Brian Curtin v Dail Eireann, Seanad Eireann, et al.

Supreme Court

[2006] IESC 14, 2 IR 556

9 March 2006

HEADNOTE:

Article 35.4.1o of the Constitution provides:-

"A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dail Eireann and by Seanad Eireann [lower house and upper house of parliament, respectively] calling for his removal."

Pursuant to s. 39 of the Courts of Justice Act 1924, Circuit Court Judges held office by the same tenure as High Court Judges. The applicant, a judge of the Circuit Court, sought to challenge by way of judicial review, a direction of an Oireachtas [Parliament] committee (established following the proposal of a resolution to remove him from office pursuant to Article 35.4.1o of the Constitution) to produce his personal computer to the committee. It was accepted that the computer contained material which constituted child pornography, as defined by the Child Trafficking and Pornography Act 1998, but the applicant contended that the material was not knowingly in his possession. The applicant had been prosecuted on indictment for offences under the Act of 1998 and acquitted by direction of the trial judge, by reason of the fact that the warrant used to enter his property had been invalid on the date of its execution, when the computer was seized by the gardai. The computer was retained in the possession of the Garda Commissioner.

As part of the scheme to enable the Oireachtas to deal with the case of the applicant under Article 35.4.1o, the Oireachtas passed the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) (Amendment) Act 2004, which provided for the attendance of a judge as a witness before an Oireachtas committee and the Child Trafficking and Pornography (Amendment) Act 2004 which was designed to permit hearings to be conducted and material to be considered without breach of the Act of 1998. Dail Eireann adopted an additional standing order number 63A setting out special procedures governing any motion for the removal of a judge pursuant to the applicable constitutional or statutory provisions and Seanad Eireann adopted an equivalent standing order 60A. Standing order 63A(2) required that where such a motion was put on the order paper, "the Dail may either reject the said motion, or on a motion made to adjourn appoint a select committee to take evidence in respect of the aforesaid Article 35.4.1o motion, provided that the select committee shall make no findings of fact nor make any recommendations in respect of same or express any opinions in respect of same". After the legislation and standing orders were amended, each House of the Oireachtas adopted a resolution appointing a select committee for that purpose. The Joint Committee made an order pursuant to s. 3(1)(c) of the Act of 1997, as amended, to the applicant to produce to the committee all documents and things (including a personal computer and its hard drive) seized from his house.

The applicant obtained leave from the High Court to apply for judicial review, inter alia, to challenge the procedures of the joint committee, including its standing orders, the constitutionality of s. 3A of the Act of 1997, as amended by the Act of 2004, and the direction pursuant to s. 3. It was contended by the applicant, inter alia, that the power to call a judge as a witness or to require a judge to produce articles was an improper and unconstitutional invasion of judicial independence and that there was no power in the Houses of the Oireachtas to amend their standing orders as they had done. It was further contended that that the exclusionary rule in the laws of evidence meant that the respondents could not lawfully take possession of the computer as it had been seized in breach of the applicant's constitutional rights, and that

the Child Trafficking and Pornography (Amendment) Act 2004 was a device to circumvent the applicant's rights. The High Court refused the application and the applicant appealed to the Supreme Court.

Held by the Supreme Court (Murray C.J., Denham, McGuinness, Hardiman, Geoghegan, Fennelly and McCracken JJ.), in dismissing the appeal,

1, that, where the words of the Constitution were plain and unambiguous, the courts applied them in their literal sense but where the words were silent, resort may be had to principles derived from other parts of the Constitution. For the purpose of these proceedings, regard was to be particularly had to the function and standing of the judiciary in the constitutional scheme, the provisions for protection of that role, the correct balance between the exercise of the power of the Oireachtas under Article 35 and the distribution of powers generally in the Constitution and the obligation to respect constitutional principles of fairness and justice in the exercise of that power.

2. That, in accordance with the principles of constitutional justice, the parliamentary procedures and standing orders followed in respect of the resolutions to remove the applicant from office must be presumed, by the courts, to be constitutional.

3. That, to accord with the presumption of constitutionality, the standard by which a court should measure whether a designated organ of government had or was likely to fall short of its constitutional obligations in the performance of the exceptional and sensitive function constitutionally assigned to it of removing of judges from office was that of clear disregard, meaning that there had been a conscious and deliberate decision by the legislature to act in breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness.

4. That s. 3 of the Act of 1997, as amended, was not unconstitutional, as the power to call a judge as a witness or to produce articles as evidence did not involve any improper or unconstitutional invasion of judicial power or judicial independence, which was included in the Constitution for the purpose of ensuring the fitness and integrity of the judiciary.

5. That the principle of judicial independence was not for the personal or individual benefit of the judges, even if it may have that incidental effect, but was a principle designed to guarantee the right of the People and a necessary corollary of judicial independence was that the judges themselves behaved in conformity with the highest standards of behaviour, both personally and professionally.

6. That there was nothing in either Article 35.4.1o or Article 15.10 to prevent the Houses of the Oireachtas from adopting standing orders providing for the establishment of a committee to investigate the question of whether a judge has been guilty of "stated misbehaviour," as alleged in a resolution "calling for his removal," which has been duly proposed pursuant to Article 35.4.1o, as the proposal of the resolution conferred that power.

