An Chúirt Uachtarach

The Supreme Court

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

Supreme Court appeal number: S:AP:IE: 2017: 000051

[2018] IESC 000

Court of Appeal record number: 2015 no 321

[2016] IECA 318

High Court record number: 2014 no 478 JR

[2015] IEHC 301

Between

Alan Shatter

Applicant/Respondent

- and -

Seán Guerin

Respondent/Appellant

Judgment of Mr Justice Peter Charleton of Tuesday the 26th of February 2019

1. Three questions are central to this appeal. Firstly, was the May 2014 report by the appellant in this Court, Seán Guerin, which commented adversely on the respondent Alan Shatter, in his capacity as Minister for Justice and Equality, an exercise in public law and thus amenable to judicial review? Secondly, was the manner of the gathering of information for that report subject to strictures requiring, at a minimum, some adherence to procedural fairness which, to a greater or lesser extent, are melded to quasi-judicial decision-making; for instance, recording the response of a person who may be subject to adverse comment? Lastly, if the reputation of Alan Shatter was unfairly diminished through the report, is there a remedy through the judicial review jurisdiction of the High Court, or is he confined to any private law remedy he may once have had?

2. While these issues seem simple in themselves, there is a potential consequential result which raises alarms against yet another extension of procedures akin to a criminal trial, derived from *In re Haughey* [1971] 1 IR 217, to every administrative inquiry and with consequent potentially crippling effect on the mechanism of day-to-day government.

Public law

3. No single test exists in Irish law for determining whether an administrative or quasi-judicial decision comes within the sphere of public law. The reasons for this are multiple. With the revision of the Rules of the Superior Courts in 1986, and the insertion of Order 84 to replace the traditional remedies of certiorari, mandamus and quo warranto, judicial review as a remedy has burgeoned far outside its original limits. It is also much easier to commence, since a conditional order from the High Court is no longer needed as under the old form of the Rules. Some would argue that the modern test for leave to commence judicial review is too easily met; *G v DPP* [1994] 1 IR 374. With the availability of declaratory relief and damages within the scope of an Order 84 action, judicial review has become a resort even for large commercial decisions that involve the State. Originally, it was thought that judicial review was available only where the rights affected or the procedures involved derived from statute. This theory, however, leaves out the entitlement of government to act outside of statute, through administrative scheme for instance; see *State (Hayes) v Criminal Injuries Compensation Tribunal* [1982] ILRM 210 and *Prendergast v The Higher Education Authority* [2010] 1 IR 490. Further, the continuation in Article 52 of the Constitution of existing legal structures means that to some, but little explored, extent the English law origin of administrative remedies that does not depend upon any single juristic conception of the State continues to influence the scope of judicial review; see de Smith's Judicial Review (8th edition, London, 2018) from paragraph 3-002.

4. Simply because some emanation of the State is involved in making a decision that an applicant feels aggrieved by does not mean that a public law remedy is available. The State can, after all, behave as a private individual. The State acts in entering into contracts, driving vehicles through its agents, employing a civil service, has shops in museum complexes, engages subcontractors to do building and other work and, in that respect, generally being liable to private law remedies in contract and in tort. In a way, it is

easier to come to a conclusion that an aspect of life has moved into the public sphere than to articulate which of the multiplicity of tests renders whatever complaint an individual may have as to the procedures of, or outcome of, that exercise amenable to judicial review. Summarising the position from a comparative perspective, de Smith's Judicial Review at paragraph 3-153 quotes the case of *Beirne v Commissioner of An Garda Síochána* [1993] ILRM 1 as exemplifying the extension of public law remedies into the scope of employment contracts effected by the State. Exclusion is, perhaps, an easier test in the sense that public law has no role where the decision impacting on an applicant is made in a context which is "manifestly a private duty and where the right to make it derives solely from contract or solely from consent of the agreement of the parties affected", as Finlay CJ put the test in that case, adopting the decision of Barr J in *Murphy v The Turf Club* [1989] IR 171 at 173-175. The editors of de Smith summarise at paragraph 3-153 the law in this jurisdiction, footnotes omitted, thus:

> Whether an entity will be amenable to judicial review will generally be dependent on a number of factors, including the source of the power or function exercised, the nature of the decision (whether it falls within the public domain), the relationship between the parties and the consequences of the decision. Judicial review will usually not be available if it is concluded that the applicant has an alternative contractual remedy in private law … Moreover, on occasion, even where the power exercised has been derived solely from contract, the power may be subject to judicial review if there is a public dimension or if the contractual relationship arose from a standard form contract which had not been the subject of negotiation.

5. There are many instances where, while the State might be involved in a process or project in a background sense in, perhaps, providing funding of some kind, such as a grant for a building, even though what is truly involved is a matter of private contract; *Rajah v Royal College of Surgeons* [1994] 1 IR 384. Thus, as Hogan and Morgan comment in Administrative Law in Ireland (4th edition, Dublin, 2010) at paragraph 17-03, "the public-private law dichotomy may be applied to either (or both): the body which is exercising the function, and the function being exercised." See also *Quinn v King's Inns* [2004] 4 IR 344, *Zhang v Athlone IT* [2013] IEHC 390 and *O'Connell v The Turf Club* [2017] 2 IR 43 and the remark of O'Donnell J at paragraph 80 that "significant power is being exercised in respect of a private citizen with the approval of the legislature … judicial review may lie to ensure that the exercise of such powers remains within their proper scope." Publicly reducing the reputation of a political figure through a formal process of enquiry and report by a governmentally appointed expert may be seen as such an exercise of significant power.

