Neutral Citation No. [2005] IEHC 10

THE HIGH COURT

2000 NO. 14671 P

BETWEEN

EDWARD CARMODY

PLAINTIFF

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 21st January, 2005.

The proceedings
1. These proceedings were initiated by a plenary summons which issued on 19th December, 2000. In his statement of claim delivered on the same day the only specific relief sought by the plaintiff, apart from costs, was a declaration that s. 2 of the Criminal Justice (Legal Aid) Act, 1962 (the Act of 1962) is inconsistent with the provisions of the Constitution. A defence was delivered on behalf of the defendants on 12th July, 2001. Notice of trial was served on 10th December, 2001. Before the scheduled hearing commenced, the European Convention on Human Rights Act, 2003 (the Act of 2003) had come into force on 31st December, 2003. On 11th February, 2004 the plaintiff's solicitors notified the Chief State Solicitor of the plaintiff's intention to seek an amendment of the pleadings at the hearing of the action. At the hearing, with the consent of the defendants, the plaintiff was given leave to amend the plenary summons and the statement of claim and the defendants were given leave to amend their defence. In consequence of the amendments the plaintiff also seeks a declaration that s. 2 of the Act of 1962 is incompatible with the State's obligations under the European Convention on Human Rights (the Convention).

The impugned section
2. Section 2 of the Act of 1962 provides as follows:

> "(1) If it appears to the District Court –
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> (a) that the means of a person charged before it with an offence are insufficient to enable him to obtain legal aid, and
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> (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,
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> 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.
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> (2) A decision of the District Court in relation to an application under this section shall be final and shall not be appealable."

3. Subsequent sections of the Act of 1962 provide for entitlement to free legal aid in relation to a trial on indictment, an appeal, a case stated, and an appeal to the Supreme Court. The entitlement to free legal aid under the subsequent provisions includes an entitlement to have counsel, as well as a solicitor, assigned save in the case of an appeal from the District Court to the Circuit Court.

4. The plaintiff's challenge to the constitutionality of s. 2 and its compatibility with the State's obligations under the Convention centres on the absence of provision in s. 2, other than where the accused is charged with murder, of provision for the assignment of counsel, in addition to a solicitor, to assist in the preparation and conduct of the accused's defence.

5. The exceptional treatment of a person charged with murder in s. 2 is no longer of any relevance. Since the coming into operation of the Criminal Justice Act, 1999 and the abolition of the preliminary examination in the District Court of persons charged with murder and other indictable offences, a person charged with an indictable offence before the District Court is either sent forward for trial or, where he pleads guilty, for sentencing. Therefore the exceptional provision made in s. 2 is effectively redundant. While counsel for the plaintiff have to some extent based their submissions on the distinction in s. 2 between murder and other indictable offences, which they contend was an arbitrary and irrational distinction, in my view, in dealing with the issues which arise in these proceedings, the court should have regard to s. 2 as it now operates in the overall context of the criminal law and should not have regard to a distinction which in reality is no longer operative. That is the course I propose to adopt.

The factual background
6. The plaintiff is a farmer who resides in County Kerry. He is currently being prosecuted by the Minister for Agriculture, Food and Rural Development (the Minister) with offences under the Diseases of Animals Act, 1966 (the Act of 1966) as amended, and regulations in relation to the control of animal disease. In early July, 2000 he was served with a considerable number of summonses, forty-two according to the statement of claim. The summonses were returnable to the District Court sitting at Tralee on 19th July, 2000. On 12th July, 2000 the plaintiff instructed his solicitor, Joseph Mannix, to represent him at the hearing. On 19th July, 2000 all of the summonses were adjourned to 19th September, 2000. On the adjourned date the summonses were further adjourned to a special sitting of the District Court to be held in Tralee on 9th and 10th October, 2000, because the matters were not suitable for an ordinary sitting of the District Court in Tralee, which is held weekly on each Wednesday. On 9th October, 2000 Mr. Mannix applied for legal aid on behalf of the plaintiff. The District Court granted a legal aid certificate in accordance with s. 2 of the Act of 1962. Mr. Mannix had given prior notice to the State Solicitor that he would be seeking legal aid on behalf of the plaintiff, to include assignment of junior counsel, and that, if the plaintiff did not receive assistance for representation by counsel, these proceedings would be launched. Such assistance was not forthcoming. The District Court was apprised of the position. The summonses were adjourned pending the outcome of the proceedings. The position, accordingly, is that the plaintiff is remanded on bail pending the outcome of these proceedings.

7. Thirty-nine of the summonses allege that the plaintiff moved an eligible animal into a holding while it was restricted between 15th October, 1998 and 17th September, 1999 contrary to paras. (a), (d) and (e) of s. 48(1) of the Act of 1966, as amended. Each

summons relates to a different animal, identifying the animal by the ear tag number. The recital of the alleged offence in each of these summonses reveals that a formidable array of statutory provision and regulation creates the offence, in that it refers to the relevant provisions of the Act of 1966, as amended by Acts of 1979 and 1996, as introduced by the Minister under certain provisions of the Act of 1996 and certain provisions of the Brucellosis in Cattle (General Provisions) Order 1991 (S.I. No. 114 of 1991) (the Brucellosis Regulations), as amended by a Statutory Instrument of 1996, which in turn was amended by a Statutory Instrument of 1998. The remainder of the summonses allege that the plaintiff committed the following offences:

> (1) An offence under a provision of the Brucellosis Regulations as amended by the Statutory Instrument of 1998 in failing to deliver to a veterinary inspector or an authorised officer the identity cards in relation to certain animals, he having been notified that his holding had been declared restricted under the Brucellosis Regulations.
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> (2) An offence under the European Communities (Registration of Bovine Animals) Regulations, 1996 (the Bovine Regulations) in that between 15th October, 1998 and 17th September, 1999 he failed to keep a register of each animal and the number of animals present in his herd.
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> (3) An offence under another provision of the Brucellosis Regulations, as amended by the Statutory Instrument of 1998, that between 15th April, 1998 and 15th May, 1998 he moved an eligible animal into his holding without the animal having passed a blood test within a period of 30 days prior to the animal being so moved.

8. Currently the penalty on conviction under s. 48 of the 1966 Act is a fine of the euro equivalent of £1,500 and/or six months imprisonment. The penalty on conviction under the Bovine Regulations is a fine of the euro equivalent of £1,000 and/or twelve months imprisonment.

9. The plaintiff intends to plead not guilty in relation to all of the charges.

The evidence

10. The evidence is that the Minister has a panel of barristers from which counsel is assigned to prosecute offences of the type with which the plaintiff is charged. There are ten barristers on the panel, both senior and junior counsel. The policy is to assign junior counsel to prosecute in the District Court and senior counsel to prosecute in the Circuit Court. The barristers on the panel are experienced prosecutors. Prosecuting counsel is instructed by the State Solicitor for the locality in which the offences are being prosecuted.

11. A survey carried out by the Minister's department indicates that between September, 2000 and March, 2004 123 prosecutions were initiated for this type of offence. Counsel was retained on the prosecution team in most of the cases. In 18 of the cases, which were interlinked and had not been concluded, the defendant was represented by counsel. Of the remaining 105 prosecutions, the defendant was represented by counsel in 26 cases.

12. Counsel has already been briefed for the prosecution of the plaintiff in the District Court.

13. The plaintiff's solicitor, Mr. Mannix, practises in Tralee. He is an experienced solicitor who has been on the criminal legal aid panel for over twenty years. His normal practice is to represent his clients in the District Court himself. Only in exceptional cases does he brief counsel for the District Court. He considers that the prosecutions pending against the plaintiff are unusual and exceptional in comparison to the generality of prosecutions in the District Court. They could have serious consequences for the plaintiff. They are complex and, in Mr. Mannix' view, more difficult to defend than a trial on indictment. In his opinion the plaintiff would not receive a proper level of representation on the charges if he was not represented by counsel on legal aid. When asked, in cross-examination, whether he had considered that a change of solicitor would be appropriate, Mr. Mannix testified that he had not. Moreover, he stated that, if the State Solicitor was prosecuting himself without the aid of counsel, he would still advise that the plaintiff be represented by counsel, on the basis that the State Solicitor is a very experienced prosecutor.

