Neutral Citation Number: [2006] IEHC 311

THE HIGH COURT
JUDICIAL REVIEW

2004 324 JR

OWEN O'CALLAGHAN, JOHN DEANE RIGA LIMITED AND BARKHILL LIMITED

APPLICANTS

AND

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

RESPONDENTS

Judgment of Mr. Justice TC Smyth Delivered on Tuesday, 10th October 2006

1. The Applicants seek, by way of judicial review, Orders of -

> (a) Prohibition - prohibiting the Respondents from further investigating or making any finding in relation to matters affecting the Applicants in the Tribunal of Inquiry (of which the Respondents are members); and
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> (b) *Certiorari*, quashing the decision of the Respondents whereby the Respondents refused to desist from further investigating or making findings in relation to matters affecting the Applicants.

2. There are two central claims made by the Applicants -

> (i) the Applicants contend that the documents and related facts documents obtained by them pursuant to court orders, demonstrated that the Applicants have not been treated fairly by the Tribunal with regard to a specific issue (Quarryvale I); and, have been denied fair procedures, in that they have been treated in an unequal manner compared to a Mr. Gilmartin.
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> Mr. Gilmartin, the Applicants contend, is a person who has made very serious allegations against them, and that this unfairness and denial of fair procedures and unequal treatment represents a serious infringement of their rights. These complaints were referred to throughout the hearing as the "fair procedures/inequality of treatment" ground.
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> (ii) The Applicants contend that there is an appearance of bias and partiality on the part of the Tribunal, and that the approach by the Tribunal to date gives rise to a reasonable apprehension or suspicion of bias.

3. This matter comes before the court as the consequences of a judgment of the Supreme Court dated 9th March 2005, which determined that the Applicants, up to that time had been denied the rights they had as a result of the decision In *re Haughey* [1971] IR 217. The order and judgment of the Supreme Court arose out of previous judicial review proceedings (Record No. JR 324). In those proceedings the Tribunal had submitted to the court that there was nothing in the undisclosed documentation (to the Applicants) material(s) which was or were inconsistent with a statement of evidence of 23rd May 2001, which was made available to the Applicants in connection with the module known as Quarryvale (I).

4. The contention of the Applicants in these proceedings is that the documentation which has been disclosed as a result of these earlier judicial review proceedings did contain a number of important matters which were very significantly inconsistent with the statement of Mr. Gilmartin and that it could not be credibly contended that such inconsistencies were not "gross or glaring or significant."

5. In *JR 324* the High Court (O'Neill J. in his judgment of 7th July 2004) noted that in the context of a ruling by the Tribunal (which was overruled by the courts - hence the documents upon which the instant case is based)

> "... this court fully accepts the assurance or guarantee given by the Tribunal to the effect that the undisclosed written or recorded statements of the notice party [Mr. Gilmartin] do not contain material which is either glaringly or grossly or significantly inconsistent with the statement of the Notice Party of the 25th May 2001 and the oral evidence given by the Notice Party."

6. In the events the Applicants contend that if there can be shown to exist gross or glaring or significant inconsistencies then such "assurance" given earlier to the court taken in conjunction with the inconsistencies themselves now known to exist betoken a disposition by the Tribunal towards the Applicant. This is not a ground upon which relief was specifically sought or granted. In my judgment it is now irrelevant what assurance(s) (if any) were considered to have been given to the court and such as did arise had their origins in counsel's submissions - because in the events the materials have now been disclosed as a result of the court orders, and any erroneous assessment or adjudication as to the inconsistencies or degrees thereof stand as set aside and can be addressed by the Applicants in open session at any future hearing by the Tribunal.

7. Prior to any consideration of the detailed submissions made in this case the following general observations are pertinent: -

> (a) Judicial review is not an appeal process *(O'Keeffe -v- An Bord Pleanala* [1993] 1 IR 39 at 71).
>
> (b) The Tribunal has been found in error in *JR 324*; the policy which was adopted by the Tribunal long predated the commencement of hearings involving Mr. Gilmartin or Mr. O'Callaghan: It had been universally applied to everyone prior to *JR 324*.
>
> (c) It is inappropriate for the court to examine in minute detail a large number of issues which relate to factual events or to carry out a microscopic investigation in relation to decisions made by the Tribunal in the course of its deliberations in relation to particular documents or events:
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> > "We do no service to the public in general if we subject every decision of every administrative Tribunal to minute analysis." (Per O'Flaherty J. in *Faulkner -v- Minister for Industry and Commerce*)
>
> (d) Procedural decisions of the Tribunal are reviewable and a fortiori post *JR 324* must be so.
>
> (e) The individual decisions challenged must be examined only to the extent necessary to determine whether such indicates a particular frame of mind by the Tribunal.

(f) A court can strike down a decision of a Tribunal which is in error - it does not substitute its own view for that of the decision maker, even if constitutional rights are affected

> "It is not a licence for the courts to stand in the shoes of the decision maker". (Per Morris P. in *Bailey -v- Flood* [2000] IEHC 169).

(g) A procedural or policy error on the part of the Tribunal which constituted a failure or infringed *In re Haughey* rights (in according fair procedures and constitutional justice) does not ipso facto amount to bias on the part of the Tribunal or any of its members.

8. In the course of his judgment in *JR 324* Hardiman J. in the context of consistency/inconsistency of what had been stated by Mr. Gilmartin in private to the Tribunal (as opposed to what found its way into the public domain) stated –

> "It is known that what he [Mr. Gilmartin] said in those private dealings are not wholly consistent with what he is now saying but no more than that is known about these admitted inconsistencies. They may be trivial or they may be gross.
>
> The primary purpose of a Tribunal of Inquiry is to conduct a full public inquiry. The Parliamentary request to conduct preliminary investigations in private is for the sole purpose of determining "whether sufficient evidence exists in relation to any of the matters referred to above to warrant to proceeding to a full public inquiry in relation to such matters". This is a threshold issue, requiring only a bare minimum of evidence. If the evidence of this module were limited to that of Mr. Gilmartin (which for all I know it may be) there would obviously be sufficient evidence to warrant to proceeding to a full public inquiry, unless the Tribunal had for some reason decided that the whole of his evidence was incapable of belief." [p. 41 of typescript of unreported judgment].

