

SUPREME COURT**Respondent's Notice**

Supreme Court record number	051/2017
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[Title and record number as per the High Court proceedings]

ALAN SHATTER -V- SEAN GUERIN
HIGH COURT RECORD NO.: 2014/478JR

Date of filing	April 3 rd 2017
Name of respondent	Alan Shatter
Respondent's solicitors	Gallagher Shatter
Name of appellant	Sean Guerin
Appellant's solicitors	A & L Goodbody

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	
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The respondent was served with the application for leave to appeal and notice of appeal on date
April 4th 2017

The respondent intends :

☐ to oppose the application for an extension of time to apply for leave to appeal

☐ not to oppose the application for an extension of time to apply for leave to appeal

☒ to oppose the application for leave to appeal

☐ not to oppose the application for leave to appeal

☒ to ask the Supreme Court to dismiss the appeal

☐ to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court

☐ Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal: ☐

Respondent's Representation

Solicitor			
Name of firm			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode		Ref.	
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)			

Counsel			
Name	Paul Sreenan SC		
Email			
Address		Telephone no.	01-872 8099
		Document Exchange no.	
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

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)

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

NOT APPLICABLE

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

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

The Respondent does not dispute Section 4 of the Notice of Appeal insofar as it refers to the decision that it is sought to appeal.

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

The Appellant seeks leave to this Court pursuant to Article 34.5.3 of the Constitution on the basis that the decision of the Court of Appeal involves matters of general public importance. Importantly, the Appellant does not seek to argue that it is necessary in the interests of justice that there be an appeal to the Supreme Court.

The Respondent opposes the Appellant's application on the basis that the decision of the Court of Appeal relates to an infringement of the Respondent's rights only and does not involve matters of general public importance.

In particular, the decision appealed from does not involve the interpretation of any statutory provision or provision of the Constitution or of EU law, whether novel or otherwise, such as might be of general public importance. Neither is there any suggestion that the Court of Appeal overruled or altered or has misapplied well established precedent or that the decision creates difficulty or confusion for other pending cases.

Four matters of alleged general public importance are put forward in Section 5 of the Application.

1. Whether the Respondent's application for judicial review was justiciable,
2. Whether the Rules of Constitutional Justice applied to the findings about the Respondent in the Report of the Appellant.
3. Whether the Respondent's application amounted to a collateral attack on the Commission of Investigation (the O'Higgins Commission).
4. Whether there was a material non-disclosure.

One and two are essentially the same question and logically the order should be reversed. If

the rules of constitutional justice are capable of applying to conclusions reached by the Appellant in his report about the Respondent, the issue of alleged non-compliance with those rules is clearly justiciable. Accordingly, it is proposed to consider matters one and two together.

In relation to matters one and two, neither the fact that the Respondent, at the material time, held public office or the fact that the Appellant was carrying out a public function is relevant to the issue of whether the decision of the Court of Appeal involves a matter of general public importance. The Court of Appeal's decision in this respect was essentially that:-

- (a) The Appellant's Terms of Reference concerned matters capable of impacting on the Respondent's good name;
- (b) The Rules of Constitutional Justice did apply;
- (c) The statements complained of in the Appellant's report, considered objectively, were damaging to the Respondent's good name
- (d) This was so regardless of any meaning in the political arena or in the media; and
- (e) The Respondent had not been afforded a right to be heard.

The Respondent will now address the matters put forward by the Appellant in the order used by the Appellant.