14. Mr. Robert Pierse, who has over 40 years experience as a practising solicitor in County Kerry, gave evidence on behalf of the plaintiff. In his view, solicitors should themselves represent their clients in the District Court and counsel should only be used in very exceptional cases. This, in fact, is what happens. However, in relation to the charges which are pending against the plaintiff, Mr. Pierse pointed out that, while technically they are all minor offences, because of the volume of offences alleged, the matter has serious consequences. The summonses raise a considerable number of points on which a reasonable solicitor would need counsel's advice. He himself had instructed counsel to represent a client who faced similar charges. His opinion was that the plaintiff should be represented by counsel because of the risk of imprisonment and the possible detriment to his reputation. He also expressed the view that it is important that the client's and the public's perception of representation on both sides on such charges should be of parity. He expressed the view that counsel is more expert than a solicitor in criminal law matters.

15. The court was invited to infer from the fact that experienced prosecuting counsel are briefed in most of the cases of the type at issue here establishes the complicated nature of the cases. No other reason was advanced by the defendants for the use of a solicitor and barrister on the prosecution team in these cases, although counsel for the defendants did suggest that the presentation of the prosecution may be more difficult than defending such charges. Counsel for the defendants dismissed as being misplaced the analogy drawn by counsel for the plaintiff of a specialist in the case of prosecuting counsel and a general practitioner in the case of a solicitor.

16. I think it is reasonable to infer from the evidence that prosecutions involving charges of the type with which the plaintiff is charged are more complex than the generality of prosecutions with which the District Court deals. I so find. A lawyer, whether a barrister or a solicitor, who is involved in the prosecution or defence of such charges is going to have the time consuming task of familiarising himself or herself with a body of regulation the source of which is both domestic law and European law, which has been the subject of considerable amendment and revision over the years. It is a body of law to which the lawyer may rarely have to have recourse. As Lord Hope of Craighead did in his judgment (at para. 21) in the *McLean* case to which I will refer later, I consider that the court is entitled to assume that a solicitor on the legal aid panel, in the words of the old adage, "gains on the swings what he loses on the roundabout". Further, I consider that the court is entitled to assume that a solicitor on the legal aid panel will represent his client according to the standard of conduct expected of his profession. In any event, aside from those assumptions, in my view, a finding that a qualified solicitor exercising ordinary professional skill and care could not effectively and adequately defend an accused person on such charges in the District Court is not open on the evidence.

Order in which issues raised should be addressed

17. Counsel for the defendants referred to the principle of "self-restraint" with regard to judicial review of legislation as outlined in "*J.M. Kelly: The Irish Constitution*", 4th Edition at para. 6.2.169 and submitted that the court should first consider whether s. 2 is

incompatible with the State's obligations under the Convention and if, and only if, the court is satisfied that there has been no violation of the Convention as alleged by the plaintiff should the court go on to consider whether s. 2 is invalid having regard to the provisions of the Constitution.

18. In outlining the canons of judicial review of legislation, and having referred to the presumption of constitutionality of post-1937 statutes, the editors of Kelly go on to say at para. 6.2.169:

> "The courts have also articulated the principle of 'self-restraint' with regard to judicial review of legislation, which in general limits the exercise of judicial review to cases where it is necessary for the decision of the issue. The principle that the constitutional validity of the law will be considered by a court only where this is unavoidable is to some extent a product of the comity that ought to exist between the great organs of States' and is simply an aspect of the presumption of constitutionality. It is, however, also a product, as Henchy J. put it in *The State (P. Woods) v. Attorney General*, of 'the inherent limitations of the judicial process': a court could invalidate a statute, and thus leave a gap in the law, but could not create a new Act to plug the gap:
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> > 'It unmakes what was put forth as law by the legislature, but, unlike the legislature, it cannot enact a law in its place. It is clear that if this power, which may seem abrogative and quasi-legislative, were used indiscriminately it would tend to upset the structure of government … Because of the constitutional proprieties involved in the judicial review of legislation and the inherent limitations of the judicial process, the rule has been evolved that a court should not enter upon a question of constitutionality unless it is necessary for the determination of the case before it.'"

19. The only relief which the plaintiff claims on the amended pleadings, other than the declaration of constitutional invalidity, is a declaration of incompatibility with the Convention. The jurisdiction to make such a declaration is contained in s. 5 of the Act of 2003. For present purposes it is interesting to note that the long title to the Act of 2003 refers to it as "an Act to enable further effect to be given, subject to the Constitution, to certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms …". In relation to the jurisdiction of the High Court to make what is referred to as "a declaration of incompatibility", s. 5(1) provides:

> "In any proceedings, the High Court … may, having regard to the provisions of s. 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration … that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions."

20. Section 2 of the Act of 2003, which applies to any statutory provision or rule of law in force immediately before the passing of the Act of 2003 or any such provision coming into force thereafter provides that, in interpreting and applying such provision or rule, a court shall, insofar as possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

21. At first sight, the fact that the plaintiff seeks only two remedies, one of which, the declaration of incompatibility, can only be granted where no other legal remedy is adequate and available, and the other, a declaration of constitutional invalidity which, as a matter of constitutional jurisprudence should only be considered if the resolution of an issue of law other than constitutional law is determined first and does not determine the case (the formulation of the self-restraint rule by Finlay C.J. in *Murphy v. Roche* [1987] I.R. 106), would seem to present a classic "catch-22" dilemma. However, on an analysis of the relevant principles, in my view, that is not the case. Section 2 of the Act of 1962 is presumed to be constitutional. As a matter of construction of s. 5(1) it cannot have been the intention of the Oireachtas that, where a statutory provision enjoys the presumption of constitutionality, the question of its compatibility with the State's obligations under the Convention provisions which are invoked should be postponed until determination of its constitutional validity. Such a construction would be at variance with the approach adopted by the courts in judicially reviewing legislation under the Constitution from the outset. It would also be at variance with the express purpose of the Act of 2003 as stated in the long title, which expressly subordinates the effect given to the Convention in domestic law to the provisions of the Constitution.

22. Accordingly, I accept the submission of counsel for the defendants as to the order in which the issues should be determined.

23. Of course, by virtue of sub-s. (2) of s. 5, if a declaration of incompatibility is made, it will not affect the validity, continuing operation or enforcement of s. 2 of the Act of 1962. The consequences of the making of such a declaration would be that the Taoiseach would be required to lay a copy of the order of the court before each House of the Oireachtas within the next 21 days on which that House has sat after the making of the order. Further, if the plaintiff claimed compensation in respect of an injury or loss or damage suffered as a result of the incompatibility, the Government would have a discretion to make an *ex gratia* payment by way of compensation to the plaintiff. The plaintiff has chosen to pursue the remedy of a declaration of incompatibility in the knowledge, as submissions made on his behalf indicate, of the practical effect of such a declaration. Whether obtaining such a declaration would resolve the issues between the parties to the extent that the court should refrain from expressing any view on the constitutionality of s. 2 in accordance with the self-restraint principle as formulated in *Murphy v. Roche* was not debated. That issue only arises in the instant case in the event that there is a finding of incompatibility. If there is not, it is a matter for another case and another day.