...

...

JUDGMENTS:

MURRAY CJ:

1 In this appeal, the court is asked to interpret the provisions of Article 35.4.1o of the Constitution regarding the parliamentary procedure for the removal of judges from office. It is one of the few occasions in the annals of legal history that such a proposal has been considered by a court and the first time since the foundation of the State.

...

46 The principal issue on the appeal concerning the interpretation of Article 35.4.1: relates to the provisions of the standing orders of the two Houses. It concerns principally the evidence gathering powers

of the Joint Committee and the subsequent consideration of that evidence by the two Houses.

47 The applicant's central claim is that the power of the Dail and the Seanad under Article 35.4.1o of the Constitution to pass resolutions calling for the removal of a judge for stated misbehaviour or incapacity can be exercised only when the allegation in question has been proved by a process of adjudication or trial, whether that process be external or internal to the Houses. The applicant's first formulation of this contention was that a resolution for the removal of a judge could not be introduced unless the misbehaviour alleged had been previously proved in some appropriate forum. While this contention appeared in the written submissions filed in this court on behalf of the applicant, and was not expressly abandoned at the hearing, it was not significantly developed or pressed in oral argument. The vital aspect of the argument was that the Houses were not entitled themselves to debate and pass a resolution so introduced unless they were satisfied that the allegation had been proved. Thus, some body or forum, internal or external to the House, must first adjudicate on the truth of allegation. Although such a body would adjudicate, its decision, would not, on the other hand, be final and certainly not binding on the Houses when considering the resolutions.

48 It is common case that the standing orders do not permit the Joint Committee to perform that role. Thus, the principal question for decision is whether the procedures which the standing orders require the Joint Committee to follow are permitted by the Constitution and, specifically, Article 35.4.1o. The question may be posed conversely: is each House obliged by the Constitution to ensure that the misbehaviour alleged against the judge be proved and established as a matter of fact prior to embarking on debate of the resolution?

49 Counsel for the applicant relied on the principle of judicial independence ordained by the Constitution, to which, he submitted, the trial judge attached insufficient weight. That principle forms part of the scheme of separation of powers and can be seen, in particular, in the several provisions of Article 35 of the Constitution, not merely Article 35.4.1o. The procedures proposed are, it is claimed, fundamentally deficient, principally because the standing orders provide that the Joint Committee "shall make no findings of fact nor make any recommendations in respect of same or express any opinions in respect of same". Thus the debate in the Houses will be conducted on the basis of an unedited pack of materials, which inevitably will contain evidence which conflicts on key points, issues of assessment of credibility and issues of reliance on materials which may be more prejudicial than probative. All of this material will, as counsel put it, be placed before the Houses "in its abundance". Counsel attached particular importance to the need for assessment of expert evidence regarding the presence and significance of "trojans" on the applicant's computer. Each member of each House will be required to assess conflicts of expert and other evidence including the credibility of witnesses. Counsel contended that, under the procedure envisaged, the Houses of the Oireachtas would not be allowed to receive any further evidence. The debate on the resolutions in the Houses could not include the taking of evidence, because that would not be a debate.

50 Counsel submitted that, before a resolution for the removal of a judge can be validly passed, a trial must take place in which there is a determination of whether the judge has, in fact, committed the acts alleged to constitute misbehaviour. There should, in effect, be a two stage process. Firstly, whether the alleged acts took place must be determined. Then the question of whether those acts amount to misbehaviour can be left to each House.

Article 35.4.1o of the Constitution

66 Article 35 of the Constitution provides, in relevant part:-

"4.1o A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dail Eireann and by Seanad Eireann calling for his removal.

2o The Taoiseach shall duly notify the President of any such resolutions passed by Dail Eireann and

by Seanad Eireann, and shall send him a copy of every such resolution certified by the Chairman of the House of the Oireachtas by which it shall have been passed.

3o Upon receipt of such notification and of copies of such resolutions, the President shall forthwith, by an order under his hand and Seal, remove from office the judge to whom they relate."

67 The present appeal has been concerned exclusively with the provisions of Article 35.4.1o. The removal of a judge from office is attended, not only by the decisive intervention of both Houses of the Oireachtas, but by subsequent solemn implementing acts of the Taoiseach and the President. These ensure that the condemned judge is stripped of his office.

70 The applicant being a judge of the Circuit Court, s. 39 of the Courts of Justice 1924 applies to his case. It provides:-

"The Circuit Judges shall hold office by the same tenure as the Judges of the High Court and the Supreme Court."

71 Thus, for all the purposes of the present proceedings, the applicant is subject to and entitled to the protection of Article 35.4.1o of the Constitution to the same extent as a judge of the High Court or of the Supreme Court.

72 The words of Article 35.4.1o impose no express restriction on the exercise by the two Houses of the Oireachtas of their power to pass resolutions calling for the removal of judges other than that such resolutions be grounded on "stated misbehaviour or incapacity". The debate on the appeal has concerned the extent to which, by reference to history, to other provisions of the Constitution, to the independence of the judiciary, to the principle of separation of powers, to the need to respect fair procedures or otherwise, this court should interpret the Article as requiring the observance of particular procedures, as submitted on behalf of the applicant. It is necessary to consider these several aspects of the matter in turn.