9. I am satisfied on the evidence before me that the Tribunal has adapted its policies following on the decision of the Supreme Court in *JR 324* and is anxious that the first named Applicant is provided with the opportunity for a full and effective cross-examination and that other parties are given a like opportunity on the basis that the principles established in *JR 324* must be and in fact have been extended and will be extended to all witnesses appearing before the Tribunal.

10. Furthermore, the point of departure for adjudication in the instant case is from the full compliance by the Tribunal with all the judgments, orders and directions in *JR 324* and arising from the Order For Leave granted by Abbott J. on 28th November 2005 in the instant case. The purpose of the orders made in JR 324 was to enable the Applicants to exercise their *In re Haughey* rights.

11. In the course of his judgment in *JR 324* Geoghegan J. said:

> "... it was absolutely essential that the documents and materials which were sought for the purpose of carrying out a worthwhile cross-examination in the extraordinary circumstances where wild allegations were flying around the tribunal against Mr. O'Callaghan and of which he had no prior notice be duly produced."

12. When such were duly produced, these proceedings began with a view, not to give effect to the order sought and obtained by the Applicant in JR 324 but to prohibit the Respondent from further investigating or making any finding in relation to matters affecting the Applicants.

13. While the majority of the public hearings dealing with Quarryvale (I) may be completed, it is clearly the intention of the Tribunal to resume hearings to complete outstanding issues. In my judgment it is incumbent on the Tribunal to recall Mr. Gilmartin so as to enable the Applicants (now in possession of all the requisite documentation) to exercise the effective cross-examination which they claim to have been denied to them in the past. The Quarryvale (II) module has as yet not been embarked upon by the Tribunal and in this regard the Tribunal, in its circulation of documents has followed the guidance of the courts as set out in *JR 324*. Indeed, counsel to the Tribunal will have a role in this regard in order to test the credibility of the evidence.

14. The Applicants submitted that the disclosed documents demonstrated the following: -

> (i) That Mr. Gilmartin had on many previous (to disclosure date) occasions made statements which were glaringly and significantly inconsistent with the statements which he had made in evidence.

Even if this submission be correct - and in my judgment the characterisation by adjectival language of any inconsistency is irrelevant - if there is any inconsistency it is the prerogative of cross-examining counsel to exploit it, and the opportunity to do so now exists. The fact that in applying pre *JR 324* policy, the application of Tribunal policy which had been declared to have been incorrect, meant that the Tribunal was in error and it obligates the Tribunal to consider afresh upon a reconsideration of all the evidence which may be adduced on Mr. Gilmartin's being cross-examined by counsel for the Respondents and any other appropriate party and any other relevant evidence.

> (ii) Mr. Gilmartin had made allegations against the Applicants and in particular Mr. O'Callaghan which were never disclosed to the Applicants and which were demonstrably and patently false.

Even if this submission be correct - and the Supreme Court on the evidence in *JR 324*, as already noted "In the extraordinary circumstances where wild allegations were flying around the Tribunal against Mr. O'Callaghan and of which he had no prior notice"- directed that the documentation be produced. When they are now produced and if they contain material that shows that allegations of Mr. Gilmartin are demonstrably and patently false, the opportunity sought (to cross-examine) in *JR 324* is now available to the Applicants to satisfy the Tribunal that Mr. Gilmartin had made false allegations. It is not for this court to go behind any of the matters raised or more properly raised in *JR 324* or to seek to anticipate any determination by the Tribunal of what may occur on the matter being resumed. The corrective effect of the decision of the Supreme Court on the formal policy of the Tribunal and its application, must of necessity cause the Tribunal to review whatever earlier preliminary views it may have expressed in any form.

> (iii) The documents revealed the circumstances in which Mr. Gilmartin had obtained immunity from the DPP (the fact of which had been previously disclosed by the Tribunal). The documents also demonstrated that the Tribunal or its counsel more particularly had formed and expressed a view that Mr. Gilmartin did not require or need any immunity. This view was expressed at a comparatively early stage in the preliminary investigation.

The Tribunal, if it did form a preliminary view as to the veracity of what Mr. Gilmartin was saying at the time or would say in the

future, were, in my judgment, entitled to consider that he would be telling people the truth. They were in my judgment not unreasonably entitled to assume that the man did not set out to deliberately perpetrate falsehoods.

In my judgment the submission in this regard is made on the basis of an interpretation of the facts disclosed by the documents. I think it not unreasonable that in its dealings (in this regard) the Tribunal were entitled to approach their task with an open mind and assume that in furnishing information (in whatever form) Mr. Gilmartin was acting in good faith and honestly, in coming forward to give evidence in respect of a public inquiry into matters of serious public interest.

Furthermore, irrespective of any views either the Tribunal or Mr. Gilmartin or the DPP may have had the provisions of the Tribunals of Enquiry (Amendment) Acts provide that a distinction is to be made and drawn from evidence tendered before a Tribunal and separate civil and criminal proceedings. Furthermore, such immunity from prosecution was subject to Mr. Gilmartin's co-operating fully in giving truthful evidence. If one or more counsel for the Tribunal or the Tribunal itself considered that Mr. Gilmartin did not need immunity, that is perfectly understandable if he was going to give truthful evidence and so far as they were aware from the facts known to them at the time of the event complained of no disclosure of any wrongdoing had come to the Tribunal's attention and it was not a decision that in fact Mr. Gilmartin had done no wrong or Mr. O'Callaghan had been engaged in any wrongdoing.

The inconsistency complained of in Mr. Gilmartin's oral evidence on this issue is now open to be explored by the Respondents. While the granting of immunity may be open to criticism if it was tendered to persuade him to give assistance in evidence to the Tribunal, it is not inherently wrongful. The granting of immunity may or may not have given Mr. Gilmartin a facility to make "wild allegations", the immunity (the document was not produced to the court) was on the basis of giving truthful evidence.

The evidence in Quarryvale (I) is as yet incomplete and that in Quarryvale (II) not begun. It would be premature for the court to inhibit the Tribunal from discharging the task imposed upon it to hear the evidence. The decision concerning immunity was that of the DPP (who is not involved in these proceedings) even if the request of Mr. Gilmartin (on the advice of his solicitor) was conveyed to the DPP via the Tribunal.

