

**THE HIGH COURT  
JUDICIAL REVIEW**

[2022] IEHC 489  
[2014 No. 431 J.R.]

**BETWEEN:**

**ANGELA KERINS**

**APPLICANT**

**AND**

**DÁIL ÉIREANN, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENT**

**JUDGMENT of The Hon. Justice Alexander Owens delivered on the 29th day of July 2022**

1. Where it appears to any court that the immunity of members in respect of speech and debate in the Houses and the exclusive authority of the Houses may be relevant to any issue before that court, the court must address that matter of jurisdiction immediately.
2. This action relates to proceedings of the Public Accounts Committee (the Committee) of Dáil Éireann. The applicant seeks damages for alleged misfeasance in public office of members of Dáil Éireann acting in the Committee.
3. The applicant and the first respondent have applied for discovery of documents. This judgment relates to these applications. The applicant seeks documents of the Committee held by Dáil Éireann. These documents are under control of the Clerk of the House.
4. The applicant claims that in a public session of the Committee on 27 February 2014, members of the Committee engaged in a sustained attack on her character which damaged her health and caused her loss. She claims that this attack continued in subsequent public proceedings of the Committee. She claims that the Committee members were aware that they were acting improperly and that they deliberately abused their powers.
5. She claims that activities within the Committee in private session led to mistreatment of her by members in public session. She seeks disclosure of documents of the Committee which are not in the public domain on grounds that they are relevant and necessary for the fair disposal of the action.
6. The tort of misfeasance in public office concerns abuse of power or authority by those entrusted by law with performance of public functions. The applicant must prove malice. This means that she must prove intention by a person exercising public authority to harm her or conscious indifference to the probability of such harm. She must also prove that the person knew that public power was being abused or was recklessly indifferent to whether the power claimed was conferred by law.
7. The categories of documents which the applicant seeks concern the "how" and the "why" of the circumstances in which she came to be before the Committee in public session, and the

“what” and the “when” of knowledge of members of the Committee that they were outside their remit in pursuing her.

8. She wishes to see documents having a bearing on knowledge by members of the Committee that they were requesting her attendance at public sessions in pursuit of an inquiry which was outside the Committee’s terms of reference.
9. She also seeks documents relevant to awareness of members of the Committee that they should confine questions or comment to matters agreed in advance between the chairman of the Committee and herself.
10. She seeks any record of legal advice received by the Committee that its proposed engagement with her was in excess of powers or otherwise improper. A newspaper report in late January 2014 alleged that a legal adviser had warned the Committee that it had departed significantly from its remit and that members discussed seeking additional powers.
11. Documents sought include anything tending to show intention of members of the Committee to use public sittings to damage the reputation of the applicant, or reckless indifference to this as a possible consequence. The request includes transcripts and recordings of private sessions of the Committee. It is argued that the tone of words spoken by members of the Committee captured in such recordings may show animus towards the applicant.
12. The period covered by the request for discovery runs from late 2013 to July 2014. In July 2014 the Committee on Procedure and Privileges of Dáil Éireann declined to give compellability powers to the Committee because it was acting outside its remit. The applicant claims that this effort to compel her further attendance before the Committee was an abuse.
13. This Court must dismiss the applicant’s application for discovery. I am precluded by Article 15.13 of the Constitution from entertaining this application because the gravamen of her claim calls for judgment on speech and debate by members of Dáil Éireann.
14. Articles 15.10, 15.12 and 15.13 of the Constitution recognise and protect freedom of speech and debate within the Houses of the Oireachtas. The Houses are given autonomy in regulation of parliamentary speech and debate. This autonomy includes autonomy of disciplinary authority over parliamentary speech and debate.
15. The protection extends to proceedings and actions of members in committees of the Houses. Propriety of speech and debate by members in private sessions of a committee of the Houses may not be the subject of litigation. It also covers documents of the Houses and of their committees which relate to speech and debate. The documents which the applicant seeks are intimately connected with protected speech and debate in a committee of Dáil Éireann. As such, they are protected.
16. There may be circumstances in which a court would grant an order for discovery of documents held by Dáil Éireann. The fact that the House has made standing orders under Article 15.10

of the Constitution to protect its official documents from release without consent may not be an absolute bar to a court order for disclosure. Whether a court would compel disclosure may depend on the nature of the issue giving rise to an application for sight of the material. This action is not of a type which would justify such a course.

