

**THE HIGH COURT**  
**JUDICIAL REVIEW**

[2014 No. 2014/431JR]

**BETWEEN****ANGELA KERINS****APPLICANT****AND**

**DEPUTY JOHN MCGUINNESS, DEPUTY MARY LOU MCDONALD, DEPUTY SHANE ROSS, DEPUTY ÁINE COLLINS, DEPUTY PAUL J. CONNAUGHTON, DEPUTY JOHN DEASY, DEPUTY ROBERT DOWDS, DEPUTY SEÁN FLEMING, DEPUTY SIMON HARRIS, DEPUTY EOGHAN MURPHY, DEPUTY GERALD NASH, DEPUTY DEREK NOLAN, DEPUTY KIERAN O' DONNELL, THE CLERK OF DÁIL ÉIREANN, THE CLERK OF THE PUBLIC ACCOUNTS COMMITTEE, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS****JUDGMENT of Ms. Justice Kennedy delivered 8th day of May, 2015**

1. The applicant moves by way of notice of motion dated 24th February, 2015 seeking discovery of various stated categories of document; there being eight in total. The respondents oppose the application.
2. The applicant is the former chief executive officer of the Rehab Group, having been appointed to that position in December, 2006.
3. The respondents, for the purpose of this discovery application are the named thirteen Teachtaí Dála, the Clerk of Dáil Éireann and the Clerk of the Public Accounts Committee. The respondents sat as the public accounts committee of Dáil Éireann, hereinafter referred to as 'the PAC' and conducted inquiries, the subject matter of the within proceedings on 27th February, 2014 and on 10th April, 2014.

**Background facts**

4. These proceedings were commenced by leave of Hedigan J. on 24th July, 2014. The applicant seeks, *inter alia*, Orders of prohibition and/or injunctive relief, an Order directing the respondents to remove from the record of the PAC any and all references to the applicant and her employment with the Rehab Group by Order of *certiorari* or otherwise. Certain other declaratory Orders are sought to the effect that the respondents had no jurisdiction to examine the applicant on expenditure of monies by the Rehab Group and in particular expenditure in connection with or concerning the applicant, that the procedures of the respondents in respect of the applicant on the occasion of her attendance before the PAC and subsequently, were unfair, unlawful, null and void and tainted by bias of individual members of the Committee. The applicant also seeks damages for breach of her constitutional rights and/or for personal injury and/or damage to reputation arising from the examination by the PAC and/or loss and damage by reason of the ending of her employment with the Rehab Group. Full statements in opposition to the applicant's claim have been delivered.

5. On 9th December, 2014, the applicant wrote seeking voluntary discovery of the categories of documents therein described and the respondent refused by letter dated 22nd January, 2015. By letter dated 18th February, 2014, the applicant was invited to attend at the public accounts committee. The applicant subsequently attended on 27th February, 2014, as requested and participated in the hearing. The applicant contends that on 27th February, 2014 she was subjected to an examination of such intensity that it caused her to be publicly degraded and her health to be adversely affected, resulting in her hospitalisation. It is pleaded that she was subjected to questioning over a period of seven hours on a number of issues that were not the subject of the hearing as notified to her in the aforementioned letter, that questioning was pursued, *inter alia*, in a hostile manner. A transcript of this hearing is available.

6. This court was informed that the public accounts committee subsequently issued a second invitation to her to return for a committee hearing set for 10th April, 2014, and on 9th April, 2014, the public accounts committee was advised that she was unable to attend due to illness.

7. On 10th April, 2014, the public accounts committee convened to continue its hearing. There is a transcript of this hearing also. The Public Accounts Committee made an application to the committee on procedure and privileges of Dáil Éireann for certification pursuant to Part 7 of the Houses of the Oireachtas (Inquiries) Privileges and Procedures Act, 2013 seeking to compel the applicant's attendance.

