Brian Curtin, Applicant v. **Dáil Éireann, Seanad Éireann, Denis O'Donovan, Jerry Cowley, James O'Keefe, Jan O'Sullivan, John Dardis, Geraldine Feeney, Michael Finucane, Ireland** and the **Attorney General**, Respondents [2006] IESC 14, [S.C. Nos. 198 and 203 of 2005]

Supreme Court 9th March, 2006

Constitution – Judiciary – Removal from office – Resolution of Oireachtas – Judicial independence – Separation of powers – Deference by courts to another organ of State – Standard which court measured failure by organ of State to comply with constitutional obligations – Judge as witness to Oireachtas committee – Statutory power to call judge as witness to Oireachtas committee – Constitutional interpretation – Presumption of constitutionality – Parliamentary procedures – Whether statute unconstitutional – Whether parliamentary procedures presumed to be constitutional – Whether power to call judge as witness constitutional – Whether resort may be had to principles derived from other parts of the Constitution for constitutional interpretation – Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 (No. 17), s. 3A – Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) (Amendment) Act 2004 (No. 16) – Constitution of Ireland 1937, Articles 15.10 and 35.4.1°.

Constitution – Oireachtas committee – Resolution for removal of judge – Fair procedures – Form of report of committee – Direction from committee – Privilege against self incrimination – Whether Oireachtas could adopt standing orders to establish sub–committee to receive evidence – Whether committee could direct production of prima facie unlawful material – Whether direction constitutional – Whether direction violated privilege against self incrimination – Child Trafficking and Pornography Act 1998 (No. 22) – Constitution of Ireland 1937, Articles 15.10 and 35.4.1°.

Article 35.4.1° of the Constitution provides:-

"A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal."

Pursuant to s. 39 of the Courts of Justice Act 1924, Circuit Court Judges held office by the same tenure as High Court Judges. The applicant, a judge of the Circuit Court, sought to challenge by way of judicial review, a direction of an Oireachtas committee (established following the proposal of a resolution to remove him from office pursuant to Article 35.4.1° of the Constitution) to produce his personal computer to the committee. It was accepted that the computer contained material which constituted child pornography, as defined by the Child Trafficking and Pornography Act 1998, but the applicant contended that the material was not knowingly in his possession. The applicant had been prosecuted on indictment for offences under the Act of 1998 and acquitted by direction of the trial judge, by reason of the fact that the warrant

used to enter his property had been invalid on the date of its execution, when the computer was seized by the gardaí. The computer was retained in the possession of the Garda Commissioner.

As part of the scheme to enable the Oireachtas to deal with the case of the applicant under Article 35.4.1°, the Oireachtas passed the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) (Amendment) Act 2004, which provided for the attendance of a judge as a witness before an Oireachtas committee and the Child Trafficking and Pornography (Amendment) Act 2004 which was designed to permit hearings to be conducted and material to be considered without breach of the Act of 1998. Dáil Éireann adopted an additional standing order number 63A setting out special procedures governing any motion for the removal of a judge pursuant to the applicable constitutional or statutory provisions and Seanad Éireann adopted an equivalent standing order 60A. Standing order 63A(2) required that where such a motion was put on the order paper, "the Dáil may either reject the said motion, or on a motion made to adjourn appoint a select committee to take evidence in respect of the aforesaid Article 35.4.1° motion, provided that the select committee shall make no findings of fact nor make any recommendations in respect of same or express any opinions in respect of same". After the legislation and standing orders were amended, each House of the Oireachtas adopted a resolution appointing a select committee for that purpose. The Joint Committee made an order pursuant to s. 3(1)(c) of the Act of 1997, as amended, to the applicant to produce to the committee all documents and things (including a personal computer and its hard drive) seized from his house.

The applicant obtained leave from the High Court to apply for judicial review, *inter alia*, to challenge the procedures of the joint committee, including its standing orders, the constitutionality of s. 3A of the Act of 1997, as amended by the Act of 2004, and the direction pursuant to s. 3. It was contended by the applicant, *inter alia*, that the power to call a judge as a witness or to require a judge to produce articles was an improper and unconstitutional invasion of judicial independence and that there was no power in the Houses of the Oireachtas to amend their standing orders as they had done. It was further contended that that the exclusionary rule in the laws of evidence meant that the respondents could not lawfully take possession of the computer as it had been seized in breach of the applicant's constitutional rights, and that the Child Trafficking and Pornography (Amendment) Act 2004 was a device to circumvent the applicant's rights. The High Court refused the application and the applicant appealed to the Supreme Court.

Held by the Supreme Court (Murray C.J., Denham, McGuinness, Hardiman, Geoghegan, Fennelly and McCracken JJ.), in dismissing the appeal, 1, that, where the words of the Constitution were plain and unambiguous, the courts applied them in their literal sense but where the words were silent, resort may be had to principles derived from other parts of the Constitution. For the purpose of these proceedings, regard was to be particularly had to the function and standing of the judiciary in the constitutional scheme, the provisions for protection of that role, the correct balance between the exercise of the power of the Oireachtas under Article 35 and the distribution of powers generally in the Constitution and the obligation to respect constitutional principles of fairness and justice in the exercise of that power.

The People v. O'Shea [1982] I.R. 384; *Sinnott v. Minister for Education* [2001] 2 I.R. 545 and *The State (Healy) v. Donoghue* [1976] I.R. 325 considered.

2. That, in accordance with the principles of constitutional justice, the parliamentary procedures and standing orders followed in respect of the resolutions to remove the applicant from office must be presumed, by the courts, to be constitutional.

Goodman International v. Mr. Justice Hamilton [1992] 2 I.R. 542 followed. *Buckley and others (Sinn Féin) v. Attorney General and another* [1950] I.R. 67; *T.D. v Minister for Education* [2001] 4 I.R. 259, *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] I.R. 317, *McDonald v Bord na gCon* [1965] I.R. 217 and *Pigs Marketing Board v. Donnelly (Dublin) Ltd.* [1939] I.R. 413 considered.

3. That, to accord with the presumption of constitutionality, the standard by which a court should measure whether a designated organ of government had or was likely to fall short of its constitutional obligations in the performance of the exceptional and sensitive function constitutionally assigned to it of removing of judges from office was that of clear disregard, meaning that there had been a conscious and deliberate decision by the legislature to act in breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness.

T.D. v. Minister for Education [2001] 4 I.R. 259 followed.

4. That s. 3 of the Act of 1997, as amended, was not unconstitutional, as the power to call a judge as a witness or to produce articles as evidence did not involve any improper or unconstitutional invasion of judicial power or judicial independence, which was included in the Constitution for the purpose of ensuring the fitness and integrity of the judiciary.

5. That the principle of judicial independence was not for the personal or individual benefit of the judges, even if it may have that incidental effect, but was a principle designed to guarantee the right of the People and a necessary corollary of judicial independence was that the judges themselves behaved in conformity with the highest standards of behaviour, both personally and professionally.

O'Byrne v. Minister for Finance and Attorney General [1959] I.R. 1 considered.

6. That there was nothing in either Article 35.4.1° or Article 15.10 to prevent the Houses of the Oireachtas from adopting standing orders providing for the establishment of a committee to investigate the question of whether a judge has been guilty of "stated misbehaviour," as alleged in a resolution "calling for his removal," which has been duly proposed pursuant to Article 35.4.1°, as the proposal of the resolution conferred that power.

7. That the committee and Houses of the Oireachtas were required to accord full rights to constitutional justice and fair procedures to the applicant and neither House of the Oireachtas nor any of their committees would have power to investigate alleged misbehaviour by a judge in advance of and merely in contemplation of the possible proposal of a resolution pursuant to Article 35.4.1°.

In re Haughey [1971] I. R. 217 followed.

8. That it was within the power of the Houses of the Oireachtas to adopt standing orders 63A and 60A respectively and to depute to the joint committee the power to report without making findings of fact, recommendations or expressing opinions.

Maguire v. Ardagh [2002] 1 I.R. 385 distinguished.

9. That s. 1 of the Child Trafficking and Pornography (Amendment) Act 2004, which provided for the giving of a direction by a committee of the Oireachtas, meant that that applicant could lawfully take possession of the computer, for the purposes of complying with the direction, notwithstanding that there were images of child pornography on it.

Bula Limited v. Tara Mines Limited [1994] 1 I.L.R.M. 111 considered.

10. That the exclusionary rule in evidence did not immunise the computer forever in all circumstances from a lawful seizure or from an order for production and the adoption of the amending Act of 2004 was not a colourable device but rather a clearly defined and lawful means by which, in the circumstances of this case, a committee of the Oireachtas, in the exercise of its constitutional powers, could require an individual to produce his own property insofar as it was lawfully available to him.

The People (Attorney General) v. O'Brien [1965] I.R. 142 and *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 I.R. 110 distinguished.

Obiter dicta: 1, that, as this appeal placed the court in an exceptional position in relation to another organ of State, it should take the opportunity to provide constructive guidance to it and in this regard, it was the opinion of the court as a matter of fairness that the applicant was entitled to a distinct hearing and decision on the issues of fact before he must confront the decision to remove him from office.

2. That the use of the power, conferred on a committee of the Oireachtas, to direct any person to send to the committee any documents in his possession did not give rise to considerations of self incrimination and that there was a distinction between a requirement that a person give a statement or give evidence which might tend to incriminate him and a requirement that a person produce for inspection whether by An Garda Síochána or other organ of the State, a physical article, including a document.

Saunders v. United Kingdom [1997] 23 E.H.R.R. 313 and *Schmerber v California* (1966) 384 U.S. 757 approved.

3. That, in the event of irrational or irresponsible abuse of power by the Oireachtas, it was not to be doubted that the courts would be prepared to exercise an appropriate level of judicial review, by reason of the duty to guarantee fair procedures and the duty to preserve the constitutional balance and to protect a judge from abuse of power.

O'Malley v. An Ceann Cómhairle [1997] 1 I.R. 427 considered.

4. That, in the exercise of a power expressly conferred by the Constitution, such as that under Article 35.4.1º, it would be open to the House of the Oireachtas to appoint a committee to hear evidence and report findings of fact to the Houses.

Maguire v. Ardagh [2002] 1 I.R. 385 distinguished.

Cases mentioned in this report:-

Boland v. An Taoiseach [1974] I.R. 338; (1973) 109 I.L.T.R. 13.

Buckley and others (Sinn Féin) v. Attorney General and Another [1950] I.R. 67.

Bula Limited v. Tara Mines Limited [1994] 1 I.L.R.M. 111.

T.D. v. Minister for Education [2001] 4 I.R. 259.

East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General [1970] I.R. 317; (1970) 104 I.L.T.R. 81.

Goodman International v. Mr. Justice Hamilton [1992] 2 I.R. 542; [1992] I.L.R.M. 145.

In re Haughey [1971] I.R. 217.

Hegarty v. Governor of Limerick Prison [1998] 1 I.R. 412.

Kavanagh v. The Government of Ireland [1996] 1 I.R. 321; [1997] 1 I.L.R.M. 321.
Lynch v. Attorney General [2003] 3 I.R. 416; [2004] 1 I.L.R.M. 129.
McDonald v. Bord na gCon [1965] I.R. 217.
Maguire v. Ardagh [2002] 1 I.R. 385.
Melling v. Ó Mathghamhna and the Attorney General [1962] I.R. 1; (1963) 97 I.L.T.R. 89.
Mooney v. An Post [1998] 4 I.R. 288.
Nixon v. United States (1993) 506 U.S. 224.
O'Byrne v. Minister for Finance and Attorney General [1959] I.R. 1; (1958) 94 I.L.T.R. 11.
O'Malley v. An Ceann Cómhairle [1997] 1 I.R. 427.
The People v. O'Shea [1982] I.R. 384.
The People (Attorney General) v. O'Brien [1965] I.R. 142.
The People (Director of Public Prosecutions) v. Buck [2002] 2 I.R. 268; [2002] 2 I.L.R.M. 454.
The People (Director of Public Prosecutions) v. M.S. [2003] 1 I.R. 606.
The People (Director of Public Prosecutions) v. Cooney [1997] 3 I.R. 205; [1998] I.L.R.M. 321.
The People (Director of Public Prosecutions) v. Kenny [1990] 2 I.R. 110; [1990] I.L.R.M. 569.
The People (Director of Public Prosecutions) v. Shaw [1982] I.R. 1.
Pigs Marketing Board v. Donnelly (Dublin) Ltd. [1939] I.R. 413.
Riordan v. An Tánaiste [1997] 3 I.R. 502.
Saunders v. United Kingdom [1997] 23 E.H.R.R. 313.
Schmerber v. California (1966) 384 U.S. 757.
Sinnott v. Minister for Education [2001] 2 I.R. 545.
The State (Healy) v. Donoghue [1976] I.R. 325; (1976) 112 I.L.T.R. 37.
The State (Trimbole) v. The Governor of Mountjoy Prison [1985] I.R. 550; [1985] I.L.R.M. 465.
In re Therrien [2001] 2 S.C.R. 3.
Tormey v. Ireland [1985] I.R. 289.
United States v. Ballin (1892) 144 U.S. 1.

Appeal from the High Court

The facts of the case have been summarised in the headnote and are more fully set out in the judgment of the court delivered by Murray C.J., *infra*.

By notice of motion dated the 22nd December, 2004, the applicant applied for an order by way of judicial review and a stay of the direction

dated the 1st December, 2004, by the chairman of an Oireachtas Joint Committee to the applicant to produce to the committee, within 21 days from the date of service of the direction, all documents and things (including a personal computer and its hard drive) which had been seized from the applicant's home. The application was heard by the High Court (Smyth J.) on the 1st, 2nd, 3rd, 4th, 8th, 9th and 10th March, 2005. By order of the High Court (Smyth J.) given on the 3rd May, 2005 and perfected on the 11th May, 2005, the application was refused.

By notice of appeal dated the 31st May, 2005 the applicant appealed to the Supreme Court. By notice of motion dated the 1st June, 2005, the applicant sought a stay of the High Court decision pending an appeal to the Supreme Court. On the 3rd June, 2005, the Supreme Court (McGuinness, McCracken and Kearns JJ.) granted the applicant a stay on the decision of the High Court. On the 3rd June, 2005, the first to ninth respondents cross-appealed so much of the order of the High Court which provided that they had to bear any of the costs of the High Court proceedings.

The appeal was heard by the Supreme Court (Murray C.J., Denham, McGuinness, Hardiman, Geoghegan, Fennelly and McCracken JJ.) on the 24th, 25th, 26th and 27th October, 2005.

John Rogers S.C. (with him *Patrick McEntee S.C., James O'Reilly S.C., Paul Burns S.C.* and *Cian Ferriter*) for the applicant:

We will not be proceeding with a substantial part of the case taken in the High Court which relied on article 73 of the Constitution of 1922 carrying over the procedures of the British parliament.

Order 63A of the standing orders of Dáil Éireann was enacted to set up a select committee for an Article 35.4 motion. It provides that "… the Select Committee shall make no findings of fact nor make any recommendations in respect of same or express any opinions in respect of same". A major plank of the case is founded on the clause: "shall make no findings of fact".

The removal motion sets out recitals of known facts. Information from the Minister for Justice, Equality and Law Reform is recited which makes reference to information from An Garda Síochána and receipt of information from the United States. The motion to appoint the select committee, sets out the information before the House. This provides details from Fort Worth as to the credit card and charge card details.

The Director of Public Prosecutions instituted a prosecution against the applicant for knowingly having child pornographic material in his possession. The trial was on the 8th April, 2004. The motion then goes on and calls for the removal of the judge, pursuant to Article 35.4 of the Constitu-

tion and s. 39 of the Courts of Justice Act 1924 for misconduct in subscribing to and accessing child pornography. Standing order 63A contemplates that the motion would be put before the House and that upon such motion a select committee was to be appointed to inquire into matters, the material and information upon which the Minister for Justice moved the motion. These appear to be the only matters before the committee and there is no jurisdiction to deal with any other inquiry. The only allegations are at the tail end of the motion. The comparable order for standing order 63A in the Seanad is article 80, which is the appointing instrument. The appointment of a select committee is in essence that the committee will gather material and technical details relevant to the matter. We say the plain intent of order 63A is that upon receipt of unedited material, the house will have a debate, having regard to that material. Neither house makes an adjudication.

In this inquiry there is going to be a dispute on the evidence; there will be technical evidence as to how things can get on a computer. There will be a dispute, as to how material got on the computer, requiring expert evidence, one way or the other. What will come before the House will be a transcript of the evidence. The matters are put before the Dáil in all its abundance without adjudication. Each member is obliged to look at everything that has come in. Where there are matters of credibility and expertise, one has to have seen the witnesses. The applicant submits that the material on the computer came there without his intervention. The contention of the mover of the motion is that this is not so. Litigation tends to rely on expert evidence, where the weight to be attached depends on how the expert presents that evidence. The key point is the fact that there is no fact finding. In order to have a vote on a general issue, to have a true construction, there needs first to be a determination. In the High Court the respondents faced down any concept of a trial in the Oireachtas. Looking at the procedure of the committee or the House, there is nothing which involves a determination. There is a duty not being provided for; we should have findings of fact before being put in peril. By reason of the independence of the judiciary, under Article 35.4 there cannot be a removal of a judge without proof of misbehaviour.

The failure of a motion to remove a judge opens up the question of the basis on which the judge was left in office. It is a two stage process, there needs to be a finding of misbehaviour and the second stage is a finding of *stated* misbehaviour. That is to say – it is stated by the body passing the motion. The Article involves a finding of misbehaviour. "Stated" is laden with difficulty, which has to be addressed in this case. Article 35.4.1° in Irish reads "Ní cead breitheamh den Chúirt Uachtarach ná den Ard-Chúirt a chur as oifig ach amháin de dheasca mí-iompair nó míthreorach a luafar, ná an uair sin féin mura rithid Dáil Éireann agus Seanad Éireann rúin á

éileamh é a chur as oifig." The comma in the Irish language version of the text (after a luafar) is not there by accident.

The phrase "shall not be removed" is an injunction. It could have been expressed positively, but was not. The draft of the Free State Constitution (document 29) was addressed in the permissive but it was subsequently changed to the negative. The interpretation is that the removal of a judge was for stated misbehaviour, then only (after a comma) by resolution. The literal construction of the Article, suggests a two stage process. Rationally applied there must be fact finding.

We say that it is a two stage process, requiring a finding of fact constituting stated misbehaviour and then the second stage, where the Houses of the Oireachtas would exercise its discretion on whether to remove the judge. We would say that it is "then only, by resolution". The permissive process of the Constitution of 1922 would have been consistent with removal and an order could remove a judge.

The House would then receive the report of the committee, which stated certain facts and the House would determine whether those facts constituted stated misbehaviour.

The Oireachtas would adjudicate, the question would be put to the members, "Do you determine that events occurred and did they constitute misbehaviour?" It may require two votes, if there is a finding of certain facts.

Had the judge been convicted, I would not have a case to make.

I am not making the argument on inherent power and am not urging that the old procedures are to be imported, I do use them in an illustrative way.

J.G. Swift McNeil , in *Studies on the Constitution of the Irish Free State* states as follows:-

> "In England judges hold office during good behaviour, but upon address of both Houses of Parliament to the Crown it might be lawful to remove them. In one case only, that of Sir Jonah Barrington, a judge of the High Court of Admiralty in Ireland, has a judge been dismissed by the Crown, acting on the address of both Houses of Parliament."

The matter first came before the Commons, for a report into the Admiralty Court, it took evidence on foot of that. Judge Barrington sought a trial and the House of Lords itself sat as a full committee. Judge Barrington made submissions and challenged witnesses. Then the House of Lords determined the issue on a vote. In 1922 this was the procedure which was known by lawyers.

This principle of the independence of the judiciary was incorporated into the Constitution of the Irish Free State 1922 by way of article 68, the application of which was extended to Circuit Court Judges by the Courts of

Justice Act 1924. However, the power to remove a judge for stated misbehaviour in Ireland was conferred on the Houses of the Oireachtas exclusively, whereas in England this power belongs to the Crown.

Thus, the clear implication throughout this discussion in J.G. Swift McNeil of the powers and position of the judiciary is that the procedure for the removal of a judge from office is more exacting under Irish law, with a heightened emphasis on the importance of judicial independence in the Constitution of 1922.

The removal process happened a number of times, but it didn't go the distance. We can say that in 1875, by the re-enactment in the Judicature Act, the removal by address was known by all lawyers in the State. From 1701 the appointment of a judge was effective until the death of a monarch, until the Tenure of Judges Act 1760.

In relation to article 68, the principal source of jurisprudence is *O'Byrne v. Minister for Finance* where Lavery J. stated at p. 39:-

> "The Constitution of the Irish Free State – which I refer to as the Constitution of 1922 – established for the State new institutions which were not derived from British precedents, but on the contrary were newly-built and involved the replacement of existing institutions and the repudiation of the idea that these new institutions were similar to or to be regarded as successors to the British institutions. It is demonstrable that the founders of the State and the framers of the Constitution were inspired by the same ideas which actuated the founders of the United States of America which are enshrined in the Declaration of Independence and in the Constitution of the United States. I shall develop this later and refer to the corresponding provisions of that Constitution."