General principles of constitutional interpretation

73 This court has, in a number of its decisions, referred to criteria governing the correct approach to the interpretation of the Constitution. As is to be expected, different interpretative elements are emphasised in individual judgments according to the particular context in which questions arise and the particular types of interpretative problem. Words denoting numbers, places or identified persons admit of no debate. On occasion, there is a narrow question as to the meaning in context of particular words of general import. In The People v. O'Shea [1982] I.R. 384, the court was divided on the issue of whether a provision for an appeal expressed in general words should be interpreted as allowing a prosecution appeal of an acquittal in a criminal case. On other occasions, broader or more philosophical questions arise, such as the nature of fundamental rights. A correct balance has to be struck between the effect to be given to the literal meaning of particular words and the need to have regard to the terms of the Constitution as a whole. One particularly authoritative statement is that found in the judgment of O'Higgins C.J., speaking for a majority of the Court, in The People v. O'Shea [1982] I.R. 384 at p. 397:-

"The Constitution, as the fundamental law of the State, must be accepted, interpreted and construed according to the words which are used; and these words, where the meaning is plain and unambiguous, must be given their literal meaning. Of course, the Constitution must be looked at as a whole and not merely in parts and, where doubt or ambiguity exists, regard may be had to other provisions of the Constitution and to the situation which obtained and the laws which were in force when it was enacted. Plain words must, however, be given their plain meaning unless qualified or restricted by the Constitution itself. The Constitution brought into existence a new State, subject to its own particular and unique basic law, but absorbing into its jurisprudence such laws as were then in force to the extent to which these conformed with that basic law."

74 In his dissenting judgment in that case, Henchy J., at p. 426, laid greater emphasis on a broad approach to interpretation:-

"Any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation. It may be said of a constitution, more than of any other legal instrument, that 'the letter killeth, but the spirit giveth life'. No single constitutional provision . . . may be isolated and construed with undeviating literalness."

75 Murray J., ... in his judgment in Sinnott v. Minister for Education [2001] 2 I.R. 545 at p. 679, went on to state:-

"It is axiomatic that the point of departure in the interpretation of a legal instrument, be it a constitution or otherwise, is the text of that instrument, albeit having regard to the nature of the instrument and in the context of the instrument as a whole."

76 The result can be expressed as follows. Where words are found to be plain and unambiguous, the courts must apply them in their literal sense. Where the text is silent or the meaning of words is not totally plain, resort may be had to principles, such as the obligation to respect personal rights, derived from other parts of the Constitution. The historical context of particular language may, in certain cases, be helpful, as explained by O'Higgins C.J. in the passage quoted above. Geoghegan J., when considering the meaning of the term "primary education" in Article 42.4 of the Constitution in his judgment in Sinnott v. Minister for Education [2001] 2 I.R. 545, said at p. 718 that it was "important in interpreting any provision of the Constitution to consider what it was intended to mean as of the date that the people approved it". Hardiman J., at p. 688, thought that it was "beyond dispute that the concept of primary education as something which might extend throughout life was entirely outside the contemplation of the framers of the Constitution".

77 This is not to say that taking into account the historical context of certain provisions of the Constitution excludes its interpretation in the context of contemporary circumstances. O'Higgins C.J. in The State (Healy) v. Donoghue [1976] I.R. 325 observed at p. 347 that ". . . rights given by the Constitution must be considered in accordance with the concepts of prudence justice and charity which may gradually change and develop as society changes and develops and which falls to be interpreted from time to time in accordance with prevailing ideas". Again in the Sinnott v. Minister for Education [2001] 2 I.R. 545, Murray J. stated at p. 680:-

"Agreeing as I do with the view that the Constitution is a living document which falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores, this does not mean, and I do not think it has ever been suggested, that it can be divorced from its historical context."

Hardiman J. at p. 688 referred to general theories of interpretation in the following terms:-

"Tensions are said to exist between the methods of construction summarised in the use of adjectives such as 'historical', 'harmonious' and 'purposive'. In my view, much of this debate is otiose, because each of these words connotes an aspect of interpretation which legitimately forms part, but only part, of every exercise in constitutional construction."

78 Thus, the natural and usually the logical starting point in every case, will be the words used. Some of the words in Article 35.4.1o are clear and unambiguous. A judge cannot be removed other than in accordance with Article 35.4.1o: both Houses must pass the required resolution; the resolution must call for the judge's removal. This apparently refers to the resolution as proposed. A resolution of one House alone will not suffice. It is also clear, by necessary implication, that the resolution itself must specify the "misbehaviour or incapacity," as the case may be (or indeed, though not relevant in this case, the "incapacity") which purports to justify the judge's removal.

79 Apart from these matters, Article 35.4.1o is silent. It does not define misbehaviour or state whether

misbehaviour relates to the performance of judicial duties or may be misbehaviour of a general kind. Article 35.4.1o prescribes no procedures to be followed by the Houses of the Oireachtas. Article 15.11.1o, however provides that: "All questions in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present and voting other than the Chairman or presiding member". In particular, Article 35.4.1o contains no guidance on the power of the Houses to appoint investigating committees or the powers it may delegate to any such committees.

