Neutral Citation [2013] IEHC 118

THE HIGH COURT

[2012 No. 446JR]

BETWEEN

DES RICHARDSON

APPLICANT

AND

JUDGE ALAN MAHON, JUDGE MARY FAHERTY, AND JUDGE GERALD KEYS (MEMBERS OF THE TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS AND PAYMENTS)

RESPONDENTS

Judgment of Ms. Justice Dunne delivered the 21st day of March 2013

The applicant herein seeks an order of *certiorari* by way of judicial review quashing so much of the first and final report of the Tribunal of Inquiry into certain matters and payments (Mahon report) as reported on 22nd March 2012, together with ancillary and declaratory relief.

The Tribunal was originally established in October 1997 to investigate planning matters in North County Dublin and its terms of references was subsequently expanded to empower it to investigate all improper payments paid to politicians in connection with the planning process. The Tribunal adopted a modular approach to its inquiry and one of those modules was the Quarryvale Module which inquired to the purchase, development and rezoning of approximately 180 acres to the West of Dublin city in the late 1980s and early 1990s.

The Quarryvale Module involved an inquiry by the Tribunal *inter alia* into allegations made by Mr. Tom Gilmartin, that in 1992, Mr. Owen O'Callaghan informed him that he, Mr. O'Callaghan had paid a total of IR£80,000 to Mr. Bertie Aherne between 1989 and 1992 when Mr. Aherne was a government minister. The Tribunal examined Mr. Aherne's finances to establish whether Mr. Aherne received any substantial sums of money from Mr. Owen O'Callaghan, whether directly or indirectly, as alleged by Mr. Gilmartin.

One item examined in respect of Mr. Aherne's finances related a lodgement of £22,500 to a bank account in the name of Mr. Aherne on the 30th December 1993. The applicant herein gave evidence to the Tribunal in the course of its investigation into the source of the funds used for that lodgement on days 789, 790, 791 and 861 of the public sittings. The evidence in relation to the sum of £22,500 was that it was made up of a sum of £15,000 in cash, a sum of £5,000 in the form of a bank draft payable to the applicant in the name of Roevin Ireland Limited and a cheque for the sum of £2,500 payable to cash dated the 22nd December 1993 drawn on the account of Will Dover Limited at Bank of Ireland in Montrose, Dublin 4 (an account controlled by the applicant and which cheque was signed by the applicant).

There was a significant dispute in the course of the evidence as to the source of the sum of £5,000 in the form of the bank draft. In order to explain precisely the issue that arose in this regard it is necessary to explain that there was evidence from a number of witnesses before the Tribunal including the applicant herein that the sum of £15,000 was the result of a "whip around" among Mr. Ahern's close friends, which was organised jointly by the applicant and a Mr. Gerry Brennan, the solicitor for Mr. Ahern in family law proceedings. Mr. Ahern gave evidence that he accepted the whip around as a loan from his friends. The applicant herein in his evidence in relation to the sum of €5,000 testified that he solicited a contribution from Mr. Padraig O'Connor who was in 1993, the managing director of NCB Group ("NCB Stockbrokers") and that he sought this sum on the basis that he believed that Mr. O'Connor and Mr. Ahern were friends. Mr. O'Connor testified that in December 1993, the applicant told him that Mr. Ahern's constituency office was seeking to raise a sum of approximately £20,000 to £25,000 to fund its annual running costs and that the applicant solicited a contribution of £5,000 from NCB Stockbrokers towards that fund. Mr. O'Connor gave evidence that NCB Stockbrokers agreed to make the donation but wished to keep it private and undisclosed. He also added that while he and Mr. Ahern had a friendly professional relationship at that time, they were not close personal friends.

The applicant then testified that as a result of the confirmation by Mr. O'Connor that he would contribute the sum of £5,000 to the £22,500 fund, he purchased a bank draft for £5,000 at the Bank of Ireland branch in Montrose in December 1993, and this bank draft represented Mr. O'Connor's contribution to the fund. Initially he stated that the source of funds that purchased the £5,000 draft was the Wildover account, because a cheque of £5,000 was drawn in that account on the 22nd December, 1993, the same day as the draft was purchased. On receipt of further information from Bank of Ireland, the Tribunal put to that applicant and he accepted that the source of funds used to purchase the bank draft was in fact, a company called Roevin Ireland Limited. The Roevin account had been opened in October 1992, at Bank of Ireland, Montrose, Dublin 4, with a lodgement of £39,000. The £5,000 Roevin bank draft was drawn from that account.

It appears that NCB Stockbrokers did make a payment on the 16th March, 1994, of £6,050 (representing £5,000 plus VAT at 21%) to Euro Work Force Limited. That company was operated by Mr. Des Maguire, a business associate of the applicant. The payment was in respect of a fictitious invoice dated the 14 December, 1993, from Euro Work Force Limited to NCB Group for a health and safety survey of the premise at Mount Street, Dublin, which never took place. The payment was intended to be for the benefit of Mr. Ahern. The Tribunal found that the applicant did not disclose to the Tribunal the true source of the funds which purchased the £5,000 draft, a finding that is not challenged by the applicant.

The findings challenged by the applicant.
The applicant herein is challenging the following paragraphs of the final report. The text which is emphasised in bold is the text being challenged in these proceedings:-

> "4.162 The Tribunal noted that the Roevin Ireland Limited bank account from which Mr. Richardson purchased the IR£5,000 draft payable to himself, and which ultimately ended up with Mr. Ahern, was opened on the 9th October, 1992, a time when, from Mr. Richardson's account of events Roevin Ireland Limited had ceased operating business in Ireland. ***The***

applicant claimed not to have any knowledge of the source of the IR£39,000, which opened the account in October 1992, or why there was a debit of IR£2,000 month later (16th November, 1992). ***The Tribunal rejected the applicant's evidence in this regard***."

