Neutral Citation Number: [2011] IEHC 2

THE HIGH COURT

JUDICIAL REVIEW

2010 1207 JR

BETWEEN

IVOR CALLELY

APPLICANT

AND

PAT MOYLAN, DAN BOYLE, FRANCES FITZGERALD, CAMILLUS GLYNN, DENIS O'DONOVAN, JOE O'TOOLE AND ALEX WHITE (MEMBERS OF THE SELECT COMMITTEE ON MEMBERS INTERESTS OF SEANAD ÉIREANN), COMMITTEE ON MEMBERS' INTERESTS OF SEANAD ÉIREANN AND SEANAD ÉIREANN

RESPONDENTS

JUDGMENT of O'Neill J. delivered on the 14th day of January, 2011

1. In these proceedings, the applicant seeks, by way of judicial review, orders of *certiorari*, quashing the respondents' *'Report of the Results of an Investigation into Complaints Concerning Senator Ivor Callely'* dated 14th July, 2010, and quashing a resolution of Seanad Éireann adopted by Seanad Éireann on 14th July, 2010, to the effect that the applicant be censured and be suspended from service of the House for a period of twenty days on which the House should sit, and that such annual sum by way salary payable to the applicant be withheld for that period, and that the period of suspension commence forthwith.

BACKGROUND

2. The applicant in these proceedings is member of Seanad Éireann, having been so appointed by An Taoiseach, Mr. Brian Cowan, T.D., in August 2007. Prior to that, he had been a member of Dáil Éireann for approximately eighteen years and lost his Dáil seat in the General Election in May 2007. As a member of Dáil Éireann, he represented the constituency of Dublin North Central, where he resided with his family, and where he had a Constituency Office. The applicant also has another home, originally a holiday home, since 1992, at Kilcrohane, near Bantry in West Cork.

3. Pursuant to s. 4(1)(c) of the Oireachtas (Allowances to Members) Act 1938 ("the Act of 1938"), members of the Seanad are entitled to recover expenses incurred in travelling to attend sittings of Seanad Éireann, from their "*normal place of residence*". The section is as follows:

> *"The travelling facility to be granted to each member of the Oireachtas under this Act shall be . . .*
>
> *(c) in the case of a member of Seanad Éireann, travelling facilities between Dublin and his normal place of residence for the time being."*

4. Pursuant to the Oireachtas (Allowances to Members) (Travelling Facilities and Overnight Allowances) Regulations 1998 (S.I. No. 101 of 1998) ("the 1998 Regulations"), a member of the Houses of the Oireachtas, whose normal place of residence was further than fifteen miles from Leinster House, had an option of choosing to claim expenses in attending Leinster House, either through a daily allowance of €61.00 or a travel allowance based on mileage and an overnight allowance of approximately €140.00 per night. These Regulations were replaced, on 2nd March, 2010, by the Oireachtas (Allowances and Facilities) Regulations 2010 (S.I. No. 84 of 2010). It is the 1998 Regulations that apply in the circumstances that are in controversy in this case.

5. The applicant, in December 2007, submitted a claim for overnight and travel expenses for the period from 3rd August, 2007 (the date of his appointment) to 3rd November, 2007. By way of explanation, he wrote as follows:-

> *"My personal situation has changed since June 2007, and while I retain my Dublin home and my Constituency Office, my current principal residence is Kilcrohane, Bantry, County Cork, as per my letter of appointment to Seanad Éireann as attached . . . "*

Here, the applicant was referring to the letter from the Department of An Taoiseach dated 3rd August, 2007, informing him of his appointment to An Seanad which was addressed to the applicant at his Cork address.

6. Subsequent claims for expenses on the same basis were submitted by the applicant for the period from 4th November, 2007, to 31st December, 2007, from 1st January, 2008 to 4th May, 2008, and for the period from 5th May 2008, to 31st August, 2008. By a claim form submitted on 22nd December, 2009, the applicant submitted a *"nil"* claim for the period from 1st September, 2008, to 31st December, 2008.

7. The applicant claimed travel and overnight expenses on the basis of travelling from his Cork residence for the periods from 1st January, 2009, to 4th April, 2009, from 5th April, 2009, to 2nd August, 2009, and from 3rd August, 2009, to 2nd October, 2009. He submitted a *"nil"* claim for the period from 3rd October, 2009, to 31st December, 2009. The applicant claimed on the same basis, *i.e.* travelling from his Cork residence, for the period from 1st January, 2010, to 28th February, 2010. By a letter of 2nd April, 2010, the applicant returned, by cheque, a sum of €3,987.00, being the March portion of his travelling and accommodation allowances.

8. In a letter of 2nd October, 2008, sent to the applicant by the Members Services (the office in the Oireachtas that deals with

allowances for Members), the following was stated:

> *"I note from your letter of December 2007, that you have stated that the House at Kilcrohane, Bantry, County Cork, is your 'current principal residence'. However, for avoidance of doubt and for absolute certainty for factual and audit purposes, I would be grateful if you could certify, in writing, that this house in Bantry was 'your normal place of residence for the time being' for the period of the claim. This is the statutory provision used in s. 4(1)(c) of the Oireachtas (Allowances to Members) Act 1938, for payment of such expenses.*
>
> *For ease of reference, the term 'normal place of residence' has been defined by the Department of Finance in previous correspondence as 'what is involved is a premises which, though not necessarily one's permanent and principal abode, is used for a period which is both of some length and for a purpose which is not ad hoc and goes beyond mere shelter in passage such as a few nights in a hotel'."*

9. By a letter of the same date, the applicant replied as follows:

> *". . . as already advised, my personal situation has changed since June 2007, as per my previous communication in December 2007. I can confirm that my residence in Kilcrohane is my normal place of residence for the time being, though not necessarily one's permanent and principal abode at all time. It is the residence from which I received my appointment to Seanad Éireann . . ."*

10. In or about June 2009, the applicant became concerned that the expenses he claimed reflected his evolving circumstances. He contacted the Members Services of the Houses of the Oireachtas and enquired about changing his claim for allowances from the '*Travel and Overnight Allowance*' to the '*Daily Allowance'*. By a letter dated 2nd July, 2009, the Members Services Office stated as follows:

> *"Following on from your recent enquiry, I am writing to confirm that you elected to recoup expenses incurred in respect of your attendance in Leinster House by way of Overnight and Travel Allowances for the year 2009.*
>
> *Section 5 of S.I. 101 of 1998 states that a Member, whose normal place of residence is more than fifteen miles (24.135 km.) from Leinster House, may opt for the Daily Allowance of Travel and Overnight Allowance <u>once and only once</u> within a normal calendar year.*
>
> *As you have previously declared, on 12th November, 2008, that your option for 2009 is to be the Travel and Overnight Allowance for the year ending 31st December, 2009, we are, unfortunately, unable to proceed with your request to change the option chosen until the start of the new calendar year on 1st January, 2010 . . ."*

11. At paragraph 11 of his affidavit grounding these proceedings, the applicant avers the following:

> *"In 2009, Kilcrohane, County Cork, continued to be my 'normal place of residence' and I continued to commute from Kilcrohane. However, as my circumstances evolved, I again found myself spending more time in Dublin. Therefore, I determined that a fair and appropriate solution to the situation in which I found myself would be for me not to claim expenses from August 2008 to December 2008, and September 2009 to December 2009. I have not received any expenses in respect of 2010. On 7th October, 2009, I emailed Members Services to explain my position as follows:*
>
> > *'I refer to our discussions in connection with my expenses. I am anxious that my claim should reflect my actual travel. I understand the current expenses system in respect of attendance is restricted in options and the option available to me is not suitable for my current travel, thus, I have not made any recent claim'.*
>
> *I note the response in July last, where a change of the restricted options is not possible until the start of the new calendar year in January 2010. Given that the Minister for Finance is currently considering amendments and/or a new system for expenses, it may be an opportunity to address any such issue . . ."*

12. On 16th December, 2009, the applicant wrote a further letter to the Members Services Office, and in it said the following:

> *"As stated in my last letter of 30th November, I would prefer 'my travel to reflect my actual and/or to be vouched to reflect actual expenses'.*
>
> *I understand a new expenses system will be introduced shortly, but will not be retrospect. In order to reflect travel between my Kilcrohane and Dublin abode and the expenses incurred, I wish to indicate that my claim, up to August 2008 is my last claim for 2008, I am claiming for eight months only in 2008, and I do not intend to claim for September, October, November or December 2008, as I feel this best reflects my particular situation.*
>
> *I await the new expenses system and do hope it will accommodate my position."*

13. On 2nd April, 2010, the applicant, again wrote to the Members Services Office, in the following terms:

> *"I refer to the cheque which I received under the new Parliamentary Standard Allowance system and to advise that I wish to return the monies received on 31st March, 2010.*
>
> *I do not wish to draw down my full entitlement, and return cheque to the value of €3,987.50. As I have previously indicated, I wish my expenses/allowance to reflect my actual expenses. I was hoping that the new allowance system would accommodate my situation, where my appointment to the Seanad was from my Kilcrohane abode, but I do also reside in my Dublin abode, the new system only accommodates one address. In order to reflect my actual situation, I feel it is best to return the monies. . ."*

14. In paragraph 13 of the applicant's grounding affidavit, he avers:

> *"On 30th May, 2010, the 'Sunday Independent' newspaper published an article under the heading 'Callely got €80,000 Mileage from Cork - ex-Dublin T.D. has Bantry Address'."*

15. By a letter dated 31st May, 2010, addressed to Ms. Deirdre Lane, Clerk of Seanad Éireann, Leinster House, Dublin 2, a complaint

was made by a Mr. John Mulligan of Kiltycreighton, Boyle, County Roscommon, in the following terms:

> *"Re: Senator Ivor Callely, Expenses Claims*
>
> *Dear Ms. Lane,*
>
> *I refer to the article published in yesterday's 'Sunday Independent' (attached), concerning the expenses claims made by Senator Ivor Callely. The article suggests that the Senator made claims for expenses based on his being domiciled in Cork and not in Clontarf in Dublin. It appears from the article that the Senator filled out the 'Home Details and Allowance' form with information showing his domicile as being in Cork. Anecdotal evidence would suggest that Senator Callely lives in Clontarf in North Dublin and that his Cork address is simply a holiday home. I am sure that an analysis of his home telephone account and utilities usage will establish the veracity of this.*
>
> *From the information contained in the 'Sunday Independent' article, I want to make a formal complaint under s. 8 of the Ethics in Public Office Bill 1995, in respect of Senator Callely's expenses claims. I am sending you this complaint in email format, but I am also posting you a hard copy, given that the Act specifically states that any such complaint should be in writing. While an email does constitute a written complaint, I am also sending the hard copy in case of any other interpretation of the Act.*
>
> *I would ask you to treat this complaint with the seriousness with which I take it. I have no issue with the Senator's politics, I simply feel that his actions in this instance reflect badly on all politicians and undermine public confidence in the political system. I believe that his apparent subterfuge of claiming to live in Cork is a blatant attempt to maximise his personal enrichment from the political process and shows utter contempt for taxpayers and citizens. In this context, I would respectfully request that you process this complaint and let me know of any outcome by email to this email address.*
>
> *In the event that the newspaper article is incorrect and that the Senator has, indeed, relocated permanently to Cork, I offer my apologies for wasting your time on this matter.*
>
> *Yours sincerely,*
>
> *John Mulligan"*

16. A further similar complaint was made by a Ms. Patricia Hurley of Acadia, Rathmichael Dales, Rathmichael, Dublin 18, in a letter addressed to Ms. Lane, dated 2nd June, 2010, in the following terms:

> *"IVOR CALLELY, SENATOR, DUBLIN NORTH CENTRAL*
>
> *Dear Sirs,*
>
> *I wish to lodge a complaint under s. 8 of the Ethics Act 1995, as amended by the Standards in Public Office Act 2001.*
>
> *Senator Callely has recovered expenses from the Irish taxpayer based on an erroneous claim that he lives in County Cork. This is a falsehood on two counts. They are:*
>
> *1. Senator Callely states on his website that he lives in Dublin. I attach evidence of this.*
>
> *http:/www.ivorcallely.ie/profile.htm.*
>
> *He notes . . . educated and continues to live in Dublin North Central.*
>
> *2. On the Oireachtas website, it gives Senator Callely's address as . . .*
>
> *'Landsdale House', 7, St. Lawrence's Road, Clontarf, Dublin 3.*
>
> *I request the matter be reviewed and the appropriate action be taken against Senator Callely.*
>
> *Yours sincerely,*
>
> *Patricia Hurley".*

17. By letters of 2nd and 3rd June, 2010, Ms. Lane referred these complaints to the Clerk to the Committee on Members Interests of Seanad Éireann. That committee *i.e.* the respondents herein, decided, on 3rd June, 2010, that there was sufficient evidence to sustain a complaint under the Acts, and that it would carry out an investigation in accordance with the provisions of the Standards in Public Office Acts 1995 to 2001. As required by s. 32(6)(b) of the Ethics in Public Office Act 1995 ("the Act of 1995"), the respondents furnished to the applicant a Statement of Contravention which said the following:

> ***"(1) Statement of Contravention***
>
> *In accordance with s. 32(6)(b) of the 1995 Act, as amended, the Committee prepared a Statement of Contravention alleged and provided this to Senator Callely.*
>
> *The Statement of Contravention read as follows:*
>
> > *'Two complaints from members of the public have been referred to the Committee on Members Interests of Seanad Éireann under the provisions of s. 8 of the Ethics in Public Office Act 1995 (as amended by the Standards in Public Office Act 2001) ("the Acts").*
> >
> > *The two complaints relate to allegations that Senator Ivor Callely misrepresented his normal place of residence for the purpose of making claims for allowances. The allegations are such that they may give rise to contravention*

under the Acts if it is determined that the act or omission complained, or the circumstances of which, is a specified act (within the meaning of s. 4 of the Standards in Public Office Act 2001) and is determined to be inconsistent with the proper performance by a Member of the functions of the Office of Member or with the maintenance of confidence such performance by the general public and the matter is one of significant public importance.'"