17. If my reasoning is correct, it must follow that the applicant's claim for damages for misfeasance in public office is not maintainable. Discovery which the first respondent seeks from the applicant will not be necessary. If this action were maintainable, the first respondent would be entitled to the documents sought. I consider that they are relevant and necessary for fair disposal of the claim. I propose to adjourn generally the first respondent's application for discovery with liberty to re-enter for the purpose of making an order on foot of this determination if it transpires that an appellate court does not agree with me.
18. At the conclusion of the first module of this action the Supreme Court found that the Committee acted unlawfully in its dealings with the applicant in two respects. It acted significantly outside its terms of reference. It did not have power to carry out the investigation which was the subject of her attendance at its public session on 27 February 2014. It subjected her to questioning and comment during that session on issues which departed significantly from the terms set out in the invitation to her to attend.
19. The declaration referred only to the public session of the Committee on 27 February 2014. It did not extend to comments made about the applicant in a public session of the Committee on 10 April 2014. The applicant complains about these comments and about comments made in another public session of the Committee on 13 March 2014 as part of her claim for damages for misfeasance in public office.
20. When giving declaratory relief the Supreme Court identified Dáil Éireann as in privity with the Committee because the members of the Committee acted in unison in matters covered by the declaration. The impugned actions of the Committee were therefore actions of Dáil Éireann. The Court refrained from making any finding which trenched on protections enjoyed by members in respect of their utterances in that House.
21. Whether a similar finding of privity could result in liability of Dáil Éireann for damages for misfeasance in public office in respect of what happened at the public session of the Committee on 27 February 2014 or other proceedings of the Committee remained undecided.
22. Any finding of liability of the House for damages in this action must involve either a finding of actual fault or privity, in the sense of identification of the House with actions and words of members of the Committee, or a finding that the House is vicariously liable for what was stated by members in speech and debate. Vicarious liability is a process of attributing to one person legal responsibility for tortious conduct of another, imposed because of the nature of the relationship between them.

23. Members of the Committee are immune from suit in courts in respect of speech and debate in public and private sessions of the Committee, irrespective of whether they act with malice or ill will or abuse their constitutional immunity and even if such abuse involves members acting in concert.
24. Article 15.12 of the Constitution makes clear that such utterances are “privileged” and “...saor ar chúrsaí dlí...,” wherever published. These immunities relate to “...any utterance in either House...”: see Article 15.13 of the Constitution which also makes clear that the relevant House is the sole body which can impose discipline or sanction on members in relation to utterances in that House.
25. The Supreme Court made relevant observations in its judgment in *O’Brien v. Clerk of Dáil Éireann* [2019] IESC 12, [2020] 1 I.R. 90 at pages 110-111, [69] and pages 118-119 [101] to [103]. Paras. [102] and [103] state as follows:

“[102] It follows that, even if a *Callely v. Moylan*-type exception exists, it could only apply in circumstances where there was cogent evidence that the Houses had abrogated their constitutional duty to have appropriate mechanisms in place. This might, in theory, be capable of being established because of a particularly egregious failure to vindicate the rights of a citizen without any remedial action being taken to ensure that such failure would not be repeated. In such a case it might be inferred that the Houses truly did not intend to fulfil their constitutional role of protecting the rights of citizens.

“[103] Likewise, persistent and unrectified failures might lead to a similar conclusion. But the question has to be asked as to whether, even if the court retains such a residual discretion, it could potentially arise on the facts of this case.”
26. Any jurisdiction of the courts in these matters, if it exists at all, can only be exercised in exceptional circumstances. The Houses operate in the political sphere. Assessments by members of a House of the propriety of conduct of other members in speech and debate may be influenced by political considerations. The courts must defer to the Houses on these matters.
27. The courts cannot force the Houses to discipline or admonish their members for the manner in which they conduct parliamentary speech and debate. The courts may not take measures which have equivalent effect to discipline or admonishment of members of the Houses for the manner in which they conduct parliamentary speech and debate.
28. At the outset of these applications, I queried whether it was appropriate to bring them at this stage. It struck me that discovery of materials held by Dáil Éireann should not be granted if a court were to decide that the applicant’s claim is not justiciable.
29. Neither side to this litigation was in favour of delay. The parties wanted a decision on the discovery applications at this stage in the action. Dáil Éireann sought an order for discovery of documents held by the applicant.

