THE HIGH COURT
JUDICIAL REVIEW

[2026] IEHC 446
Record No. 2025 714 JR

IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 SECTION 3(1)

BETWEEN

ANDREW CLARKE

APPLICANT

AND

THE OFFICE OF THE OMBUDSMAN

RESPONDENT

RULING of Ms. Justice Siobhán Phelan, delivered on the 7th day of July, 2026

INTRODUCTION

1. In these judicial review proceedings, the Applicant challenges a decision of the Office of the Ombudsman relating to a dispute with the Sustainable Energy Authority of Ireland ("SEAI") over a solar PV grant and a requirement to install an emergency isolation/shunt switch.

2. The matter comes before me on foot of two separate interlocutory applications, namely:

(i) an application for a protective costs order ("PCO"); and

(ii) a discovery application.

3. The Applicant is a litigant in person. These applications are not before me by Notice of Motion in the usual way, but the issues of protective costs and discovery have been clearly raised by the Applicant at case management hearings. The proceedings were listed before me for hearing on these applications, notwithstanding that no Notice of Motion has issued.

4. In circumstances where the applications are clearly set out in the papers, where the parties have exchanged written submissions addressing both applications, and where no principled objection has been pursued on behalf of the Ombudsman in relation to the procedural pathway by which these issues come before me, I am satisfied that it is appropriate to determine the applications without requiring a formal Notice of Motion.

BACKGROUND

5. By way of summary background, the Applicant received a €2,400 SEAI grant for a micro-inverter solar PV system. After installation, SEAI inspected the system and issued a Re-Works Notification ("RWN") requiring corrective works because the system allegedly lacked a required emergency isolation device.

6. The Applicant challenged the RWN internally within SEAI and then complained to the Ombudsman. The core technical dispute centred on whether micro-inverter solar PV systems require an emergency isolation/shunt switch under I.S. 10101, SEAI's Code of Practice and the Building Regulations. The Applicant's position, as articulated in his complaint, appears to be that his system uses micro-inverters rather than a string inverter and automatically shuts down when mains power is lost. He contends, therefore, that an additional emergency isolator is unnecessary. He further claims that

NSAI documentation and certificates support his interpretation, that SEAI has misunderstood or misapplied the regulations, and that potentially many thousands of grant recipients may have been affected by the same interpretation.

7. My understanding of SEAI's position in response to the Applicant's complaint is that the Code of Practice and I.S. 10101 require emergency isolation and that this requirement applies to all solar PV configurations, including micro-inverter systems. SEAI further maintains that compliance with the Code is a condition of receiving the grant and that failure to comply can justify a re-works notification and possible grant recovery.

8. On the 25th of February 2025, the Ombudsman did not uphold his complaint.

9. The Ombudsman's decision was based on the view that SEAI had correctly applied the Solar PV Scheme's rules and requirements, and that the Ombudsman's role was limited to reviewing the administrative handling of the case rather than deciding who was right in the underlying technical dispute. The Ombudsman's main reasons for the decision adopted were that SEAI's requirement for an emergency isolator was supported by the relevant rules and the Ombudsman accepted SEAI's position that section 4.7 of the SEAI Code of Practice requires an automatic isolation/shunt arrangement. Section 712.537.4.1 of I.S. 10101 similarly requires automatic isolation of the circuit from the PV modules. It was concluded that these requirements apply to all configurations, including micro-inverter systems such as the Applicant's. Accordingly, the Ombudsman concluded that the re-works notification issued to the Applicant was consistent with the Scheme requirements.

10. In making these findings, the Ombudsman did not itself determine whether SEAI's Code of Practice correctly reflected I.S. 10101 or the applicable regulatory requirements. A central part of the Ombudsman's reasoning in rejecting the complaint was that it could not adjudicate technical engineering disputes concerning the correctness or application of electrical standards. In substance, it found that its role was to consider whether SEAI had applied the terms and conditions of the Scheme correctly, rather than to adjudicate on technical disputes or the merits of the regulations themselves. The Ombudsman therefore did not undertake an independent technical assessment of the Applicant's interpretation of the regulations but accepted SEAI's position as that of the competent authority on those technical requirements.

11. The Ombudsman also relied on the fact that applicants must agree to the Solar PV Scheme's terms and conditions. Those terms require compliance with the Code of Practice and relevant regulations. SEAI considered Mr Clarke's installation non-compliant with those requirements.

12. The finding further indicated that if an applicant had concerns about the technical requirements of the Scheme, those concerns should have been raised before agreeing to the terms and before installation.

13. As the Ombudsman accepted that SEAI followed its published rules, applied the Scheme requirements as it understood them and acted within the framework of the Scheme, it found no evidence of unfair administration or maladministration by SEAI. Therefore, the complaint was not upheld.

14. In essence, as apparent from the summary above, the Ombudsman did not reject the complaint because it resolved the technical argument for or against the Applicant after independent analysis. Rather, it rejected the complaint because it accepted SEAI's interpretation of the Scheme requirements, considered that SEAI had applied those requirements consistently, and concluded that the Ombudsman's role was to assess whether SEAI had administered the Scheme properly, not whether SEAI's technical interpretation was correct.