6. While Hogan and Morgan, in the same text at paragraph 17-29, suggest the application of a test derived from European law as to which bodies should be liable for breaches of rights that are "unconditional and sufficiently precise" under Directives passed by the European Council but not implemented by the State, the utility of a test based on being "subject to the authority or control of the State" or having "special powers beyond those which result from the normal rules applicable to relations between individuals", derived from the decision of the Court of Justice of the European Union in *Foster v British Gas* Case C-188/89 [1991] 1 QB 405, may be to take a fundamentally different turn. In any event, such a possible development awaits decision in an appropriate case. As to the test itself, see also *Farrell v Whitty Case* C-413/15 [2018] 3 WLR 285.

7. Traditionally, judicial review has been available as a remedy against the overarching power of the State, where that power has been unfairly exercised, thus setting up a need for intervention by the courts based on the imperative that, generally, there should be a remedy for injustice. The ideal of justice cannot alter existing law, however. In *Eogan v University College Dublin* [1996] 1 IR 390 at 398, Shanley J tentatively suggested the following principles as being among the matters which can be taken into account in deciding whether a public law remedy is available to a litigant:

> (a) whether the decision challenged has been made pursuant to a statute;
>
> (b) whether the decision maker by his decision is performing a duty relating to a matter of particular and immediate public concern and therefore falling within the public domain;
>
> (c) where the decision affects a contract of employment, whether that employment has any statutory protection so as to afford the employee any "public rights" upon which he may rely;
>
> (d) whether the decision is being made by the decision maker whose powers, though not directly based on statute, depend on approval by the legislature or the Government for the continued exercise.

8. On the facts of this case it is possible to argue that a private law remedy might exist in favour of Alan Shatter, perhaps in defamation. Such an action, structured as it is in a repellently complex and costly fashion, however, would not achieve the same result as a declaration of wrong by the High Court. While not every wrong gives rise to a remedy, and certainly not a relief in public law, the challenge of injustice can be a factor whereby what would otherwise be argued to be within the sphere of private law may necessitate intervention through judicial review; but only where there is, in truth, a sufficient public law element. In *Becker v Duggan* [2009] 4 IR 1, a teacher had applied for a post at a voluntary school. Unless found to be unsuitable, under the particular scheme she was entitled to a post as of right. She was found to be unsuitable. She appealed to an arbitrator appointed pursuant to a circular promulgated by the Department of Education and Science. In being dismissed from employment there is, depending on the circumstances, the possibility of resort to a private law remedy in contract or to remedies under the Unfair Dismissals Act 1976. But, the applicant had no such remedy since she had no privity of contract as what she was doing was applying for a contract. In making such an application she was adjudged unsuitable. Ordinarily, as in that case, in applying for employment, disappointment gives rise to no remedy. This was the case here, and that despite the clear undermining of reputation which these particular circumstances involved. In the High Court, Ó Néill J granted relief. As in every judicial review case involving the quashing of an order, as opposed to declaratory relief or damages under Order 84, the result of successful intervention is in relation to the procedure. The courts do not substitute their own decision but rather require that the matter should be analysed afresh. Tellingly, in that case, the judge based his intervention to quash the decision on factors set out at page 15 of the report:

> 33. Where private law remedies are available in contract, there is no necessity, in order that justice may be done, for a public law remedy to be available.
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> 34. In my opinion, if a decision maker, bound to act judicially, makes decisions affecting rights of or imposing liabilities on another, justice requires that the ordinary principles of natural justice should be observed. If the decision making is done in breach of natural justice, the aggrieved person should, in principle, if not entitled to a private law remedy under contract, be entitled to a public law remedy. It is reasonable to suppose that the emergence of the great public law remedies must have been inspired by the need to provide a remedy where injustice was done by public authorities in decisions made, where the persons adversely affected clearly had no contractual connection with the decision maker.

> 35. It is, therefore, obviously crucial in determining whether or not a public law remedy is available to see whether or not the person affected by a decision made by a decision maker, bound to act judicially, can rely upon a contractual relationship which would entitle the person affected to appropriate declaratory and injunctive relief to protect them from, inter alia, breaches of natural justice in the decision making process.

9. On this appeal, at paragraphs 36 and 37 of his judgment for the majority, O'Donnell J emphasises the governmental and public function whereby this scoping exercise by Seán Guerin was to amount to a recommendation that some form of statutory inquiry was necessary. It was entirely possible that no public enquiry of any kind might have been recommended. As it turned out in the report, as regards Alan Shatter, a public declaration was made as to the inadequacy of his stewardship of the Department of Justice and Equality referable to the treatment of a particular police officer. In *Beirne*, at issue was the termination of what might be regarded as a training contract to join the police force. As to whether this should ever have been an area into which the complexities of judicial review intruded is not to be commented on here, but it was the nature of the power exercised whereby, ultimately, those who became gardaí would be custodians of public powers that was persuasive in the decision. Who is or is not vested with these powers is a matter of public moment. Hence, Finlay CJ, at page 4, held that the function of admitting men and women to that status involved "matters of particular and immediate public concern … directly relevant to the public question of the ordering of society and the regulation of discipline within society." This is not different.

10. Here, any negative comment against Alan Shatter could predictably have the effect of calling into sharp focus his competence and application to duty as a member of Government. This was not a private, or internal administrative, or even confidential, exercise. At all times that report was either going to be published or would otherwise come to public attention. With the attention directed at the underlying issues that the report otherwise properly addressed, its official nature, which was publicly proclaimed as such, and the fact that the Government openly turned to an outside source for an expert viewpoint and with public focus on this matter of extreme public interest, this is, as O'Donnell J reasons at paragraph 37, a matter of public law.