80 In these circumstances, it is reasonable to consider whether there is any history or background to the enactment of the Constitution capable of elucidating what was in the contemplation of the framers. More particularly, however, it will be necessary to consider the constitutional context of Article 35.4.1o. Three elements, in particular, are relevant. They are: firstly, the function and standing of the judiciary in the constitutional scheme and the provisions for protection of that role; secondly, the express power conferred on the Oireachtas by the Article and the correct balance between the exercise of that power and the distribution of powers generally in the Constitution; thirdly, the obligation to respect constitutional principles of fairness and justice in the exercise of that power.

History

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82 The parties have provided the court with a great deal of potentially useful information about the history throughout the common law world of provisions governing the removal of judges from office. Ultimately, Article 35.4.1o must be interpreted in its own terms in the constitutional context in which it appears.

83 There are several special aspects of British constitutional history. The British parliament enjoyed a number of powers, apart entirely from the remedy of an address from both Houses. The most notable of these was that of impeachment, which involved the exercise of the judicial powers of parliament in respect of public officers, and whose history is traced back at least to the fourteenth century. Having fallen into disuse for several centuries, it was revived in the reign of James I but has been abandoned since 1805. There were other even more obscure provisions. It is prudent to be aware of their existence principally because their continued existence is clearly excluded by the unambiguous wording of Article 35.4.1o of the Constitution.

84 The first legislative protection of the tenure of judges in the British constitutional system was enacted by the Act of Settlement of 1701, an Act the principal purpose of which was to settle the royal succession. It represented a reaction to the abuses of the Stuart period, when judges held office at the will and pleasure of the Crown, so that they could be removed (and sometimes were) for pronouncing judgments which did not please the monarch. The Act provided:-

"Judges Commissioners be made Quamdiu se bene gesserint [during good behaviour], and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them."

By an Act of the British Parliament the Commissions and Salaries of Judges Act (1 Geo. III, c. 23), (1760), this provision became applicable notwithstanding the demise of the king and was extended to Ireland, in 1781, when the Irish parliament passed a statute (21 and 22 Geo. III, c. 50) entitled "An Act for securing the independency of judges, and the impartial administration of justice . . .". The tenure of the judges was, to continue "in full force during their good behaviour . . . notwithstanding the demise of the King . . ." and, as s. 3 provided, they might be removed "upon the address of both Houses of Parliament". That Act was repealed by the Statute Law Revision (Pre-Union Irish Statutes) Act 1962.

...

87 In addition, the framers of that Constitution were in a position to and the evidence suggests that they did consult relevant provisions of the constitutions of what were then called the Dominions. Section 99(1) of the Constitution (Canada) Act 1867, an Act of the British Parliament (30 & 31 Vict., c.3),

provided:-

"the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and Houses of Commons."

Section 72 of the Australian Constitution of 1900 provided:-

"The Justices of the High Court and of the other courts created by the Parliament:-

. . .

ii shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity."

The South Africa Act 1909, establishing the Union of South Africa, contained a practically identical provision (s. 101). All prior versions were expressed in permissive terms; in the Australian version this became: "shall not be removed except". No doubt, the condition of good behaviour had been treated as implicit from 1700, but the Australian and South African versions permitted removal only on "the ground of proved misbehaviour or incapacity". ...

88 It is generally accepted that the framers of the Constitution of 1922 consulted widely among the constitutions of the common law countries. Kingsmill Moore J., in his judgment in O'Byrne v. Minister for Finance and the Attorney General [1959] I.R. 1, having recited much of this history, said at p. 63:-

"Whereas both the earlier enactments and the American Constitution provide for fixity of tenure during good behaviour, the American Constitution does not contain a prohibition against removal save on an address from both Houses which is to be found in the Constitution of South Africa and in the Constitution of the Commonwealth of Australia, and which is reproduced in the Constitution of the Free State. It is clear that the framers of the Free State Constitution had before them, considered, and adopted this provision, taking it from some source other than the United States Constitution and presumably from one of the Dominion constitutions to which I have referred."

89 The only point that can be gleaned from all of this history is that it was considered necessary both in Great Britain, at least since the abandonment of parliamentary trial by impeachment sometime after 1805, and the Dominions to have a resolution of both Houses of Parliament, taking the form of an address to the sovereign or the sovereign's representative, in order to remove a judge from office. It was implicit rather than explicit that such an address would be grounded on misbehaviour. Ultimately, Article 35.4.1o of the Constitution is expressed in more absolute and clearer terms than any of the preceding enactments. However, the sections themselves offer no direct assistance in the resolution of the very precise procedural issues raised on this appeal.

90 The applicant has, of course, to a great extent in the High Court and to a more limited extent in this court relied on the historic parliamentary practice whereby the Houses of Parliament caused a committee, sometimes a select committee, sometimes a committee of the whole House, to report on the alleged misbehaviour of a judge before debating a resolution. At most, all this establishes is that parliaments have over the centuries resorted to the use of committees to investigate contentious or complex matters.