15. It bears noting that the SEAI Domestic Solar PV Installer Code of Practice, to which SEAI and the Ombudsman attached importance, is a document issued by SEAI setting out the technical and installation standards with which contractors and grant applicants must comply when participating in the SEAI Solar PV grant Scheme. SEAI relied heavily on section 4.7, "*Emergency Isolation*", of the Code. That section states that all domestic PV installations under the Scheme must provide an automatic shunt/interlocked isolation system and expressly provides:

> *"For the avoidance of doubt an isolation of the supply from the PV modules is required in ALL cases, whether micro-inverters, DC optimised inverters ... or any other configuration is used."*

16. SEAI's position was that the Applicant's micro-inverter system did not comply with this requirement because it lacked the required automatic isolation arrangement. A central part of the Applicant's case is that the Code incorrectly interprets, or goes beyond, the underlying electrical regulations and that section 712.537.4.1 of I.S. 10101 does not require emergency isolation for his micro-inverter system. On the Applicant's case, the Code misrepresents what the regulations require. He contends that SEAI has effectively rewritten the regulatory requirements through the Code and that the Code purports to amend or reinterpret Building Regulation Technical Guidance Document B in a way SEAI has no authority to do.

17. In making this argument, the Applicant relies heavily on NSAI Agrément Certificates for solar PV systems. His argument is that NSAI drafted and publishes I.S. 10101, and that various NSAI Certificates for micro-inverter PV systems contain diagrams and specifications that do not show the emergency isolation devices that SEAI says are mandatory. He therefore maintains that NSAI's published material appears inconsistent with SEAI's interpretation of I.S. 10101. The Applicant's position is that, if the NSAI certificates show compliant micro-inverter systems without emergency isolators, that supports his interpretation of section 712.537.4.1.

18. In its finding, the Ombudsman accepted that compliance with the Code of Practice formed part of the Solar PV Scheme requirements, that grant applicants agreed to comply with the Code when participating in the Scheme, and that SEAI was entitled to assess compliance against the Code. As a result, the Ombudsman concluded that SEAI had acted in accordance with the Scheme rules and did not uphold the complaint.

19. The disagreement between the Applicant and SEAI as to whether the Code correctly reflects I.S. 10101 and requires an emergency isolator on all PV systems, including micro-inverter systems, or instead misstates the regulations and imposes a requirement that the regulations themselves do not impose on micro-inverter systems, was at the heart of the Applicant's complaint. He is dissatisfied that the more fundamental question of the proper interpretation of the regulatory requirements was not decided by the Ombudsman.

20. As noted above, the specific provision at the centre of the dispute is Section 712.537.4.1 of I.S. 10101. This regulation states:

> *"In order to provide emergency isolation of the circuit from the PV array into*

the building the following requirements shall be met:"

21. It then requires that the emergency isolation comply with the isolation requirements in the standard; provide isolation of the circuit from the solar PV modules into the building, whether the circuit is AC or DC; be as close to the PV modules as possible; automatically isolate the circuit when the mains AC supply to the building is disconnected; automatically reconnect when AC supply is restored and not be operated by a manual switch, push button, or similar device.

22. The Applicant places particular emphasis on the phrase "*the circuit from the PV array into the building*." His argument is that in a string inverter system, DC cables run from the solar panels into the building, so emergency isolation is readily apparent. In his micro-inverter system, the DC is converted to AC immediately behind the panels outside the building. Therefore, the Applicant contends, there is no relevant PV circuit running "*into the building*" that requires emergency isolation under section 712.537.4.1. He maintains that the Ombudsman and SEAI omitted or failed to analyse those opening words when reaching their conclusions.

23. SEAI's interpretation is much broader. It maintains that the requirement applies to all PV installations and that micro-inverter systems are not exempt. SEAI's position is that automatic isolation is required regardless of configuration, and this position is reflected both in IS 10101 and in the Solar PV Code of Practice.

24. As noted above, the Ombudsman accepted SEAI's reading of I.S. 10101 and concluded that the standard requires emergency isolation, the requirement applies to micro-inverter systems and SEAI therefore acted in accordance with the Scheme requirements when issuing the re-works notification. The Ombudsman did not undertake its own technical interpretation of the regulation, but instead accepted SEAI's interpretation as the view of the competent authority.

25. The Applicant subsequently brought judicial review proceedings. The High Court (Bolger J.) initially refused leave on the 7th of July, 2025, but the Court of Appeal overturned that decision and granted leave on the 17th of November, 2025.

