THE SUPREME COURT
JUDICIAL REVIEW

198 & 203/05

Murray C.J.
Denham J.
McGuinness J.
Hardiman J.
Geoghegan J.
Fennelly J.
McCracken J.
BETWEEN:

BRIAN CURTIN

Applicant/Appellant

and

CLERK OF DÁIL ÉIREANN, CLERK OF SEANAD ÉIREANN, DEPUTY DENIS O'DONOVAN, DEPUTY JERRY CROWLEY, DEPUTY JAMES O'KEEFE, DEPUTY JAN O'SULLIVAN, SENATOR JOHN DARDIS, SENATOR GERALDINE FEENEY, SENATOR MICHAEL FINUCANE and THE ATTORNEY GENERAL

Respondents

Judgment of the Court delivered on the 9th day of March, 2006 by Murray C.J.

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 Appellant was appointed as a judge of the Circuit Court in November 2001.

3. On 20th May 2002, the President of the District Court issued a warrant for the search of the Appellant'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 section 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.

4. 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 27th May 2002, members of An Garda Síochána searched the Appellant's home. They found and took possession of materials said to be relevant to the allegation mentioned in the warrant.

5. 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;…"*

6. Since the seven-day period specified for the search of the Appellant'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.

7. On 26th November 2002, the Appellant was charged by summons with the offence of *"possession of child pornography contrary to section 6 of the Child Trafficking and Pornography Act, 1998."* The particulars of the offence were that the Appellant *"on 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 Court.

8. The Appellant pleaded not guilty on arraignment at the Circuit Court in Tralee on 20th April 2004. Following legal submissions, the trial judge, His Honour Judge Carroll Moran, ruled that the materials seized from the Appellant'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 the Garda Síochána purported to rely on it in their search of the accused's home on the 27th May 2002."*

9. The learned judge, being bound by the decision of this court in *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."*

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

Initiation of steps for removal: correspondence

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

12. The Secretary General to the Government, on 27th April 2004, wrote to the Appellant 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 Appellant'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 Appellant's computer. It also stated that the Appellant's detailed response had never been recorded. The letter invited the Appellant 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."*

13. 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 Appellant so that they could fairly consider a decision whether to initiate such a resolution.

14. In a letter of 13th May 2004, the Appellant 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."*

15. The Taoiseach then made a statement in the Dáil. He outlined the intended course of action which is more fully described below. The Appellant's solicitors wrote to the Taoiseach seeking assurances concerning his right to be heard before any resolutions would be debated or voted upon.

16. The Secretary General to the Government, on 25th May 2004, sent a letter to the Appellant's solicitors describing in detail steps that were to be taken leading to the possible removal of the Appellant 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 Appellant from office pursuant to Article 35.4.1 of the Constitution (as applied by section 39 of The Courts of Justice Act, 1924) on grounds of stated misbehaviour;

    b) a motion would be introduced 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 Appellant 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.

17. 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 the 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 enquiries indicated that this person was Brian Curtin, Judge of the Circuit Court, with a home address of 24 Ard na Li, Tralee, Co Kerry,*
>
> *(d) that a warrant to search Judge Curtin's home under section 7 of the Child Trafficking and Pornography Act 1998 issued from the District Court on foot of an application by a member of the Garda Síochána on 20 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 section 6 of the Child Trafficking and Pornography Act, 1998,*
>
> *(g) that the trial of the said charge commenced on 20 April 2004 at Tralee Circuit Court and that on 23 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."

18. 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

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

20. Firstly, the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, 1997 ("the 1997 Act") was amended by the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) (Amendment) Act, 2004 ("the 2004 Act"). The need for this amendment arose from section the 3(4) of the1997 Act. 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, section 3(4) of the 1997 Act, before amendment, provided that section 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 2004 Act inserted a new section, section 3A, into the 1997 Act. 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."*

21. This provision applies, by virtue of paragraph (b) of section 3A, 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 Appellant claims that section 3A is unconstitutional.

22. A related amendment was made to the Child Trafficking and Pornography Act, 1998 (*"the 1998 Act"*). 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 1998 Act. Section 1 of that Act inserts a new section 13 into the 1998 Act as follows:

> *"13.—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."*

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

Proceedings in the Oireachtas

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

25. Firstly, following on a recommendation of its Committee on Procedure and Privileges, Dáil Éireann, on 2nd June 2004, adopted an additional Standard 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:

26. 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."*

27. 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 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."* (S.O. 63A(2))

28. Where the Dáil does not appoint a Select Committee within five days, the *"motion shall lapse."*

29. 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."

