputation of the applicant. Even then, if they had been preceded by an invitation to the applicant to express his views, I do not think it would have been appropriate to grant any relief. The terms of reference were not clear-cut, and so long as a person in the position of the applicant had been afforded an opportunity to express his views and have them reflected in the report, I do not think the applicant could complain, or that a court should intervene. In this respect, I agree with the judgment of Charleton J. But this step was not taken, and I consider accordingly that it is appropriate that the court should declare that the expressions of conclusions adverse to the applicant, contained in particular in paras. 19.101 and 20.11 of the report, exceeded the scope of the inquiry the respondent was authorised to carry out.

64 I do not think that any more elaborate declaration would be appropriate, and still less would I consider that any of the more extravagant reliefs sought by the applicant should be granted. This, it should be remembered, was a very unusual case. It is indeed unlikely that the limits of the inquiry would have been subject to such searching scrutiny if not for the consequences of the applicant in the political world, which could not have been foreseen. It is also clear that the respondent carried out his task with great thoroughness and admirable expedition. Furthermore, the position of the Minister was not central to the inquiry, and was, if anything, peripheral to it. The letter to the department official nominated as a liaison for the inquiry on 11 April 2014 made it clear that the respondent was concerned that an apparent absence of a documentary trail, and the failure to respond to that letter contributed, in my view, to the impression the respondent appears to have formed. Furthermore, the division of functions within the Department, and an apparent lack of clear communication with the Minister, contributed to the difficulty, particularly when it must have appeared appropriate for the respondent to maintain the proprieties of communication with a Minister of the government through his department. To some extent also, the respondent was encouraged to express conclusions by some ambiguity in the terms of reference, the approach of the government, and the absence of any clear legal definition of the function and role he was to perform and its limits. In the future, it would be very desirable that there be absolute clarity as to the legal nature of the tasks to be performed, and its limits. For all these reasons, I would consider that, while the applicant was entitled to advance the claim, he should succeed on a relatively narrow and slender basis, which should be reflected in the declaration made.

Decision
65 (i) An unfounded and unjustified allegation of bias and its grudging withdrawal are matters which may and perhaps should have consequences in proceedings, but in this case do not in themselves amount to a sufficient ground requiring the court to refuse relief to which an applicant is otherwise entitled as a matter of law.

(ii) An assertion that the existence of judicial review proceedings precludes, or even inhibits, the establishment of a commission of investigation or any other inquiry, while erroneous and unfounded, does not in itself amount to a ground upon which a court should refuse relief to which an applicant is otherwise entitled.

(iii) On analysis of the materials available in this case, the respondent was appointed to conduct a preliminary inquiry with the view to recommending to the government whether or not it should establish a commission of investigation, and, if so, the matters into which any investigation should be carried out.

(iv) The appointment of an independent person to carry out such an inquiry, which will result in a report to be delivered to the Oireachtas and published more generally, is a matter of the exercise of public law power, and is not a purely private law matter. The resulting report is in principle amenable to judicial review.

(v) The conclusion that a commission of investigation, or any further inquiry itself obliged by law to afford fair procedures to those affected by it, is warranted, does not amount to a final conclusion in relation to a person's good name such as to itself require that fair procedures are afforded to that person before such a recommendation is made.

(vi) The government, or any branch thereof, could itself conclude that a commission of investigation should be held. That conclusion does not itself require in law any procedures be adopted before the conclusion is arrived at and announced. A prior recommendation to that effect issued by an independent person, where a commitment has been given to comply with such a recommendation, does not normally require more.

(vii) The respondent's recommendation cannot be viewed as the final word in the process reflecting on the reputation and good name of any person, nor is the process the only means of vindication that reputation and good name. The O'Higgins Commission, established pursuant to the respondent's recommendation, provided an opportunity for the vindication of the individual's reputation, and did vindicate the applicant's reputation in fact. It was the final determination, and was thus obliged to comply with fair procedures.

(viii) If the delivery of the respondent's report had not been a catalyst for the resignation of the applicant, it would have been difficult if not impossible to contend that the preliminary inquiry conducted by the respondent in itself required that procedural protections be afforded before it was delivered.