Incompatibility with Convention provisions: preliminary point

24. It was submitted on behalf of the defendants that it is not open to the plaintiff to seek to raise in these proceedings any claim that s. 2 of the Act of 1962 is incompatible with the Convention on the grounds that the Act of 2003 was not in force when the prosecutions against the plaintiff were initiated or when these proceedings were commenced and that the Act of 2003 does not have retrospective effect. In support of this contention, counsel for the defendant relied primarily on the decision of the House of Lords in In *re McKerr* [2004] 2 All E.R. 409, whereas counsel for the plaintiff relied primarily on an earlier decision of the House of Lords in *Wilson v. First County Trust Ltd. (No. 2)* [2003] 3 W.L.R. 568.

25. The *McKerr* case arose out of the killing of Gervaise McKerr on 11th November, 1982 by a member or members of a unit of the R.U.C. In May, 2001 the European Court of Human Rights decided that the United Kingdom had not complied with its obligation to provide an effective official investigation which, in an earlier case from Northern Ireland, the Strasbourg Court had held was a requirement of article 2 of the Convention, which guarantees that the right to life shall be protected by law, when individuals have been killed as a result of the use of force by agents of the State. In January, 2002, Mr. McKerr's son commenced judicial review proceedings claiming declarations that the Secretary of State's continuing failure to provide an article 2 compliant investigation was unlawful and in breach of s. 6 of the U.K. Human Rights Act, 1998. Section 6 provides that it is unlawful for a public authority to "act in any way which is incompatible with a Convention right", the expression "Convention right" being defined by reference to certain articles of the Convention, which are set out in a schedule to the Act. Section 6 is mirrored in s. 3 of the Act of 2003, in that sub-s.

(1) of s. 3 provides that, subject to any statutory provision or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions. In the Act of 2003 Convention provisions include the provisions which are invoked by the plaintiff in these proceedings. Sub-s. (2) of s. 3 provides for a remedy in damages for a person who has suffered injury, loss or damages as a result of a contravention of sub-s. (1), where no other remedy in damages is available. The expression "organ of the State" in s. 3 of the Act of 2003 does not include a court.

26. Prior to the *McKerr* case it was settled law in the United Kingdom that s. 6 was not retrospective. In the *McKerr* case the Court of Appeal had held that the obligation to hold an investigation which complied with the requirements of article 2 into the death of Mr. McKerr was a continuing one and made a declaration that the Government had failed to carry out an investigation complying with article 2. The Secretary of State appealed to the House of Lords against that decision and the House of Lords upheld the appeal. Lord Steyn dealt with the retrospectivity issue in his opinion (at para. 50) stating as follows:

> "The retrospectivity issue now arises. Mr. McKerr's case is founded on section 6 of the 1998 Act. Leaving aside proceedings taken at the instigation of a public authority, which are not under consideration, it is now settled law that section 6 is not retrospective … Mr. McKerr's father was killed in 1982. The 1998 Act came into force on 2nd October, 2000. The Court of Appeal held that there is a continuing breach of article 2 which requires to be addressed by the Government … In my view the Attorney General has demonstrated this reasoning cannot be sustained. The Government may have been in breach of its obligations under international law before 2nd October, 2000 to set up a prompt and effective investigation. But those treaty obligations created no rights under domestic law, not even after the right to petition to Strasbourg was created by the United Kingdom Government in 1966. The very purpose of the 1998 Act was 'to bring home rights' which were previously justiciable only in Strasbourg."

27. Lord Hoffman also attributed the error of the Court of Appeal to a failure to distinguish between obligations under international law and duties under domestic law in the following passage in his opinion (at para. 64):

> "In my opinion the reasoning which the Court of Appeal accepted does not sufficiently distinguish between the obligations under international law which the United Kingdom (as a state) accepted by accession to the Convention and the duties under domestic law which were imposed upon public authorities in the United Kingdom by section 6 of the 1998 Act. These obligations belong to different legal systems; they have different sources, are owed by different parties, have different contents and different mechanisms for enforcement."

28. Later Lord Hoffman stated that, if one keeps the distinction between international and domestic obligations firmly in mind, the fallacy in the reasoning which the Court of Appeal had accepted becomes apparent. He illustrated the point by reference to a decision of the High Court to the effect that, in the case of a prisoner who had died after an asthma attack in 1996, the investigation into his death did not comply with articles 2 and 3 and the claimants could pursue a remedy for a continuing breach of articles 2 and 3 after 2nd October, 2000 pursuant to s. 6 and subsequent sections of the 1998 Act, stating:

> "But the fallacy of the reasoning lies in the notion of a 'continuing breach' of articles 2 and 3. The judge was concerned with the rights of the claimants in domestic law. Before 2nd October, 2000, there could not have been any breach of a human rights provision in domestic law because the Act had not come into force. So there could be no continuing breach. There may have been a breach of article 2 as a matter of international law and this may have 'continued' after 1st October, 2000 … but that is irrelevant to whether the claimants had rights in domestic law, for which there can be no source other than the 1998 Act. The Act did not transmute international law obligations into domestic ones. It created new domestic human rights. The simple question is whether as a matter of construction, those rights applied to deaths which occurred before the Act came into force."

29. Lord Hoffman gave a negative answer to that question.

30. It seems to me that, if what was at issue here was whether an event which occurred before 31st December, 2003 could give rise to a claim for damages founded on an alleged contravention by an organ of the State of the duty imposed by sub-s. (1) of s. 3 of the Act of 2003, the opinions of the Law Lords in the *McKerr* case would be persuasive authority. However, that is not what is at issue here. What is at issue is whether as of now s. 2 is compatible with the State's obligations under the Convention provisions invoked by the plaintiff. That issue is properly before the court on the amended pleadings, irrespective of the fact that the proceedings were initiated before the coming into operation of the Act of 2003. The standing of the plaintiff to prosecute these proceedings derives not from the fact that he was granted a legal aid certificate under s. 2 in October, 2000, but from the fact that he is facing trial on criminal charges with the benefit of a certificate under s. 2, which he contends will not enable him to be effectively represented and will expose him to the risk of an unfair trial. In my view, the pursuit by the plaintiff of a declaration of incompatibility under s. 5(1) does not involve any element of retrospectivity.

31. Accordingly, I reject the defendants' submission that it is not open to the plaintiff to seek relief under the Act of 2003.

Incompatibility with Convention provisions: substantive arguments

32. In the amended pleadings the plaintiff alleges that s. 2 of the Act of 1962 is incompatible with the obligations of the State under articles 5, 6 and 14 of the Convention and article 1 of Protocol No. 11. However, in reality, it is the right to a fair trial provided for in article 6 which primarily forms the basis of the plaintiff's contention of incompatibility, although he makes a subsidiary submission based on article 14.

Article 6

33. Article 6, insofar as it is relevant for present purposes, provides as follows:

> "(1) In the determination of his civil rights and obligations or of any criminal charge against him, every one is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> (2) …
>
> (3) Everyone charged with a criminal offence has the following minimum rights:

(a) …

(b) …

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require …

(d) …

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

34. In their written and oral submissions counsel for the parties dealt comprehensively with the case law of European Court of Human Rights (the European Court) in which article 6, and specifically article 6(3)(c), and article 14 have been considered. For completeness I have set out in Appendix A to this judgment, in alphabetical order, the case law of the European Court to which the court has been referred. The relevant citations of the authorities which I will consider in this judgment are to be found in Appendix A. As is to be expected, there was a lot of common ground between counsel for the plaintiff and counsel for the defendants as to the principles which have been enunciated by the European Court in the application of article 6. Moreover, both sides referred to a very helpful exposition of the relevant principles which were set out in the judgments of the Judicial Committee of the Privy Council on an appeal from the High Court of Justiciary in Scotland in *McLean & Anor. v. Procurator Fiscal, Fort William & Anor*. [2001] U.K.P.C. D.3. In particular both sides opened the outline of the relevant principles in relation to article 6(3)(c) set out in the judgment of Lord Clyde in paras. 58 to 64 inclusive.