And on p. 40 Lavery J. cited article 69:-

> "All judges shall be independent in the exercise of their functions, and subject only to the Constitution and the law. A judge shall not be eligible to sit in the Oireachtas, and shall not hold any other office or position of emolument" and then stated "It has also been recognised that in a limited written constitution – the word, 'rigid,' has been used – provisions to secure the independence of the judicial power are to be expected. This is perhaps most eloquently and forcefully stated by Alexander Hamilton in '*The Federalist*' – when explaining the reasons for and the purpose of Article III, s. 1 (which corresponds to the provisions of the Constitution of 1922 now in question):-
>
> > 'The Executive not only dispenses the honours, but holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary,

> has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment. This simple view of the matter … proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks … The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing … [*The Federalist*, No. 78].'"

Lavery J. continued on p. 43:-

"I should again point out that judges appointed under the Constitution are not successors of the judges of the British régime nor are the courts established by the Constitution successors of the British courts in Ireland. The courts and judges represent a new departure constituted under different ideas. There is no justification, in my opinion, for referring to British precedents. So, far from being founded on British precedents or recognising British forms the Constitution of 1922 repudiated deliberately and consciously these institutions. Having shown that the Constitution of 1922, and indeed the Constitution in so far as the judicial power is concerned, is based on the Constitution of the United States, it is instructive to quote a recent work on '*American Constitutional Law*' by Bernard Schwartz, Professor of Law in New York University, published by the Cambridge University Press, 1955, with a foreword by Professor A. L. Goodhart, Master of University College, Oxford. Dr. Schwartz writes (Ch. V, at p. 125):-

> 'Ever since de Tocqueville, outside observers have emphasised the primordial role of the judge in American society. Nor is this role based exclusively upon the fact that the Constitution of the United States, unlike that in Britain, is a written instrument. Most of the countries of Continental Europe have written constitutions; yet in none of them has the judge attained anything like the status of his American confrère. From a practical point of view, the situation in such Continental countries is basically like that in

> Britain because of the lack in their system of any effective judicial control of the constitutionality of the laws enacted by the legislature. The restrictions placed upon the legislature under most Continental constitutions are not, in reality, laws since they are not rules which in the last resort will be enforced by the Courts. Their true character is that of maxims of political morality, which have more a moral than a legal basis.'"

Lavery J. continued on p. 44:-

"It is rather the fact that the American judiciary is looked upon as one of the three co-ordinate branches of the Federal Government, not as dependent upon the legislature or the executive, that has enabled it to assert the power of review which so sharply differentiates the American constitutional system from those which have prevailed in Britain and the Continent. 'The judiciary,' declares a leading American judge, 'owes its place in American government in large measure to its having been established in our federal and state constitutions in accordance with the doctrine of separation of powers as an independent, coordinate branch of government, and also in part to its being so often called on (in contrast with the English and French judiciary, though for different reasons in each of these countries) to decide what is the 'supreme law of the land' and thus on occasion to override legislative or executive action. Because of this high responsibility the independence of the judiciary from both the legislative and executive branches is the keystone of American constitutional government."

To interpret Article 35.4; look at the totality of Article 35 which has no meaning without looking at its jurisprudential history.

It is further submitted that Todd, in *Parliamentary Government in England, its Origin, Development and Practical Operation*, relied upon by the trial judge, supports the basic submission advanced on behalf of the applicant. In the commentary on the removal of judges, Todd, who was librarian of Parliament for the Dominion of Canada, summarised the principles that were to apply. This leads to the conclusion that facts are required to be found in any such process.

Todd, having considered the manner in which this procedure was applied to a number of judges, some of them Irish, including the cases of Judge Fox, Chief Baron O'Grady, Judge Kenrick, Sir Jonah Barrington, Baron Smith, Abinger and Sir Fitzroy Kelly, then proceeds to summarise the principles applicable to removal of judges. In that context it is observed that Sir Jonah Barrington's case, as is common case, is the only case where that procedure was carried to conclusion.

We assert that there must be a finding before the motion: this comes from the Constitution. Manuals like Todd were available in 1922 to the

drafters of the Constitution, who were three former members of this court, Murnaghan and Byrne JJ. and a Chief Justice. It would be very surprising if personnel of that order would miss out on previous history and they would have had regard to the Judicature Act 1875. *Maguire v. Ardagh* is distinguishable, as there is jurisdiction conferred on parliament.

There would still need to be "misbehaviour" even if "stated" was not included. When does it need to be stated? It has to be stated on every occasion. In the Australian Constitution it has to be proven - we know of no other constitution which uses the word stated. There is provision for a debate following receipt of the report. Going through the process of the report coming from the committee, the Dáil must, by order, make provision for a debate. Such a motion must include the right to due notice, fair procedures and the right to be heard. Order 63A moves from the commissioning of evidence and delivery into a process of debating what comes in. The House may have a debate, but that does not mean oral evidence. The right of address, is a right to address the jurors, on whether that evidence is sufficient. That might be related to a debate. Fair procedure clauses are written in. I do not accept that the standing order allows for the hearing of witnesses by the Dáil. Order 63A(2) provides that the House may reject the motion or appoint a select committee to collect evidence provided it makes no finding of facts.

An article by Mr. O'Donnell S.C. in the *Judicial Studies Institute Journal* (Vol. 4(2) 37) related to the question of judicial independence. At p. 64 he states, "A related area where the Constitution is surprisingly and unexpectedly weak, is the guarantee of judicial independence. Although that guarantee is stated explicitly in Article 35.2, Article 34.4 provides for the removal of a Judge by the resolution of both Houses of the Oireachtas. Effectively, a simple majority will suffice. Something that contrasts, somewhat inexplicably, with the provisions of Article 12.10 which require a two third majority in the case of the President. The requirement of independence of the judiciary is a requirement in the first place, of independence from politics and, in particular, the executive arm of the Government. However, in our Constitution, the Executive necessarily controls a majority in the Houses of the Legislature, and accordingly, a proviso that a Judge can be removed on a majority determination of the Houses of the Legislature is, in effect, a provision which permits a removal of a Judge by the Executive".

I refer the court to an article by La Touchney who refers to the Act of Settlement and in the following pages refers to the *Sheedy* affair and then to this case.

Fennelly J.: this material does not advance matters.

John Rogers S.C.: It was alleged that the applicant had accessed child pornography. He denied the charge. The hearings in the committee will involve evidence as to how the material got onto his personal computer, there will be evidence from gardaí, the applicant and experts. All that they say will be compiled in a report in a transcript of what actually happened before the committee. There will be areas of conflict of evidence, which will not be resolved. The members will not have seen the evidence nor will the issue be resolved. There will be no findings. This charge does not import any *mens rea*. The criminal charge was that of knowingly being in possession. Throughout the entire process directed to the applicant, the rules were all changed. The applicant was said by s. 3A of the House of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997, as amended, to be amenable to the committee. It is clear from the correspondence of the 27th April, 2004, that the government put this motion for the purposes of removing the applicant from office.

A new section 3A was introduced so as to make the applicant amenable to the committee and that trespasses on judicial independence. Nothing has been proven against the applicant, but something has been alleged which is not related to the performance of his judicial function. The applicant could be forced to give evidence, but a judge as a witness could not be coerced. The section empowers parliament to force the applicant to be incriminated to his own disadvantage causing a penalty.

We must see the entire process as a package. Enactments were passed which permit s. 7(3) directions be made to a judge after the acquittal of the applicant.

I now turn to the order pursuant to s. 3 (if the constitutionality of the Act is upheld). The applicant has been directed to produce something of which he is not in possession, and which by unconstitutional means has being put into the category of the fruit of poisoned tree *per Trimbole*. By letter from the committee they became part of the unconstitutional act. The applicant has not been given his property back. It may be a criminal offence for it to be in his possession as *prima facie* there are pornographic images on the personal computer. That is the view of the gardaí.

Section 3 directs the applicant by notice to produce the computer, therefore the applicant had to obtain it. If he had control of it, then it is in his possession.

The s. 3 order is a device, intended to circumvent the law. The ongoing detention of the computer by the gardaí at the request of the committee is unlawful. The computer should be destroyed by those who have authority to destroy it. There is not sufficient distance between the committee and the unconstitutional seizure of the computer. Notwithstanding the admission as to the nature of the material on the computer, the committee could

not run the process without the computer, as the issue is how the trojans got on the computer. For the criminal offence, possession amounts to possession. If you can direct the handover to the committee of the computer, then you are in possession of it.

A s. 3 finding requires power. The House of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 is clear – the committee may direct a person before it to produce a document in his possession or power. If one takes the position on the 30th November, 2004: what was the applicant's position in relation to the items he was asked to produce? He had neither possession nor power of the items he was directed to produce. If the applicant had gone to the gardaí, they would not have given the computer to him. Child pornography is illegal. On the face of it the Garda Commissioner does not have the computer for the purposes of a prosecution under the Child Trafficking and Pornography Act 1998.

It could not be said that the applicant has possession, when he does not have the object and he cannot get it. The question is whether the applicant had the power to get it? The Garda Commissioner committed himself not to give up possession. The wording of the section is power not title, that means lawful right to obtain. I suggest, for the purposes of the Act, that power is not pervaded by concepts of entitlement to ownership. Under the Child Trafficking and Pornography Act 1998 there must be knowing possession. The question is:- what was the position on the 30th November, 2004 (before the s. 3 notice issued)? It was submitted by counsel for the respondents that the Act of 2004 permits a person to have child pornography for the purposes of the order. But by making the order, he still does not have power or possession. The two new acts were designed to allow someone to have possession of child pornography.

The Garda Commissioner replied that all evidence would remain in safe keeping until otherwise directed by law. The Committee developed a strategy to retain the material. The Committee and the Oireachtas knew that this material had been determined by the Circuit Court to be unconstitutionally obtained. In effect the Committee were requesting the gardaí to facilitate the retention of illegal material to facilitate an order pursuant to s. 3. Had the applicant looked for the material to be returned before the s. 3 order was made, between the date of the request and the making of the order, the gardaí could not have given it to him. The preservation was on foot of a Committee request. The letter requested that the evidence be retained and the Commissioner gave an assurance. The Committee were using a device which is constitutionally improper as it is contrived to seek to put the applicant in possession of the computer.

The fact that the computer could not be used in the Circuit Court means that it could not be used in other circumstances. They are using a

device to get the applicant to produce the computer, which is constitutionally improper as it is contrived to seek to put the applicant in possession of the computer. I say there is no power or possession of the computer and the committee are using this device, whereby the applicant is in the position of producing the computer or not being in compliance with the order. The power and possession point was made to the committee, but the order was made notwithstanding those submissions. In *State (Trimbole) v. Governor of Mountjoy Prison* the Chief Justice stated that the device in that case was invalid. What has been done here was that there is the order of the Circuit Court saying it couldn't be used in a criminal trial. That is not grey, it is back and white. The Garda Commissioner, as the enforcer of the law, could give the computer to the applicant.

I do not have to make the argument that the taint of unconstitutionality always remains and therefore it comes within *Trimbole* and that is inadmissible for all purposes forever. *Kenny* may have related to policy grounds concerning the gardaí but in this case an organ of the State did seize the computer. The wrong here was a Garda wrong and the prosecution was stopped. I say it is excluded so long as someone is seeking to enforce its admissibility through the medium that seized it. On the subject of unconstitutional behaviour, the evidence was excluded and now another organ of the State seeks to direct the applicant to produce that material.

The applicant's personal rights were transgressed. The applicant cannot go to the gardaí and ask them for the computer. The order is for the applicant to produce it. The applicant has an obligation to assist the committee, but he also has rights himself. The main argument is that of admissibility. I am stating that the s. 3(1) order should not have been made, because the computer unlawfully came into the possession of the gardaí and that unlawfulness cannot be cured. It would be lawful for the applicant to say to the Garda Commissioner, "Give it to the committee" but it would be a circumvention of power. Do judges have constitutional rights? The applicant is being forced to give the committee something which was unlawfully obtained.

The order was made on the assumption that the applicant has possession and power of the computer. There is also the issue of the acquittal. The committee has to have regard to what another organ of the State has done. We are talking about individual constitutional rights. My case is founded on the established breach of a constitutional right. Another organ of the State is seeking to circumvent the fact of the acquittal. Fair procedures do not permit the admissibility of unconstitutionally obtained evidence.

When it comes to a right such as one over a dwelling, this cannot be taken away from him even though he is a judge. It cannot be right that the Oireachtas would live in our dwellings … in the dwelling of a judge.

I do not know whether the applicant would or would not direct that the computer be destroyed. He is being put in the position of having to waive a constitutional right. The implication of treating rights as hierarchical is that the Oireachtas can take advantage of unconstitutionally obtained evidence just because the applicant is a judge. There is no such extraordinary excusing circumstance such as in *People (Director of Public Prosecutions) v. Shaw*.

The right of the individual to his dwelling must supersede the right of the Oireachtas to investigate.

Counsel for the applicant cited *O'Byrne v. Minister for Finance*; *People (Director of Public Prosecutions) v. Kenny; The People (Director of Public Prosecutions) v. Shaw*; *The State (Trimbole) v. Governor of Mountjoy Prison*.

Donal O'Donnell S.C. and *Brian R. Murray S.C.* (with them *Paul Anthony McDermott* and *Douglas Clarke*) for the tenth and eleventh respondents:-

There are three issues to be addressed: -

1. the constitutionality of the proceedings pursuant to standing order 63A;
2. the constitutionality of s. 3A;
3. the entitlement to make any order for inspection of the computer.

First, I would make some general observations. We take issue with the contention of the applicant on a number of points and we suggest, that there has been:-

1. a confusion between what is constitutionally permissible and what is constitutionally required;
2. a consequent confusion of the familiar with the necessary;
3. a failure to address the separation of powers which is treated as of assistance to the applicant's case and not, as it truly is, as a substantial hurdle to it;
4. a treatment of the separation of powers as somehow "coterminous with judicial independence". Judicial independence is treated as an end in itself without regard to its function within the Constitution.

The applicant accepted his duty to cooperate and that is now very significant. We contend that Article 35.4 is not in conflict with judicial independence. It is an important part of it. Judges are independent but judicial accountability is also required. The applicant's case is made by a journey back in history, and across jurisdictions. Neither source supports

the applicant's case. The answer arrived at after this journey is no different from the one which we could find here and now in this room in the text of the Constitution

The applicant refers to standing order 63A. He says that it leaves no possibility of evidence being heard. However, there is nothing in the standing orders that precludes the hearing of evidence if the House deems it necessary. That would require a new order by the either House, but it is within their powers. It is also possible to have a hearing in a joint sitting of both Houses.

As to the procedures in issue, the Select Committee first takes the evidence. "Noting" in the context of the resolutions means, that the Oireachtas merely notes the information that has been provided to it. The committee is not to take those matters contained in the resolution, as having been proved.

Once the motion is introduced it is immediately adjourned without any view being formed or judgment made to permit an investigation to take place. There is I think a valuable comparison with the specific procedure created under Article 12 relating to the impeachment of the President. An Article 12.10.5° motion is proposed by one House, and the other House shall "investigate" the charge. The President has a right to participate in the investigation stage but there is no preceding fact finding stage.

The sequence in which a charge is made, and then an investigation follows, is clearly constitutionally permissible in the case of the President. Under Article 12, it is notable that the President is to be removed for "stated of misbehaviour". In that regard it is the self same language. In the absence of specific procedures contained in Article 35 we must look to the words of the Constitution in context. There is nothing inimical to constitutional fair procedures in investigating after the preferment of a charge. The alternative is to investigate without proffering any charge which would be an investigation without limits. There is an element of the State being damned if it does and damned if it doesn't. There is nothing unconstitutional in preferring the motion and then immediately adjourning it for investigation of the facts.

It is certainly conceivable that an argument could be made, and was indeed made in Canada, that an investigation by parliament without any motion, would be *ultra vires* the powers of parliament as the only purpose would be to try and gather evidence to ground a motion for removal. It would not be correct to proceed on the basis of "*lets see what we can find*".

There is a statement of certain information before the Houses. I do not think it can be described as an accusation. There is a statement of misbehaviour, and subsequently an investigation of whether or not it occurred. The Oireachtas will decide how this is to proceed subsequent to the select

committee gathering the evidence. Other parliaments have done it with the simple decision on a general issue. At a bare minimum, there will however be a full hearing before the select committee with full *In Re Haughey* rights, cross-examination and submissions. The standing order provides for a report to be provided by the Oireachtas with the transcripts and audio-visual material with an opportunity for the applicant to make submissions prior to making a report. This is the minimum that is provided for.

Some T.D.'s might conclude that there was access to the website. Others might find there was no access or no subscription. Others could find that there was misbehaviour but not sufficient to warrant removal of the applicant. People can come to different conclusions on the issue of subscription but there would have to be a unitary decision on removal.

The formation of a view as to how the decision will be taken and whether it is susceptible to judicial review is premature. The procedures are flexible. They are not fixed. We are also jumping ahead to judicial review which raises its own constitutional issues. I am not saying that it does not matter what reason is given for a decision but we have not reached that point yet.

What the motion says is that the applicant's conduct by subscription or access to child pornography renders him unsuitable to exercise his role as a judge. The statement identifies the subject matter of the inquiry and the matters capable of leading to a finding of accessing and use of pornographic images of children. The stated misbehaviour is that contained in para. 2 of the motion. The issue is that of subscription or access. There is no requirement to reproduce a criminal charge by requiring that the conduct be carried out knowingly. Subscription and access would comprehend knowing conscious access which renders him unsuitable for members of the Circuit Court bench. This is not in controversy with the applicant. It is clear that he understands the issues and his Defence is based on what might be described as "unknowing" access. The Oireachtas will hear the evidence and conclude what that shows and decide therefore on his suitability as a judge.

The applicant has taken a stand on a surprisingly narrow ground i.e. that there has to be a finding of fact which however is non-binding. That finding could be made, it appears, by voluntary arbitration, by judges, a tribunal of inquiry, or by the Houses themselves, or by a committee of the Houses. The applicant's case, therefore, is that the procedure does not go far enough; there needs to be a finding of fact – which nevertheless is non-binding. But Article 35.4 clearly, and without equivocation, consigns this whole question to the House of the Oireachtas and there is no provision for other bodies to participate in it. In *Sinnott v. Minister for Education*, Murray C.J. states at p. 86:- "it is axiomatic that the point of departure in

the interpretation of legal instrument be it a constitution or otherwise is the text of that instrument, albeit having regard to the nature of the instrument and the context of the instrument as a whole".

The question of the separation of powers has not been addressed in the application. The respondents are the Dail and Seanad. There are serious issues raised by these proceedings. In *Kavanagh v. The Governor of Ireland*, Keane C.J. at p. 362 stated:-

> "sovereignty resides in the people alone and the exclusive vesting in the judicial arm of the power to declare unlawfully either to the Government or the Oireachtas is simply part of the system of checks and balances essential to the operation of the separation of powers. It follows that, where the Constitution unequivocally assigns to either the Government or the Oireachtas the power to be exercised exclusively by them judicial restraint of an unusual order is called before the courts intervene. That is also no more than a recognition that, while all three organs of State derive their powers from the People, the Government and the Oireachtas are accountable, directly and indirectly, to the People in the electoral process."

This is part of a stream of authority from *Boland v. An Taoiseach* where Fitzgerald C.J. stated at p. 362 that:-

> "the Courts have no power either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such, to amount to clear disregard by the Government of the powers and duties conferred upon it by the Constitution."

The headnote to *T.D. v. The Minister for Education* states:-

> "that the doctrine of the separation of powers requires that no one of the three institutions of Government by paramount. All three institutions exercise their powers for the benefit of the State and it was for the benefit of the State that they were independent in the exercise of their respective functions" and "the doctrine of the separation of powers would not protect the Executive where there was a clear disregard of its constitutional powers and duties; the courts would act to protect the rights of those affected by such disregard or breach of duty. This could include in exceptional circumstances, making a mandatory order against the Executive."

Maguire v. Ardagh was an inquiry concerning the lawfulness of a killing which would have led to adjudication by the Oireachtas, for which there was no explicit power in the Constitutional text. In this case, the inquiry is unequivocally consigned by the Constitution to the Oireachtas.

What is required for a challenge to a decision of the Oireachtas is the absence of good faith or reckless disregard. As Hardiman J. points out

there is an obligation to respect rights which applies to every organ of the state. The courts were given a greater area of latitude. On p. 359 of *T.D. v. Minister for Education*, Hardiman J. states:-

> "there is sometimes a tendency to confuse the separation of powers with the independence of the judiciary. The latter is an essential aspect of the former but is an aspect only. The Virginian formulation emphasises the *mutual* independence of the different powers of government. It is right that the judiciary, within their constitutional sphere should be quite independent of the Legislature and the Executive, but has no less right that these, within their respective constitutional spheres, be independent of the judiciary" and at p. 369 he states "the terms of Article 40.3.1° involve the State and are a guarantee to respect and, as far as practicable by its laws to defend and vindicate the personal rights of the citizen. This guarantee is given by *the State* and not uniquely any one of the organs of State. It is a guarantee to respect vindicate and defend these rights 'by its laws'."

It is counter-intuitive to ask a court to intervene in a constitutional process of the Oireachtas which process is one of the checks in the system on the judicial branch. Article 15.10 allows the Oireachtas to make its own procedures. It is a possible option for the court to approach this case in a way which would ensure that the procedures will not contravene the express terms of the Article and will not fall foul of constitutional fair procedures.

