AN CHÚIRT UACHTARACH
THE SUPREME COURT

Supreme Court Appeal Number: S:AP:IE:2022:000118
[2024] IESC 24

O'Donnell CJ
Dunne J
Charleton J
O'Malley J
Hogan J
Murray J
Edwards J

BETWEEN/

ANGELA KERINS

APPLICANT/APPELLANT

– AND –

DÁIL ÉIREANN, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice Brian Murray delivered on the 18th of June 2024

1. The first module of this action concluded with the grant of a declaration that the Public Accounts Committee of Dáil Éireann (‘*the PAC’)* had acted unlawfully in conducting public hearings into certain expenditure by the Rehab Group, a charity of which the applicant was Chief Executive. This Court made that Order for two reasons. First, because the hearing was outside the terms of reference of the PAC and, second, because that committee ‘*departed significantly’* from the terms of an invitation by which the applicant was requested to (and did) attend before it. In reaching these conclusions the Court took into account statements made by members of the PAC in the course of the impugned proceedings: [2019] IESC 11 and [2019] IESC 42, reported at [2020] 1 IR 1 and 75 respectively (‘*Kerins I’* and ‘*Kerins II’*).

2. The members of the PAC and the Clerk of Dáil Éireann and Clerk of the PAC were originally named as respondents. For reasons to which I will return, following the hearing of the first module, Dáil Éireann was substituted for these parties. Before that substitution they had contended, amongst other things, that the grant of relief by the Court by reference to statements of members of Dáil Éireann before a committee of that House was precluded by the separation of powers and those provisions of the Constitution that provide for parliamentary privileges and immunities (Articles 15.10, 15.12 and 15.13). The Court rejected that contention. In so concluding it relied upon the approach that had been adopted in earlier

cases[1] arising from the proceedings of parliamentary committees in which utterances before such committees had been considered by the Court.

3. The applicant now seeks damages for injury which she alleges she sustained as a consequence of this unlawful inquiry. In so doing, she seeks to rely on the same utterances of certain members of the PAC in the course of its proceedings as the Court had regard to in granting declaratory relief in the first module. This module of her action thus presents an important question: whether the applicant, consistent with Articles 15.10, 15.12 and 15.13 of the Constitution and the separation of powers, can seek to visit on the respondents a claim for damages arising directly from what was said by members of Dáil Éireann in the course of proceedings of a parliamentary committee which the Court has determined to be unlawful by reference to those same statements.

4. The matter now comes back to this Court because the applicant has sought discovery in aid of her claim for damages. The material of which she seeks discovery includes a wide range of documents relating to the subject matter of the PAC's examination. That application was refused for reasons explained in the judgment of Owens J. now appealed by the applicant ([2022] IEHC 489). He held (i) that the Court could not receive in evidence material relating to utterances of members of the PAC at the heart of the applicant's claim for damages, (ii) that in consequence the Court could not

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[1] *Re Haughey* [1971] IR 217; *Maguire v. Ardagh* [2002] 1 IR 385; *Curtin v. Dáil Éireann* [2006] IESC 14, [2006] 2 IR 556; *Callely v. Moylan* [2014] IESC 26, [2014] 4 IR 112.

order disclosure of documents for the purposes of tendering same in evidence for that purpose and (iii) that in any event, disclosure of the documents was precluded by Standing Orders of Dáil Éireann made pursuant to Article 15.10 of the Constitution. The Determination recording the reasons the Court granted leave to appeal this decision appears at [2023] IESCDET 4.

5. The substantive issue underlying the applicant's claim is closely connected with the basis on which the respondents resist the discovery sought by the applicant – the claim that parliamentary privilege and/or the separation of powers renders the direction of such discovery inappropriate. In those circumstances I think that it would be impractical and – having regard to the nature of the important constitutional issues in play – unprincipled, to address the issue of discovery without deciding the substantive question. That is, essentially, how the High Court judge approached the matter. As he put it '*I am precluded by Article 15.13 of the Constitution from entertaining this application because the gravamen of* [the] *claim calls for judgment on speech and debate by members of Dáil Éireann.'* The central issue now is whether Owens J. was correct in reaching that conclusion. The answer depends on the scope of privileges and immunities conferred by the Constitution on members of the Houses of the Oireachtas in respect of their speech in those Houses.

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6. Those privileges are captured in three provisions – Articles 15.10, 15.12 and 15.13. Article 15.10 provides, amongst other things, for the power of each House of the Oireachtas to ensure freedom of debate, and to protect its official documents and the private papers of its members. Article 15.12 confers a privilege on all official reports and publications of the Oireachtas or of either House thereof as well as upon all *'utterances made in either House wherever published'*. Article 15.13 provides a privilege from arrest for members of the Houses when going to and returning from and while within the precincts of either House, and further states that those members:

> '*shall not, in respect of any utterance in either House, **be amenable to any court** or any authority other than the House itself*'.
>
> (emphasis added)

7. While it is now understood that the privileges and immunities provided for in these provisions are narrower than those in other jurisdictions, and in particular that they do not simply replicate the protections provided for under the law of the United Kingdom, the legal and historical context within which these Articles were adopted remains relevant to their proper construction.[2] This, as it happens, was stressed in the course of the judgment in *Kerins I* (see para. 125). That background also illustrates the generally recognised dimensions of the immunities and importance of the interests they seek to protect.

[2] *Attorney General v. Hamilton* (No.2) [1993] 3 IR 227 at p. 248 per Geoghegan J.