35. It is recognised in the jurisprudence of the European Court that para. (c) of article 6(3) identifies three distinct rights for the accused. In this case, at issue is the third right – the right, if an accused person has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. The jurisprudence also recognises that the right to free legal assistance is dependent on two conditions being satisfied: that the accused person has not sufficient means to pay for legal assistance; and that the interests of justice requires that free legal assistance be afforded by the State. Both of those conditions are reflected in s. 2, in that the District Court can grant a certificate only if the means of the person charged are insufficient to enable him to obtain legal aid, and, 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. No issue as to compliance with the conditions arises in this case: the District Court has already granted a certificate on the basis of compliance and that decision is final and unappealable. In broad terms, the area of dispute in this case is whether, having regard to the circumstances of the prosecution of the plaintiff, the provision which the District Court is empowered to make under s. 2 for legal aid for the plaintiff, representation by a solicitor alone, fulfils the State's obligation under the third limb of article 6(3)(c) to provide free legal assistance for the plaintiff. The basis on which the plaintiff contends that it does not can be subsumed into two broad grounds:

(a) that in the prevailing circumstances representation by a solicitor alone will not constitute effective representation, and

(b) given that the prosecution will be represented by counsel, the principle of equality of arms will not be observed.

36. I will now look at those contentions in the context of the relevant case law of the European Court.

Effective representation

37. The source of the principle that under the third limb of para. (c) of article 6(3) the accused is entitled to effective representation is the case of *Artico*. In that case, the European Court in its judgment in 1980 stated as follows (at paras. 32 and 33):

"Paragraph 3 of article 6 contains an enumeration of specific applications of the general principle stated in para. 1 of the article. The various rights of which a non-exclusive list appears in para. 3 reflect certain of the aspects of the notion of a fair trial in criminal proceedings … When compliance with para. 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots.

… sub-para. (c) guarantees the right to an adequate defence either in person or through a lawyer, this right being reinforced by an obligation on the part of the State to provide legal assistance in certain cases. Mr. Artico claimed to be the victim of a breach of this obligation. The [Italian] government, on the other hand, regarded the obligation as satisfied by the nomination of a lawyer for legal aid purposes, contending that what occurred thereafter was in no way the concern of the Italian Republic. According to them, although [the lawyer] declined to undertake the task entrusted to him … , he continued to the very end and 'for all purposes' to be the applicant's lawyer. In the government's view, Mr. Artico was, in short, complaining of the failure to appoint a substitute but this amounted to claiming a right which was not guaranteed. The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive (see *Airey v Ireland* [1979] 2 E.H.R.R. 305 at 314-315, para. 24 and 32)."

38. Later, in para. 35, the Court dealt with the question whether the lack of assistance must have actually prejudiced the accused for there to be a violation of article 6(3)(c). The question was considered in the context that the Court of Cassation had dealt with Mr. Artico's application in the absence of any legal representation on his behalf. It is clear that the type of prejudice under consideration was prejudice arising from a legal point, which a lawyer would have raised not having been raised, on behalf of the accused. The court, having pointed out that it could not be proved beyond all doubt that the substitute for the lawyer nominated would have pleaded statutory limitation and convinced the Court of Cassation, then went on to state:

"Nevertheless it appears plausible in the particular circumstances that this would have happened. Above all, there is nothing in article 6(3)(c) indicating that such proof is necessary; an interpretation that introduced this requirement into the sub-para. would deprive it in large measure of its substance. More generally, the existence of a violation is conceivable even in the absence of prejudice …; prejudice is relevant only in the context of article 50."

39. On the facts, the European Court held there had been a breach of the requirements of article 6(3)(c), having made the following observations on a State's obligation under that provision (in para. 36):

"Admittedly, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid

purposes but, in the particular circumstances, it was for the competent Italian authorities to take steps to ensure that the applicant enjoyed effectively the right to which they had recognised he was entitled. Two courses were open to the authorities: either to replace [the lawyer nominated] or, if appropriate, to cause him to fulfil his obligations … they chose a third course – remaining passive – whereas compliance with the Convention called for positive action on their part (see the above *Airey v. Ireland* …)."

40. The European Court also found that there had been a violation of article 6(3)(c) in the case of *Goddi* in 1984. At issue in that case was the representation of Mr. Goddi before an appeal court, which decided the appeal following a hearing held not only in his absence but in the absence of his lawyer, who had not been notified of the hearing. However, at the hearing, the court of appeal assigned another lawyer to act for Mr. Goddi and proceeded to hear the appeal. In relation to the defence which Mr. Goddi received, the Court stated as follows (at para. 31):

> "As regards the defence provided for Mr. Goddi … by the officially-appointed lawyer, it is not the Court's task to express an opinion on the manner in which [the substitute lawyer], a member of a liberal profession who was acting in accordance with the dictates of his conscience as a participant in the administration of justice, considered that he should conduct the case. On the other hand, the Court does have to determine whether the Bologna Court of Appeal took steps to ensure that the accused had the benefit of a fair trial, including an opportunity for an adequate defence. In fact, [the substitute lawyer] did not have the time and the facilities he would have needed to study the case file, prepare his pleadings and, if appropriate, consult his client … Short of notifying [Mr. Goddi's lawyer] of the date of the hearing, the Court of Appeal should – whilst respecting the basic principle of the independence of the Bar – at least have taken measures, of a positive nature, calculated to permit the officially- appointed lawyer to fulfil his obligations in the best possible conditions (see, *mutatis mutandis*, the above-mentioned *Artico* judgment, p. 16, para. 33). It could have adjourned the hearing, as the Public Prosecutor's office requested … or it could have directed on its own initiative that the sitting be suspended for a sufficient period of time."

41. In the *Daud* case in 1998 the European Court found that Mr. Daud did not have the benefit of a practical and effective defence as required by article 6(3)(c), citing its decision in *Goddi*. It recorded in its judgment (at para. 39) that the first officially assigned lawyer, before reporting sick, had not taken any steps as counsel for Mr. Daud, who tried to unsuccessfully conduct his own defence. As to the second assigned lawyer, whose appointment Mr. Daud learned of only three days before the beginning of his trial, the Court considered that she did not have the time she needed to study the file, visit her client in prison if necessary and prepare his defence. In relation to the principles applicable the Court stated (at para. 38):

> "The Court reiterates that the Convention is designed to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective, and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused' (see the *Imbrioscia* … judgment … para. 38). 'Nevertheless, a State cannot be responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes … it follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or privately financed … The competent national authorities are required under article 6(3)(c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.' (*Kamasinski v Austria* judgment of 19 December, 1989, Series A no. 168, p. 33, para. 65)."

42. In the cases referred to above in which the European Court has found a failure on the part of the State respondent to provide practical and effective free representation for an accused person as required by article 6(3)(c), the accused person had no legal representation at all (*Artico*) or, in reality, because of *ad hoc* (*Goddi*) or peremptory (*Daud*) assignment of legal representation, manifestly could not get an effective and adequate defence. The European Court was not concerned with the number of lawyers assigned for the defence or with the qualifications or expertise of the lawyer assigned. It was astute in recognising and having regard to the nature of the lawyer and client relationship. In the *Imbrioscia* case in 1993 the European Court stated that under article 6(3)(c) the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention (para. 41).

43. In each of the cases referred to above, the European Court was considering whether a breach of article 6(3)(c) had occurred *ex post facto*. In the *McLean* case, as here, the Judicial Committee was concerned with what might be called, although not in any technical sense, an anticipatory breach of article 6(3)(c). It was contended by the applicant in that case that, because he was granted legal aid on a criminal charge under a regulatory regime which provided for payment of a fixed fee to his solicitor, he would not receive effective legal assistance. In considering what constitutes effective representation, Lord Clyde, having referred to the decisions of the European Court in the *Artico* and *Goddi* cases, stated as follows (at para. 60):

> "The right to an effective representation should be satisfied by the services of a lawyer actually exercising the ordinary professional skill and care in the interest of the defence of his client."