The second paragraph under challenge is as follows:-

"4.163 ***The Tribunal found it incredible that the applicant, who, without difficulty appeared able to access the account of Roevin Ireland Limited on the 22nd December, 1993, and to use its funds to obtain a draft payable to himself, was unable to account to the Tribunal for the origins of the funds in the account. The Tribunal did not believe that applicant in this regard, and concluded that the applicant, in all probability, knew the reason why the account was opened and its purpose, and that he knew the source of the £39,000 which initially funded the account in October 1992***, and the destination of the IR£36,337.99 which ultimately left the account, on its closure, in September 1995. ***The applicant chose, for whatever reason, not to disclose this information to the Tribunal***."

The Issues
There are a number of issues which arise for consideration in these proceedings and I propose to summarise those issues in the following terms:-

1. The point was made on behalf of the applicant that the respondents accept that the applicant was not asked a direct question relating to the source of £39,000 which opened the Roevin account and reliance is placed by the applicant on para. 36 of the affidavit of Susan Gilvarry, solicitor to the Tribunal of Inquiry, by way of response to this application. Ms. Gilvarry had stated as follows:-

> "In reply to further correspondence from the applicant's solicitors exhibited in the verifying affidavit at 'DR5' and exhibit 'SG4' herein, the respondents further replied to the threat of judicial review proceedings with reference to the above emphasised parts of paras. 4.162 and 4.163 of the final report and with further reference to cited legal authority on the 18th May, 2012 as follows:
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> > 'As set out by the Tribunal in its letter dated the 27th April, 2012m, during the course of its public inquiry, Mr. Richardson was questioned extensively by counsel for the Tribunal in relation to his association with Roevin Ireland Limited and the Roevin Ireland bank account. Notwithstanding the absence of a direct question relating to the source of the IR£39,000, it was clearly evident from the question of Mr. Richardson that the Tribunal was anxious to learn of the full detail of the account, including the source of the funds, yet that information was not provided. The Tribunal therefore maintains its previously stated position that it had a sufficient basis for the making the findings set out in paras. 4.162 and 4.163 on page 1326 of its final report.'"

It is argued that because of the concession that a direct question was not asked about the source of the sum of £39,000, there was no evidential basis for the impugned findings.

2. Complaint is made by the applicant that the respondent has made reference to irrelevant matters which are said to have been "admitted" by the applicant in that he did not challenge those matters in judicial review proceedings. The matters described as "irrelevant" are a list of findings adverse to the applicant made by the respondents. The characterisation of the adverse findings as "admitted" may not be an entirely accurate characterisation of the applicant's position in relation to the adverse findings but it is undoubtedly the case that those adverse findings have not been the subject of any challenge by the applicant and could not be the subject of any challenge. The question of their relevance will be considered later.

3. The core argument of the applicant is that the respondents were not entitled to make the adverse findings being challenged in these proceedings in circumstances where it is contended that there is no evidential basis for the findings.

4. The respondents place reliance on the unchallenged text of paras. 4.162 and 4.163 together with a number of other paragraphs in the final report (paras. 4.164 to 4.167). In essence, it is alleged that there is a lack of candour on the part of the applicant as described in some detail in the affidavit of Susan Gilvarry. A number of points are made in that affidavit complaining, inter alia, that the applicant failed to disclose "the complicated facts surrounding the Roevin draft and the payment of £6,050 by NCB Stockbrokers to Euro Workforce Limited" on foot of a bogus invoice (see para. 17 of the affidavit) together with a complaint that the applicant failed to disclose in his verifying affidavit the adverse findings made by the Tribunal, (see paras. 21 and 23 of the affidavit).

6. It is contended on behalf of the respondents that the applicant's case herein is a challenge to the findings based on a mistake of fact and thus not amenable to judicial review.

7. Further, it is contended that the respondents had due regard to the requirement of fair procedures.

8. It was submitted on behalf of the respondents that this was not a case in which the concept of irrationality/unreasonableness as described in the decisions such as *Meadows v. Minister for Justice* [2010] 2 I.R. 701 and the *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986]1.R. 642, could be said to arise.

Before considering the submissions made on behalf of the parties herein, I should refer briefly to the affidavit of Brid O'Dwyer, solicitor, in the firm of Frank Ward and Company Solicitors for the applicant herein. She referred to her letters of the 20th April, 27th April, 2nd May and the 9th May, 2012, which preceded the application for judicial review and to the letter of the 18th May, 2012, from the respondents solicitors received on the 21st May, 2012, the date on which leave was granted by the High Court (Peart J.) to apply for judicial review. She stated that the letter of the 18th May, 2012, was opened to the court in the course of the *ex parte* application for leave to apply for judicial review. She pointed out that in her correspondence she had asked for a reply by close of business on the 17th May, 2012, as it was intended to apply for leave for judicial review. The letter of the 18th May, 2012, made proposals for the amendment of paras. 4.162 and 4.163, while rejecting the applicant's entitlement to seek judicial review.

Finally, I should point out that during the course of the hearing before me, I was referred to the transcript of evidence given to the Tribunal of Inquiry by the applicant on day 791, the 27th November, 2007, and day 861, the 21st May, 2008. The discussion between pp. 8 and 25 of the transcript of day 791 was concerned with the company called Roevin and the purchase of the bank draft in the sum of £5,000. The applicant testified that he acquired the company from its former owners and took over its bank account. At that time, the Tribunal did not have access to the account of Roevin Ireland Limited at Bank of Ireland, Montrose. At q. 20 on day 861, reference to that account was made and it would be helpful to refer briefly as well as to the preceding question, q. 19:-

"Q.19 You had, you indicated to the Tribunal that the funds within that account were funds which you considered to be your own by virtue of an agreement with the English directors of Roevin which was owned by Doctus pic company which was either in receivership or liquidation is that right?