It is a significant fact that the Constitution does assign the duty to the Oireachtas and that the Oireachtas members are the representatives of the people pursuant to Article 16 and 18. The Constitution has identified who is a member of the Oireachtas and clearly understands the nature of the proceedings. The nature of these proceedings is not stated to be a trial or an impeachment, but is a resolution and removal. It is not a criminal procedure.

It is significant that stated misbehaviour in the capacity of a judge is something to be decided by the Oireachtas. In the case of incapacity of the President, that is adjudicated by the Supreme Court. The fact that elected members may remove a judge for stated misbehaviour suggests that the elected representatives make a judgment for the confidence of the people. It is very telling that Article 35.4 was a duplication of the provision in the Constitution of 1922, but that Article 12 was a newly thoughtout and different procedure was adopted for the President but the procedure for removal of judges was not changed. To some extent the flexibility of standing orders allows for the possibility to make submissions to the Oireachtas after all the evidence has been gathered.

In its simplest form there was a unitary transaction in relation to subscription access and use and differentiation between those concepts does not matter. If the evidence is however more equivocal then when the Oireachtas comes to make such a decision it must address the sub-division. There is a distinction between conduct and quality of the act. If one single thing is alleged, then the question is did it occur and does it justify removal. We are not yet at the point where conflicts of fact have been identified where, for example, it is suggested that there was subscription e.g. but no use. The applicant has indicated by correspondence that his computers contained unwanted images and he made strenuous efforts to get rid of them.

There appears to be a *lacuna* in Kelly *The Irish Constitution* in that it does not distinguish between impeachment and removal although removal is a separate procedure. The use of Article 12.10 in relation to impeachment of the President shows that the drafters of the Constitution were aware of the choice between impeachment as a procedure and removal of judges (and the Controller and Auditor General) by resolution. Article 12 is very precise. It does not require any prior procedure before the resolution. In Article 34.5.4º by contrast, there are procedures required both before and after a resolution. The Article is very specific e.g. on how and by whom the President is to be notified. The only possible conclusion is that the drafters chose a different vehicle from that created for the President. Consistent with that is the fact that the provision does not identify with any precision the procedures to be adopted. It must follow that latitude is deliberately given to the Oireachtas in this regard.

In the case of *Nixon v. United States*, Judge Nixon was removed by the Senate after a hearing which allowed a committee of senators to hear evidence and report the evidence to the full Senate without coming to any conclusion of fact, and in fact being precluded from doing so. We do say that you can have a hearing of matters which have been the subject of an acquittal in a trial. If the removal motion states the underlying facts, the Oireachtas can hear and determine the issues. Acquittal in a criminal trial was no bar to subsequent impeachment. Under the Constitution of the United States, there can be impeachment prior to a trial.

Article 35.4 does not set out the procedures but that does not render procedures which have been adopted in any way unconstitutional. Article 12 helps in that the concepts of being investigated or cause to be investigated is acknowledged in that context, and is clearly consistent with the Constitution. It could not be argued therefore that the concept of investigation was in breach of either an express provision of the Constitution or of the fair procedures guaranteed by it. The applicant has accepted it is possible to have committees which hear evidence. Again, the only com-

plaint made is that the committee is not empowered to make an intermediate finding of fact, even though it is conceded that such a finding would not be binding. It is difficult to see what functions such a finding would fulfil.

In the United States the articles on impeachment are drafted by the House of Representatives but no conclusion of fact or finding of fact is made. The applicant says there should be: he states that the process should not continue without an intermediate finding of fact. That was a keystone of his submissions. It is however, hard to discern any constitutional, or indeed useful, principle in that position.

There is merit in laying the motion before the Houses. It is not a case of "lets see what we can find". Neither House could conduct an investigation unless the alleged misbehaviour was of a kind which it was clear would justify removal. If this conduct was then established, it would justify removal.

The applicant has no complaint in relation to the delegation of evidence gathering and that it is necessary for each member to have the opportunity to have perusal of all the evidence. Clearly evidence has to be gathered for the purposes of adjudication: the members must consider to adjudicate and must be present for any argument on submissions.

There is a distinction between what is constitutionally permissible and what is constitutionally required. A range of procedures could have been proposed consistent with the Constitution. What will be before each T.D. or Senator is a report of the proceedings before the select committee without any comment. Each member of the Oireachtas will have therefore, 1) the report; 2) the transcript of the evidence; 3) audio-visual material, namely a video of the hearings; 4) the right to receive submissions notwithstanding the material on the video.

Each member would have their own video. If either House for some reason wanted to hear a witness again that could be arranged. Before there is a vote, there can be a debate.

Under Article 35.4, if there is no basis in history or comparative analysis for the applicant's case, then everything depends on the applicant on establishing that "stated" comprehends an intermediate finding of fact – albeit non-binding. If the Constitution had intended that, it could have done so in a clearer manner than the use of the word "stated". Article 35.4 requires that the grounds for removal be identified and specified and furthermore identifies how those grounds are to be adjudicated on. The removal is carried out by the President but only upon resolution of both Houses which resolution has identified stated misbehaviour. The word "stated" means therefore identifiable or specific and not general (which in itself was a notable advance on the procedure for removal provided for under the Act of Settlement). The matter is adjudicated upon by the body

to whom the Constitution assigns that task. The vote is then a vote to adopt the motion or not.

The applicant says at paragraph three of the submissions that he never knowingly accessed child pornography. There is then no issue on subscription and none on access. The issue is "knowingly". There is no issue on whether there was access or subscription and there is no issue on whether there was child pornography on the personal computer. The resolution is put before the House and the evidence is then considered. The resolution can be amended at any stage and that is contemplated by standing orders. But there could not be a new statement of misbehaviour.

Article 35.1 states "a Judge of the Supreme Court or High Court shall not be removed from office except for stated misbehaviour or incapacity and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann". The appointing power is that of the President of the binding advice of the Government. At the end of the process, the President again can remove a judge. It is a carefully worded provision. Judges, on the resolution of both Houses, may be removed. Before that there has been three methods of removal as a matter of history: the sovereign could remove at his pleasure, parliament could remove, or the courts could remove by proceedings brought without purpose. The Act of Settlement addressed the sovereign's abuse of the power of removal at his pleasure. Parliament thereafter placed a limit on the sovereign's power.

Pursuant to Article 35.4, a judge's appointment is by the Executive through the medium of the President. The significance of stated misbehaviour is that it requires removal to be specified. "Ná an uair fhéin" suggests that it is only the Oireachtas which can remove and only then in the context of a removal motion.

"Stated" is a requirement of particularity of behaviour which is identified but not proved. It may mean two things, specification the passing of the motion i.e. adoption of the motion. *O'Byrne v. Minister for Finance* explains the context of article 68 of the Irish Free State Constitution. Maguire C.J. at p. 3 states that article 68 derived from articles contained in the provisions of the United States, South Africa and Australia. The Australian Constitution uses the phrase "proven misbehaviour". That does not require an intermediate finding of fact. If you substitute the word "stated" for "proven" it adds force to the contention that the word "stated" means specified, clarified and identified. This court has dealt with findings of fact by the Oireachtas which are legally sterile but can be damaging to reputations: see *Maguire v. Ardagh*. Non-binding findings are also legally sterile and they can also be damaging to reputations. What is the point of any such intermediate determination, particularly when committee mem-

bers will be entitled to participate in the debate on vote as members of their respective Houses, in a way which is binding.

Hardiman J. referred to the statement of Lavery J. in *O'Byrne v. Minister for Finance* that the position of a judge sometimes is very difficult. The administration of justice is defined by reference to Judges. Judges become in one sense the constitutional embodiment of the administration of justice. In *Re Therrien* at para. 151, it was stated by Gonthier J. that "…we cannot ignore the unique role embodied by the Judge in that society, and the extraordinary vulnerability of the individuals who appear before that Judge seeking to have their rights determined or when their lives or liberties are at stake". This is the importance of ensuring confidence can be reposed in the judiciary.

We do not know what is on the computer. The applicant states it is unwanted material, but he is however not consenting to the request of the committee to deliver the personal computer to it. The substantive issue must be determined by each individual T.D. and Senator who must satisfy themselves of the misbehaviour. There have been seventeen impeachments in the United States, one removal in the United Kingdom and this is the first time a procedure has reached this stage here. The applicant is and will remain a judge unless removed by this procedure. There have been 324 appointments of judges since 1924, 126 of which were for the Superior Courts. There was only one attempt to remove a judge, in 1940. This is not a history of abuse by the Executive or Legislature of the power of removal.

In relation to the constitutionality of s. 38A, the only argument against it arises from the element of compellability. At the moment we are not dealing with compellability to give oral evidence but the requirement to provide real evidence. Judicial independence encompasses Article 34.5, and it is appropriate that the Oireachtas is entitled to get documentation and information for the purposes of a procedure under Article 35.4. Judicial independence means not being asked or required to explain why a particular decision was made. Even as the law stood prior to the enactment of s. 3A, it was arguable that the applicant was compellable.

Brian Murray S.C.:

I propose to address the question of whether the order made by the committee was invalid because it requested production of material which had been unconstitutionally seized.

There are three aspects to the issue of invalidity of the order:-

1. the general question of whether the exclusionary rule operates to prevent the Houses of the Oireachtas having access to the material in issue;

2. the implications of *Trimbole*, in so far as it is suggested that the order for production was designed to breach constitutional rights;
3. the doctrine of independent source, where even if the evidence was unconstitutionally seized, it may be admitted if obtained independently of the search.

In relation to the first of these; how does the exclusionary rule affect parliament, in a motion to remove a judge? The United States authorities say that effectively there are no rules of evidence in impeachment procedures. This was observed by Michael J. Gerhardt in *The Federal Impeachment Process*. The mere fact that goods were unconstitutionally seized does not immunise them permanently from further seizure. In relation to the seizure, the warrant was validly granted but was invalidly executed. It was never suggested that it was done with *mala fides.*

As in *People (Director of Public Prosecutions) v. Kenny*, the gardaí did not know that they were infringing constitutional rights. The law on deliberate and conscious violation results in exclusion but does it apply to procedures before the Houses of the Oireachtas, such as that in issue here?

In this regard the general factual basis is relevant. There was independent information available to the committee which suggested that the applicant was in possession of a computer which may have been used to access child pornography from the United States. This was information entirely separate from the search which justified the making of an order. At the time of the order the violation had occurred and had been completed and the process had taken its course.

In terms of principle, the nature of the process of Article 35.4 is one which has as its central objective, to uphold public confidence in the judiciary. That does not override the rights of judges. However there are different considerations in play to those of *People (Director of Public Prosecutions) v. Kenny*, because it involves the Houses in discharging a function under the Constitution being restricted in what they have regard to.

In relation to the goods seized by the gardaí, the applicant is *prima facie* the person in control of them. The Garda Commissioner remains in possession of the computer from the day of the hearing in the Circuit Criminal Court on the 24th April, 2004; the applicant has never requested its return to his possession. He instituted proceedings in the High Court against the Garda Commissioner, the Director of Public Prosecutions and the Attorney General. Those proceedings sought declarations that the seizure was unconstitutional and sought orders to prevent the passing of the property to a third party but not its return. On consent these reliefs were struck out except for the question of damages.

Legislation was put in place as there were a number of *lacunae*, the effect was to make judges compellable in so far as possible and also to make it possible for the possession of property concerned. Once it was possible to secure it by order against the applicant or the gardaí, there was no infirmity in directing production.

In the applicant's initial proceedings there was a plea of unlawful possession in the defence. Here the applicant in these proceedings does not seek the return of the computer and he does not assert that it is his property and amongst the material seized are images. The plaintiff has not established any lawful entitlement to the property.

The gardaí took the computer as a fruit of a search and they have retained it. They have never been asked to give it back and could not give it back but the actual reason they still have it is that nothing can be done. We know of no authority requiring the gardaí to give back something which was unlawfully detained. The owner cannot take the property and sue about the goods without seeking their return, therefore the possession is not adverse. It is very difficult to believe that it is a continuing violation where the gardaí cannot give property back and the owner has not asked for it.

Finlay C.J. in *Kenny* explained the reason which led him to conclude that there was a deliberate and conscious violation which referred to the quality of the act constituting the violation. He stated, "[t]o apply, on the other hand, the absolute protection rule of exclusion whilst providing also that negative deterrent, incorporates as well a positive encouragement to those in authority over the crime prevention and detection services of the State to consider in detail the personal rights of the citizens as set out in the Constitution, and the effect of their powers of arrest, detention, search and questioning in relation to such rights".

In this case the balance which has to be identified is between the principle of constitutional law of non-admissibility of unconstitutionally obtained evidence and the various considerations underpinning Article 35. In the United States, the exclusionary rule does not apply to civil proceedings. In *United States v. Janis* evidence obtained by unconstitutional means was held admissible in a claim on foot of a tax demand.

Trimbole was the only case in which a prior unconstitutional act has invalidated a subsequent act, which was *prima facie* lawful. In *Trimbole* the second arrest on foot of the extradition was held to be bad, due to the first detention. There are a number of factors which result in the conclusion that the second arrest was invalid. The first was the *mala fides* of the first act, which distinguishes it from this case. The second is that the *mala fides* act was for the purposes of allowing the second arrest to take place, *i.e.* the State was held to have effectively concocted a false arrest to ensure Trimbole's availability for extradition process. It was held that the State

ought not to be entitled to benefit from that action. The Chief Justice stated on p. 575, "[i]t is clear that not every unlawful arrest, even though it may be classified as conscious and deliberate, gives to a person so arrested, after his necessary release from illegal detention, any immunity from the proper enforcement of due processes of law or makes him unamenable to answer to criminal offences in our courts". The first unconstitutional step was unlawful and known to be unlawful.

The applicant faces a difficulty in trying to bring himself under the *Trimbole* test in that *Trimbole* requires a *mala fide* act and because there the State engaged in a deliberate strategy to breach Trimbole's constitutional rights to achieve a result. The decision was that they were deprived of the fruits of that scheme. In this case, it was not possible to return the computer. The point of conclusion is that the search was not made with a view to committing a deliberate violation and *Trimbole* does not get the applicant to that point. How could it be otherwise, when someone does not ask for it back?

Hegarty v. Governor of Limerick Prison, in which Geoghegan, Kelly and Smyth JJ. presided, was concerned with an inadvertent breach of constitutional rights due to the invalidity of a Special Criminal Court appointment. As a remand was unconstitutional, the Director of Public Prosecutions arranged for the applicant to be permitted to go outside Limerick prison, where he was immediately re-arrested. One of the *Trimbole* arguments was dealt with at p. 427:-

> "If, however, the person is already charged with the offence before a lawful court there may be circumstances where it would be an abuse of the process of that court to effect a re-arrest. But as to whether this is so or not will depend upon intention and purpose. In this case, through no fault of the Director of Public Prosecutions, an unlawfully constituted Special Criminal Court purported to remand in custody a person being lawfully and properly prosecuted before that Court and having been originally lawfully arrested and charged and brought before that Court. Because of the unlawfully constituted court the purported committal warrant or remand order was itself invalid and inoperative with the result that the applicant was not in lawful custody. As he was not in lawful custody, the applicant was entitled to have the unlawful custody terminated. But this could not give him an immunity from prosecution for the offences which he was alleged to have committed and for which he had been charged. The Director had a public duty and indeed a constitutional duty to proceed with the prosecutions. He therefore had to consider how best this could be done effectively. A factor that the Director was entitled to take into account was the problem of ensuring that the released men could be brought back before the Court."

That requirement of a causal connection between the breach of the constitutional rights and the disability to the State is that the State has independent information which had nothing to do with the invalidly of the search with the second act. No submission has been advanced to make such a connection. There was an attempt to make a *Trimbole* type argument but there was no *mala fides*, no scheming and no objective. No other cases have been cited in submissions of the applicant which make the same point.

I would emphasise that the order of the committee can be justified independent of the search. This is a case where the applicant has deployed the computer to offer an explanation which he has repeated before the committee and in the affidavit of the solicitor for the applicant; it is peculiar therefore that the applicant makes claims in relation to the possession but denies to the committee an opportunity of looking at it.

I also rely on *Boland v. An Taoiseach*; *In re Haughey*; *Hegarty v. Governor of Limerick Prison*; *Kavanagh v. Government of Ireland*; *Maguire v Ardagh*; *Nixon v. United States*; *O'Byrne v. Minister for Finance*; *People (Attorney General) v. O'Brien*; *Sinnott v. Minister for Education*; *The State (Trimbole) v. Governor of Mountjoy Prison*; *T.D. v. Minister for Education*; *In Re Therrien*.

Shane Murphy S.C. (with him *Úna Ní Raifeartaigh*) for the first to ninth respondents:-

I will address the court in relation to the s. 3 order, on possession and power and fair procedures and supervision of the constitutionality of the Act of 1997. I will then address the proposed debate in the Oireachtas.

I would ask the court to consider the book of appeal and tie the legal argument to the facts.

The letter from the solicitors for the applicant to the Ceann Comhairle must be seen in the context of the requirement of a technical examination. The committee needs to have the computer examined by an expert. In the context of the acquittal, the applicant was in the same position as on the day of the arrival of the gardaí. As a matter of fact and law, the applicant was entitled to transfer to the gardaí the computer at the time. Under the terms of the order, the Garda Commissioner is restrained from making use of or delivering the computer. It is an enforceable legal right. At the present time and since he has been acquitted, the applicant has a legally enforceable claim to possession of the computer or to direct its transfer as a matter of law.

There is no concession on whether the committee could order the gardaí to transfer the computer to the committee, but the committee decided to

adopt the course of action of requesting the computer from the applicant, which legally was the most expedient course.

The committee's order was made validly and lawfully. It had received submissions from the applicant, therefore there was no want of fair procedures. On the date of the order, the applicant was in possession or had power of procurement of the computer.

In the context of a voluntary request between the 2nd June, 2004 and the 1st December, 2004, the Child Pornography (Amendment) Act 2004 came into force on the 2nd June, 2004, to alleviate any potential exposure to criminal liabilty.

Section 13 of the Act of 1998, as amended by the s. 1 of the Act of 2004, states:-

"Nothing in this Act prevents –

(a) the giving of or compliance with a direction under section 3 of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997, or

(b) the possession, distribution, printing, publication or showing by either House of the Oireachtas, a committee (within the meaning of that Act) or any person of child pornography for the purposes of, or in connection with, the performance of any function conferred by the Constitution or by law on those Houses or conferred by a resolution of either of those Houses or resolutions of both of them on such a committee."

The applicant advanced the argument of compulsion; he would have had protection under that provision. After making the order on the 1st December, 2004, s. 13(a) applied, which allowed the applicant to possess or have power over the material without exposure to criminal liability. On the 1st December, 2004, there was a new situation. The s. 3 order was made after the voluntary option was extended and was refused, following a full hearing before the committee with representation on behalf of the applicant. There was no *Trimbole* style activity. The order was made validly and lawfully.

In relation to the Oireachtas, I adopt the position as set out by counsel for the tenth and eleventh respondents on the decision by the Oireachtas to appoint the Committee and how the process has operated to date. The Houses manifestly have power to pass a resolution and there is no requirement to appoint a fact finding committee. The rules and procedures before each House exist and if necessary may be amended to ensure fair procedures. There is no case of want of fair procedures; it is premature to consider it and there is no evidence to demonstrate a want of fair procedures. To do so is to presume parliamentary chaos at a later stage. There is

no evidence of manifest failure to conform with constitutional and fair procedures.

The issue of the standard of proof to be applied is not relevant at this stage and has not been addressed and the applicant can make submissions on it to the committee at a later time, when it does arise.

John Rogers S.C. in reply:

In relation to the Child Trafficking and Pornography (Amendment) Act 2004, I am not sure that counsel for the first nine respondents is correct in stating that s. 13(b) provides a cover for the applicant, as it refers to "publication or showing by either House of the Oireachtas, a committee (within the meaning of that Act) or any person of child pornography for the purposes of, or in connection with, the performance of any function conferred by the Constitution or by law on those Houses or conferred by a resolution of either of those Houses or resolutions of both of them on such a committee". The applicant does not have material for the purpose of the committee. The voluntary direction is not before this court. There is no challenge on the basis of a voluntary transmission. The position prior to the 1st December, 2004, was that the applicant could have authorised transmission. That position applies all the time and is covered by s. 13(b). The issue is whether the applicant can be made to do it. Under the *Bula Limited v. Tara Mines* definition of power, the applicant does not have power over the computer.

Without the order the applicant is not bound to do anything. Section 13 (a) contemplates the giving of direction, but no such direction was given.

What your lordships have heard is extraordinary, witnesses have already been called before the committee for non-essential issues but the committee does not know the standard of proof to be applied. Although the committee has embarked on a constitutional process, it has not yet fixed a standard of proof. We have the removal motion which at para. 2 proceeds to contemplate that the Houses of the Oireachtas will consider and debate, but the Oireachtas does not know the standard of proof. A first instinct of fair procedures is that before I start to deal with the procedure, I will know on what basis the House will resolve them. I am concerned with this because of the submissions of counsel for the tenth and eleventh respondents where he said the motion could be amended.

A big point in this case must turn on a true interpretation of Article 35.4. That is a big issue. I have said that it was a two stage process, but on the other hand, counsel for the tenth and eleventh respondents says this is a unitary resolution. Assume, if I conceded to the court (which I am not) that it is open to two interpretations of those alternatives, the court would have to look at which of those two was mandated by the Constitution in its

entirety and in particular Article 35.2. Counsel for the tenth and eleventh respondents is offering an interpretation, based on Article 12 but not Article 35.2. Judicial independence means we have to buy into what Lavery J. said in *O'Byrne v. Minister for Finance* on the meaning of judicial independence. In this context when there is removal, it must be seen as the three organs of State jostling for power.