1. The Appellant asserts that the Court of Appeal reached its conclusions "on the basis of" an assessment of the political ramifications of the Appellant's report ("the Report"). This is simply wrong.
2. At paragraph 56 of his judgment, the President stated the following:
"Some of the issues do not involve law. The first requires simple interpretation or understanding of the meaning of words to determine whether the statements made in the report are actually deleterious of Mr Shatter's good name. In my view, they are. If it were otherwise, that would be the end of the case because if his good name was not impaired by the conclusions reached by Mr Guerin in the report, that is the end of the matter. Admittedly, the fact that the Taoiseach, in effect, required the Minister's resignation clearly meant that the head of the Government required no convincing as to the meaning of the judgments in the report. Nevertheless, it is not the meaning that the Taoiseach or the Minister ascribed to the contents of the report but what they mean when considered objectively outside and independent of the political arena that is critical" [Emphasis added]
3. At paragraph 64 of his judgment, the President stated the following:
"It is correct to say that the responses of the Taoiseach and the Minister to these parts of the report represented political judgments. Counsel for the appellant also sought to introduce Press material to show how the report was considered by the media. If these evaluations of the contents of the report relating to Mr Shatter were different interpretations of what I think is the meaning of the words, it may be that consideration would have to be given to the impact on political actors and media, but I do not think that arises when I am in agreement about the meaning of the statements. However, irrespective of how they were considered by others, it seems to me that these observations amount to findings of fact or conclusions or opinions that reflect serious

criticism of the Minister in the conduct of his office." [Emphasis added]

4. At paragraphs 34 and 35 of her judgment, Finlay-Geoghegan J expressed the following view:

"Accordingly, my conclusion is that the Report is amenable to judicial review by the courts on the present application of the appellant.

In reaching the above conclusion in this judgment I have done so by consideration of the Report itself and without regard to what happened when the Report was furnished to the Taoiseach or views expressed as to the understanding of others as to what it conveyed. I accept the submission of the respondent that such matters may be influenced by political considerations and that it is not appropriate for the Court to take them into account in deciding whether the Report should be considered as critical of and affecting the appellant's constitutionally protected right to his good name and reputation" [Emphasis added]

5. At paragraph 3 of her judgment, Irvine J stated the following:

"It is clear beyond doubt that the terms of reference directly concerned matters relating to Mr Shatter's reputation and good name, namely, the adequacy of any investigation carried out by him as Minister and whether there was reason to be concerned as to whether he, enjoying as he did a number of relevant statutory powers that he had been asked to deploy, had taken the appropriate steps to investigate and address certain specified complaints. Likewise, the outcome of the inquiry, leaving aside altogether the consequences that the Report had for Mr Shatter as these may well have been influenced by political considerations, was destined to impact on his constitutionally protected right to his good name." [Emphasis added]

6. It is difficult to reconcile the Appellant's assertion in his Notice of Appeal with these clear statements in the judgments delivered in the Court of Appeal that their decisions were in no way influenced by consideration of political consequences.

7. The issue is whether the conclusions of the Appellant in his report were capable of impacting on the Respondent's good name. They clearly were and there are findings of fact by the Court of Appeal to this effect. These findings are explicitly based on the particular circumstances of this case. Given the particular circumstances of this case, that the Rules of Constitutional Justice apply to the exercise of the Appellant's public function is, it is submitted, beyond argument. The Court of Appeal has not established any new legal principle of general public importance. It has simply applied well established principles to the specific facts of the case before the Court.

8. At paragraph 75 of his judgment, the President stated the following:

*"Characterising the review by Mr Guerin as being legally sterile is not a point of distinction with other inquiries. In respect of the other features of this examination process, as identified by the judge, none of the points highlighted is, in my view, a justification for abandoning every element of fair procedures. Time constraints, the number of persons involved, the nature of their involvement and particularly the extent to which they are exposed to interference with their constitutional or legal rights and the general nature of the investigative process are all relevant matters when it comes to determining the level of protection that is required by law. What cannot be done lawfully is to decide that there is no or no sufficient time to allow for procedural rights to be exercised. In this case, the complaint that Mr Shatter makes is not that he was deprived of all of the Haughey rights that were enumerated in [1971] IR 217. He actually claims no more than the second of the classic rules of natural justice that have long since been subsumed into fair procedures or constitutional rights, namely *audi alteram partem*."*

9. The President continued on this theme at paragraph 79:

"In order to identify the relevant legal principle, it is sufficient, in my view, to cite one of the most quoted statements of principle in the whole of our jurisprudence, in which Chief Justice Ó Dálaigh set down the cornerstone of the now very substantial edifice of fair procedures and constitutional justice to which so much of our attention in the courts is directed..."

'In proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution, the State, either by its enactments or through the Courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights.'"