44. It was submitted by counsel for the defendants that that is the test which should be applied by this court in determining what is required of the State in article 6(3)(c). As to the assertion of an anticipatory violation of the right to an accused's fair trial under article 6, on the basis that the State's provision of free legal aid would not ensure effective representation of the accused, Lord Clyde dealt with the approach to be adopted in the following passage in his judgment at para. 65:

> "… the question is raised whether there has been demonstrated in the present case to be any unfairness in the proceedings. Undoubtedly in a criminal case such as the present, where there is a risk of the loss of liberty, some possibility of a degree of complexity in determining the parts allegedly played by each of the appellants, a victim who evidently resides in Spain, and an allegation of racial aggravation, an absence of representation would lead to an unfair trial. As I observed earlier, the issue is being raised at the outset of the proceedings. The precise question is not as to the adequacy of the funding provided under the legal aid scheme, but whether, albeit on account of an inadequacy in that respect there will inevitably be an absence of effective representation for the appellants in the preparation and presentation of their defences, thus depriving them of their right to a fair trial."

45. I will return to the issue of the appropriateness of the inevitability test later.

46. In the *McLean* case, the Judicial Committee held that, as the matter stood, there was no good reason for believing that, if the pending prosecutions continued, the appellants would lack proper and effective legal assistance and, for that reason, that they would not receive a fair trial. However, the danger of inflexibility in a legal aid scheme leading to injustice was a recurring theme in the judgments. For instance, Lord Clyde stated at para. 71:

> "The most obvious, but perhaps not the only, risk may arise from the lack of flexibility in the present regulations. No allowance is made for any unusual or exceptional circumstances. The requirements of fairness in judicial proceedings are rarely, if ever, met by blanket measures of universal application. Universal policies which make no allowance for exceptional cases will not readily meet the standards required for fairness and justice."

47. In determining whether s. 2 fulfils the State's obligations under the third limb of article 6(3)(c)to provide effective and practical representation for an indigent accused person, a number of factors have to be borne in mind. First, the District Court is a court of first instance. Secondly, in criminal matters it is a court of summary jurisdiction and by virtue of Article 38.2 of the Constitution only minor offences are triable summarily by it. Thirdly, solicitors have a right of audience in all courts in the State since 1971, so that the State and, in particular, the system of administration of justice, recognises the competence of a qualified solicitor to act as an advocate in every court from the lowest, the District Court, to the highest, the Supreme Court. Since 1995 a practising solicitor of not less than twelve years standing, like a similarly qualified barrister, is eligible for appointment as a judge of the High Court and the Supreme Court.

48. In relation to the basic right to free legal aid which an indigent accused person is guaranteed by the Convention, s. 2 is not inflexible. It expressly recognises that an offence dealt with by the District Court may have grave consequences and that other exceptional circumstances may exist which dictate that justice requires that the indigent accused should be afforded free legal aid. In such circumstances the District Court is mandated to issue a certificate. The only element of inflexibility in s. 2 is the restriction on the number of lawyers which the court is empowered to assign and the branch of the legal profession to which the sole lawyer it is entitled to assign belongs. But that limitation does not, in my view, render s. 2 incompatible with the State's obligations under Article 6. It has not been established that a qualified solicitor on the legal aid panel exercising normal professional skill and care cannot afford effective and practical representation for a person being tried summarily on a minor offence in the District Court. Nor has it been established that there is a risk of an unfair trial if an indigent accused is represented by a solicitor alone on any charge which is triable summarily in the District Court, including the charges of the type which the plaintiff is facing. Therefore, the provision for legal aid contained in s. 2 does not constitute a violation of the State's obligations to provide legal assistance for an indigent accused because it limits the legal representation to be paid for by the State to representation by a solicitor alone.

Equality of arms

49. The court was referred to a number of European Court authorities in which the principle of equality of arms was considered in the context of determining whether there had been a violation of article 6.

50. In the *Neumeister* case, which counsel for the defendants stated was the first case in which the principle was mentioned, one of the applicant's grounds of complaint was that the procedure in Austria for considering applications for release pending trial were not in accordance with the principle of "equality of arms" safeguarded by article 6(1). In delivering its judgment in 1968 the European Court stated (at para. 22) as follows:

> "The applicant has stated, and it has not been disputed by the Austrian government, that the decisions relating to his detention on remand were given after the prosecuting authority had been heard in the absence of the applicant or his legal representative on the written request made by them. The Court is inclined to take the view that such a procedure is contrary to the principle of 'equality of arms' which the Commission, in several decisions and opinions, has rightly stated to be included in the notion of a fair trial (*procès équitable*) mentioned in article 6(1). The Court does not consider however that the principle is applicable to the examination of requests for provisional release."

51. In the *Monnell* and *Morris* case, the two applicants had unsuccessfully sought leave to appeal against conviction and sentence in the United Kingdom. The U.K. Court of Appeal, in dismissing their application at a hearing where they were neither present nor represented, ordered that part of the time spent by the applicants in custody after conviction should not count towards the service of the sentences of imprisonment imposed on them at first instance. The applicants claimed, *inter alia*, that the procedure followed by the Court of Appeal in their cases did not comply with article 6(1) and (3)(c). The European Court held in 1987 that there had been no breach of article 6. In its judgment (at para. 62) it stated as follows:

> "To begin with, the principle of equality of arms, inherent in the notion of fairness under article 6(1), was respected in that the prosecution, like the two accused, was not represented before either the single judge or the full Court of Appeal.
>
> The principle of equality of arms is, however, only one feature of the wider concept of fair trial in criminal proceedings; in particular even in the absence of a prosecuting party, a trial would not be fair if it took place in such conditions as to put the accused unfairly at a disadvantage."

52. The Court recorded that pursuant to the legal aid scheme, the applicants had the benefit of free legal advice on appeal. Counsel who had represented them at the trial advised that there was no reasonable prospect of successfully appealing, but they chose to ignore the advice and press ahead with applications for leave to appeal. They were both also aware that, in the absence of arguable grounds of appeal, to lodge and then renew their applications for leave to appeal might well result in loss of time orders. The Court held that the interests of justice and fairness could, in the circumstances, be met by the applicants being able to present the relevant considerations through making written submissions.

53. In the *Borgers* case in 1991 the European Court found, "not surprisingly" it was submitted by counsel for the defendants, that there had been a breach of the principle of equality of arms. Mr. Borgers' complaint was that his appeal to the Court of Cassation was dismissed following a hearing at which the Court heard the report of the Judge Rapporteur and the concurring submissions of the Advocat General, the latter having attended the deliberations of the Court in accordance with a provision of the Belgian Judicial Code. In its judgment (at para. 27) the Court noted that at no time could Borger reply to the submissions of the Advocat General: before hearing them, he was unaware of their contents because they had not been communicated to him in advance; thereafter he was prevented from doing so by statute. The Court could see no justification for such restriction on the rights of the defence, and the fact that the Court of Cassation's jurisdiction was confined to questions of law made no difference in that respect. The Court went on to state as follows (at para. 28):

> "Further and above all, the inequality was increased even more by the Advocat General's participation, in an advisory capacity, in the Court's deliberations. Assistance of this nature, given with total objectivity, may be of some use in drafting judgments, although this task falls in the first place to the Court of Cassation itself. It is, however, hard to see how such assistance can remain limited to stylistic considerations, which are in any case often indissociable from substantive matters, if it is in addition intended, as the Government also confirmed, to contribute towards maintaining the consistency of the case law. Even if such assistance was so limited in the present case, it could reasonably be thought that the deliberations afforded the Advocat General an additional opportunity to promote, without fear of contradiction by

the applicant, his submissions to the effect that the appeal should be dismissed."