If one assumed the resolution was rejected, on a unitary transaction, we as citizens could not know if the applicant was found "guilty but not removed", or "not guilty". It is opaque – the Constitution could not have contemplated that. We could not determine how the Oireachtas found that there was no misbehaviour. The citizens are entitled to know, in relation to the options available, why this judge was removed and on which particular aspect of the charge. For example if a judge was accused of being a poor subject to be on the bench by reason of drink driving or adultery and there was then a resolution or for example if a judge was charged with downloading adult or child pornography, we should know on which charge the resolution to remove was founded.

It appears the Oireachtas has contemplated that a committee consider a matter under Article 35.4 but not necessarily make a resolution and the Oireachtas has contemplated a process where the Oireachtas pass a resolution. Counsel for the tenth and eleventh respondents said it had to be an Article 35.4 resolution. Section 3A is couched in a way which concerns behaviour and not alleged misbehaviour of a judge. This section seems to indicate that the Houses of the Oireachtas contemplated a two stage inquiry of judicial behaviour. What does the Constitution mandate? I make no concession on the unitary transaction.

On the question of joint sitting by both Houses. There cannot be a joint sitting; each component of the Oireachtas must pass the resolutions separately. Counsel for the first to ninth respondents made a point about legal sterility (*Goodman International v. Hamilton*) or that the findings of fact of tribunals are legally sterile but it was not clear what his point was.

The issue of the onus of proof was put to counsel for the tenth and eleventh respondents. The onus is clear from the Article, "shall not be removed except". This is unlike tribunals of inquiry, this is a different type of resolution; there has to be a finding of misbehaviour. There must be an onus of proof and the evidence must satisfy it.

Counsel for the tenth and eleventh respondents is wrong in his unitary transaction proposal, it is essential for constitutional and natural justice that the resolution only be put after misbehaviour is found. That requires two stages and two votes.

Order 63A does not contemplate amendment of itself and is self contained. It is a parliamentary procedure to serve Article 35.4.

There are 5 stages:-

1. putting down the motion to remove;
2. an adjournment of the motion;
3. the committee being established;
4. a report;
5. a debate including a hearing.

Counsel for the tenth and eleventh respondents stated that when you enter the 5th stage, then there can be evidence. No other steps are contemplated by standing order 63A. No other steps. If the debate has started, there is no room for anything else. What the Oireachtas is doing is debating, which comes under standing order 48. Now the judge is in a removal debate. If a judge is faced with this process, he or she should know what is to happen and whether the motion is capable of being amended. Counsel for the tenth and eleventh respondents says it can. If they are going to have a committee, it should be fact finding. The business of the committee has to be gathering evidence and fact finding on the basis of that evidence.

Counsel for the tenth and eleventh respondents relied on *United States v. Nixon*. Looking at the judgment of White J., he perceived that the committee there was a fact finding one. Look at the conclusion of that judgment and the view that it is the only way in which the impeachment process in United States will survive.

In relation to *Trimbole*; essentially what was said by the respondents was there was a want of a connection between the breach of constitutional rights and the evidence. But here we have an illegal entry, the taking of materials, unlawful and unconstitutional acts and a ruling on inadmissibility. Notwithstanding all of that, the Garda Commissioner holds onto the material and takes no step to restore the personal computer to the applicant. He knew it came from the applicant's house, but no step was taken between April and June. On the 30th June, there was a letter from the committee. There has been no letter from the Garda Commissioner to the applicant. There was no application under the Police (Property) Act 1897. Without consulting the applicant, the Commissioner says he will preserve it and retain it and take no steps to destroy it without consulting the applicant. He gives that commitment without consulting the applicant or allowing him be heard. There was no Police (Property) Act 1897 application. Markedly he did not tell the applicant what he proposed to do with the computer. In the affidavit of the solicitor for the applicant, it was deposed that it was not until November, when we came before the committee, that we heard of the commissioner's position. He committed himself to retain it. He said he could retain it. It ignores the fact of an unlawful seizure. The Garda Commissioner is part of the executive arm of the State, which has engaged in an ongoing breach of the constitutional right of the applicant

under Article 40.5 - not to have his dwelling violated. The chief of police is retaining it without consulting the applicant but he is responding to another arm of the State. Why didn't the Commissioner go to the committee and say, "Give me a production order"? He retains the fruit of an unconstitutional seizure. (It is not, however, open to this court to return it to the applicant as no this relief was not pleaded.)

The evidence before the court is clear, that despite the fact that the Garda Commissioner knew it came from the applicant's house, he responded to the committee. It is a continuation of unlawfulness *á la Trimbole*.

My friends made a case of prematurity. Our plain complaint is they are engaging in a process which does not conform with Article 35.4.

Cur. adv. vult.

Pursuant to the provisions of Article 34.4.5°, the judgment of the court was delivered by a single member.

Murray C.J. 9th March, 2006

1 In this appeal, the court is asked to interpret the provisions of Article 35.4.1° of the Constitution regarding the parliamentary procedure for the removal of judges from office. It is one of the few occasions in the annals of legal history that such a proposal has been considered by a court and the first time since the foundation of the State.

Facts: prosecution and acquittal

2 The applicant was appointed as a judge of the Circuit Court in November, 2001.

On the 20th May, 2002, the President of the District Court issued a warrant for the search of the applicant's dwelling house. The warrant recited the information on oath of a sergeant of An Garda Síochána that there were reasonable grounds for suspecting that evidence, relating to an offence under s. 6 of the Child Trafficking and Pornography Act 1998, to wit "child pornography, computer, computer equipment, computer software, floppy discs and their associated parts" was to be found at that place.

3 Section 7(2) of the Act of 1998 requires any entry on a premises in pursuance of a warrant granted under the Act to take place "within 7 days from the date of the warrant". The warrant, reflecting that provision,

authorised a search "within seven days of the date hereof". On the 27th May, 2002, members of An Garda Síochána searched the applicant's home. They found and took possession of materials said to be relevant to the allegation mentioned in the warrant.

4 Section 11 of the Interpretation Act 1937 provides, so far as relevant:-

> "The following provisions shall apply and have effect in relation to the construction of every Act of the Oireachtas and of every instrument made wholly or partly under any such Act, that is to say:-
>
> …
>
> h) Periods of time. Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall, unless the contrary intention appears, be deemed to be included in such period, and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall, unless the contrary intention appears, be deemed to be included in such period;"

Since the seven day period specified for the search of the applicant's dwelling house was inclusive of the day of issue of the warrant, the search took place one day outside the time allowed. Thus the warrant, at the date of its execution, was spent.

5 On the 26th November 2002, the applicant was charged by summons with the offence of "possession of child pornography contrary to s. 6 of the Child Trafficking and Pornography Act 1998". The particulars of the offence were that the applicant "on the 27th May, 2002, at [his home] did knowingly have in [his] possession child pornography". He was sent forward for trial on indictment to the Circuit Criminal Court.

6 The applicant pleaded not guilty on arraignment at the Circuit Court in Tralee on the 20th April, 2004. Following legal submissions, the trial judge, His Honour Judge Carroll Moran, ruled that the materials seized from the applicant's home on foot of the search warrant were not admissible in evidence. He ruled as follows:-

> "There is no doubt that on a proper interpretation of s. 7 of the Child Trafficking and Pornography Act 1998, having regard to s. 11(h) of the Interpretation Act 1937, in the present case, the day on which the search warrant was issued was to be included in the reckoning and since the warrant was issued on the 20th May, 2002, it expired on midnight of the day ending on the 26th May 2002. Accordingly, it was spent when An Garda Síochána purported to rely on it in their search of the accused's home on the 27th May 2002."

The judge, being bound by the decision of this court in *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 I.R. 110, held that "there was a violation of the accused's constitutional rights committed by acts of the Garda Síochána which were not unintentional or accidental". He

ruled: "… evidence of the search and of what was found in the search is inadmissible and cannot go before the jury".

There being no other evidence against the applicant, the judge withdrew the case from the jury and the applicant was found not guilty by direction on the 23rd April, 2004.

Initiation of steps for removal: correspondence

7 Within days of his acquittal, the Government initiated correspondence with the applicant. It is necessary to outline the principal points.

The Secretary General to the Government, on the 27th April 2004, wrote to the applicant conveying the Government's deep concern at the circumstances surrounding the criminal proceedings described above. The letter referred to the fact that a search of the applicant's home and the initiation of a prosecution against him had been considered justified and that counsel for the Director of Public Prosecutions had alleged in open court that images of child pornography had been found on the applicant's computer. It also stated that the applicant's detailed response had never been recorded. The letter invited the applicant to record in writing his response to the allegations made against him. It stated:-

> "Given the importance of the mutual respect due between the institutions of the State, and having regard to the critical importance of public confidence in the judiciary, the Government believes that it is entitled to a full and frank disclosure from you of the information and comments which are sought from you and to be apprised of the full circumstances surrounding the matters referred to."

The letter drew attention to the provisions of Article 35.4.1° of the Constitution and of the Courts of Justice Act 1924 enabling the Houses of the Oireachtas to pass a resolution calling for the removal of a Circuit Court Judge from office for stated misbehaviour or incapacity. The letter stated that the members of the Government, who could propose such a resolution, would require to be apprised of the information and comments being sought from the applicant so that they could fairly consider a decision whether to initiate such a resolution.

8 In a letter of the 13th May, 2004, the applicant stated, through his solicitor, that, while it "would not be constitutionally appropriate for him to answer questions asked by or on behalf of the Government", he would, "should the Oireachtas, the organ of State mandated by the Constitution with oversight of judicial conduct, see good to make requirements of [him] in due course, … respond to that body appropriately".

9 The Taoiseach then made a statement in the Dáil. He outlined the intended course of action which is more fully described below. The

applicant's solicitors wrote to the Taoiseach seeking assurances concerning his right to be heard before any resolutions would be debated or voted upon.

10 The Secretary General to the Government, on the 25th May, 2004, sent a letter to the applicant's solicitors describing in detail steps that were to be taken leading to the possible removal of the applicant from office. These steps were to be as follows:-

1. Two motions would be proposed in each House of the Oireachtas as follows:
   a) a motion calling for the removal of the applicant from office pursuant to Article 35.4.1° of the Constitution (as applied by s. 39 of the Courts of Justice Act 1924) on grounds of stated misbehaviour;
   b) a motion proposing the establishment of a Joint Committee of the Houses of the Oireachtas for the purposes of investigating and receiving evidence in relation to matters of public concern specified in the letter and pertaining to the applicant and for the purpose of according fair procedures; the resolution would define the powers of the Joint Committee, including the power to compel witnesses; the committee would not make any findings of fact or recommendations or express any opinions.
2. The first motion would be adjourned pending the receipt of a report from the Joint Committee.

The Government letter then set out set out the circumstances and matters which the Joint Committee would be required to investigate, which were:-

"(a) that An Garda Síochána in August, 2001, on receipt of information from Interpol obtained by the United States Postal Inspection Service during a search of premises in Fort Worth, Texas, concerning details of alleged customers of a company offering access to child pornography websites, commenced an operation in relation to persons allegedly so identified from this jurisdiction;

(b) that these details included the names, passwords and credit card and charge card details of certain persons;

(c) that one of the persons from this jurisdiction so named was a Brian Curtin, 35 Ashe Street, Tralee, Co. Kerry, and that subsequent inquiries indicated that this person was Brian Curtin, Judge of the Circuit Court, with a home address of 24 Ard na Lí, Tralee, Co Kerry;

(d) that a warrant to search Judge Curtin's home under s. 7 of the Child Trafficking and Pornography Act 1998 issued from the Dis-

trict Court on foot of an application by a member of An Garda Síochána on the 20th May, 2002;

(e) that Judge Curtin's home was subsequently searched on foot of the said warrant and that gardaí took possession of a personal computer and other material during the search;

(f) that an investigation file was submitted to the Director of Public Prosecutions by the garda authorities in October, 2002 and that the Director of Public Prosecutions instructed that Judge Curtin be prosecuted for knowingly having in his possession child pornography contrary to s. 6 of the Child Trafficking and Pornography Act 1998;

(g) that the trial of the said charge commenced on the 20th April, 2004, at Tralee Circuit Criminal Court and that on the 23rd April, 2004, Judge Curtin was found not guilty of that charge without evidence being given in relation to the subject matter of the charge, the Circuit Criminal Court having determined that the aforesaid warrant was spent when executed at the home of the Judge Curtin."

The scheme thus outlined on behalf of the Government, together with certain legislative changes, was carried into effect and is the subject of the present proceedings.

Legislative changes

11 As part of the scheme to enable the Oireachtas to deal with the case of the applicant, the Government proposed and the Oireachtas passed two pieces of amending legislation which came into force in June, 2004.

12 Firstly, the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 ("the Act of 1997") was amended by the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) (Amendment) Act 2004 ("the Act of 2004"). The need for this amendment arose from s. 3(4) of the Act of 1997. Section 3(1) of the Act authorises a committee of a House of the Oireachtas to "direct in writing any person whose evidence is required by the committee to attend before the committee on a date and at a time and place specified in the direction and there to give evidence and to produce any document in his or her possession or power specified in the direction". However, s. 3(4) of the Act of 1997, before amendment, provided that s. 3(1) did not apply to a judge of any of the courts. Thus it could not be employed even in a case involving the possible removal of a judge from office pursuant to Article 35.4.1° of the Constitution. The Act of 2004 inserted a new section, s. 3A, into the Act of 1997. Section 3A(a) now provides:-

"Section 3, in so far as it relates to a committee established for the purposes of, or in connection with, a matter arising under section 4 of Article 35 of the Constitution or pursuant to section 39 of the Courts of Justice Act 1924 or section 20 of the Courts of Justice (District Court) Act 1946, shall, notwithstanding subsection (4) of section 3, apply to a judge of a court that is specified in that subsection and to which judge the matter relates."

This provision applies, by virtue s. 3A(b), to a case concerning "the behaviour or capacity of a judge whether occurring or first arising before or after" the passing of the Act. In these proceedings, the applicant claims that s. 3A is unconstitutional.

13 A related amendment was made to the Child Trafficking and Pornography Act 1998 ("the Act of 1998"). The Child Trafficking and Pornography (Amendment) Act 2004 was designed to exempt any proceedings of the Oireachtas from criminality by reason of the possession or distribution of child pornography, which had been made criminal by the Act of 1998. Section 1 of that Act inserts a new s. 13 into the Act of 1998 as follows:-

"Nothing in this Act prevents –

(a) the giving of or compliance with a direction under section 3 of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997, or

(b) the possession, distribution, printing, publication or showing by either House of the Oireachtas, a committee (within the meaning of that Act) or any person of child pornography for the purposes of, or in connection with, the performance of any function conferred by the Constitution or by law on those Houses or conferred by a resolution of either of those Houses or resolutions of both of them on such a committee."

It is not alleged that this amendment to the Act of 1998 was unconstitutional. However, it is relevant to the interpretation of s. 3A and to the power of the Joint Committee to give a direction to the applicant pursuant to s. 3 of the Act of 1997, which is one of the issues to be decided.

Proceedings in the Oireachtas

14 On the 2nd June, 2004, the parliamentary procedures intended to give effect to the proposals mentioned above were initiated in both Houses of the Oireachtas.

Firstly, following on a recommendation of its Committee on Procedure and Privileges, Dáil Éireann, on the 2nd June, 2004, adopted an additional standing order number 63A, setting out special procedures governing any motion for the removal of a judge pursuant to the applicable constitutional

or statutory provisions. The essence of the new Dáil Standing Order 63A, so far as material, may be summarised as follows:-

15 Any such motion must "state the matters upon which it is contended by the proposer of the said motion that the Judge who is the subject matter of the motion should be removed for stated misbehaviour or that he or she is incapacitated".

16 Where such a motion is put on the order paper, "the Dáil may either reject the said motion, or on a motion made to adjourn the debate by motion appoint a Select Committee to take evidence in respect of the aforesaid Article 35.4.1° motion, provided that the Select Committee shall make no findings of fact nor make any recommendations in respect of same or express any opinions in respect of same" (standing order 63A(2)).

17 Where the Dáil does not appoint a select committee within five days, the "motion shall lapse".

18 The following paragraphs govern the procedures of the Select Committee:-

"(5) The Select Committee shall at all times have due regard to the constitutional principles of basic fairness of procedures and the requirements of natural and constitutional justice.

(6) The Select Committee shall take all steps to ensure that an appropriate record is taken of its proceedings.

(7) The proceedings of the Select Committee shall be held in private, save insofar as otherwise directed by the Committee following a request in that behalf by a judge who is the subject of an Article 35.4.1° motion.

(8) Following the completion of its proceedings, the Select Committee shall furnish a report of those proceedings to the Dáil, together with appropriate transcripts and associated audio-visual material. Provided that the Committee shall first send its report to the Clerk of the Dáil, who shall arrange in the first instance for the report to be circulated to the members of the Dáil and to the Judge who is the subject matter of an Article 34.4.1° motion. Provided further that the Dáil may subsequently order that the report be published and laid before the Dáil.

(9) Following receipt of the said report, the Dáil may by order make provision for the debate on the said Article 35.4.1° motion which shall include:

– due notice of the taking of the debate to be resumed on such part of the Article 35.4.1° motion calling for the removal of the Judge in question;
– due observance by each Member of the constitutional principle of fair procedures;

– the right of the Judge and his or her legal representatives to be heard prior to any vote of the said Article 35.4.1 motion;
– such special rules of procedure as may be deemed appropriate."

It is also provided by order 63A that a Select Committee so appointed by the Dáil "shall, with the concurrence of Seanad Éireann, be joined by order of the Dáil with a similar Select Committee of that House appointed to perform its functions in respect of a corresponding Article 35.4.1° motion moved in that House in respect of the same Judge". The Chairman is to be a member of Dáil Éireann.

19 A materially identical corresponding standing order, numbered 60A, was, *mutatis mutandis*, adopted by Seanad Éireann on the same day, the 2nd June, 2004.

20 Secondly, a resolution for the removal of the applicant pursuant to Article 35.4.1° of the Constitution and s. 39 of the Courts of Justice Act 1924 was proposed in each House. Each resolution recited in full the matters, which had been listed at paragraphs (a) to (g), quoted above, from the Government letter of the 25th May. The stated misbehaviour was, in each resolution, described as:-

> "… being his conduct in and in relation to subscribing to, accessing and use of websites containing child pornographic images and thereby rendering himself unsuitable to exercise the office of a Judge of the Circuit Court."

The resolutions, having been proposed, were adjourned in accordance with the pre-ordained procedure.

21 On the 3rd June, 2004, each House of the Oireachtas adopted a resolution appointing a Select Committee with four members "to be joined with a Select Committee to be appointed by [the other House]. Those resolutions recite at length: paragraphs (a) to (g) of the letter of the 25th May, 2004, already quoted; the correspondence that had passed between the Secretary General to the Government, on the one hand, and the applicant and his solicitors, on the other; particularly, the applicant's undertaking to respond to requirements of the Oireachtas (his solicitors' letter of 13th May); the fact that a resolution pursuant to Article 35.4.1° had been proposed. Each of those resolutions also contains the following:-

> "4. Considering the exceptional circumstances thus arising, having regard to the need for the public to have complete confidence in the judiciary and in the integrity of the administration of justice, conscious of the fact that the said matters do not relate to any exercise of a judicial function by Judge Curtin, and mindful of the status and importance of the principle of judicial independence.
>
> 5. [*omissis*]

6. Conscious of the responsibility and duty of the Houses, prior to the members of the Oireachtas forming a judgment as to whether they wish to vote in favour of or against such a motion, to cause an investigation to take place into the said matters so as to gather and ascertain the facts of and evidence relating to same and to provide the opportunity to Judge Curtin to state and present his case to the said Houses.
7. Mindful of Judge Curtin's entitlement to due process and fair procedures and noting that this House shall accord fair procedures and due process to Judge Curtin and in particular an opportunity to advance evidence to the Select Committee herein established and make such submissions as he considers appropriate to the Select Committee and thereafter to this House and moreover shall provide for the exercise of all rights conferred on him by law to defend and protect his position and good name any other right or entitlement enjoyed by him at law."

When the Select Committees are joined in accordance with those resolutions and with standing orders, the Joint Committee has eight members. The chairman is Deputy Denis O'Donovan, who is the third respondent.

Proceedings of the Joint Committee

22 The Joint Committee sat on the 15th June 2004. It notified the applicant by letter of the 16th June, that it intended to seek the consent of the joint sub-committee on Compellability of the Committees on Procedure and Privileges of the two Houses for it, the Joint Committee, to make directions pursuant to s. 3 of the Act of 1997. That Act had, as already stated, been amended by the Act of 2004, by the insertion of a new s. 3A specifically designed to provide for a direction in the case of a judge who is the subject of an investigation in the context of a resolution pursuant to Article 35.4.1° or s. 39 of the Courts of Justice Act 1924.

23 On the 29th June, that joint sub-committee gave its consent to the Joint Committee to "make any or all directions within the meaning of s. 3(1) of the Act of 1997 in respect of persons or matters generally for the purpose or purposes of carrying out any or all of the functions of the Joint Committee as set out in …" the relevant orders of the two Houses.