10. At paragraph 90 of his judgment, in further addressing the issue of fair procedures the President observed:

*"It is once again necessary to come back to fundamentals. It is true that the cases are clear in declaring that there is no one size fits all set of procedures that must apply to every inquiry or investigation or process undertaken by or on behalf of the Government of a Department. But the basic principle is clear. Not only that, before people spoke of the full panoply of fair procedures ... there were two classic principles of natural justice, *nemo iudex in causa sua* and *audi alteram partem*. It is only one function of those rules and of fair procedures generally that they afford protection of rights; they also operate to enhance the validity of any conclusions reached."* [Emphasis added]

11. At paragraph 92, the President concluded on this topic in the following terms:

"It must be considered absolutely fundamental that before a person is severely criticised in a significant public undertaking by an eminent person in a report to the Government in regard to a matter of urgent national importance that he or she be afforded at least some notice of the criticisms and an opportunity to comment on them."

12. At paragraph 33 of her judgment, before concluding that the Appellant's report was amenable to judicial review, Finlay-Geoghegan J made the following observations:

"It is of course necessary that judicial restraint is exercised in any expansion of the type of inquiries, processes or resulting reports which may be subject to judicial review. However the above approach requires that both the process and its outcome are directly concerned with and have the ability to directly affect the constitutionally protected rights of an applicant to his good name and reputation. It is in those limited and perhaps exceptional circumstances that it appears to me correct to accept as amenable to judicial review the Report herein. If it is not so then the appellant, if he is correct in the claim that he seeks to make is left without a remedy to vindicate his good name as is required by Article 40.3.2 of the Constitution. This would be contrary to the well known dicta of O'Dálaigh C.J. ... that the courts are the custodians of the rights assured to individuals by the Constitution with the necessary powers to vindicate the rights. (Emphasis added)

13. Finlay-Geoghegan J continued on this topic at paragraph 58 of her judgment:

"However, on the particular facts and circumstances of the Review the appellant was, in my view, entitled to be heard before the respondent could include in the Report the type of statement made at para 19.103 and certain earlier expressions of opinion in Chapter 19. At its simplest the respondent's obligation to hear the appellant follows from the audi alteram partem principle as applied in Re Haughey since the appellant's good name was at risk in the Review process." (Emphasis added)

14. Finlay-Geoghegan concluded her judgment on this topic as follows:

"My conclusion on the entitlement of the appellant to have been heard is reached on the particular terms of reference; the focus in the Review on the adequacy on what was done by the appellant as Minister in relation to serious complaints concerning the administration of justice such that his good name and reputation were at risk in the process and the other relevant facts and circumstances in relation to the Review and Report. What procedures will be required in any future non-statutory inquiry or review commissioned by the Government will depend upon all the circumstances including the subject matter; terms of reference and most particularly whether the good name or reputation of an individual is at risk in the process to be undertaken."
(Emphasis added)

15. In agreeing with the judgments of her colleagues, Irvine J concluded:
"Accordingly, in the relatively unique circumstances which arise in the present case, like my colleagues, I am satisfied that the Report prepared by the Respondent is amenable to judicial review. That being so, for the reasons already fully outlined by my colleagues, I too am satisfied that the appeal must be allowed."
16. The Appellant asserts that a key factual aspect of the case was that correspondence sent to the Respondent's nominated point of contact within his Department was apparently not actually passed on to Mr Shatter. It is difficult to see how this factual issue singularly peculiar to this case can give rise to a matter of general public importance justifying an appeal. However, even if that is incorrect, this matter was resolved in the Appellant's favour in the Court of Appeal. In this regard, at paragraph 60 of her judgment, Finlay-Geoghegan J stated that the *"respondent was entitled to rely on communications with the nominated official as being communication to the Minister."* Consequently, there is no basis for the Appellant relying on this issue as a ground for seeking leave to appeal.
17. Accordingly, there is no matter of general public importance as asserted by the Appellant in Section 5, paragraphs 4 and 5 of the Notice of Appeal as the principles applied by the Court of Appeal are well established and in no way novel. Furthermore, the judgments of the Court of Appeal make it clear that those well-established principles were applied to the specific facts of the case before the Court.
18. The Appellant asserts that the issue of whether the proceedings brought by the Respondent amounts to a collateral attack on the decision of the Government to establish a Commission of Investigation is a matter of general public importance. Here it is the Appellant who seeks to rely on political debate in the Dáil. However, the fact is that the Respondent did not launch any proceedings challenging the establishment of the Commission which has now reported and concluded its work.
19. Furthermore, the circumstances in which the Respondent came to engage in correspondence in relation to the establishment and terms of reference of the Commission of Investigation are so singularly peculiar that it is difficult to envisage how it can give rise to a matter of general public importance upon which a decision of the Supreme Court would be of any general benefit. It would amount to a decision on the peculiar facts of the case and not a decision on principle that would have general application.
20. Accordingly, there is no matter of general public importance as asserted by the Appellant in Section 5, paragraph 6 of the Notice of Appeal.
21. The Appellant asserts that there is a matter of general public importance as to whether the duty to make full disclosure when seeking leave for judicial review continues to retain practical force as a legal principle.