(ix) Here, however, it must be recognised that the immediate consequence of the delivery report was that, after the meeting with the Taoiseach, the applicant resigned his office. The applicant was subsequently exonerated from criticism by the report delivered by the O'Higgins Commission. It is tempting to consider that, had some minimum procedural steps been taken, the respondent might not have made the recommendations which he did in relation to the exercise by the applicant of his ministerial responsibilities, and the applicant would not have been required to resign. That speculation cannot itself determine the legal issue of whether such procedural steps were required as a matter of law.

(x) If the applicant, who was not central to the main thrust of the preliminary inquiry, is entitled to such procedural protection, then all individuals and entities potentially within the scope of the inquiry, whether direct or indirect, would also be so entitled.

(xi) The lack of precision about the procedures which it is said are required is telling. Where no such procedures are specified, it becomes difficult to resist a claim for extensive procedural steps in an other cases. The conclusion that the applicant was entitled to more by way of procedural steps prior to the delivery to the Taoiseach of a recommendation that a commission of investigation should be established would therefore have far reaching consequences, both in terms of the persons who could demand such steps and the particular procedures required.

(xii) The fact that the applicant considered he was required to resign is not a reflection on the lack of fair procedures in the respondent's report, but rather on the fact that the Taoiseach, as a matter of constitutional law and theory, may dismiss a minister or require the resignation of a minister without any process of inquiry, hearing, or subsequent review or appeal. That is both an established feature of the public law relating to the applicant's former position, and a reality of political life. It cannot be a basis for imposing either a rule of general application on the respondent, or requiring a different procedure in respect of recommendations relating to persons in politics.

(xiii) The lack of clarity about the legal nature of any ad hoc inquiry as a preliminary exercise can give rise to undesirable uncertainty both as to the steps required and the legal principles to be applied to such an exercise.

(xiv) It is desirable that the precise legal function of a preliminary inquiry be clarified at the outset on the appointment of a person to inquire. It is also desirable that any person appointed to produce a preliminary report on whether or not a further inquiry is necessary should avoid expressions which suggest that he or she has come to any conclusion on the matters which remain in dispute.

(xv) Certain comments made by the respondent, and in particular those contained in para. 20.11, went further than was necessary to express conclusions on the question of whether a commission of investigation was necessary.

(xvi) While any scrutiny is necessarily conducted in hindsight and after the publication or the making available of a report, if it is apparent from a consideration of comments made and the thrust of the report as a whole that the person appointed to provide a preliminary report has exceeded the proper boundaries of that role, then a court has the power to so declare.

(xvii) In exercising such a jurisdiction, a court is not required or expected to conduct an in-depth analysis of individual sentences on paragraphs of a report once delivered. Where applicable, a court must form a view on the overall thrust of the report as to whether it has exceeded the limits of its terms of reference. Even then, a court should rarely if ever grant any relief if it is apparent that the party concerned was given an opportunity to comment on the matter in advance and put forward his or her views.

(xviii) Here, taken in the context of the entire report, it appears that certain conclusions in respect of the applicant contained in paras. 19 and 20.11 were outside the scope of the task set, and were not the subject of any notice to or representations by the applicant.

66 Like the President of the Court of Appeal, I am far from being critical of the conduct of the respondent. The timescale was short, and the source of the difficulty here can be traced to ambiguity in the nature of the role which the respondent was asked to perform, and which has led to differences of analysis between the nine different judges of the Superior Courts who have had the time to consider the matter, with the assistance of detailed submissions and the inestimable benefit of hindsight. The difficulty of the task was compounded by a surprising lack of communication within the Department of Justice. Nevertheless, I have come to the conclusion that the applicant is entitled to complain about the outcome of the report as it affected him. Accordingly, I would substitute for the order of the Court of Appeal the limited declaration that the respondent's conclusions at paras. 19.95. 19.96, 19.100, 19.101 and 20.11 were outside the scope of the terms of reference, and would otherwise dismiss the appeal