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92 The Senate of the United States of America, prior to 1935, according to a longstanding tradition sat in banc for the conduct of, including the taking of evidence in, impeachment trials. No doubt this presented no great problem during the early years of the Republic, when the number of senators, being two per state, was necessarily small; there were twenty six members at the beginning. As the number of states and the volume of legislative work grew, it was generally seen as "more than inefficient and inconvenient" (see Napoleon B. Williams, The Historical and Constitutional Bases of the Senate's Power to Use Masters or Committees to receive evidence in Impeachment Trials (1975) 50 NYU Law Review, 512 at p. 516). In 1935, the Senate adopted "Rule of Procedure and Practice in the Senate when sitting on

Impeachment Trials XI." That rule authorises the Senate to "appoint a committee of twelve senators to receive evidence and take testimony . . ." An immediate cause of the adoption of the rule was the high rate of absenteeism of senators at the then recent trial of a judge (Williams, ibid., p. 517). Having regard to the arguments on the present appeal, it is instructive to consider the terms of the obligation of such a committee to report to the full Senate. It reads:-

"The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate."

While Rule XI does not appear in terms to allow a committee to make findings of fact, White J. in his judgment in Nixon v. United States (1993) 506 U.S. 224, discussed later, spoke of it having a "fact finding" role.

Consideration of Article 35.4.1o

93 The power of the Houses of the Oireachtas to vote for the removal of a judge from the bench is hugely significant for all branches of government. The prescribed mechanism empowers the legislative organ to pass judgment on the fitness of a member of the judicial organ to continue to hold an office, which itself may supervise the performance of its constitutional tasks by the former. The executive branch, as in the present case, will, in practice, necessarily be involved. It has an obvious constitutional interest both in the independence of the judiciary and in the integrity of the holders of judicial office, and a corresponding interest in seeing that the power is not used irresponsibly. Article 35.4.1o is relevant to the confidence of the people in the performance by government of its constitutional functions and, not least, for the individual judge. It is necessary, when interpreting Article 35.4.1o, to consider the implications for each branch of government and for the entire constitutional scheme.

Judicial independence

94 Article 6 of the Constitution designates the powers of government as "legislative, executive and judicial" and as deriving "under God, from the people . . .". The Constitution prescribes the methods of choosing the persons who exercise those several powers and allocates tasks between the respective constitutionally designated organs. The judicial power is principally described in Article 34.1:-

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution . . ."

Thus, only judges appointed to such courts may administer justice. The importance of the judicial function in the carefully balanced constitutional scheme is underlined by two specific powers expressly assigned to the courts. Article 34.3.2o provides that "the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution . . ." Article 26 empowers the President to refer to the Supreme Court any Bill for its "decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or any provision thereof". These two provisions, and others, highlight the supreme importance of the tasks assigned to the courts by the framers of the Constitution. The courts are required to act as custodians of the Constitution and as such, to act as a check on the actions of the other two arms of government and to ensure that they act in accordance with the rule of law, respect individual constitutionally protected rights and observe the provisions of the Constitution.

95 It is inherent and essential for the performance of these functions that the independence and integrity of the courts be guaranteed and respected. Hence, Article 35.2 provides:-

"All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law."

Provisions of Article 35, other than Article 35.4, give further effect to this fundamental principle. Article 35.3 provides:-

"No judge shall be eligible to be a member of either House of the Oireachtas or to hold any other office or position or emolument."

Article 35.5 provides:-

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

96 By these important provisions, the Constitution declares unambiguously the principle that courts and judges are independent of both the government and the legislature. Not content with that declaration, the Constitution gives concrete effect to the principle of judicial independence in the provisions cited, most pointedly in Article 35.4.1o itself. The principle of judicial independence does not exist for the personal or individual benefit of the judges, even if it may have that incidental effect. It is a principle designed to guarantee the right of the people themselves from whom, as Article 6 proclaims, all powers of government are derived, to have justice administered in total independence, free from all suspicion of interference, pressure or contamination of any kind. An independent judiciary guarantees that the organs of the State conduct themselves in accordance with the rule of law.

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

99 Judges enjoy a special constitutional protection from removal from office, in common with some other constitutionally designated persons. That protection is not intended to benefit individual persons holding judicial office. As individual human persons, judges are no more deserving of protection than any other office holder. The constitutional task that they perform requires them to be able authoritatively to resolve disputes between the three organs of government. They must be guaranteed the freedom to decide without fear or favour and, hence, that they be independent of the other branches of government.

Separation of powers

100 The doctrine of separation of powers, as already indicated, protects the independence of the judiciary. Equally, however, both the legislative and executive branch must be permitted to perform their allotted constitutional functions without improper encroachment from the other branches. The classical and oft-quoted formulation of the doctrine remains that found in the judgment of the court delivered in Buckley and others (Sinn Fein) v. Attorney General and Another [1950] I.R. 67 by O'Byrne J., stating at p. 81:-

"Article 6 provides that all powers of government, legislative, executive and judicial, derive, under God, from the people, and it further provides that these powers of government are exercisable only by or on the authority of the organs of State established by the Constitution. The manifest object of this Article was to recognise and ordain that, in this State, all powers of government should be exercised in accordance with the well-recognised principle of the distribution of powers between the legislative, executive, and judicial organs of the State and to require that these powers should not be exercised otherwise. The subsequent articles are designed to carry into effect this distribution of powers."