18. A statement dated 2nd June, 2010, was furnished by the applicant to the respondents. It reads as follows:

"Statement by Senator Ivor Callely to the Cathaoirleach of the Select Committee on Members Interests

Arising out of the presentation of a Sunday newspaper article, there has been a considerable speculation about my expenses.

Since my nomination to Seanad Éireann, I have been open and transparent with my expenses and communication with the Houses of the Oireachtas. Contrary to public perception, I am not currently in receipt of subsistence and travel from Cork. I was residing in my Cork residence in 2007, part of 2008 and periods of 2009. I did attempt to change my chosen option for subsistence and travel allowance for attendance in Leinster House but was unable to do so.

I now put the most relevant parts in chronological order and will fully cooperate with the Select Committee. It is my intention to wholesomely address and respond to all matters.

1. On 24th May, 2007, I lost the Seat I held for eighteen years for the Constituency of Dublin North Central. This had an immediate and devastating effect on my social, domestic and personal life. It had been a long and difficult campaign as the constituency had been reduced to a three-seater for that period, I resided mainly in my Clontarf home.

2. Once the formal matters were attended to, I then had to attend to a difficult campaign for the Seanad elections. For a significant period, my home and base was my residence in Kilcrohane, County Cork. I found that residence, with the well-known warm and sense of community, to be a great source of assistance to me at that time.

3. I continued to reside in Kilcrohane after I was unsuccessful in the Seanad race and for the period June onwards, it was my normal place of residence, so much so that when I was appointed to the Seanad, on the Taoiseach's nomination, on 2nd August, 2007, I was resident there and this is reflected in the letter of appointment. (See Document 1).

4. Following my appointment to the Seanad, I maintained myself in West Cork. I decided to remain in West Cork, commute to Dublin to fulfil my duties in the Seanad, retain my home in Clontarf and maintain my Constituency Office in Dublin North Central.

5. In December 2007, I informed the Members Services that, 'while I retain my Dublin residence and Constituency Office, my principal residence is Kilcrohane, as per my letter of appointment to Seanad Éireann'. (See Document 2).

6. In completing forms for the Oireachtas, I advised them that this was my address and the forms were processed in the normal way by independent officers of the Public Service, doing their job in a professional manner, and payments were made on this basis. On 2nd October, 2008, I was advised in very clear terms by the Members Services, to confirm my 'normal place of residence' and the officer helpfully defined it as per s.4(1)(c) of the Oireachtas (Allowance to Members) Act 1938. I confirmed this on correspondence of the same date. In stating that Kilcrohane was my 'normal place of residence for the time being, though not necessarily my permanent and principal abode at all times', I replied honestly and properly and this reflected my personal, domestic and social circumstances which existed from June 2007 to that date. (See Documents 3 and 4)

7. During the period of late 2008 and 2009, I began to spend more time in my home in Clontarf. This was due to changing personal and domestic circumstances. I also answered the Taoiseach's call to Fianna Fáil Oireachtas Members to 'put the shoulder to the wheel' in relation to the second Lisbon Referendum and because my son was a candidate in the local elections 2009 for the Constituency of Clontarf.

8. Accordingly, in 2009, I reflected on what my normal place of residence was, and on 2nd July, I contacted the Members Services to reconsider the position as to the expenses regime. I was advised by a member of the Members Services section that, 'section 5 of S.I. 101 of 1998, states that a 'member whose normal place of residence is more than fifteen miles (24.135 km) from Leinster House, may opt for the daily allowance of Travel and Overnight Allowance, once and only once, within a normal calendar year'.' (See Document 5)

9. I acknowledged this situation in response by email (see Document 6) dated 7th October, 2009, and noted that the Minister for Finance was considering amendments and/or a new scheme for expenses. I was optimistic that whether amendments to the old expenses regime or a new system was introduced, that it would reflect members' circumstances and travel, such as in my case, travel between my residence in Cork and my home in Clontarf.

10. On 16th December, 2009, I wrote to the Members Services section. I advised them that in order to reflect the travel between my Kilcrohane and Dublin abode and the expenses incurred, I wished to indicate that my claim up to August 2008 is my last claim for 2008, I am claiming for eight months only in 2008, and do not intend to claim for September, October, November or December 2008, as I feel this best reflects my particular situation. (See Document 7)

11. I honestly feel that this was a fair way of dealing with the anomaly in the old expenses regime, which was inflexible for those who may find themselves with a normal place of residence separate from their family home. The complexity of such situations were not reflected in the Statutory Instrument or administrative scheme, pursuant to it.

12. When the new expenses and allowances did come into effect, I was disappointed that, while the new scheme was a vast improvement, it still could only reflect one address. I immediately returned the full allowance cheque I received in March 2010. (See Document 8). On 31st May, 2010, I received the standard personal representative allowance of €1,250 for the months of March, April and May 2010, which I have not cashed and have retained on file, as I am determined to resolve this issue.

13. The chronology of these events do not lend themselves to a personal statement on the floor of the Seanad and I feel that a hearing before this body was required in order that I could attach relevant correspondence and endeavour to satisfactorily respond to any other matters raised by the Committee.

14. I am very grateful for the opportunity to clarify the situation and confirm that I will comply with any directions that this Committee gives.

Senator Ivor Callely."

19. The respondents decided to hear the investigation into this matter in public and held three sittings on 25th June, 2010, 30th June, 2010, and 13th July, 2010. The applicant gave evidence to the Committee on 25th June, 2010, and again, on 13th July, 2010. The respondents also met in private on 3rd June, 2010, 17th June, 2010, 25th June, 2010, 30th June, 2010 and on 6th, 7th, 8th and 14th July, 2010.

20. On 14th July, 2010, the respondents issued the Report of the Results of an Investigation into the Complaints Concerning Senator Ivor Callely, which, under the heading, *'FINDINGS AND DETERMINATIONS'*, stated the following:

"1. The Committee determines that Senator Ivor Callely has done a specified act, as contemplated by s. 4 of the 2001 Act, by misrepresenting his normal place of residence for the purpose of claiming allowances. The Committee finds that such action was inconsistent with the proper performance by Senator Callely of the function of the office of Senator, was inconsistent with the maintenance of confidence in the performance by Senator Callely of the function of the office of Senator by the public, and was of significant public importance.

2. The Committee determines that the aforementioned act on the part of part of Senator Callely is continuing.

3. In order to cease the specified act, the Committee determines that Senator Callely, in conjunction with the relevant authorities, take account of the findings of this report and regularise and make good his allowance affairs and cease to misrepresent his normal place of residence. In this context, the Committee records Senator Callely's clear undertaking given in the evidence on 25th June, 2010, that he would 'reimburse' or 'repay' any overpayment of allowances.

4. The Committee determines that the specified act on the part of Senator Callely was done intentionally.

5. The Committee determines that the specified act on the part of Senator Callely in all of the circumstances was of a serious and grave nature.

6. The Committee determines that Senator Callely did not act in good faith, having regard to all the circumstances.

In making all of these determinations and findings, the Committee took into account all of the evidence before it, and on balance, agreed that the weight of all the facts taken together, including but not limited to the facts that Senator Callely:-

- *Describes his residence as his family home;*
- *Maintains a Constituency Office in Dublin which has regular weekly opening hours and at which Senator Callely advertises on his website that he is available to attend Mondays, Wednesdays and Fridays;*
- *Represents on his website that he is continuing to work in the Constituency in Dublin North Central and that he continues to live in Dublin North Central;*
- *Has directed the Seanad to send his post to his family home in Clontarf;*
- *Used his family home in Clontarf for the purposes of receiving post in relation to his Ministerial pension;*
- *Uses his family home in Clontarf for the purpose of correspondence with the Revenue Commissioners; and*
- *Was registered to vote in Dublin.*

Link Senator Callely to his family home in Clontarf rather than to Kilcrohane, County Cork.

The Committee is strengthened in its conclusion by the fact that Senator Callely entered nil claims for September, October, November and December 2008 and 2009, and has not cashed certain cheques in 2010.

The Committee believes that the expenses regulations would benefit from a clear and more robust definition of "normal place of residence". In the interest of maintaining public confidence in the Houses, the Committee would recommend that this matter is addressed."

21. In this report, under the heading, *'Action to be Taken by Seanad Éireann'*, the following actions were recommended by the respondents:

"As the Committee has determined that Senator Callely has done a specified act, it is bound to cause a copy of its report of the results of its investigation to be laid before the Seanad.

The Committee considers it is appropriate, having regard to all the circumstances, to cause a motion to be moved in the Seanad that the actions, as specified below, being reasonable in the circumstances, be taken by the Seanad in relation to this matter:-

(a) that the Seanad note this report of the Committee;

(b) that the Seanad censure Senator Callely, and

(c) that the Seanad suspend Senator Callely from the service of the Seanad for a period of twenty days on which the Seanad shall have sat."

"Considering the Committee has determined that, in its opinion, the specified act on the part of Senator Callely was done intentionally and was of grave nature, and considering it reasonable in all the circumstances, the Committee would recommend that the Seanad also resolve to withhold from Senator Callely so much of the annual sum by way of salary payable to Senator Callely under the Oireachtas (Allowance to Members) Act 1938, during the period of the twenty days suspension."

22. On the day that the respondents issued their report, the Seanad did pass the resolution as recommended by the respondents.

23. As a result of these events, the applicant avers that the has been pilloried in the media and subjected to vilification and that his reputation has been utterly destroyed and that he has been subjected to personal abuse from strangers.

JUSTICIABILITY

24. The respondents, in their statement of opposition, raise a preliminary objection to this court hearing and making any determination in this judicial review application on the grounds that the applicant's challenge, both to the resolution of the Seanad and the report of the respondents, is not cognisable by this court; that the actions of the respondents in adopting the report and of Seanad Éireann in passing the resolution, are not amenable to judicial review by virtue of the doctrine of the separation of powers and, in particular, by virtue of Article 15.10 of the Constitution. They submit Seanad Éireann and its committees, including the respondents, are masters of their own deliberations and this court can exercise no function with regard to their deliberations. They also plead that the determination of whether the applicant has done a specified act within the meaning of s. 4(1)(a) of the Standards in Public Office Act 2001 ("the Act of 2001") is peculiarly within the discretion of the Members of Seanad Éireann and is not a determination which is capable of review by reference to objective legal standards and is, accordingly, not amenable to judicial review.

25. Thus, the first issue that this court must consider is whether or not it has any jurisdiction to hear and determine the applicant's case for judicial review. This is the first time that a Member of the Oireachtas has come to the High Court to challenge a decision of a committee of a House of the Oireachtas or a resolution of a House of the Oireachtas imposing a disciplinary sanction on such Member, relating that Member's membership of a House of the Oireachtas.

26. There are a number of cases in which the courts have been asked to consider the application of Article 15.10 of the Constitution. In *Wireless Dealers Association v. Fair Trade Commission* (Unreported, 14th March, 1956), O Dalaigh J. stated the following in giving reasons for rejecting an application to injunct the passing of a Bill, passed by Dáil Éireann through Seanad Éireann:

"This survey of the Constitution is adequate to demonstrate that the Constitution makes each of the two Houses of the Oireachtas complete master of its own deliberations and that the High Court, while granted a general jurisdiction to pronounce on the constitutional validity of laws, i.e. measures which have been passed by both Houses and duly signed and promulgated by the President, exercises no functions with regard to the deliberations of the Oireachtas."