30. Dáil Éireann asserts that the material sought by the applicant consists of protected "...official documents and...private papers..." of members of Dáil Éireann and that this Court must cede to protection which the House has given to this material in exercise of powers under Article 15.10 of the Constitution. Dáil Éireann submits that standing orders which that House adopted on 15 September 2015 preclude this Court from making an order for discovery.
31. Dáil Éireann also asserts that it is not amenable to this Court in respect of documents held by it in relation to activities of the Committee which have not been put into the public domain. Documents which Dáil Éireann holds relate to confidential work of the Committee. Dáil Éireann asserts that this material relates to "utterances in the either House" protected by Article 15.13 of the Constitution.
32. Dáil Éireann also asserts that s.92(1), (2) and (3) of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 (the 2013 Act) protect documents held by a committee from disclosure. These provisions supplement protections provided by the Constitution. They confer various immunities, protections, and privileges in relation to proceedings of committees of the Houses and documentation generated for, provided to, or disclosed during proceedings of such committees.
33. My starting point in considering the applicant's request for discovery is that protection accorded to members for utterances in either House by Article 15.13 of the Constitution is absolute. These utterances are not "...amenable to any court or any authority other than the House itself." The relevant House is the only body which may exercise authority on these matters. These utterances are privileged under Article 15.12, in the sense of not being amenable to any legal process relating to their content or propriety, wherever published. Such utterances are first protected when they are communicated within the Houses and further protected whenever their content is repeated in any report of proceedings of the Houses.
34. This non-justiciability extends to utterances made in committees of either House and to "...matters sufficiently closely connected to such utterances as to enjoy the same privileges and immunities": see *Kerins v. McGuinness* [2019] IESC 11, [2020] 1 I.R. 1 at 55 [149]. The Supreme Court has also indicated [149] that if a member of a House is not directly amenable in respect of utterances or matters closely connected with utterances, avoidance of the effect of this immunity cannot be achieved by collateral means.
35. This action relates to damage and injury alleged to have been caused by utterances of members of the Committee in public sessions. The Applicant's claim is that parliamentary powers of speech and debate in proceedings of the Committee were misused to launch an attack on her character and good name.
36. A court must not order discovery of documentary material held by the Committee if it concludes that to do so would involve a collateral attack on protections given by the Constitution to secure freedom of speech and debate in the Houses. If speech and debate of members in the Houses is not justiciable in a court action, then it is not permissible for a court

to entertain any application for a court process to compel or adduce protected matter in proceedings ancillary to such an action either.

37. Article 15.10 of the Constitution provides that:

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

38. Article 15.12 of the Constitution provides that:

“All official reports and publications of the Oireachtas or of either House thereof and utterances made in either House wherever published shall be privileged.”

39. Article 15.13 of the Constitution provides as follows:

“The members of each House of the Oireachtas shall, except in case of treason as defined in this Constitution, felony or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of, either House, and shall not in respect of any utterance in either House, be amenable to any court or any authority other than the House itself.”

40. Article 15.10, Article 15.12, and Article 15.13 of the Constitution complement each other. Article 15.10 refers to “...freedom of debate...” in the Houses. This is a constitutional value which the Houses are given power to ensure. The Houses may seek assistance from courts and other bodies exercising authority to secure rights and protections given by Article 15.10 and Article 15.13. This includes protection for freedom of debate of members within the Houses.

41. This entitlement of members and of the Houses to protection for freedom of debate within the Houses does not depend on whether the Houses have made rules or standing orders in exercise of powers given by Article 15.10 of the Constitution for protection of their official documents or private papers of members.

42. Protection for freedom of speech and debate in the Houses was not relevant to the issues considered in *Howlin v. Morris* [2006] 2 I.R. 321. The issue in *Howlin v. Morris* concerned whether material held by a member of Dáil Éireann was “private papers,” protected by Article 15.10 of the Constitution from disclosure to a statutory tribunal established pursuant to resolutions of the Houses. The Supreme Court held that as Dáil Éireann had not made Standing Orders protecting such material, neither the member nor the House could invoke protection from disclosure under Article 15.10.