26. These judicial review proceedings are directed to the Ombudsman's handling of the Applicant's complaint rather than directly to SEAI's decision-making. The core of the Applicant's case is that the Ombudsman wrongly refused to engage with the substantive interpretation of the regulations and failed to address several material arguments that could, he says, have shown SEAI's position to be wrong. In the case as pleaded, he alleges, *inter alia*:

(i) a failure to address key arguments (e.g. an alleged failure to engage with the proper interpretation of I.S. 10101, evidence from the NSAI, arguments based on estoppel, misrepresentation and irrationality and requests to obtain expert evidence or refer legal questions to the High Court);

(ii) unfair procedures (specifically his claim that he was not shown all material submitted by SEAI, he was not allowed to comment on all evidence before a final decision was made and that this breached constitutional fair procedures, natural justice and Article 6(1) of the ECHR);

(iii) jurisdictional error (specifically that the Ombudsman wrongly claimed that technical matters were outside its remit and unlawfully narrowed its own jurisdiction);

(iv) irrationality, in that he contends that the Ombudsman's conclusion that SEAI acted reasonably was irrational because the RWN referred to ET101, which he says was outdated, I.S. 10101 was misapplied, SEAI could not identify practical equipment that would satisfy its own requirements, and the underlying technical assumptions were flawed.

27. In opposing these proceedings, the Ombudsman argues that its role is to review administrative fairness, not to determine technical engineering disputes. It submits that its investigations are inquisitorial rather than adversarial, that the Ombudsman Act, 1980 (as amended) (hereinafter "the 1980 Act") gives it broad discretion over its procedures (which procedures expressly provide that copies of correspondence will in general not be provided to the complainant as part of the investigation process), and that it was not required either to provide every document or to address every argument in detail. In this regard it relies on the fact that Ombudsman investigations are expressly required to be conducted otherwise than in public (s. 8(1) of the 1980 Act) and specific obligations of confidentiality are placed on the Ombudsman and his staff in respect of investigations (s. 9(1) of the 1980 Act).

28. The ability to communicate confidentially, where appropriate, with public service providers in order to achieve cooperation with the Ombudsman's general recommendations as to the improvement of the public service is also stressed. The Ombudsman further contends that the Applicant received the material relevant to the finding and was given opportunities to comment. In opposing these proceedings, the Ombudsman relies on ss. 4(8) and 8(3) of the 1980 Act which vests him with a discretion to conduct investigations as he sees fit, including a discretion as to whether to initiate, continue or discontinue an investigation. It also relies on the non-binding nature of Ombudsman recommendations as limiting the practical value of judicial review. It contends that the Ombudsman's role and function does not give rise to an entitlement to the kinds of procedural fairness that would apply in proceedings involving the administration of justice.

29. From the foregoing, it appears that this case raises broader questions about the extent to which the Ombudsman must disclose material obtained from public bodies to complainants, whether complainants are entitled to comment on all such material before a finding is made, the extent of the Ombudsman's jurisdiction in technically complex cases, and the standard of reasoning required in Ombudsman decisions. It also raises, at least as part of the factual context, issues concerning the interpretation of I.S. 10101, the SEAI Code of Practice and related solar PV safety requirements, which the Applicant contends may affect many grant recipients. In short, the Applicant argues that both SEAI and the Ombudsman misapplied the law and denied him fair procedures, while the Ombudsman maintains that it acted fairly and within its statutory role, and that the underlying technical dispute falls outside the purpose of an Ombudsman investigation.

PROTECTIVE COSTS APPLICATION

30. The Applicant seeks a protective costs order because, *inter alia*, he is retired and has limited resources, and the Ombudsman has estimated its legal costs at approximately €30,000. He argues that the case raises issues of public importance affecting not only other solar grant applicants, but also complainants using the Ombudsman's services generally.

31. The Ombudsman opposes the application, arguing the case is a private dispute concerning a relatively modest grant (€2,400) and does not justify exceptional costs protection.

32. In presenting his submissions in support of his application, the Applicant relies on the decision in *Child and Family Agency v. Guardian Ad Litem* [2026] IEHC 88 which recognised the Court's jurisdiction to grant a PCO. He asks that he be protected from any adverse costs order if unsuccessful in these proceedings, while preserving any entitlement to recover costs if successful.

33. Applying the factors identified in *Child and Family Agency*, the Applicant maintains that this case raises issues of general public importance which go well beyond his personal dispute. He says that the case raises important legal questions affecting thousands of applicants under the SEAI solar grant scheme, future complainants using the Ombudsman's services, and the lawful scope of the Ombudsman's powers and procedures.

34. He identifies several issues of public importance, including whether the Ombudsman was entitled to ignore or fail to address an alleged significant disagreement between SEAI and NSAI regarding the interpretation of I.S. 10101; whether the Ombudsman can decline to engage with issues because they are said to be "technical"; whether complainants are entitled to see and comment on evidence and submissions obtained from public bodies; whether the Ombudsman can lawfully operate procedures allowing public bodies to comment on draft determinations while complainants do not receive equivalent opportunities; and whether the Ombudsman may fail to address material arguments advanced by complainants. He submits that there are no directly applicable authorities on many of these issues and that Court guidance would benefit the public.