30. It is also provided by Article 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.

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

32. Secondly, a resolution for the removal of the Appellant pursuant to Article 35.4.1 of the Constitution and section 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 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."

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

34. On 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 25th May 2004 already quoted; the correspondence that had passed between the Secretary General to the Government, on the one hand, and the Appellant and his solicitors, on the other; particularly, the Appellant'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."

35. 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-named Respondent.

Proceedings of the Joint Committee

36. The Joint Committee sat on 15th June 2004. It notified the Appellant by letter of 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 section 3 of the 1997 Act. That Act had, as already stated, been amended by the 2004 Act, by the insertion of a new section 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 section 39 of The Courts of Justice Act, 1924.

37. On 29th June, that Joint Sub-Committee gave its consent to the Joint Committee to *"make any or all directions within the meaning of section 3(1) of the 1997 Act 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.

38. By a letter of 30th June 2004, the Chairman of the Joint Committee reminded the Appellant of the letter of 13th May in which his solicitors had expressed his willingness to *"respond appropriately"* to the Oireachtas. The Chairman asked the Appellant to provide an explanation of the matters which had led to the application on 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 Appellant *"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 1997 Act as amended.

39. On 30th June, the Chairman also wrote to the Commissioner of An Garda Síochána stating that the Joint Committee was aware that the Garda Síochána had, in execution of a search warrant relating to the Appellant's home pursuant to section 7 of the 1998 Act, 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 Appellant says that he was unaware of the correspondence with the Garda Commissioner until he learned of it at a sitting of the Joint Committee on 25th November 2004.

40. There was further correspondence concerning the Appellant'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 Appellant at all times claimed to be doing so without prejudice to his right to contest the constitutional and legal validity of the entire process.

41. By a letter to which the Appellant attaches considerable importance, dated 20th July 2004, the Appellant's solicitors conveyed to the Joint Committee what, in written submissions to this Court, is described as the Appellant's *"defence"*. It is said that this defence was also conveyed to the Joint Committee at one of its private hearings on 24th August 2004. The first point made in response to the Committee's letter of 30th June 2004 is that the evidence which was to be used against him in the Circuit Court was obtained in conscious and deliberate breach of the Appellant'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 Appellant 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 Appellant *"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."*

42. 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 Appellant'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 the Garda Síochána, that their presence had been confirmed by an expert on behalf of the Appellant, and that these are capable of downloading child pornographic images without the owner's consent.

43. This correspondence was, of course, confidential and the hearings of the Joint Committee took place in private. However, the letter of 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 Appellant drew the attention of this Court to the letter for the purpose of establishing that the Appellant had proffered a defence and explanation to the Joint Committee.

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

> *"NOW TAKE NOTICE that you are directed pursuant to section 3(1)(c) of the 1997 Act 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 Li, Oakpark, Tralee, Co. Kerry by members of An Garda Síochána in May, 2004."*

45. Shortly after, counsel to the Joint Committee gave notice of an intention to seek a further direction, relating to the Appellant's financial records. At the subsequent hearing of the Joint Committee in December 2004, counsel for the Appellant 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 15th December in order to facilitate the making of the application.

Leave to Apply for Judicial Review

46. Smyth J on 21st December 2004 granted leave to the Appellant to apply for Judicial Review in respect of:

- The procedures of the Joint Committee, including the Standing Orders;
- The constitutionality of section 3A of the 1997 Act as amended by the 2004 Act;
- The section 3 direction ordering the Appellant to produce to it the computer and other materials seized by an Garda Síochána

pursuant to the search warrant.

47. 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. Articles 63A and 60A of the Standing Orders 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.

48. 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 Appellant had already been acquitted by a Court.

49. The Appellant claimed that section 3A of the 1997 Act (as inserted by the 2004 Act) 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.

50. The Appellant claimed that the direction made by the Joint Committee pursuant to section 3 of the 1997 Act 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 Appellant and the obligation of the Joint Committee to vindicate and protect his constitutional rights.

51. 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 Appellant's behaviour and to debate and pass the resolutions in accordance with the procedures proposed, the Appellant 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 Appellant in the resolutions were incapable of constituting "*stated misbehaviour*" within the meaning of Article 35.4.1 of the Constitution.

High Court proceedings

52. The application for judicial review was heard by Smyth J, who delivered a detailed and considered judgment on 3rd May 2005.

53. It suffices to mention briefly the submissions of the Appellant before the High Court. These submissions have been significantly modified on appeal. The principal contention of the Appellant 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 Appellant 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 Appellant. 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.

54. In the light of these submissions, it was submitted that the procedures envisaged under Standing Orders 63A and 60A respectively were fundamentally misconceived.