8. This request was subsequently refused in July, 2014 by the Committee on Privileges and Procedures.

**Categories of document sought**

9. The application before me seeks eight categories of document. I will consider each in turn.

- i. All documents relating to the identification by the Public Accounts Committee of the terms of reference or the precise subject of examination before the public accounts committee on the date when a decision was made to commence the examination of payments made to the Rehab Group which subsequently required the attendance of the applicant before the public accounts committee;
- ii. All documents relating to (including but not limited to minutes and/or recordings of meetings of the Public Accounts Committee and/or between individual members whether in private or public session) and/or considered by the Public Accounts Committee when it made the decision(s) to commence the examination into payments by the Rehab Group pursuant to which the applicant was requested to attend before the Public Accounts Committee;
- iii. All documentation recording the legal advice sought by the Public Accounts Committee and/or provided to and/or

available to the Public Accounts Committee:-

- a.) at the time they commenced their examination of the affairs of the Rehab Group;
  - b.) at the time they decided to seek the applicant's attendance before the Public Accounts Committee;
  - c.) at the time they decided to request the applicant to return before the Public Accounts Committee in April, 2014;
  - d.) at the time they made application for powers of compellability to the Committee on Procedures and Privileges in relation to the applicant; and
  - e.) at any time during the period from 1st December, 2013 to 21st July, 2014 wherein such advice sought and/or provided to and/or made available to, the Public Accounts Committee related to the applicant and/or the Rehab Group and/or the examination commenced by the Public Accounts Committee into payments by the Rehab Group;
- iv. All documents (including but not limited to minutes and/or recordings of meetings of the Public Accounts Committee and/or between individual members whether in private or public session) relating to the decision of the Public Accounts Committee to make an application to the Committee on Procedure and Privileges of Dáil Éireann for an order under part 7 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act, 2013 to compel the applicant to attend before it;
- v. All minutes or records (including audio or visual records) of any meetings of the Public Accounts Committee that took place since 1st December, 2013 (including private meetings) at which the public accounts committee discussed or referred:
- a) the Rehab Group;
  - b) the applicant;
  - c) whether payments to the applicant or other members of staff employed by Rehab could be or should be subject of examination; and
  - d) whether the Public Accounts Committee could or should seek the attendance of the applicant as a witness before the Public Accounts Committee.
- vi. All documentation arising from communications between the Public Accounts Committee and the Health Services Executive and/or the Department of Justice, Equality and Law Reform and/or the Comptroller and Auditor General with regard to the examination being conducted by the public accounts committee concerning payments to and by the Rehab Group;
- vii. All documents relating to:
- a) Communications and/or correspondence between the members of the Public Accounts Committee;
  - b) Communications and/or correspondence between the Public Accounts Committee (and/or its individual members) and any other body or individual;
- which relate to the examination commenced by the Public Accounts Committee into the Rehab Group and the applicants private affairs; and
- viii. All documentation in relation to the application submitted to the Committee on Procedures and Privileges of Dáil Éireann for an order compelling the attendance of the applicant before the Committee.

#### **The applicant's submissions**

10. I propose to set out broadly the applicant's grounds and submissions.

The applicant maintains that discovery is required to advance her case and/or detract from the respondent's opposition to her application; such a test impliedly incorporates the hurdles of relevancy and necessity which the applicant is required to surmount. This test was classically iterated in *Sterling Winthrop Group Ltd. v Fabenfabriken Bayer* [1967] I.R. 97 where it was held:-

"...every document relating to the matters in question in an action, which not only would be evidence upon an issue, but which, it is reasonable to suppose...enable the party requiring the affidavit to advance his own case or damage the case of his adversary, should be discovered."

Clearly the issue of the respondent's jurisdiction is fundamental to this application. The applicant also alleges that there was motivational bias displayed by the public accounts committee and alleged misfeasance in public office. The applicant seeks discovery of legal advice afforded to the Public Accounts Committee in that she alleges that the Committee conducted their inquiries contrary to such advice; thus creating a misfeasance in public office.