> (iv) The documents revealed that the Tribunal legal team on at least 36 occasions met with Mr. Gilmartin mostly without the presence of his solicitor or any legal representative.

This is not a matter of dispute. The documents reveal the necessity for many of these meetings, the initiative for same sometimes originating from the Tribunal, sometimes from solicitors, sometimes counsel and sometimes Mr. Gilmartin himself. The nature and extent of the several topics raised referable directly or indirectly to Mr. Gilmartin clearly warranted several interviews or attendances. The court would be usurping the function of the Tribunal if it seeks to dictate to it the number of occasions it (in its opinion or judgment) it should meet any particular witness. The absence of Mr. Gilmartin's own solicitor or legal representative is not a circumstance that should concern the court when Mr. Gilmartin on many occasions himself bypassed them and communicated directly with counsel to the Tribunal.

There is nothing in the papers that convinces me that Mr. Gilmartin did not have a mind and will of his own. Indeed quite the contrary. Which is one of the reasons that has led to these proceedings and indeed to *JR 324.*

> (v) The Tribunal assisted Mr. Gilmartin with the drafting of his affidavit even when he had his own legal representative.

The documents reveal that Mr. Gilmartin was not always totally focused on issues raised by him or when raised with him. In the course of ordinary litigation it is not unusual for an affidavit to be drafted by a lawyer and that prior to its finalisation a discussion to lead to the settlement of its terms, the ultimate responsibility for which rests with the deponent, a meeting takes place for that purpose. If the former practice of the Tribunal of seeking to segregate Quarryvale (I) from Quarryvale (II) was applied too rigidly - this has now been overcome by the Tribunal abiding by the final determination of *JR 324*.

The purpose of Tribunal counsel was to seek to put shape or form on the information given to him, not to advise Mr. Gilmartin concerning his own interests (although from time to time this may have occurred as an incidence of a communication). If the inferential criticism is that Mr. Gilmartin was groomed or coached in the evidence he was to give to the Tribunal this can and will be no doubt very readily exploited in the cross-examination opportunities that now lie open to the Respondents.

> (vi) Mr. Gilmartin had direct access to the Tribunal legal team and availed of direct contact with the Tribunal counsel.

This is not a matter of dispute. It is a feature of the evidence that, (given the range of topics, the length of time during which Mr. Gilmartin had dealings with the Tribunal) can hardly have come as a surprise to anyone with any experience at all of 'long running' tribunals where the witnesses presented to the Tribunal in public may have protracted dealings with the Tribunal staff over a long period of time and can come to regard such person or persons with whom the witness may have come to repose confidence or to have a particular rapport, so that when they have a query or something further occurs to them they feel free to establish direct contact with such member of staff.

> (vii) The Tribunal was in possession of a very considerable volume of information emanating from Mr. Gilmartin of and concerning the Applicants, which was highly negative and critical of the Applicants.

Whatever about the preconceived degree of criticism in information emanating from Mr. Gilmartin of the Applicants, it seems clear that the elements of irrelevance to the Tribunal's concerns were not put into the public domain. In my judgment the Tribunal were entitled to exercise their discretion but not in the fashion in which they did as is clear from the results of the decisions in *JR 324* and now the extended range of information is available and this stems from the court's determination that the enforcement by the Tribunal of its general policy was incorrect. But that does not mean that earlier determinations in discretion were not *bona fide*.

> (viii) The documents revealed that the Tribunal had divulged to Mr. Gilmartin information provided by another person.

This concern arises from an averment in paragraph (60) of Mr. O'Callaghan's affidavit sworn on 25th November 2005 which refers to a memorandum of a telephone conversation between counsel to the Tribunal and Mr. Gilmartin. Mr. O'Callaghan avers: -

> "I have to say that the disclosure by Tribunal counsel to Mr. Gilmartin of information which on the basis of the Tribunal's rulings was at a private stage of its inquiry "confidential" reinforces my concern about the partisan nature of this Tribunal. Before the circulation of the brief, I was not told of any evidence given privately to the Tribunal by any other witness. It is not clear to me why this immediate disclosure of information obtained from that solicitor was made by Tribunal counsel to Mr. Gilmartin."

The Tribunal's response in this regard is set out in a replying affidavit of Ms. Susan Gilvarry sworn on 23rd January 2006, as follows:

> "(xi) Alleged disclosure of information by Tribunal to Mr. Gilmartin
>
> (128) At paragraph (60) of his affidavit the Applicant avers that counsel for the Tribunal disclosed confidential information to Mr. Gilmartin contrary to its confidential policies and that he, Mr. O'Callaghan was not told of any information given privately to the Tribunal by any other witness. I say that this is incorrect as the general nature of information given to the Tribunal in the course of the private investigative phase would have to be put to witnesses in order to elici further information.
>
> (129) For example I say that in the course of an interview with the Tribunal on 11th October 2000 Mr. O'Callaghan was made aware of information given privately to the Tribunal by another witness. I say that he was informed that allegations were made against him by a named individual. In the course of that interview information gathered by the Tribunal was put to Mr. O'Callaghan by way of questions and that this would have been clear to Mr. O'Callaghan at the time of the conduct of the interview. I say that such a communication was made in the course of the Tribunal's private investigative phase in order to assist the Tribunal, with its other independent investigations, in determining whether the Tribunal would proceed to public inquiry on certain matters.
>
> (130) At paragraph (76) of his affidavit the first named Applicant further alleges that counsel for the Tribunal inappropriately disclosed information gathered in its preliminary investigative stage to Mr. Gilmartin. I say that Mr. O'Callaghan is aware that the alleged inappropriate disclosure was in fact information already within Mr. Gilmartin's knowledge as both Mr. Gilmartin and the first named Applicant had entered into an option agreement that contained the information allegedly imparted by counsel for the Tribunal to Mr. Gilmartin."

15. This is the only heading of the several identified by the Applicants in their summary as to what was revealed in the documents which issued consequent upon the court orders in *JR 324*, which I have directly related to the evidence for illustrative purposes. What the Respondents have sought to do in these proceedings is in part to seek to re-litigate *JR 324* and to raise further the assertion that in some way (s) the Tribunal has given preferential treatment in particular as to confidentiality to Mr. Gilmartin over that accorded to the Applicants.