11. Amenability to judicial review is but the first test. What follows before any relief can be granted on a discretionary basis is the proof of a substantial procedural injustice or the exceeding of the boundaries of jurisdiction. Hence, in Becker a decision that a teacher was unsuitable was overturned but only because of the fundamental want of any fair procedure in reaching that conclusion. Here, on this appeal, since the Guerin exercise came within the scope of public law, it follows that there should be a remedy unless any conclusion arrived at adverse to the right to the good name of Alan Shatter respected, at least to a minimum degree, his entitlement to make a representation as to any issue concerned. The Supreme Court in *Dellway Investments Limited v. NAMA* [2011] 4 I.R. 1, certainly through Finnegan J at 360-377, clarified that the special treatment of mortgagees and the commercial consequences of the transfer of a mortgage to a State agency for impaired loans gave rise to a right to be heard on the part of the borrower. This interpretation was based on legislation, but as in *Becker*, it sprang from the consequences of a diminution of an existing right through the expectation that only through some minimal aspect of the application of constitutional fairness could that be validly effected. The origin, from the point of view of legislative interpretation, is in the decision of the Supreme Court in *East Donegal Co-operative Livestock Mart Limited v. Attorney General* [1970] I.R. 317, in which Walsh J. stated at 341:

> … the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts.

12. Constitutional protection would only arise in the context under appeal because of the public nature of the decision involved; one which was never meant to be, and never mandated as, a decision as to the rights and wrongs of the oversight by Alan Shatter of the Department of Justice and Equality. O'Donnell J expresses a similar view at paragraph 62 as to the overall viewpoint of an individual reading this report. That analysis is compelling. What if this process had been set up with an avowed aim of determining whether the stewardship of the Minister for Justice was adequate? Would anyone then doubt that fairness in coming to a decision was required? Instead it was not set up as that but came, nonetheless, to a negative conclusion. How can such a process escape the requirement that it be fair? As in the Divisional Court decision in *Dellway Investments*, a constitutional right is in issue; that of the protection of the good name of a citizen. What was involved here, as to the final outcome, was more than the mere possibility of an effect. Where the impairment of that right is material, then it gives rise to an entitlement to fairness of treatment by the decision-maker, or as in this instance, the publicly-nominated opinion-former.

13. The courts have yet to definitively delimit the circumstances under which the full rights of representation, notice and cross-examination must be given, as at a public tribunal of enquiry, or some lesser right of notice of a potentially negative finding in a report of a commission of enquiry with an opportunity to comment, but there is a minimum standard for a public declaration by an officially designated person that a citizen was seriously in the wrong on an issue of moment to the community. That much is clear. As to the extent of any procedure that needed to be engaged for any valid public declaration, in this instance that was minimal: just what do you say about this, firstly, and the insertion of that response in any report, secondly, without endorsing either apparent point of view. It was not afforded here. As to the nature of the kind of public declaration that might be made against a person and which attract at least the minimal standard to an enquiry of the person who might have their good name undermined and the receipt of their answer, it will be noted that these range over a wide area from incompetence, at one level, to illegal arms purchases, at another; see paragraph 26 below. The only legal principle that is yet uncertain is the degree of fairness that must be afforded. What is there about an allegation that has to result, before conclusions adverse to citizens can be taken, in a public tribunal of enquiry with procedures akin to a criminal trial? That is the ultimate standard. But it is not yet certain as to when it is needed. Would a commission of enquiry, usually held in private but with a public report, suffice with the examination of witnesses one-by-one and the distribution of a draft report together with the material relevant to any negative finding to any affected? That is an intermediate and more cost-effective procedure. Or is it just the case that an informal investigation that will lead to a public statement on a matter of public moment should just adopt the minimal procedure of asking the affected person and considering what that person may say? That is the minimum where public law applies. This is not the case to develop beyond what the decided cases already state, which is that the level of procedures adopted is situation-dependent. In addition, it must also be remembered, there are clearly other cases where the public administration has an entitlement to function and where procedures simply must yield to the need for good administration. That point is developed later in this judgment. This public task by an outside expert which led to this particular public declaration, however, was a case which attracted the minimum standard. What is not accepted in this judgment or in that of O'Donnell J is any proposition which states that it is an attack on a person's good name for a scoping exercise to conclude that issues arise which require a more formal procedure such as a commission of enquiry or a tribunal of enquiry.

The public task

14. The task of Seán Guerin was both very public and was also of public moment. It was likely to have serious consequences for those commented on and such comment was going to have an immediate impact. Further, he was never asked to comment on anyone. As O'Donnell J states at paragraph 58, he went outside the boundaries of the task assigned to him. His brief was to "conduct an independent review and undertake a thorough examination" as to police actions "pertaining to certain allegations of grave deficiencies in the investigation and prosecution of crimes" in a particular district. The terms of reference enabled or required him to interview a particular police officer "and any other person as may be considered necessary and capable of providing relevant and material assistance", to examine documentation, to scrutinise what steps have been taken at an official level, to "review the adequacy of any investigation or inquiry" by the police and to "consider if… there is a sufficient basis for concern as to whether all appropriate steps were taken" by the police or by "any other relevant entity or a public body" to investigate and address the issues. Fairly construed, the purpose of the report was to "advise, arising from" the "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 formal inquiry on a statutory basis and "if so, the matters to be investigated." Those were the terms of reference. If those terms of reference stated that conclusions could be reached or opinions given as to the competence or conduct of those involved, it could reasonably be expected that anyone affected would seek to have their voice heard and included in a public report. But that was not this situation. There existed no mandate in these terms of reference to comment in the public sphere on any individual. But, as regards Alan Shatter, the report went beyond that. The material impairment of a constitutional right test derived from the Divisional Court decision in *Dellway Investments* is thus met.