#### **Jurisdiction**

11. The applicant contends that the respondents, as members of the Public Accounts Committee, had no jurisdiction to carry out the examination it did and seeks to know the basis for the Committee's purported jurisdiction. The 2005 and 2009 Comptroller and Auditor General reports were relied upon by the respondents, but counsel for the applicant, Mr. Rogers, S.C., submitted that a question must

arise as to whether the members of the Public Accounts Committee had the aforementioned reports in mind when deciding to require the attendance of the applicant, or whether such reports were discovered *ex post facto* in order to justify the basis for the examination conducted. The applicant further argues that even if the Public Accounts Committee possessed the relevant jurisdiction, the conduct of the process by which the Committee exercised its jurisdiction was sufficient to vitiate such jurisdiction and render any decision reached as a nullity.

12. The applicant contends that discovery is sought to establish the true, factual and evidential basis upon which the respondents acted. Categories one and two are in relation to the applicant's contention that despite perusal of the available documents, comprising the transcripts, the reports of the Comptroller and Auditor General and the Standing Orders of the Dáil together with the contents of the opposition papers filed, they do not disclose the parameters of the Committee's remit. The terms of reference, it is maintained, should delineate the scope of the examination and are consequently required to be discovered. The applicant argues that such terms are necessary as a court requires such facts in order to determine whether the remit was a lawful one—that is whether or not the terms fell within Standing Order 163 of the Standing Orders of Dáil Éireann— and to determine whether the Public Accounts Committee remained within the boundaries of such terms.

13. It is the applicant's case that the jurisdiction of the respondents as members of the Public Accounts Committee is limited to examining and reporting upon the appropriation accounts, accounts that are audited by the Comptroller and Auditor General and reports carried out by the Comptroller. It is also the applicant's case that the conditions for the exercise of jurisdiction under Order 163 of the Standing Orders of Dáil Éireann have not been satisfied, as the Comptroller and Auditor General has never audited, nor sought to audit, the accounts of Rehab, nor has the Comptroller and Auditor General reported on payments made by the Rehab Group. The applicant submitted that, as a matter of law, the accounts of the Rehab Group are not subject to a power of inspection on the part of the Comptroller and Auditor General under the provisions of the Comptroller and Auditor General (Amendment) Act, 1993 and in particular s.8 thereof. It is submitted by the applicant that Order 163 does not provide for the examination of the employment relationship of the applicant with the Rehab Group and that the Respondents contest this without identifying in clear terms the basis for that authority or the factual or evidential basis relied upon by the respondents in coming to that conclusion. Discovery is sought by the applicant so as to establish the factual and evidential basis upon which the respondents acted.

#### **Motivational bias**

14. The applicant submits that the motivation of the members in conducting the examination, and their alleged bias, is inextricably linked to the jurisdictional issue of the Committee. The applicant submitted that the members of the Public Accounts Committee were biased towards her and therefore by their conduct vitiated any semblance of jurisdiction, if such existed in the first instance. Reliance is placed upon the decision of *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 A.C. 147 as authority for this proposition. Thus, the applicant seeks discovery of documents which would serve to outline the Public Accounts Committee's motivations or the members' purpose in questioning the applicant on such matters, which formed the basis of the questioning.

15. The applicant also seeks discovery in respect of legal advice in that the applicant contends that the respondents were aware that the Committee did not possess the power to enquire into the applicant's private affairs and had been so advised but yet the Committee proceeded to pry into the applicant's personal affairs nonetheless.

