

Appendix FF

Order 58, rule 15

No. 1

SUPREME COURT

Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from	
<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court

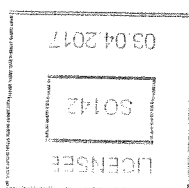
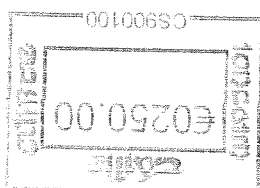
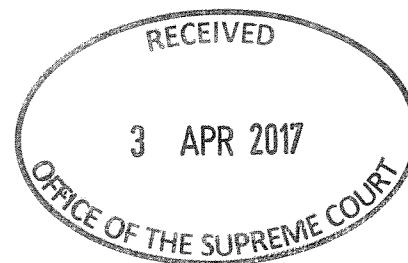
[Title and record number as per the High Court proceedings]

Alan Shatter	V	Sean Guerin
High Court Record Nr	2014 No.478 JR	Court of Appeal Record Nr
Date of filing	3 April 2017	
Name(s) of Applicant(s)/Appellant(s)	Sean Guerin	
Solicitors for Applicant(s)/Appellant(s)	A & L Goodbody	
Name of Respondent(s)	Alan Shatter	
Respondent's solicitors	Gallagher Shatter	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No X	
If yes, give [Supreme Court] record number(s)		

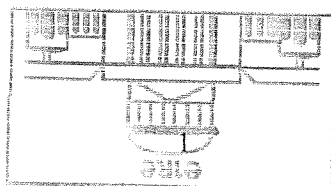
Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> X	<input type="checkbox"/> No
If Yes, please explain why			

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Ryan P, Finlay Geoghegan J, Irvine J
Date of order/ Judgment	10 November 2016; 2 March 2017



51507450
1402550



2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Sean Guerin SC
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Original status

<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant
<input type="checkbox"/>	Applicant	<input checked="" type="checkbox"/>	Respondent
<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party
<input type="checkbox"/>	Petitioner		

Solicitor			
Name of firm	A & L Goodbody		
Email	afanagan@algoodbody.com; bcurran@algoodbody.com		
Address	North Wall Quay IFSC Dublin 1	Telephone no.	01-6492000
		Document Exchange no.	DX 29
Postcode	D01 H104	Ref.	AVF 01412025

How would you prefer us to communicate with you?

<input type="checkbox"/> Document Exchange	<input checked="" type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

Counsel			
Name	Paul Gallagher SC		
Email	psa@paulgallagher.ie		
Address	Paul Gallagher S.C. 4A Wellington Road Ballsbridge Dublin 4	Telephone no.	01-817 5048
		Document Exchange no.	DX 816205A
Postcode	D04 CD37		

Counsel			
Name	Paul Anthony McDermott SC		
Email	paulanthonymcdermott@eircom.net		
Address	2 Arran Square Arran Quay Dublin 7	Telephone no.	01 - 8733413
		Document Exchange no.	DX 810134
Postcode	D07 KOYT		

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	Alan Shatter
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Original status	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant	Is this party being served with this Notice of Application for leave?		
	X	Applicant		Respondent			
	<input type="checkbox"/>	Prosecutor		Notice Party			
	<input type="checkbox"/>	Petitioner					
				Yes	X	No	

Solicitor Brian Gallagher			
Name of firm	Gallagher Shatter		
Email	bg@gallaghershatter.ie		
Address	4 Ely Place Upper, Dublin	Telephone no.	(01) 661 0317
		Document Exchange no.	
		Ref.	
Postcode	D02 T188		

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	X	E-mail
X	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Paul Sreenan SC		
Email	sreenan@pslaw.ie		
Address	1 Arran Square Arran Quay Dublin 7	Telephone no.	01-817 4478
		Document Exchange no.	DX 810164
Postcode	D07 PA0D		

Counsel			
Name	Cathal Murphy BL		
Email	cathalbmurphy@eircom.net		
Address	1 Sallymount Terrace Ranelagh Dublin 6	Telephone no.	01 - 8175360
		Document Exchange no.	DX 813014
Postcode	D07 YX89		

If the Respondent is not legally represented please complete the following

Current postal address	
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e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

4. Information about the decision that it is sought to appeal

The decision against which leave to appeal is sought is the decision of the Court of Appeal dated 10 November 2016 (and the subsequent decision on the Orders sought dated 2 March 2017) to grant the application by the Applicant/Respondent (Mr Shatter) for judicial review of a Report delivered to An Taoiseach on 6 May 2014, concerning the handling of allegations made by Sergeant Maurice McCabe relating to Garda misconduct, which Report was carried out by the Respondent/Appellant (Mr Guerin) (the Report). Mr Shatter instituted judicial review proceedings against Mr Guerin on the basis that the Report contained damaging findings and conclusions about him that Mr Guerin included without giving Mr Shatter an opportunity to rebut or make reply to.

On 27 February 2014, the Government announced its decision to hold a review and published the Terms of Reference for a review which Mr Guerin had been asked to carry out and report on.