27. In *O'Malley v. An Ceann Comhairle* [1997] 1 I.R. 427, a Member of Dáil Éireann sought leave to challenge, by way of judicial review, a decision of the Ceann Comhairle to disallow a full Dáil question which Deputy O'Malley wished to ask. The Ceann Comhairle disallowed part of the question because of repetition arising from replies to previous questions. The applicant's contention in that case was that his question had been changed in breach of the Standing Orders of Dáil Éireann. In the High Court, Barron J. refused leave, having regard to the doctrine of the separation of powers. He held that the judicial arm of Government was not entitled to intervene in the internal affairs of Dáil Éireann. This decision was upheld in the Supreme Court where O'Flaherty J., delivering the judgment of the court, said as follows:

"How questions should be framed for answers by members of the Government is so much a matter concerning the internal working of Dáil Éireann that it would seem to be inappropriate for the court to intervene, except in some very extreme circumstances which it is impossible to envisage at the moment. But, further, it involved to such a degree the operation of the internal machinery of debate in the House as to remain within the competence of Dáil Éireann to deal with exclusively, having regard to Article 15.10 of the Constitution."

28. Similar statements were made by Geoghegan J. in *Haughey v. Moriarty* [1999] 3 I.R. 1 at 16 and by Kelly J. in *Controller of Patents, Designs and Trademarks v. Ireland* [2001] 4 I.R. 229. In the *Haughey* case, Geoghegan J., in excluding from the hearing of the applicant's challenge, evidence to suggest that the Seanad was improperly convened when it passed resolutions, pursuant to the Tribunals of Enquiry (Evidence) Act 1921, said the following:

"It seemed to me that these matters were not justiciable in the courts on the grounds of the constitutional separation of powers. The Dáil and Seanad regulate and enforce their own procedures."

29. Kelly J., referring to the *O'Malley* case, in the *Controller of Patents, Designs and Trademarks* case, said:

"There was much force in the defendant's submission that what happened in Leinster House, either in the Upper or Lower House, is neither cognisable by this court nor relevant to the issue that has to be tried."

30. In *Murphy v. Ardagh* [2002] 1 I.R. 385, both in the High Court and in the Supreme Court, the justiciability of the applicant's case was considered in the context of the separation of powers doctrine and, in particular, Article 15.10 of the Constitution. In that case, the challenge was to a decision of a committee of the Oireachtas but the applicant was not a member of the Oireachtas. In the High Court, Morris J., delivering the judgment of the Divisional Court, held that matters, "*internal to the workings of Parliament in carrying out its legislative power, or alternatively in dealing with its own Members*" could not be subjected to judicial review.

31. In the Supreme Court, on the question of the extent to which the affairs of an Oireachtas committee were amenable to judicial review, Keane C.J. said the following:

"The courts have made it clear that they will not intervene in the manner in which the House exercises it's jurisdiction under Article 15.10 to make its own rules and standing orders and to ensure freedom of debate, where the actions

sought to be impugned do not affect the rights of citizens who are not Members of the House."

32. McGuinness J., in the same case, also expressed similar views concerning Article 15.10, as follows:

> *"It is clear from this sub-article, that, as submitted by counsel for the applicants, the Oireachtas 'makes its own rules for its own Members'. These rules are, in the main, set out in the Standing Orders of both Houses. Various committees of each House administer these rules and they provide for penalties for their breach. Committees such as the Committee on Procedure and Privilege and the Committee of Selection are long established and are known as Standing Committees. In recent years, another such Standing Committee has been established - the Committee on Members Interests of Dáil Éireann. All these committees, all investigations carried out by them and all penalties imposed by them (or by the Dáil or Seanad at their instigation) concern solely the Members of the Oireachtas themselves. There is no doubt but that all these matters are non-justiciable in accordance with Article 15.10."*

33. McGuinness J. goes on to address the specific point at issue in that case, namely, whether the non-justiciability principle extended to persons who are not Members of the House, saying:

> *"Can this non-justiciability extend to actions of the Oireachtas, its committees and its Members, when those actions impinge on the rights of persons who are not Members of either House, as contended for by counsel for the sub-committee and Deputy Shatter? More particularly, can non-justiciability extend to a situation where such persons are compelled to attend and give evidence before a committee of either House or a joint committee? Could such non-justiciability extend to a situation where, for instance, the members of a committee were in blatant breach of the Standing Orders of the House itself, and that breach affected the rights of non-Members? It seems to me that it could not."*

34. In the same case, Geoghegan J. also addressed the question of justicability of measures taken by the Houses of the Oireachtas in respect of their own Members:

> *"While it is true that out of respect for the separation of powers, the courts will not intervene with the internal operations of the Orders and Rules of the House in respect of their own Members, the non-justicability principle stops there. If there is some essential procedural step which a House of the Oireachtas or a committee thereof has to take before rights of an outsider, that is to say, a non-Member of the House, can be affected, then, at the suit of that outsider, the courts can give relief if that essential step is not taken."*

35. In *Howlin v. Morris* [2006] 2 I.R. 321 at p. 366, Hardiman J., considering encroachment on the powers and functions of the Oireachtas in the context of Article 15, said the following:

> *"The text of the Article nowhere envisages that a person or body outside the Oireachtas will exercise the powers conferred on that body. There is no precedent of which I am aware in which a court has actually exercised a power which the Constitution has conferred on the Oireachtas or either House thereof. Indeed, this court has several times declined to interfere in 'the internal machinery of debate of the House' because this is 'within the competence Dáil Éireann to deal with exclusively, having regard to Article 15.10 of the Constitution' (see O'Malley v. An Ceann Comhairle [1997] 1 I.R. 427, per O'Flaherty J.). On a small number of occasions, when the courts have been prepared to supervise the orders or procedures of an Oireachtas body, it has been at the suit of non-Members whose rights were affected: see In Re Haughey [1971] I.R. 217, and Maguire v. Ardagh [2002] 1 I.R. 385. This is a vital distinction as Keane C.J. said in the latter case at p. 538:-*
>
> > *'Different considerations apply, however, where, as here, the Oireachtas purports to establish a committee in power to enquire and make findings on matters which may largely affect the good name and reputation of citizens who are not Members of either House. An examination of the courts of the manner in which such an enquiry is established in no way trespasses on the exclusive role of the Oireachtas in legislation. Nor does it in any way qualify or dilute the exclusive role of the Oireachtas in regulating its own affairs'."*

36. The respondents rely on the foregoing passages from the judgments referred to, to submit, that in these passages, there is to be found a clear unequivocal statement of the law governing the issue of justiciability in this case, namely, because the applicant is a member of the Oireachtas, this fact, of itself, excludes the amenability of the report or the resolution impugned, to judicial review. They further submit that the report and resolution were intrinsically an exercise in the Regulation by the Seanad of its own affairs. They submit that although the committee and Seanad were exercising a statutory function, pursuant to the Act of 1995, as amended, this distinction is irrelevant insofar as this court's jurisdiction is concerned, because the present resolution is no different in principle than many other disciplinary or *quasi*-disciplinary decisions taken by either Houses of the Oireachtas in respect of its Members, and by way of example, they submit that a decision of either House to suspend a member for unruly behaviour could not be amenable to judicial review.

37. They further submit that the issues raised in these proceedings cannot be amenable to judicial review because there are no legally recognisable standards by which such a matter can be measured. They say, that some may think, as did the Seanad, that the applicant's conduct was egregious and worthy of censure, not least because it happened at a time of acute economic hardship, when leadership and sacrifice is expected of politicians. They acknowledge that others may disagree with that assessment, but the kernel of their submission in this regard is that there is a lack of judicially discoverable and manageable standards for resolving that question, simply because the issue involves one of political and not legal judgment, and therefore cannot be resolved using conventional legal standards of vires or other standard judicial review grounds.

38. There is no doubt that the judicial statements recorded in the passages above are clear and unequivocal and to the effect, as contended for by the respondents, that both Houses of the Oireachtas enjoy exclusive jurisdiction in matters relating to the internal disciplining of the Members of either House. However, all of the cases in which these *dicta* were given, concern complaints by non-Members of the Oireachtas that their constitutional rights had been breached by the activities of various committees of the Oireachtas. This case is the first one in which the High Court has been asked to consider a complaint by a member of the Oireachtas that his constitutional rights, in this case, his right to fair procedures, and his right to vindicate his good name, have been breached by the manner in which the respondents conducted and determined the investigation into the applicant's claims for expenses. Thus, the foregoing *dicta*, notwithstanding their apparent persuasive value, must be considered as obiter *dicta* and my examination of the issues raised in the case must be conducted from first principles and not confined or circumscribed by any binding or authoritative precedent.

39. It is well settled that the source of parliamentary powers and privileges is now solely to be found in the Constitution itself. The adoption of the 1922 and later the 1937 Constitutions marked a clean break with our prior history of imposed parliamentary government with it's attendant theory of the sovereignty of Parliament and the privileges that went with that. That clear departure and new constitutional beginning was acknowledged authoritativly by Walsh J in the case of *Byrne v. Ireland* [1971] I.R. 71 . In *Maguire v. Ardagh* the matter was put beyond any doubt by *dicta* in the judgments of Denham, Murray, Hardiman and Geoghegan JJJJ. The following passage from the judgement of Denham J, puts it succinctly at p 562;

> *"The constitution of Ireland, 1937, did not establish a structure of government, or a system of parliament, modelled on Westminister. Indeed differences which existed under the Constitution of the Irish Free State, 1922 were expanded in the Constitution of Ireland, 1937. For example the concept of parliamentary sovereignty was not established. The superior courts were given the power of judicial review."*

40. The respondents, understandably, rely on Article 15.10 of the Constitution as the source of the separation of powers principle which is the basis upon which they submit that the disciplinary process conducted by them in respect of the applicant was a legally exclusive constitutional preserve of the Oireachtas to the exclusion of any interference by the courts. Article 15.10 is as follows:

> *"Each House shall make its own rules and standing Orders with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties."*

41. Geoghegan J., in the Supreme Court, in *Howlin v. Morris*, in his judgment with which Murray C.J. and Denham J. agreed, in considering the correct interpretation of Article 15.10, was impressed by what the 1967 Constitutional Review Committee said in its review of Article 15.10, and he quoted from that report *in extenso*. As the judgment of Geoghegan J. on this topic represents the majority view of the Supreme Court in *Howlin v. Morris* and is the leading authoritative interpretation of Article 15.10, I propose to quote his judgment at p.382 on this aspect in full:

> *"….As far as the alleged constitutional privilege is concerned, I am of opinion that it could only arise under Article 15.10 and that is the issue which I am now considering. The absence of relevant case law is unfortunate. The fact that the wording is wholly different from the provision relied on in the constitution of the Weimar Republic makes it very dubious and, indeed, in my opinion, speculative that any reliance should be placed on that provision. Nor does there appear to be much academic assistance apart from the notable exception of Professor Gwynn Morgan. Surprisingly, the recent report of the constitutional review group did not attempt any analysis of what Article 15.10 meant. It would seem probable that the committee decided to leave well alone, as no serious problems had arisen from the parliamentary privilege provisions, whatever they might mean, and that interpretation was better left to the courts. Interestingly, however, Article 15.10 was interpreted by the earlier committee on the Constitution as reflected in their report of December 1967. I find myself impressed by what that report had to say in relation to this provision and I think it worthwhile citing the most relevant passages in full. Paragraph 35 sets out the text of Article 15.10. Paragraph 36 then reads as follows:*
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> > *'The wording of this provision presents some difficulties and it is not easy to determine from it, the nature of the powers with which it was intending to endow the Oireachtas. It will be observed, first of all, that it says nothing about the non-application of other provisions of the Constitution in relation to the matters at issue. In the absence of such an exclusion clause, it must be assumed that other provisions of the Constitution such as Articles 34, 37, 38 and 40 are not brushed aside as they are, for example, in the case of Article 28.3.3. If they continue to operate with full force, then it necessarily follows that the powers of the Houses are not at all as wide as those of some other parliaments such as the British. It will be noted, furthermore, that the powers given by Article 15.10 to impose penalties extend only to the rules and standing orders of each House, and there seems to be no power to punish offenders for the other matters dealt with by the section, such as the protection of each House and its members against interference, molestation and attempts to corrupt. If the Houses of the Oireachtas were intended to have penalty powers in relation to these matters, it would have been a very simple matter to draft the section on a different basis'.*
>
> *Paragraph 39 then reads as follows:-*
>
> > *'Our parliament can operate only within the confines laid down in the present Constitution, which was intended to provide the charter for all aspects of public affairs in this country. That Constitution has been very careful to outline detailed provisions about the court system to be established, the procedure for the trial of offences and the fundamental rights of the citizens, including the right to personal liberty and freedom of expression. If it had been the intention from the beginning that the powers enjoyed by the Oireachtas were not to be restricted by any safeguards of this kind, there would surely have been a great deal more comment about the nature and effect of parliamentary privilege than has heretofore been the case. As already indicated, the wording of Article 15.10 itself suggests that this was not the intention'.*
>
> *The committee's conclusions on Article 15.10 are then summed up in para. 40:-*
>
> > *'We have, therefore, come to the conclusion that Article 15.10 ought to be regarded as empowering the Houses of the Oireachtas to deal with internal matters of procedure and discipline only, and to punish its own members for breaches of its rules; it should, of course, also be open to each House to withdraw any privileges from any such persons as transgress any regulations of the House. In addition, each House should have power to deal effectively with persons who endeavour to disrupt its proceedings. All other offences against Parliament and its members should, in our view, be dealt with by a special Act of the Oireachtas on the same lines as the legislation passed by other countries. If so desired, the Chairman of each House could be empowered to make complaints to the Attorney General requesting that particular matters be investigated with a view to prosecutions. If any amendment of Article 15.10 is required to enable these matters to be dealt with in this way, then we recommend that the change should be made'."*

42. Further on, Geoghegan J. goes on to say, concerning the point in issue in that case, namely, whether the private papers of a Member of the Oireachtas enjoy a privilege from disclosure under the provision of Article 15.10:

> *"I will merely say that my inclination is in favour of the view expressed by the 1967 constitutional committee that since*

there were no words included in Article 15.10 equivalent to the words included in Article 15.12 and Article 15.13 clearly indicating absolute privilege or even any express words indicating a qualified privilege, there is not nor is there the potentiality to create any constitutional privilege under Article 15.10 that can be pleaded against a third party or stranger in ordinary court proceedings or against a tribunal in tribunal proceedings.