35. Furthermore, the Applicant maintains that his case is meritorious. He contends that there is substantial evidence supporting his interpretation of I.S. 10101. On his case, the Ombudsman failed to address key parts of that evidence and the Ombudsman wrongly excluded matters it characterised as technical. He maintains that the Ombudsman acted contrary to natural justice and Article 6(1) of the ECHR in relation to disclosure and fair procedures. He also contends that the Ombudsman has no statutory power to disregard material arguments or rewrite the Ombudsman Act through internal procedures. In his view, the proceedings raise serious and arguable points deserving judicial determination. He cites two English and UK Ombudsman authorities (*R (M) v Commissioner for Local Administration in England* [2006] EWHC 2847 (Admin) and *AB against The Scottish Public Services Ombudsman* [2025] CSOH 48) seemingly to support the "*strength of the points*" limb of his PCO application, and also more broadly to reinforce the arguability of his substantive judicial review challenge

36. In addition, the Applicant points to what he considers to be a significant imbalance in resources. Whereas he is a retired individual with limited means, the Respondent is a State body funded from public resources. He notes that the Ombudsman informed him that its likely legal costs were estimated to be approximately €30,000 including VAT and that costs could rise further if additional parties became involved. He argues that this creates a substantial deterrent to pursuing a case raising issues of public importance.

37. Next, the Applicant acknowledges that he has a personal interest in the proceedings, in that he seeks withdrawal of the RWN, an apology and compensation for the time and trouble to which he says he has been put. He argues, however, that his personal interest, and in particular his limited financial loss, is modest relative to the wider public interest and the broader significance of the case. If his interpretation is correct, he says, many other grant applicants and Ombudsman complainants could benefit from the Court's guidance.

38. The Applicant also maintains that refusal of a PCO could effectively prevent determination of the issues as without costs protection he would need to give serious consideration to whether he could continue the proceedings given the financial exposure. He argues that most solar grant recipients are unlikely to risk substantial litigation over comparatively modest grants and points out that Ombudsman complainants are often unrepresented and may lack the resources or knowledge needed to bring judicial review proceedings, with the result that the issues raised may never be determined if a PCO is refused.

39. Finally, the Applicant relies on what he says is a significant additional factor, namely that the Ombudsman itself states that issues of the type raised are more appropriately dealt with by courts than by the Ombudsman. He argues that if that is truly the Ombudsman's position, it strengthens the case for protecting a litigant who has brought those issues before the Court.

40. In essence, the Applicant argues that this case concerns important questions about the Ombudsman's powers, procedures and fairness obligations. He contends that the issues raised are meritorious and potentially affect large numbers of members of the public, particularly solar grant applicants and persons using the Ombudsman's services. He submits that the inequality of resources between himself and the State-funded Respondent justifies the making of a PCO, as, without costs protection, the case may never be heard, depriving the courts of the opportunity to determine matters of wider public importance.

41. Accordingly, he submits that it is fair and just for the Court to grant a PCO.

42. The Ombudsman opposes the application and argues that a PCO is not justified because there is nothing exceptional about the case and the circumstances do not satisfy the criteria identified by Simons J. in *Child and Family Agency v Guardian Ad Litem*.

43. Firstly, the Ombudsman maintains that the case is an ordinary private judicial review which it characterises as a "*common-or-garden*" judicial review challenge to an administrative decision, rather than litigation raising issues of exceptional public importance. The Ombudsman emphasises that the underlying dispute concerns a grant of only €2,400, the real dispute is between Mr Clarke and SEAI, not the Ombudsman and the Ombudsman's decision itself was merely a non-binding assessment of administrative action.

44. Secondly, the Ombudsman maintains that no point of law of general public importance arises, arguing that the case concerns the relatively specialised subject of SEAI solar grants and technical electrical standards and that the alleged inconsistency/disagreement between SEAI and NSAI is an "*esoteric*" issue. The Ombudsman argues that there is no evidence that determination of the issues would produce a wider public benefit.

45. Thirdly, as regards the merits of the claim, the Ombudsman submits that the Applicant's arguments are without merit and that this weighs heavily against the grant of a PCO. It further argues that because Ombudsman recommendations are non-binding, the practical utility of the proceedings is limited. The Ombudsman maintains that the proceedings may be futile given the limited value of the underlying dispute and the nature of the relief sought. Reliance is placed in passing on the fact that the High Court originally refused leave before the Court of Appeal reversed that decision, which the Ombudsman cites as an indicator that the case is far from obviously strong. The Ombudsman goes so far as to contend that the proceedings represent a poor use of scarce High Court resources.

46. A central feature of the Ombudsman's opposition is that this litigation is fundamentally about the Applicant's own circumstances concerning his own grant application and solar installation. On behalf of the Ombudsman, it is submitted that any benefit to the public is speculative and these judicial review proceedings reveal a personal rather than public-interest objective. Accordingly, the Ombudsman argues that this is not the type of public-interest litigation that would justify exceptional costs protection.

47. As for the Applicant's reliance on financial disparity, the Ombudsman says this is not enough to justify the making of a PCO. The Ombudsman points out that there is no sworn evidence before the Court regarding Mr Clarke's financial means and that the Ombudsman's budget ultimately comes from public funds with the result that granting costs protection transfers risk to the taxpayer.