43. An issue which solely relates to the degree of protection which should be afforded to private papers of a member of one of the Houses is very different to an issue directly concerned with protection accorded by the Constitution to speech and debate in the Houses.
44. Article 15.13 of the Constitution is almost identical to the "Speech and Debate Clause" in article 1, section 6, clause 1 of the Constitution of the United States of America. This "Speech and Debate Clause" has been the subject of many decisions of federal courts in the United States of America. In my view both provisions have the same effect.
45. The term "utterances" in Article 15.13 of the Constitution has the same meaning as "speech or debate." Utterances are anything said or published by members in proceedings and sessions of the Houses and their committees.
46. Section 92(1) of the 2013 Act reinforces protections and authority given by Article 15.13 of the Constitution and confirms that: "A member of a House shall not, in respect of any utterance in or before a committee, be amenable to any court or any authority other than the House." This provision is declaratory in the sense that it was unnecessary for the Oireachtas to so enact.
47. The protections given by Article 15.13 of the Constitution extend to the utterances of Members of each House in sessions of committees of the Houses. Exclusive authority of the Houses in respect of speech and debate in committees of those Houses is also derived from that provision of the Constitution.
48. Article 15.13 of the Constitution gives members of the Houses an absolute and unqualified assurance that their speech and debate in the Houses will not be the subject of some proceeding by a body other than the relevant House or Houses. The protections given by the Constitution to members of the Houses in respect of parliamentary speech and debate are meaningless, unless they can be fully confident that they only are answerable to the Houses themselves for the manner of exercise this freedom.
49. It is difficult to envisage any exception to this absolute prohibition other than those referred to in Article 15.13. These exceptions are treason, offences within the conceptual framework of crimes formerly classified by law as felonies, and breaches of the peace committed during or in connection with proceedings in the Houses.
50. If the subject matter of any litigation invites judgment on the propriety of an utterance of a member in proceedings of a House of the Oireachtas, then the matter is not justiciable in any form. This area of non-justiciability includes any critique of content or tone of utterances in the Houses. It extends to critique of the treatment by members of witnesses attending before committees of the Houses.
51. Article 15.13 of the Constitution lays down an express delineation in separation of powers between the courts and any other body having legal authority and the Houses of the Oireachtas. Courts are bound to intervene and give full assistance to the Houses. Courts have

a positive duty to secure to the Houses their exclusive role under Article 15.13. Courts must act on that duty wherever the issue arises in any court proceeding.

52. How far and to whom or what does the protection given by Article 15.13 of the Constitution extend? Does it protect documents and other records kept by the secretariat of the Committee? Does it protect the records of private sessions of the Committee from court orders requiring that they be disclosed? Does it prevent a court from considering evidence by members of the Committee or the secretariat of the Committee of what may have taken place in the private sessions? Does it prevent a court from considering evidence of what was said by members in the public sessions of the Committee?
53. While the Houses sit in public except in cases of special emergency, as allowed for by Article 15.02 of the Constitution, committees of the Houses often sit in private and liaise with House staff and advisors in preparation for private and public sessions.
54. The protection extends to voting and to participation in the preparation of reports and for hearings of committees. These are "...sufficiently closely connected..." to utterances to attract the protection. The protection also extends to the work and documents of the secretariat of a committee and any minute or recording of the proceedings of a committee, be they formal or informal. The protection extends to legal advice provided to a committee, irrespective of whether it is followed. It also extends to the work product of those who assist members of a committee in preparing for sessions. These are also "...sufficiently closely connected..." to utterances to attract the protection.
55. The speech and debate protections given by Article 13.15 of Constitution, if they are to mean anything, must extend to all activities of committees within the Houses of the Oireachtas and to all documents held by or for such committees.
56. I have already set out what must be proved to establish the tort of misfeasance in public office. The applicant's proceedings relate to what was said about her and how she was treated by members in public sessions of a committee of Dáil Éireann. It follows that the subject matter of current element of this litigation is, irrespective of what the cause of action is identified in pleadings, firmly within both the protections given to members of the Houses by Article 15.12 and Article 15.13 of the Constitution and the exclusive supervisory role given the Houses by Article 15.13.
57. If a House of the Oireachtas was to be held by a court responsible in law for utterances of a member in that House, whether the basis of such liability be actual fault or privity or vicarious liability or responsibility based on some non-delegable obligation, this would, of necessity, require that court to pass judgment on the propriety of such utterances.
58. The effect of this would be that the very bodies charged by the Constitution with exclusive oversight of parliamentary speech and debate would be deemed liable in law for utterances of members in those Houses. This would upend the constitutional obligation of courts and



other authorities to recognise the authority of the Houses and make a nonsense of protection given by the Constitution to secure freedom of debate within the Houses.