54. The Court concluded its judgment on article 6 as follows (at para. 29):

> "In conclusion, having regard to the requirements of the rights of the defence and of the principle of the equality of arms and to the role of appearances in determining whether they have been complied with, the Court finds a violation of article 6(1)."

55. Counsel for the plaintiff laid particular emphasis on the role of appearances and, in this connection, referred to the views expressed by Sir John Freeland in the *Boner* case. In that case the applicant's request for legal aid to conduct an appeal against his conviction for armed robbery was denied by the Scottish Legal Aid Board because the Board was not satisfied that he had substantial grounds for appeal. He complained that the refusal of legal aid violated article 6(3)(c). The European Court held unanimously in 1994 that there had been a violation of para. (3)(c) and in reaching that conclusion it stated (at para. 43) of its judgment:

> "It is not the Court's function to indicate the measures to be taken by national authorities to ensure that their appeals system satisfies the requirements of article 6. Its task is solely to determine whether the system chosen by them in this connection leads to results which, in the cases which come before it, are consistent with the requirements of article 6.
>
> The situation in a case such as the present, involving a heavy penalty, where an appellant is left to present his own defence unassisted before the highest instance of appeal, is not in conformity with the requirements of article 6."

56. In his concurring opinion Sir John Freeland, having expressed the view that no substantive injustice had been established, stated that that did not dispose of the question whether "the interests of justice" required that Mr. Boner should have been given free legal assistance for the hearing of his appeal. Referring to an argument that "justice should not only be done, it should also be seen to be done", he went on to state:

> "… the Crown was represented at the hearing of the appeal (as it is in all comparable cases) by counsel who was present and able to advance a legal argument if called upon by the court to do so. Admittedly he was not called upon; but that might be simply because the absence of legal assistance left Mr. Boner unable to persuade the court that he had an argument which required a response. Given that there was a legal issue to be addressed on Mr. Boner's appeal and that, having regard to the severity of his sentence, so much was at stake for him, I am satisfied that his lack of legal representation for the hearing, when counsel for the Crown was present, produced at least the appearance of injustice."

57. Lord Clyde, in his judgment in the *McLean* case, at para. 62, referring to the concurring opinion of Sir John Freeland, stated that the principle that justice should not only be done but should be seen to be done may also be applied in the absence of effective representation.

58. Counsel for the plaintiff submitted that where, as here, the defendants have instructed counsel to prosecute the offences and the legal aid certificate only entitles the plaintiff to representation by a solicitor, there is a clear breach of the principle of equality of arms. The accused is being required to present his defence under circumstances which place him at a disadvantage *vis-à-vis* the prosecution. This inequality of arms contravenes article 6. Moreover, the appearance of unfairness is obvious. Counsel for the defendants, on the other hand, submitted that the principle of equality of arms does not require exactly the same representation on both sides. Where does one draw the line, counsel rhetorically asked. For example, is an accused facing a prosecution for use of "angel dust" required to be provided with the assistance of a forensic scientist under the legal aid scheme?

59. An analysis of the jurisprudence of the European Court cited by counsel in relation to the concept of equality of arms indicates that, in the context of article 6, it is concerned with basic fairness and justice. As the decision in the *Borgers* case illustrates, it encompasses rules which in this jurisdiction are now considered components of the concept of constitutional justice – *audi alteram partem and nemo iudex in causa sua*. The question which the invocation of the concept in asserting that s. 2 violates article 6 and, in particular, article 6(3)(c), raises is whether the interests of justice require that there should be parity of representation, in terms of lawyer numbers and qualification, between the prosecution and the indigent accused. If it is the case, and I believe it is, that a solicitor alone can provide effective representation for a person facing criminal charges in the District Court, the absence of parity of itself does not endanger the right to a fair trial as guaranteed by article 6.

60. There is an element of artificiality in considering whether s. 2 provides for effective representation of an indigent accused in the District Court separately from the question whether the concept of equality of arms is observed. The essential issue is whether the provision contained in s. 2 fulfils the State's obligations under article 6 to ensure that the plaintiff gets a fair hearing and, in particular, that he gets effective legal representation free of charge. The conclusion I have come to is that it does and that s. 2 is compatible with the State's obligations under article 6.

Article 14

61. Article 14 provides as follows:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

62. It was submitted on behalf of the defendant that article 14 has no relevance to the plaintiff's claim, in that there is no question of the plaintiff being discriminated against on any of the grounds referred to in the article. In my view, article 14 cannot be so readily dismissed on the grounds of irrelevance. In the *Monnell* and *Morris* case, the applicants contended that they were victims of discrimination in breach of article 14 when taken in conjunction with article 5 and article 6. They argued that under the relevant U.K. statute, unlike a convicted person not in custody, a convicted person in custody risked a loss of liberty in addition to the sentence received at first instance (article 5) and such risk might operate in practice as an impediment to access to the Court of Appeal (article 6). The European Court, in considering article 14 in conjunction with article 6, held that there was a difference of treatment, but that the difference of treatment had an objective and reasonable justification – expediting the process of hearing applications to the Court of Appeal so as to reduce the period spent in custody by an applicant with a meritorious appeal.

63. The decision of the European Court relied on by the plaintiff in support of his case based on article 14 is the case of *Luedicke et al* in which judgment was given in 1978. The applicants in that case, who had been provided with the assistance of interpreters at their respective trials in Germany alleged a breach of article 6(3)(e) in that, under German law, once convicted they were required to repay the costs of the proceedings including the interpretation costs. The Court specifically declined to deal with the issue "whether

and for which reasons and under what conditions the expenses associated with" paras. (c) and (d) of article 6(3) may be awarded against or left to be borne by the accused after his conviction, because it was not called on to interpret those provisions (para. 44). The Court construed para. (e), which has been quoted earlier, in the context of the right to a fair trial, as entitling an accused who cannot understand or speak the language used in court to free assistance of an interpreter (para. 48). In relation to the applicant's argument based on an alleged violation of article 14, the Court stated as follows (at para. 53):

> "The Court … considers that in the particular circumstances it is not necessary also to examine the case under article 14. In the present case, only article 6 para. 3(e) is relevant. In order to secure the right to a fair trial, article 6 para. 3(e) seeks to prevent any inequality between an accused person who is not conversant with the language used in court and an accused person who does not speak and understand that language; hence it is to be regarded as a particular rule in relation to the general rule embodied in articles 6 para. 1 and 14 taken together. Accordingly, there is no scope for the application of the two latter provisions."

64. The discrimination for which the plaintiff contends is difference in treatment between an indigent accused who is provided with legal assistance of a solicitor free of charge, on the one hand, and an adequately resourced accused who can retain a solicitor and brief counsel in his defence out of his own resources, on the other hand, it being contended that s. 2 disadvantages the former *vis-à-vis* the latter. What is prohibited by article 14 is discrimination in enjoyment of the rights and freedom set forth in the European Convention. The right at issue here is the right of the plaintiff to effective legal representation in his defence on the charges he is facing, in the overall context of his right to a fair trial on those charges, without cost to him. The fact that a rich farmer facing similar charges may choose to spend his money in retaining a legal team, including a solicitor and leading senior counsel, to act in his defence, in my view does not amount to discrimination under article 14 in conjunction with article 6.