8. Thus, in England, freedom of speech has been consistently asserted by parliament since the middle of the sixteenth century (and arguably before),[3] it was enshrined in Article 9 of the Bill of Rights 1689, embedded in the constitutional systems of the colonies and dominions, given influential expression in the Speech or Debate Clause (Article 1 s. 6[4]) of the Constitution of the United States, and inevitably imported into the Constitution of the Irish Free State and Bunreacht na hÉireann via Articles 18, 19 and 20 of the former (these being similar to Articles 15.10, Article 15.12 and Article 15.13). The reason for these privileges and immunities is universal and clear: as Clarke CJ explained in the course of his judgment in *Kerins I,* Articles 15.10, 15.12 and 15.13 are designed to ensure freedom of debate and the free exercise of the other constitutional roles of the legislature such as holding the government to account and providing representation for the people on matters of genuine public interest. These are, on any version, critical values that are central to the independence, autonomy and authority of parliament: it is, as Denham J. put it in *Attorney General v. Hamilton (No.2)* [1993] 3 IR 227 at p. 298 '*a cornerstone of democracy that members of the Oireachtas have free speech in the legislature'*.

9. Reflecting that context and in line with the approach adopted in Courts in other jurisdictions, the authorities have, at least generally, given Articles

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[3] See Carl Wittke '*The History of English Parliamentary Privilege'* (Ohio State University 1921) at pp. 23-32: '*No privilege of parliament is more essential than freedom of speech'*; See also the useful consideration in Imelda Higgins '*Parliamentary Privilege and Free Speech in the Oireachtas'* (2010) 32 DULJ 94.

[4] '*[F]or any Speech or Debate in either House,* [Senators and Representatives] *shall not be questioned in any other Place'*

15.12 and 15.13 a broad interpretation. This, again, was reiterated in *Kerins I*: the privileges and immunities cover a '*significant area'* (para. 134), must be given '*full and indeed generous interpretation'* (at para. 102) and confer '*a wide scope of privilege and immunity'* (para. 208 (iii)). So, the meaning of Article 15.10 was explained by Finlay CJ in *Attorney General v. Hamilton (No. 2)*: '*the proper construction of Article 15, s. 12 is that an utterance made in either House of the Oireachtas* ***cannot attract or be the subject matter of any form of legal proceedings,*** *wherever it may be published'* (at p. 268; O'Flaherty J. at p. 293) (emphasis added). He made that comment when expressly refusing to accept that the word '*privileged'* had the same connotation as in the law of defamation.

10. It has been suggested that Article 15.13 prevents a member of one of the Houses being held accountable to a Court for an utterance in that House by being sued in defamation in respect of that statement, being charged with criminal libel or contempt of Court arising from it, being charged with an offence in which it was sought to use the statement as an admission, being sued for a civil remedy not arising from the utterance but in respect of which the plaintiff sought to tender the utterance as relevant evidence, being charged with an offence of which the necessary constituents were the making of the statement or being compelled by a Court or other authority to explain or expand upon the utterance.[5] In all but the last of these circumstances, the utterance is the basis for an attempt to impose a liability on the member.

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[5] *Attorney General v. Hamilton (No. 2)* [1993] 3 IR 227 at p. 269 (per Finlay CJ).

11. In this case, it is not sought to make any of the members of Dáil Éireann whose utterances before the PAC have been referred to in the course of these proceedings liable in law for making them: as I have already noted, these members are not respondents to the proceedings. The question here is whether '*amenability'* has a broader meaning than exposing the member themselves to a liability or punishment for making the statement in question and/or whether more general principles of justiciability demand a wider prohibition on the use by a Court of parliamentary utterances.

12. Experience suggests three possible answers: (a) that the prohibition on rendering a parliamentarian '*amenable'* for an utterance before one of the Houses or more general principles of justiciability means that a Court should *never* use that statement for the purposes of making *any* finding[6], (b) that these prohibitions *only* apply where it is sought to impose such a liability on the member in the sense outlined in the previous paragraphs, or (and between these extremes) (c) that the prohibitions operate more generally so as to prevent a statement being used before a Court as the basis for a finding of wrongdoing against, or direct criticism of, a member (with or without the imposition of a consequent liability or sanction on the member) but that parliamentary utterances may be referred to in proceedings before a Court for some purposes that fall short of this.

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[6] Joseph, '*Parliament's Attenuated Privilege of Freedom of Speech*' (2010) LQR 568: '*[Article] 9 ... aimed to prevent any judicial or other recourse based on what was said or done in Parliament .... [p]roceedings in Parliament are questioned whenever counsel or the courts draw inferences, findings or conclusions from them*'.

13. The third of these is the most attractive and, at the same time, the most slippery. Depending on how broadly the notion of a direct finding of wrongdoing against, or direct criticism of, a member and the permissible purposes are drawn, it may allow the use of parliamentary speech to chart a narrative, to adjudicate on the manner in which statutory powers were exercised, to establish (or perhaps to contest) the proportionality of legislation for the purposes of constitutional challenges or challenges based on the European Convention on Human Rights or EU law, or to generate legitimate expectations.