101 The court considered that principle extensively in its judgments in T.D. v. Minister for Education [2001] 4 I.R. 259. Murray J. stated at p. 331:-

". . . in order to avoid the paramountcy of one organ of State, each must respect the powers and functions of the other organs of State as conferred by the Constitution. Each must exercise its powers within the competence which it is given by that Constitution."

Hardiman J. stated at p. 359:-

"It is right that the judiciary, within their constitutional sphere, should be quite independent of the legislature and the executive, but it is no less right that these, within their respective constitutional spheres, be independent of the judiciary."

103 Those statements are at a level of high generality, whereas more particular considerations are at stake in the present case. The present appeal makes it necessary for this court for the first time to pronounce on the limits, if any, on the powers conferred on the Houses of the Oireachtas by Article 35.4.1o of the Constitution. To that extent, it may be said to be unique. However, relevant precedent is not wanting. Since shortly after the enactment of the Constitution, the High Court and this court have had to exercise their constitutionally conferred powers to pronounce on the validity of legislation passed by the Oireachtas. They developed, in that context, the principle of the presumption that such legislation is in accordance with the Constitution. Shortly after the entry into force of the Constitution, in Pigs Marketing Board v. Donnelly (Dublin) Ltd. [1939] I.R. 413, Hanna J. stated at p. 417:-

"When the Court has to consider the constitutionality of a law it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established."

104 This is a presumption universally applied ever since. The court has explained that the principle ". . . springs from, and is necessitated by, that respect which one great organ of State owes to another" (per O'Byrne J. in Buckley and others (Sinn Fein) v. Attorney General and Another [1950] I.R. 67, at p. 80). That presumption and the reasoning underlying it have more recently been held also to apply to resolutions of both Houses of the Oireachtas. In Goodman International Ltd. v. Mr. Justice Hamilton [1992] 2 I.R. 542, Finlay C.J., speaking with the agreement of a majority of the court, stated, at p. 586:-

"I am satisfied that the presumption of constitutional validity which has been applied by this Court, in a number of cases, to statutes enacted by the Oireachtas and to bills passed by both Houses of the Oireachtas and referred to this Court by the President pursuant to Article 26, applies with equal force to these resolutions of both Houses of the Oireachtas. It seems to me inescapable that having regard to the fact that the presumption of constitutional validity which attaches to both statutes and bills derives, as the authorities clearly establish, from the respect shown by one organ of State to another, and by the necessary comity between the different organs of State, that it must apply in precisely the same way to a resolution of both Houses of the Oireachtas, even though it does not constitute legislation."

...

106 The foregoing provides clear authority for the broad proposition that the parliamentary procedures followed to date in respect of the resolutions to remove the applicant from office must be presumed, by the courts, to be constitutional. This presumption applies in particular to the amended standing orders and to the resolutions appointing the Joint Committee adopted in June, 2004.

107 More generally, the Constitution specifically and with all deliberation assigns the power to pass resolutions as provided for in Article 35.4.1o to the Houses of the Oireachtas and to no other body. It is an exclusive power. The words of Keane J., expressed in his judgment, with which a majority of the court agreed, in Kavanagh v. The Government of Ireland [1996] 1 I.R. 321 at p. 363, seem particularly relevant:-

". . . where the Constitution has unequivocally assigned to either the Government or the Oireachtas a power to be exercised exclusively by them, judicial restraint of an unusual order is called for before the courts intervene. That is also no more than recognition that, while all three organs of State derive their powers from the people, the Government and the Oireachtas are accountable, directly and indirectly, to the people in the electoral process."

...

109 It is important to any consideration of the use by the Houses of the Oireachtas of their powers to mention Article 15.10 of the Constitution, which, so far as relevant reads:-

"Each House shall make its own rules and standing orders, with power to attach penalties for their infringement . . ."

110 This court made brief reference to this constitutional provision in O'Malley v. An Ceann Comhairle [1997] 1 I.R. 427, where O'Flaherty J. (Murphy and Lynch JJ. concurring) stated at p. 431:-

"How questions should be framed for answer by Ministers of the Government is so much a matter concerning the internal working of Dail Eireann that it would seem to be inappropriate for the court to intervene except in some very extreme circumstances which it is impossible to envisage at the moment. But, further, it involves to such a degree the operation of the internal machinery of debate in the house as to remain within the competence of Dail Eireann to deal with exclusively, having regard to Article 5, s. 10 of the Constitution."

...

112 In Nixon v. United States (1993) 506 U.S. 224, a judge was impeached before the Senate of the United States, having been convicted of making false statements before a federal grand jury in a matter concerning acceptance by him of a bribe. The Senate convicted him on articles of impeachment prepared by the House of Representatives and removed him from office. The Senate had appointed a committee pursuant to its impeachment rules already mentioned. In subsequent proceedings, the judge claimed that the rule authorising the appointment of the committee violated the Federal Constitution's impeachment trial clause. The majority of the Supreme Court rejected the former judge's claim as being non-justiciable. White J., with whom Blackmun. J. concurred, did not agree that the matter was non-justiciable. Unlike the majority, therefore, which did not reach the issue, he considered the challenge to the Senate Rule on its merits. That judgment is of some interest in the present context. Following a historical account which treads some of the ground described earlier in this judgment, White J. concluded, at p. 250, that the trial clause of the United States Constitution "was not designed to prevent employment of a fact finding committee." He continued:-

"In short, textual and historical evidence reveals that the Impeachment Trial Clause was not meant to bind the hands of the Senate beyond establishing a set of minimal procedures. Without identifying the exact contours of these procedures, it is sufficient to say that the Senate's use of a fact-finding committee under Rule XI is entirely compatible with the Constitution's command that the Senate 'try all impeachments'."