15. Like every other country, from time to time in Ireland matters of public moment are invested with an emotional overlay as to the issues, and the real facts become difficult to see. The task of this kind of public report on a matter of serious public consequence, sometimes now called in the public sphere a scoping exercise, is twofold. Firstly, the objective is to search out what allegation is being made by whom against which other individual or body and to concisely state the issue and what any available answer to it may be. Secondly, given the potentially febrile nature of public discourse giving rise to the temptation to add issue upon issue, thus overloading a public enquiry or a commission of enquiry, an inducement that it last years, such a report should focus on what matters are important and should exclude what is unimportant. That is what such an exercise is about. It may be that there are situations where all of the available facts point only one way. In so reporting, however, care is also needed by the author of any report that such really is the case and that there is no other view of the facts.

16. Hence, the publicly mandated nature of this task had boundaries. It is more than analogous to call these boundaries ones which define jurisdiction. In commissioning a report in the public sphere, it was never expected that facts would be found or condemnations issued. Instead, the limits were of an exploratory kind in defining important issues, both as to what was apparent and as to what answers might be available to explain any apparent shortcomings potentially identified. This report went beyond those limits. It identified the issues in policing which were the subject of complaint both by the officer involved and those members of the public who felt that, as victims of crime, a proper service had not been afforded to them. It identified with precision a series of cases which required further scrutiny. In doing so, and in that respect, the report was kept within the jurisdictional boundaries that the nature of the exercise required. The report, except in respect of Alan Shatter, assiduously avoided reaching any conclusion but, instead, suggested that a judicial inquiry be set up on a statutory basis.

17. As O'Donnell J points out in his separate judgment at paragraph 16, in the course of his report Seán Guerin stated that no fact apparently stated by him constituted either a finding of fact or his opinion on fact beyond the necessity, as the terms of reference make clear, of stating a view as to the desirability of a further investigation. It's all very well to say that and then to come out several dozen pages later with a very likely to be headline statement to the effect that the Minister for Justice and Equality "despite his having an independent supervisory and investigative function with specific statutory powers" did not seem "to have been able" to heed "the voice of a member [of the gardaí] whose immediate supervisors held him in high regard which Sergeant McCabe was held."

18. This report exceeded its mandate and did so without any aspect of fairness being afforded to its subject. Nor was that comment at all necessary because of the nature of the context constricting the application of any aspect of fairness of procedures. Nor was the comment inescapable. It would have been equally possible to say that a statutory inquiry was warranted because an issue had been identified as to whether sufficient use had been made by the Department of Justice and Equality, or the Minister, of their independent supervisory and investigative functions. That would have expressed no view. Nor would it necessarily have precipitated any public turmoil or any ministerial resignation. Thus, unlike the approach in the Court of Appeal, on this analysis, the recommendation of a further commission of enquiry or tribunal of enquiry on the basis that there were issues as to whether there was proper oversight, or whether there was sufficient competence, or whether some other wrong may have been done, does not attract the necessity for any form of fair procedures. To say that an issue arises which requires investigation is not to say that anyone behaved wrongly.

Public enquiries

19. In the early 1960s, the disquiet in the neighbouring kingdom in relation to what was called the Profumo affair led to the appointment of Lord Denning to report publicly on the issues involved. As part of a process which he felt was best given the circumstances, he interviewed witnesses without representation, assisted only by administrative backup; Cmnd 2152 of 1963. There was no fairness of procedures. There were no procedures. The judge simply spoke to whomsoever he thought fit. He did this on a one-to-one basis. He enquired in a closed room and in the presence only of a stenographer, and sometimes not even that. His report, nonetheless, was widely accepted, judging from the public response to it. As Lord Salmond commented later in his Report of the Royal Commission into Tribunals of Inquiry, as to what could "be regarded as a brilliant exception to what would normally occur when an inquiry is carried out under such conditions"; Cmnd 3121 of 1966, paragraph 21. What marked out the Denning exercise was its public and comprehensive nature coupled with the complete absence of any rights for those accused of the most serious wrongdoing other than that of being present in the room with the inquirer and answering his questions. In so far as there were any protections, these were dependent on the good sense of the person making the inquiry. Possibly this was an informative background to what occurred in this jurisdiction thereafter.

20. In this jurisdiction, the case of *In re Haughey* then happened in 1971. That decision required criminal trial procedures before a citizen's good name was diminished. It was the extreme opposite of the Lord Denning approach. That decision of the Supreme Court applied in its original iteration only to what was, in effect, a committee of investigation set up by the Oireachtas into the apparent disappearance of what was then a considerable sum of money earmarked for the relief of distress north and west of the Irish border in consequence of reaction to demands for civil rights. The trajectory of the investigation could have been to the effect that the money in question had been diverted away from humanitarian aid and into arms purchases and that Páraic Haughey, the original applicant, bore responsibility in that regard. His brother Charles was prominent in Irish politics. To proceed on evidence as to what senior gardaí believed without any entitlement, by what was in effect a person accused of such conduct, to see an underlying witness, to cross-examine him or her, or to make submissions as to what conclusions ought to be reached, effectively put the Committee of Public

Accounts, which again became so prominent in the case of the police officer at the centre of this controversy, in the position of potentially removing the good name of a citizen in an extraordinarily serious manner. This is a right guaranteed by Article 40.3.3º of the Constitution which the State was, and is, obliged "by its laws to protect as best it may from unjust attack". Hence, the Supreme Court decided, Pádraig Haughey had rights to notice, to all relevant documents, and to participation through counsel as to submissions and cross-examination. Effectively, it is hard to see the distinction between that and a criminal trial or a plenary action before the High Court.