A. It was, yes

Q.20 Yes. Now that information came to the Tribunal very late in the day, indeed when your evidence was being taken on the issue, and perhaps if we could just refer briefly the documentation which backs that. If we see on screen please p. 24742, this is a bank print out of the details of the account of Roevin Ireland Limited from a period commencing in October 1992, on the page in front of you there you will see that it opens with a lodgement of £39,000 or there is £39,000 in it.

A. OK.

Q.21 Isn't that right? and from October 1992, until December of 1993, which is the last entry on that page, you will see that there is only one withdrawal, that is £2,000 on the 16'h November, that's up at the top of the column, 16th November, 1992; £2,000 comes out of that account and then on the 22nd December, 1993; £5,000 comes out of that account.

A. Yes.

Q.22 And it's the £5,000 account withdrawal that we see here which went on to fund the draft that was payable to Mr. Bertie Ahern and which is said to resent Mr. Padraig O'Connor's payment, isn't that so?

A. Yes."

Subsequently other questions were asked of the applicant in relation to the balance of the account.

Thus, the point was made on behalf of the applicant that the applicant was not asked about the source of the £39,000 in that account.

Finally, for completeness I should say that the applicant in a replying affidavit took issue with a number of the averments of Ms. Gilvarry.

Consideration of the Submissions
Counsel on behalf of the applicant in his submissions emphasised that the question of the source of the £39,000 in the Roevin account was simply not canvassed. He referred to the case of *O'Callaghan and Others v. Mahon and Others* (Unreported, High Court, O'Neill J. 6th October 2009) which was an application by a number of parties before the same Tribunal of inquiry seeking to have a copy of the proposed draft findings in relation to the applicants for the purpose of making submissions or dealing with additional facts that arose in evidence concerning them. O'Neill J. refused the relief sought and commented at p. 21:-

"It is clear that in the instant case the applicants know the evidence that has been given and are in a position to address their submissions to those items of evidence that are adverse [to] them. For this reason I am satisfied that there is no want of fair procedures or natural justice in the denial to them of the relief now sought."

At p. 22 he continued:-

"What the tribunal must now do is make findings of fact based on the evidence it has heard."

Mr. O'Callaghan S.C. makes the point that as the applicant was never asked the direct question as to the source of the sum of £39,000 which opened the Roevin account he was

(a) never put on notice of the fact that adverse findings could be made against him in respect of the source of the £39,000 in the Roevin account and

(b) he was never put on notice of the fact that adverse findings could be made against him in respect of his credibility in refusing to answer questions that were never asked and

(c) consequently the respondents were not entitled to make adverse findings in relation to these matters.

In the course of submissions Mr. O'Callaghan S.C. on behalf of the applicant referred to a number of authorities and I propose to briefly mention those. Reference was made to well known decision, *Re. Haughey* [1971] I.R. 217, in which it was stated by O'Dailagh C.J. as follows:-

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

He continued at p. 264:-

"Where, as here, it is considered necessary to grant immunity to witnesses appearing before a tribunal, then a person whose conduct is impugned as part of the subject matter of the inquiry must be afforded reasonable means of defending himself. What are these means? They have been already enumerated at (a) to (d) above."

In *Lawlor v. Planning Tribunal* [2010]1I.R. 170, the Supreme Court and in particular Murray C.J. at p. 183, referred to the importance of fair procedures in Tribunals of Inquiry in the following terms:-

"Nonetheless, the courts have stressed repeatedly the obligation of tribunals to apply fair procedures and to trench upon the rights of the individual as little as possible, consistent with the aims and objectives of the inquiry itself. In this regard the invocation by persons under investigation of the panoply of rights identified by this court in *In Re Haughey* [I971] I.R. 217 is an entitlement repeatedly upheld and supported by the courts. That said, the courts have been quick to

> acknowledge that considerable adverse reputational consequences can flow, both from allegations aired at tribunals and from supposedly 'legally sterile' tribunal findings. The term 'legally sterile' has been used as an allusion to the fact that the findings of a tribunal are the conclusions only of the chairperson, and its members where there is more than one member, and in no sense, as pointed out above, has the status of a judicial finding, civil or criminal, notwithstanding that in order to ensure the independence of a tribunal, its chairman and members are judges."

It was also stated by Murray C.J. at p. 186 of that decision that the findings of Tribunals of inquiry "must clearly be proportionate to the evidence available. Any such findings of grave wrongdoing should in principle be grounded upon cogent evidence".

Reference was made in addition to the decision in the case of *Murphy v. Flood Tribunal* [2010] 3 I.R. 136. That case concerned findings made by a Tribunal that the plaintiffs in the proceedings had obstructed and hindered the Tribunal and those findings were found to have been invalid. Denham J. at p. 156 of her judgment stated:-

> "Although the issue does not arise, in light of my decision on the 'vires', I would also state that, in all the circumstances, the decision of the Tribunal was made in breach of fair procedures. On well established principles of fair procedures the plaintiffs should have been given notice of an intended ruling on obstruction and hindrance in relation to the issue of costs and an opportunity to make submissions. No notice was given of the intention to address the issues of obstruction and hindrance, and so the plaintiffs had no opportunity to make submissions on such matters. Thus the manner in which the Tribunal made the rulings was in breach of fair procedures."
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> She added:-
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> "The Tribunal made substantive findings of corruption. There was no challenge by the plaintiffs to the findings of corruption by the plaintiffs made by the Tribunal. This was specifically acknowledged by counsel for the plaintiffs in answer to questions from the court. Thus the determinations made by the Tribunal as to corruption stand."