48. Finally, the possibility that the Applicant may discontinue his proceedings without the benefit of a PCO, as he has submitted, is not considered by the Ombudsman to be a valid reason to make such an order. It is pointed out that this assertion is not supported by affidavit evidence. It is further contended that the mere fact that a litigant may decide not to proceed because of costs risk does not justify a departure from ordinary costs rules. The Ombudsman relies on authorities stressing that costs rules serve an important function in discouraging weak or unmeritorious litigation.

49. Having considered the case law cited by the parties and the facts and circumstances of this case, I am satisfied that this is not an appropriate case in which to depart from the normal rules as to costs by making a PCO. At its heart, this is a private dispute concerning the Applicant's own solar installation, his own grant and his own complaint to the Ombudsman. It is not, in my view, public-interest litigation. These proceedings are directed at a private grievance rather than a matter brought principally for the public good. While the resolution of the legal issues may have relevance for other people, that is true of many proceedings, and I am not satisfied that the legal issues are of general public importance in the sense required to justify a PCO.

50. From the perspective of the merits, the general utility and purpose of these proceedings is questionable. Although I note the Applicant's reliance on *Wynne v Office of the Ombudsman* [2026] IEHC 123, which is cited to argue that the Ombudsman's role is not confined as narrowly as the Ombudsman suggests and that the Ombudsman may have to consider whether a public body acted in accordance with "*procedures, policies, legislation and regulations*", this case does not establish an entitlement to costs protection in these proceedings.

51. The English and UK authorities which the Applicant includes in the Book of Authorities demonstrate that in those jurisdictions the Ombudsman enjoys a broad statutory discretion as to whether and how to investigate a complaint and the court should not convert judicial review into an appeal on the merits of the underlying dispute. At the same time, that discretion is not immune from review. Where an Ombudsman mischaracterises the complaint, wrongly treats a matter as outside jurisdiction, fails to take account of material considerations, or reaches an irrational decision, judicial review may lie. These authorities therefore inform the substantive arguability of aspects of the claim advanced in these proceedings, but they do not establish that the Applicant is entitled either to a PCO.

52. I am not persuaded that the Applicant has demonstrated sufficient merit to justify the maintenance of such costly proceedings at public expense. After all, the Ombudsman's finding was only a non-binding recommendation. There is no evidence before me that this issue has been raised by anyone else. Furthermore, whether the Scheme or Code correctly reflects the requirements of the relevant electrical standards is secondary to the fact that the terms of the Scheme are themselves clear and were agreed to by applicants seeking a grant under the Scheme. There is nothing to suggest that any other applicant under the Scheme has disputed the application of this condition. This is hardly surprising as there is an apparent tension between the premise of the Applicant's complaint and the fact that he applied under the Scheme and does not dispute that the Scheme requires (Condition 24 of the Terms and Conditions) that installations must meet all relevant regulations and meet the Code of Practice for the Solar PV Scheme. The Code of Practice in turn states that all domestic PV installations installed under the Scheme must provide an automatic isolation system. The Applicant's argument is not that the Code does not so require but that the Code allegedly goes beyond or misstates I.S. 10101. If the Applicant is correct, however, and the Code of Practice were found to go further than required under I.S. 10101, it nonetheless remains a clear requirement of approval under the Scheme for payment of the grant that all conditions of the Code of Practice be complied with.

53. In terms of the financial inequality argument advanced, many judicial review respondents are State actors with the result that if State funding alone could justify a PCO, it would not be an unusual phenomenon. Ultimately, public funds belong to the taxpayer. I see no reason why the taxpayer should carry costs exposure on the Applicant's behalf in view of the nature of the issues in these proceedings. The fact that the Applicant faces costs risk is not exceptional and exposure to such risks serves an important function in safeguarding the courts from unmeritorious proceedings. It is well established that adverse costs exposure is an important feature of civil litigation. *Permanent TSB v. Skoczylas* [2021] IESC 10 and *Browne v. An Taoiseach* [2023] IEHC 205 are authorities for the proposition that costs rules help encourage responsible litigation and deter weak or unmeritorious claims. Save in exceptional cases, public funds and taxpayer resources should not be used to insulate an ordinary litigant from the normal consequences of unsuccessful litigation.

54. As recognised in Simons J.'s decision in *Child and Family Agency v. Guardian Ad Litem*, the jurisdiction to make a PCO is an exceptional departure from the normal costs rule that costs are decided at the end of litigation and generally follow the event. I have concluded that the Applicant does not satisfy the criteria identified in that case as guiding a decision to grant a PCO and the facts of this case do not justify the exercise of such an exceptional jurisdiction.