Still less, of course, is there anything in Article 15.10 to suggest a self-executing privilege, a point which now arises out of the notice to vary. The most that can be said is that Article 15.10 does seem to assume that, independently of the terms of Article 15.10 itself, the freedom of debate, the protection of official documents and the protection of private papers of members were all natural to the efficiency and efficacy of a house of parliament. The main purpose of Article 15.10 is to dispense with the necessity for legislation to secure these freedoms and protections by allowing each House to make its own separate rules relating to them. The members of Dáil Éireann might have a quite different idea about how to protect the "private papers" of members than would appeal to the members of Seanad Éireann and, indeed, there might be good objective reasons for a different approach. Effectively, Article 15.10 is allowing each House to make its own laws in this connection. Under the ordinary law of the land, of course, either House could protect itself against trespassers or against persons trying to corrupt its members. One could envisage situations however where one member of the House might attempt to corrupt another member or where one member of a House might steal the private papers of another member or where such activities could be carried out by staff of the House. It might be desirable and indeed almost certainly would be desirable to have special provisions relating to security. Each House would have the power to deal with these matters under Article 15.10 but I fail to see that it can be read into the terms of Article 15.10 that either House could plead documentary privilege in stranger proceedings in a court or as against a public tribunal. I would, therefore, reject the "self executing" argument."

43. Later in his judgment, at p. 386, Geoghegan J. said the following:

"I believe that counsel's opening submission to the tribunal was correct and that Article 15.10 does not envisage some kind of ad hoc exercise of a power to impose a privilege whether by a formal motion (as unfortunately ultimately suggested by the respondent) or otherwise. In my view, it is a misreading of Article 15.10 to suggest that it is divided into two quite separate sections, one involving the House making its own rules and standing orders and the other conferring various powers on the House. As I see it, what was envisaged was that the nature and scope of these powers would be formally enacted in rules or standing orders and they would then automatically apply in particular situations. Neither House in this instance had made any rules or standing orders relating to the private papers of its members . . ."

44. The judgment of Geoghegan J in the *Morris* case, is relevant to this case in a number of ways. Firstly, because of the absence of an express exclusion in Article 15.10 of the jurisdiction of the courts, such as is contained in Article 12.8 in relation to the President, in Articles 15.13 in relation to utterances by Members of the Oireachtas in either House, and in Article 28.3.3 in relation to emergency legislation for the purpose of securing the public safety and preservation of the State in time of war or armed rebellion, all other parts of the Constitution continue to have full force and effect, including Article 40. Thus, in this disciplinary process, the applicant's right to vindicate his good name is preserved intact, as is his right of access to the courts, which is one of the unenumerated rights protected by Article 40. Whilst I would readily accept, as was submitted by Mr. Bradley SC for the respondents, that the applicant's constitutional rights must be protected by the respondents in the inquiry, nevertheless, the absence of any appeal from the determination of the respondents, would seriously injure the applicant's constitutional right to vindicate his good name and the denial of access to the courts, if jurisdiction in the matter was confined exclusively to the Oireachtas, would manifestly breach his right under Article 40 of the Constitution to access to the courts to vindicate his good name.

45. Under the provisions of the Acts of 1995 and 2001 and the Standing Orders of Seanad Éireann, the respondents are the only entity within the Oireachtas, in the absence of any appeal procedure, which has any jurisdiction to hear and determine the complaints made against the applicant. Thus any complaints or grievances arising in connection with procedural orders or fair procedure issues, or other interlocutory orders made by the respondents, could only be heard by the respondents, thereby creating a situation in which the respondents could find themselves as judges in their own cause, which would of course be an affront to one of the basic norms of natural justice.

46. As is apparent from the judgments in the *Morris* case, the approach to the construction of Article 15.10 should be a literal or strict one because of the very serious nature of the potential detriment to persons who would otherwise enjoy the full protection of the Constitution. If it is to be said that by virtue of becoming a Member of the Oireachtas, a person's constitutional rights are to be trenched upon, it necessarily follows, in my view, that the constitutional provision, said to have that effect should be strictly construed.

47. There is no express provision in Article 15.10 which ousts the jurisdiction of the courts to discharge the role given exclusively to the High Courts in Articles 34.1 and 34.3 of the Constitution, namely, the administration of justice, and the exercise of a full original jurisdiction to determine all questions of law or fact. Neither has it been demonstrated that the exclusion of the jurisdiction of the Courts is necessarily to be implied in the interest of achieving a constitutional objective or in ensuring the harmonious and complimentary co-existence of these two organs of government. What is at stake here is not the proper unfettered functioning of the legitimate activity of the respondents, but rather the constitutional rights of the applicant. The correct observance of the applicants constitutional rights would not impede the proper discharge by the respondents of their functions. On the other hand, the denial of access to the Courts to the applicant, undoubtedly degrades the constitutional protection he would otherwise enjoy. It would seem to me that the boundary between the exclusive roles of the Oireachtas, on the one hand, and the High Court on the other hand, appropriately respecting the separation of powers principle, does not exclude access to the courts where a Member of the Oireachtas, in circumstances such as those of the applicant in this case, seeks the protection of the Constitution in vindicating his constitutional right to his good name and to natural justice and fair procedures.

48. The second aspect of the judgment of Geoghegan J., which is of importance to this case, is the finding that Article 15.10 is not a two-part provision, namely, one involving the House of the Oireachtas making its own Rules and Standing Orders, and the other conferring various self executing powers on a House of the Oireachtas. As said by Geoghegan J., *"what was envisaged was that the nature and scope of these powers would be formally enacted in rules or standing orders and they would then automatically apply in particular situations . . ."* Thus, the entirety of Article 15.10 was not self-executing, and to have force and effect required the making of Rules and Standing Orders or, parhaps, legislation, to give effect to the various provisions set out in Article 15.10. This leads to a consideration of the potential executing measures taken which are relevant to whether Art 15.10 excludes the jurisdiction of the Courts in this case, namely Art 90 of the Standing Orders of the Seanad and the Acts of 1995 and 2001.

49. Article 90 of the Standing Orders relative to public business of Seanad Éireann 2007 is relevant to this case and reads as follows:

"90(1) There shall stand established at the commencement of every Seanad a select committee of Seanad Eireann which shall be called the Select Committee on Members Interests of Seanad Eireann, to perform the functions conferred on it by the Ethics in Public Office Act 1995 . ."

50. As is apparent from the foregoing, the only function which the respondents have, under Standing Order 90, is the discharge of the functions conferred in the Act of 1995. Manifestly, the Standing Orders of the Seanad do not make any provision for the claiming of allowances, be it by way of salary or travelling and overnight expenses. Order 90, which is included in the section dealing with Committees, is the only Standing Order which has any connection to the issues in this case, and, it merely sets up the respondents as a select committee to carry out the functions conferred in the Acts of 1995 and 2001.

51. This brings me to a consideration of the statutory scheme under which the complaints against the applicant were processed by the respondents. This process was commenced by the two complaints made by Mr. John Mulligan and Mr. Patrick Hurley, both of which were expressly made under s. 8 of the Act of 1995. Section 8 reads as follows:

"8.—(1) Each House shall as soon as may be after the commencement of this section and, thereafter, as soon as may be after the first meeting of that House subsequent to a general election for members of that House appoint a select committee which shall be known—

. . .

(b) in the case of the committee appointed by Seanad Éireann, as the Committee on Members' Interests of Seanad Éireann, to perform the functions conferred on it by this Act.

(2) A person (other than a member) who considers that a member (other than a member who is or, at the relevant time, was an office holder) may have contravened section 5 or 7 may make a complaint in writing in relation to the matter to the Clerk and, subject to subsection (3), the Clerk shall refer the matter to the Committee and shall furnish a copy of the complaint to the Committee . . ."

52. Section 4 of the Act of 2001, creates an additional basis for complaint under s.8, against, *inter alia*, Members of Seanad Éireann for acts or omissions which are inconsistent with the proper performance of the functions of the office in question, or where the act or omission is inconsistent with the maintenance of confidence in such performance by the general public and the matter is one of significant public importance. The section reads as follows:

"4.—(1) Where a person ("the complainant") considers that—

(a) a specified person or a person who, in relation to a specified person, is a connected person may have done an act or made an omission after the commencement of section 2 that is, or the circumstances of which are, such as to be inconsistent with the proper performance by the specified person of the functions of the office or position by reference to which he or she is such a person or with the maintenance of confidence in such performance by the general public, and the matter is one of significant public importance . . ."

53. Schedule One to the Act of 2001, which contains amendments to the Act of 1995, defines a "*specified act*" as an act or omission referred to in s. 4(1)(a) of the Act of 2001, as quoted above.

54. Pursuant to s. 8(2) of the Act of 1995 (as amended), the Clerk of the Seanad referred the two complaints to the respondents who determined, under s. 9(1) of the Act of 1995, that it was appropriate to carry out an investigation to determine whether the applicant had committed a "*specified act*" as provided for in s. 4(1) of the Act of 2001. For the purpose of this investigation, a variety of procedural safeguards are provided for in s. 32 of the Act of 1995. Specifically, s. 32(6)(b) required the respondents to give the applicant a statement of the alleged contravention and with the names of proposed witnesses and a copy of the statements intended to be used. Sections 32(6)(c) and 32(6)(f) entitled the applicant to be represented by counsel and to cross-examine witnesses, should he choose. Section 32(6)(g) required the respondents to permit the applicant to call and examine witnesses on his behalf. Section 32(6)(c) required the respondents to permit the applicant to have legal representation to present his case. These statutory safeguards correspond to the minimum guarantees to be afforded to a person facing an enquiry in which his good name and reputation and livelihood were at stake, as set out by the Supreme Court in the case of *In Re Haughey* [1971] I.R. 217, at p. 263.

55. Section 32(2)(a) gives the Chairman of the respondents power to direct in writing that the applicant attend before the respondents at a date and time to be specified in the direction. Although it was unnecessary to do so, as the applicant volunteered his attendance when required, such directions were made. Section 32(2)(b) gives a similar power to direct any other person whose evidence is required by the committee to attend before it at a date and time to be specified in the direction to give evidence and to produce any document specified in the direction. Section 32(2)(d) gives power to direct a person, other than the applicant in this case, *i.e.* the person the subject of the investigation, to send to the respondents any document or thing in his or her possession as specified in the direction, and s. 32(2)(e) gives a residual power to give any other directions for the purpose of the proceedings concerned, that appear to a Chairperson to be reasonable and just. The process of enforcement, for breaches without just cause or excuse, of directions given under s. 32(2) is provided for in s. 32(3) and is to the effect that such breaches constitute criminal offences. Section 32(5) provides that the giving of false evidence before the respondent would, in similar circumstances in the High Court, be perjury, and the persons who are doing it will be guilty of an offence.