I was also referred to the decision in *R v. University of Cambridge* [1723]1 S.T.R. 577 and to *Mahon v. Air New Zealand* [1984] A.C. 808, a decision of the Privy Council. That was a case involving a Royal Commission of inquiry into the cause and circumstances of an airline crash. In that case it was stated by Lord Diplock at p. 820 as follows:-

> "The rules of natural justice that are germane to this appeal can, in their Lordships' view, be reduced to those two that were referred to by the Court of Appeal of England in *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965]1 Q.B. 456, 488, 490, which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the judge inquiring into the Mt. Erebus disaster. The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.
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> The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.
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> The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result."

Reference was also made to a passage at p. 832 of the judgment and it is made clear that in judicial review proceedings the court is not entitled to disturb findings of fact unless "(i) the procedure by such findings were reached was unlawful ... or (ii) primary facts were found that were not supported by any probative evidence".

Relying on the various authorities referred to, the point was made on behalf of the applicant that the applicant was never asked a direct question relating to the source of the £39,000 in the Roevin account and he was never put on notice of the fact that adverse findings could be made against him in respect of the source of the £39,000; (b) he was never put on notice of the fact that adverse findings could be made against him in respect of his credibility in refusing to answer questions that were never asked; (c) that the respondents were not entitled to make adverse findings in relation to these matters.

The applicant also made the point that the Tribunal had to behave in a manner which was reasonable and rational and in that context referred to the decision in *Meadows v. Minister for Justice* [2010]2 I.R. 710. In that case at pp. 743 to 744

Denham J. summarised the principles to be applied in a judicial review application to determine if the decision was reasonable or irrational in the following terms:-

> "(i) in judicial review the decision making process was reviewed;
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> (ii) it was not an appeal on the merits and it was not for the court to step into the shoes of the decision maker;
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> (iii) the onus of proof rested upon the applicant at all times;
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> (iv) in considering the test for reasonableness, the basic issue to determine was whether the decision was fundamentally at variance with reason and common sense.;
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> (v) the nature of the decision and decision maker being reviewed is relevant to the application of the test;
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> (vi) where the legislature has placed decisions requiring special knowledge, skill, or competence for example, as under the Planning Acts, with a skilled decision maker, the court should be slow to intervene in the technical area;

> (vii) the court should have regard to what Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986]1.R. 642 referred to as the 'implied constitutional limitation of jurisdiction' in all decision making which affects rights. Any effect on rights should be within constitutional limitations, should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision."

Reference was also made to the decision of Fennelly J. at p. 814 in that case, where he stated:-

> "Henchy J. did not differentiate between unreasonableness and irrationality. A requirement to demonstrate that a decision was irrational would set the bar at an almost impossibly high level. In the quoted passage, Henchy J. twice draws 'fundamental reason' and 'common sense' together. Mark de Blacarn, in his work, *Judicial Review*, (Tottel Publishing, 2nd ed.), at p. 338, distinguishes between irrationality and unreasonableness, observing that 'the irrational is limited to the absurd or perverse, whereas the unreasonable includes a broader range of wrongful acts'."

The point made by Mr. O'Callaghan was that the findings he challenges in these proceedings do not flow from the evidence. There was no relevant material before the respondents which would allow such a finding to be made.

By way of response, Mr. O'Reilly S.C. made an argument in relation to mistakes of fact and referred to para. 4.162 and the statement therein that "the applicant claimed not to have any knowledge of the source of the IR£39,000 which opened the account in October 1992 ..."which is central to this application. He pointed out that insofar as this is a factual mistake it would be unusual for a court to review the factual finding in proceedings by way of judicial review. He referred to Hogan and Morgan, *Administrative Law in Ireland* (4th Ed.) and para. 10.132 in which the learned authors stated:-

> "Most of the errors in the cases just discussed have been errors on points of law, specifically statutory interpretation. It remains to deal here with the fate, in judicial review proceedings, of errors of fact; and, in the next section, with errors as to mixed questions of fact and law. Traditionally, among the most definite rocks of the island of immunity impregnable to judicial review has been error of fact. It is easy to see why this should be so. First, constellations of facts, of their nature, are unique and erroneous decisions in relation to them leave no precedence. Secondly, the body whose decision is under review will have heard the witnesses and sifted the documents; and will often be a specialised body with expertise and experience in the particular field. These considerations justify the traditional position that a court will not review for error of fact. In the *Ryanair Limited v. Flynn*, Kearns J. commented on the general unavailability of judicial review for errors of fact;
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> > 'it seems clear that the cases where the court can intervene by way of judicial review to correct errors of fact must be extremely rare ... there is no body of jurisprudence in this jurisdiction which suggests that it would be desirable for the courts to interfere where errors within jurisdiction are made ... it seems clear to me on the authorities that a very high threshold must be met, at least in this jurisdiction, before the court can or should intervene.'"

Mr. O'Reilly examined in some detail the decision in the case of *Ryanair Limited v. Flynn* and in particular the passages from which the learned authors of Hogan and Morgan quoted in para. 10.132. He also referred to the decision in the case of *Air Rianta cpt v. Commissioner of Aviation Regulation* which was commented upon by Hogan and Morgan in para. 10.134 :-

> "As a last resort, Keams J. suggested, the court would usually exercise its discretion to refuse a remedy as a means of avoiding entangling itself in the protracted dispute under review. It is notable though that in *Air Rianta cpt. v. Commissioner for Aviation Regulation*, O'Sullivan J. rejected the suggestion that the High Court had any power whatever to correct errors of fact:
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> 'I would share Kearns J. marked reluctance to endorse the notion of jurisdiction to correct for error [of fact] as expressed in his judgment in Ryanair. Insofar as his obiter dicta in that case may appear to acknowledge the existence of such a jurisdiction I would respectfully decline to agree.:"
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> Finally Mr. O'Reilly referred to para. 10.152 of Hogan and Morgan where they stated:
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> "In the first place, if the court's jurisdiction is dependent on the existence of a collateral fact, there must be sufficient evidence on which the court can conclude that its jurisdictional requirements have been satisfied. This may be illustrated by *State (Holland) v. Kennedy.* The District Court's jurisdiction to sentence a young person to prison was contingent on evidence that the accused was 'depraved'. Henchy J. concluded that the District Judge erred in law in a manner going to jurisdiction when she wrongly concluded that this statutory requirement was satisfied by one single aberrational incident. In other words, there was no or insufficient evidence to enable the District Court to conclude that this jurisdictional requirement had been satisfied. Secondly, discretionally powers must be exercised in a manner which is capable of being factually justified, so that an administrative determination for which there is no adequate evidence can be set aside on irrationality grounds."