21. Except, of course, multiple people may be potentially affected by the findings of such a committee and each set of contending parties as to facts would apparently have an entitlement to all those rights. How was that properly to be done? This led to resort to existing legislation and the setting up of public tribunals of inquiry under the Tribunals of Inquiry (Evidence) Act 1921. Even where such a tribunal is set up under a judge to apply all those rights in the ultimate report, some aspect of care as to the damaging nature of allegations is exercised even along the way. For instance, where there is an opening speech from counsel, it is noteworthy that for every allegation stated, some tribunals have taken the trouble to give the response of the person alleged to be in the wrong or to state, if no contrary information was available, that it was to be presumed that such allegation was denied; see for instance counsel's opening in the Morris Tribunal, www.morristribunal.ie, and search under "preliminary opening statement". The ultimate report is the document in which, if warranted, condemnatory opinions are expressed. In running a tribunal of inquiry, care is taken to ensure that condemnation does not happen in the preliminaries, even by counsel for the tribunal.

22. Further, even within the strictures of the *Haughey* decision, there can be situations where someone who asserts an interest in allegation which a public tribunal of inquiry may reject may not be entitled to representation, becoming in effect no more than a witness. They are more like a person testifying in a court case whose evidence is not accepted; *Boyhan v Beef Tribunal* [1993] 1 IR 210. That case concerned whether the United Farmers Association were entitled to full representation at a tribunal of inquiry into the beef industry. This application was refused, with Denham J finding at 219 that:

> there are no allegations against the U.F.A. or its members. It is a witness which has proffered itself. As such, while its constitutional rights must at all times be protected it does not appear that its rights—to good name, for example—are in jeopardy in any way at all. The position of the U.F.A. at this time in relation to the Tribunal is analogous to a witness in a trial and as such it is not entitled to the protection as set out … by Ó Dálaigh CJ [in Haughey]. Its position, as a witness, is fully protected by the limited legal representation awarded by the Tribunal.

23. There are, and were, other models besides statutory tribunals of inquiry whereby a fair decision can be reached. Full strictures of *Haughey* rights can be applied by a decision-making body but still, after all that, a wrong decision can be reached. Having multiple parties with procedural rights does not necessarily guarantee a factually accurate result. It certainly does guarantee that a huge amount of time will be needed. It is also productive of a vast multiplicity of documents and confusion resulting from multiple represented parties. That has to be controlled and that's not at all easy. One of the ways, as in the *Boyhan* decision, is by keeping issues tightly controlled and by severely limiting representation. The difficulty with the *Haughey* case was that the issues involved, potentially of embezzlement and gunrunning, were so stark. But, in effect, someone might have ended up in a situation that looked as if the National Parliament had convicted him, or at least publicly condemned him, on the same terms.

24. Other models are available within this jurisdiction for investigating and publicly reporting on issues of major public concern. Within the context of the structures set up by the Commissions of Investigation Act 2004, the model to be followed by the chairman in deciding issues against people does not necessarily have to involve all of these *Haughey* rights. Instead of a trial involving multiple parties and ill-defined issues, each of whom might expect to be represented to the fullest level of public expense, the purpose of the 2004 Act was to enable an inquiry to be conducted with witnesses attending and being examined by the commission but not, necessarily, by any party with an opposing factual stance. Once the chairperson of the inquiry is of the view that cross-examination is not necessary for a fair determination, the practice, derived from the decision of the English Court of Appeal in *In re Pergamon Press Ltd* [1971] Ch 388, is to send a draft of preliminary findings together with the material on which this is based to any person who may be criticised and to seek, and then consider, whatever comments followed.

25. Experience has shown that tribunals conducted under the Tribunals of Inquiry (Evidence) Acts 1921-2004 become very lengthy and expensive because of general issues put forward for public inquiry and because the rights derived from the *Haughey* case can be used to minimise cooperation with the tribunal; this has an opposite effect to assuring rights in order that a correct factual decision might be reached. Principles derived from that case can be extended so that even making any order of a preliminary kind can be declared to have some aspect of those rights attached to them; see *Haughey v Moriarty* [1999] 3 IR 1. This is not a legal development which should be continued. But, at the end of the day, what characterises either a commission of investigation or a tribunal of inquiry is that a report is written and that, from the point of view of the public mind, what happened or did not happen and who was responsible, and to what degree, has then been decided through an independent exercise in fact-finding. That only happens after some kind of fair procedure. In a preliminary reporting exercise such as that conducted here by Seán Guerin, which in the public sphere is now called a scoping exercise, where the mandate is to identify issues and make a recommendation for or against further inquiry, that is neither mandated and nor is it appropriate.

26. There are many situations of public controversy where the determination of rights does not arise so starkly, or in so damaging a fashion, as was the case in the original Haughey decision. No definitive ruling is made here as to when one kind of inquiry may be chosen over another. What is, however, clear is once the defence of a constitutional right materially arises within the public sphere whereby there will be a substantial impact on the exercise of that right, then some minimal aspect of fairness of procedures is to be applied. Clarke J in *Atlantean v Minister for Communications and Natural Resources* [2007] IEHC 233, following the decision of Barrington J in *Mooney v An Post* [1998] 4 IR 288 at 298, describes the floor of rights then applicable as beginning with "the minimum" that a person so affected "is entitled to" is some notice of what might be described as "the charge against him" and while cross-examination or a public hearing do not come into the question necessarily, that person must "be given an opportunity to answer it and make submissions." So, it's merely fair notice and a chance to comment. Looking at the decisions whereby at least that entitlement, that of notice of what might be publicly reported as a person being at fault and that person being allowed to put an answer before the decision-maker or opinion-former, certainly the 1971 decision in *Haughey* is stark; was a person a thief, a gun runner, and a facilitator of terrorism? But, it also arises where a teacher is described as unsuitable, as in *Becker*, where assets are transferred into a less amenable environment for managing debt and, on the judgment of Denham J, described as a "bad bank", as in *Dellway Investments*, where someone might be condemned for a fatal shooting, as in *Maguire v Ardagh* [2002] 1 IR 385, and where a student is accused of plagiarising an essay at university level, as in *Flanagan v UCD* [1988] IR 274, and where there is to be an inquiry into someone's financial transactions, as in Haughey v Moriarty; for a full analysis see Hilary Biehler - Judicial Review of Administrative Action: A Comparative Analysis (3rd edition, Dublin, 2013) from page 300. Though, since all that was in *Haughey v Moriarty* was an inquiry in the private sphere that might or might not later lead to questions before a tribunal, where full rights up to criminal trial level would be afforded, that decision seems to run counter to the modern test which is now derived from *Dellway Investments*. Thus, the analysis of relevant precedents suggests that fairness of procedures arises in this instance. Because of the publicly proclaimed