#### **Misfeasance**

16. The applicant submitted that the Public Accounts Committee members proceeded with the examination into her private affairs in the knowledge that they had no power to do so and proceeded with a reckless disregard for the consequences of their actions for her in so doing. It was submitted that to succeed in her claim of misfeasance in public office, she must establish knowledge on the part of the respondents and a decision to proceed notwithstanding that knowledge. The applicant, in this respect, faces an admittedly high evidential burden. To argue this ground more fully, the applicant maintains that the sought documents are required to give effective access to the courts in order to properly prosecute the applicant's claim of misfeasance in public office. The applicant contends that the respondents were aware that they had no power to enquire into her private affairs and had been legally advised in this respect. The respondents proceeded nonetheless to do so which gives rise to this claim. The applicant relies upon *Kennedy v Law Society of Ireland (No. 4)* [2005] 3 I.R. 228; *Three Rivers D.C. v Bank of Ireland (No. 3)* [2000] 2 W.L.R. 1220 and *Glencar Explorations Plc v Mayo County Council (No. 2)* [2002] 1 I.R. 84 for the proposition that the respondent's knowledge that they ought not to pose questions concerning the applicant's private affairs was known, but that the respondents deliberately chose to pursue this line of questioning regardless of the legal advice given. This is averred to in para. 38 of the applicant's grounding affidavit.

#### **The respondents' submissions**

17. The respondents oppose the motion and Mr Gallagher, S.C., submitted in the first instance that there is a distinction between discovery in judicial review proceedings and in plenary proceedings and relies in this respect upon *K.A. v Minister for Justice* [2003] 2 I.R. 93, *Sheehy v Government of Ireland* (Unreported, High Court, Kelly J., 30th July, 2002) and *Carlow Kilkenny Radio Ltd v Broadcasting Commission* [2003] 3 I.R. 528; in substance that the necessity for discovery will be more difficult to establish in discovery proceedings, as in many instances the facts are not in dispute. Mr. Gallagher, S.C., submitted that the applicant had failed to meet the required test for discovery in the within proceedings.

#### **Jurisdiction of the PAC**

18. Mr Gallagher, S.C., submitted that the respondents do not accept the applicant's contention that there is a distinction between payments 'to Rehab' and payments made 'by Rehab', that either way payments involved the expenditure of public funds which is relevant to the determination of whether or not the PAC had jurisdiction to carry out its examination. The respondents also reject the assertion made by the applicant that the Rehab Group is a private body. It was submitted that the applicant had attended voluntarily before the PAC. It was further submitted that the PAC had full jurisdiction to carry out the impugned examination on foot of Standing Order 163 of the Standing Orders of Dáil Éireann and that what was in the mind of the parties is not relevant to the determination of the issue as to whether jurisdiction was vested in the respondents in the first instance and that the question of *vires* falls to be determined objectively. The respondents submitted that even if the decision of *Anisminic* was the correct approach, (which was not accepted) and even if the PAC had lost jurisdiction by virtue of the conduct of the examination on 27th February 2014, the loss of jurisdiction can be properly assessed by reference to the available transcripts of the proceedings.

19. The respondents submitted that the public accounts committee possessed the required jurisdiction to conduct the examination of the applicant in the manner in which it did pursuant to Standing Order 163 of the Standing Orders of Dáil Éireann.

Standing Order 163 (1) provides:-

"There shall stand established, following the reassembly of the Dáil subsequent to a General Election, a Standing Committee, to be known as the Committee of Public Accounts, to examine and report to the Dáil upon-

(a) the accounts showing the approbation of the sums granted by the Dáil to meet public expenditure and such other accounts as they see fit (not being accounts of persons included in the Second Schedule of the Comptroller and Auditor General (Amendment) Act 1993) which are audited by the Comptroller and Auditor General and presented to the Dáil, together with any reports by the Comptroller and Auditor General thereon”

20. Furthermore, the respondents rely upon the fact that the Rehab Group had been included in the former Comptroller and Auditor General Reports as deposed by the first named respondent in his affidavit but submitted that the intention of the PAC is not relevant to jurisdiction.