24 By a letter of the 30th June, 2004, the chairman of the Joint Committee reminded the applicant of the letter of the 13th May, in which his solicitors had expressed his willingness to "respond appropriately" to the Oireachtas. The chairman asked the applicant to provide an explanation of the matters which had led to the application on the 20th May, 2002, for a search warrant of his home and, in particular, to address "the allegation that [he]

subscribed to, accessed or used websites containing child pornographic images and, if [he] did so, [to] provide details of the nature and circumstances of such conduct". Further, the chairman requested that the applicant "voluntarily submit to the committee" material stated to be "currently in [his] power or possession … for the purposes of technical examination". The letter then listed a wide range of computers and associated materials of possible relevance to the allegation of possession of child pornography. It also mentioned the possibility that it would make an order for production of these materials pursuant to its powers under the Act of 1997, as amended.

25 On the 30th June, the chairman also wrote to the Commissioner of An Garda Síochána stating that the Joint Committee was aware that An Garda Síochána had, in execution of a search warrant relating to the applicant's home pursuant to s. 7 of the Act of 1998, taken possession of a personal computer and other material. He asked the Commissioner that this material remain in the possession of An Garda Síochána, be retained in safe and secure storage and that no step be taken which might in any way alter the state of that material. The Commissioner replied in writing that the material would "remain in garda safekeeping and will be so retained until otherwise directed in accordance with law". The applicant says that he was unaware of the correspondence with An Garda Commissioner until he learned of it at a sitting of the Joint Committee on the 25th November, 2004.

26 There was further correspondence concerning the applicant's state of health and fitness to appear before the Joint Committee, which is not material to the present appeal. When appearing before the Joint Committee, counsel for the applicant at all times claimed to be doing so without prejudice to his right to contest the constitutional and legal validity of the entire process.

27 By a letter, to which the applicant attaches considerable importance, dated the 20th July, 2004, the applicant's solicitors conveyed to the Joint Committee what, in written submissions to this court, was described as the applicant's "defence". It is said that this defence was also conveyed to the Joint Committee at one of its private hearings on the 24th August, 2004. The first point made in response to the committee's letter of the 30th June, 2004, is that the evidence which was to be used against him in the Circuit Criminal Court was obtained in conscious and deliberate breach of the applicant's constitutional rights, that the Oireachtas was bound by the law of the land and that the evidence was inadmissible. The letter stated that the applicant was not at that stage prepared to consent to the release to the Joint Committee of the materials taken from his residence. Secondly, and more in the way of conveying to the Joint Committee a substantive explanation or "defence" to the charge of misbehaviour, the letter stated

that the applicant "at no time ha[d] knowingly or willingly subscribed to, accessed or attempted to access or used websites containing child pornographic images". It further stated:-

> "In 1999 our client was under severe stress and was abusing alcohol. In such condition he sought access to adult pornography. At no time did he knowingly seek to access child pornography."

The letter claimed that computers are vulnerable to invasion by third parties wishing to deposit unwanted material. It stated that there was reason to believe that the applicant's computer had been manipulated in the manner suggested and specifically that viruses of a type known as "trojan horses" had been detected on his computer by An Garda Síochána, that their presence had been confirmed by an expert on behalf of the applicant, and that these are capable of downloading child pornographic images without the owner's consent.

28 This correspondence was, of course, confidential and the hearings of the Joint Committee took place in private. However, the letter of the 20th July was exhibited in an affidavit sworn in the present judicial review proceedings. Those proceedings have, both in the High Court and in this court, been heard in open court. Furthermore, counsel for the applicant drew the attention of this court to the letter for the purpose of establishing that the applicant had proffered a defence and explanation to the Joint Committee.

On the 25th November, 2004, the Joint Committee heard submissions from its own counsel, who applied for a direction pursuant to s. 3 of the Act of 1997, directing the applicant to deliver up to the Joint Committee the computer and associated materials seized from him by the members of An Garda Síochána. On the 30th November, the Joint Committee made the order sought. That order ("the s. 3 direction"), as expressed in a letter from the chairman dated the 1st December, 2004, is in the following terms:-

> "Now take notice that you are directed pursuant to s. 3(1)(c) of the Act of 1997 to produce to the Committee within 21 days from the date of service of this Direction all documents and things (including a personal computer and its hard drive) seized from your house at 24 Ard Na Lí, Oakpark, Tralee, Co. Kerry by members of An Garda Síochána in May, 2004."

30 Shortly after, counsel to the Joint Committee gave notice of an intention to seek a further direction, relating to the applicant's financial records. At the subsequent hearing of the Joint Committee in December, 2004, counsel for the applicant informed the Joint Committee that he proposed to apply to the High Court for judicial review of the entire procedure including the validity of certain statutory provisions. The Joint

Committee adjourned its proceedings on the 15th December, in order to facilitate the making of the application.

Leave to apply for judicial review

31 Smyth J. on the 21st December, 2004, granted leave to the applicant to apply for judicial review in respect of:-

- the procedures of the Joint Committee, including the standing orders;
- the constitutionality of s. 3A of the Act of 1997, as amended by the Act of 2004;
- the s. 3 direction ordering the applicant to produce to it the computer and other materials seized by An Garda Síochána pursuant to the search warrant.

32 The first issue concerns the constitutionality of the procedures adopted by the Houses of the Oireachtas in the exercise of their powers under Article 35.4.1° of the Constitution. Leave was granted on a large number of grounds, not all of them consistent, many of which have not subsequently been pursued. It is sufficient at this point to mention the broad categories of grounds advanced, which were as follows:-

1. standing orders 63A and 60A as adopted respectively by the Houses of the Oireachtas were unlawful and contrary to the Constitution, because Article 35.4.1° refers to "stated misbehaviour" specified and proved and the Houses have no power to prefer or investigate such a charge;
2. alternatively, if the Houses have such a power, the same articles are unlawful and contrary to the Constitution because any such investigation must involve a process of adjudication on the charge of stated misbehaviour prior to the debate on or passing of the resolutions.

One of the grounds of challenge to the powers of the Houses of the Oireachtas was that they could not investigate a matter in respect of which the applicant had already been acquitted by a court.

33 The applicant claimed that s. 3A of the Act of 1997, as inserted by the Act of 2004, was repugnant to the Constitution and invalid on the ground that, by removing from the legislation as passed in 1997 the provision that the powers of an Oireachtas committee to make directions did not apply to judges, the Act impermissibly encroached on the independence of the judiciary as enshrined in Article 35.2 of the Constitution.

34 The applicant claimed that the direction made by the Joint Committee pursuant to s. 3 of the Act of 1997, as amended, was invalid, as the personal computer and hard drive mentioned were not at any relevant time

in his possession and that the direction was an impermissible device designed to circumvent the rights of the applicant and the obligation of the Joint Committee to vindicate and protect his constitutional rights.

35 It will be apparent from this brief summary that, while the application for judicial review constitutes a profound and far reaching challenge to the power of the Houses of the Oireachtas to investigate the applicant's behaviour and to debate and pass the resolutions in accordance with the procedures proposed, the applicant does not contest the power of the Oireachtas to remove a judge from office. The grounds do not claim that the matters alleged against the applicant in the resolutions were incapable of constituting "stated misbehaviour" within the meaning of Article 35.4.1° of the Constitution.

High Court proceedings

36 The application for judicial review was heard by Smyth J. who delivered a detailed and considered judgment on the 3rd May, 2005 [2005] IEHC 163.

37 It suffices to mention briefly the submissions of the applicant before the High Court. These submissions have been significantly modified on appeal. The principal contention of the applicant before the High Court was that the Houses could not, in accordance with the Constitution, debate and pass any such resolutions as had been proposed unless the applicant had previously had the benefit of a form of trial on the charge of misbehaviour alleged. Article 35.4.1° had to be interpreted in the light of the Constitution as a whole and, in particular, by reference to the obligation of the Houses to protect and vindicate the personal rights of the applicant. The Houses would be administering justice for the limited purpose of determining the charge. Consequently, the charge would have to have been proved, following a trial involving the determination and evaluation of evidence in accordance with appropriate standards before a relevant moving member would be entitled to put down such a resolution for debate.

38 In the light of these submissions, it was submitted that the procedures envisaged under standing orders 63A and 60A respectively were fundamentally misconceived.

39 The applicant presented an elaborate scheme for the interpretation of Article 35.4.1° There should be implied in the Article, as in its predecessor, article 68 of the Constitution of Saorstát Éireann, the procedure followed in the British Parliament since the Act of Settlement of 1701. The charge should, on the model provided by Article 12.10 of the Constitution for the impeachment of the President, be preferred by one House and tried by the other. It was not permissible to delegate the determination of the charge to

a joint committee. Furthermore, it was submitted that the proposed procedures would, in many respects, constitute a breach of the applicant's right to fair procedures.

40 Moreover, and, in effect by way of an alternative to the claim that prior adjudication was essential, the applicant complained of the proposal, contained in the standing orders, that the Joint Committee should "make no findings of fact nor make any recommendations in respect of same or express any opinions in respect of same". Thus, there is no mechanism for the resolution of conflicts of evidence, or for assessing the weight, relevance or admissibility of evidence, all of these being necessary prior to any debate on the resolution. The result is that the elected members of both Houses will receive all of the evidence without any evaluation, guidance or determination.

The High Court judgment

41 Smyth J. at p. 106 of his judgment rejected the historical interpretation proposed on behalf of the applicant. It was "fundamentally at variance with both a literal and harmonious interpretation of the Constitution," which he was required to adopt. He cited, *inter alia, The People v. O'Shea* [1982] I.R. 384; *Tormey v. Ireland* [1985] I.R. 289; *Riordan v. An Tánaiste* [1997] 3 I.R. 502; *Sinnott v. Minister for Education* [2001] 2 I.R. 545; *The People (Director of Public Prosecutions) v. M.S.* [2003] 1 I.R. 606. The previous practice and custom of the British Parliament was not embraced by either article 73 of the Constitution of Saorstát Éireann or Article 50 of the Constitution. The Houses of the Oireachtas do not have either the functions or the power of a court, as did the former imperial parliament. The trial judge cited, *inter alia*, *Melling v. Ó Mathghamhna and the Attorney General* [1962] I.R. 1 and *Maguire v. Ardagh* [2002] 1 I.R. 385. The power of removal of judges was expressly conferred by the Constitution on the Houses of the Oireachtas. These constitutional provisions are different and distinct from those concerning the impeachment of the President.

42 Smyth J. rejected the argument based on double jeopardy. He held, citing *Mooney v. An Post* [1998] 4 I.R. 288, that the investigation of alleged "stated misbehaviour" was a constitutional function of the Oireachtas designed to protect public confidence in the judiciary.

43 Smyth J. rejected the complaint that it was impermissible to appoint a committee to gather evidence for the Houses of the Oireachtas as proposed, citing, in particular, *Nixon v. United States* (1993) 506 U.S. 224. When all the evidence has been gathered and placed before the members of the two Houses, the applicant will there be entitled to appear in person and by counsel. Article 15.10 of the Constitution provides: "Each House shall

make its own rules and standing orders". Smyth J. also reviewed at length the position of the judges in the constitutional scheme. Judicial independence is guaranteed by the Constitution, not for the protection of the privileges of judges as individuals, but because the administration of justice is required to be independent under the Constitution. He cited *O'Byrne v. Minister for Finance and the Attorney General* [1959] I.R. 1. Thus the Oireachtas, when considering a resolution for the removal of a judge from office, is concerned essentially with whether the judge is a person in whom the public can have confidence in submitting to him or her their disputes about their lives, liberties and interests.

44 In response to the applicant's complaints of lack of fairness of procedures, Smyth J. held that a presumption of constitutionality applied to the motions, standing orders and procedures of the Houses of the Oireachtas (*Goodman International v. Mr. Justice Hamilton* [1992] 2 I.R. 542.) and that, accordingly, the proceedings, procedures, discretions and adjudications which are permitted will accord with and respect the constitutional rights of the applicant. He also noted the several provisions made for the applicant to appear in person and by counsel before the Joint Committee and the several Houses. He did not consider that the applicant's constitutional rights were compromised by the procedures which had been set up.

The appeal: the applicant's case

45 The applicant's case on appeal has, from the outset, been presented on a narrower basis. He has not contested the High Court rejection of the argument that Article 35.4.1° should be interpreted in the light of the former British parliamentary procedure or of the special provisions for impeachment of the President pursuant to Article 12.10 of the Constitution. It is no longer claimed that the Houses must adopt a procedure analogous with impeachment as historically applied in the British parliament or as ordained by Article 12.10 of the Constitution. Nor has the applicant persisted in the argument based on double jeopardy.

46 The principal issue on the appeal concerning the interpretation of Article 35.4.1º relates to the provisions of the standing orders of the two Houses. It concerns principally the evidence gathering powers of the Joint Committee and the subsequent consideration of that evidence by the two Houses.

47 The applicant's central claim is that the power of the Dáil and the Seanad under Article 35.4.1° of the Constitution to pass resolutions calling for the removal of a judge for stated misbehaviour or incapacity can be exercised only when the allegation in question has been proved by a

process of adjudication or trial, whether that process be external or internal to the Houses. The applicant's first formulation of this contention was that a resolution for the removal of a judge could not be *introduced* unless the misbehaviour alleged had been previously proved in some appropriate forum. While this contention appeared in the written submissions filed in this court on behalf of the applicant, and was not expressly abandoned at the hearing, it was not significantly developed or pressed in oral argument. The vital aspect of the argument was that the Houses were not entitled themselves to debate and pass a resolution so introduced unless they were satisfied that the allegation had been proved. Thus, some body or forum, internal or external to the House, must first adjudicate on the truth of allegation. Although such a body would adjudicate, its decision, would not, on the other hand, be final and certainly not binding on the Houses when considering the resolutions.

48 It is common case that the standing orders do not permit the Joint Committee to perform that role. Thus, the principal question for decision is whether the procedures which the standing orders require the Joint Committee to follow are permitted by the Constitution and, specifically, Article 35.4.1°. The question may be posed conversely: is each House obliged by the Constitution to ensure that the misbehaviour alleged against the judge be proved and established as a matter of fact prior to embarking on debate of the resolution?

49 Counsel for the applicant relied on the principle of judicial independence ordained by the Constitution, to which, he submitted, the trial judge attached insufficient weight. That principle forms part of the scheme of separation of powers and can be seen, in particular, in the several provisions of Article 35 of the Constitution, not merely Article 35.4.1°. The procedures proposed are, it is claimed, fundamentally deficient, principally because the standing orders provide that the Joint Committee "shall make no findings of fact nor make any recommendations in respect of same or express any opinions in respect of same". Thus the debate in the Houses will be conducted on the basis of an unedited pack of materials, which inevitably will contain evidence which conflicts on key points, issues of assessment of credibility and issues of reliance on materials which may be more prejudicial than probative. All of this material will, as counsel put it, be placed before the Houses "in its abundance". Counsel attached particular importance to the need for assessment of expert evidence regarding the presence and significance of "trojans" on the applicant's computer. Each member of each House will be required to assess conflicts of expert and other evidence including the credibility of witnesses. Counsel contended that, under the procedure envisaged, the Houses of the Oireachtas would not be allowed to receive any further

evidence. The debate on the resolutions in the Houses could not include the taking of evidence, because that would not be a debate.

50 Counsel submitted that, before a resolution for the removal of a judge can be validly passed, a trial must take place in which there is a determination of whether the judge has, in fact, committed the acts alleged to constitute misbehaviour. There should, in effect, be a two stage process. Firstly, whether the alleged acts took place must be determined. Then the question of whether those acts amount to misbehaviour can be left to each House.

Constitutionality of s. 3A: submissions

51 Counsel for the applicant submitted that s. 3A of the Act of 1997, as introduced by the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) (Amendment) Act 2004, was repugnant to the Constitution. The applicant seeks a declaration pursuant to Article 15.4 of the Constitution that the section is invalid having regard to the Constitution.

52 That section, it was submitted, involves an impermissible encroachment on the independence of the judiciary enshrined in Article 35.2 of the Constitution and a violation of the doctrine of separation of powers. It authorises a judge to be compelled to give evidence in the context of a resolution proposed pursuant to Article 35.4.1° of the Constitution, which can be done on the basis of a mere allegation. Thus it permits the Oireachtas to require a judge to incriminate himself. It may also be used to compel a judge to divulge information concerning his judicial functions. Counsel accepted, however, in the course of argument, that a person, including a judge, might be compelled to give answers in the course of civil proceedings which might tend to incriminate him.

53 Counsel for the tenth and eleventh respondents submitted that it is necessary for the purposes of Article 35.4.1° that the Joint Committee have a power to call a judge to give evidence. The respondents also point to a number safeguards which are built into the legislation. A committee may only direct a person to give evidence or to produce a document which is relevant to its proceedings (s. 4(1)). Where a person challenges the relevancy of a direction, the matter is referred to the chairman of the House in question, from whose decision there is an appeal to the High Court. Pursuant to s. 11(1), a witness before a committee has the same privilege as a witness before the High Court. Disputed claims of privilege are to be determined by the High Court (see s. 6).

54 Furthermore, the respondents rely on the presumption of constitutionality and the presumption that the powers of the Houses of the

Oireachtas will be exercised constitutionally. The exercise of the power to remove a judge from office cannot *per se* constitute an infringement of Article 35.2 of the Constitution, which stipulates that judges are "subject only to this Constitution and the law".

Direction by committee: s. 3 Act of 1997: submissions

55 The applicant obtained leave to apply for judicial review, pursuant to the order of Smyth J. dated the 21st December, 2004, of the direction made by the committee on the 1st December, 2004, pursuant to s. 3(1)(c) of the Act of 1997, requiring him "to produce to the committee all documents and things (including a personal computer and its hard drive) ["computer materials"] seized from [his] house … by members of An Garda Síochána in May, 2004".

56 As is clear from the summary of facts set out earlier in this judgment that the computer materials had remained in the physical possession of An Garda Síochána following the termination of the criminal trial and the applicant had not sought their return.

57 The applicant advanced his case in the High Court on three main grounds:-

1. that the direction represented an infringement of his constitutional rights, because the materials in the possession of An Garda Síochána constituted the fruits of an unconstitutional search of his house and seizure and that the direction was a colourable device designed to circumvent his constitutional rights;
2. that the materials were not, in law or in fact, in his possession or power;
3. that the direction represented an invasion of his privilege against self incrimination.

The trial judge rejected all these arguments in a fully reasoned judgment. The first argument can be called the exclusionary rule. Smyth J. observed that the applicant's rights to the return of his property had not been set at naught. Insofar as the applicant relied on knowledge of what was on the computer materials, there was no evidence that the members of the committee had any such knowledge. The invalidity in the execution of the warrant did not affect the process for the applicant's removal from office. It was premature to object to the admissibility of the evidence. That would be a matter for the committee to rule on. In any event, he believed that there were extraordinary excusatory circumstances connected with the power of the houses of the Oireachtas pursuant to Article 35.4.1° of the Constitution which would justify the admission of the evidence. He also rejected the contention that the computer materials were not in the posses-

sion or power of the applicant. He was the legal owner of it and entitled to claim it. He had not enforced that right. He also held that the direction did not infringe his privilege against self incrimination. This could not happen merely by virtue of production of the computer. He drew a distinction between a criminal trial and the work of the committee. The constitutional object of maintaining public confidence in the judiciary justified the admission of the evidence seized by An Garda Síochána.

58 The applicant, in his appeal, has concentrated on the first two issues raised in the High Court. Though he has appealed against the refusal of his claim on the grounds of self incrimination, it has not figured largely in the arguments before this court.

59 The applicant says that the exclusionary rule requires the court to rule that the committee should not have the power to obtain the computer materials from him. They are his property, seized from him by means of an unlawful and unconstitutional search of his dwelling house in violation of his rights pursuant to Article 40.5 of the Constitution. Article 40.3 of the Constitution requires the courts to defend and vindicate those rights. He relies particularly on the *dictum* of Walsh J. in *The People(Attorney General) v. O'Brien* [1965] I.R. 142 at p. 170 that:-

> "The defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence. The Courts in exercising the judicial powers of government of the State must recognise the paramount position of constitutional rights and must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State or its servants or agents as a result of a deliberate and conscious violation of the constitutional rights of the accused person where no extraordinary excusing circumstances exist, such as the imminent destruction of vital evidence or the need to rescue a victim in peril."

60 It is constitutionally impermissible, counsel for the applicant submits, for any organ of state to rely on the fruits of deliberate and conscious violation of the constitutional rights of a citizen. The direction pursuant to s. 3 was a mere device to avoid having to seek the computer materials directly from An Garda Síochána. The amending legislation was a legislative attempt to circumvent the constitutional rights of the applicant. Vindication of the applicant's rights requires more that mere return of the unconstitutionally seized property. Use of unconstitutionally obtained materials includes knowledge obtained from the unconstitutional action. He relies particularly on the decision of this court in *The State (Trimbole) v. The Governor of Mountjoy Prison* [1985] I.R. 550. In that case the court held that the arrest of Mr. Trimbole pursuant to s. 30 of the Offences against the State Act 1939 was a ruse or colourable device to detain him

pending the coming into force of an extradition treaty with Australia. Even his re-arrest on foot of a warrant was held to have been unconstitutional. Counsel for the applicant cites passages from the judgments of Finlay C.J. and McCarthy J. The applicant emphasises that he has at no stage sought to repossess the computer materials and accepts that, if he had retaken physical possession, there might be no constitutional objection to the direction.