It was submitted on behalf of the respondents that only the latter part of that paragraph could be relied on by the applicant. In the written submissions of the applicant, the applicant expressly referred to the sentence in Hogan and Morgan to the effect that "an administrative determination for which there is no adequate evidence can be set aside on irrationality grounds" and relying on that sentence it was submitted that insofar as the respondents relied on an argument based upon mistake of fact that in the circumstances of the present proceedings such an argument would fail. Mr. O'Reilly disagreed. He pointed out that the basis for that statement is the decision in the case of *State (Creedon) v. Criminal Injuries Compensation Tribunal* [1988] I.R. 51, in which it was stated by Finlay C.J. at p. 53:

> "It is accepted by counsel on behalf of the applicant that, having regard to the decision of this Court in *The State (Keegan and Lysaght) v. Stardust Compensation Tribunal* [1986] I.R. 642, in order to succeed she must satisfy the Court that the decision of the Tribunal was at variance with reason and common sense."
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> Finlay C.J. continued:-
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> "There are no grounds on which the Tribunal would have been entitled to reject the accuracy of the account of the happening of this unfortunate accident which I have summarised. What remained at issue for them only was the inference which could be drawn from those facts as to whether what the deceased was engaged in at the time of this accident was an attempt to save human life. It is of some importance that the category of claim provided for in the Rules, at rule

> 4(d), does not require as a necessary proof that objectively a life was in danger, nor, of course, does it require that a life was actually saved. All that is necessary to bring a claimant within that sub-rule is to prove that the activity in the course of which or because of which the injury was suffered was an attempt to save a life, honestly believed by him to be in danger."

Having referred to that decision Mr. O'Reilly contended that the authority relied on by the applicant did not support the contentions of the applicant as set out in para. 50 to the effect that an argument based on mistake of fact must fail.

I want to refer briefly to two other authorities opened to the court. First, reference was made to the decision in the *Meadows* case referred to above and to a number of passages in relation to proportionality. In the course of his judgment at para. 62, Murray C.J. commented:-

> "It is inherent in the principle of proportionality that where there are grave or serious limitations on the rights and in particular the fundamental rights of individuals as a consequence of an administrative decision, the more substantial must be the countervailing considerations that justify it."
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> Fennelly J. at para. 229 of the same judgment said:-
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> "I prefer to explain the proposition laid down in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanála* [1993]1 I.R. 39, retaining the essence of the formulation of Henchy J. in the former case. I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word, 'substantive' to distinguish it from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of the decision maker. This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J. The applicant must discharge that burden by producing relevant and cogent evidence."

That decision received some consideration in the course of the judgment in *Donegan Dublin City Council* [2012] I.E.S.C. 18 and I would refer to a passage in the course of that judgment at para. 47 which considered the role of judicial review proceedings. It was noted therein that:-

> "On judicial review, where it is determined that there is a matter of fact in controversy, which is relevant to the dispute, it is commonplace for discovery and cross-examination to be available. Further, there is jurisdiction to quash decisions on the basis that a tribunal has proceeded on an 'incorrect basis of fact' ... and it is accepted that there is jurisdiction to direct judicial review proceedings to continue by way of plenary hearing. The limitation in relation to fact finding in judicial review is therefore not a general one. Whilst it is true that review on the ground of unreasonableness, established in *State (Keegan) v. Stardust Tribunal* [1986] I.R. 642, has been applied, so that a court will not review the conclusion of a decision-maker unless it is one which no reasonable body could have come to, the structure of unreasonableness and irrationality recognises the separation of powers between the courts and administrative decision-makers."

It was further stated in the course of the judgment in that case in considering the decision in *Meadows* at para. 131 as follows:-

"In this regard the decision of Murray C.J. at p. 723 should be noted:-

> "In examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense I see no reason why the Court should not have recourse to the principle of proportionality in determining those issues.... Application of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness, I do not find anything in the dicta of the Court in *Keegan* or *O'Keefe* which would exclude the Court from applying the principle of proportionality where it could be considered relevant.

It is clear from this statement, that although some extension of judicial review for reasonableness is envisaged so as to take account of the proportionality of the action, it is to be done on the basis of *Keegan* and *O'Keeffe*, rather than as an entirely novel criterion. As Fennelly J. noted at p. 817 in the same case:-

> 'Two fundamental principles must, therefore, be respected in the rules for the judicial review of administrative decisions. The first is that the decision is that of the administrative body and not of the court. The latter may not substitute its own view for that of the former. The second is that the system of judicial review requires that fundamental rights be respected.'

Thus although some consideration of fundamental rights may be entered into in judicial review, this in no way affects the traditional position that such remedy cannot be used as a rehearing or otherwise to determine conflicts of fact.

In light of the comments already made as to the adequacy of judicial review, I would not find that *Meadows* has substantially altered that position in this regard."

Thus, the decision in *Meadows* has not brought about a fundamental change in the way in which a court functions in judicial review proceedings. It remains the position that the court is not a court of appeal and does not engage in a rehearing to resolve conflicts of fact.