65. Accordingly, I conclude that s. 2 is not incompatible with the State's obligations under article 14.

Inconsistency with the provisions of the Constitution

66. As the plaintiff is not entitled to a declaration of incompatibility with the provisions of the Convention, I will now consider whether the plaintiff is entitled to a declaration of invalidity having regard to the provisions of the Constitution. In support of his application for a declaration that s. 2 is inconsistent with the provisions of the Constitution the plaintiff specifically contends that the absence of provision for affording him parity of representation with the prosecution is inconsistent with the Constitution and, in particular, with Articles 38.1, 40.1, 40.3.1, 40.3.2, and 40.4.1.

67. The starting point of the consideration of whether the plaintiff's contention is well founded must be the decision of the Supreme Court in *The State (Healy)v. Donoghue* [1976] I.R. 325. The principles which underlie the plaintiff's contention are outlined in the first paragraph of the judgment of Henchy J. (at p. 353) as follows:

> "When the Constitution states that 'no person shall be tried on any criminal charge save in due course of law' – (Article 38. s. 1), that 'the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen' – (Article 40, s. 3, sub-s. 1), that 'the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen' – (Article 40, s. 3, sub-s. 2), and that 'no citizen shall be deprived of his personal liberty save in accordance with law' – (Article 40, s. 4, sub-s. 1), it necessarily implies, at the very least, a guarantee that a citizen shall not be deprived of his liberty as a result of a criminal trial conducted in a manner, or in circumstances, calculated to shut him out from a reasonable opportunity of establishing his innocence; or, where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances."

68. Henchy J. went on to state that the implied guarantee is effectuated in the case of poor persons by s. 2 and, that as it is designed to give practical implementation to a constitutional guarantee, the judicial function would be incompletely exercised if a bare or perfunctory application of it left the constitutional guarantee unfulfilled. It follows that it is the duty of a judge of the District Court to ensure that an accused who appears to be qualified for a legal aid certificate is informed of his right to apply for it. Further, when a legal aid certificate has been granted to an accused, the duty extends to ensuring that the accused will not be tried against his will without the benefit of that legal aid. Accordingly, the Supreme Court quashed a conviction of the prosecutor, who had been tried in the Children's Court without being informed of his right to apply for legal aid and was unrepresented at his trial. The Supreme Court also upheld a decision of the High Court quashing a conviction of the prosecutor in the District Court following a trial at which he was not represented by the solicitor assigned to him under a legal aid certificate, solicitors on the legal aid panel having withdrawn their services at the relevant time.

69. The question which arises on this aspect of the plaintiff's case is whether it has been established that, by limiting representation of a person whose means are insufficient to enable him to obtain legal aid and who has satisfied the District Court that it is essential in the interests of justice that he should have legal aid, to representation by a solicitor alone, where the prosecution team will comprise of solicitor and counsel, s. 2 falls short of the constitutional guarantee of a trial in due course of law. In substance the grounds on which the plaintiff asserts that the statutory provision falls short of the constitutional guarantee mirror the grounds on which he alleges that the State's obligations under article 6 of the Convention are not fulfilled in s. 2: that the plaintiff is entitled to an effective representation and that cannot be afforded by a solicitor alone having regard to the nature and possible consequences of the charges he is facing; and that there is inequality of procedural arms as between the prosecution and the accused.

70. While I find it unnecessary to refer to all of the Irish authorities to which the court has been referred, for completeness I have set out, in alphabetical order, the authorities in Appendix B.

71. In support of their argument that s. 2 discharges the constitutional duty imposed on the State to provide legal aid for indigent persons in the District Court, counsel for the defendants relied on the following passage from the judgment of O'Higgins C.J. in *The State (Healy) v. Donoghue* (at p. 352):

> "The Act of 1962 provides for a choice of both solicitors and counsel from amongst those in both branches of the legal profession who have agreed to operate the Act. This Act has been in effective operation for a number of years. It has provided for accused persons, who are held to be entitled to avail of it, the means whereby they can have a solicitor and counsel of their choice. The only limitation on this choice has been that the practitioner concerned must have declared himself willing to provide legal aid by going on the panel. While I regard the Act as a recognition by the State of what is the constitutional right of a poor person facing a serious criminal charge, I do not say that the provisions of the Act match exactly what the Constitution requires. In particular I would be slow to hold that the Constitution requires the choice which the statute gives. I can imagine circumstances in which, for one reason or another, the State cannot provide a choice of lawyer; in such circumstances the provision of a designated lawyer or lawyers, trained and

experienced for the task, is an adequate discharge of the State's duty to provide legal assistance for the person without means."

72. Barr J. in *The State (Freeman) v. Connellan* [1986] I.R. 433 pointed out that the opinion expressed in the first four sentences of the above quotation is *obiter*. Indeed, the whole quotation is obiter because lawyer choice was not an issue in the *Healy* case. In the *Freeman* case, Barr J. held that, in the light of the applicant's constitutional rights, the District Court, in applying s. 2 and the provisions of the relevant regulations made under the Act of 1962, should be very slow to refuse to assign the applicant's choice of solicitor and should do so only if there is good and sufficient reason. In fact the relevant regulation mandated the court to assign a solicitor from the panel "having taken into consideration the representations (if any) of the person to whom the certificate was granted". Barr J. considered the approach adopted by the District Court – that the onus was on the applicant to establish why he wanted the particular solicitor – was "unnecessarily and unreasonably restrictive".

73. In the context of the instant case, I do not think it appropriate to assign any significance to the terminology used by O'Higgins C.J. in the passage quoted above – his reference to "lawyer", rather than solicitor or counsel, and his reference to provision of "legal assistance" rather than legal aid or legal representation. Similarly, I do not consider it appropriate to assign any particular significance to the reference to "counsel", which counsel for the plaintiff emphasised, in the following passage from the judgment Griffin J. in the *Healy* case (at p. 357):

> "The principles enshrined in these provisions of the Constitution [Article 38. s. 1 and Article 40. s. 2, sub-ss. 1 and 2] require fundamental fairness in criminal trials – principles which encompass the right to legal aid in summary cases no less than in cases tried on indictment – whenever the assistance of a solicitor or counsel is necessary to ensure a fair trial. Ours is an adversary system of criminal justice. On the one side is the State with all its resources, which it properly and justifiably uses in the prosecution of crime. It has available to it a trained and skilled police force, and lawyers to prosecute in the interest of the public. On the other side is the person charged with a crime; if he has the resources, he will retain the best solicitor and counsel obtainable for the preparation and conduct of his defence. If he is too poor to engage a solicitor or counsel, can he be assured of a fair trial unless legal aid is provided for him?"

74. Griffin J. answered the question posed in the last sentence by stating that it seemed to him to be beyond argument that if lawyers are necessary to represent persons with means to pay for them, they are no less necessary for poor persons who are unable to provide for them out of their own resources.

75. Counsel for the defendants submitted that the evidence of Mr. Mannix and Mr. Pierse goes no further than suggesting that a solicitor representing a person facing the charges which the plaintiff is facing would consider it desirable that counsel be briefed; it has not been established, it was submitted, that representation by counsel is necessary to ensure that such a person receives a fair trial. Having already found that it has not been established that a qualified solicitor on the legal aid panel exercising normal professional skill and care cannot afford effective and practical representation for a person being tried in the District Court on charges of the type which the plaintiff is facing, it follows that I consider that this submission is correct.

76. The fact that there may, in terms of lawyers, be a numerical imbalance or a divergence of legal qualification between the prosecution team and the defence team does not disadvantage the accused person to the extent that his guarantee to a fair trial is imperilled unless the lawyer defending him cannot do so effectively. In my view it has not been shown that such is the case. Therefore, on the same basis that I consider that s. 2 does not violate the concept of equality of arms inherent in article 6 of the Convention, I do not think it violates a person's constitutional right to a fair trial. Further, for the reasons I have rejected the plaintiff's contention that article 14 of the Convention is violated, I consider that s. 2 does not violate the right to be treated equally before the law guaranteed by Article 40.1 of the Constitution.