61 However, the applicant claims that a direction under s. 3(1)(c) can be applied only in relation to a thing "in his possession or power." For that purpose, he must have "an enforceable legal right," as held in *Bula Limited v. Tara Mines Limited* [1994] 1 I.L.R.M. 111, to the thing. By virtue of the fact that the computer contains images of child pornography as defined in the Child Trafficking and Pornography Act 1998, he could not legally claim to possess it. He counters the suggestion that it could be lawful by virtue of the amendment of that Act, already described, by s. 13 of the Child Trafficking and Pornography (Amendment) Act 2004, by an argument based on alleged circularity. If, as he claims, he could not lawfully claim possession of the computer materials, that was the position which pertained immediately before the making of the order. Hence, the committee could not make the order, because at the time the applicant had no enforceable right to possession of the computer.

62 Counsel for the respondents, respectively for the Houses of the Oireachtas and for Ireland and the Attorney General, adopted a largely similar stance in relation to the applicant's arguments. They submitted that the committee is exercising its own legal power to seek material from the applicant himself, not from An Garda Síochána. This has no relationship with the cases concerning the exclusionary rule or the notion of "colourable device".

63 The respondents submit that the flaw in the applicant's argument is that the exclusionary rule does not prevent the use or admission of material which can be introduced without reliance on the illegality. In that case, there is no connection between the use of the evidence and the prior unconstitutionality. The computer materials sought here will be obtained under the s. 3 order through a lawful process entailing no violation of any constitutional interest. The persons seeking access to the computer materials are not those responsible for the invalid search. The exclusionary rule is concerned with the admissibility of evidence unconstitutionally obtained from a citizen at the criminal trial of that citizen. It does not state that it is inadmissible for all time and in all contexts. The respondents cited *People (Attorney General) v. O'Brien* [1965] I.R. 142; *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 I.R. 110; *Lynch v. Attorney General* [2003] 3 I.R. 416; *The People (Director of Public Prosecutions) v.*

Cooney [1997] 3 I.R. 205; *The Director of Public Prosecutions v. Buck* [2002] 2 I.R. 268.

64 Knowledge that the applicant possessed a computer and that it was relevant to whether he possessed child pornography existed quite independently of the execution of the search warrant. The order was made on the basis of the detailed terms of reference of the committee, some parts of which refer to alleged events pre-dating the execution of the search warrant as well as on matters asserted on behalf of the applicant himself in correspondence and oral submissions to the committee, during which he claimed that there were in fact images of child pornography, though unwanted by him, on his computer.

65 Finally, the respondents relied on s. 13 of the Child Trafficking and Pornography (Amendment) Act 1998, as inserted by the Act of 2004, to validate the direction made pursuant to s. 3 of the Act of 1997.

Article 35.4.1° of the Constitution

66 Article 35 of the Constitution provides, in relevant part:-

"4.1° A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.

2° The Taoiseach shall duly notify the President of any such resolutions passed by Dáil Éireann and by Seanad Éireann, and shall send him a copy of every such resolution certified by the Chairman of the House of the Oireachtas by which it shall have been passed.

3° Upon receipt of such notification and of copies of such resolutions, the President shall forthwith, by an order under his hand and Seal, remove from office the judge to whom they relate."

67 The present appeal has been concerned exclusively with the provisions of Article 35.4.1°. The removal of a judge from office is attended, not only by the decisive intervention of both Houses of the Oireachtas, but by subsequent solemn implementing acts of the Taoiseach and the President. These ensure that the condemned judge is stripped of his office.

68 Article 68 of the former Constitution of Saorstát Éireann corresponds with Article 35 of the Constitution. That Article contains, with other provisions concerning the judiciary, the following:-

"The judges of the Supreme Court and of the High Court shall not be removed except for stated misbehaviour or incapacity, and then only by resolutions passed by both Dáil Éireann and Seanad Éireann."

69 The language of Article 35.4.1° is, for practical purposes, identical with that of the relevant part of article 68 of the earlier constitution. The later provision, however, requires that the resolution "call for" the removal of the judge.

70 The applicant being a judge of the Circuit Court, s. 39 of the Courts of Justice 1924 applies to his case. It provides:-

> "The Circuit Judges shall hold office by the same tenure as the Judges of the High Court and the Supreme Court."

That section remains in force and applies to judges of the Circuit Court established under the present Constitution. Section 48 of the Courts (Supplemental Provisions) Act 1961 provided, *inter alia*, that the Act of 1924 applied to the judges of the then newly established Circuit Court "as if it were enacted in this Act".

71 Thus, for all the purposes of the present proceedings, the applicant is subject to and entitled to the protection of Article 35.4.1° of the Constitution to the same extent as a judge of the High Court or of the Supreme Court. Technically, he is protected by a legislative rather than a constitutional provision. But that is a distinction of no consequence. The legislature has decided to confer on judges of the Circuit Court tenure equivalent to the constitutional protection.

72 The words of Article 35.4.1° impose no express restriction on the exercise by the two Houses of the Oireachtas of their power to pass resolutions calling for the removal of judges other than that such resolutions be grounded on "stated misbehaviour or incapacity". The debate on the appeal has concerned the extent to which, by reference to history, to other provisions of the Constitution, to the independence of the judiciary, to the principle of separation of powers, to the need to respect fair procedures or otherwise, this court should interpret the Article as requiring the observance of particular procedures, as submitted on behalf of the applicant. It is necessary to consider these several aspects of the matter in turn.

General principles of constitutional interpretation

73 This court has, in a number of its decisions, referred to criteria governing the correct approach to the interpretation of the Constitution. As is to be expected, different interpretative elements are emphasised in individual judgments according to the particular context in which questions arise and the particular types of interpretative problem. Words denoting numbers, places or identified persons admit of no debate. On occasion, there is a narrow question as to the meaning in context of particular words of general import. In *The People v. O'Shea* [1982] I.R. 384, the court was divided on the issue of whether a provision for an appeal expressed in

general words should be interpreted as allowing a prosecution appeal of an acquittal in a criminal case. On other occasions, broader or more philosophical questions arise, such as the nature of fundamental rights. A correct balance has to be struck between the effect to be given to the literal meaning of particular words and the need to have regard to the terms of the Constitution as a whole. One particularly authoritative statement is that found in the judgment of O'Higgins C.J., speaking for a majority of the Court, in *The People v. O'Shea* [1982] I.R. 384 at p. 397:-

> "The Constitution, as the fundamental law of the State, must be accepted, interpreted and construed according to the words which are used; and these words, where the meaning is plain and unambiguous, must be given their literal meaning. Of course, the Constitution must be looked at as a whole and not merely in parts and, where doubt or ambiguity exists, regard may be had to other provisions of the Constitution and to the situation which obtained and the laws which were in force when it was enacted. Plain words must, however, be given their plain meaning unless qualified or restricted by the Constitution itself. The Constitution brought into existence a new State, subject to its own particular and unique basic law, but absorbing into its jurisprudence such laws as were then in force to the extent to which these conformed with that basic law."

74 In his dissenting judgment in that case, Henchy J., at p. 426, laid greater emphasis on a broad approach to interpretation:-

> "Any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation. It may be said of a constitution, more than of any other legal instrument, that 'the letter killeth, but the spirit giveth life'. No single constitutional provision … may be isolated and construed with undeviating literalness."

The latter passage was cited with approval by Keane C.J. in *The People (Director of Public Prosecutions) v. M.S.* [2003] 1 I.R. 606 at p. 619.

75 Murray J., having cited the passage from the judgment of O'Higgins C.J. in his judgment in *Sinnott v. Minister for Education* [2001] 2 I.R. 545 at p. 679, went on to state:-

> "It is axiomatic that the point of departure in the interpretation of a legal instrument, be it a constitution or otherwise, is the text of that instrument, albeit having regard to the nature of the instrument and in the context of the instrument as a whole."

76 The result can be expressed as follows. Where words are found to be plain and unambiguous, the courts must apply them in their literal sense.

Where the text is silent or the meaning of words is not totally plain, resort may be had to principles, such as the obligation to respect personal rights, derived from other parts of the Constitution. The historical context of particular language may, in certain cases, be helpful, as explained by O'Higgins C.J. in the passage quoted above. Geoghegan J., when considering the meaning of the term "primary education" in Article 42.4 of the Constitution in his judgment in *Sinnott v. Minister for Education* [2001] 2 I.R. 545, said at p. 718 that it was "important in interpreting any provision of the Constitution to consider what it was intended to mean as of the date that the people approved it". Hardiman J., at p. 688, thought that it was "beyond dispute that the concept of primary education as something which might extend throughout life was entirely outside the contemplation of the framers of the Constitution".

77 This is not to say that taking into account the historical context of certain provisions of the Constitution excludes its interpretation in the context of contemporary circumstances. O'Higgins C.J. in *The State (Healy) v. Donoghue* [1976] I.R. 325 observed at p. 347 that "… rights given by the Constitution must be considered in accordance with the concepts of prudence justice and charity which may gradually change and develop as society changes and develops and which falls to be interpreted from time to time in accordance with prevailing ideas". Again in the *Sinnott v. Minister for Education* [2001] 2 I.R. 545, Murray J. stated at p. 680:-

> "Agreeing as I do with the view that the Constitution is a living document which falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores, this does not mean, and I do not think it has ever been suggested, that it can be divorced from its historical context."

Hardiman J. at p. 688 referred to general theories of interpretation in the following terms:-

> "Tensions are said to exist between the methods of construction summarised in the use of adjectives such as 'historical', 'harmonious' and 'purposive'. In my view, much of this debate is otiose, because each of these words connotes an aspect of interpretation which legitimately forms part, but only part, of every exercise in constitutional construction."

78 Thus, the natural and usually the logical starting point in every case, will be the words used. Some of the words in Article 35.4.1° are clear and unambiguous. A judge cannot be removed other than in accordance with Article 35.4.1°: both Houses must pass the required resolution; the resolution must call for the judge's removal. This apparently refers to the resolution as proposed. A resolution of one House alone will not suffice. It

is also clear, by necessary implication, that the resolution itself must specify the "misbehaviour or incapacity," as the case may be (or indeed, though not relevant in this case, the "incapacity") which purports to justify the judge's removal.

79 Apart from these matters, Article 35.4.1° is silent. It does not define misbehaviour or state whether misbehaviour relates to the performance of judicial duties or may be misbehaviour of a general kind. Article 35.4.1° prescribes no procedures to be followed by the Houses of the Oireachtas. Article 15.11.1°, however provides that: "All questions in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present and voting other than the Chairman or presiding member". In particular, Article 35.4.1° contains no guidance on the power of the Houses to appoint investigating committees or the powers it may delegate to any such committees.

80 In these circumstances, it is reasonable to consider whether there is any history or background to the enactment of the Constitution capable of elucidating what was in the contemplation of the framers. More particularly, however, it will be necessary to consider the constitutional context of Article 35.4.1°. Three elements, in particular, are relevant. They are: firstly, the function and standing of the judiciary in the constitutional scheme and the provisions for protection of that role; secondly, the express power conferred on the Oireachtas by the Article and the correct balance between the exercise of that power and the distribution of powers generally in the Constitution; thirdly, the obligation to respect constitutional principles of fairness and justice in the exercise of that power.

History

81 The wording of Article 35.4.1° is identical to all intents and purposes to that of article 68 of the Constitution of Saorstát Éireann, save principally for the addition of an express requirement that the resolution should be one "calling for his [the judge's] removal". This strict and exclusive means of removing judges from office has thus, though not used to date, been in force since the foundation of the State.

82 The parties have provided the court with a great deal of potentially useful information about the history throughout the common law world of provisions governing the removal of judges from office. Ultimately, Article 35.4.1° must be interpreted in its own terms in the constitutional context in which it appears.

83 There are several special aspects of British constitutional history. The British parliament enjoyed a number of powers, apart entirely from the remedy of an address from both Houses. The most notable of these was

that of impeachment, which involved the exercise of the judicial powers of parliament in respect of public officers, and whose history is traced back at least to the fourteenth century. Having fallen into disuse for several centuries, it was revived in the reign of James I but has been abandoned since 1805. There were other even more obscure provisions. It is prudent to be aware of their existence principally because their continued existence is clearly excluded by the unambiguous wording of Article 35.4.1° of the Constitution.

84 The first legislative protection of the tenure of judges in the British constitutional system was enacted by the Act of Settlement of 1701, an Act the principal purpose of which was to settle the royal succession. It represented a reaction to the abuses of the Stuart period, when judges held office at the will and pleasure of the Crown, so that they could be removed (and sometimes were) for pronouncing judgments which did not please the monarch. The Act provided:-

> "Judges Commissioners be made *Quamdiu se bene gesserint* [during good behaviour], and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them."

By an Act of the British Parliament the Commissions and Salaries of Judges Act (1 Geo. III, c. 23), (1760), this provision became applicable notwithstanding the demise of the king and was extended to Ireland, in 1781, when the Irish parliament passed a statute (21 and 22 Geo. III, c. 50) entitled "An Act for securing the independency of judges, and the impartial administration of justice …". The tenure of the judges was, to continue "in full force during their good behaviour … notwithstanding the demise of the King …" and, as s. 3 provided, they might be removed "upon the address of both Houses of Parliament". That Act was repealed by the Statute Law Revision (Pre-Union Irish Statutes) Act 1962.

85 Section 13 of the Supreme Court of Judicature (Ireland) Act 1877 (40 & 42 Vict., c. 57) (corresponding to the English Act of 1875) provided tenure for judges of the two divisions of the new Supreme Court of Judicature (but not of what the Act called "inferior courts") in practically identical terms to that which had existed since 1781 in Ireland:-

> "Every judge of the High Court of Justice other than the Lord Chancellor, and every ordinary judge of the Court of Appeal shall hold his office for life, subject to a power of removal by Her Majesty on address by both Houses of Parliament."

86 This was the immediately previous statutory background to the drafting and adoption of the Constitution of Saorstát Éireann.

87 In addition, the framers of that Constitution were in a position to and the evidence suggests that they did consult relevant provisions of the

constitutions of what were then called the Dominions. Section 99(1) of the Constitution (Canada) Act 1867, an Act of the British Parliament (30 & 31 Vict., c.3), provided:-

> "the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and Houses of Commons."

Section 72 of the Australian Constitution of 1900 provided:-

> "The Justices of the High Court and of the other courts created by the Parliament:-
>
> …
>
> ii shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity."

The South Africa Act 1909, establishing the Union of South Africa, contained a practically identical provision (s. 101). All prior versions were expressed in permissive terms; in the Australian version this became: "shall not be removed except". No doubt, the condition of good behaviour had been treated as implicit from 1700, but the Australian and South African versions permitted removal only on "the ground of proved misbehaviour or incapacity". In article 68 of the Constitution of Saorstát Éireann, "proved" becomes "stated," the term retained in Article 35.4.1° .

88 It is generally accepted that the framers of the Constitution of 1922 consulted widely among the constitutions of the common law countries. Kingsmill Moore J., in his judgment in *O'Byrne v. Minister for Finance and the Attorney General* [1959] I.R. 1, having recited much of this history, said at p. 63:-

> "Whereas both the earlier enactments and the American Constitution provide for fixity of tenure during good behaviour, the American Constitution does not contain a prohibition against removal save on an address from both Houses which is to be found in the Constitution of South Africa and in the Constitution of the Commonwealth of Australia, and which is reproduced in the Constitution of the Free State. It is clear that the framers of the Free State Constitution had before them, considered, and adopted this provision, taking it from some source other than the United States Constitution and presumably from one of the Dominion constitutions to which I have referred."

89 The only point that can be gleaned from all of this history is that it was considered necessary both in Great Britain, at least since the abandonment of parliamentary trial by impeachment sometime after 1805, and the Dominions to have a resolution of both Houses of Parliament, taking the form of an address to the sovereign or the sovereign's representative, in

order to remove a judge from office. It was implicit rather than explicit that such an address would be grounded on misbehaviour. Ultimately, Article 35.4.1° of the Constitution is expressed in more absolute and clearer terms than any of the preceding enactments. However, the sections themselves offer no direct assistance in the resolution of the very precise procedural issues raised on this appeal.

90 The applicant has, of course, to a great extent in the High Court and to a more limited extent in this court relied on the historic parliamentary practice whereby the Houses of Parliament caused a committee, sometimes a select committee, sometimes a committee of the whole House, to report on the alleged misbehaviour of a judge before debating a resolution. At most, all this establishes is that parliaments have over the centuries resorted to the use of committees to investigate contentious or complex matters.

91 The case of Sir Jonah Barrington, a judge of the Irish Admiralty Court, is both the most celebrated and the most instructive. It is the only reported case in which a judge has been removed pursuant to an address of both Houses. In 1828, the House of Commons requested the Commissioners of Judicial Inquiry in Ireland to provide a report on the state, particularly the financial state, of the Admiralty Court over which Sir Jonah presided. A report of the commissioners and other documents were laid before the House and referred to a select committee. The select committee, after a full investigation, including hearing the evidence of the judge, reported that he had been "guilty of malversation in office". Thereafter, there were hearings separately before each House, each of which passed a resolution in the form of an address, which was duly presented to the King, who caused him to be removed from office.

92 The Senate of the United States of America, prior to 1935, according to a longstanding tradition sat *in banc* for the conduct of, including the taking of evidence in, impeachment trials. No doubt this presented no great problem during the early years of the Republic, when the number of senators, being two *per* state, was necessarily small; there were twenty six members at the beginning. As the number of states and the volume of legislative work grew, it was generally seen as "more than inefficient and inconvenient" (see Napoleon B. Williams, *The Historical and Constitutional Bases of the Senate's Power to Use Masters or Committees to receive evidence in Impeachment Trials* (1975) 50 NYU Law Review, 512 at p. 516). In 1935, the Senate adopted "Rule of Procedure and Practice in the Senate when sitting on Impeachment Trials XI." That rule authorises the Senate to "appoint a committee of twelve senators to receive evidence and take testimony …" An immediate cause of the adoption of the rule was the high rate of absenteeism of senators at the then recent trial of a judge (Williams, *ibid*., p. 517). Having regard to the arguments on the present

appeal, it is instructive to consider the terms of the obligation of such a committee to report to the full Senate. It reads:-

> "The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate."

While Rule XI does not appear in terms to allow a committee to make findings of fact, White J. in his judgment in *Nixon v. United States* (1993) 506 U.S. 224, discussed later, spoke of it having a "fact finding" role.

Consideration of Article 35.4.1°

93 The power of the Houses of the Oireachtas to vote for the removal of a judge from the bench is hugely significant for all branches of government. The prescribed mechanism empowers the legislative organ to pass judgment on the fitness of a member of the judicial organ to continue to hold an office, which itself may supervise the performance of its constitutional tasks by the former. The executive branch, as in the present case, will, in practice, necessarily be involved. It has an obvious constitutional interest both in the independence of the judiciary and in the integrity of the holders of judicial office, and a corresponding interest in seeing that the power is not used irresponsibly. Article 35.4.1° is relevant to the confidence of the people in the performance by government of its constitutional functions and, not least, for the individual judge. It is necessary, when interpreting Article 35.4.1°, to consider the implications for each branch of government and for the entire constitutional scheme.

Judicial independence

94 Article 6 of the Constitution designates the powers of government as "legislative, executive and judicial" and as deriving "under God, from the people …". The Constitution prescribes the methods of choosing the persons who exercise those several powers and allocates tasks between the respective constitutionally designated organs. The judicial power is principally described in Article 34.1:-

> "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution …"

Thus, only judges appointed to such courts may administer justice. The importance of the judicial function in the carefully balanced constitutional scheme is underlined by two specific powers expressly assigned to the courts. Article 34.3.2° provides that "the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution …" Article 26 empowers the President to refer to the Supreme Court any Bill for its "decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or any provision thereof". These two provisions, and others, highlight the supreme importance of the tasks assigned to the courts by the framers of the Constitution. The courts are required to act as custodians of the Constitution and as such, to act as a check on the actions of the other two arms of government and to ensure that they act in accordance with the rule of law, respect individual constitutionally protected rights and observe the provisions of the Constitution.

95 It is inherent and essential for the performance of these functions that the independence and integrity of the courts be guaranteed and respected. Hence, Article 35.2 provides:-

> "All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law."

Provisions of Article 35, other than Article 35.4, give further effect to this fundamental principle. Article 35.3 provides:-

> "No judge shall be eligible to be a member of either House of the Oireachtas or to hold any other office or position or emolument."

Article 35.5 provides:-

> "The remuneration of a judge shall not be reduced during his continuance in office."

96 By these important provisions, the Constitution declares unambiguously the principle that courts and judges are independent of both the government and the legislature. Not content with that declaration, the Constitution gives concrete effect to the principle of judicial independence in the provisions cited, most pointedly in Article 35.4.1° itself. The principle of judicial independence does not exist for the personal or individual benefit of the judges, even if it may have that incidental effect. It is a principle designed to guarantee the right of the people themselves from whom, as Article 6 proclaims, all powers of government are derived, to have justice administered in total independence, free from all suspicion of interference, pressure or contamination of any kind. An independent judiciary guarantees that the organs of the State conduct themselves in accordance with the rule of law.