negative comment, minimal fairness of procedures were required; but only to the extent of telling the person against whom a comment that substantially affects the right to a good name or other constitutional right that might be impacted negative to them and then taking their answer into consideration. Where what is involved is a scoping exercise, as here, then what is required is to seek a centrally involved person's point of view or fact, record that and any apparent issue against that person, and then say that a commission of inquiry or tribunal of inquiry will sort where the truth is to be found. Fair procedures would come in to that later process.

Limits to the application of fair procedures

27. Potentially, an alarming vista emerges. In the current edition of Kelly's Irish Constitution (5th edition, Dublin, 2018) the editors at 6.1.158 propose, footnotes omitted, the following occurs:

> The concept of 'constitutional justice' or the constitutional right to fair procedures probably includes the right to sue for damages for breach of the constitutional right to fair procedures; the right to reasons in respect of a judicial or administrative decision; the right to an administrative decision within a reasonable time; the right to have legal proceedings instituted and processed with a reasonable time; a requirement that an administrative decision is based on probative evidence; the requirement that an administrative appeals process apply clear procedures and standards; and, ultimately, the right to have a statute invalidated for want of compliance with the guarantee of fair procedures. The constitutional right of fair procedures also guarantees an entitlement to have an important disciplinary decision taken by a body whose members have the necessary capacity and competence to make that decision. In addition, it may entail a right to an oral hearing, depending on the circumstances of the case …

28. What requires emphasis here, without any comment on what has just been quoted, is that what is involved before fairness of procedures may be invoked to condemn a decision is: firstly, a determination that public law be shown to be applicable; secondly, that the applicant demonstrate a substantial impact on the exercise of a constitutional right as threatened by a public law decision; and, thirdly, that for every such exercise, the subject is told what might be wrong and whatever representation in reply is taken account of. That can involve the decision-maker deciding against the subject of the decision. But, this is not to mandate or require an endless slide into the application of criminal-trial-type rights as in *Haughey*. As McCarthy J noted in *International Fishing Vessels Ltd v Minister for the Marine (No 2)* [1991] 2 IR 93 at 102: "Neither natural justice nor constitutional justice requires perfect, or the best possible justice, it requires reasonable fairness in all the circumstances." Furthermore, it is clear that there are circumstances in which though apparently required, the exigencies of a situation may mean that constitutional justice must yield to a higher value; see for instance *National Asset Loan Management v McMahon* [2015] 2 IR 385.

29. It is to be doubted that the full panoply of *Haughey* rights are necessary just because a negative comment impacting on the good name of a citizen may be made; even through a public inquiry. The Oireachtas has determined, through passing the 2004 Act, that lesser strictures than those applicable to a public tribunal should apply to a commission of investigation, most usually held in private. It would be contrary to sense to extend the rights derived from the 1971 *Haughey* decision from tribunals of inquiry to commissions of investigation. It makes even less sense to apply *Haughey* entitlements to internal or administrative inquiries or to preliminary scoping exercises properly carried out. Were this to happen, it would have the result that the State, in its various iterations, could never inquire into anything or follow the essential dynamic of government in finding out what went wrong and where and how. Naturally, in any event, from the point of view of an exercise that has value, to attempt to find out what actually happened, anybody making an enquiry will go to those involved for information and will cross-check assertions. There is a basic entitlement, however, in government that derives from the nature of governance to control and correct public administration. That carries a governmental right to know and that requires an ability to inquire. That, however, is not necessarily a publicly mandated condemnation. In contrast, it is an internal administrative function but even there, it is to be supposed that the floor right of telling the person who may be found seriously at fault that an issue arises and taking any response into consideration would be observed. Good practice dictates that. Without doing that a report's worth might be questioned. But even that may not be required.

30. If there is an analogy to be drawn in that regard, which proposes that *Haughey* rights should be confined to their original setting, if not otherwise inapplicable or properly modified by statute, it is with the court procedures. While in a court action, the plaintiff and defendant, or applicant and respondent, will define for each other the issues between them and each will have an opportunity to engage the other through cross-examination, or the exchange of affidavits with possible leave to cross-examine, and to make submissions before an independent court, this does not at all mean that in the necessary process of sifting through evidence with a view to reaching a judgement that every single person who appears in court and who may be criticised is entitled to those same Haughey rights. They are not. Witnesses, who are not the plaintiff and defendant, or applicant and respondent, regularly have their testimony rejected. They may be ordinary witnesses as to fact. Their evidence can be rejected. That happens without them having any right to represent their position beyond giving evidence. The only rule protecting them is the legal requirement on counsel for the other party to put any opposing case or relevant set of facts claimed by contrary witnesses to them so that they may comment; see *Browne v Dunn* (1893) 6 R 67 and *McDonagh v Sunday Newspapers* [2017] IESC 46. That rule applies also to expert witnesses, someone who may be commenting on an arcane discipline and apparently assisting the court through an opinion. In a medical negligence case, for example, an expert will be called as to, for instance, the kind of explanation as to risk appropriate to give to a patient before a particular operation or the correct method of treating an illness. It is commonplace in those situations, and in the everyday throughput of personal injury litigation, for experts to take different views based upon the same material. On occasions, a court may question whether the experts are really independent or whether they are witnesses to truth.