56. Thus, in the ultimate, the process of enforcement requires the involvement of the Director of Public Prosecutions to prosecute offences that might arise as a result of the breaches of any directions given, as set out under section 32.

57. Having concluded the investigation, the nature of the report of that investigation is required to comply with s. 10(2) of the Act of 1995 (as amended), including, *inter alia*, when there has been a determination that a specified act has been done that:

"(i) If the determination is that the contravention or act is continuing steps to be required by him or her to secure . . . the cessor of the act;

(ii) whether the contravention or act was committed or done inadvertently, negligently or recklessly or intentionally;

(iii) whether the contravention was, in all the circumstances, a serious or minor contravention, and

(iv) whether the member acted in good faith and in the belief that his or her action was in accordance with guidelines

published or advice given in writing by a committee under section 12,

and may refer to such matters, if any, as the committee considers appropriate."

58. Where there has been a determination, such as occurred in this case, that a Member has contravened sections 5 or 7 or has done a specified act, s. 10(1)(b) mandatorily requires that a copy of the report is laid before the House.

59. Section 28(1) of the Act of 1995 (as amended) provides that where a report is laid before either House, the committee, *i.e.* the respondents, may cause a motion to be moved in that House for a resolution that such actions, as are specified in the resolution and as provided for in s. 28(2), be taken by the House. Section 28(2) provides a menu of actions including the censuring of the Member concerned and the suspension of the Member from the service of the House for a period not exceeding thirty days on which the House is sitting. Under s. 28(2A)(a), where a Member is suspended from the service of the House, the resolution can include a withholding from the Member of so much of the annual sum by way of salary payable to him or her under the Oireachtas (Allowanced Members) Act 1938, as may be specified in the resolution. As is apparent, the jurisdiction of the Seanad in respect of the action to be taken is entirely circumscribed by s. 28 of the Act.

60. It is abundantly clear that the entire disciplinary procedure is, from its very outset to its conclusion, regulated in detail by statute. Indeed, Standing Order 90 of Seanad Éireann, is itself a response to the mandatory requirement set out in s. 8(1) of the Act of 1995, to appoint a select committee after the first meeting of the House, subsequent to a General Election, and the Standing Order mirrors precisely the language used in section 8(1).

61. S. 4(1) of the Act of 2001, greatly expands the range of subject matter which could be investigated by a select committee. Whereas under the Act of 1995, this was confined to breaches of ss 5 and 7 of the Act of 1995; pursuant to s. 5(1), the failure within the time prescribed to furnish a statement of registerable interests, and pursuant to s. 7(2), a failure to make a declaration of interest before or during a speech in either House or a committee of either House or a joint committee or the failure to declare in writing an interest before voting, if the Member does not speak. The concept of "*specified act*", as introduced in s. 4(1) of the Act of 2001, manifestly expands the investigative remit of the select committee on members' interests over all activities and omissions relating to performance by a Member of his duty, and additionally, such acts or omissions which are inconsistent with the maintenance of confidence in such performance by the general public, where the matter is one of significant importance. Also, the actions and omissions of "*connected persons*" are brought under the scrutiny of the investigative regime in the Acts. Thus, it could be said that many aspects of the personal or vocational life of a Member of Seanad Éireann, though not directly connected with the performance of the parliamentary functions of a Member of Seanad Éireann, could, nevertheless, be the subject matter of an investigation if the matter in question was inconsistent with the maintenance of confidence in such performance by the general public and was of significant public importance.

62. Of very real importance to the issues I have to consider, is s. 8(2) of the Act of 1995, which provides that a person other than a Member may make a complaint in writing of a contravention of sections 5 or 7 of the Act of 1995, or of s. 4(1) of the Act of 2001. Thus, at this point, the operation of the Act ceases to be a scheme of internal regulation by the Seanad of its own Members. Manifestly, a member of the public who had made a complaint, pursuant to s. 8(2), and who was dissatisfied with the manner in which the complaint was dealt with, would have access in the courts to public law remedies. It would seem odd, to say the least of it, if a Member of the Seanad, against whom a complaint was made by a member of the public, is to be denied similar access to the courts, if likewise dissatisfied with the conduct of the investigation and the determination. In my view, the clearest terms, which of course are not there, would be required in the constitution *i.e.* Art 15.10, to shelter such an obvious invidious discrimination, which otherwise would breach Art 40.1 of the Constitution which states:

"All citizens shall, as human persons, be held equal before the law."

63. The applicant relies heavily on the statutory nature of the process and, specifically, its external connections; the fact that it deals with complaints from the public; that a committee must invoke the criminal law to enforce its directions; where criminality is discovered, it must make a report to the Director of Public Prosecutions; the fact that the statute prescribes the type of content in the report; that the report must be laid before the House if a contravention is found and finally that the range of actions open to the Seanad by way of penalties is prescribed in the statute. The applicant contrasts all of this with the manner which, under Standing Orders, the Seanad, through its Cathaoirleach, controls its internal debates and deals with infractions of its internal procedures and Standing Orders. The applicant submits that simply because the respondents were discharging a statutory function, their determination and the resolution of the Seanad is amenable to judicial review.

64. The applicant cites, in support of his submission, the case of *Cane v. Dublin Corporation* [1927] I.R. 582. In this case, the plaintiff sued the defendant in respect of a Bill of Costs incurred in resisting before a Joint Committee of the Dáil and Seanad, a proposal for a private bill, which the plaintiff contended, caused him damage. At the conclusion of its hearing, the Joint Committee awarded the plaintiff his costs. The plaintiff had these costs taxed and sued for the taxed amount. The defendant sought leave to defend on the grounds that the Joint Committee had acted in excess of and without jurisdiction. The High Court and the Supreme Court permitted the question to be considered because the Committee was exercising a statutory jurisdiction. In the High Court, O'Byrne J. said the following, at p. 603

"In considering this matter I am of opinion that no question as to the privilege or prerogative of Parliament is involved. In awarding costs, the Joint Committee were not exercising any inherent or prerogative right, but were purporting to exercise a statutory jurisdiction. For the due exercise of such a jurisdiction the provisions of the statute must be complied with."

65. In the Supreme Court, Fitzgibbon J. said the following at p. 608 and 611:

"The legal right of a petitioner or promoter to recover costs in respect of proceedings before a Parliamentary Committee upon a private Bill does not depend upon the exercise of any prerogative of Parliament, but is purely statutory, and is created by, and can only be enforced in accordance with, the four statutes cited in Standing Order No. 114 of the 'Standing Orders of the Dáil and the Seanad relative to private business' which were adopted by both Houses in 1923. These statutes were adopted and applied by sect. 5 of the Private Bill Costs Act, 1924 (No. 52 of 1924), and the particular authority which the Joint Committee purported to exercise in the present case is conferred by sect. 1 of 28 Vict. c. 27. . .

the power of the Committee to make an award of costs enforceable in a Court of law against the promoters of any Bill is limited by the statute, from which alone all the jurisdiction of the Committee over costs is derived . . ."

66. The plaintiff also relied upon *Re Haughey* [1971] I.R. 217, in this context, to the extent that in that case, the Supreme Court reviewed the procedures of a Parliamentary Committee whose function was grounded on legislation. The applicant further relies upon a passage from the judgment of McGuinness J. in *Maguire v. Ardagh* [2001] 1 I.R. 385, at p. 626, where she quotes a passage from the judgment in the High Court in which there appears to be a concession by the Attorney General that the court can examine orders or resolutions of a sub-committee insofar as they relate to the operation of statutory powers, as follows at p 626:

> *"The Attorney General takes a slightly different view. He contends that the court can examine and construe the various orders and resolutions which concern the sub-committee insofar as they relate to the operation of the statutory powers contained in the Act of 1997. By reference to the case of Cane v. Dublin Corporation and Cane v. Liffey Syndicate [1927] I.R. 582, he says that it may be legitimate for the court to construe the various resolutions and orders insofar as they impinge upon the exercise of the statutory power".*

67. The respondents adopt the position that, whilst there may be exceptions to the general immunity from scrutiny by the courts of parliamentary activity, as indicated in the case referred to, these exceptions were only in the cases of persons who were not Members of either House and they rely upon the various judicial *dicta* referred to above which discriminate between Members of the Oireachtas and non-Members and which exclude the dealings of the Oireachtas with its own Members from interference by the courts.

68. Although there is nothing expressly stated in the Constitution to prevent the Oireachtas from regulating the internal business of either House by ordinary legislation, Art 15.10 does, in using the expression *"Each House shall make its own rules and standing orders…"* gives an unequivocal mandatory direction to each house to make standing orders. I have no doubt, but that this direction was intended to compel the creation of regulation of the internal business of each House in carrying out the functions given to each House under the Constitution by means of Standing Orders rather than legislation. Article 15.10, is non-specific about the range of matters which can be the subject matter of Standing Orders, apart from freedom of debate, the protection of official documents and private papers of members and the protection of either House and their members from interference molestation and corruption in the discharge of their duties by any persons. None of these are relevant to this case. In my opinion, the direction given in Art 15.10 to make Standing Orders appears to have been intended to regulate normal parliamentary business in so far as it is conducted by or affects the members of each House and the Standing Orders of Seanad Eireann bears this out. The ensuring of freedom of debate, the protection of official papers and the papers of members and the protection of the House and it's members from interference, molestation and corruption from any person are matters which in my view, were envisaged as being dealt with otherwise, i.e by legislation. It makes sense, that in dealing with the internal parliamentary business of the Seanad, Standing Orders would be used as directed in Art 15.10, but where legally effective measures were needed to deal with persons who might not be members of the Seanad, legislation should be used. The mandatory constitutional requirement in Art 15.10 to regulate the business of each House by means of Standing Orders must mean, that matters which are regulated by legislation and in particular where that regulation extends to or involves persons who are not members of the Seanad, are beyond the exclusive jurisdiction of the Oireachtas under Art 15.10. As the Acts of 1995 and 2001 are not addressed to the specific matters mentioned above, as enumerated in Art 15.10, it would seem to me that they cannot be seen as a compliance with the mandatory requirement in Art 15.10 to make rules and standing orders to govern the normal parliamentary business of the Seanad.. Thus these acts are not an execution of the provisions of Art 15.10. The statutory jurisdiction being exercised by the respondents under the Acts of 1995 and 2001 does not therefore exclude resort to the High Court. Notwithstanding that in this case, the applicant, a member of the Seanad is being investigated by a Select Committee of the Seanad, there is nothing in Art 15.10 which would prevent me following the reasoning of the former Supreme Court in the *Cane* case, which I respectfully follow.

69. I have come to the conclusion that the applicant's submission, that the statutory nature of the respondent's jurisdiction, takes this disciplinary process outside the exclusive jurisdiction of the Oireachtas under Art 15.10., is substantially correct.

70. Apart altogether from, and even if the foregoing conclusions are incorrect, a consideration of the subject matter of this investigation, namely, whether the applicant's claims for travelling and overnight allowances were correctly made, and also a consideration of the nature of the investigation, namely a fact finding enquiry with the potential to cause grave damage to the reputation and livelihood of the applicant, lead in my view, as will be discussed hereunder, to a conclusion that investigations of this type are not within the exclusive realm of the Oireachtas, so as to oust the jurisdiction of the Courts under Art 15.10.

71. Having regard to the mandatory requirement in Article 15.10 to make Rules and Standing Orders, a conclusion that something that was not provided for in Standing Orders, was, nonetheless, within the exclusive parliamentary reserve of the Oireachtas because of what is contained in Article 15.10. would seem tenuous. In essence, what would have to be said, is that in this case, the business of claiming travelling and overnight expenses should have been provided for in Standing Orders, but was not, but, nonetheless, it is properly within the ambit of Article 15.10 for the purposes of delineating the correct boundary between the Oireachtas and the courts.

72. In my view, the court must ascertain whether the subject matter of the respondent's enquiry was one which comes within the ambit of Article 15.10 and, if so, whether Article 15.10, properly construed, has the effect of denying the applicant access to the courts to litigate the issues raised in these proceedings. In essence, what must be done is to ascertain the extent of parliamentary activity covered by Article 15.10, and thus, potentially outside the jurisdiction of the courts. As discussed above, an examination of the Standing Orders of the Seanad should demonstrate the extent of activity covered. As is provided for in Article 15.10, penalties can be imposed on Members of either House for breaches of its Rules or Standing Orders. Necessarily, the limits of the exclusive jurisdiction of the Houses of the Oireachtas over the lives of its Members must be clearly understood. Manifestly, the Houses of the Oireachtas do not have any kind of unlimited jurisdiction to govern the lives of their Members. It is, of course, the case and beyond argument, that some of the activities of Members of the Seanad, and specifically, disputes between a Member and the House or a committee of the House, could give rise to recourse by an aggrieved Member to the courts. For example, if a Member was injured by the tortious act of an employee of the Houses of the Oireachtas, it could hardly be said that the Member in question could not sue. The problem, always, is to discern where the constitutional boundary between a House of the Oireachtas and the courts lies.