DISCOVERY APPLICATION

55. In these proceedings the Applicant contends with reference to s. 8(2) of the 1980 Act that the Ombudsman was required to put all his allegations to SEAI and that, without disclosure of the Ombudsman–SEAI exchanges, he could not know whether that had happened. Section 8(2) of the 1980 Act, provides:

> *"Where the Ombudsman proposes to carry out an investigation under this Act into an action he shall afford—*

(a) any reviewable agency concerned, and

(b) any other person who appears or, in a case where a complaint in relation to the action has been made to the Ombudsman, is alleged, to have taken or authorised the action,

an opportunity to comment on the action and, if a complaint in relation to the action has been made to the Ombudsman, on any allegations contained in the complaint."

56. In practical terms, the subsection gives the reviewable agency *viz.* the SEAI and any person alleged to have taken or authorised the action, an opportunity to comment on both the action and any allegations contained in the complaint. It does not expressly confer a reciprocal right on the complainant to see and comment on the agency's response. The Applicant relies on the statutory wording requiring the Ombudsman, where he proposes to investigate an action, to afford the reviewable agency an opportunity to comment on the action and, where a complaint has been made, on "*any*" allegations contained in the complaint. His position is that he had made a series of detailed arguments, including his interpretation of I.S. 10101, the alleged inconsistency between SEAI and NSAI material and points about the legality/rationality of SEAI's position. He maintains that he does not know whether those arguments were communicated to SEAI, or whether SEAI has responded to them.

57. The Applicant seeks discovery of all communications between the Ombudsman and SEAI concerning his complaint. He says this is necessary to determine whether all his points were put to SEAI, whether important material was withheld and whether additional grounds for challenge exist. The Ombudsman argues discovery is unnecessary because relevant documents have already been disclosed and judicial review discovery should remain limited. The Ombudsman also relies on its statutory remit and the nature of the process (as more fully summarised above at paras. 27 and 28).

58. In his submissions in support of the discovery application, the Applicant accepts that one of the issues in the judicial review is whether the Ombudsman was legally entitled to withhold communications between itself and SEAI. He argues, however, that disclosure is necessary to ensure that the judicial review itself can be heard fairly. He argues that discovery is required to allow the Court properly to assess how the Ombudsman conducted the investigation.

59. The Applicant further contends that the Ombudsman has not complied with the duty of candour applicable in judicial review proceedings. Relying on *Elsharkawy v Minister for Transport* [2024] IECA 258 and the principle that public bodies must put their "*cards face upwards*", he argues that the Ombudsman should disclose all relevant communications rather than leaving him uncertain as to what occurred during the investigation. His position is that without seeing the exchanges he cannot know whether the Ombudsman has accurately described the investigative process in its evidence.

60. The Applicant also contends that the undisclosed communications could themselves reveal procedural defects. He points out that under s. 8(2) of the Ombudsman Act, his allegations were required to be put to SEAI. He says discovery is needed because some of his arguments may not have been communicated to SEAI at all, material points may have been omitted and the SEAI may have made representations that generated new issues which were never disclosed to him and those matters could give rise to further grounds of judicial review. He relies on *McEvoy v. An Garda Síochána Ombudsman Commission* [2015] IEHC 503 as supporting disclosure in circumstances where documents may shed light on the fairness of the decision-making process.

61. The Applicant argues that he has only seen a very small portion of the communications between the Ombudsman and SEAI. He notes that a schematic diagram disclosed to him was, in his view, irrelevant and the Ombudsman later disclosed a single SEAI letter. He points out that the said letter pre-dated his principal argument concerning the interpretation of I.S. 10101 and therefore it cannot demonstrate that SEAI ever considered or responded to his submissions on this point. He says it is therefore impossible to accept the Ombudsman's assertion that he has already seen everything relevant to the complaint.

62. The Applicant submits that if his interpretation is correct and the Ombudsman should have considered the regulations themselves, not merely the SEAI scheme documents, there may be further relevant material that he has never seen. In particular, he argues that there may be communications dealing with the interpretation of I.S. 10101; his arguments concerning micro-inverter systems and the alleged inconsistency between

SEAI and NSAI positions. Discovery is therefore said to be directly relevant to issues already before the Court.

63. The Applicant also takes issue with a specific assertion in the Ombudsman's affidavit that the Ombudsman is entitled to communicate confidentially with SEAI. He argues that there is no lawful basis for confidential communications of that nature and the Ombudsman is not a mediator. He maintains that if such communications occurred, the Court should know what they were and what role they played in the investigation. He therefore seeks discovery of any such confidential exchanges also.

64. The Ombudsman opposes the Applicant's request for discovery of all exchanges between the Ombudsman and SEAI and argues that the application should be refused because the requested disclosure is neither necessary nor appropriate in judicial review proceedings.

65. The Ombudsman submits that the core premise of the discovery application is incorrect because the Applicant was already provided with the material that mattered to the investigation. In particular, the Ombudsman relies on the fact that on the 17th of January, 2025, the Applicant was given the full SEAI response dated the 23rd of December, 2024. He was then invited to comment on that response before the investigation was finalised. The Ombudsman therefore says the Applicant has already seen the germane material relevant to his complaint. Accordingly, discovery would serve little or no practical purpose.