14. It is clear that the first version does not represent the law in this jurisdiction following *Kerins I*, and it would be most surprising if it ever did. The position was explained clearly by Murphy J. in *Garda Representative Association v. Ireland* [1989] ILRM 1 at p. 12: parliamentary debates contain a valuable record of the considered views of members of the Houses, and it would be absurd to proceed on the footing either that the statements were never made or that others did not acquaint themselves with those statements. The statements, accordingly, can be relied upon to establish facts. As explained in some detail in *Kerins I*, there are a number of decisions of this Court addressing the legality of the proceedings of parliamentary committees in which reference to statements made by members of the Houses before those committees was deployed, at the very least for the purposes of charting a factual narrative. It is, of course, clear that the principle of non-amenability prevents the imposition of sanction or liability on a member for what they have said in parliament. But there can

be no doubt but that following *Kerins I* and *II* that there are other restrictions, derived from the Constitution, on the extent to which regard can be had by the Courts to parliamentary speech.

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15. Two judgments of the High Court have proceeded on the basis that the principle of non-amenability reflected in Article 15.12 and Article 15.13 extends beyond a prohibition on the use of a parliamentary utterance so as to impose a liability on the member and incorporates a preclusion on a party to proceedings or the Court from challenging the motivation for making such a statement or to attribute impropriety to the deputy or senator doing so. These cases also suggest that judges may not condemn a parliamentarian for what they say in the Houses.

16. One of these cases is of importance in identifying what was decided in *Kerins I,* and both relied on decisions of Courts in other jurisdictions. To understand why they were decided as they were, and to determine the extent to which they have survived *Kerins I, II* and the decision of this Court in *O'Brien v. Clerk of Dáil Éireann* [2019] IESC 12, [2020] 1 IR 90 ('*O'Brien'*), it is necessary to take a short detour across those decisions from other jurisdictions, all of which depended on the meaning of Article 9.1 of the Bill of Rights 1689. It proclaimed that '*freedom of speech and debates*

or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.

17. By the early 1990s there was confusion in some jurisdictions around the extent to which Article 9 precluded reference to or reliance upon statements in parliament for purposes *other* than the imposition of a liability or sanction on the speaker. As it happens, the differing views foreshadow the issues facing this Court in *Kerins I* and *II* and indeed, in this module and many of the Commonwealth authorities and English authorities in which they were debated, assumed prominence in the decisions of this Court in *Attorney General v. Hamilton (No. 2*). In the context of interpreting Article 9, Courts in other jurisdictions had thus entertained evidence of parliamentary utterances for the purpose of proving the basis on which Ministers exercised statutory powers,[7] but refused to allow evidence of what a member of parliament had said in the House for the purpose of establishing malice in a defamation action[8] or to prove a fact in judicial review proceedings.[9] At the same time, it had been found that reference to parliamentary speech could be made for the purpose of reducing damages in a libel action,[10] and it had been held that Article 9 did not prevent a statement made in parliament from being put to a witness in cross examination before a parliamentary select committee with a view to establishing a previous inconsistent statement.[11] Yet it had also been said that it was a breach of privilege to allow what was

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[7] *R v. Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696.
[8] *Church of Scientology v. Johnson-Smith* [1972] 1 QB 522.
[9] *R. v. Secretary of State for Trade ex parte Anderson Strathclyde plc* [1983] 2 All ER 233.
[10] *News Media Ownership v. Finlay* [1970] NZLR 1089.
[11] *R. v. Murphy* (1986) 64 ALR 498.

said in parliament to be the subject matter of investigation or submission.[12] Some cases had drawn a distinction between proceedings brought by the member of parliament and those brought against him or her.[13]

18. In *Pepper v. Hart* [1993] 1 All ER 42 the House of Lords decided that Article 9 did not prevent reference to parliamentary debates for the purposes of construing a statute: the speech of Lord Browne-Wilkinson at one point suggested an extremely narrow view of Article 9, describing its scope as being '*to ensure that Members of Parliament were not subjected to any penalty, civil or criminal for what they said ...'* (at p. 68). Reference to such material was permissible not to construe the words used by the Minister, he said, but to give effect to the words used so long as they were clear. At the same time, he also suggested that the provision prevented the use of parliamentary statements to suggest that a member of the House had acted '*improperly in Parliament in saying what he did in Parliament'* (at p. 68).

19. *Pepper v. Hart* was decided in November 1992. A year and a half later, the Privy Council delivered its opinion in *Prebble v. Television New Zealand* [1995] 1 AC 321. Here, the question was whether pleas of justification advanced in defence of proceedings in defamation brought by a former member of the New Zealand parliament should be struck out insofar as they were based upon statements made by him and others in parliament. The defendant contended that Article 9 was only engaged where proceedings

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[12] *Comalco Ltd. v. Australian Broadcasting Corporation* (1983) 50 ACTR 1.
[13] *Wright and Advertiser Newspapers Ltd. v. Lewis* (1990) 53 SASR 416.

sought to assert legal consequences against the maker of the statement for making it. In holding that the pleadings should be struck out the Privy Council, in an opinion delivered by Lord Browne-Wilkinson, expressed the view that the purpose of Article 9 was not simply to avoid the imposition of sanction, but to ensure that *inter alia* members of Parliament could '*speak freely without fear that what they say will later be held against them in the courts'*. One statement he made was cited and relied upon in *Kerins I*: there could be no objection to the production of Hansard to establish historical facts, that is '*to prove what was done and said in Parliament as a matter of history'*. There was, however, a line drawn with that purpose at one side, and the invocation of parliamentary speech to assert that words were improperly spoken, on the other. He said the following (at p. 337):