73. The two cases which have been referred to in which the Supreme Court refused to intervene in parliamentary business, namely, *Wireless Dealers Association v. The Minister for Industry and Commerce and Attorney General, The Fair Trade Commission and Others* [1956] WJSE-AC, and *O'Malley v. An Ceann Comhairle* [1997] 1 I.R. 427, both clearly involved matters which were not only, obviously, a part of normal parliamentary business, but were also clearly provided for in Standing Orders. Whilst it is undoubtedly the case that in attempting to ascertain the range of parliamentary activity which is within the exclusive jurisdiction of the Oireachtas, as expressed in Article 15.10, one must, of course, look to the Standing Orders of the House in question as the reliable guide to the range of activity encompassed, nonetheless, the Standing Orders cannot be viewed as exhaustive in this regard. One must also look to the provisions of the Constitution itself, which create, define and limit the functions and powers of each House of the Oireachtas, in the unlikely event that there are matters there, outstanding, which, for whatever reason, have not been provided for in Standing Orders.

74. In this respect, only one Article of the Constitution apart from Art 15.10, could be said to have any relevance to the circumstances of this case; that is Article 15.15 which reads as follows:

> *"15. The Oireachtas may make provision by law for the payment of allowances to the members of each House thereof in respect of their duties as public representatives and for the grant to them of free travelling and such other facilities (if any) in connection with those duties as the Oireachtas may determine."*

75. The Act of 1938 is the current statute which gives legislative effect to Article 15.15. It is quite clear that in the light of the constitutional framework for the appropriation of and disposal of public monies, contained in Articles 17, 21 and 22 of the Constitution, the payment of allowances or other expenses to Members of the Oireachtas could only be dealt with by way of legislation and could not be the subject of Standing Orders, as provided for in Article 15.10. As discussed above, it is well settled, that in seeking to ascertain the extent of the powers and privileges of the Oireachtas, one can only look to the provisions of the Constitution, i.e Art 15.10, and not to more ancient parliamentary traditions. Notwithstanding that it might, at first glance, appear that travelling and overnight expenses are closely linked to the internal affairs of the Oireachtas and, specifically, the Seanad in this case, in my view, the subject matter of travelling and other allowances was never contemplated as being part of the subject matter provided for in Article 15.10, as these are separately expressly dealt with in Art 15.15. and are substantially affected by the provisions of Arts 17, 21 and 22. Thus travelling expenses and other allowances were not envisaged as being within the exclusive realm of the Oireachtas as provided for in Art 15.10. and hence, in my opinion, the jurisdiction conferred on the High Court by Article 34(3) of the Constitution does reach to this area.

76. It is plainly obvious that the exclusive jurisdiction of the Oireachtas, as protected in Article 15.10, is limited to parliamentary business, as set out in the Rules and Standing Orders or as necessarily arising from a provision in the Constitution. Thus, prior to the enactment of the Act of 1995, there would have been little difficulty in ascertaining the extent of that exclusive jurisdiction. The Act of 1995 introduced a new function and with it a new select committee, the Select Committee on Members Interests, presently the respondents. Initially the range of investigation and determination was limited to two contraventions, namely, contraventions of sections 5 and 7 of the Act of 1995. It could, of course, be said that the contraventions in question, namely, the breach of the obligation to furnish a statement of registerable interests or the breach of the obligation of disclosure of an interest when speaking or before voting, were so inextricably or closely linked with classical parliamentary business, as to be considered comfortably within the realm of normal or standard parliamentary activity.

77. Section 4(1) of the Act of 2001, introducing, as it does, in the concept of the "*Specified Act"*, a very broad, indeed, potentially limitless range of human activity, not necessarily at all, either directly or even indirectly, connected with normal parliamentary business, raises the question of whether whatever is alleged to be the "*Specified Act*" could be fairly considered to be within the realm of normal parliamentary activity so as to come within the ambit of Article 15.10 with the consequence of excluding the jurisdiction of the courts. It is clear that investigations by the Select Committee on Members' Interests under s. 8(2) into the broad range of activity permitted under s. 4(1) of the Act of 2001, carries with it the potential that the Select Committee would make findings of fact which would adversely affect the good name reputation and livelihood of the Member affected, as has occurred in this case. No challenge to the jurisdiction of the respondents is made in this case on grounds similar to those advanced in the *Maguire v. Ardagh* case, and therefore, the matter must proceed on the basis that the respondents had ample jurisdiction, notwithstanding the seriousness of the allegation under investigation, and the potential for adverse findings of fact damaging the good name and reputation and, perhaps, also, the livelihood of the applicant.

78. The issue in this case, is whether in those circumstances, the jurisdiction of the courts is ousted. Standing Order 90 does draw the respondents' enquiry within the ambit of Seanad Standing Orders in the sense of designating the members of Seanad Éireann to exercise the jurisdiction to conduct an inquiry arising out of a complaint made under s. 8 of the Act of 1995. That, of itself, in my opinion, cannot be conclusive, if it is apparent that the subject matter of the investigation manifestly falls outside the normal sphere of parliamentary activity. This will undoubtedly be so, in my opinion, where the subject matter of the enquiry and the potential findings of fact were likely to cause grave damage to the good name and reputation and, perhaps, livelihood of the Member under investigation. In essence, that kind of enquiry is one, which was struck down in the *Maguire v Ardagh* case as being beyond the express or inherent powers of parliament when conducted in respect of a non-Member. Even where the power to conduct such an enquiry is given in legislation, as in the Acts of 1995 and 2001, it cannot be said that this type of enquiry could be considered to be part of normal parliamentary business, within the exclusive jurisdiction of the Oireachtas, as envisaged in Article 15.10.

79. In summary my conclusions on this aspect of the case can be stated as follows;

> A. Art.15.10 of the Constitution does not expressly exclude the the application of Art 40 or the jurisdiction of the Courts as provided for in Art 34.
>
> B. Art. 15.10 does not require by necessary implication the exclusion of the jurisdiction of the Courts to achieve some recognisable constitutional objective, or to preserve the harmonious and complimentary co-existence of the Oireachtas and the Courts.
>
> C. In light of A and B above a restriction which inhibited a Member of the Seanad in circumstances such as the applicant from access to the Courts would breach his constitutional rights to access to the Courts and to natural justice and fair procedures.
>
> D. The statutory nature of the jurisdiction exercised by the respondents under the Acts of 1995 and 2001 takes investigations of this kind outside the exclusive parliamentary realm, protected from the Courts by Art 15.10.
>
> E. The extent or ambit of the range of subject matter covered by the exclusive jurisdiction of the Oireachtas under Art 15.10 is to be discerned from the Standing Orders of the Houses of the Oireachtas and the provisions of the Constitution which confer functions and powers on the Oireachtas.
>
> F. Travelling and overnight expenses to be paid to members of Seanad Eireann, by virtue of Art 15.15 and the Articles of the Constitution dealing with the appropriation and disposal of public monies, can only be provided for in legislation and not in Standing Orders of the Houses of the Oireachtas, and hence it was never intended that such expenses would come within the remit of Art 15.10.
>
> G. Investigations under ss.8 and 9 of the Act of 1995 into allegations that a "specified act" within the meaning of s. 4[1] of the Act of 2001, has been committed, where the nature of the of the allegation is such that an adverse determination would cause serious damage to the good name and reputation and/or livelihood of the member concerned, are not within

the exclusive jurisdiction of the Oireachtas as provided for in Art 15.10.

H. The allegation in this case that the applicant misrepresented his normal place of residence for the purpose of claiming travelling and overnight allowances is such an allegation and is outside the scope of Art 15.10.

80. The respondents submit that the determination by them of whether or not the applicant had or had not committed a "*Specified Act*" within the meaning of s. 4(1)(A) of the Act of 2001, intrinsically requires a political judgment to be exercised by politicians in respect of their peers as to the extent to which their peers have acted in a manner inconsistent with the standards expected of a politician. They say that there are no cognisable legal standards by which the political judgment of the respondents can be determined. They say their determination and also that of the Seanad, as expressed in the resolution passed by the Seanad, is not a determination which is capable of review by reference to objective legal standards and, accordingly, is not amenable to judicial review. Paragraph 19 of the affidavit of the 1st respondent expresses this as follows;

> *"The Committee considered that its role was to determine whether the actions of Senator Callely, in these circumstances, were such as to be inconsistent with the performance by him of the his office or were inconsistent with the maintenance of confidence in Senator Callely's performance of his office by the general public, within the meaning of Section 4[1][a] of the Standards in Public Office Act, 2001. The matter was clearly of significant public importance. The committee considered that it was exercising a political function, judging a member of the Oireachtas by reference to what Committee Members believed to be the appropriate ethical standards expected of a member of the Oireachtas. The Committee therefore viewed Senator's actions in a political context, in circumstances where it concluded that he had a greater affinity with Clontarf that with Kilcrohane. The committee viewed his actions in the light of their understanding of political ethics and their appreciation of the propriety of Senator Callely's behaviour. The Committee did not consider that, in exercising its peculiarly political functions, it was circumscribed by the interpretation of Section 4[1][c] of the 1938 Act given by the Department of Finance in the circumstance outlined by Mr Dignam."*

81. Before engaging in detail with this part of the respondents' objection, a number of observations on basic norms of fair procedures are appropriate. Where a person is facing a charge of misconduct before any Tribunal of enquiry, that can have the consequence of serious damage to reputation and livelihood or liberty, it is well settled that natural justice requires certain basic minimum standards to be observed, as set out in the judgment of the Supreme Court in the *In Re Haughey* case and repeated many times since. Implicit in this scheme of natural justice is that before the person accused is condemned, the facts necessary to establish the charge must be proven or established to the satisfaction of the Tribunal. If the facts are established, then the Tribunal may move to whatever form of censure or penalties, as are prescribed. If the facts are not proved, then the matter is at an end and the person charged is entitled to exoneration. Investigations under the Act of 1995, to establish whether a "*Specified Act*" has been committed are no different. A Member of Seanad Éireann, such as the applicant, facing an investigation, as conducted by the respondents, is entitled to expect no less and has the same constitutional right to fair procedure as all other citizens. He is entitled to have the facts, as alleged, proved before an adverse determination can be made against him. In this respect, I must respectfully but profoundly disagree with the averment of the 1st respondent quoted above where he avers that the respondents were exercising a "*political function*" in judging the applicant by reference to their belief as to the ethical standards to be expected of a member of the Oireachtas and that in exercising its "*peculiarly political functions*" that it was not circumscribed by the Department of Finance interpretation of s. 4 [1][c] of the Act of 1938.

82. In conducting this investigation the respondents were bound by the ordinary rules of natural justice and fair procedures. There can be no doubt about this whatsoever. Apart from the constitutional imperative to observe the requirements of natural justice and fair procedures, S. 32 of the Act of 1995 imposes a statutory obligation on the respondents to do this. In conducting an inquiry resulting in findings of fact, which had the potential to cause grave damage to the reputation and livelihood of the applicant, it necessarily follows, that the function the respondents were discharging was a judicial or quasi judicial function in which they were bound to act judicially. It most certainly was not a political function in which they were entitled to free themselves from the disciplines of natural justice and fair procedures and in particular to dispense with or ignore binding legal provisions, in order to arrive at a conclusion considered to accord with "*political ethics"*.

83. The issues arising in this investigation are simple. Did the applicant misrepresent his normal place of residence for the purposes of obtaining expenses to which he was not properly entitled, in effect, an allegation of dishonesty? Did he do this intentionally, negligently or recklessly? Did he do it in bad faith and was he continuing to do it? If it was established, after a proper enquiry, that he had done this, then it is fair to say that all right thinking people would wish to censure him in an appropriate way for this misconduct. This would be the case with any person who obtained a benefit, by misrepresentation, to which they were not properly entitled. I see nothing arcane, obscure or esoteric in any of these considerations and I fail to see how the respondents or, indeed, members of Seanad Éireann itself, are possessed of some unique and specialised capacity which equips them exclusively to deal with this type of enquiry. It can be observed that this kind of inquiry is habitually conducted in Courts up and down the country every day of the week. Lay people, *i.e.,* jurors, and judges, are amply endowed to be able to cope with issues of this kind as indeed are the many other quasi judicial and administrative tribunals of enquiry that are an essential part of the machinery of public administration in Ireland today.