31. A court is entitled to reject such a witness's testimony, even though that person is not represented. Judicial restraint, no doubt, will mean that in many judgments one witness's evidence will simply be preferred over the other. But sometimes it is necessary to actually say unpleasant things, such as that a person lied or that an expert witness lacked objectivity or skill or deceitfully adopted a point of view. That witness is unrepresented and his or her inability to exercise the defence of his or her reputation is a necessary and inevitable consequence of the trial process. Not everyone can be represented because the consequence would be for cases to become unmanageable. Damage to the reputation of a witness may thus be an inevitable consequence of the trial process. But, for the proper pursuit of justice that is unavoidable. The judicial arm of government would, otherwise, be rendered unworkable were aspects of rights derived from the 1971 *Haughey* decision to become universally applicable. That happens in tribunals of inquiry. These are very lengthy, cumbersome, unwieldy and expensive. The courts could not operate that model and neither should the administration of the State be obliged to.

32. For similar reasons to the courts, the executive, in probing into matters of administration in the course of the business of government will, no doubt, seek to find out what has gone wrong, or right, and how and for what reason, and the course of such an exercise will no doubt be characterised by an attempt to collate documents and accounts from relevant parties. But it would not be in

the nature of an attack on someone's good name to make a decision only where that individual were granted any variant of rights as between either *Haughey* and *Pergamon Press* or the floor right of notice and response. In public administration, that is both unnecessary and impossible. The strictures derived from criminal trials or plenary hearings are not appropriate to administration and should not be so applied.

Ultimate vindication as an answer

33. This exercise was never set up as a two-part process. Here, what was involved was a public declaration about individual. This had been publicly commissioned through Government decision to announce what was, in effect, a report on an independent basis against a Minister of Government. It was supposed to be a scoping exercise, so called, to see what, if any, inquiry might be needed. Through error, or as O'Donnell J says in his judgment at paragraph 19, perhaps consequent on the heady temptations of rhetoric in a public space, the so-called scoping exercise went beyond its scope. Its character changed. If that was to happen then the correct approach would have been either to seek out and to record any contrary viewpoint from Alan Shatter or, most properly, to simply say that there was an issue which only some form of inquiry could decide.

34. For Seán Guerin, it is argued that what was said publicly about Alan Shatter was subject to the ultimate decision of the commission of investigation which he recommended and that, consequently, it was of no legal effect. But, in the plain reality of the public space, it did matter and it also had an immediate effect.

35. No inevitable two-stage process was involved in this. There was no requirement that on the report being delivered another review would follow. Instead, it was an exploration as to whether a commission of investigation ought to be set up. Certainly, that recommendation was made but unlike other instances of a process with an automatic right of a review, a true two-stage process, it was up to the Government as to whether any second step was warranted. This was not, thus, a two-stage process. Hence, the exceeding of the scope of the exercise through the making of negative comment is not saved simply because another process might have followed. After all, the point of the exercise conducted by Seán Guerin was supposed to be to say whether any other form of inquiry was needed. To say that it was did not take Alan Shatter's good name provided that the issues to be decided were simply laid out as opposed to a negative view being taken.

36. The bifurcation of process, that can be seen in some aspects of administration, whereby a preliminary view is taken of an administrative situation such as licensing, planning, or taxation subject to a right of appeal where some very limited aspect of *Haughey* rights might be applied is not applicable here. In reality, the words of Seán Guerin quoted in this judgment, and more fully set out in the separate judgment of O'Donnell J, were always likely to have resulted in such immediate action within the realm of public opinion that would have left lasting damage. In the administrative sphere, no such bifurcated decision would ever have had that effect. What distinguishes this case is that what is involved is a public declaration in a publicly commissioned process and by someone who is not an administrator or investigator but an independent expert.

37. In the textbooks, the leading example for the validity of a bifurcated process where preliminary decisions are made is the often-cited case of *Gammell v Dublin County Council* [1983] ILRM 413. That case was about temporary dwellings on a caravan site. In the first part of the procedure, an order was made under the relevant legislation prohibiting the parking of caravans. Under statute, any person who felt aggrieved by the order had a fortnight to appeal to the Minister. In the absence of such an application for its annulment, that order came into force 30 days after publication in accordance with the relevant statute. In the High Court, Carroll J was of the view that the making of the order did not have to satisfy the requirements of natural justice. This was because of the two-stage nature of the process where representations could be made before the order became operative:

> However in this case we are not dealing with an order effective when made and an appeal therefrom to an appellate body. Under s.31 of the Act the order has no effect until the person aggrieved has been given an opportunity of stating reasons why it should not come into effect. There is no 'appeal' to the Minister from an operative order. There is machinery set up under the section whereby an aggrieved party can make representations why the order should not come into operation. If successful, the order is annulled by the Minister and it never becomes operative. This is very different to the Ingle case and the Moran case where the revocation of the licence became operative immediately and of necessity there had to be a time lag between the revocation and the determination of an appeal in the District Court.