16. In fact the contents of exhibits "SG 8" and "SG 9" give the lie to such assertion: Fair treatment or equal treatment does not mean identical treatment. In my judgment Mr. Gilmartin was not accorded any special or privileged status by receiving information from him on a confidential basis. The Supreme Court has already dealt with information received on such basis, which now no longer exists in this case.

17. I deliberately refrain from what I consider to be unnecessary determinations of each of the several minute decisions of the Tribunal. The ground of unfairness is raised on the basis that the Tribunal if acting in a reasonable way would have acted otherwise than it did - and if it so acted the unfairness of which the Respondents complain would not have arisen.

18. No ground of irrationality of the conduct of the Tribunal was advanced as a basis for seeking leave to apply for judicial review. I echo the remarks of Mummery LJ in *Reg -v- East Sussex CC, ex parte Tandy* (C.A.) [1997] 3 WLR 884 at 908 where he said -

> "These submissions were made with a skill that stirs concerns - ... about the detail of the decision-making process... but they do not lead to the conclusion that the decision was irrational. In examining the decision-making with an over critical eye, there is a danger that a legitimate exercise in review of legality becomes an impermissible appeal on the merits and that imperfections in the process are equated with irrationality in the result."

19. In the course of his judgment in *Kiely -v- Minister for Social Welfare* [1977] IR 367 at 281 Henchy J., having referred to the fact that article 40, s.3. of the Constitution implies a guarantee to the citizen of basic fairness of procedures referred to tribunals in the terms following –

> "Tribunals exercising quasi judicial functions are frequently allowed to act informally - to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures and the like – but they may not act in such a way as to imperil a fair hearing or a fair result."

20. In the instant case prior to the determination of *JR 324* a regime existed which the courts clearly considered was inimical to a fair hearing. That situation was redressed by the courts by the quashing of the Tribunal's ruling of 22nd March 2004. Indeed the grounds upon which the Applicants had sought Mr. Gilmartin's prior statements was "in the interests of fairness". The documents now revealed and the facts disclosed by them, now being open to cross-examination by the Applicants a fair hearing is no longer imperilled.

21. The state of imbalance contended for in the plea of inequality of treatment (if it existed in substance) has now no meaning. I am satisfied that the construction sought to be placed on the dealings of the Tribunal with Mr. Gilmartin do not in any objective sense amount to an inequality of treatment and are explained in the replying affidavits of the Respondent, in particular paragraphs 117 - 122 and 124 - 126 of Ms. Gilvarry already referred to.

Apparent Bias

22. The grounds upon which leave was given to proceed to an application for judicial view were:

> (a) The failure of the Tribunal to put to Mr. Gilmartin prior inconsistent statements and in particular prior statements containing a glaring and/or significant inconsistency gives rise to a reasonable apprehension of bias.
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> (b) That in the case of counsel for the Applicants challenging Mr. Gilmartin's credibility on an issue concerning a discussion between Mr. Gilmartin and one Finbar Hanrahan at Buswell's Hotel, one of the members of the Tribunal commented that he had no doubt that the first named Applicant knew Mr. Hanrahan quite well. As a result of what are stated to be false allegations that have come to light as a result of the disclosure of documents in their unedited form, the Applicants are concerned that the Tribunal hold or held a view of the first named Applicant.
>
> (c) In September 2005 the Tribunal refused the Applicants' request that it desist from further investigating or making any finding in relation to the matters affecting the Applicants. Specifically, the Tribunal in the course of its letter of 26th September 2005 to the Applicants' solicitors stated that it had been lead

> "To a conclusion that you have elected to pursue a course of dealing with the Tribunal which is intended to create the false impression that you have a legitimate concern as to the capacity of the Tribunal to deal fairly and impartially with the issues involving your clients."

The Applicants aver that they reasonably understood this statement to be an expression of a concluded view of the Tribunal, that the Applicants were not genuine and that their concern as to the capacity of the Tribunal to deal fairly or impartially with the issues against them were not legitimate. The Applicants say that they were greatly disturbed that in circumstances where they had to face into a lengthy hearing before the Tribunal which would ultimately make findings on allegations against them, the Tribunal had already reached a conclusion which was so damning in terms of its bona fides.

(d) The Applicants cannot have and do not have any faith in the fairness of the process or the procedures of the Tribunal. They submitted that they are of the view and entitled to form the view that the Tribunal cannot fairly adjudicate upon allegations of impropriety against them. The Applicants aver that they reasonably suspect bias and partiality on the part of the Tribunal in the treatment of Mr. Gilmartin on the one hand and of the Applicants on the other hand. Notwithstanding that at the leave stage an alternative ground of 'a real likelihood of such bias or partiality' (actual bias) was advanced, such was abandoned and not pursued at the hearing of the application.

23. The Applicants submitted that because at some stage in the investigative stage the Tribunal formed a view (within each module) that certain inconsistencies were insubstantial (i.e. not gross or glaring or going to the heart of the matter or were irrelevant to a specific module) that the Tribunal could not now possibly assess Mr. Gilmartin's credibility. Whatever view the Tribunal may have formed prior to the court determination in JR 324 must of necessity be reviewed by the Tribunal.

24. The decision in JR 324 simply put, is that once any inconsistency appeared it was the entitlement of the Applicants to be informed of it and it was not the prerogative of the Tribunal to determine the significance or effect of same until after such had been the subject of cross-examination and/or submissions thereon.

25. While there is no evidence of any final or concluded view by the Tribunal on the verracity of Mr. Gilmartin's evidence or his credibility, any tentative views that may have been formed must be recast (in whole or part) or refined when all the evidence and submissions are completed.

26. Notwithstanding the several criticisms of the Respondents, the state of the evidence before the court is put very bluntly in paragraph (21) and (37) of Ms. Gilvarry's affidavit sworn on 23rd January 2006 thus: -

> "(21) The members have not formed a view in respect of any of the matters that form the subject of the Tribunal's inquiries and state that they will remain open minded until such time as they have heard all evidence in public before they come to make their findings of fact based on that evidence and report to the Oireachtas.
>
> (37) The Tribunal has reiterated frequently and directs me to say now that only evidence given at a public hearing will form the basis of the findings of the Tribunal. The Tribunal's procedures at the private investigative stage are tailored towards answering the question as to whether this is a matter that merits public inquiry, not whether such issues arising could be conclusively proved at the end of the public hearings. The inquiry is constantly evolving. In this regard, the difference between the adversarial system and the inquisitorial system are relevant since the public hearings of the Tribunal constitute an inquiry."