113 These decisions of the Supreme Court of the United States can have persuasive value only to the extent that they relate to the interpretation of analogous provisions of our Constitution and are consistent with the approach of our courts to issues of interpretation. There is no apparent difference of substance between the power conferred on the Houses of the Oireachtas by Article 15.10 of the Constitution, "to make its own rules and standing orders," and that of the Houses of the United States Congress to "determine the rules of its proceeding . . .". ...

Constitutional justice; fair procedures

...

117 The applicant's complaint is that the procedures adopted by the Houses are not capable of meeting the admitted standards of constitutional fairness. His complaint relates to the entire structure of the Joint Committee and the reporting system established by the standing orders.

...

Constitutionality of s. 3A of Act of 1997

120 The court, in accordance with long established principles, must presume that legislation duly

enacted by the Oireachtas is in conformity with the Constitution. The courts, as the judicial arm, must accord due respect to laws passed by the Oireachtas, the designated organ of State with the exclusive power to pass laws.

121 This principle has particular significance in the case of the section under attack. It was passed for the particular purpose of assisting the Oireachtas in the performance of its exclusive and important function of considering a resolution proposing the removal of a judge from his judicial office. In order to do so, the Houses of the Oireachtas are obliged by the Constitution to consider whether the judge in question has been guilty of misbehaviour. This is a weighty responsibility. It necessarily involves the Houses in an investigation of acts alleged against a judge.

122 The applicant contends that a requirement that the judge appear before the committee constitutes an encroachment on the independence of the judiciary. He argues that a resolution may be proposed on the basis of a mere allegation.

123 It is axiomatic that any resolution proposed pursuant to Article 35.4.1o of the Constitution will involve some sort of intrusion into the life or affairs, public or private, of the judge. That is the nature of the function assigned to the Oireachtas. For reasons given elsewhere in this judgment, it is to be presumed that the powers of the House of the Oireachtas will be exercised in respect of the principles of basic fairness and constitutional justice. Furthermore, the courts will, if necessary, protect the independence of the judiciary and the rights of an individual judge from irresponsible, irrational or malicious abuse of these powers.

124 In the light of these basic principles, the court considers that there is no ground for challenge to the power of a Committee of the Houses of the Oireachtas to call a judge before it or to require him or her to produce documents or other things, which the Committee considers necessary for its investigation of matters relating to a motion duly proposed pursuant to Article 35.4.1o. It is legitimate for the Committee to ask a judge to provide relevant documents and articles.

125 The court does not consider that the power to call a judge as a witness or to produce articles as evidence involves any improper or unconstitutional invasion of judicial power or judicial independence. On the contrary, the power is included in the Constitution for the purpose of ensuring the fitness and integrity of the judiciary. The court finds nothing unconstitutional in the impugned provision.

Conclusion on interpretation of Article 35.4.1o

126 The first key question of interpretation is whether the Houses of the Oireachtas may or may not appoint a committee, joint or otherwise, for the purpose, to use a neutral term, of assisting them in their consideration of a resolution pursuant to Article 35.4.1o of the Constitution. While the applicant does not question the power of the Houses to appoint a committee with appropriate powers, the court must express its opinion on the point, as it is an essential link in the reasoning. The second, related question is whether, assuming the power to appoint a committee, it may be of the type which has been adopted by the Houses in their amended standing orders or whether, as the applicant contends, any such committee must have power to assess, evaluate and report findings on the evidence heard.

127 Article 35.4.1o is entirely silent on both these questions. It does not require the Houses to appoint committees, nor does it prescribe any particular type of committee. It would not be right, however, to treat Article 35.4.1o as containing a complete code. The Article must be read with other relevant provisions of the Constitution. It is necessary to consider whether a requirement to operate through committees of any particular kind should be read into the provision.

128 The principle of the separation of powers, combined with Article 15.10 of the Constitution, is necessarily relevant. The Oireachtas is the body exclusively charged with considering whether a judge has so misbehaved (or is so incapacitated) as to render him or her no longer fit to hold the office of judge under the Constitution. Whether or not it is unsatisfactory or undesirable that elected political

representatives should sit in judgment on the behaviour of a judge, whether the power is open to abuse through a government's use of its majority in the Oireachtas, whether, as has been suggested, a simple majority vote, as provided by Article 15.11, should not suffice are all irrelevant. The Constitution is clear. A judge may be removed from office only by means of a resolution of both Houses and by no other means whatever.