> '*parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading.'*

20. Noting that throughout all of these decision there is at various points a merger of Article 9, and what is referred to as '*a wider principle'* of non-intervention by Courts in parliamentary affairs (see for example *Prebble* at p. 332), these comments in *Prebble* led a Divisional Court (Johnson P., Kelly and O'Neill JJ) to conclude in *Ahern v. Mahon* [2008] IEHC 119, [2008] 4 IR 704 that a Tribunal of Inquiry could not cross-examine a

member of parliament about statements made within parliament that were said to be inconsistent with statements made outside it: while the Tribunal could refer to such statements and reproduce them in its report, it could not suggest that the statements were untrue, misleading or inspired by improper motivation (para. 33-35). *Ahern v. Mahon* thus located in Article 15.13 a privilege that went far beyond a prohibition on the use of utterances to ground a sanction: '*it protects members from being questioned regarding statements made in the context of legal proceedings and precludes any suggestion that statements made in the House were false or were motivated by a desire to mislead'*.[14] That, in turn, proved influential in the analysis of these provisions conducted by Ní Raifeartaigh J. in the course of her judgment in *O'Brien* (the High Court decision in which appears at [2017] IEHC 179, [2017] 1 ILRM 457).

21. There, the applicant sought to challenge a decision of the Committee on Procedure and Privileges of Dáil Éireann dismissing the applicant's complaint that statements made by two members of parliament touching on his financial affairs were an abuse of privilege. By the time the matter came before the High Court, the members who made the statements were not respondents in the action, and there was thus no question of any attempt being made to impose a liability upon them for anything they had said in parliament. Ní Raifeartaigh J. determined that the proceedings should be dismissed. In the course of her impressive analysis of the authorities she

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[14] Imelda Higgins '*Parliamentary Privilege and Free Speech in the Oireachtas'* (2010) 32 DULJ 94 at p.110.

explained that the prohibition imposed by Article 15.12 prevented parliamentary utterances being subject to '*determination*' so that where the purpose of proceedings was a '*judicial condemnation*' of what had been said by deputies, this would '*cut through to the very heart of the immunity*' (see para. 106). The effect of the stipulation in Article 15.12 that parliamentary utterances were '*privileged*' was, she decided, that the statements made in Dáil Éireann the subject of those proceedings '*cannot be the subject of the Court's adjudication and condemnation*' (para. 104). That provision, she said, combined with Article 15.13:

> '*to create a basket of privileges and immunities to ensure that the courts (and tribunals) would not be involved in the exercise of analysing and pronouncing upon parliamentary speech ... or the motivation of the speaker...*'

22. If this statement is true in all respects, then (for reasons I explain at greater length later) the applicant can never succeed in her claim for damages: that claim will require the Court of trial to examine a wide range of pleaded utterances said to have been made by various members of the PAC in the course of the proceedings of which she complains, and will (if the applicant is to be successful) demand the attachment of an award of damages to those utterances. That, inevitably, involves analysis, pronouncement, an examination of motivation and, ultimately, adjudication *and* condemnation.

23. It might be suggested that three related considerations point to the conclusion that the privileges may not be this broadly drawn. First, and as I have already observed, in a number of cases the Courts have, in fact, had regard to statements before parliamentary committees in the course of proceedings in which questions were raised as to the legality of their proceedings. It is a short step from that fact, to the conclusion that – whatever exactly the words appearing in Articles 15.12 and 15.13 mean – they do not preclude the attachment of some legal consequence to an utterance, arguably one adverse to the speaker. If parliamentary utterance is used to establish the illegality of proceedings of a parliamentary committee the Court, in deciding that the committee is acting unlawfully could be said to have in effect decided that the member ought not to have spoken as they did. The approaches adopted to parliamentary statements in these earlier cases weighed heavily with the Court in *Kerins I.*

24. Second, one proposition that emerges more forcefully from *Kerins I* and *II* than from any of the earlier cases is that it cannot be assumed that the privileges conferred on parliamentarians by Article 15 are coterminous with those provided for in Article 9 of the Bill of Rights: Clarke CJ cautioned against construing these provisions of Article 15 '*by lazy analogy with current or historic practice in the United Kingdom'* (*Kerins I* at para. 127). Yet, as clear from the foregoing, many of the earlier cases leading up to the decision in *O'Brien* relied heavily on common law precedent. The history of parliamentary privilege is important background in understanding the constitutional guarantees contained in the 1922 and 1937 Constitutions but

it would be a significant error to decide any claim in Irish law simply by reference to the position that applies or at any other time applied, in any other jurisdiction.

25. Third, *Kerins I* and *II* make it clear that the Court can use parliamentary utterance to establish '*actions'* but not '*words'* and it might be said that this grounds a new distinction (at least as expressed in those terms) which, it might be argued, charts a new course. These three propositions – essentially – defined the legal argument advanced by the applicant here.

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26. While the judgment of Ní Raifeartaigh J. was recited at length in the course of the judgment of this Court in *O'Brien,* in neither that case nor in the decisions in *Kerins I* or *II* did the Court expressly endorse in full, her account of the scope of privileges and immunities. In fact it is clear that those judgments combine to impose one significant qualification on the formula derived from the Article 9 cases. It seems to me to be arguable that they characterise differently the legal basis for some of the immunities, and it is possible that in one respect, the Irish constitutional immunities intrude less on the power of judges to at least indirectly criticise parliamentary speech than do those in other jurisdictions. These follow from the following four findings within the three judgments.