27. Further it is averred that prior to the decision of the courts in *JR 324* –

> "(53) Parties were advised that they could re-visit issues of credibility of a witness in any later module and that they could reserve their submissions until the completion of all the evidence given by a particular witness in all modules. The Tribunal considered that to allow free ranging examination of witnesses on all matters upon which they had relevant evidence, whether in direct or in cross-examination, would render the proceedings incomprehensible in view of the multiplicity of issues involved. t was not the intention of the Tribunal that cross-examination would be confined, but rather, that it would be conducted in stages in conjunction with the examination of the individualissues under scrutiny."

28. Rulings of 20th November 2002 and 4th February 2003 set out in exhibit "SG 3" bear out the facts deposed to in Ms. Gilvarry's affidavit. The fact that the implementation of the orders arising in *JR 324* may require the Tribunal to adopt a method of proceeding which may be perceived as less orderly is not a matter that calls for any view or determination in these proceedings.

29. The concern of the Applicants about the impartiality of the Tribunal was raised in several different ways during the hearing. It is (inter alia) replied to in this manner in paragraph (70) of Ms. Gilvarry's affidavit already referred to –

> "In addition this Tribunal wishes to respond to the first named Applicant's averment "Again it is hard for me to accept that a Tribunal which has such an allegation in its possession from a witness such as Mr. Gilmartin could be mpartial when it comes to me". I am instructed by the Tribunal to make clear that while the Applicants are understandably aggrieved that allegations which they allege are false have been made against them, the Tribunal reiterates that they have to date reached no conclusions in respect of these matters and that they will make their findings only on the basis of evidence heard in public and submissions made and that they have not and will not have regard to matters arising in the preliminary investigative stage that are not inquired into by them in public."

30. The Applicants submitted that a Tribunal which differentiates between those being investigated and the witnesses making the allegations as contended for by them, undermines the very appearance of impartiality which it is required to have and which is fundamental to any constitutionally fair treatment of the witnesses before it. This is in effect a plea of bias - but it is based on an unfairness said to arise from what the courts have decided in *JR 324* was a mistaken view of the law by the Tribunal as to how the Tribunal should have acted.

31. I accept the Applicants' submission that the fact that the Tribunal avers (at paragraph (20) of Ms. Gilvarry's affidavit, sworn on 23rd June 2006) that they have no bias is not ad rem.

32. It is settled law that the test is objective.

> "It is whether a reasonable person in the circumstances would have a reasonable apprehension that [a litigant] would not

receive a fair trial of the issues." *Bula -v- Tara Mines Ltd*, Supreme Court 3rd July 2000 per Denham J. at p. 24.

She proceeded at p. 27 to state the test –

> "It does not involve the apprehension of the judge or judges. Nor does it involve the apprehension of any party. It is an objective test - it involves the apprehension of the reasonable person."

33. This test has been preferred by both the South African Courts (*President of the Republic of South Africa -v- African Rugby Football Union* [1999] (7) BCLR 723 Constitutional Court) and in the Australian court (*Webb-v- The Queen,* 181 CLR 41 [1993]) to that favoured by the House of Lords in *R -v- Gough* [1993] AC 646 which is more stringent. In the course of his decision in *Radio Limerick One Ltd -v- IRTC* [1997] 2 ILRM 1 at p. 21 Keane J. (as he then was) expanded on the matter thus: -

> "Whether the bias alleged is subjective or objective, it may take a variety of forms. The decision maker may have a financial or proprietary interest in the outcome of the litigation. He or she may be related by family, social or business ties to one of the parties. He or she may have on some other occasion so prejudged the matters in dispute as to be incapable of reaching a detached decision or, at all events a decision which reasonable people will regard as free from even the suspicion of bias.
>
> It has been held in England that in cases where the Tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings, the law will assume bias on the part of the Tribunal: See *R -v- Gough* [1993] AC 646. In all other cases, the test is whether a reasonable person would have apprehended that the decision would not be free from bias.
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> Some of the instances of bias given above are simply illustrations of another celebrated maxim, nemo iudex in causa sua. However, it has also been recognised that the application of that fundamental principle of natural justice may differ, depending on whether the body concerned is a court engaged in the administration of justice under the Constitution or an administrative body, not so engaged, but exercising powers which can be regarded as quasi judicial in nature. Even in the case of courts, its strict application may on occasions be impossible, as witness the necessity for judicial determination by the High Court and this court [the Supreme Court] of the constitutionality of provisions affecting the remuneration of judges: *O'Byrne -v- Minister for Finance* [1959] IR 1 and *McMenamin -v-Minister for Finance*, Supreme Court [1994] No. 296, 19th December 1996. A fortori, there are bound to be instances in which an administrative Tribunal charged with quasi judicial duty may lack the appearance of strict impartiality expected from a court administering justice."

34. Further in *Orange Ltd -v- Director of Telecoms (2)* [2001] 4 IR 159 at 186 Keane CJ elaborated further as follows: -

> "While the test for determining whether a decision must be set aside on the ground of objective bias has been stated in different ways from time to time by the courts in the United Kingdom, there is... no room for doubt as to the applicable test in this country: It is that the decision will be set aside on the ground of objective bias where there is a reasonable apprehension or suspicion that the decision maker might have been biased, *i.e*. where it is found that, although there was no actual bias, there is an appearance of bias.
>
> The English decisions have preceded on the basis that cases on which the Tribunal has a pecuniary or proprietary interest in the subject matter of the proceeding fall into a special and unique category, in that in such cases bias is presumed without the need for any further inquiry as to whether in such circumstances it would be reasonable to apprehend bias: It is immediately and automatically assumed that such apprehension would be reasonable... All other cases – such as, for example, the prejudgment category under consideration in *Dublin Well Woman Centre* [1995] 1 ILRM 408 - called for the application of the test as to whether there is a reasonable apprehension of bias".