84. As this investigation had be conducted in accordance with the requirements of natural justice and fair procedures and as the subject matter of the enquiry was no different in kind to the types of cases that habitually come before the courts, it simply cannot be said that the complaints made by the applicant in these proceedings are not cognisable by the courts on the basis that there no recognised standards or measurements by reference to which the issues raised can be judged. These issues can readily be adjudicated on by this Court, by reference to the ordinary laws of the land which applies to all persons including the Members of the Oireachtas and in this case the respondents. The standards of natural justice and fair procedure prescribed by the law to which all citizens are entitled, cannot be displaced by a "*political judgement*" simply because the person affected, in this case the applicant, is a member of the Oireachtas. Members of the Oireachtas like all human persons in this jurisdiction enjoy the full protection of the Constitution.

85. I am quite satisfied that the respondents cannot exclude the jurisdiction of the courts on a basis such as this.

86. Following the hearing in this case, judgment was delivered by Kearns P. on 3rd November, 2010, in the case of *Pearse Doherty v. The Government of Ireland and the Attorney General*. I convened a further hearing in this case on the 17th day of November 2010, and invited the parties to make submissions on that judgment, relative to the issue of justiciability in this case. Both sides submitted that the judgment of Kearns P. in that case was not dispositive of the issues in this case. In that case, the applicant, who was a member of Seanad Éireann, sued the Government for its failure, over a lengthy period of time, either to bring a motion in Dáil Éireann or not to oppose a motion brought by a Member of Dáil Éireann for the purposes of moving the writ to hold the Donegal South West By-Election. The court granted a declaration to the effect that there had been unreasonable delay in moving the writ for the By-

Election in Donegal South West. In that case, although the applicant was a Member of Seanad Éireann, he sued, not as such, but as a citizen and a constituent living in the Donegal South West constituency and he did not sue or seek any relief in relation to Oireachtas Éireann. Instead, he sued the Government for its failure to move the writ in a timely manner. Thus, the issue of justiciability, as it arose in that case, is wholly different to this case.

87. For the reasons set out above, I have come to the conclusion that the issues sought to be litigated by the applicant in these proceedings are justiciable and, accordingly, I must proceed to determine those issues.

The applicant's judicial review grounds

88. Before embarking on a consideration of the grounds for judicial review advanced by the applicant, I would like, first, to consider paragraphs 9 and 10 of the respondents' Statement of Grounds of Opposition which read as follows:

> *"9. The committee, in adopting the report, did not err in law. The committee did not fail to have regard to relevant considerations. The committee was not determining whether the applicant's claim for travel allowance and overnight expenses for travelling from his residence at Kilcrohane, Bantry, to his Dublin residence, and for staying overnight at his family home in Dublin for the following period;*
>
> *- August 3rd 2007 to December 31st 2007;*
>
> *- January 1st 2008 to August 31st 2008;*
>
> *- January 1st 2009 to October 2nd 2009;*
>
> *- January/February 2010*
>
> *was properly claimed, pursuant to the provisions of s. 4(1)(c) of the Oireachtas (Allowances to Members) Act 1938, and the Regulations adopted thereunder, being the Oireachtas (Allowances to Members) (Travelling Facilities and Overnight Allowances), Regulations 1998 (S.I. No. 101 of 1998). Rather, the committee was determining whether the submitting of such expenses claims by the applicant constituted a specified act within the meaning of s. 4(1)(a) of the 2001 Act, and whether it was, in the circumstances, consistent with the proper performance by the applicant of his functions, or with the maintenance of public confidence in the applicant's performance, to claim the said expenses. Accordingly, the determination of the committee was one that related to political ethics and the propriety of the applicant's behaviour in submitting such expenses claims.*
>
> *10. Without prejudice to the foregoing, if the committee concluded that the applicant misrepresented his normal place of residence, within the meaning of s. 4(1)(c) of the 1938 Act (which is denied), it was entitled not to apply the Department of Finance 1994 interpretation of that phrase, as communicated to the applicant by letter dated October 2nd, 2008. The latter interpretation of the 'normal place of residence' was erroneous and ultra vires the 1938 Act. For the avoidance of doubt, the respondents acknowledge that the applicant's claim for expenses came within the scope of the interpretation given by the Department of Finance."*

89. At paragraph 4.2 of the respondents' written submissions, the following is stated:

> *"4.2 The respondents acknowledge that, having regard to the applicant's evidence as to his use of the house in Kilcrohane, that house constituted a normal place of residence within the meaning of the Department of Finance 'definition'. However, the committee was not deciding whether the applicant's claim came within the Department of Finance definition. Rather, the committee was deciding whether the applicant had done a 'Specified Act' within the meaning of s. 4(1)(a) of the Act of 2001 . . ."*

90. This concession is entirely appropriate in light of the undisputed evidence of the applicant in the inquiry, to the effect that since May 2007 for personal and domestic reasons he had spent 60% plus of his time in his West Cork residence and generally was there when not attending an Seanad. A perusal of his travelling pattern, also not challenged in the inquiry, from West Cork to Leinster House bears out his evidence in this regard.

91. The position which the respondents seek to adopt in these proceedings is quite remarkable. In essence, what they have attempted to do is to say that they did not make a determination that the applicant had misrepresented his normal place of residence, but rather, that his submission of expenses claims offended "*political ethics*" and was thereby a "*Specified Act*" within the meaning of s. 4(1)(a) of the Act of 2001.

92. Firstly, I reject the attempt by the respondents to resile from what was the unequivocal, clear content of their determination. That determination, as its text makes absolutely clear, concluded that the applicant had misrepresented his normal place of residence, that he had done so intentionally, that he was continuing to do so and that he lacked good faith. Nowhere in this determination was there any mention of a contravention of any political ethic or other form of impropriety. Nowhere is it said that such offence to political ethics was the specified act. On the contrary, it is made absolutely crystal clear that the "*Specified Act*" was his misrepresentation of his normal place of residence, intentionally, continually and in bad faith. That is what the determination says and that is how it was clearly understood by the media and by the public and that clear message comprehensively destroyed the plaintiff's good name.

93. Secondly, as discussed earlier, before an adverse finding can be made against a party in a Tribunal of enquiry, the facts which are alleged to constitute the charge must be established to the satisfaction of the Tribunal. The allegation levelled against the applicant in the Statement of Contravention and identified as the specified act, was that he misrepresented his normal place of residence. It is now accepted by the respondents that the applicant did not misrepresent his normal place of residence as that was defined in the Dept of Finance definition. In light of the unchallenged evidence of Mr Derek Dignam, to the effect that the Department of Finance definition was the operative definition notified to and adhered to by the applicant, it necessarily follows that the claims for expenses made by the applicant on the basis of Kilcrohane being his normal place of residence were made lawfully. There was no charge or allegation of breach of "*political ethics*" or any other impropriety. Needless to say, if it was established that he had misrepresented his normal place of residence for the purpose of claiming expenses to which he was not entitled, it could readily be said that that breached "*political ethics*". Indeed, it might very well be said that the addition of the adjective "*political*" was entirely unnecessary

and added nothing to the ultimate conclusion. If the allegation was proved, there is no doubt that it would amount to reprehensible conduct judged by the ethical norms prevalent in our society. Manifestly, there could not be a conclusion of a breach of "*political ethics*" or other impropriety without first establishing the contravention alleged to constitute the specified act.

94. The attempt by the respondents to skip that essential ingredient in the process, namely, proving or establishing that the applicant had misrepresented his normal place of residence, in order to leap to a condemnatory conclusion, amounts to a failure on the part of the respondents to properly discharge their adjudicative function. In substituting a political judgement as described in the affidavit of the 1st respondent, for what should have been a *quasi* judicial determination, they stepped outside the jurisdiction conferred on them by ss 8 and 9 of the Act of 2005 and in my opinion, the investigation and determination and indeed the dependant resolution of Seanad Éireann were thereby rendered *ultra vires*.

95. The applicant seeks judicial review of the respondents' determination and the resolution of the Seanad on the grounds that the determination of the respondents was either based on an error of law and/or arrived at in breach of natural justice and fair procedures; that the respondents had regard to matters that were irrelevant to the determination; that the applicant's legitimate expectation to have his normal place of residence determined in accordance with the Department of Finance definition contained in the letter to him of 2nd October, 2008, was breached, and, finally, that the determination of the respondents was tainted by bias.

96. As is apparent from the Statement of Opposition and the submissions of the respondents, the respondents now accept that the claims for expenses which were submitted by the applicant were in compliance with the definition of normal place of residence, as contained in the Department of Finance definition, as communicated to the applicant in the letter of 2nd October, 2008. The respondents now submit that they were entitled to treat that definition as erroneous and, indeed, as *ultra vires* the Act of 1938. In the course of the hearing before the respondents' evidence was given on the second day of the hearing by a Mr. Dignam, a Civil Servant in the office in Leinster House responsible for dealing with claims for allowances and expenses. His evidence was unequivocally to the effect that the working definition, for the purposes of these claims for expenses, was the Department of Finance definition given in 1994, and still applied in 2008, and as such, was communicated to the applicant. If the respondents had wished to reject that definition, as incorrect in law, they should have made that plain to the applicant during the course of the enquiry, and indeed, if that had happened, it would have been necessary to have stopped the enquiry, either altogether, so that it might be reconvened, either with a different Statement of Contravention, or otherwise, an opportunity would have had to have been afforded to the applicant to deal with what would have been, in effect, an entirely different case against him. This did not happen, and nowhere in the transcript of the hearings was there any departure from the Department of Finance definition, save that one Member, Senator O'Toole, did clearly express great dissatisfaction with it, but, nonetheless, the enquiry proceeded on its original path. It can, of course, be observed that had the respondents decided to reject the Department of Finance definition as the basis upon which "*normal place of residence*" was to be ascertained, they would have been faced with the difficult, if not impossible, task of coming up with a different definition when, in fact, none existed, the Department of Finance definition having been the working definition since 1994. In effect the respondents overcame any difficulty they had with the Dept of Finance definition, by determining the matter on the basis of a "*political judgement*" as discussed above.

97. In my view, the respondents cannot now *ex post facto* be heard to contend that the Department of Finance definition was not the lawfully binding definition of "*normal place of residence*" for the purposes of assessing the applicant's claims for expenses in issue in these proceedings. I am quite satisfied that this definition was the operative definition and it was the one by reference to which claims for expenses were lawfully to be made, as was done by the applicant.

98. In the context of the applicant's contention that the failure of the respondents to adhere to and apply the Dept of Finance definition, breached his legitimate expectation to have this definition applied, the respondents submit that this definition was *ultra vires* the Act of 1938. The basis of this submission is that the Act of 1938 refers to a residence as "*for the time being*" clearly envisaging the possibility of a change of residence, but it does not permit a number of normal places residences at the same time. Whilst couched in more expansive terminology, the Dept of Finance definition, in my view, is not inconsistent with the Act of 1938. Furthermore, the 1998 Statutory Instrument does have a bearing on the matter, insofar as it prohibits a change of normal place of residence during the currency of a year. In effect it copper fastens the exclusiveness of a normal place of residence for the duration of a particular year thereby reinforcing the provision in the Act of 1938 that a member could not have more than one normal place of residence at the same time. But as said above, the Dept of Finance definition fits into this statutory scheme without any inconsistency. I am quite satisfied that the respondents have failed to demonstrate that the Dept of Finance definition was *ultra vires* the Act of 1938.

99. As the respondents now accept that the applicant's claims for expenses were in compliance with the Department of Finance definition, and as these guidelines were not *ultra vires* the Act of 1938, it necessarily follows that their determination is clearly based on an error of law.

100. The *ex post facto* attempt to shift the basis of the determination to the vague ground of breach of "*political ethics*", I have rejected above as being wholly inconsistent with the unequivocal terms of the determination given and as a failure to discharge their function in a proper adjudicative manner. Even if it were not so, attempting to uphold the determination on that basis would, in any event, be a gross breach of fair procedures, given that the Statement of Contravention made no mention of that kind of an allegation or charge, and apart from a very brief and oblique mention of it by Senator White during the course of the hearing, the matter was not at all canvassed as a live issue. The case to the effect that, although the applicant's claims for expenses were compliant with the Department of Finance definition, nonetheless, he committed a specified act by breaching political ethics in submitting these claims, simply was not a part of this enquiry. Accordingly, to uphold the determination on this basis, when the applicant had no opportunity, to address that kind of allegation, would manifestly be in breach of natural justice and fair procedures.

101. The applicant submits that the respondents had regard to irrelevant matter in that much attention was focused by some of the respondents on whether the house at Kilcrohane would be attract a liability to Capital Gains Tax, if it were sold. One of the respondents, Senator O'Toole seemed very concerned that a determination which was favourable to the applicant could result in the applicant avoiding a liability of €250,000. To a lesser extent the respondents expressed an interest in which of the applicant's houses was the second home tax paid on.