27. First, it is clear that Articles 15.12 and 15.13, whether viewed collectively or separately, prevent the imposition of a liability or sanction on a member of either House of the Oireachtas for what they say before those Houses (*Kerins I* at paras. 141, 142 and 143). However, taking evidence of what transpired at a parliamentary committee does not itself breach the immunities conferred on the Houses of the Oireachtas: such evidence, Clarke CJ said, could be admitted '*for the purposes of determining the action in which that committee was engaged'* (paras. 123 and 124). Specifically, he explained, in so acting '*a court does not infringe the prohibition against making members of the House amenable to a court in respect of their utterances as prohibited by Article 15 and does not infringe against any privilege conferred by the same Article'* (*Kerins I* at para. 208(ii)). So, at least in some cases where the members of the Houses whose utterances are relied upon to establish the actions of the committee as a whole are not themselves respondents to the proceedings (and thus not themselves liable to face claims for costs or damages), there is no difficulty in using utterances for this purpose. To that extent, the parliamentary statement may be indirectly in issue in the proceedings, and it might be said that the member may find themselves being inferentially criticised by the Court for making the utterance if it is found to be evidence of an illegality as found by the Court.

28. Second, the decisions emphasised that while it was a breach of Article 15[15] to make a member amenable for something said in the House or a committee, Clarke CJ also stressed that the same '*amenability'* could not be achieved '*by collateral means'* (para. 149). This prohibition was formulated in a number of different ways throughout the judgments. There was, he said, a '*clear area of non-justiciability which surrounds utterances made in the Houses or their committees or matters which are sufficiently closely connected to such utterances as to enjoy the same privileges and immunities'* (id.). Later, he said that utterances could not be '*the subject of litigation'* (para. 180 (c)). In *Kerins II*, he made it clear that to review the tone or manner of questioning would be to render deputies amenable (para. 14). In the course of the judgment in *O'Brien* it was found (upholding the decision of Ní Raifeartaigh J.) that even though the deputies were not parties to the proceedings, the challenge to the decision of the Committee on Procedure and Privileges finding that their utterances did not breach privilege would be '*to allow the court to have a role in the ultimate determination of whether those utterances were found to be impermissible and in a decision as to whether, and if so what, sanctions were appropriate. While indirect, such a course of action would amount to making a deputy amenable to a court in respect of utterances in the House'* (para. 94). What was precluded, the judgment infers, was rendering the Court '*indirectly involved in the assessment of utterances made in the Houses'* (para. 97) or consideration of '*questions which relate indirectly or collaterally to utterances made in the*

[15] It will be observed that the focus of the analysis of the Court in each of *Kerins I, Kerins II* and *O'Brien* is upon Article 15.13: Clarke J. described Article 15.12 as principally involving a privilege from suit in defamation (para. 141).

Houses' (para. 113). The concluding part of the judgment makes clear that it was collateral and indirect involvement in '*dealing with utterances'* that rendered the action at issue in that appeal, impermissible (para. 113).

29. Third, the judgments in all three of the cases can be interpreted as viewing the prohibition on '*collateral'* or '*indirect'* amenability as being a necessary and integral part of the immunity provided for in Article 15.13, or they can be understood as acknowledging a distinct prohibition arising from more general principles of justiciability, or from the separation of powers. Using language loosely it might not be wrong to say that a claim that sought to render a parliamentarian '*amenable'* for an utterance was for that reason non-justiciable: the use of different language arises because Clarke CJ differentiated for the purposes of his analysis between a narrow question of '*amenability'* arising where it was proposed to hear evidence of parliamentary utterance, and a broader question of '*justiciability*' arising when the Court examined whether the actions of the Committee could be challenged (see in particular para. 124). These were identified in *O'Brien* as '*two separate but connected bases on which it may be said that a court lacks jurisdiction to intervene in respect of matters which occur within the Oireachtas'* (at para. 95).

30. I have already noted how a not-dissimilar issue presents itself around the relationship between Article 9 and the general principle of non-intervention in some of the common law cases. Certainly, some of the comments in *Kerins I* would suggest a broad justiciability categorisation (*Kerins I* at

paras. 143, 149, 154 and 156). One of these formulations was approved in *O'Brien* (at paras. 95-96) while other statements in *O'Brien* to which I have referred in the preceding paragraph might be thought to locate indirect amenability specifically in Article 15.13 (*O'Brien* at paras. 94 and 97). Usually, the finer points of categorisation will not be important but there are cases, I think, in which this could make a difference: the prohibition in Article 15.13 is absolute, while principles of justiciability may be open to exceptions. While exceptions may be relevant where the question is whether proceedings could ever be instituted arising from an event in parliament, in this case (and for the reasons outlined by the Chief Justice in his judgment) there is no basis for suggesting such an exception.

31. Fourth and finally there was, in addition, '*a clear need for courts to be careful in respecting the separation of powers provided for in the Constitution'* (para. 150). That principle, Clarke CJ said, '*requires a court to refrain from making orders which would have the effect of impermissibly inhibiting the Oireachtas in its work'* (para. 208 (iii)). That rule of restraint included, but was not exhausted by, acting in a manner that would invoke a jurisdiction in respect of matters closely connected with the privileges and immunities provided for in Article 15.