66. The Ombudsman expressly argues that further discovery would be "*futile and a waste of resources*" because the relevant SEAI response has already been disclosed to the Applicant. Its position is that the Applicant is seeking extensive disclosure despite already possessing the material relied upon in reaching the Ombudsman's determination.

67. The Ombudsman submits that discovery in judicial review proceedings is more restricted than in ordinary civil litigation. It cites *McEvoy v. An Garda Síochána Ombudsman Commission*, where the Court set out principles governing discovery in judicial review, including that judicial review is concerned primarily with the legality of the decision-making process, not the merits of the underlying dispute. The principles reiterated in that case include that discovery is not available merely to conduct a trawl through another party's documents. Discovery is only appropriate where documents are demonstrably relevant and necessary for the fair determination of identified issues. An applicant cannot seek discovery simply to test whether something helpful might turn up. The Ombudsman argues that the Applicant's application falls into precisely the sort of impermissible exploratory search.

68. The Ombudsman maintains that the Applicant's own submissions reveal that he wants discovery to ascertain whether additional grounds for judicial review may exist. The Ombudsman argues that this is not a proper basis for discovery because discovery is not available to investigate whether a case might be improved and discovery must relate to existing pleaded issues. It is submitted that a litigant is not entitled to search through documents in the hope of uncovering a new claim.

69. In addition, the Ombudsman rejects the allegation that it did not comply with its duty of candour and submits that it is conscious of its duty of candour and recognises the requirement to *"lay with its cards face up*". It is maintained that this obligation has been fully complied with in this case. Accordingly, the Ombudsman says there is no basis for ordering discovery on the ground that relevant information has been withheld.

70. The Ombudsman further relies on the principle identified in *McEvoy* that a party is generally not entitled to "*go behind*" affidavit evidence by seeking discovery merely to test its accuracy; there must be some external material suggesting that the affidavit is materially inaccurate before such an exercise may be appropriate. The Ombudsman argues that the Applicant has identified no such evidence here.

71. The Ombudsman also notes that, "*other than that already provided to the Applicant*", the documentation sought may no longer be available to it. This is raised as a practical difficulty with the Applicant's broad discovery request.

72. In addition, the Ombudsman places considerable emphasis on the statutory nature of Ombudsman investigations, which are inquisitorial rather than adversarial. It maintains that it is not obliged to exchange all correspondence between the complainant and the public service provider. It further submits that the 1980 Act contains confidentiality provisions and gives the Ombudsman considerable discretion in conducting investigations. It says that imposing broad disclosure obligations would undermine the flexibility and efficiency of the Ombudsman process. The Ombudsman therefore rejects the Applicant's contention that all communications with SEAI should automatically be disclosed.

73. In summary, the Ombudsman argues that discovery should be refused because the Applicant has already received the relevant SEAI response and had an opportunity to comment on it and further discovery would be futile and unnecessary. In this regard, however, it seems to me that the language used in averments made on behalf of the Ombudsman does not go so far as to confirm that the Applicant has already received the full SEAI response, but rather to confirm that he has received the full response provided by letter dated the 23rd of December, 2024 (as disclosed on the 17th of January, 2025). It is not specifically averred that there was no other response. Indeed, the Applicant maintains that he obtained a document in Opposition papers contained in the SEAI response which had not previously been furnished to him.

74. While I do not think the Ombudsman's affidavit evidence fully supports the submission that the Applicant already has the entirety of SEAI's responses or communications, the real question is whether anything material to the issues this Court must decide at the full hearing turns on this. In this regard, I note that the SEAI response furnished to the Applicant and exhibited in these proceedings sets out the matters upon which the Ombudsman relies in rejecting the Applicant's complaint.

75. Accordingly, even if there is further documentation from SEAI, insofar as information was communicated by SEAI in response to the complaint and was relied upon in rejecting the Applicant's complaint, the exhibited material confirms that the nature of that response has been communicated to the Applicant. While some of this material may have been furnished in the context of these proceedings rather than while the process was ongoing, it is now available to the Applicant to support any case he wishes to advance arising from the fact that not all material had been furnished to him for comment before his complaint was rejected.

76. I do not consider that the Applicant's reliance on *McDonncha v Minister for Education & Skills* [2018] IESC 50 supports his application for discovery. While this authority may be relevant to the Applicant's substantive judicial review because the Applicant relies on his right to fair procedures as part of the basis for seeking Ombudsman–SEAI communications, it does not demonstrate that discovery is necessary at this interlocutory stage. Similarly, the decision of the ECHR in *Heather Moor & Edgecomb Ltd (No. 2) v United Kingdom* App. No. 1550/09 relied upon by the Applicant to argue that Article 6 standards can apply to Ombudsman-type processes and that a complainant may be entitled to know and respond to material used in the decision-making process, may bear on the merits of the pleaded challenge, but does not require discovery where the issue is a legal question which arises for determination on the case as pleaded.