The final decision I want to refer to in the context of these arguments is the decision in the case of *E. v. Home Secretary.* 2004 Q. B. 1044 I would refer to one passage from the judgment of the Court of Appeal in that case (Camwath L.J.) at p. 1071 , where he stated:-

> "In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise

> code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the *Criminal Injuries Compensation Board* case. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established" in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

One of the observations made in that regard by Mr. O'Reilly was that the decision in relation to mistake of fact in that case arose in the context of asylum/immigration law in which both sides have a shared interest in cooperating to achieve the correct result.

The approach in that case does appear to be somewhat at variance with the decision in the case of *Ryanair Ltd. v Flynn* but the key to the difference in approach is almost certainly to be found in the nature of the case before the court in the Court of Appeal, namely, a decision in an asylum/immigration case, where there is, as pointed out, a shared interest in cooperating to achieve the correct result. I do not think that the case of *E* is of assistance to the court in these proceedings.

Mr. Lehane in his final submissions reiterated that the court was not permitted to step into the shoes of the Tribunal and asking whether or not it would have been possible for the court to have come to a different view.

Finally, I was referred to a decision in a case entitled *Kirrane v. The Honourable Mr. Justice Finlay*, *Sole Member of the Tribunal of Inquiry in the Blood transfusion Board* 1997/206 J.R. in which the applicant challenged certain adverse finding of the BTSB Tribunal on the grounds that he had not been notified of the fact that allegations had been made against him and that he had not furnished with a copy of the evidence which reflected on his good name. The proceedings in that case were settled and I was furnished with a copy of the order made therein. I think it would be inappropriate to place any reliance on that decision given that (a) it was the result of settlement between the parties and (b) that there is no factual information in relation to the matter to assist the court in considering the issues beyond a newspaper cutting in relation to the outcome of the proceedings.

Decision on fair procedures and unreasonableness/irrationality and error of fact within jurisdiction
A key consideration for the court in relation to this matter is to determine whether or not the findings under challenge in these proceedings can be set aside on the grounds of either a lack of fair procedures or on the grounds of unreasonableness/irrationality. Having considered all of the submissions in this case I find it somewhat difficult to reach the conclusion that there is a basis for saying that there was a want of fair procedures in the manner in which the Tribunal reached its decision in relation to the findings under challenge. I have to say that in the context of the evidence before me, I find it difficult to reach the conclusion that there was a want or breach of fair procedures in the *Re. Haughey* sense. I do not think that the matters raised in this case come within the category of adverse findings described in *Murphy v. Flood* [2010]3 I.R. 136, in relation to which a question arose as to issues of obstruction and hindrance. It is clear that in the present case the applicant was cross examined at length on two separate occasions about the Roevin account. Various matters were put to him as to the monies in that account on the first day when he was questioned and one version of events was given by the applicant. On the second occasion, the position in relation to that account was somewhat altered in that more information had been obtained by the Tribunal. It would not be appropriate for me to re-evaluate the evidence in this regard as that was clearly a matter for the Tribunal, but having regard to the issue that has arisen I do not think that I could say there has been any want of fair procedures in relation to the matter in the sense in which that phrase is understood from cases such as *In Re. Haughey* and *Murphy v. Flood* referred to above.

In the course of submissions much was said as to decisions which are unreasonable or irrational and decisions in which errors have occurred. Mr. O'Reilly on behalf of the respondents has said that this is a case about a mistake of fact as opposed to a case involving an adverse finding which flies in the face of reason.

I have referred above to the lengthy submissions made to the court in relation to errors of fact occurring within jurisdiction and in particular to the decision in the case of *Ryanair v. Flynn*.. In the course of the decision in the *Ryanair v. Flynn* case, to which reference has been made above, Kearns J. was emphatic in stating:-

> "There is no body of jurisprudence in this jurisdiction which suggests that it would be desirable for the courts to interfere where errors within jurisdiction are made. Indeed, the author cited by counsel for the applicant in support of such a supposed new doctrine also states:-
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> > 'It must also be remembered that the courts have a long-standing dislike of investigating questions of fact in judicial review proceedings, even though the facilities for doing so have been improved.' (Wade and Forsyth's *Administrative Law* (1994 Ed. p. 311)

It is worth referring to a quotation from the judgment of Denham in *O'Callaghan v. Mahon* [2008] 2 I.R. 514 at 533, where she said:-

> "The court is asked to supervise decisions of the tribunal and to control any of its actions in excess of jurisdiction. This process is not a procedure by which to correct errors, nor is it a court of appeal...."

Insofar as the law on this issue is concerned, I think the position is clear from the two authorities referred to above. It is undoubtedly the case that there is an error of fact apparent in para 4.162 insofar as it says that "Mr. Richardson claimed not to have any knowledge of the source of the IR£39,000 which opened the Roevin account in October 1992". The applicant in these proceedings did not make that claim.

I think it is important to observe that the applicant has embarked on an exercise in parsing and analysing the terms of paras. 4.162 and 4.163 and has extracted sentences from both paragraphs which are then challenged. If one looks at para. 4.162 in particular, it is noteworthy that much of that paragraph is not challenged. Thus, there is no challenge to the following findings:

> "The Tribunal noted that the Roevin Ireland Limited bank account, from which Mr. Richardson purchased the IR£5,000 draft payable to himself, and which ultimately ended up with Mr. Ahem, was opened on the 9th October, 1992, a time when, on Mr. Richardson's account of events Roevin Ireland Limited had ceased operating business in Ireland. [The sentence under challenge appears next] ... or why there was a deficit ofiR£2,000 one month later (16th November, 1992)."

It is interesting to note that the next sentence in para. 4.162, is also challenged which is as follows:

> "The Tribunal rejected the applicant's evidence in this regard."

I hardly think that the last sentence can be regarded as incorrect in all respects although I accept as a matter of fact that there was a mistake in relation to the assertion that the applicant claimed not to have any knowledge of the source of the IR£39.000.