129 Two observations may, nonetheless, legitimately, be made. Firstly, there is no evidence whatever in the history of this State or, indeed, of any of the countries of the common law, in modern times that the corresponding power of removal of judges has ever been abused by government. ... [T]he constitutional history lends little support to the applicant's stated apprehension of infringements of judicial independence. The material placed before the court includes many examples of parliamentary restraint in considering the exercise of the power. Secondly, though the matter need not be considered in this case, in the event of irrational or irresponsible abuse of the power, as by the proposal of a resolution in response to an unpopular judicial decision, or otherwise maliciously or in bad faith, it is not to be doubted that the courts would be prepared to exercise an appropriate level of judicial review. They would have a duty, apart entirely from their duty to guarantee fair procedures, to preserve the constitutional balance and to protect a judge from abuse of power. The obiter dictum of O'Flaherty J. in O'Malley v. An Ceann Comhairle [1997] 1 I.R. 427 suggests that the courts would not, in a clear case, permit even the Oireachtas to default on its constitutional obligations.

130 Since the Houses of the Oireachtas have the exclusive power to consider the passing of resolutions for the removal of a judge from office, the courts must, in accordance with the principle of the separation of powers, exercise a significant level of judicial restraint when considering the exercise of that power. ... The applicant demands only that the procedures followed by the Houses meet the fundamental constitutional requirements of fairness and justice. The court is asked to decide that the procedures proposed do not meet that standard.

131 The Houses of the Oireachtas explicitly guarantee in the measures already adopted and in the resolutions proposed to respect the "principles of basic fairness of procedures and the requirements of natural and constitutional justice" (see standing orders 63A(5) and 60A(5)). By the use of this language, the Houses have rightly and necessarily undertaken to accord to the applicant the procedural rights historically and universally seen as essential, where a person's good name, livelihood, liberty or other rights are at stake. This court, in In re Haughey [1971] I.R. 217 unambiguously declared that they were guaranteed by Article 40.3 of the Constitution.

...

135 The applicant claims that it is necessary, in order to assure the basic fairness of the procedures proposed, that the Houses appoint a committee to investigate, gather evidence and report their findings and conclusions to the Houses. It is not open to the courts to read such extensive additional provisions into the Constitution in the absence of a constitutional mandate. Article 35.4.1o must be read in the light of Article 15.10. Insofar as the former provision is silent as to matters of procedure, it must be recalled that Article 15.10 empowers each House to make its own "rules and standing orders," and places no express limits or restrictions on that power. It is acknowledged, of course, as already stated, that the Houses must respect constitutional justice and fair procedures.

136 There is nothing, therefore, in either Article 35.4.1o or Article 15.10 to prevent the Houses from adopting standing orders providing for the establishment of a committee to investigate the question of whether a judge has been guilty of "stated misbehaviour," as alleged in a resolution "calling for his removal," which has been duly proposed pursuant to Article 35.4.1o. It is the proposal of the resolution that confers that power. Having regard to the draconian character of that power, it is clear that neither a House of the Oireachtas nor any of its committees would have power to investigate alleged misbehaviour by a judge in advance of and merely in contemplation of the possible proposal of such a resolution.

...

143 In any event, the court is satisfied that it was within the power of the Houses of the Oireachtas to adopt standing orders 63A and 60A respectively and to depute to the Select Committee the power to report without making findings of fact, making recommendations or expressing opinions. The court is satisfied that the committee and, following the report of the committee, the Houses can, as it is agreed they must, accord to the applicant his full rights to constitutional justice and fair procedures.

...

149 This appeal places the court in an exceptional position in relation to another great organ of state, the Oireachtas. In the view of the court, it should take the opportunity, having regard to the several circumstances mentioned in the preceding paragraph, to provide constructive guidance to the Houses in the exercise of its unique constitutional power to remove a judge from office. It is undesirable and would not be in the public interest to leave this matter in a state of uncertainty until the matter reaches the stage of debate before the two Houses.

150 It is certainly within the power of the Houses of the Oireachtas, particularly having regard to Article 15.10 of the Constitution, to regulate their own procedures. The courts should intervene only where it is clear that a particular course of action would be in clear breach of the principles already frequently mentioned of basic fairness and constitutional justice. A resolution proposing the removal of a judge from office for "stated misbehaviour" necessarily and logically involves consideration of two distinct matters. The first is whether the judge, who is the subject of the resolution, has committed the acts alleged against him. The second is whether those acts constitute such misbehaviour as would justify his being removed from his judicial office.

151 It is undesirable to speculate on the possible outcome of the investigation of the Joint Committee or of the debate in the Houses. It suffices to say that it is not inevitable that one clear result will emerge.
...

152 It is the opinion of the court that, as a matter of basic fairness, the applicant should be entitled to a distinct hearing and decision on the issues of fact before he must confront the ultimate and drastic decision to remove him from office. Some support is to be found in the words of Article 35.4.1o. The first part of the sentence declares that a judge may not be removed "except for stated misbehaviour or incapacity". The second part goes on to provide that this may happen: "and then only upon resolutions passed . . .". These remarks are not intended to impose onerous legal requirements on the Houses. They retain a large area of discretion as to how the resolutions are put. They are not necessarily obliged to break the allegations against the applicant into several components. They may decide that the factual issues may fairly be expressed in the form of a single proposition.

...

Conclusion

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