97 A necessary corollary of judicial independence is that the judges themselves behave in conformity with the highest standards of behaviour, both personally and professionally.

98 The most significant judicial pronouncements on the constitutional notion, as enshrined in the Constitution of Saorstát Éireann, of independence of the judiciary are to be found in the judgments of the former Supreme Court in *O'Byrne v. Minister for Finance and Attorney General* [1959] I.R. 1. The widow of a Supreme Court Judge claimed that the imposition of income tax on a judge's salary contravened the prohibition, contained in article 68 of the Constitution of Saorstát Éireann, on diminution of a judge's remuneration during continuance in office. Maguire C.J., speaking for the majority, held, at p. 38, that:-

> "The purpose of the Article is to safeguard the independence of judges. To require a judge to pay taxes on his income on the same basis as other citizens and thus to contribute to the expenses of Government cannot be said to be an attack upon his independence."

In his concurring judgment in the same case, at p. 64, Kingsmill Moore J. stated:-

> "… I must take into account the history of the legislation, the evil sought to be avoided and the nature of the remedy devised to avoid such evil. All these matters are plain from the titles and preambles to the statutes I have cited. The object was to secure the independence of the judges and the impartial administration of justice. The *legislation was for the protection of the people, not for the interests of the judges*" (emphasis added).

99 While those remarks concerned the diminution of judicial salaries, it cannot be doubted that they are at least equally applicable to the provisions of Article 35.4.1°. Judges enjoy a special constitutional protection from removal from office, in common with some other constitutionally designated persons. That protection is not intended to benefit individual persons holding judicial office. As individual human persons, judges are no more deserving of protection than any other office holder. The constitutional task that they perform requires them to be able authoritatively to resolve disputes between the three organs of government. They must be guaranteed the freedom to decide without fear or favour and, hence, that they be independent of the other branches of government.

Separation of powers

100 The doctrine of separation of powers, as already indicated, protects the independence of the judiciary. Equally, however, both the legislative and executive branch must be permitted to perform their allotted constitutional functions without improper encroachment from the other branches. The

classical and oft-quoted formulation of the doctrine remains that found in the judgment of the court delivered in *Buckley and others (Sinn Féin) v. Attorney General and Another* [1950] I.R. 67 by O'Byrne J., stating at p. 81:-

> "Article 6 provides that all powers of government, legislative, executive and judicial, derive, under God, from the people, and it further provides that these powers of government are exercisable only by or on the authority of the organs of State established by the Constitution. The manifest object of this Article was to recognise and ordain that, in this State, all powers of government should be exercised in accordance with the well-recognised principle of the distribution of powers between the legislative, executive, and judicial organs of the State and to require that these powers should not be exercised otherwise. The subsequent articles are designed to carry into effect this distribution of powers."

101 The court considered that principle extensively in its judgments in *T.D. v. Minister for Education* [2001] 4 I.R. 259. All judgments cited *Buckley and others (Sinn Féin) v. Attorney General and Another* [1950] I.R. 67 (save that Murphy J., by agreeing with Keane C.J., did so indirectly). That case concerned orders made by the High Court directing the State to act in vindication of the constitutional rights of a category of disadvantaged children by providing physical accommodation for them. The making of those orders was based on the proposition that the Constitution implied respective rights for individuals and correlative powers of the State and the courts.

102 This court, however, held on appeal, that the orders made by the High Court constituted an invasion of the executive power of the State. The case is, on its facts, sharply distinguishable from the present case, where the debated Article provides that a specified express constitutional function is to be performed exclusively by one organ of the State. Nonetheless, the judgments contain pronouncements of general application. For example, Denham J. stated at p. 300 of her dissenting judgment:-

> "In exercising the functions of State it behoves each organ of State to respect the other organs of State and their independence and functions and to act accordingly."

Murray J. stated at p. 331:-

> "… in order to avoid the paramountcy of one organ of State, each must respect the powers and functions of the other organs of State as conferred by the Constitution. Each must exercise its powers within the competence which it is given by that Constitution."

Hardiman J. stated at p. 359:-

> "It is right that the judiciary, within their constitutional sphere, should be quite independent of the legislature and the executive, but it is no less right that these, within their respective constitutional spheres, be independent of the judiciary."

103 Those statements are at a level of high generality, whereas more particular considerations are at stake in the present case. The present appeal makes it necessary for this court for the first time to pronounce on the limits, if any, on the powers conferred on the Houses of the Oireachtas by Article 35.4.1° of the Constitution. To that extent, it may be said to be unique. However, relevant precedent is not wanting. Since shortly after the enactment of the Constitution, the High Court and this court have had to exercise their constitutionally conferred powers to pronounce on the validity of legislation passed by the Oireachtas. They developed, in that context, the principle of the presumption that such legislation is in accordance with the Constitution. Shortly after the entry into force of the Constitution, in *Pigs Marketing Board v. Donnelly (Dublin) Ltd.* [1939] I.R. 413, Hanna J. stated at p. 417:-

> "When the Court has to consider the constitutionality of a law it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established."

104 This is a presumption universally applied ever since. The court has explained that the principle "… springs from, and is necessitated by, that respect which one great organ of State owes to another" (*per* O'Byrne J. in *Buckley and others (Sinn Féin) v. Attorney General and Another* [1950] I.R. 67, at p. 80). That presumption and the reasoning underlying it have more recently been held also to apply to resolutions of both Houses of the Oireachtas. In *Goodman International Ltd. v. Mr. Justice Hamilton* [1992] 2 I.R. 542, Finlay C.J., speaking with the agreement of a majority of the court, stated, at p. 586:-

> "I am satisfied that the presumption of constitutional validity which has been applied by this Court, in a number of cases, to statutes enacted by the Oireachtas and to bills passed by both Houses of the Oireachtas and referred to this Court by the President pursuant to Article 26, applies with equal force to these resolutions of both Houses of the Oireachtas. It seems to me inescapable that having regard to the fact that the presumption of constitutional validity which attaches to both statutes and bills derives, as the authorities clearly establish, from the respect shown by one organ of State to another, and by the necessary comity between the different organs of State, that it must apply in precisely the same way to a resolution of both Houses of the Oireachtas, even though it does not constitute legislation."

105 Hederman and McCarthy JJ. did not expressly refer to the presumption but agreed with the result proposed by Finlay C.J. Having recalled the principle of double construction and the presumption that "all proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed …" would also be conducted in accordance with the principles of constitutional justice (citing *McDonald v. Bord na gCon* [1965] I.R. 217 at p. 239; *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317), Finlay C.J. continued, at p. 587:-

> "In applying this principle to these resolutions and the issues arising in this case, clearly, in so far as the applicants contend for a constitutional invalidity in the resolutions setting up the Inquiry, this Court must presume that the proceedings of the Inquiry and the rulings and conduct of the Inquiry by the Tribunal will be in accordance with constitutional justice."

106 The foregoing provides clear authority for the broad proposition that the parliamentary procedures followed to date in respect of the resolutions to remove the applicant from office must be presumed, by the courts, to be constitutional. This presumption applies in particular to the amended standing orders and to the resolutions appointing the Joint Committee adopted in June, 2004.

107 More generally, the Constitution specifically and with all deliberation assigns the power to pass resolutions as provided for in Article 35.4.1° to the Houses of the Oireachtas and to no other body. It is an exclusive power. The words of Keane J., expressed in his judgment, with which a majority of the court agreed, in *Kavanagh v. The Government of Ireland* [1996] 1 I.R. 321 at p. 363, seem particularly relevant:-

> "… where the Constitution has unequivocally assigned to either the Government or the Oireachtas a power to be exercised exclusively by them, judicial restraint of an unusual order is called for before the courts intervene. That is also no more than recognition that, while all three organs of State derive their powers from the people, the Government and the Oireachtas are accountable, directly and indirectly, to the people in the electoral process."

108 In that case an attempt was made to contest the validity of the Government proclamation of 1972 that the ordinary courts are inadequate to secure the effective administration of justice and preservation of public peace and order.

109 It is important to any consideration of the use by the Houses of the Oireachtas of their powers to mention Article 15.10 of the Constitution, which, so far as relevant reads:-

> "Each House shall make its own rules and standing orders, with power to attach penalties for their infringement …"

110 This court made brief reference to this constitutional provision in *O'Malley v. An Ceann Cómhairle* [1997] 1 I.R. 427, where the court affirmed a High Court decision refusing to grant leave to apply for judicial review of a decision of the Ceann Cómhairle disallowing part of a question put down for answer by a minister. O'Flaherty J. (Murphy and Lynch JJ. concurring) stated at p. 431:-

> "How questions should be framed for answer by Ministers of the Government is so much a matter concerning the internal working of Dáil Éireann that it would seem to be inappropriate for the court to intervene except in some very extreme circumstances which it is impossible to envisage at the moment. But, further, it involves to such a degree the operation of the internal machinery of debate in the house as to remain within the competence of Dáil Éireann to deal with exclusively, having regard to Article 5, s. 10 of the Constitution."

111 The Supreme Court of the United States has had occasion from time to time to consider the corresponding provision of the Constitution of the United States. Article 1.5 provides: "Each house may determine the rules of its proceeding …" In *United States v. Ballin* (1892) 144 U.S. 1, the court declined to consider whether an Act of Congress had been validly passed. The following *dictum* appears in the judgment of the court, delivered by Brewer J., at p. 5:-

> "The Constitution empowers each house to determine its own rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by a rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just."

112 In *Nixon v. United States* (1993) 506 U.S. 224, a judge was impeached before the Senate of the United States, having been convicted of making false statements before a federal grand jury in a matter concerning acceptance by him of a bribe. The Senate convicted him on articles of impeachment prepared by the House of Representatives and removed him from office. The Senate had appointed a committee pursuant to its impeachment rules already mentioned. In subsequent proceedings, the judge claimed that the rule authorising the appointment of the committee violated the Federal Constitution's impeachment trial clause. The majority of the Supreme Court rejected the former judge's claim as being non-justiciable. White J., with whom Blackmun. J. concurred, did not agree that the matter was non-justiciable. Unlike the majority, therefore, which did not reach the issue, he considered the challenge to the Senate Rule on its merits. That judgment is

of some interest in the present context. Following a historical account which treads some of the ground described earlier in this judgment, White J. concluded, at p. 250, that the trial clause of the United States Constitution "was not designed to prevent employment of a fact finding committee." He continued:-

> "In short, textual and historical evidence reveals that the Impeachment Trial Clause was not meant to bind the hands of the Senate beyond establishing a set of minimal procedures. Without identifying the exact contours of these procedures, it is sufficient to say that the Senate's use of a fact-finding committee under Rule XI is entirely compatible with the Constitution's command that the Senate 'try all impeachments'."

113 These decisions of the Supreme Court of the United States can have persuasive value only to the extent that they relate to the interpretation of analogous provisions of our Constitution and are consistent with the approach of our courts to issues of interpretation. There is no apparent difference of substance between the power conferred on the Houses of the Oireachtas by Article 15.10 of the Constitution, "to make its own rules and standing orders," and that of the Houses of the United States Congress to "determine the rules of its proceeding …". The approach of the United States Supreme Court in the two cases cited (in one case, in a minority opinion) is not significantly different from that expressed on behalf of this Court by O'Flaherty J., as already quoted, in *O'Malley v. An Ceann Comhairle* [1997] 1 I.R. 427. O'Flaherty J. in an *obiter dictum*, somewhat like Brewer J. in *Ballin v. United States* (1892) 144 U.S. 1, hinted at possible limits to the deference which the judicial arm owes to the legislative arm of government, when he said at p. 431:-

> "Yet if, for example, the Government used its majority in the Dáil and Seanad to prevent the Oireachtas holding at least one session per year (Article 15, s. 7); or if the Dáil did not meet within thirty days from the date of a general election (Article 16, s. 4, sub-s. 2) is it to be said that the courts would not have a jurisdiction to intervene? Since the court is not called on to resolve these questions now, it is sufficient to state that the problem posed for resolution here is a different one."

Constitutional justice; fair procedures

114 It is not contested by the Attorney General or by or on behalf of the Houses of Oireachtas that the applicant, faced with a resolution calling for his removal from the bench for stated misbehaviour, is entitled to full plenitude of the protection of all of the rules of fair procedures guaranteed

by the Constitution. The applicant says that the corollary of the existence of the power to remove a judge from office is that the people have a right not to have judicial independence threatened or undermined through a process which falls short of full respect for the core value of judicial independence.

115 The standing orders of each of the Houses contains, as already seen, an express recognition of these principles as applicable to the select committee:-

> "The Select Committee shall at all times have due regard to the constitutional principles of basic fairness of procedures and the requirements of natural and constitutional justice."

116 The resolutions passed on the 3rd June, 2004, contain substantially similar provisions. In fact, the applicant has been heard by the committee through his solicitors and counsel on several occasions and has made no complaint regarding the fairness of the procedures which have, in fact, been followed.

117 The applicant's complaint is that the procedures adopted by the Houses are not capable of meeting the admitted standards of constitutional fairness. His complaint relates to the entire structure of the Joint Committee and the reporting system established by the standing orders.

118 The core of the complaint is that the remit of the committee is that it will simply collect evidence and that it will not and cannot do anything more (standing order 63A(2)). The committee will not consider what evidence should or should not be heard. It will have no power to rule on the admissibility of evidence, to consider and weigh the credibility of witnesses or their expertise. Examination of the applicant's computer and hard drive will require the hearing of experts who are appropriately qualified in matters of information technology to enable them to give expert opinion on the presence, absence or function of the "trojans" or viruses said to be on that hard drive. Consequently, the entirety of all evidence gathered, including expert evidence, whether in the form of transcripts or video or audio tapes and any documentary evidence, will simply be gathered and handed over in an entirely undigested form to all the members of each House.

119 It is submitted, that the result will be, accordingly, that there cannot be a fair hearing before either House. The members cannot reasonably or realistically be expected to absorb and consider such evidence, "in all its abundance," in such undigested form. The applicant complains that he will not be allowed to give or call witnesses or otherwise produce evidence before either House. Counsel for the respondents dispute this and says that there is nothing to prevent such evidence being given as is required.

Constitutionality of s. 3A of Act of 1997

120 The court, in accordance with long established principles, must presume that legislation duly enacted by the Oireachtas is in conformity with the Constitution. The courts, as the judicial arm, must accord due respect to laws passed by the Oireachtas, the designated organ of State with the exclusive power to pass laws.

121 This principle has particular significance in the case of the section under attack. It was passed for the particular purpose of assisting the Oireachtas in the performance of its exclusive and important function of considering a resolution proposing the removal of a judge from his judicial office. In order to do so, the Houses of the Oireachtas are obliged by the Constitution to consider whether the judge in question has been guilty of misbehaviour. This is a weighty responsibility. It necessarily involves the Houses in an investigation of acts alleged against a judge.

122 The applicant contends that a requirement that the judge appear before the committee constitutes an encroachment on the independence of the judiciary. He argues that a resolution may be proposed on the basis of a mere allegation.

123 It is axiomatic that any resolution proposed pursuant to Article 35.4.1° of the Constitution will involve some sort of intrusion into the life or affairs, public or private, of the judge. That is the nature of the function assigned to the Oireachtas. For reasons given elsewhere in this judgment, it is to be presumed that the powers of the House of the Oireachtas will be exercised in respect of the principles of basic fairness and constitutional justice. Furthermore, the courts will, if necessary, protect the independence of the judiciary and the rights of an individual judge from irresponsible, irrational or malicious abuse of these powers.

124 In the light of these basic principles, the court considers that there is no ground for challenge to the power of a Committee of the Houses of the Oireachtas to call a judge before it or to require him or her to produce documents or other things, which the Committee considers necessary for its investigation of matters relating to a motion duly proposed pursuant to Article 35.4.1°. It is legitimate for the Committee to ask a judge to provide relevant documents and articles.

125 The court does not consider that the power to call a judge as a witness or to produce articles as evidence involves any improper or unconstitutional invasion of judicial power or judicial independence. On the contrary, the power is included in the Constitution for the purpose of ensuring the fitness and integrity of the judiciary. The court finds nothing unconstitutional in the impugned provision.

Conclusion on interpretation of Article 35.4.1°

126 The first key question of interpretation is whether the Houses of the Oireachtas may or may not appoint a committee, joint or otherwise, for the purpose, to use a neutral term, of assisting them in their consideration of a resolution pursuant to Article 35.4.1° of the Constitution. While the applicant does not question the power of the Houses to appoint a committee with appropriate powers, the court must express its opinion on the point, as it is an essential link in the reasoning. The second, related question is whether, assuming the power to appoint a committee, it may be of the type which has been adopted by the Houses in their amended standing orders or whether, as the applicant contends, any such committee must have power to assess, evaluate and report findings on the evidence heard.

127 Article 35.4.1° is entirely silent on both these questions. It does not require the Houses to appoint committees, nor does it prescribe any particular type of committee. It would not be right, however, to treat Article 35.4.1° as containing a complete code. The Article must be read with other relevant provisions of the Constitution. It is necessary to consider whether a requirement to operate through committees of any particular kind should be read into the provision.

128 The principle of the separation of powers, combined with Article 15.10 of the Constitution, is necessarily relevant. The Oireachtas is the body exclusively charged with considering whether a judge has so misbehaved (or is so incapacitated) as to render him or her no longer fit to hold the office of judge under the Constitution. Whether or not it is unsatisfactory or undesirable that elected political representatives should sit in judgment on the behaviour of a judge, whether the power is open to abuse through a government's use of its majority in the Oireachtas, whether, as has been suggested, a simple majority vote, as provided by Article 15.11, should not suffice are all irrelevant. The Constitution is clear. A judge may be removed from office only by means of a resolution of both Houses and by no other means whatever.

129 Two observations may, nonetheless, legitimately, be made. Firstly, there is no evidence whatever in the history of this State or, indeed, of any of the countries of the common law, in modern times that the corresponding power of removal of judges has ever been abused by government. As has been submitted on behalf of the tenth and eleventh respondents, the constitutional history lends little support to the applicant's stated apprehension of infringements of judicial independence. The material placed before the court includes many examples of parliamentary restraint in considering the exercise of the power. Secondly, though the matter need not be

considered in this case, in the event of irrational or irresponsible abuse of the power, as by the proposal of a resolution in response to an unpopular judicial decision, or otherwise maliciously or in bad faith, it is not to be doubted that the courts would be prepared to exercise an appropriate level of judicial review. They would have a duty, apart entirely from their duty to guarantee fair procedures, to preserve the constitutional balance and to protect a judge from abuse of power. The *obiter dictum* of O'Flaherty J. in *O'Malley v. An Ceann Cómhairle* [1997] 1 I.R. 427 suggests that the courts would not, in a clear case, permit even the Oireachtas to default on its constitutional obligations.

130 Since the Houses of the Oireachtas have the exclusive power to consider the passing of resolutions for the removal of a judge from office, the courts must, in accordance with the principle of the separation of powers, exercise a significant level of judicial restraint when considering the exercise of that power. The applicant has not, in these proceedings, challenged the right of the Houses of the Oireachtas to pass resolutions for the purposes of Article 35.4.1°. He does not deny to the Oireachtas the power to investigate allegations of misbehaviour by a judge, to find facts and, inherent in the constitutional allocation of that function, to decide what constitutes such misbehaviour as would warrant the removal of a judge from office. The applicant demands only that the procedures followed by the Houses meet the fundamental constitutional requirements of fairness and justice. The court is asked to decide that the procedures proposed do not meet that standard.

131 The Houses of the Oireachtas explicitly guarantee in the measures already adopted and in the resolutions proposed to respect the "principles of basic fairness of procedures and the requirements of natural and constitutional justice" (see standing orders 63A(5) and 60A(5)). By the use of this language, the Houses have rightly and necessarily undertaken to accord to the applicant the procedural rights historically and universally seen as essential, where a person's good name, livelihood, liberty or other rights are at stake. This court, in *In re Haughey* [1971] I.R. 217 unambiguously declared that they were guaranteed by Article 40.3 of the Constitution.

132 It is necessary to identify a standard by which the court can measure whether a designated organ of government is falling or is likely to fall short of its constitutional obligations.

133 Murray J. in *T.D. v Minister for Education* [2001] 4 I.R. 259 at p. 337, considered the circumstances in which a court might consider making an order directing, in that case, the executive to fulfil a legal obligation. He said:-

> "I have already made the distinction between 'interfering' in the actions of other organs of State in order to ensure compliance with the Constitution and taking over their core functions so that they are exercised by the courts. For example, a mandatory order directing the executive to fulfill a legal obligation (without specifying the means or policy to be used in fulfilling the obligation) *in lieu* of a declaratory order as to the nature of its obligations could only be granted, if at all, in exceptional circumstances where an organ or agency of the State had disregarded its constitutional obligations in an exemplary fashion. In my view the phrase 'clear disregard' can only be understood to mean a conscious and deliberate decision by the organ of state to act in breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness."

134 The standard of "clear disregard" was used, in that case, in the somewhat different context of an order directed to the government to make provision for certain disadvantaged children. The legal basis for the adoption of this standard was, however, the fact that the matters at issue fell primarily within the executive province of government. The standard should also be applied, in the opinion of the court to the performance of the exceptional and sensitive function constitutionally assigned to one organ of government, the legislature, of removing of judges from office. It accords with the presumption of constitutionality.