### **Bias**

21. The respondents submitted that discovery is unnecessary to enable the applicant to demonstrate bias arising from the manner in which it is pleaded together with the submissions of the applicant. The respondents argue that this issue of bias is premised on the transcripts of the proceedings before the PAC and the subsequent media commentary by the third named respondent and that therefore the applicant already has access to all the necessary documentation for her to make her claim of bias. Reliance is placed on the decision of Kelly J. in *Sheehy* where the applicants complained that the Minister was biased against them, by reference to statements made by the Minister in the Dáil and speeches which were quoted in that respect. Kelly J. stated:-

“...insofar as they may seek to make the case that there is a bias of pre-judgment, they have been able to demonstrate by reference to the parliamentary record the statement made by the minister for justice prior to the conviction of the applicants before a special criminal court. In these circumstances I do not see why these documents are needed.”

### **Possession, power and procurement**

22. The applicant places reliance on the affidavit of Ms. Quinn in this respect and submitted that the documents sought are the documents of the PAC itself and not the documents of the individual members. Therefore, as the ninth, tenth, eleventh and thirteenth named respondents are no longer members of the PAC, (as deposed to in the affidavit of Ms. Quinn) the ability of these respondents to retrieve the documents is entirely restricted. It is submitted that the PAC itself is constrained in its control of the documents as the Houses of the Oireachtas are the final arbiters on all matters relating to the custody and control of documents. The respondent relies on Standing Order 111 in this respect which states as follows:-

“The Clerk shall have custody of all journals of proceedings, records, or other documents belonging to the Dáil, and he or she shall neither take nor permit to be taken any such journals of proceedings, records or documents from the Chamber or offices, without the express leave or order of the Dáil: provided, however, that in the event of the Dáil being adjourned for any period longer than a week, such leave may be given by the Ceann Comhairle who shall report the same to the Dáil upon its reassembling.”

The applicant submitted in reply that Order 111 had no application in that it related only to documents belonging to the Dáil and Mr. Rogers, S.C., submitted that the Dáil and a committee are two separate entities.

23. Mr. Gallagher, S.C., opened s. 92(1), (2) and (3) of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act, 2013, which provide that:-

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

(2) Subject to sections 36(2) and 37(2), the following are privileged wherever published:

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

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

(c) All utterances made in proceedings of a committee.

(3) Utterances made or documents prepared at or for meetings of a committee that are held otherwise than in public and at which no evidence is given to the committee shall not be disclosed without the consent in writing of the chairman.”

24. Mr. Gallagher, S.C. submitted, *inter alia*, that this section places a restriction on members of a committee from disclosing documents and in particular he relied upon sub-section 3 thereof which he submitted imposes a general restriction on disclosure without the consent of the chairman of the committee.

25. In reply Mr. Rogers, S.C. submitted that there must be a determination by the court in the first instance as to whether discovery should be made and that such should be determined in the interests of justice. Thereafter, he argued that it will be a matter for the first named respondent to decide whether he will provide his consent as chairman of the committee.

26. The respondents also rely upon privilege pursuant to Article 15.10 of the Constitution, however, I am satisfied that this is not a matter for me at this time.

### **Misfeasance**

27. The respondents submitted, *inter alia*, that in so far as there is any dispute of fact in this case, it is very limited and further questions whether any dispute of fact even arises in the context of the claim of misfeasance or alleged breach of the applicant's constitutional rights. The respondent asserts that in any event, even if there is a dispute of fact in relation to the applicant's claim of misfeasance or alleged breach of her constitutional rights, which will require to be determined, this will only arise if the applicant is successful in demonstrating that the PAC respondents acted unlawfully in the first instance. Consequently, it is submitted that it would be more proportionate for the court to determine the issue of unlawfulness before determining the issue of discovery in the context of the applicant's claim of misfeasance in public office and breach of her constitutional rights. In *Telephonica O2 (Ireland) Ltd v Commission for Communications Regulations* [2011] IEHC 265 the applicant sought disclosure of confidential documentation. In the substantive proceedings, the applicant sought to quash a determination of the respondent fixing the price at which emergency calls which are free to the public were to be charged as and between the services providers. The case concerned a determination of the standard of review to be applied. Counsel for the applicant contended that the standard of review ought to be a “manifest error” standard, rather than the *O’Keeffe v An Bord Pleanála* [1993] 1 I.R. 39 irrationality standard. It was accepted on behalf of the

applicant that the disclosure sought would not be appropriate if the standard of review was found to be *O'Keeffe* irrationality. Clarke J., therefore, was of the view that it was appropriate to depart from the usual way of dealing with this type of application and decided to separate out, on a modular basis, the standard of review issue from the remaining issues. Clarke J. concluded that he would decline to make discovery at that stage and would adjourn the application until after the first portion of the modular hearing had concluded. The respondents urge me to adopt this approach.

