

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2014 No.204 J.R.]**

**BETWEEN**

**OWEN MCDONAGH**

**APPLICANT**

**AND**

**JUDGE SEAMUS HUGHES AND THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Eagar delivered on the 16th day of February 2015**

1. This is an application for an order of *certiorari* quashing the decision of the Respondent District Judge refusing to grant the Applicant a legal aid (District Court) certificate and an order of *mandamus* compelling the Respondent or another Judge of the District Court to consider the Applicant's application for legal aid in accordance with the criteria under s.2 of the Criminal Justice (Legal Aid) Act 1962.

**Facts**

2. The Applicant appeared before the Respondent Judge on foot of a charge relating to an offence under s. 4 of the Criminal Justice (Public Order) Act 1994. He was co-accused with his brother Michael. The Applicant is in receipt of social welfare and suffers from ill health. His brother was charged with offences under s. 4 and s. 6 of the Criminal Justice (Public Order) Act 1994. The Applicant entered a guilty plea in respect of the charge which was dealt by the application of s.1 (2) of the Probation of Offenders Act 1907. The Respondent Judge upon application by counsel for the Applicant granted legal aid to the Applicant's brother and co-accused but refused the Applicant legal aid. The Applicant's solicitor swore an affidavit to ground the application for the orders of *certiorari* and *mandamus* and in that affidavit he makes a number of averments:-

(1) He says that the Applicant and his co-accused brother were both before Mullingar District Court on the 27th February 2014 and that the Applicant was in receipt of social welfare.

(2) He says that both the Applicant and his brother were charged with offences arising from the same public order incident. The Applicant was charged under s. 4 of the Criminal Justice (Public Order) Act 1994 and the co-accused was charged with offences contrary to s. 4 and s. 6 of the Criminal Justice (Public Order) Act 1994. He then said that both men had been advised on all aspects of the proceedings.

(3) He then says that both men had no previous convictions and were attempting to avoid the imposition of a criminal conviction in respect of the offences charged.

(4) He said that his office briefed counsel, who attended Mullingar in order to represent the accused men. It is worthy of note that Mr O'Higgins did not nor does it appear any number of his staff attend Mullingar District Court on the relevant date.

3. Both men wished to enter a guilty plea in respect of the charges and presumably did so. Counsel outlined mitigation separately in respect of the accused and in respect of the Applicant information was given to the Respondent District Judge demonstrating that the Applicant suffered from serious health problems and on hearing the mitigation that had been offered on behalf of both accused the Respondent District Judge applied s. 1 (2) of the Probation of Offenders Act 1907. Counsel then applied for a legal aid (District Court) certificate in respect of the Applicant and in respect of the Applicant's brother also. The learned District Judge granted a certificate to the Applicant's brother but refused to grant a certificate according to the affidavit of Mr O'Higgins on the basis that he had already granted a certificate to the Applicant's brother. Mr O'Higgins states that the Applicant is someone who is entitled pursuant to s. 2 of the Criminal Justice (Legal Aid) Act 1962 to a certificate of legal aid. Mr O'Higgins did not, it appears, have a representative attending counsel so he must have depended on the counsel's return to him in respect of the decision of the judge.

4. The next affidavit is that of Owen McDonagh and he refers to the contents of the Statement of Grounds and the contents of the affidavit of Mr. O'Higgins. He confirms the assertions, allegations and information contained in the Statement of Grounds and the affidavit of Mr. O'Higgins which within his own knowledge are true. Finally he says that he is aware that it is an offence to make a statement in this affidavit that is false or misleading in any material respect which he knows to be false or misleading.

5. The next affidavit is that of Inspector Dermot Drea who says that he was prosecuting on behalf of the second named Respondent in the case before the District Court in Mullingar. He says that he refers to the para. 7 of the affidavit of Mr. O'Higgins sworn on the 24th March 2014 where it is averred that the Applicant had no previous convictions. He says that the Applicant has at least 38 previous convictions and he refers to a document based on the past records which list the Applicants ten most recent convictions as at the time of the proceedings before the first named Respondent in February 2014. He says that to the best of his recollection he was not asked by the first named Respondent for information about the Applicant's previous convictions but says that such information would not normally be sought in a case of this nature where the offence is punishable with a fine only and where the Judge was contemplating giving the defendant the benefit of the Probation Act.

6. The second affidavit of Cahir O'Higgins, solicitor for the Applicant, dated the 5th February 2014, makes the following points:-

1) Inspector Drea states at para. 5 of his affidavit that to the best of his recollection he did not provide the Respondent judge with information on the Applicant's previous convictions.