102. Whilst it is undoubtedly the case that the potential liability of the applicant to CGT on either of his houses had no direct relevance to the determination of the respondents, nevertheless questions on these subjects were legitimate as a collateral means of exploring the nature of the connection of the applicant to his respective residences, unless it could be shown that the respondents interest in these topics reflected an intent on their part to ensure that their decision did not confer on the applicant a collateral tax benefit and that their decision was skewed by that concern. In my view, the evidence adduced for the Plaintiff falls short of establishing this and I am satisfied that these questions were explored as a legitimate means of testing the applicant's connection to his West Cork residence, and as such the determination could not be quashed on the basis that they had regard to irrelevant matter,

on this ground.

103. The applicant submits that the failure or refusal of the respondents to adhere to and apply the Dept of Finance definition in the determination of the enquiry was in breach of his legitimate expectation to have his expenses claims and consequently the issues arising in the investigations of the two complaints made against him, decided in accordance with this definition of normal place of residence. It was in this context that the respondents submitted that this definition was *ultra vires* the Act of 1938, so that the applicant could not rely on an *ultra vires* interpretation of the statute, as the basis of a legitimate expectation that a particular course of conduct would be pursued by a public authority. In this respect, I have concluded that this definition was not *ultra vires* the Act of 1938. I would agree with the respondents, that not having given any representation to the applicant in respect of the definition, they cannot now in their independent adjudicative role under the Acts of 1995 and 2001, be bound by any representation given by an entirely separate public authority. Thus, whilst the respondents were as a matter of law and natural justice bound to have adhered to the definition, they were not on the basis of any enforceable legitimate expectation of the applicant.

104. This brings me, finally, to the question of bias. The complaint which the applicant makes in this regard is that a reasonable person, in the circumstances, would have a reasonable apprehension that the respondents did not afford the applicant a fair hearing and that statements of the sixth and seventh named respondents at the hearing gave rise to a real risk and/or perception of actual or objective bias.

105. Insofar as the sixth named respondent is concerned, the particular statements which the applicant sees as indicating bias and identified in their written submission, are deposed to at paragraphs 22, 23 and 24 of the applicant's grounding affidavit. In the hearing on 30th June, 2010, the sixth named respondent stated, as follows:

> *"I want to go back to the normal place of residence. In that letter - the 2008 letter or one of those letters, at least - you gave the definition from the 1938 Act. It is very important for us to have on record, because there is a huge issue here about the question of travel. I do not see the relevance, at all."*

106. Also, on the same day, the following was stated by the sixth named respondent:

> *"The actual definition does not have any relevance to the claiming regime as it is here today."*

107. On 13th July, the sixth named respondent stated the following:

> *"I will just put a few things to you clearly. The 1938 Department of Finance definition clearly holds no sway whatever with me - none whatsoever."*

108. Later, on the same day, he says:

> *"They gave you that as being the only definition. Let us be clear about it. The one stop shop did not say to you that currently, that is the definition. They said what was offered in 1938."*

109. Insofar as the seventh named respondent is concerned, the following statement made in the hearing on 13th July, 2010, is pointed to in this context:

> *"I have nothing to do with this: what do you say to the prospect that the committee might decide or might be saying, 'look, yes, in terms of the letter of the law, West Cork satisfies the definition, but for somebody in public life, for a Member of the Oireachtas to opt, as it were, to claim expenses, as it were, in respect of that address, rather than the address that he would appear to be very substantially associated with, is exploiting an imprecise definition that exists, and that is wrong. It is not acceptable'.*
>
> *That is the sort of thinking, certainly, that I have at the moment, and I have not come to a final conclusion on it. It is only fair that I should say that to Senator Callely so you can address that before you finish."*

110. It is interesting to note that in the grounding affidavit of the applicant, these quoted statements by the sixth and seventh named respondents are alluded to, not in the context of bias, but as evidence of misdirection on the relevant law. In the applicant's affidavit, no complaint of bias is made based on these statements. The particulars under paragraph 11 of the applicant's Statement of Grounds does complain of bias relating to statements of the sixth and seventh named respondents.

111. In addition, the applicant, in his second affidavit sworn on 22nd September, 2010, complains of bias on the part of the sixth named respondent arising out of remarks made by him on the Marian Finucane programme on 22nd August, 2010, in which the applicant claims he was publicly mocked by the sixth named respondent and that he treated the complaints process against him as a source of humour and that he said that he hated being involved in the committee and wished he were anywhere else. The applicant complains that a reasonable person would have a reasonable apprehension that the sixth named respondent could not and did not give the applicant a fair hearing.

112. The applicant also complains that the second named respondent, Senator Boyle, having recused himself from the Select Committee on Members' Interests investigating a separate matter affecting the applicant, indicates that a reasonable person would have a reasonable apprehension that the second named respondent could not and did not afford the applicant a fair hearing.

113. The law on bias, and, in particular, objective bias, is well settled. Fennelly J., in *Kenny v. Trinity College* [2008] 2 I.R. 40, at p. 45, said the following:

> *"The test for deciding whether objective bias exists in the case of any adjudication has been repeated in slightly different terms in many cases over many years. Some of the best known cases are:- The State (Hegarty) v. Winters [1956] I.R. 320; Dublin Wellwoman Centre Ltd. v. Ireland [1995] I.L.R.M. 408; O'Neill v. Beaumont Hospital Board [1990] I.L.R.M. 419; Orange Ltd. v. Director of Telecoms (No. 2) [2000] 4 I.R. 159; Spin Communications Ltd. v. I.R.T.C. [2001] 4 I.R. 411; Joyce v. Minister for Health [2004] 4 I.R. 293; Landers v. Director of Public Prosecutions [2004] 2 I.R. 363; Bula Ltd. v. Tara Mines Ltd. (No. 6) [2000] 4 I.R. 412.*
>
> *Denham J described the test authoritatively in her judgment in Bula Ltd. v. Tara Mines Ltd. (No. 6) [2000] 4 I.R. 412. At p. 441, she stated:-*

> *'… it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person'.*
>
> *The hypothetical reasonable person is an independent observer, who is not over sensitive, and who has knowledge of the facts . . .*
>
> *The test of objective bias is expressed in general terms. Its application demands an appreciation of all the circumstances of the individual case, followed by a particularly careful exercise of the faculty of judgment . . ."*

114. In *A.P. v. His Honour Judge Donagh McDonagh* [2009] IEHC 310, Clarke J., having reviewed the relevant law, stated as follows:

> *"It seems to me that . . . that amongst the factors which a court should have regard to is the effect which an ambiguous statement by an adjudicator might reasonably have on persons connected with the process. If an adjudicator makes a statement which is reasonably capable of being intrepreted by an objective and informed bystander as implying that pre-judgment exists, then that is a factor to be weighed significantly in the balance in a challenge to the continued role of the adjudicator in question in the process under challenge . . ."*

115. Further on, he says:

> *"However, it seems to me that there is another form of pre-judgment which arises where the adjudicator indicates that the adjudicator has reached a conclusion on a question in controversy between the parties, at a time prior to it being proper for such adjudicator to reach such a decision (indeed it might well be more accurate to describe such a situation as premature judgment rather than pre-judgment). It can hardly be said that a reasonable and objective and well informed person would be any the less concerned that a party to proceedings was not going to get a fair adjudication if, at an early stage of the hearing, comments were made by the adjudicator which made it clear that the adjudicator had reached a decision on some important point in the case at a time when no reasonable adjudicator could have, while complying with the principles of natural justice, reached such a conclusion.*
>
> *It is important that I emphasise that nothing which I say should be considered as presenting any barrier to adjudicators (and in that context adjudicators includes judges), giving indications as to questions, whether of fact or law, which are causing concern to the adjudicator even though such indications may be given in the course of a hearing. Indeed, many advocates would argue persuasively that an adjudicator who does not give any indication of the issues which may be causing concern to that adjudicator, leaves the parties in a most difficult position of not being able to address any such issues adverse to that parties case which may be causing such concern. There is a difference, however, between a judge or adjudicator indicating matters that may be causing concern, on the one hand, and using language which, on the other hand, might cause a reasonable and informed observer to believe that the judge or adjudicator concerned had excluded any realistic possibility of coming to anything other than one conclusion at a time when, in the context of the process being followed, further evidence or argument was to be expected in relation to the issue concerned . . ."*

The statements pointed to by the applicant as indicating bias, seem to me to potentially fall into the category described by Clarke J. above as either pre-judgment or premature judgment. The issue, therefore, that arises in respect of these statements is whether they are properly to be regarded as such, namely, premature judgment, or as indicators of matters of concern to the respondents in question.

116. The statement of the seventh named respondent, Senator White, in my view, quite clearly falls into the latter category when considered in its entirety, and I am satisfied it cannot be considered as pre-judgment amounting to objective bias.

117. The statements of the sixth named respondent must also be considered in the light of the totality of the hearings. At p. 38 of the transcript of the hearing on 13th July, 2010, the sixth named respondent says the following:

> *"Why I am pursuing this Chathaoirligh, is this. I said to you, Senator Callely, last time around, that I am clear in my mind where I stand at the moment, unless you can convince me in the next twenty minutes. We also have to decide at the end of the day, if something were done in contravention, as I said to you before, was it inadvertent, was it negligent, was it reckless or was it intentional. These are important issues for the future, in terms of where we go. I am only one person on the committee, so this might not apply to anybody else, but I do not want to be saying it in private session or anywhere else, or in deliberation. I want you to know what I am seeing. Everything that is in front of me has you in Clontarf."*

118. It would seem to me that this passage indicates that, notwithstanding the fact that the sixth named respondent had indicated a view, on a number of occasions, adverse to the applicant, he was, nonetheless, merely putting the applicant on notice of this and challenging him to persuade him to the contrary. It has to be borne in mind that the sixth named respondent was one of seven adjudicators, that the hearing was not conducted in a classically adversarial manner, and was conducted with relative informality without legal representation. Bearing in mind, further, the peer relationship between the applicant and the respondents, I am not satisfied that the statements made by the sixth named respondent could be said to be premature judgment amounting to objective bias. In approaching the matter in this way, I am very conscious of the statement of Fennelly J. in the Kenny case:

> *"The test of objective bias is expressed in general terms. Its applicant demands an appreciation of all the circumstances of the individual, followed by a particularly careful exercise of the faculty of judgment."*

I am satisfied, therefore, that in applying this stricture to all the relevant circumstances, that I should not reach a conclusion that there was objective bias on the part of the sixth named respondent on the basis of the foregoing statements.

119. The statement actually made by the sixth named respondent on the Marian Finucane programme, according to the transcript of that programme, reads as follows:

> *"Well, I think the only way to resolve it is by taking bigger decisions like the ones we have taken here, I mean, I am certainly not interested in spending next summer and whatever going through pages of complaints and going back and checking back over, I am going home this afternoon to check over four hundred pages of documentation on various*

expenses claimed.

***Presenter Charlie Bird**:*

Will you not be watching the match?

Senator Joe O'Toole (Independent):

I can't go to the match, I don't want to make a martyr of myself, but it's something I hate being involved in and I wish I were anywhere else."

120. I do not see anything in what was said by the sixth named respondent which was mocking of the applicant or made light of or treated humorously the process of investigation that had been completed. His expression of distaste for being involved in the process could not, in my view, be reasonably interpreted by a reasonable person as indicating an unwillingness or inability to afford a fair hearing. It seems to me that what the sixth named respondent merely said was to indicate a distaste for having to undertake an inherently unpleasant and onerous duty, and no more than that. I am quite satisfied that what he said could not be reasonably regarded as objective bias.

121. Finally, on the issue of bias, relating to the second named respondent, the mere fact that he recused himself from another investigation involving the applicant, could not, of itself, be said to amount to any form of legally cognisable bias. The applicant has not adduced any other evidence of bias on the part of the second named respondent and, accordingly, I am satisfied there was none.

122. In conclusion, therefore for the reasons set out above, I am satisfied that the issues raised in these proceedings are justiciable; that the determination of the respondents and the resolution of Seanad Éireann impugned in these proceedings were *ultra vires* the Acts of 1995 and 2001, on the basis that the respondents failed to exercise their adjudicative function in an appropriate judicial manner by making a political judgment on the issues in the investigation, thereby breaching the applicant's constitutional right to natural justice and fair procedures; they misdirected themselves in law on the definition of "*normal place of residence"* and they breached natural justice and fair procedures in failing to have afforded the applicant a reasonable opportunity to defend himself on a charge of breach of political ethics, notwithstanding his compliance with the applicable definition of "*normal place of residence*".

123. Accordingly, there will be an order of *certiorari* quashing the determination of the respondents and also the resolution of the Seanad, as that is inextricably linked under the Act of 1995, with the determination.