35. Murphy J. in the course of his judgment in *Orange* at p. 242 refers with approval to extracts from the decision in *In re JP Lenihan* [1943] 138F (2d) 650 of Frank J. in the terms following: -

> "Democracy must, indeed, fail unless our courts try cases fairly, and there can be no trial before a judge lacking in impartiality and disinterestedness. If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even in infancy is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition are pre-judices."

36. In the instant case some regard must be had to the fact that the members of the Tribunal are members of the Judiciary who have taken an oath of office on taking up their judicial post. However, as has already been noted in other cases they are not sitting as judges while acting as members of the Tribunal and accordingly any reasonable person must see them as functioning as members of a Tribunal albeit as persons who hold judicial office though not exercising it in the Tribunal.

37. In the course of his judgment in the *Orange* case Barron J. at p. 228 sought to identify the relevant test as being –

> "... the existence of some factor that constitutes a set of circumstances from which a reasonable observer might conclude that there was a real possibility that such factor would cause the decision maker to seek a particular decision or which might inhibit him or her from making his or her decision impartially and independently without regard to such factor."

38. To paraphrase that test and apply it to the circumstances of the present case, the Applicants in my judgment would require to establish that a reasonable observer might conclude that there was a real possibility that the Tribunal wished to vindicate Mr Gilmartin at the expense of the Applicants. In my judgment there is no "such factor" in the instant case.

39. The judgment in Orange clearly indicates that a court was not entitled to infer from the establishment of errors in an impugned decision or the process leading to the decision that the decision itself was vitiated by the existence of bias which could be equated to objective bias. Furthermore that bias could not be established from the nature of a decision made, as the allegation of bias had to be made on foot of circumstances outside the actual decisions made in the case itself. The manner in which proceedings were conducted could not in itself solely create a reasonable suspicion of bias.

40. In effect the Applicants' case is that the individual members of the Tribunal have deliberately and consciously decided (and effectively therefore conspired together) to favour and protect Mr. Gilmartin with a view to making a case against the Applicants. In my judgment while many of the factors identified by the Applicants in the course of these proceedings are matters that may require

to be ultimately determined, there is an adequate explanation at this stage before the court as to why the matter should proceed to be dealt with by way of resolution of such differences as have been highlighted.

41. In this question of bias a sense of proportion must be maintained. The viewpoint has to be that of

> "A reasonable man and not either over sensitive or careless of his own position, would have good grounds for a fear that he would not get in respect of the issues involved, from a body at independent hearing." *O'Neill -v- Beaumont Hospital Board* [1990] ILRM 419 at 439 per Finlay CJ.

42. In *O'Neill`s* case the court decided that a clear distinction had to be made between what had been incorrectly and mistakenly done and a judgment on the issues which had been heard.

43. In the instant case there is an analogy in that while there was undoubtedly a mistake made by the Tribunal as is clearly demonstrated in the judgments in *JR 324* such error in judgment was not a determination in any way on the issues that require to be ultimately resolved when determined by the Tribunal.

44. Having regard therefore to the first of the two complaints made under this general heading of apparent bias, i.e. the observation made in the course of the hearing by one of the members of the Tribunal a debate arose as to whether this was made by way of question, affirmative statement, a point of view or a request *en passant.* In *Locobail Ltd -v- Bayfield Properties* Lord Bingham CJ sought to identify a range of factors which should not be considered as having the effect of a determination to prejudgment or bias and stated, *inter alia*: -

> "... the mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness or found the evidence of a party or witness to be unreliable would not without more found a sustainable objection. In most cases we think the answer one way or the other will be obvious. But in any case if there is a real ground for doubt that doubt should be resolved in favour of recusal. We repeat: Every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection was raised the weaker (all things being equal) the objection will be".

45. In the course of his judgment in *Orange*, Murphy J.quoted the above passage and proceeded as follows: -

> "It is unnecessary to express any view whether all the circumstances listed by Lord Bingham as being exceptional would be similarly treated in this jurisdiction or whether, indeed, a comparable list here would even be longer. It is sufficient for the purposes of this appeal to emphasise that not all extraneous factors are fatal to the reality or appearance of mpartiality in the exercise of the judicial function".

46. In the instant case there is no adverse comment made by the member of the Tribunal. It appears to me he is either trying to establish a fact by way of question or referring to information known to exist, (*i.e*. that Mr. Gilmartin and Mr. O'Callaghan were known to each other at a later date) or that there was a want of focus as to the precise time sequence as to the date of the meeting in Buswell's Hotel.

47. There is certainly no concluded view taken by the member of the Tribunal. In my judgment the cases advanced by the Applicant in support of apparent bias in regard to the observation made by the individual member of the Tribunal in the instant case, *i.e. R (Donoghue) -v- Cork JJ* [1910] 2 IR 271, *Dineen -v-Judge Delap* [1994] 2 IR 228 bear no relationship to the complaint made in the instant case.

48. I accept without hesitation the submission of the Applicants that if there is any doubt as to whether there is apparent or objective bias the doubt must always be given to the Complainant: In my judgment in this case it would not be contrary to constitutional justice to proceed with the Tribual inquiries. Concerning the case based on the correspondence of September 2005, this is to be seen in the context of the letter written by the Applicants to the Tribunal dated 13th September 2005 which, having recited a number of matters of complaint, concludes as follows: -