77. Accordingly, in my view, the provision contained in s. 2 for legal representation of an accused person in the District Court on charges of the type the plaintiff is facing does not fall short of the constitutional safeguards implicit in the articles of the Constitution invoked by the plaintiff, which ensure that he is afforded every reasonable opportunity to defend himself and is tried in due course of law.

78. It is not necessary to consider the secondary argument advanced on behalf of the plaintiff, that, if the doctrine of proportionality applies to the rights guaranteed by the provisions of the Constitution invoked by the plaintiff, s. 2 does not pass the test of proportionality as formulated by Costello P. in *Heaney v. Ireland* [1994] 3 I.R. 593. It is appropriate to record that, on the authority of *Donnelly v. Ireland* [1998] I.R. 321, it was the plaintiff's case that if s. 2 breaches the constitutional guarantee of a trial in due course of law, that is the end of the matter. Moreover it was accepted on behalf of the defendants that proportionality has no place in due process issues.

Consideration of Convention right/constitutional guarantee in tandem

79. As regards the specific complaint made by the plaintiff in this case, there would appear to be little or no difference between the protection afforded to the plaintiff by article 6 of the Convention and by the provisions of the Constitution invoked by him.

80. One argument advanced on behalf of the defendants, which I have not addressed, would seem to bear on both claims made by the plaintiff. It was submitted that the plaintiff was "putting the cart before the horse" in contending that he is at risk of an unfair trial. If his trial proceeds, the remedy of judicial review is available to redress any wrong he suffers if it transpires that his trial does not meet the standard of fairness and justice which is guaranteed by the Constitution and that the State is committed to providing to him by the Act of 2003. In this connection, it was submitted that the decision of the Court of Criminal Appeal in *D.P.P. v. McDonagh* [2001] 3 I.R. 411 indicates that, in determining whether lawyer ineffectiveness resulted in an unfair trial, the threshold is high. In particular, counsel referred to the following passage from the judgment of the court delivered by Keane C.J. (at p. 426):

> "The exceptional nature of the circumstances in which an appellate court should intervene on such a ground was also emphasised by Lord Lane C.J. giving the judgment of the same court in *R. v. Wellings* (Unreported, Court of Criminal Appeal, 20th December, 1991) also cited in *R v. Clinton* [1993] 1 W.L.R. 1181 where he said at p. 1187:
>
> > 'The fact that counsel may appear to have made at the trial a mistaken decision or has indeed made a decision which in retrospect is shown to have been mistaken, is seldom a proper ground of appeal. Generally speaking, it is when counsel's conduct of the case can be described as flagrantly incompetent advocacy that this court will be minded to intervene.'
>
> Subject to the *caveat* that the last sentence may arguably set the threshold for intervention at too high a level, the court is satisfied that the observations quoted set out, in necessarily general terms, the limited circumstances in which an

> appellate court may properly set aside the verdict of the jury where the grounds relied on consist essentially of criticisms of the conduct by the accused's legal advisors of the defence of the trial or steps taken preparatory to the trial."

81. Earlier, Keane C.J. had stated (at p. 425):

> "A criminal trial, in which the defence of the accused was conducted with such a degree of incompetence or disregard of the accused's interest as to create a serious risk of a miscarriage of justice, could not be regarded as a trial in 'due course of law'."

82. Counsel for the defendant submitted that it is inappropriate in proceedings such as this for a court to speculate that a trial will be unfair on the basis of appearances. As with the doctrine of proportionality, it was submitted that appearances do not come into play in consideration of "due process" issues.

83. It could not be a proper answer to the plaintiff's claims that he should wait and see whether he is effectively defended by a solicitor alone, and, in fairness, I did not understand that to be the submission of the defendants. However, the submission does raise the critical question as to the test to be applied in these proceedings in determining whether the provision made in s. 2 violates the plaintiff's right to a fair trial. It seems to me that first one must look objectively at the effectiveness and adequacy of the legal aid provided for in s. 2 (representation by a solicitor alone at the expense of the State) in the context of the task to be performed (the preparation and conduct of the defence of an accused person in the District Court on the trial of a summary offence). On the basis of that assessment, one then determines, as a matter of probability, not on the basis of inevitability of outcome, whether the accused will be afforded a fair trial. While it may appear to be truly "putting the cart before the horse" to apply the test before articulating it, that is the approach I have adopted in relation to each of the plaintiff's claims.

Order
84. There will be an order dismissing the plaintiff's claim.

Appendix A
Case law of European Court of Human Rights
1. *A. v. United Kingdom* [2002] E.C.H.R. 35373/97

2. *Artico v. Italy* [1980] 3 E.H.R.R. 1

3. *Benham v. United Kingdom (1)* (7/1995/513/597) – Judgment of 10 June, 1996.

4. *Boner v. United Kingdom* [1994] 19 E.H.R.R. 246

5. *Borgers v. Belgium* [1993] 15 E.H.R.R. 92

6. *Croissant v. Germany* [1993] 16 E.H.R.R. 135

7. *Daud v. Portugal* (11/1997/975/997) – Judgment dated 21 April, 1998.

8. *De Haes and Gijsels v. Belgium* [1987] 25 E.H.R.R. 1

9. *Eliazer v. The Netherlands* [2001] E.C.H.R. 38055/97

10. *Engel & Others v. The Netherlands* [1978-1980] 1 E.H.R.R. 647

11. *Goddi v. Italy* – Judgment 9 April, 1984

12. *Granger v. United Kingdom* [1990] 12 E.H.R.R. 469

13. *Hoang v. France* [1992] 16 E.H.R.R. 53

14. *Imbrioscia v. Switzerland* [1993] 17 E.H.R.R. 441

15. *Luedicke, Belkacem and Koc v. Germany* – Judgment 28 November, 1978

16. *Maxwell v. United Kingdom* [1994] 19 E.H.R.R. 97

17. *Monnell and Morris v. United Kingdom* [1987] 10 E.H.R.R. 205

18. *Murray v. United Kingdom* [1996] 22 E.H.R.R. 29

19. *McGee v. United Kingdom* [2000] E.C.H.R. 28135/95

20. *Neumeister* [1968] E.C.H.R. 1936/63; [1979-1980] 1 E.H.R.R. 91

21. *Pakelli v. Germany* [1983] 6 E.H.R.R. 1

22. *Poitrimol v. France* [1993] 18 E.H.R.R. 130

23. *Quaranta v. Switzerland* (23/90/214/276) – Judgment of 24 May, 1991

24. *S. v. Switzerland* (48/90/239/309-310) – Judgment 25 October, 1991

Appendix B
Irish Case Law
1. *Byrne v. Judge McDonnell* [1997] 1 I.R. 392

2. *Cahill v. Judge Reilly* [1994] 3 I.R. 547

3. *Conroy v. A.G.* [1965] I.R. 411

4. *Donnelly v. Ireland* [1998] 1 I.R. 321

5. *DPP v. B* [2002] 2 I.R. 246

6. *DPP v. McDonagh* [2001] 3 I.R. 411

7. *Heaney v. Ireland* [1994] 3 I.R. 595

8. *K. Security Ltd. & Anor. v. Ireland & A.G.* (Unreported, 15 July, 1977, High Court, Gannon J.)

9. *Kirwan v. Minister for Justice* [1994] 1 I.L.R.M. 444

10. *Re National Irish Bank Ltd. (No. 1)* [1999] 3 I.R. 145

11. *Rock v. Governor of St. Patrick's Institution* (Unreported, 22 March, 1993, Supreme Court)

12. *The State (Freeman) v. Connellan* [1986] I.R. 433

13. *The State (Healy) v. Donoghue* [1976] I.R. 325

14. *The State (Sharkey) v. District Justice McArdle* (Unreported, 4 June, 1981, Supreme Court)