The Terms of Reference of the review that Mr Guerin was asked to undertake required him to conduct a review and examination of the action taken by An Garda Síochána, and any other relevant entity or public body, pertaining to certain allegations of grave deficiencies in the investigation and prosecution of crimes, in County Cavan and elsewhere. The Terms of Reference required Mr Guerin to inter alia interview Sergeant McCabe and any other person as may be considered necessary and capable of providing relevant and material assistance to the review, and to examine all documentation and data held by An Garda Síochána, the Department of Justice and Equality and any other entity or public body as was deemed relevant. Mr Guerin was asked to deliver a report to An Taoiseach at the conclusion of the review, within 8 weeks of 27 February 2014 or so soon as may be thereafter.

At the time of the review, Mr Shatter held the position of Minister for Justice and

Equality, and Minister for Defence, in the Government.

Mr Guerin submitted his Report to An Taoiseach on 6 May 2014. An Taoiseach furnished a copy of selected parts of the Report to Mr Shatter on the following morning, and Mr Shatter resigned his two Government positions on 7 May 2014.

The statements in relation to which Mr Shatter complains appear in Chapters 19 and 20 of the Report as stated at paragraph 20 of the Judgment of the President delivered 10 November 2016.

Following his resignation, an ex parte application seeking leave to issue these Judicial Review proceedings against Mr Guerin was granted to Mr Shatter by Baker J on 30 July 2014.

In his judgment on the application, which he delivered on 20 May 2015, Noonan J. rejected Mr Shatter's complaints on all grounds.

Mr Shatter appealed that decision to the Court of Appeal, which by judgment dated 10 November 2016, and by judgement and Order dated 2 March 2017, upheld the appeal and granted a declaration that the conclusions in the Report were reached in breach of fair procedures and constitutional and natural justice, and ordered that Mr Guerin pay Mr Shatter the costs of the proceedings in the High Court and the costs of the Appeal. The Court of Appeal placed a stay on the Costs Order in the event of an application for leave to appeal and in that event, a continuing stay pending the outcome of that appeal.

5. Reasons why the Supreme Court should grant leave to appeal

Leave to appeal to this Court pursuant to Article 34.5.3° of the Constitution is sought on the basis that the decision of the Court of Appeal involves a matter of general public importance for the following reasons:

- 1) The first matter of general importance is the issue as to whether the claim of Mr Shatter was properly justiciable in all the circumstances. There is a fundamental question of whether it was appropriate for the Court of Appeal to reach its conclusion on the basis of an assessment of the political ramifications of the Report. The judgment of the President was predicated on the finding that *“It is clear that the Taoiseach’s withdrawal of confidence and Mr. Shatter’s response by resigning happened because they considered that the statements in the Report contained serious criticisms of the latter in the performance of his responsibilities as Minister for Justice and Equality.”* (para 17)
- 2) This is a statement concerning the political circumstances of Mr. Shatter’s resignation and the political reasons for such resignation. It was a finding that was of central importance to the President’s judgment, with which the other two judges agreed.
- 3) In the High Court Noonan J concluded at paragraph 124 of the Judgment that *“In my view, most if not all of the consequences of which [the Appellant] makes a complaint arose from purely political decisions. These included the matters already identified but in addition the alleged determination of An Taoiseach not to allow the [Appellant] an opportunity to consider the report before it was published, the alleged decision by An Taoiseach that he would be unable to express confidence in the [Appellant] if asked and ultimately the [Appellant’s] decision to resign.”*
- 4) The second matter of general importance is whether or not the requirements of fair procedures and natural and constitutional justice apply and, if so, the extent to which they apply to an inquiry and report of this nature and, in the circumstances, whether the claim is actually justiciable. The applicability of fair procedures to a task of the kind undertaken by Mr Guerin and the nature of the requirements imposed thereby is a matter of general public importance, particularly so in light of Mr Shatter’s particular position of knowledge with respect to the scope of the Report. (see the judgment of Noonan J at pages 47-48 and 101) and the

knowledge available to him from the Department official nominated to liaise with Mr. Guerin.

- 5) The issue of whether or not Mr. Guerin afforded Mr. Shatter the requisite level of fair procedures is, in the particular context of the issues raised above, a matter of general public importance. A key factual aspect of the case in that regard was that the correspondence sent Mr Shatter's nominated point of contact within his Department was apparently not actually passed on to Mr Shatter.
- 6) The issue of whether or not the judicial review amounted to a collateral attack on the decision to establish a Commission of Investigation and, in particular an attempt to have Mr Shatter excluded from the Terms of Reference of such Commission, is a matter of general public importance. It raises the important issue of collateral attack in a novel context. The judicial review proceedings were expressly used to try and limit discussion of the matter in the Dail and to have Mr. Shatter excluded from the Terms of Reference of the Commission and this was done in circumstances where the Government could have made him the subject of the Terms of Reference even if no scoping exercise had taken place.
- 7) The judgment of the Court of Appeal raises an important issue as to whether or not the duty to make full disclosure when seeking leave for judicial review continues to retain any practical force as a legal principle. In the present case Mr Shatter sought leave on the basis of a completely false claim that Mr Guerin was guilty of actual and/or apparent bias because he was a member of a committee that had lobbied in respect of the Legal Services Bill. If the mere fact of being forced to accept the true position is an answer to an unexplained and inexcusable act of material non-disclosure then the obligation to make full disclosure when seeking leave is no longer a principle of any force or effect and this raises a matter of general public importance.
- 8) Finally, and by way of conclusion, it is noted that the Court of Appeal itself recognised the importance and novelty of the issue that it had to determine. See the President's Judgment at para 55 and 58 and finally Geoghegan J's at para 33.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