22. The issue of disclosure did not arise in the High Court, or the Court of Appeal. Accordingly, the Appellant cannot now seek to appeal to the Supreme Court in respect of such an issue. What the Appellant refers to in this section is not a material non-disclosure but rather inclusion of a ground for relief which was based on a misunderstanding and which ground was subsequently withdrawn when the Respondent became aware that it was factually incorrect.
23. Accordingly, there is no matter of general public importance as asserted by the Appellant in Section 5, paragraph 7 of the Notice of Appeal.
24. Finally, the Appellant asserts that the Court of Appeal noted the importance and novelty of the issues that it had to determine, citing three specific paragraphs in support of this assertion. It is not clear whether this paragraph is of a general nature in support of the preceding paragraphs in Section 5 of the Notice of Appeal or it is a separate ground for seeking leave. However, it is of such a general nature that it must be concluded that it is merely offered as support for the other grounds set out in Section 5.
25. Many issues considered by the Courts, especially in judicial review applications, are important or novel. That does not mean that the resulting decisions are all of "general public importance" within the meaning of Article 34.5.3 of the Constitution. When one actually considers the paragraphs cited by the Appellant, the Court of Appeal does not recognise the "*importance and novelty of the issue*" that it had to determine.
26. At paragraph 55 of his judgment, the President notes that there is no single, clear authority that disposes of the issue of whether the Appellant's report is susceptible to judicial review. Firstly, he was addressing this one issue. Secondly, he makes no reference to its importance or otherwise. Thirdly, he makes no reference to the novelty of the issue, although it might be inferred.
27. At paragraph 58, the President again notes that there is no single, clear authority that disposes of the issue of whether the Appellant's report is susceptible to judicial review. While he notes that this issue is crucial to the case, he makes no reference to it being of importance in a broader sense beyond the case, nor does he make any reference to the issue being novel.
28. At paragraph 33 of her judgment, Finlay-Geoghegan J acknowledges the "*exceptional circumstances*" of the case before her, she also does not recognise any importance or novelty in the issue to be determined.
29. Furthermore, even if the Court of Appeal had recognised the "*importance and novelty*" of the issues as asserted by the Appellant, that does not render them of general public importance justifying and the grant of leave to appeal to the Supreme Court and the Appellant has not offered any support for such a contention in the Notice of Appeal.
30. Accordingly, there is no matter of general public importance as asserted by the Appellant in Section 5, paragraph 8 of the Notice of Appeal.

5. Respondent's reasons for opposing the appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

1. The Court of Appeal's decision that the Report was susceptible to judicial review was not predicated on any finding of fact that the Report had been the reason why Mr

Shatter resigned. As already referred to herein, the Court of Appeal expressly restricted itself to consideration of matters that occurred prior to the Report being furnished to the Taoiseach and accepted that such matters may be influenced by political considerations, which would be inappropriate for the Court to take into account. As is clear the passages already cited herein, the Court of Appeal's decision that the Report was susceptible to judicial review was firmly grounded in the application of well-established principles of fair procedures, natural and constitutional justice to the facts of the case before the Court. In particular, where an individual is on risk of having his constitutionally protected rights jeopardised through the making of adverse findings, he is entitled to be heard.