32. So, and in summary, prior to *Kerins* it might have been thought that, while parliamentary utterances were admissible in order to establish what was said and done in parliament as a matter of history, they could not be used so as to, either directly or indirectly, visit any consequence on a member of either

House for what they said in parliament, *or* in such a way that the member would either be forced, or feel it necessary, to explain the statement, or be cross-examined on it, *or* that the parliamentary utterance would be scrutinised, criticised or parsed by the Court. While it was arguable that the approach adopted by the Court in both *Re Haughey* and *Maguire v. Ardagh* had modified this, *Kerins I* and *II* confirms that this is the case, articulates the consequence and reflects that modification in the application of the constitutional text.

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33. The change, to repeat, is that the utterance can be used to characterise an action, and that the Court can base a conclusion of illegality on that characterisation. That modification, it might be observed, will be relevant only where a Court is concerned with actions of a collective (whether of a committee of the House or Houses or the Houses as a whole). The justification and basis for this interpretation lies in the closely related obligations of the Court to defend and vindicate the constitutional rights of persons in the course of proceedings of such a committee *and* to superintend compliance by such committees with the law. While pre-dating the analysis of the principles to be applied in construing provisions of the Constitution outlined in my judgment in *Heneghan v. Minister for Housing, Planning and Local Government* [2023] IESC 7, [2023] 2 ILRM 1 (with which O'Donnell CJ, Dunne, O'Malley, and Baker JJ. agreed), the conclusion

reflects the approach to constitutional interpretation outlined in that case. The cases from other jurisdictions dealing with Article 9 of the Bill of Rights disclose a range of different interpretations in a similar context of the words appearing in that provision ('*impeached'* or '*questioned'*), and the use of the word '*amenable'* in Article 15 does not, in itself, necessarily out-rule any one of the three possible constructions I have referred to earlier. It was, accordingly, necessary for the Court to posit a construction of the provision which protects freedom of parliamentary speech, while at the same time allowing it to discharge its constitutional functions of determining the legality of the proceedings of parliamentary committees, and (to the greatest extent possible consistent with the interests protected by Article 15 itself) vindicating the rights of those who come before those committees (functions, it might be observed, that neither the State nor the Houses of the Oireachtas have ever questioned since the decision in *Re Haughey*).

34. At the same time, it follows from the approach adopted in *Kerins I* and *II* and *O'Brien* that not only is the prohibition on imposing a sanction or liability on a member of the Houses consequent upon their parliamentary speech inviolable, but whether viewed as an aspect of Article 15.13 or as a more general principle of justiciability, the Constitution also prohibits proceedings of a Court or other authority which result in *collateral* or *indirect* amenability. This means that it prohibits making an utterance (or matters that are sufficiently closely connected to such utterances) '*the subject of litigation'* and/or assessing utterances made in the House, or

reviewing the tone or manner of questioning of a person by a member of a parliamentary committee.

35. *Kerins I* and *II* make it clear that in at least some cases the Court can embark upon a determination of whether a parliamentary committee has acted unlawfully by reference to what was said by members of the Houses before the committee, without breaching this prohibition. It follows that the process of consideration of parliamentary utterances and use of those statements as the basis for a finding of illegality by the committee as a whole did not in itself necessarily result in the utterances being either the subject of litigation, assessed, collaterally attacked and/or indirectly challenged in the sense in which Clarke CJ used those terms in his judgments. This was subject to the requirement that any such judicial review had to be conducted within the boundaries described by the Court and, thus, (a) that the Court could not review the tone or manner of questioning, and (b) that there could be no question of the members of the committee facing any pecuniary or other sanction as a consequence of what they said before the committee and, thus, should not be respondents in any such proceedings (hence the replacement of the original respondents in *Kerins II*).

36. But where these two conditions are met, it seems to me to follow from *Kerins I* that a Court's consideration of parliamentary speech when determining the legality of the proceedings of an Oireachtas committee is properly viewed as incidental to the assessment of the actions of the committee as a whole. It is those actions, not the statements of the individual

parliamentarians relied upon in characterising them, that are the focus of the challenge, and thus the '*subject of the litigation'*. The purpose of that consideration of parliamentary utterance is to determine the legality of the actions of the committee, not to condemn the speech of its individual members. The distinction, I think, was alluded to by Clarke CJ at an early point in his judgment in *Kerins I* when he noted the difference between using a parliamentary utterance to decide what action was being taken by a committee and a Court placing reliance '*on an individual utterance for the purposes of providing an aggrieved party with a remedy'* (at para. 73). Thus it was that the Court in *Kerins I* and *II* necessarily decided that using the statements of members of an Oireachtas committee to identify the nature of that committee's activities was not a collateral or indirect attack on the parliamentarians' speech.

37. The incisive and enlightening academic commentary[16] on *Kerins I and II* looks critically at the distinctions underlying these conclusions. I do not doubt that cases may emerge in which they may be difficult to draw. In point of fact, the literature around the interpretation of Article 9 of the Bill of Rights in the decisions since *Pepper v. Hart* makes not dissimilar points.[17]

38. The fact is (to revert to the categorisation framed at para. 12 above) that once it is decided that it is *not* the law either (a) that the prohibition on rendering

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[16] See, in particular, Hickey '*Justiciability and proceedings in the Oireachtas: the case of Angela Kerins'* [2020] PL 610 and Doyle and Hickey '*Constitutional Law: Text, Cases and Materials'* (2nd Ed. 2019) at paras. 7-35 – 7-59.