> "All of the foregoing indicates that Mr. Gilmartin was a witness who was from the very beginning entertained and minded by the Tribunal in a partisan way and that the statements circulated as part of the Tribunal brief was indeed a sanitised version of what had been said by Mr. Gilmartin to the Tribunal. Little did our clients know when they came before the Tribunal that the Tribunal had in fact set out to prove a case of fraud against Mr. O'Callaghan, had formed a view as to the probity and integrity of Mr. Gilmartin (*i.e*. he did not need immunity), and had in its possession a catalogue of the most foul and damaging allegations against Mr. O'Callaghan and to an extent Mr. Deane that were being concealed by the Tribunal.
>
> Indeed the view that the Tribunal had had of Mr. O'Callaghan is not only evidenced in retrospect by Judge Keys' comments to which reference has been made above but by the disparaging comment made about our clients' proceedings in the Tribunal's submission to the Supreme Court. Rather than appreciating that our client was seeking to vindicate constitutional rights (which the Supreme Court ultimately held had been infringed by the Tribunal), the Tribunal disparagingly referred to the application as being one seeking material that might potentially provide some "ammunition for cross-examination".
>
> In the light of the foregoing our clients cannot have and do not have any faith in the fairness of the process or procedures of this Tribunal. They are firmly of the view (and we have so advised) that the Tribunal cannot fairly adjudicate upon allegations of impropriety against them. In particular, our clients reasonably suspect bias and partiality on the part of this Tribunal in their treatment of Mr. Gilmartin on the one hand and our clients on the other. In those circumstances we are writing to invite you now to confirm that in the light of the foregoing the Tribunal will desist from further investigating or making any findings in relation to matters affecting our clients or any of them.
>
> It is with regret that we must inform you that if we do not receive a positive response to this within the next seven days it is our clients' intention to commence such proceedings as they may be advised."

49. That letter was written against a background of the decision of the courts in *JR 324*. At that time the only inquiry (however defectively it may be considered to have been) related to the module in Quarryvale (I). To the extent of the evidence known to the courts at that time Hardiman J. was able to say: -

> "If the evidence on this module were limited to that of Mr. Gilmartin (which for all I know it may be) there would obviously be sufficient evidence to warrant proceeding to a full inquiry, unless the Tribunal had for some reason decided that the whole of his evidence was incapable of belief."

50. Whether the disclosure of the information given to the Tribunal in confidence, (when circulated pursuant to the decision in JR 324 or the principles enunciated in it, to those who may be concerned) will lead almost inevitably ('though not necessarily inexorably) through dissemination, to unfair and unjust damage to the good name and privacy of others, or simply adds more talk and paper to a Tribunal at work for well nigh on eight years, does not fall for determination in these proceedings.

51. However, I do not read the judgment of Hardiman, J. just cited indicating that 'there would be sufficient evidence to proceed to a full inquiry', that in determining the issue in JR 324 in favour of the Plaintiff's constitutional rights, this should lead to the logical conclusion that the exigencies of the common good to be addressed by the Tribunal in its terms of reference as mandated by the Oireachtas are to be abandoned in whole or part because of the alleged consequences of the errors rectified by the decision in *JR 324*.

52. The Tribunal has embarked upon a public inquiry in Quarryvale (I) which was incomplete and the Quarryvale (II) inquiry had not begun at all. The Tribunal's letter of 26th September 2005 the subject of criticism by the Applicants concludes as follows:

> "The Modular Approach.
>
> As you are aware, the Tribunal's decision to conduct its affairs by way of modules has been endorsed by the Supreme Court. The Tribunal has determined that it would deal with the involvement of your client with Mr. Gilmartin and the development of the lands at Quarryvale in two modules, namely Arl/Q 78 - 90 and Qv 11.
>
> Because the Tribunal split its inquiries in the manner set out above, it became necessary to circulate as part of Arl/Q 87 - 90 module only a portion of the statement of Mr. Tom Gilmartin. Indeed your client Mr. O'Callaghan's statement of 3rd May 2000 was similarly redacted. Your letter does not appear to criticise the Tribunal for withholding the balance of Mr. Gilmartin's statement as contained n the redacted portion of his statement.
>
> Your client is already in possession of the brief in both modules and an amount of evidence has been heard in connection with the first module dealing with matters up to December 1990 approximately. As you are aware, it is now the intention of the Tribunal to resume hearing the evidence on matters left over from the first module and then proceed to hear evidence from approximately 85 witnesses, including your clients, in relation to the second module. In addition, the Tribunal is presently engaged in an exercise to ensure compliance with the decision of the High Court and Supreme Court in O'Callaghan -v- Mahon and Ors. You have already received the prior statements of Mr. Gilmartin on foot of this decision.
>
> The Tribunal again reaffirms its stated position that it will not form any ultimate conclusion until all of the evidence has been heard. Insofar as Mr. Gilmartin is concerned, both you and your clients will be aware that he had not finished giving evidence and your clients will be again afforded an opportunity, as was assured to you by the Tribunal, when he returns to the witness stand to be cross-examined further.
>
> The allegations of Mr. Gilmartin in respect of which complaint is raised in your letter were not the intended subject matter of Arl/Q 87 - 90 module and were aired by him, in the main, in response to vigorous cross-examination on behalf of parties who were effectively endeavouring to undermine his credibility. These responses went beyond the issues which were being dealt with in the module. They were made without prior knowledge of the Tribunal and were not allowed to be elaborated upon by the Tribunal because they were not relevant to the Tribunal's inquiry into the subject matter of the module then at hearing. It is incorrect to state that no restraint was imposed upon Mr. Gilmartin.
>
> The Tribunal is led to the conclusion that you have elected to pursue a course of dealing with the Tribunal which is intended to create the false impression that you have a legitimate concern as to the capacity of the Tribunal to deal fairly and impartially with the issues involving your clients. Notwithstanding this belief on the part of the Tribunal, your clients may rest assured that the members of the Tribunal will continue to act fairly and impartially in carrying out the tasks given to them by the Oireachtas and that they will reach such conclusion as may be open to them only on the basis of the evidence heard at public sessions with which all affected parties will have been afforded the opportunity of exercising their constitutional rights.
>
> Given your clients' stated concern about their reputations, the Tribunalis anxious to resume the hearings into the Quarryvale rezonings so that your clients will have the earliest possible opportunity to dispel the alleged damage to their reputation."

53. In my judgment, notwithstanding the verbiage used in the letter, the Tribunal could reasonably have come to the view that the Applicants' solicitor's letter of 13th September indicated that they or their clients had formed the view that the Tribunal had prejudged such actions as the Tribunal might take in the event of the matter proceeding and had attributed improper motives to the Tribunal when, so far as the Tribunal was aware, there was no evidence to support such conclusions. "In law context is all", and it seems to me that the expression in the letter of 13th September that the documents revealed that the Tribunal had in fact set out to prove fraud against Mr. O'Callaghan is not borne out by the evidence placed before the court. However, it is with such emotive baggage that the correspondence must be reviewed.