1. For the reasons adverted to above, the Court of Appeal erred in holding that the claim of Mr Shatter was properly justiciable at the point in time at which it was brought and, in particular, erred in finding as a fact that the Report had been the reason why Mr Shatter resigned. In particular, The judgment of the High Court correctly held that Mr Shatter was seeking to litigate non-justiciable issues of a political nature such as the reason why An Taoiseach only permitted him to read parts of the report, the reason he resigned and the reason An Taoiseach published the Report notwithstanding Mr Shatter's apparent concerns about it. The High Court correctly found as a fact that "*In reality, the complaint appears to be of the publication and the subsequent political consequences*" (para 87).
2. The Court of Appeal erred in holding that the requirements of fair procedures and natural and constitutional justice apply (at least to the extent contended for by Mr Shatter) to an inquiry and report of this nature. The report of Mr Guerin was not a final determination or an inevitable step to a further process; rather it was commissioned by the Government of which Mr Shatter was a member and the consequences it had were all because of political decisions (such as the decision of An Taoiseach to only permit Mr Shatter to read 3 chapters and to then make it public).
3. The Court of Appeal erred in holding that Mr. Shatter had not in fact received the benefit of such fair procedures as were appropriate to an enquiry and report of this nature.
4. The Court of Appeal erred in not holding that the judicial review amounted to a collateral attack on the decision to establish a Commission of Investigation. The Court of Appeal failed completely to address the finding of fact in the High Court that Mr. Shatter sought to use the existence of the proceedings to prevent debate in the Dáil in circumstances where the outcome of the proceedings could not possibly have prevented his inclusion within the Terms of Reference (the relevant facts in this regard are set out at para 126 et seq of the High Court judgment).

5. The Court of Appeal erred in not holding that Mr Shatter had no standing to bring the challenge and that “The occupant of the office does also have a personal function and it is that capacity that is in question here” (para 67). The only reason the Report referred to Mr Shatter was because he held the Office of Minister and that was the only capacity in which it referred to him.
6. The Court of Appeal erred in not declining to grant relief on the basis of material non-disclosure at the time when leave was sought and obtained. The High Court correctly held that this was in and of itself a proper basis on which to refuse the discretionary relief of judicial review. The Court of Appeal failed to cite or engage with any of the case law on the consequences of material non-disclosure in its judgment and its judgment is entirely inconsistent with that said case law.
7. The Court of Appeal erred in granting the Applicant relief in circumstances where his case was based on factual assertions that the High Court found (at paras 106 and 108) to be untrue and which said findings the Court of Appeal did not actually disturb. In circumstances where judicial review is a discretionary relief it is unclear how the Court of Appeal could have granted such relief in circumstances where it did not overturn any of the findings in the High Court to the effect that Mr Shatter had adopted a position that was factually untrue.
8. The fact that the Court of Appeal ultimately was unable to award Mr Shatter any of the reliefs that he indicated were actually necessary to secure the vindication of his good name illustrates the error in its reasoning and the fact that the judicial review was misconceived in so far as it was brought against Mr Guerin and not against the Government.

Paul Gallagher SC

Paul Anthony McDermott SC

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

PAUL GALLAGHER SC, PAUL ANTHONY McDERMOTT SC

7. Other relevant information

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

Court of Appeal [2017] IECA 48 and [2016] IECA 318

References to Law Report in which any relevant judgment is reported

Court of Appeal [2017] 3JIC 0201 and [2016] II JIC 1005

High Court [2015] 5 JIC 2002; [2015] IEHC 301

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

1. An Order setting aside the Order of the Court of Appeal made on 2 March 2017
2. An Order dismissing the Respondent's application for Judicial Review.
3. An Order for the Appellant's costs of the proceedings before the High Court, the Court of Appeal and this Court.

What order are you seeking if successful?

Order being appealed:

set aside ☒

vary/substitute ☐

Original order:

set aside ☐

restore ☒

vary/substitute ☐

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

N/A

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

N/A

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

☐ Yes

☒ No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

☐ Yes

☒ No

If Yes, please give details below:

Will you request a priority hearing?

Yes

☒ No

No

If Yes, please give reasons below:

Signed: A&L Goodbody
(Solicitor for) the ~~applicant~~ ^{appellant}

Please submit your completed form to:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.