[17] Joseph, '*Parliament's Attenuated Privilege of Freedom of Speech'* (2010) LQR 568 at pp. 576-578: '*[t]o draw inferences, findings or conclusions is to question'*.

a parliamentarian '*amenable'* for an utterance before one of the Houses (or any allied principle of justiciability) means that a Court should *never* use that statement for the purposes of making *any* finding, or (b) that the prohibition *only* applies where it is sought to impose a liability in damages or other sanction on a member, it is necessary to draw a potentially difficult distinction between permissible and impermissible considerations of parliamentary speech. That distinction is framed by reference to the combined effect of the purpose for which that evidence is sought to be adduced, and the impact on the individual parliamentarian if it is used for that purpose.[18] There will always be the prospect of cases at the margins of such a distinction.

39. However, once the force of the rule of restraint is appreciated and the definition of indirect amenability as summarised in para. 34 above is factored into any individual case, it seems to me likely that these distinctions can be readily applied in all but the most unusual of situations. Restraint demands that the inquiry as to the purpose for which it is sought to use an utterance should be conducted at a high level of generality and, as with any inquiry into motive, depends on identifying an objective which is dominant or actuating. When that purpose has been thus determined, the Court must ask whether the purpose is a permissible one. If the purpose for which it is

[18] It might be observed the Court of Appeal for England and Wales has recently referred to the Courts in that jurisdiction as having '*redrawn the boundaries of privilege to allow examination in judicial review proceedings of the reasons given by a minister in Parliament for a particular decision under challenge*' (*Warsama v. Foreign Commonwealth Office* [2020] EWCA Civ. 142, [2020] QB 1076), and to the view that the effect of the Human Rights Act 1998 has been to mandate that reference to parliamentary speech be permissible in challenges under that legislation (*R (Project for the Registration of Children as British Citizens) v. Secretary of State for the Home Department* [2021] EWCA Civ. 193 at para. 99).

sought to deploy parliamentary utterances involves questioning tone, motivation or manner of speech, or is such that the utterances are the subject of the litigation, it follows from the judgments in *Kerins I* and *II* that the dominant purpose will not (or at least not usually) be to determine the legality of the actions of the committee. It is hard to foresee circumstances in which tone, motivation and manner of speech will be used for the dominant purpose of establishing what the Committee was doing. These matters will more usually be relevant where it is sought to attach some consequence to the speech of the individual, than to the action of the collective.

40. Accordingly, and in summary:

(i) The principle of non-amenability in respect of parliamentary utterance reflected in Articles 15.12 and 15.13 of the Constitution precludes the imposition of any sanction or liability on a member of either House of the Oireachtas for a statement made in those Houses.

(ii) Moreover, there is a principle that members of the Houses ought not to be rendered '*indirectly*' or '*collaterally*' amenable for their statements before either House. This means that a Court cannot permit an utterance (or matters that are sufficiently closely connected to such utterances) to be made '*the subject of litigation*' and that a Court should not engage in assessing utterances made in the House, and/or reviewing the tone or

manner of questioning of a person by a member of a parliamentary committee.

(iii) This principle is not necessarily breached when a Court has regard to a statement made by a member of either House to a committee of either House (or both Houses) when characterising the actions of the Committee for the purposes of determining the legality of its proceedings.

(iv) The foregoing proviso is, accordingly, by definition limited to circumstances in which the purpose, for which it is sought to deploy the utterance, is to allow the Court to assess the actions of a collective. It will not apply where the members of the Committee are parties to the proceedings, or where the dominant purpose is to review the tone or manner of questioning or where the parliamentary speech is, in substance, the subject of the proceedings.

(v) In determining the dominant purpose for which it is sought to deploy a parliamentary utterance and whether the utterance is in fact the subject of the proceedings, the Court must apply a principle of restraint and should assess the proposed use of the statement at a level of generality asking, in an overall sense, what conclusions the litigant is seeking to ask the Court to draw from the utterance. Unless within the situation identified in (iii) above, if those conclusions might amount to an

imposition of direct or indirect amenability thus understood, the Court should not entertain evidence of the utterance.

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41. In this case, the applicant is correct insofar as she says that the purpose for which she refers to parliamentary utterance is not to render the members directly amenable. They are not parties to the proceedings and no question of a direct sanction or liability accordingly arises. However, it also seems to me to be clear from the pleadings that the applicant *does* seek to render the members in question collaterally or indirectly amenable for making the statements, and that in substance her purpose in doing so is not to establish what the committee was doing, but what the individual members were saying. Discovery, as Owens J. held, should never issue to support such a claim.

42. The dominant purpose animating the proposed calling by the applicant of evidence of what was said by the members of the committee falls to be determined by reference to her pleaded claim. There, she frames her plea for damages as follows:

> '*Damages (including damages for breach of the Applicant's right to constitutional justice and/or damages for personal injury and/or damage to her reputation arising from the* ***unlawful examination by the***

Respondents as members of the Public Accounts Committee *of expenditure by the Rehab Group and/or the work of the Applicant as Chief Executive Officer of the said Group and/or loss and damage by reason of the ending of the Applicant's employment with the Rehab Group consequent upon the unlawful actions of the Respondents).'*

(emphasis added)