2. The Court of Appeal did not determine, as a matter of general principle, that fair procedures, natural and constitutional justice apply to an inquiry and report of the Report's nature. As is also clear from the passages already cited herein, the Court determined that, given the peculiar facts of the case before it, in particular the nature of the exercise to be performed by the Appellant as regards the Respondent as set out in the terms of reference and the conclusions that he was proposing to include in his report, the Appellant was obliged to afford the Respondent the opportunity of being heard.
3. The Court of Appeal applied well-established principles to the facts of the case before it and afforded the Respondent the minimum protection necessary, i.e. *audi alteram partem*.
4. The Respondent issued these proceedings challenging the Report prior to any decision being made establishing the Commission of Investigation. The Respondent has a constitutional right to seek the protection of the Courts where he asserts his constitutional rights have been infringed. That legitimate exercise of his constitutional right of access to the Courts cannot amount to a collateral attack on a Commission of Investigation that has yet to be established and have its terms of reference approved. The Court of Appeal correctly concluded that there was no "logical connection" between the Respondent's proceedings and the correspondence regarding the Commission of Investigation such as to debar the Respondent "*from proceeding with his claim that he was damaged by the procedure adopted by MR Guerin.*"
5. The Appellant has not sought to argue as ground for seeking leave to appeal that there is an issue of general public importance as to whether the Respondent has *locus standi* to maintain these proceedings. Accordingly, in the event that leave is granted, the Appellant is debarred from arguing this point before the Supreme Court. Without prejudice, the criticisms in respect of acts done or not done by the Respondent while he was holding the office of Minister can only be objectively viewed as criticisms of the Respondent personally with consequent damage to his good name and reputation. To deny the Respondent *locus standi* to seek the protection of the Court would be set at nought the Respondent's constitutional right to his good name and reputation.
6. There was no issue before the High Court or the Court of Appeal in relation to material non-disclosure in relation to the leave sought and obtained. Accordingly, no such issue can be raised before this Court. The issue before the High Court and the Court of Appeal was an allegation of objective bias that was subsequently withdrawn when found to be based on a misunderstanding. Insofar as the Appellant seeks to appeal on this ground, it is submitted that the Court of Appeal applied the correct principles of law to this issue in concluding that relief should not be refused to the applicant by reason of a claim of objective bias, subsequently withdrawn, in circumstances where breaches of constitutionally protected rights are at issue.

7. The Appellant has not sought to argue as a ground for seeking leave to appeal that there is an issue of general public importance as to whether the Court of Appeal can grant the relief it granted here without overturning certain findings of fact. Accordingly, in the event that leave is granted, the Appellant is debarred from arguing this point before the Supreme Court. Without prejudice, the Respondent's case was not "based on" facts that the High Court found to be untrue and the High Court did not make findings to this effect. Furthermore, the Court of Appeal did not err in granting relief as asserted in Section 6, paragraph 7 of the Notice of Appeal. Furthermore, both the President (paras. 85 to 92) and Finlay-Geoghegan J (para. 60) addressed these issues in their judgments.

8. The Court of Appeal granted the Respondent relief in the form of appropriate declarations regarding the infringement of his constitutional rights. Order 19, rule 29 of the Rules of the Superior Courts provide that no action or pleading shall be open to objection on the grounds that merely declaratory relief is sought. Clearly, the importance of declaratory relief is recognised in this rule and was recognised by the Court of Appeal in the relief that it granted to the Respondent. The fact that Court of Appeal concluded that, in the circumstances of the case, it could not grant further relief in no way undermines the legitimacy of the Respondent's case against the Appellant. It was the Appellant, not the Government that breached the Respondent's constitutionally protected rights. Accordingly, the Appellant was the appropriate party to bring proceedings against. The fact that other parties might also have been joined is irrelevant.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

Cathal Murphy BL
Paul Sreenan SC

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

Not applicable

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

If Yes, please give reasons below:

Signed:

Gallagher Shatter

(Solicitors for the respondent)

Please submit your completed form to:

The Office of the Registrar to the Supreme Court

The Four Courts

Inns Quay

Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.