38. Other decisions have distinguished this authority; see for instance *Ó Ceallaigh v An Bord Altranais* [1998] IESC 60 and *Eircell Limited v Leitrim County Council* [2000] 1 IR 479. Consequently, the principle may be difficult to elucidate. Helpful in this regard, however, is the analysis in Hogan and Morgan at paragraph 14-276, of two-tiered administrative-adjudicative systems with such rights to representation as the situation demands confined to the second stage as appropriate:

> This distinction can also be applied in other areas. Take, for instance, applications for planning permission: considered in isolation, the procedure before a local planning authority might appear to violate the audi alteram partem rule in that (confining the discussion to the applicant for planning permission and not examining the position of objectors) the applicant is not told of the authority's provisional thinking on his application, much less allowed any opportunity to make representations in regard to it. On the other hand, there is ample constitutional justice at the rehearing, on appeal, to An Bord Pleanála. The crucial question thus is whether the initial application stage is to be examined in isolation or whether it is to be considered together with the proceedings before An Bord Pleanála. In other words, is the structure of the decision-making system analogous to that involved in *Gammell*? It is submitted that the two systems are similar and thus that the planning application system does not violate the audi alteram partem rule. The key factor is that (as with the prohibition order) a local planning authority decision granting permission does not come into effect until the appeal has been heard or, if no appeal is taken, until the period for appealing has elapsed.

39. In the field of taxation, that analysis has been applied to the processes adopted under statute by the Revenue Commissioners. There, the process of assessment and collection is essentially administrative while issues that might be argued as to validity or other special defences are left to an appeal process where the taxpayer can add to any special pleading and be represented before the Appeal Commissioners, perhaps by a chartered accountant; see *McNamee v Revenue Commissioners* [2016] IESC 33. The Supreme Court also revisited the authorities in this area in *Crayden Fishing Company v Sea Fisheries Protection Authority* [2017] 3 IR 785, with O'Donnell J suggesting at paragraph 32 that he would approach such cases "on the basis that the default position is that a person conducting a preliminary investigation, which itself does not lead directly in law to a binding and adverse decision, is not normally under an obligation to comply with a requirement of a fair hearing."

40. That approach involves is a sensible interpretation which assists in analysing: firstly, where any form of fair procedure is

necessary; secondly, that some processes which involve a two-stage analysis can validly apply fairness at a later stage at the option of the person affected; and, thirdly, that the minimum standard is the simple one of enabling the person affected to put their side of the affair. This was not set up as a two-stage process. No one knew if it would go further. Fairness would suggest simply asking the Minister what his viewpoint was and noting his answer. None of that happened. A public declaration was made as to the competence and application of a Minister in the Government. That opinion was always likely to be publicised and was of its nature damaging to the good name of Alan Shatter. Even still, he was neither asked what his side of the story was and no such contradictory view was included in this public report. That is not what the law has consistently required in the public space.

Further issue

41. Too much time was spent both on the initial hearing in the High Court and before the Court of Appeal and in this Court on whether there was recklessness in alleging objective bias against the author of the scoping report. While the parameters of the discretion in judicial review require proper analysis in an appropriate case, what should be noted here is that actual bias, a shocking allegation, was not posited either in the formal pleadings before the High Court or in preliminary correspondence. Any allegation of bias, however, is really serious and should be thought-through before it is made. Where an allegation of objective bias is made by way of a mistake, then as O'Donnell J analyses the matter, it depends on how serious the allegation is and on how tenuous a basis in order to decide whether that alone could bar relief on a discretionary basis in judicial review. What is important here is that there was some confusion but that no allegation of actual bias was made. Here, as a matter of discretion, the limited relief sought should not be refused. Any impact, however, on the recovery of full costs requires further argument.

Result proposed

42. The report by Seán Guerin constituted a step in quieting public turbulence as to the actions of the national police force in dealing with one particular officer who had chosen to speak out. Within the constraints of the time limits imposed on him an error occurred whereby a definite statement directly against the interests of the Minister for Justice and Equality was made. That damaging error would not likely have occurred had Alan Shatter been spoken to. But this judgment does not say that such a step would be necessary in any ordinary administrative investigations. Rather, it is the exceeding of the boundaries of this preliminary exercise coupled with a public declaration as to the stewardship of a Minister of Government over his Department that is the problem. The report was one in the public sphere which had the immediate public effect of undermining the position of Alan Shatter and that was done without asking his point of view and, since that was not done, without recording that two views were open. Where a statement of that kind was to be made in the context of a public investigation, then some aspect of fairness of procedures would have been required. But that was not this exercise. This was a scoping exercise not a public scrutiny of what went right or wrong. Here, all that was necessary was to put the case of the Minister. That would have required nothing more than an inquiry of the Minister: what do you say about this issue? Then the answer could be given and included in any report. What is wrong about this report is in coming to a definite and damaging conclusion when that was, firstly, not the task undertaken and, secondly, where the statement was unnecessary and was of such a kind as would have required the application of minimal fairness if this had been such an enquiry.

43. The report went beyond the scoping exercise that it was described as in public, and, instead, made a declaration in the public sphere. This ought to be corrected by a limited declaration. This was not to be excused like a bifurcated system with a first tier of administration or preliminary decision-making as part of the administration of the State with an appropriate second stage that could be taken up by those aggrieved.

44. There is no reason why it was ever necessary to say of the Minister for Justice and Equality that "despite his having an independent supervisory and investigative function with specific statutory powers" he did not seem "to have been able" to heed "the voice of a member [of the gardaí] whose immediate supervisors held him in high regard which Sergeant McCabe was held." That was not the brief given to Seán Guerin. If the brief was to find responsibility for what had gone wrong, and not as in this case to see what might have gone wrong and what kind of inquiry might be necessary to determine both what had gone wrong and who had responsibility, then some minimal aspect of fairness in that inquiry would have been necessary. That did not have to involve a full *Haughey*-type application of rights.

45. In consequence, declaratory relief of a limited kind as suggested by O'Donnell J is appropriate.