43. The reference to '*examination'* (it was confirmed by counsel in the course of his oral submissions to the Court) was to the questions that were asked of the applicant before the PAC in a public hearing although this, he stressed, was an '*action'*. The '*stress, anxiety and trauma'* said to have been caused to the applicant was, it is pleaded, '*occasioned by the unlawful actions of the Respondents in pursuing its examination into the financial affairs of the Rehab Group'*. She says that she '*was subjected to questioning over a period of seven hours on a number of issues that were not the subject of the hearing as notified to her'*. '*Questioning was pursued in a hostile manner',* she asserts, '*and in a manner which suggests that the Respondents and/or individual members of the Respondents were engaged in a witch hunt insofar as the Applicant was concerned.'* These pleas are substantiated over three and a half pages by recitation of questions asked by individual members of the PAC at the seven-hour meeting that took place on 27 February 2014. These quotations are then followed thus:

'*Arising from injury caused to the Applicant* ***as a result of the bias of the Respondents and individual members thereof during the hearing before the Public Accounts Committee*** *and in public comment thereafter she was hospitalised between the 2nd and 11th March 2014. During this period in the immediate aftermath of her appearance before the Respondents and as a direct consequence of same she also ceased to be employed by the Rehab Group …'*

(emphasis added)

44. The Statement of Grounds proceeds to address a later hearing of 10 April 2014 (which the applicant did not attend). Over a further five pages, statements made by the members of the PAC in the course of the meeting are recited. Those comments are described as '*highly prejudicial and damaging to the Applicant'*. She pleads that the PAC and/or its members '*pursued a political and/or personal agenda with regard to the questioning of the Applicant'*. It was her case, her counsel said, that the words used by the members of the PAC '*should not have been uttered'*, and while it was an integral part of the claim for damages that he was asking the Court to so conclude, he submitted that the Court had already concluded that they should not have been uttered because they were uttered without jurisdiction.

45. Her affidavit evidence is to like effect. She experienced, she avers, a '*serious health collapse'* and was hospitalised, as a result of '*the behaviour of the Respondents'*. That '*behaviour'* is variously described by her as

including '*a tirade of abuse directed at me personally in hostile and aggressive tones',* the pursuit '*of inappropriate questioning'* of her, treatment that was '*highly abusive'*, and the making in the course of public hearings '*prejudicial, hostile and damaging commentary'*.

46. What these pleadings show follows in any event from commonsense. The dominant feature of the applicant's complaint is not simply that the PAC knowingly exceeded its jurisdiction thereby causing her damage. That illegality (knowing or otherwise) may have been *a* cause of her injury, but it was not the *causa causans.* Her claim does not limit itself to the assertion that she suffered the distress or anxiety or for that matter the financial loss of which she complains in her proceedings just because the PAC exceeded its terms of reference or its invitation to her. She therefore does not seek in this module of her action to deploy these statements just to prove that there was such an excess of jurisdiction. Her claim for damages is characterised by her complaint about how she was treated, not on the fact that that treatment had at its root an illegality.

47. Thus, what she consistently suggests in her claim is that what caused that alleged injury is the *way* the PAC exceeded its jurisdiction: she avers at one point to her objection to '*the manner I was treated when I attended before the Public Accounts Committee'.* The applicant wishes to adduce evidence of parliamentary utterances because they are the statements to which the applicant refers at length in her Statement of Grounds that, she says, humiliated, debased and injured her. This will depend, avowedly, on the

tone of the questioning, the manner in which it was pursued, the content of the questions and statements, and the alleged motivation of the member of the House asking them. Not only is the object of the exercise far removed from the identification of the acts of the committee as a whole for the purposes of establishing an excess of jurisdiction, but if she is to succeed in her claim the inevitable outcome is specific and direct judicial condemnation of the speaker.

48. Thus, the applicant wants the Court to conclude that identified statements of particular Dáil deputies combined not merely so as to render them '*actions'* of the PAC as a whole (this of course being the conclusion reached in the first module) but now additionally in this second module to decide that the nature and effect of these statements was that they wrongfully caused her injury. Her claim for damages can only be sustained if the Court examines the utterances and determines that by their very nature, serious personal injury was both an actual and reasonably foreseeable consequence of their being made. The fact that they are sought to be deployed in this way, and for this purpose, unavoidably means that in the applicant's damages claim, the utterances are '*the subject'* of the litigation. Indeed, if the applicant succeeds in her claim the end point would be that Dáil Éireann would have an unanswerable claim against the deputies who made the statements, subject only to the defence that this would render them amenable in breach of Article 15.13. If this is not '*indirect'* or '*collateral'* amenability, it is very difficult to conceive what is.

49. This conclusion should not be understood as simply the product of a narrow or technical parsing of the applicant's pleadings, nor should I be taken as ignoring the fact that the applicant also complains of statements made outside the Houses. But there is no version of her asserted right to damages that will not require the Court to assess parliamentary utterances, determine the motivation of those making them, and decide whether those statements were of such a nature, and were capable of having such an impact on the applicant, that she should be compensated for their *sequelae*, whether in the form of the personal injury of which she complains, or the termination of her employment. While the applicant presently contends that her object is merely to establish a knowing excess of power by the PAC, for as long as she asks the Court to assess and award damages for the impact on her of that illegality the dominant feature of her claim will remain the attachment to parliamentary speech of judicial analysis, consideration, assessment and, ultimately, the imposition of civil liability on Dáil Éireann because of those statements. There is no possible amendment to her proceedings that could alter that feature of her case. Discovery of parliamentary papers should not be directed in support of such a claim. For these reasons, together with those identified by the Chief Justice in the course of his judgment (with which I fully agree) this appeal should be dismissed.