54. If there was pardonable disbelief by the Tribunal in the position being adopted by the Applicants' solicitors in their letter of 13th September 2005 such is not surprising given that they very properly had vigorously prosecuted JR 324 to obtain all the information necessary to present their clients' case in full to the Tribunal. Having received it, they then would appear to have formed a view concerning it without the matter being fully ventilated before the Tribunal. In short, the Tribunal's response was one in the nature of a retort to a pre-emptive strike made by the Applicants' solicitors. Concentrating on the matter of substance it seems to me that worrying over the misuse or infelicitous use of language does not amount to apparent bias. Furthermore, such view as the Tribunal might have entertained at that stage was expressly stated to be capable of being set at rest or set at naught by the tone of the letter as a totality. Furthermore, the letter in no way represents any form of decision or the exercise of a judgment on the merits of the contested questions of fact outstanding between Mr. O'Callaghan and Mr. Gilmartin.

55. I do not consider the letter is expressed in such extreme and unbalanced terms as to throw doubt on the ability of the Tribunal to try the issue that it is entrusted to try with an 'objective judicial mind'.

Quarryvale (II)
56. In the course of the submissions made to the court in this case it was indicated and is clear from the documents that there are some 85 witnesses interested in this module which commenced on Tuesday, 29th November 2005. The opening statement of counsel included an outline of the evidence intended to be adduced, including an outline of allegations against witnesses to the module. It seems to me reasonable that these witnesses will want to address matters that have been included in the opening statement. The Tribunal must of necessity in the light of the decision in *JR 324* have a legitimate interest in ensuring that those interested parties, which includes the Applicants, will have an opportunity to exercise any rights to which affected persons may be entitled under *In re Haughey* in defending their good name and reputation and, furthermore, such persons are entitled to the right to cross-examination under the decision of *In re Haughey.*

57. In the light of the foregoing rights of third parties such persons are entitled to have such allegations as were made against them dealt with as soon as is possible. It is apparent from the transcript of the public hearing on day 604 at the close of the opening statement on Quarryvale (II) that at least one party have been made has expressly indicated that he wishes to respond to those allegations without delay.

58. Councillor Richard Green made representations to the Tribunal indicating that he wished to have an opportunity as soon as is possible to have the right to put his side of the story and to cross-examine one Mr. Dunlop who had made serious allegations against him. In the course of his judgment in *McDonald -v- Brady* [2001] 3 IR 589 Keane CJ considered the issue and expressed himself thus: -

> "It is not in dispute that the inquiry which has been conducted is in the public interest. While the extent to which the hearings would be delayed by the continuance of the present stay until the final determination of the proceedings in the High Court - or, it may be, on an appeal to this court - is necessarily uncertain, in the nature of things it is bound to be significant."

The Chief Justice then proceeded to discuss the consequences of a stay for other parties and stated: -

> "Nor can one disregard the fact that the effect of granting the stay, given the relatively small number of witnesses still to be examined, will be to defer, rather than expedite, the cross-examination by the Applicant of any of these witnesses. It will also have the undesirable consequence of deferring the cross-examination by other interested parties of any of these witnesses."

The Doctrine of Necessity
59. This is stated conveniently in *Judicial Review of Administrative Action (Comparative Analysis)* by Delaney (2001) - Roundhall Sweet and Maxwell) as follows: -

> "Individuals who might in normal circumstances be disqualified from acting on grounds of bias may be found to be competent to act on grounds of necessity when it is not otherwise possible to constitute a properly qualified body to make a decision. This will often be the case in relation to judicial proceedings and judges have been called upon to act in circumstances where they would normally have been disqualified so as to ensure that the machinery of justice does not break down. The principle may be applied, *e.g*. where all members of a decision-making body would be disqualified because of their interest in proceedings or where a quorum of impartial members cannot be put together. However, where it is possible to constitute an alternative Tribunal to exercise the relevant power, the doctrine of necessity cannot be invoked. The effect of the doctrine is summarised by Brennan J. in the Australian decision of *Builders Registration Board of Queensland -v- Rauber* [1983] 47 ALR 55, 71 as follows:
>
> "The Common Law allows an exception as to the disqualifying effect of bias whether arising from an earlier prejudgment of a material question, from interest, or from some other cause where the exception is necessary to allow the functioning of the sole Tribunal with power to act."

60. While I am satisfied that the case on bias has not been made out, nonetheless I am of opinion that even if such were, that the doctrine of necessity applies. It is unreal to suggest that the Oireachtas might consider appointing a new Tribunal to embark upon Quarryvale (I) which has already been substantially part heard and Quarryvale (II) opened before a Tribunal and in respect of which third parties have made certain representations.

61. In *O'Neill -v- Beaumont Hospital* [1990] ILRM 419 at 440 Finlay CJ, addressing a submission made on behalf of the appellant that statements made at a meeting coupled with the reference to the Chairman's remarks at a meeting (that he was glad of the unanimous recommendation of the decision of the Chief Executive Officer) meant that the entire board was tainted by the fault or prejudgment. Finlay CJ. rejected such. He did not think there was a reasonable inference to be taken from the minutes in that they failed to distinguish between a ratification of what incorrectly and mistakenly had been done and a judgment on the issues which had been heard. He then proceeded as follows:-

> "I think that in relation to this last point regard must be had to the doctrine of necessity. It is not a dominant doctrine, it could never defeat a real fear and a real reasonable fear of bias or injustice but it is a consideration in relation to the question of the entire board being prohibited, for if that were to be done there can be no other machinery by which something which is of great importance both to the board of the hospital and to the plaintiff and, I might add, to the public who will attend the hospital, namely the continuance or non continuance of the Plaintiff's services in the hospital, can be determined in accordance with the terms of the probationary agreement."

62. In the instant case the Applicants submitted that if a case for bias was made out, as they contended it should be, that it would be open to the Oireachtas to appoint a new Tribunal to consider and deal afresh with the matters in Quarryvale (I) and Quarryvale (II). In my judgment there is an air of unreality about this approach. If there had been a firm concluded decision of a nature such as could ground a successful application for the case in objective bias then clearly the doctrine of necessity would not avail. However, in the instant case, while I do not think it necessary to rely on it I think it is something the Respondents properly and fairly advanced in their Defence.

63. In my judgment the application for judicial review fails.