The error of fact in that paragraph is, effectively, replicated in para. 4.163 insofar as the Tribunal stated that it found it incredible that the applicant was unable to account to the Tribunal for the origins of the funds in the account. However, again it appears to me that this was a mistake of fact.

It is a somewhat artificial exercise to break down the findings in the respective paragraphs complained of and to criticise elements of those paragraphs as being irrational or unreasonable findings. In truth, this is more in the nature of a challenge to "part findings" of the Tribunal. It seems to me that the manner in which this has been done by the applicant lends force to the argument that what is at the heart of this application is an error of fact and an error within jurisdiction which is not amenable to judicial review. It is not the function of the court in these proceedings to correct errors of fact made by the Tribunal and thus, I have concluded that the applicant is not entitled to the relief sought herein.

Lack of Candour
I now want to turn to a different topic, namely, the alleged lack of candour on the part of the applicant in the verifying affidavit. A number of complaints have been made by the respondents in this respect. The first complaint is that the applicant did not explain the source of the £39,000 which opened the Roevin account. With the greatest respect, I do not think that the identity of the source of the money concerned is relevant to the issue of whether or not the applicant is entitled to judicial review in relation to the findings of the Tribunal against him. Judicial review is for the purpose of examining the process by which a decision has been reached or a finding has been made as opposed to examining the underlying merits of the decision.

However, a series of other complaints have been made on behalf of the respondents in relation to the failure of the applicant to make full and frank disclosure. This was outlined in the affidavit of Susan Gilvarry at paras. 21 and 23 of her affidavit and in paras. 25 to 29, she explains the relevance of certain matters which were not disclosed by the applicant in the course of his application for judicial review. One of those issues was central to the acquisition of the bank draft for £5,000 which as is now known obtained from the funds in the Roevin account. It had been put before the Tribunal that the sum of £5,000 represented the contribution of Padraig O'Connor of NCB Stockbrokers to the fund of £22,500 gathered for Mr. Ahem. No reference was made in the affidavit of the applicant to the invoice dated the 14th December, 1993, raised by Euro Workforce Limited and paid by NCB Stockbrokers in the amount of£6,050. That invoice and the issue of Mr. O'Connor's contribution was a significant part of the findings in relation to the applicant and was without doubt, a central issue in relation to Roevin.

The response of the applicant to the complaint in relation to these adverse findings made against the applicant is to say that they were not relevant for the purpose of this application for judicial review. The applicant in his grounding affidavit did set out some details in relation to the lodgement of £22,500 to the bank account owned by Mr. Ahem. He also dealt with the "Padraig O'Connor contribution" and the account of Roevin. These are matters set out at paras. 9 to 14 inclusive of the verifying affidavit. For example at para. 11, the applicant stated:

> "Mr. O'Connor gave conflicting evidence. He testified that in December, 1993, the applicant told him that Mr. Ahem's constituency office was seeking to raise a sum of approximately £20,000 to £25,000 to fund its annual running costs and that the applicant solicited a contribution of £5,000 from NCB Stockbrokers towards that fund. Mr. O'Connor testified that NCB Stockbrokers agreed to make the donation but wished to keep it private and undisclosed. Mr. O'Connor testified that while he and Mr. Ahem had a friendly professional relationship at that time, they were not close friends." The applicant continued at para. 12:
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> "Arising from Mr. O'Connor's confirmation that he would contribute £5,000 to the £22,500 fund, the applicant testified that in December 1993, he purchased a bank draft for £5,000 at the Bank of Ireland branch in Montrose and that this bank draft represented Mr. O'Connor's contribution to the £22,500 fund. Initially the applicant believed that the source of the fund that purchased the £5,000 draft was the Willdover account, because a cheque of £5,000 was drawn on that account on the 22nd December, 1993, the same day as the draft was purchased. On receipt of further documentation from Bank of Ireland, the Tribunal suggested, and Mr. Richardson accepted, that the source of funds used to purchase the bank draft was, in fact, a company called Roevin Ireland Limited ('Roevin)."

In considering the arguments on behalf of the respondents in this regard it is necessary to consider a number of authorities to which the court was referred. The first of those is the decision in the case of *JRM Sports Limited trading as Limerick Football Club v Football Association of Ireland* (Unreported, Clarke J. High Court, 31st January, 2007). That was a case in which an application for an interim order had been made to the High Court (Peart J.) in relation to the ability of the FAI to enter into a contract or to grant a licence to carry out the functions of a member of the FAI in place of or instead of the member, Limerick Football Club. One of the issues raised before the court was the fact, that the case originally made by Limerick FC when it brought an application before the court for an interim injunction, was factually inaccurate. There was a discussion thereafter by the role of a party in making an *ex parte* application to court for relief in terms of the information to be put before the court. Clarke J. at p. 19 of the judgment stated as follows:-

> "Both of those explanations have consequences. The first matter which I need to address is the law that applies in relation to applications to the Court where only one side is represented. It is clear from two decisions which I have given in the last two years in the cases of *F. McK- DC* [2006] IEHC 185 and *Bambrick v Cobley* [2005] IEHC 143 that there is a clear duty on any party who comes before the Court without the other side being notified, to put before the Court not only the facts that suit their case, but also any facts that might influence the Court in refusing their application. The reason for that rule is set out in those cases, but it only stems from common sense. Allowing people to go into Court and get an order without the other side being told in advance is a departure from the normal rule that both sides are entitled to be heard. It is a necessary departure in emergency situations, but the price which a party pays for being able to do it, is that they have an obligation of what is called in the cases 'candour' and which means simply that they have to put all the cards on the table. It is manifestly clear that not only were not all the cards put on the table in this case, but that some of the cards were in fact distorted. It is clear in those circumstances that the Court has a discretion to refuse an order which might otherwise properly be given on the basis that parties have abused their right of access to the Court by, in substance, misleading the Court by not putting forward all of the relevant facts.
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> As I indicated in paragraph 3.4 of my judgment in *Bambrick*, the three principal factors which the Court should take into account are firstly the extent or materiality of the matters that are misstated or omitted; secondly, whether the omissions were deliberate or accidental and, thirdly, the question of whether an order should in any event be given having regard to all the circumstances of the case."