### The law

28. Order 31 of the Rules of the Superior Courts deals extensively with discovery applications. It is clear that a more restrictive attitude towards the availability of discovery in judicial review proceedings pervades the jurisprudence. Such a restrictive approach is primarily based upon the fact that the function of most discovery applications is to essentially clarify factual matters. Thus, as the defining feature of judicial review proceedings is concerned with the manner in which a decision was taken or the legal basis of such a decision, discovery will logically play a more limited part.

29. From a perusal of the relevant case law three principles emerge, which are required to be outlined below. The court is aided in this process by reference to the judgment of Ó Caoimh J. in *Shortt v Dublin City Council* [2003] 2 I.R. 69—where it was noted that the rarity with which discovery is ordered in judicial review proceedings is not due to any latent restriction in the right to apply for that order, rather it is simply a natural consequence of the fact that its necessity will be more difficult to establish in judicial review proceedings. Therefore the three principles which emerge are: first, discovery is more rarely granted in judicial review proceedings, second, that notwithstanding the rarity at which discovery may be granted, the court is still permitted to grant a discovery order if the documents are relevant and necessary and that such discovery will lead to a fair disposal of the matter, and third, the court, in so acting, must look at the nature of the proceedings in order to ascertain whether the documents are both relevant and necessary. It is undoubtedly the position that the standard test of relevance and necessity will be more difficult to establish in the context of judicial review proceedings.

30. In *Carlow/Kilkenny Radio Ltd. v Broadcasting Commission of Ireland* [2003] 3 I.R. 528, the High Court's refusal to order discovery was appealed to the Supreme Court where it was held (Murray, Geoghegan and Fennelly JJ.) in dismissing the appeal, that as judicial review was not concerned with the correctness of a decision, but rather it was concerned with the way that decision was reached, it followed that the categories of documents which a court would consider necessary to be discovered would be much more confined. Furthermore, discovery would not normally be regarded as being necessary if the judicial review application was based upon procedural impropriety, as usually that could be sufficiently established without resorting to a discovery application. Discovery would be necessary where there was a clear factual dispute on the affidavits that would have to be resolved in order to properly adjudicate on the application.

31. In the aforementioned decision of *Shortt v Dublin City Council* Ó Caoimh J. cited a passage from the judgment of Sir Thomas Bingham, M.R. in the unreported case of *R. v. Secretary of State for Health, ex parte Hackney London Borough* (Unreported, English Court of Appeal, 24th July, 1994,) at p. 82:-

"The basic approach is that discovery and production will be ordered in judicial review proceedings where they are necessary for disposing fairly of the application but not otherwise. The rules themselves provide no guidance as to when discovery should be treated as necessary for disposing fairly of an action or application, but over the years a practice has developed, the broad principles of which are clearly understood, even if the application of those principles inevitably gives rise to controversy in individual cases. It is undesirable to attempt any precise definition of the existing practice, but I think it is broadly true to say that discovery will be regarded as necessary for disposing fairly of the action, or application, if a party raises a factual issue of sufficient substance to lead the court to conclude that it may, or will, be unable to try the issue fairly, fairly that is to all parties, without discovery of documents bearing on the issue one way or the other."

From the foregoing, it is clear that there is deep reluctance to grant discovery in judicial review proceedings, but that it is still permitted when considering the particular facts of each case which is brought before the court.