59. Article 15.13 of the Constitution prevents any court from receiving evidence from any person who has been present at proceedings of a committee about what took place in the House where the substance of the issue before the court is responsibility at law for the content of utterances of a member in proceedings of a committee.
60. This Court cannot receive in evidence any material relating to utterances of members of the Committee in public sessions which are at the heart of the applicant's claim for damages. This Court cannot receive evidence of what took place in the House during public or private sessions of the Committee for any purpose connected with adjudication of her claim. This Court cannot make any comment or finding on the propriety of such utterances. Any proposed evidence for such purposes is inadmissible.
61. It follows that if the documents sought were disclosed voluntarily, they cannot be used in Court proceedings for the purposes for which they are sought by the applicant. This Court cannot order disclosure of documents by Dáil Éireann or issue a subpoena to an official of Dáil Éireann or subject any person to any compulsory process of law for the purpose of advancing her claims.
62. The courts, if they can intervene in parliamentary affairs at all, may only do so in very rare circumstances where the Houses, as the bodies charged by the Constitution with exercising authority over speech and debate by their members, abandon their responsibilities to protect rights of citizens in an egregious way. The purpose of any permitted judicial intervention is limited to ensuring that the Houses do not deliberately turn protections given by the Constitution into instruments of oppression.
63. Remedial action in this context relates to exercise by the Houses of authority over their members. Any issue of whether the Committee or its members abused privileges in dealing with the applicant is a matter for the House to attend to in exercise of its authority. This action does not have a purpose of ensuring that the House carries out a supervisory responsibility over the exercise by members of the Committee of their privileges.
64. Dáil Éireann submits that the effect of changes made to standing orders of the House in 2015 is that the Clerk of the Dáil is precluded by Standing Order 153(4) from affording access to or allowing disclosure of documents sought. Standing Order 153(4) states that "The Clerk must not afford access to, or allow disclosure of, an official document unless and to the extent that, that access or disclosure is provided for in or under paragraph (5) or (6) or otherwise in or under these Standing Orders." Standing Order 153(1) states that Standing Order 153 "...is made for the purposes of giving effect to Article 15.10 of the Constitution so far as it provides for the protection of the official documents of the Dáil."

65. Dáil Éireann submits that as these changes were made by the House in exercise of power given by Article 15.10 of the Constitution, this Court has no power to order disclosure of the documents sought.
66. These changes did not contravene any constitutional prohibition on retrospective legislation, even though they may affect proceedings which commenced prior to 2015. The House was entitled to exercise its power under Article 15.10 of the Constitution to make these rules at any time.
67. The documents sought by the applicant are "...documents in the custody of, or belonging to, the Dáil or a committee of the Dáil, or over which the Dáil or Committee exercises control, and which: (a) are or have been prepared for the purposes of, or purposes incidental to, transacting any business of the Dáil or of such a committee..." within Standing Order 153(2)(a) of Dáil Éireann. This applies to a wide range of documents referred to in Standing Order 153(3)(a) and Schedule 1.
68. The applicant's application for discovery does not come within any exception in the standing orders of the House. The Clerk of the Dáil is only permitted to afford access to or disclosure of the documents where authorised either by resolution of the Dáil, or by the Committee on Parliamentary Privileges and Oversight on behalf of the Dáil, under Standing Order 153(5).
69. I refer to comments in the judgment of Hardiman J in *Howlin v. Morris* at pages 365-366 [46] and [47]. He gives an example in a different context of a situation which may not attract the protection of Article 15.10. Litigation or proceedings such as investigations by statutory tribunals of enquiry may raise issues which make it appropriate for a court or other authority to order discovery of documents held in the Houses. Such cases will be exceptional and very rare. This is not an exceptional case because the documents are sought for a purpose which directly engages with protected parliamentary speech and debate.