I was also referred to the decision in *In Re. Downes* [2006] N.I.Q.B. 77, a decision of the Queen's Bench Division of the High Court Justice in Northern Ireland (Girvan J.). That was an application for judicial review in relation to the appointment of the Interim Victims Commissioner. At para. 30 of his judgment, Girvan J. made the following observations:-

> "In the circumstances I accept that Mr Treacy's contentions that there was a significant lack of candour. In consequence the court must approach the totality of the evidential basis of the respondent with considerable caution and parse the words used by the deponents with considerable care. While the normal approach is that in a judicial review application the affidavits of public officers will be interpreted in *bonam partem* that principle is based on the assumption that candour, openness and frankness are to be expected of public officials. If the trust of the court is broken then, as Laws L.J. has pointed out in *Quark*, the court may have to draw inferences against the decision maker on points which remain obscure.
>
> Before concluding this aspect of the case it is timely to forcefully remind parties of their duties of candour in relation to the provision of information to the court. The affidavits of all parties should be drafted in clear unambiguous language. The language must not deliberately or unintentionally obscure areas of central relevance and draftsmen should look carefully at the wording used in any draft to ensure that it does not contain any ambiguity or is economical with the truth of the situation. There can be no place in affidavits in judicial review applications for what in modem parlance is called 'spin'. Public bodies and central government agencies in particular are involved in the provision of fair and just public administration and must present their cases dispassionately and in the public interest. Justice lies at the heart of public interest and can only be served by openness in assisting the court to arrive at a proper and just decision. The judicial restraints on matters such as discovery and cross- examination would not long survive if lack of frankness and openness were to become commonplace in judicial review applications."

There are a number of observations to make in relation to those two authorities. The first is that the decision in the *JRM Sports Limited* case was one dealing with an application for an interim injunction, not judicial review proceedings. Nevertheless, the essential point is that a party making an *ex parte* application has an obligation or duty of candour in making the application. The second observation to make is that the decision in *Re Downes* was a case where there was a lack of candour on the part of the respondent as opposed to the party applying *ex parte* for relief- the court in that case had pointed out at an earlier stage that the "duty of good faith an candour lying in relation to both the bringing and defending of a judicial review application is well established". In other words the duty of candour is not solely that of the party making the application. Nonetheless, the observations in that case are of assistance in reminding parties of the responsibilities of those applying for and defending applications for judicial review to put all relevant matters before the court considering the particular application. The duty of candour is not confined to *ex parte* applications as pointed out by Girvan J.

Having made those general observations it seems to me that in considering whether or not there has been a lack of candour on the part of the applicant in this case, the test to be applied is that set out by Clarke J. in the case referred to above, namely, the extent or materiality of the matters that are misstated or omitted; secondly, whether the omissions were deliberate or accidental and thirdly, the question of whether an order should in any event be given having regard to all the circumstances of the case.

Given that I have already come to the conclusion that this is not a case in which judicial review should be granted, strictly speaking it is not necessary for me to decide this issue, but in the event that I am mistaken in the conclusion I have reached, I should give an indication of my views in this regard. I have to say that in my view, this is not a case where it could be said that the applicant has placed all his cards on the table in relation to the application. In the course of the affidavit grounding the application, the description given by the applicant in relation to soliciting funds from Mr. O'Connor of NCB Stockbrokers and in relation to the manner in which the sum of £5,000 was obtained to purchase the bank draft in that amount did not represent fully the findings of the Tribunal in respect of those issues. Looking at the affidavit of the applicant, there is no reference of any kind to the evidence in respect of the invoiced raised in the amount of £6,050 paid by NCB Stockbrokers to Euro Workforce Limited, something which was, in my view, material. No reference was made to the fact that the said sum was obtained on foot of a fictitious invoice. The applicant did refer to an evidential dispute between the said Mr. O'Connor and himself in relation to the sum of £5,000 but no reference at all was made to the findings of the Tribunal in that regard. To that extent, it seems to me that the affidavit of the applicant was less than a full and frank disclosure of the findings of the Tribunal on these issues. I disagree with the submission on behalf of the applicant that these matters were not relevant. For example, he considered it relevant to discuss the evidential dispute between Mr. O'Connor and himself and yet did not consider it relevant to indicate the Tribunal's findings on the issue. In my view they were relevant in setting out the full position in relation to the findings made by the Tribunal in respect of the applicant.

I think it is important to point out that a lack of candour on the part of an applicant for judicial review will not necessarily preclude a party otherwise entitled to succeed in an application for judicial review from obtaining the appropriate relief but it will have an effect on the weight to be attached to the evidence of the applicant. It should also be borne in mind that judicial review is a discretionary remedy and as such, a lack of candour on the part of an applicant will play a part in the court's decision as to how to exercise its discretion. In an appropriate case, a court may take the view that the lack of candour is such as to disentitle an applicant from obtaining the relief sought One could say that in cases where a court has been misled deliberately in a material respect by an applicant for judicial review that the court would be entitled to refuse relief which might otherwise have been granted. The issue of candour may also have a bearing on the costs of proceedings.

Nevertheless, I would not go so far as to say that the omissions on the part of the applicant were such as to have necessarily resulted in the court refusing to grant relief by way of judicial review.

In conclusion, I have already indicated that I am not satisfied that this is an appropriate case in which to make the orders sought by the applicant.

By way of postscript, I would add that this is a case in which there was a mistake of fact on one issue in respect of the findings of the Tribunal in respect of the applicant. No doubt the Tribunal will be happy to correct the error.