135 The applicant claims that it is necessary, in order to assure the basic fairness of the procedures proposed, that the Houses appoint a committee to investigate, gather evidence and report their findings and conclusions to the Houses. It is not open to the courts to read such extensive additional provisions into the Constitution in the absence of a constitutional mandate. Article 35.4.1° must be read in the light of Article 15.10. Insofar as the former provision is silent as to matters of procedure, it must be recalled that Article 15.10 empowers each House to make its own "rules and standing orders," and places no express limits or restrictions on that power. It is acknowledged, of course, as already stated, that the Houses must respect constitutional justice and fair procedures.

136 There is nothing, therefore, in either Article 35.4.1° or Article 15.10 to prevent the Houses from adopting standing orders providing for the establishment of a committee to investigate the question of whether a judge has been guilty of "stated misbehaviour," as alleged in a resolution "calling for his removal," which has been duly proposed pursuant to Article 35.4.1°. It is the proposal of the resolution that confers that power. Having regard to the draconian character of that power, it is clear that neither a House of the Oireachtas nor any of its committees would have power to

investigate alleged misbehaviour by a judge in advance of and merely in contemplation of the possible proposal of such a resolution.

137 Having regard to the potentially complex nature of any allegation of misbehaviour, it is obvious that any house of any parliament charged with the performance of this constitutional function will need to use a committee to gather evidence. Apart from its being obvious and uncontested, it has been demonstrated that it has been historically the practice of parliaments to appoint committees and assign to them, to varying degrees, the role of investigation.

138 The nub of the applicant's complaint is that the Houses do not have power to appoint a committee of the sort provided for respectively by the new standing orders 63A and 60A respectively of the Dáil and Seanad, containing the key provision:-

> "… provided that the Select Committee shall make no findings of fact nor make any recommendations in respect of same or express any opinions in respect of same."

139 However, neither Article 35.4.1° nor Article 15.10 prohibits the Houses of the Oireachtas from adopting such a provision. Ultimately, this court could conclude that this provision was beyond the power of the Houses only if it was clear that it would be, recalling the *dictum* of Murray J., cited above, in "clear disregard" of the right of the applicant to the benefits of basic fairness of procedures and constitutional justice. As is clear from the terms of the standing orders themselves, the committee must "at all times have due regard to the constitutional principles of basic fairness of procedures and the requirements of natural and constitutional justice". It follows, therefore, that the applicant's complaint is necessarily narrowed down to an issue of whether he can show that the procedure before each House, following receipt of the committee's report, will necessarily be in clear disregard of those principles.

140 Part of the applicant's complaint is that he will not have the right to give or call witnesses before the Houses. This contention is apparently based on the assumption that all of the evidence will have been taken by the committee. However, there is nothing in the standing orders to prevent the Houses hearing evidence, however unprecedented that course of action might be. Insofar as the applicant claims that that possibility must be open if constitutional justice is to be respected, then it follows that the Houses must be open to considering further evidence. More generally, the applicant complains that it is, in general, highly unsatisfactory to expect all the members of each House to consider, absorb and adjudicate upon the great mass of evidence which will be placed before them.

141 No doubt, it is true that it will be difficult for an entire House of the Oireachtas to perform those tasks as each individual member must make

his or her own decision on the issues raised by the resolution. But that is of the very nature of the process laid down by the Constitution. Whether the debate upon the resolutions takes place upon consideration of the considered report and opinion of a committee, as the applicant proposes, or on the "undigested" evidence as envisaged by the standing orders, the task for the elected members will be extremely difficult. It is important to recall that the applicant, even while advocating the first type of committee, submits that its opinions on the evidence or otherwise would not be binding.

142 The court accepts that it might well have been more satisfactory for the Houses to have opted for the first type of committee. A committee empowered to hear evidence, rule on admissibility, resolve conflicts of evidence and report its findings to the Houses would have had obvious advantages. The committee would have been in a position to schedule hearings, hear and evaluate the evidence of witnesses, eliminate irrelevant material, concentrate on the principal points at issue and furnish a coherent and cogent report to the Houses. In the opinion of the court it would have been open to the Houses to have chosen such a committee, but they have not done so. It may well be that the Houses were concerned that such a committee could not validly be appointed, having regard to the decision of this court in *Maguire v. Ardagh* [2002] 1 I.R. 385. If so, it should be said that, so far as the power to appoint a committee was concerned, that case related to the question whether the Oireachtas had inherent implied power to appoint committees to investigate the behaviour of individuals. It has no application to a case where the Oireachtas is acting in the exercise of a power expressly conferred on it by the Constitution.

143 In any event, the court is satisfied that it was within the power of the Houses of the Oireachtas to adopt standing orders 63A and 60A respectively and to depute to the Select Committee the power to report without making findings of fact, making recommendations or expressing opinions. The court is satisfied that the committee and, following the report of the committee, the Houses can, as it is agreed they must, accord to the applicant his full rights to constitutional justice and fair procedures.

144 It should be added that the powers of the committee need not be interpreted as restrictively as the applicant suggests. It is true that the standing orders preclude the committee from: (a) making findings of fact; (b) making any recommendations concerning the facts; (c) expressing any opinions in respect of same. It is not correct, however, to suggest that the committee is required merely to place all the evidence gathered in an entirely undigested and disorganised form before each House. Paragraph (8) is material. Its says that "[f]ollowing the completion of its proceedings, the Select Committee shall furnish a report of those proceedings to the Dáil, together with appropriate transcripts and associated audio-visual

material". There is a distinction between the report and the associated raw evidence which will be in the form of transcripts and audio-material. The paragraph proceeds to require that the "Committee shall first send its report to the Clerk of the Dáil, who shall arrange in the first instance for the report to be circulated to the members of the Dáil and to the Judge …" None of this prevents the committee, nor could it ever have been intended, from organising the evidence gathered into a manageable form. It may and probably must prepare indices and summaries of the evidence. Those summaries may be related to distinct issues of fact raised in the resolution including the introductory paragraphs of the resolution. The entire will, no doubt, be subdivided into chapter headings. While the committee may express no opinions, it is not prevented from pointing out issues or conflicts in the evidence. In short, the committee is required to produce a report which will act as a useful guide to the members for their consideration, when debating the resolution, and to the applicant and his advisers in representing him.

145 Properly understood, therefore, and in light of the explicit guarantees of basic fairness and respect for constitutional justice, the steps taken by the Houses of the Oireachtas to date do not infringe either Article 35.4.1°, Article 15.10 nor, indeed, any provision of the Constitution. The court therefore rejects the applicant's challenge to the standing orders.

146 At the hearing, an issue emerged, which had not figured explicitly among the grounds upon which leave to apply for judicial review was granted, but which is intimately related to the applicant's complaint concerning the committee's role in the conduct of the investigation of his alleged misbehaviour. The applicant's essential complaint is that the scheme adopted denies him the right to a decision on whether he, in fact, committed any of the acts alleged, prior to a debate on his removal. The essence of that complaint can, however, be transferred to the stage of the debate. The applicant's concern is that the members might debate and consider passing the resolutions as if they constituted one single issue, namely whether he should be removed from office for the misbehaviour stated in the resolutions. The applicant contends that there are, in truth, two distinct issues. The first is whether, as a matter of fact he is guilty of the misbehaviour alleged. He claims that there should, first, be an adjudication on that issue before either House goes on to consider whether he should be removed from office.

147 The applicant argues that a single vote might include among the majority passing the resolution deputies or senators who had not decided whether the allegations were true (or even who did not believe them to be true) but nonetheless voted for the resolution. Most precisely, he claims the

right to know whether or not the members accept that he engaged in the use of websites containing child pornography, as alleged.

148 It has to be repeated that this particular point, at least in the form in which it has been presented, did not figure among the grounds upon which leave to apply for judicial review was granted. Presumably, it could not have done. Neither the resolution nor the standing orders prescribe any particular mode of debating the resolution. Paragraph (9) of the standing order provides that the (respective) House "may by order make provision for the debate on the said Article 35.4.1° motion …" It proceeds to mention some of the rights guaranteed to the applicant and concludes with "such special rules of procedure as may be deemed appropriate". Therefore, it is open to the Houses to adopt a rule providing either for a single vote on the resolution to remove or to divide the issue in the manner for which the applicant contends. In that sense, it is clear that, in the ordinary way it is premature to deal with this matter. However, this is a quite exceptional case in very many respects. It is the only case in which this court has ever been asked to pronounce on the interpretation of Article 35.4.1°. The argument on the debate procedure is logically quite closely linked with the applicant's principal criticism of the Oireachtas scheme. Although the Houses have not yet indicated which course they are bound to follow, their counsel took the stand that it was premature to conclude whether there would be any want of fair procedures.

149 This appeal places the court in an exceptional position in relation to another great organ of state, the Oireachtas. In the view of the court, it should take the opportunity, having regard to the several circumstances mentioned in the preceding paragraph, to provide constructive guidance to the Houses in the exercise of its unique constitutional power to remove a judge from office. It is undesirable and would not be in the public interest to leave this matter in a state of uncertainty until the matter reaches the stage of debate before the two Houses.

150 It is certainly within the power of the Houses of the Oireachtas, particularly having regard to Article 15.10 of the Constitution, to regulate their own procedures. The courts should intervene only where it is clear that a particular course of action would be in clear breach of the principles already frequently mentioned of basic fairness and constitutional justice. A resolution proposing the removal of a judge from office for "stated misbehaviour" necessarily and logically involves consideration of two distinct matters. The first is whether the judge, who is the subject of the resolution, has committed the acts alleged against him. The second is whether those acts constitute such misbehaviour as would justify his being removed from his judicial office.

151 It is undesirable to speculate on the possible outcome of the investigation of the Joint Committee or of the debate in the Houses. It suffices to say that it is not inevitable that one clear result will emerge. Findings may be partial or equivocal; issues of intent or accident may arise; there may be explanations, some meritorious, some less so. It is conceivable that some but not all of the facts alleged will be established to the satisfaction of members to be true. All these issues would merge into the single resolution for removal, unless the issues are separated.

152 It is the opinion of the court that, as a matter of basic fairness, the applicant should be entitled to a distinct hearing and decision on the issues of fact before he must confront the ultimate and drastic decision to remove him from office. Some support is to be found in the words of Article 35.4.1°. The first part of the sentence declares that a judge may not be removed "except for stated misbehaviour or incapacity". The second part goes on to provide that this may happen: "and then only upon resolutions passed …". These remarks are not intended to impose onerous legal requirements on the Houses. They retain a large area of discretion as to how the resolutions are put. They are not necessarily obliged to break the allegations against the applicant into several components. They may decide that the factual issues may fairly be expressed in the form of a single proposition.

Conclusion on s. 3 order

153 The applicant has not, in this court, pursued his argument that the direction made by the Committee on the 1st December, 2004, infringed his right not to be forced to incriminate himself. It is important, nonetheless, to draw attention to the nature of the power conferred on a Select Committee of a House of the Oireachtas by s. 3(1)(c) of the Act of 1997. The committee has power to "direct in writing any person to send to the committee any document in his or her possession or power specified in the direction …" The term "document" is defined by s. 1 as including a "thing".

154 It is common case that this section is capable of being applied to the applicant. The dispute relates only to the nature of the materials being sought from him. It is also common case that these materials are in the possession of An Garda Síochána and that this possession arose from their seizure by members of that force pursuant to the unlawful, and as held by the learned Circuit Court Judge, unconstitutional execution of a search warrant. While originally held for the purposes of the then pending trial of the applicant, it has subsequently been retained following correspondence with the chairman of the committee. In correspondence in July, 2004, summarised in the judgment of the court, the applicant accepted that he had

sought access to adult pornography and that he became aware that his computer had been invaded by unwanted images. He said that he had at no time knowingly brought images of child pornography onto his computer.

155 It is not strictly necessary to review the argument that the s. 3 order unconstitutionally requires the applicant to incriminate himself. It has not been pursued in this court. However it is appropriate to draw attention to the distinction between a requirement that a person make a statement or give evidence which may tend to incriminate him and a requirement that a person produce for inspection, whether by An Garda Síochána or other organs of the State, a physical article, including a document. The first right or privilege is recognised in our law and protected by the Constitution and, incidentally by the European Convention on Human Rights and Fundamental Freedoms, and it is not necessary to say any more about it in this case. The State or designated state organs have power to demand the production for inspection or examination of articles, premises, animals, licenses or other documents or things pursuant to a host of regulatory laws. For the investigation of crime, An Garda Síochána have certain powers, regulated by statute, subject sometimes, but not always, to judicial supervision, to enter upon and search premises, including dwelling houses, and to take away articles to be used as evidence for the purpose of investigating crime. The last type of power may require the owner of the dwelling house to permit the search to take place and cooperate with the gardaí in finding materials to take away. It cannot be said that this type of power involves any element of self-incrimination. This distinction is well described in the important decision of the European Court of Human Rights in the case of *Saunders v. United Kingdom* (1997) 23 E.H.R.R. 313, recognising the right to silence as guaranteed by article 6 of the Convention. The judgment contains the following passage at para. 69:-

> "… the right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention, and elsewhere, it does not extend to the use in criminal proceedings of a material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath blood and urine samples and bodily tissues for the purposes of DNA testing."

156 An analogous distinction was adopted by the Supreme Court of the United States in the *Schmerber v. California* (1966) 384 U.S. 757, when it considered a citizen's right to silence and privilege against self incrimination under the Fifth Amendment (the court also referring to similar protections under State constitutions) which reflects the historic common

law rule against self incrimination. In that case, after the defendant's arrest on suspicion of driving under the influence of alcohol, while at a hospital receiving treatment for injuries suffered in a motorcar accident, a blood sample was withdrawn by a physician at the direction of a police officer, acting without a search warrant, despite the defendant's refusal, on the advice of counsel, to consent to the blood test. In delivering the opinion of the court, Brennan J. in acknowledging that the Fifth Amendment of the Constitution of the United States guaranteed the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty for such silence, went on to state at p. 761:-

> "We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."

Later in his opinion in referring to the privilege against self incrimination he stated at p. 764:-

> "On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

157 In the view of the court, the use of the power conferred on a committee does not give rise to considerations of self incrimination. It is important, nonetheless, to draw attention to the provisions of ss. 6 and 11 of the Act of 1997. Section 11 provides that a witness before a committee "shall be entitled to the same privileges and immunities as if the person were a witness before the High Court". Furthermore, where a person directed to give evidence before a committee or has been required to produce a document (which includes any thing), s. 6 permits him to claim that he "is of opinion that, by virtue of s. 11(1), he or she is entitled to disobey the direction …" Thereupon, the committee is required by s. 6(2) to "apply to the High Court in a summary manner for the determination of the question …"

158 Turning to the applicant's substantive arguments, it is most convenient to deal, in the first instance, with the contention that the computer materials are not in the applicant's "possession or power", as is required by s. 3(1)(c) of the Act of 1997. The court accepts that, where a person is not in actual

possession, "power" is equivalent to an enforceable legal right, as was held in *Bula Limited v. Tara Mines Limited* [1994] 1 I.L.R.M. 111. The applicant is indisputably the owner of the computer materials. They were unconstitutionally seized from him and he is entitled to their return. This is an "enforceable legal right". He claims to apprehend that he cannot lawfully take possession of them, because there are unlawful images of child pornography on the computer. This does not affect his legal title to the goods. In any event, s. 1 of the Child Trafficking and Pornography (Amendment) Act 2004, amends the Act of 1998, by inserting s. 13, which provides that:-

> "Nothing in this Act prevents –
> (a) the giving of or compliance with a direction under section 3 of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 …"

159 In the opinion of the court, this provision conclusively deprives the applicant's argument of any merit. The argument based on suggested circularity is entirely unconvincing. At the time the committee gave its direction, the applicant was the undisputed owner of the computer materials. To the extent that his possession or possible possession at that time was unlawful, the matter is cured by rendering lawful the "giving" of the direction. If there were to be any problem of illegality in his taking possession of the materials, it is removed by the provision regarding "compliance".

160 It remains to consider the applicant's reliance on the exclusionary rule, in respect of which the parties made particular reference to *The People (Attorney General) v. O'Brien* [1965] I.R. 142 and *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 I.R. 110.

161 In the particular circumstances of this case it is not pertinent to review the full ambit and effect of the exclusionary rule or the principles as set out in those cases. This case has individual features which allow the issues it raises to be resolved on its facts without reference to arguments of general application.

162 As already mentioned there is no doubt that the computer materials in question, when seized on foot of the search warrant, were seized unlawfully and in breach of the applicant's constitutional rights.

163 As a consequence evidence related to the seized computer materials was declared inadmissible at his subsequent trial on criminal charges and he was acquitted of those charges. He cannot be prosecuted again on such charges.

164 The computer remains in the ownership of the applicant. In the ordinary course of events he was entitled the return of his property by reason of that ownership and in a complete vindication of the constitutional

right which was breached. He did not seek to do this because, as he has stated, it contained pornographic material of children, the possession of which is prohibited by law. A particular feature of this case is that the applicant, in response to the allegations of stated misbehaviour, has told the Select Committee that at no time did he knowingly subscribe to or access websites containing child pornography and that an expert retained on his behalf confirmed that there were viruses found on the disk of his computer. Such viruses are capable of manipulating the computers so as to download child pornographic images, or any other images, onto a computer without the knowledge or consent of its owner. Thus, while the applicant asserts that he was never personally responsible for access to or use of child pornography on a website, he has acknowledged and accepted that there is some child pornography to be found on his computer. Accordingly, he also adopted the position that as a consequence the gardaí could not return it to him and he could not receive it.

165 It is also an exceptional feature of the situation that the inhibition in returning the computer to the actual possession of its owner stems not so much from the unlawful search and seizure of the computer but primarily, as the applicant himself acknowledges, from the unlawful nature of the material on it. The situation is analogous to one where heroin had been unlawfully seized on foot of an invalid search warrant but which could not be returned to its owner, not as a consequence of an unlawful search of premises in breach of that person's constitutional rights, but by reason of the unlawful nature of the substance seized.

166 If the computer could have been and had been returned to his possession it could not be said that the exclusionary rule means it was forever immune, in all circumstances, from a lawful seizure or order for production. In the present case the order for production might be regarded as legitimately triggered, apart from any other consideration, by the applicant's express and public reliance, in the course of the Article 35 process, on the assertion that his computer material was affected by the placing on it of unlawful material albeit which he did not want and had not sought.

167 As a result of the foregoing situation the applicant has maintained that the computer was neither in his power nor possession and he was therefore not bound to comply with the direction of the Select Committee.

168 On the 1st December, 2004, the date of the s. 3 order, it was lawful, having regard to s. 13 of the Act of 1998, as amended, for the applicant to seek and obtain the computer, his property, from the gardaí for the purposes of complying with the direction of the Select Committee. When the direction was made the computer was within his own "power or possession".

169 That section, in enabling the Oireachtas, through a Select Committee, to require a person who has either in their possession or within their power a computer containing child pornography material to produce such material is a legitimate means of ensuring that such a committee can fulfil their constitutional functions where those functions are legitimately concerned with such an issue.

170 Accordingly, the adoption of the amending Act of 2004 was not a colourable device but rather a clearly defined and lawful means by which, in the circumstances of this case, a committee of the Oireachtas, in the exercise of its constitutional powers, could require an individual to produce his own property insofar as it is lawfully available to him. Accordingly, this ground of appeal must fail.

Double jeopardy

171 The applicant obtained leave to apply for judicial review in part on the ground that, having been acquitted at a criminal trial, he could not, in effect, now be tried by the Houses of the Oireachtas effectively for the same offence. As already stated, the trial judge rejected this argument. The applicant has included the matter in his notice of appeal, but has, in the view of the court, rightly, not pressed the matter on appeal. The acquittal of the applicant of the charges laid against him in the indictment means that he can never be prosecuted again in respect of those matters. The Houses of the Oireachtas are considering an entirely different matter. It is whether the applicant has conducted himself in respect of those or very similar matters to the extent that constitutes "misbehaviour" of sufficient gravity to warrant his removal from the bench.

Conclusion

172 For the reasons given in this judgment, the court will dismiss the appeal and affirm the order of the High Court Judge.

[*Reporter's note*: the applicant and the respondents applied for their costs. It was contended on behalf of the applicant that he had won a core issue in the case, as the tenth and eleventh respondents had contended that the adjudication was a unitary decision consisting of whether he was guilty of stated misbehaviour and whether that stated misbehaviour warranted his removal from office. Counsel for all parties had made reference to a number of decisions of the court as to the award of costs, in circumstances where an applicant had been refused the reliefs sought.

On the 6th April, 2006, the Supreme Court (Murray C.J., Denham, McGuinness, Hardiman, Geoghegan, Fennelly and McCracken JJ.) held, in granting the applicant half his costs in the High Court and Supreme Court against the tenth respondent and making no order for costs in respect of the other respondents, that the court would

exercise its discretion as the case was exceptional and *sui generis* as the court had to interpret and define the meaning and ambit of Article 35 of the Constitution. The court, as a constitutional court, would not treat the applicant as having succeeded but had to address issues which went beyond the specific issues raised and determined, by way of constructive interpretation, how the final adjudication process must be addressed and has clarified for the future the constitutional norms in a core area of constitutional governance as between the three organs of State.]

Solicitors for the applicant: *Pierse & Fitzgibbon.*

Solicitor for the tenth and eleventh respondents: *The Chief State Solicitor.*

Solicitors for the first to ninth respondents: *Matheson Ormsby Prentice.*

Conor Gallagher, Barrister