55. The Appellant 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 Appellant's right to fair procedures.

56. Moreover, and, in effect by way of an alternative to the claim that prior adjudication was essential, the Appellant 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

57. Smyth J rejected the historical interpretation proposed on behalf of the Appellant. It was *"fundamentally at variance with both a literal and harmonious interpretation of the Constitution,"* which he was required to adopt. He cited *People (Director of Public Prosecutions) 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 and others* [2001] 2 I.R. 545; *People (Director of Public Prosecutions) v MS* [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 learned trial Judge cited, *inter alia, Melling v MacMathghamhna* [1962] I.R. 1; *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.

58. 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.

59. 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* (1933) 506 U.S. 224, 122 L Ed. 3d1, 113 S. Ct. 732. When all the evidence has been gathered and placed before the members of the two Houses, the Appellant 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…"* The learned judge 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 under the Constitution to be independent. He cited *O'Byrne v Minister for Finance* [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.

60. In response to the Appellant'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 Hamilton and others* [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 Appellant. He also noted the several provisions made for the Appellant to appear in person and by counsel before the Joint Committee and the several Houses. He did not consider that the Appellant's constitutional rights were compromised by the procedures which had been set up.

The Appeal: the Appellant's case

61. The Appellant'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 Appellant persisted in the argument based on double jeopardy.

62. The principal issue on the appeal concerning the interpretation of Article 35.4.1 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.

63. The Appellant'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 Appellant'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 Appellant, 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.

64. 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?

65. Mr. John Rogers, Senior Counsel, for the Appellant, relied on the principle of judicial independence ordained by the Constitution, to which, he submitted, the learned 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 Mr. Rogers put it, be placed before the Houses "*in its abundance*." Mr. Rogers attached particular importance to the need for assessment of expert evidence regarding the presence and significance of "*Trojans*" on the Appellant's computer. Each member of each House will be required to assess conflicts of expert and other evidence including the credibility of witnesses. Mr. Rogers 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.

66. Mr. Rogers 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 section 3A: submissions

67**.** Mr. Rogers submitted that section 3A of the 1997 Act 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 Appellant seeks a declaration pursuant to Article 15.4 of the Constitution that the section is invalid having regard to the Constitution.

68. 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. Mr. Rogers 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.

69. Mr. Donal O'Donnell, Senior Counsel for the Attorney General, 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 (section 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 section 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 section 6).

70. 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: Section 3 1997 Act: submissions

71. The Appellant obtained leave to apply for judicial review, pursuant to the order of Smyth J dated 21st December 2004, of the direction made by the Committee on 1st December, 2004 pursuant to section 3(1)(c) of the 1997 Act, 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."*

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

73. The Appellant 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 the 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.

74. The learned 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 Appellant's rights to the return of his property had not been set at naught. Insofar as the Appellant 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 Appellant'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 possession or power of the Appellant. 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 the Garda Síochána.

75. The Appellant, 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.

76. The Appellant 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, section 5 of the Constitution. Article 40, section 3 of the Constitution requires the Courts to defend and vindicate those rights. He relies particularly on the dictum of Walsh J in *People v O'Brien* [1965] I.R. 142 at 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."*

77. It is constitutionally impermissible, the Appellant 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 section 3 was a mere device to avoid having to seek the computer materials directly from the Garda Síochána. The amending legislation was a legislative attempt to circumvent the constitutional rights of the Appellant. Vindication of the Appellant'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 *State (Trimbole) v Governor of Mountjoy Prison* [1985] I.R. 550. In that case, the Court held that the arrest of Mr. Trimbole pursuant to section 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 rearrest on foot of a warrant was held to have been unconstitutional. He cites passages from the judgments of Finlay C.J. and McCarthy J. The Appellant 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.

78. However, the Appellant claims that a direction under section 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 section 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 Appellant had no enforceable right to possession of the computer.

79. 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 Appellant's arguments. They submitted that the Committee is exercising its own legal power to seek material from the Appellant himself, not from the Garda Síochána. This has no relationship with the cases concerning the exclusionary rule or the notion of "*colourable device*."

80. The Respondents submit that the flaw in the Appellant'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 section 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,* cited above*; People (Director of Public Prosecutions) v Kenny* [1990] 2 I.R. 110; *Lynch v Attorney General* [2004] 1 I.L.R.M. 129, *People (Director of Public Prosecutions) v Cooney* [1997] I.R. 129; *Director of Public Prosecutions v Buck* [2002] 2 I.R. 268.

81. Knowledge that the Appellant 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 Appellant 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.

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

Article 35.4.1 of the Constitution

83. 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."*

84. The present appeal has been concerned exclusively with the provisions of subsection 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.