2) He states that he understood from counsel's return that the Applicant did not have any previous convictions and this is averred in his previous affidavit. He said that this does not amount to a lack of candour as contended for by the Respondents and that the Respondents do not contradict his averment that the Applicant was at all times entitled to legal aid and the Applicant instructed him that he had received legal aid in the past.

3) He finally concludes that it remains the position that the District Judge did not offer any reason for the refusal of legal aid in respect of the Applicant other than that he granted a certificate of legal aid to the co-accused.

7. I note that he has not sought to exhibit his counsel's return nor whether or not the Applicant had had any discussion with counsel in relation to the issue of previous convictions.

### **Conduct**

8. It is absolutely clear that the Applicant's affidavit is untruthful and tantamount to perjury. He states that he agrees with the affidavit of Mr O'Higgins which contends that the Applicant has no previous convictions and that the Applicant "was attempting to avoid the imposition of a criminal conviction."

9. The two possible explanations are suggested:-

a) That the Applicant had read the affidavit of his solicitor and without bringing it to Mr O'Higgins' attention was satisfied to swear an affidavit that he agreed with the statement that he had no previous convictions (Which was false)

b) That the Applicant was not shown the content of Mr O'Higgins' affidavit and in those circumstances swore an affidavit without being aware of the contents of that affidavit.

10. Mr O'Higgins is a very experienced criminal practitioner and I would assume that the affidavit of Mr O'Higgins would have been explained to the applicant either by Mr O'Higgins himself or by another solicitor in Mr O'Higgins' office.

11. Counsel on behalf of the Applicant argues the District Judge erred by refusing to grant a legal aid certificate in respect of this prosecution and on the basis that he had already given legal aid to the Applicant's brother. I do not believe that that is correct although it is not a matter for this court to grant legal aid.

12. The provisions of the Criminal Justice (Legal Aid) Act 1962, s. 2 (1) states:-

*"(1) If it appears to the District Court—*

*(a) that the means of a person charged before it with an offence are insufficient to enable him to obtain legal aid, and*

*(b) that by reason of the gravity of the charge or of exceptional circumstances it is essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence before it, the Court shall, on application being made to it in that behalf, grant in respect of him a certificate for free legal aid (in this Act referred to as a legal aid (District Court) certificate) and thereupon he shall be entitled to such aid and to have a solicitor and (where he is charged with murder and the Court thinks fit) counsel assigned to him for that purpose in such manner as may be prescribed by regulations under section 10 of this Act."*

13. Mr McDonagh was charged an offence which carries at the maximum a fine of €500 and it does not seem to this court that counsel for the Applicant can say that the District Judge erred by refusing to grant a legal aid certificate to him.

14. An application for judicial review is a solemn process and there is thus a heavy onus on Applicants when seeking to invoke this jurisdiction to place all material and relevant facts before the court at the *ex parte* leave stage. It is not a matter to be treated in a casual or offhand manner as occurred in this case. As I have said at best there were errors, failures and omissions on the part of the Applicant's solicitors and it underlines why it is important for counsel to be attended by at least a representative of the instructing solicitor's firm so that counsel is not left in the invidious and impossible position of not being able to protect herself.

15. I am absolutely satisfied that there was a lack of candour by the Applicant by his untruthful affidavit such as would disentitle the Applicant on that ground alone for relief.

16. In *Delaney and McGrath* ("Civil Procedures" in the Superior Court, 2nd Edition) there is a useful discussion on the discretionary nature of the remedies:-

*"Discretion must be exercised in accordance with well established principles. The factors which will influence the exercise of discretion are examined in turn below and experience has shown that delay in seeking relief may often be a factor which will disentitle an applicant to a remedy which would otherwise have been granted. While lack of good faith and other forms of misconduct are less frequently invoked where they are established they will weigh strongly against an applicant. Finally it should be noted that the availability of an alternative remedy is also raised against an applicant."*

*Further the conduct of the applicant may have an important influence in the manner in which a court exercises its discretion to grant or withhold relief in judicial review proceedings and an applicant must show good faith in making an application. Full and accurate disclosure will be necessary in the applicant's affidavit and in cases where there has "not merely an omission to disclose but concealment of material facts", an applicant cannot expect to obtain an order for judicial review."*

17. I am absolutely satisfied that I am entitled to exercise my discretion in this matter to refuse the relief sought by the Applicant and I dismiss the application for certiorari.