32. In *Telefonica O2 (Ireland) Ltd v Commission for Communications Regulation* [2011] IEHC 265, Clarke J. relied upon his own decision in *Independent Newspapers (Ireland) Ltd v Murphy* [2006] 3 I.R. 566 in deciding that:-

"For the reasons set out...it seems to me that the court has a jurisdiction to put in place an appropriate regime designed to minimise the risk that confidential information will be disclosed only for it to transpire later that the disclosure in question was unnecessary."

At para. 4.4 of the judgment in *Telefonica*, Clarke J. further stated:-

"...it seems to me that it would be appropriate to depart from what might otherwise be the normal way of dealing with all issues in this case at a unitary trial and separate out, on a modular basis, the standard of review issue from all remaining issues."

This approach has a direct effect on the court's view of the legal advice documents sought in category three, which is also viewed through the prism of the decision in *Kennedy v The Law Society of Ireland* [2005] 3 I.R. 228.

### Decision

33. This court's paramount consideration is to do justice. The court must, in evaluating if discovery is relevant and necessary, have regard to the guiding consideration which is the overriding interest in the administration of justice. The respondents argue that jurisdiction can be readily assessed by having regard to Standing Order 163, the Comptroller and Auditor General's reports of 2005 and 2009 and the available transcripts of the hearings. However, I am not convinced that these documents are the sole consideration. It will be for the court at the substantive hearing to decide ultimately the issues between the parties and to determine whether the process utilised here was lawful, within jurisdiction and fair. To so determine, I am satisfied that the material relevant and necessary to the issue of the jurisdiction of the PAC should be discovered. In *O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39, Finlay C.J. in having regard to the onus on an applicant in judicial review proceedings to establish the nature and extent of the material before the decision maker stated:-

"...the necessity for the applicant to take this step arises from the onus which is upon him of establishing the nature and extent of the material which was before the decision-making authority at the relevant time."

Furthermore, in these proceedings, what is at issue is to determine whether the respondents had jurisdiction to embark upon the impugned examinations. Therefore, it logically follows that the material relevant to this fundamental issue must be discoverable. It is

submitted by the respondents that the question of whether a public authority has jurisdiction to undertake a particular act is determined by reference to the interpretation of the powers of the public authority and whether the actions undertaken by the public authority fall within the limits of those powers. Therefore, the terms of reference and the basis of the decision to examine the applicant are clearly relevant and necessary to demonstrate the jurisdiction of the respondents and the limits of that jurisdiction. I am satisfied that certain categories of documents should be granted in order to establish the true factual and evidential basis upon which the respondents acted in examining the applicant and are necessary and relevant to the issue as to whether the respondents acted within the limits of any such jurisdiction. These documents are also relevant to determine that if the PAC had jurisdiction in the first instance, whether such jurisdiction was then vitiated by conduct. I am satisfied that the documents sought at categories one and two fall within this parameter and are necessary to do justice between the parties.

34. The documents sought at category three relate to the issue of misfeasance in public office. Applying the decision of Clarke J. in *Telefonica O2 (Ireland) Ltd v Commission for Communications Regulation* [2011] IEHC 265, I am of the view that the issue of the applicant's claim for damages should be addressed after the determination of whether there was unlawfulness on the part of the respondents. Therefore, I do not propose to decide this category now and will adjourn this aspect of the motion until after the first module has been determined.

35. I am satisfied that the documents referred to in category four are both relevant and necessary in that the applicant should be in a position to assess the basis for the respondents' application to the Committee on Procedure and Privileges of Dáil Éireann, as this is relevant to the issue of the jurisdiction of the PAC in the first instance. I am satisfied that the documents sought at category eight overlap with category four and are therefore superfluous.

36. I am further satisfied that the documents sought in category five are also relevant and necessary.

37. The materials sought in categories six and seven are, I am satisfied, superfluous to categories one and two and are not necessary.

38. Whilst it has been argued that the PAC itself may be subject to constraints in respect of the documents, I am not satisfied that this is a basis upon which to refuse discovery.