85. 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."*

86. 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.

87. The Appellant being a judge of the Circuit Court, section 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."*

88. 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."*

89. Thus, for all the purposes of the present proceedings, the Appellant 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.

90. The words of Article 35.41 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 then 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

Appellant. It is necessary to consider these several aspects of the matter in turn.

General principles of constitutional interpretation

91. 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 case of *O'Shea* already cited, the Court was divided on the issue 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 *People (Director of Public Prosecutions) v O'Shea* [1982] I.R. 384 at page 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."*

92. In his dissenting judgment in that case, Henchy J, at page 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."*

93. The latter passage was cited with approval by Keane C.J. in *People (Director of Public Prosecutions) v M.S.,* cited above at page 619.

94. Murray J, as he then was, 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 page 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."*

95. 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,* cited above, said, at page 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 page 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."*

96. 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 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* case Murray J. stated *"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 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."*

97. 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.

98. 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.

99. 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

100. The wording of Article 35.4.1 is identical to all intents and purposes with 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 of judges from office has thus, though not used to date, been in force since the foundation of the State.

101. 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.

102. 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.

103. 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:

104. *"Judges Commissioners be made hold office 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."*

105. By an Act of the British Parliament (1 Geo. III, c 23), (1761), 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 section 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.

106. 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."*

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

108 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 of the Constitution (Canada) Act, 1867, an Act of the British Parliament (30 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."*

109. 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:*
>
> *……."*

110. The South Africa Act, 1909, establishing the Union of South Africa, contained a practically identical provision. 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 1701, 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.

111. It is generally accepted that the framers of the 1922 Constitution consulted widely among the Constitutions of the common-law countries. Kingsmill Moore J, in his judgment in *O'Byrne v Minister for Finance,* already cited, having recited much of this history, at page 63 of his judgment said:

> *"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."*

112. 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.

113. The Appellant 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.

114. 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.

115. 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 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.,* page 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."*

116. 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* 506 US 224, discussed later, spoke of it having a *"fact-finding"* role.

Consideration of Article 35.4.1

117. 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

118. 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……"*

119. 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.

120. 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."*

121. 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."*

122. Article 35.5 provides:

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

123. 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.

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

125. 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,* already cited. 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 page 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."*

126. In his concurring judgment in the same case, at page 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).

127. 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

128. 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 v Attorney General (Sinn Féin Funds)* [1950] I.R. 67 by O'Byrne J, stating at page 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."

129. 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* (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.

130. 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 page 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."

131. Murray J, as he then was, stated at page 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."

132. Hardiman J stated at page 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."

133. 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."

134. 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 v Attorney General and another,* already cited, at page 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* and others, already cited, Finlay C.J., speaking with the agreement of a majority of the Court, stated, at page 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."

135. Hederman and McCarthy JJ did not expressly refer to the presumption but agreed with the result proposed by the Chief Justice. 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 239; *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] I.R. 317), Finlay C.J. continued, at page 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."

136. The foregoing provides clear authority for the broad proposition that the parliamentary procedures followed to date in respect of the resolutions to remove the Appellant 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.

137. 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 Government of Ireland* [1996] 1 I.R. 321 at 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."

138. 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.

139. 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……"

140. This Court made brief reference to this constitutional provision in *O'Malley v An Ceann Comhairle* [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 Comhairle disallowing part of a question put down for answer by a minister. O'Flaherty J (Murphy and Lynch JJ concurring) stated at page 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."

141. 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, section 5 provides: *"Each house may determine the rules of its proceeding……"* In *United States v Ballin* (144 U.S. 321), 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 page 324:

"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."

142. In *Nixon v United States,* cited above, 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 authorizing 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-justifiable. 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 page 22, that the trial clause of the 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.""

143. 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 US Congress to *"determine the rules of its proceeding…"* The approach of the US 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.* O'Flaherty J in an *obiter dictum,* somewhat like Brewer J in *Ballin,* hinted at possible limits to the deference which the

judicial arm owes to the legislative arm of government, when he said, at page 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

144. It is not contested by the Attorney General or by or on behalf of the Houses of Oireachtas that the Appellant, 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 Appellant 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.

145. 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."*

146. The resolutions passed on 3rd June 2004 contain substantially similar provisions. In fact, the Appellant 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.

147. The Appellant'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.

148. 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 (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 Appellant'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, include expert evidence, whether in the form of transcripts or video or audio tapes and any documentary will simply be gathered and handed over in an entirely undigested form to all the members of each House.

149. The result will be, accordingly, it is submitted, 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 Appellant complains that he will not be allowed to give or call witnesses or otherwise produce evidence before either House. Counsel for the Attorney General and for the Houses disputes this and says that there is nothing to prevent such evidence being given as is required.