77. I accept the Ombudsman's submission that discovery in judicial review is limited, although this is because of the nature of the issues which typically arise in judicial review proceedings. In ordinary civil proceedings, discovery is often used to uncover evidence relevant to determining disputed facts and liability. The court is concerned with the merits of the dispute, so wider disclosure may be appropriate if documents could assist in proving or disproving a claim. Judicial review is different because the court is usually not deciding whether the decision was correct, but whether it was reached lawfully.

78. It is noted that s. 8(2) of the 1980 Act requires the Ombudsman to inform the reviewable agency of "*any*" allegations made in the complaint and to give it an opportunity to comment. This provision is important to the Applicant's discovery application because he contends that, as s. 8(2) required all of his allegations to be put to SEAI, he needs disclosure of the Ombudsman–SEAI correspondence to verify whether all of his arguments were in fact communicated to SEAI, what responses SEAI gave, and whether those responses generated new issues that were not disclosed to him.

79. To argue that there had been a breach of s. 8(2), however, it would be necessary for the Applicant to demonstrate that he made a different allegation in later documentation which changed the nature of his complaint such that there was a requirement to put that change to SEAI. He does not require discovery to do so, as the terms of his communications with the Ombudsman are already in his possession. It would also be necessary to establish that the Applicant, as complainant, has an entitlement to object to the manner and extent to which an allegation is communicated where the intention reflected in s. 8(2) appears to be to safeguard the fairness of the process for the public body under investigation, not the complainant, who does not stand accused and is not amenable to a finding against him. This is a question of law for which discovery is not necessary.

80. The Applicant maintains that there is an asymmetry in the Act and in the Ombudsman's procedures, in that the public body is guaranteed an opportunity to respond to the allegations made against it under s. 8(2), but the complainant is not automatically entitled to see and comment upon the public body's response. That asymmetry exists. The Applicant is not, however, entitled to discovery in aid of these proceedings where the question of his entitlement to the exchanges sought in his discovery application is itself a matter arising for determination in the proceedings.

81. A central issue in these proceedings is whether the Ombudsman is obliged to provide a complainant such as the Applicant with all communications. The Ombudsman maintains that compliance with s. 8(2) means ensuring that the reviewable agency can respond to allegations, not that every communication must be exchanged between the parties. The fairness issue raised by s. 8(2), on the Ombudsman's case, is that it expressly protects the agency's right to know and answer the complaint, whereas the Applicant argues that fairness requires a reciprocal opportunity for the complainant to know and answer the agency's responses.

82. Insofar as the primary issue relied upon to justify discovery is whether the Ombudsman was required to furnish the Applicant with all correspondence with SEAI, or to invite SEAI to respond to issues raised in further correspondence received from the Applicant, it seems to me that this issue does not depend on whether there was further communication between SEAI and the Ombudsman. It is a legal question which must be assessed by reference to the legislation and to the requirements of fairness, having regard to the nature of the procedure and what is at stake for the different parties. Discovery is not necessary to determine that question.

83. It is also well established that discovery cannot be used as a fishing expedition. Insofar as the Applicant states that the documents he seeks are required to see whether new grounds of challenge can be found, that is clearly an impermissible basis for the grant of discovery. It seems to me that, by his own admission, the discovery sought by the Applicant is an attempt to search for new grounds of challenge.

84. He has not identified a basis upon which the documentation sought is genuinely necessary to determine existing pleaded complaints about procedural fairness, disclosure, and compliance with s. 8(2) of the Ombudsman Act 1980. Those are questions of law capable of being determined on the record of the Applicant's engagement with the Ombudsman and the terms of the Ombudsman's finding in respect of his complaint against SEAI by reference to the Ombudsman's procedures, the correspondence already exhibited, the Ombudsman's finding, and the statutory framework. The Applicant does not need discovery of all Ombudsman–SEAI communications to argue that non-disclosure was unfair. Similarly, whether the

Ombudsman wrongly declined to engage with technical/regulatory arguments, is a question the court can determine from the complaint, the correspondence, the Ombudsman's procedures, the finding, and the affidavit evidence and the legislation. Given that the Ombudsman's decision is made based on information discernible from the SEAI response already disclosed to the Applicant, discovery is not required because the decision demonstrates that the SEAI made a new point to the Ombudsman which was material to the finding and never disclosed.

85. The further authorities relied upon by the Applicant in submissions (including *Wynne v Office of the Ombudsman*, *McDonncha v Minister for Education & Skills*, *R (M) v Commissioner for Local Administration in England*, *AB against The Scottish Public Services Ombudsman* and *Heather Moor & Edgecomb Ltd v United Kingdom*) may bear on the substantive questions of whether the Ombudsman properly characterised the complaint, complied with fair procedures, addressed material arguments and remained within the lawful scope of its statutory discretion. They do not, however, alter my conclusion on these interlocutory applications. They do not establish that this is an exceptional case warranting a PCO, nor do they demonstrate that the wide-ranging discovery sought is necessary for the fair determination of the pleaded issues.

CONCLUSION

86. For the reasons set out above, I have decided to refuse both applications. The Applicant has established neither an entitlement to a PCO nor to discovery. I will hear the parties in respect of any consequential matters.