Constitutionality of section 3A of 1997 Act

150. 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 laws passed by the Oireachtas, the designated organ of State with the exclusive power to pass laws.

151. 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.

152. The Appellant 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.

153. 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.

154. 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.

156. 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

157. 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 Appellant 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 Appellant contends, any such committee must have power to assess, evaluate and report findings on the evidence heard.

158. 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.

159. 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.

160. 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 Ireland and the Attorney General, the constitutional history lends little support to the Appellant'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* suggests that the courts would not, in a clear case, permit even the Oireachtas to default on its constitutional obligations.

161. 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 Appellant 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 Appellant 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.

162. 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 paragraph (5) of Standing Orders 63A and 60A.) By the use of this language, the Houses have rightly and necessarily undertaken to accord to the Appellant 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.

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

164. Murray J, as he then was, in *T.D. v Minister for Education,* at page 337, considered the circumstances in which a court might consider making an order directing, in that case, the executive to fulfill 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."*

165. 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.

166. The Appellant 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.

167. 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.

168. 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.

169. The nub of the Appellant'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."*

170. 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 Appellant 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 Appellant'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 report, will necessarily be in clear disregard of those principles.

171. Part of the Appellant'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 Appellant 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 Appellant 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.

172. 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 Appellant 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 Appellant, even while advocating the first type of Committee, submits that its opinions on the evidence or otherwise would not be binding.

173. 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,* already cited. 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.

174. 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 Appellant his full rights to constitutional justice and fair procedures.

175. It should be added that the powers of the Committee need not be interpreted as restrictively as the Appellant 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 disorganized 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 Appellant and his advisers in representing him.

176. 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 Appellant's challenge to the Standing Orders.

177. 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 Appellant's complaint concerning the Committee's role in the conduct of the investigation of his alleged misbehaviour. The Appellant'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 Appellant's concerns 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 Appellant 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.

178. The Appellant 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.

179. 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 Appellant 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 Appellant 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 Appellant'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.

180. 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. 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.

181. 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.

182. 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.

183. It is the opinion of the Court that, as a matter of basic fairness, the Appellant 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 Appellant into several components. They may decide that the factual issues may fairly be expressed in the form of a single proposition.

Conclusion on section 3 order

184. The Appellant has not, in this Court, pursued his argument that the direction made by the Committee on 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 section 3 of the 1997 Act. 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 section 1 as including a *"thing."*

185. It is common case that this section is capable of being applied to the Appellant. 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 the 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 Judge, unconstitutional execution of a search warrant. While originally held for the purposes of the then pending trial of the Appellant, 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 Appellant 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.

186. It is not strictly necessary to review the argument that the section 3 order unconstitutionally requires the Appellant 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 the 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, the 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 EHRR 313 recognising the right to silence as guaranteed by Article 6 of the Convention. The judgment contains the following passage at paragraph 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."

187. An analogous distinction was adopted by the Supreme Court of the United States in the *Schmerber –v- California* 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:

"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."

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

"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."

189. 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 sections 6 and 11 of the 1997 Act. 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), section 6 permits him to claim that he *"is of opinion that, by virtue of section 11(1), he or she is entitled to disobey the direction…"* Thereupon, the Committee is required by section 6(2) to *"apply to the High Court in a summary manner for the determination of the question…"*

190. Turning to the Appellant's substantive arguments, it is most convenient to deal, in the first instance, with the contention that the computer materials are not in the Appellant's *"possession or power,"* as is required by section 3(1)(c) of the 1997 Act. 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.* The Appellant 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, section 1 of the Child Trafficking and Pornography (Amendment) Act, 2004 amends the 1998 Act, by inserting section 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,……"

191. In the opinion of the Court, this provision conclusively deprives the Appellant's argument of any merit. The argument based on suggested circularity is entirely unconvincing. At the time the Committee gave its direction, the Appellant 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."*

192. It remains to consider the appellant's reliance on the exclusionary rule, in respect of which the parties made particular reference to *The People (Attorney General) –v- O'Brien and The People (Director of Public Prosecutions) –v- Kenny*.

193. 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.

194. 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 appellant's constitutional rights.

195. 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.

196. The computer remains in the ownership of the appellant. 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 appellant, 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 appellant 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.

197. 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 appellant 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.

198. 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 appellant'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.

199. As a result of the foregoing situation the appellant 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.

200. On 1st of 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 appellant 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"*.

201. 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.

202. 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

203. The Appellant 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 learned trial judge rejected this argument. The Appellant 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 Appellant 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 Appellant 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

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