Neutral Citation Number: [2014] IEHC 425

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 496JR]

BETWEEN/

MICHAEL O'BRIEN

APPLICANT

AND

DISRICT JUDGE JOHN COUGHLAN

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Kearns P. delivered on 19th day of September, 2014

On the 9th May, 2013 at a sitting of Naas District Court before District Judge John Coughlan ('the first respondent') the applicant pleaded guilty to two offences contrary to the Road Traffic Acts. The orders of conviction record the offences as use of a vehicle without insurance contrary to s.56 of the Road Traffic Act 1961, as amended and "*driving a vehicle while disqualified*" contrary to s.38 of the Road Traffic Act, 1961, as amended. Prior to the two convictions recorded against the applicant on 9th May 2013, the applicant had amassed a total of 14 previous convictions under the Road Traffic Acts, including two for driving while disqualified and five for driving while uninsured. Having expressed his dissatisfaction with the applicant's record the respondent imposed a four month custodial sentence as well as a 40 year driving ban.

The applicant seeks an order of *certiorari* quashing the order of conviction and sentence; an order quashing the decision of the respondent to disqualify the applicant from driving for 40 years; and an order quashing the decision of the respondent in respect of the application for legal aid.

DUTY TO CONSIDER COMMUNITY SERVICE

It is submitted on behalf of the applicant that the decision of the first respondent to sentence the applicant to four months imprisonment was in breach of statute and the applicant's constitutional right to a fair trial and just procedures, as the first respondent failed to consider whether to make a community service order in respect of the applicant as an alternative to a custodial sentence.

The Criminal Justice (Community Service) (Amendment) Act 2011 ('the 2011 Act') amends the Criminal Justice (Community Service) Act 1983. Section 3 of the 2011 Act provides as follows –

> *"(a) by the substitution of the following subsection for subsection (1)—*
>
> *(1) (a) Where a court, by or before which an offender stands convicted, is of opinion that the appropriate sentence in respect of the offence of which the offender is convicted would, but for this Act, be one of imprisonment for a period of 12 months or less, the court shall, as an alternative to that sentence, consider whether to make an order (in this Act referred to as a 'community service order') in respect of the offender and the court may, if satisfied, in relation to the offender, that the provisions of section 4 have been complied with, make a community service order in accordance with this section.*
>
> *(b) Where a court, by or before which an offender stands convicted, is of opinion that the appropriate sentence in respect of the offence of which the offender is convicted would, but for this Act, be one of imprisonment for a period of more than 12 months and, it is satisfied, in relation to the offender, that the provisions of section 4 have been complied with, the court may make a community service order in accordance with this section.*
>
> *(b) by the insertion of the following subsections after subsection (1A) (inserted by section 18 of the Fines Act 2010):*
>
> *"(1B) Where in relation to an offender, the court considers that the offender is a person in respect of whom it may be appropriate to make a community service order, it shall request the Probation Service to prepare a report (in this Act referred to as an 'assessment report') in respect of the offender…*
>
> *…(c) by the insertion of the following subsection after subsection (2):*
>
> *"(2A) Nothing in subsection (1) shall be construed as affecting any power of the court under any rule of law or by or under any enactment to make such orders as the court sees fit providing for an alternative to a sentence of imprisonment in respect of the offender."*

Section 4 of the Principal Act was amended as follows –

> *4.— Section 4 of the Principal Act is amended—*
>
> *by the substitution of the following subsection for subsection (1):*

> *"(1) A court shall not make a community service order unless the following conditions have been complied with:*
>
> *the court is satisfied—*
>
> *having considered the offender's circumstances,*
>
> *having considered the assessment report prepared by a probation officer pursuant to a request under section 3(1B), and*
>
> *where the court thinks it necessary, having heard evidence from such an officer,*
>
> *that the offender is a suitable person to perform work under such an order and that arrangements can be made for him or her to perform such work;*
>
> *(b) the offender has consented to the making of such an order."…*

As the first respondent was of the opinion that the applicant should be sentenced to four months imprisonment, it is submitted that this triggered the mandatory obligation to consider making a community service order as an alternative sentence. However, it is the applicant's case that the first respondent failed to conduct any enquiry into the applicant's suitability for such an order and that there were no materials before the court which would have caused the first respondent to reasonably conclude that the applicant was unsuitable. Further, no report under section 3(1B) of the 2011 Act was obtained from the Probation Service. Alternatively, even if obtaining such a report is not a mandatory requirement, counsel for the applicant contends that in every case falling within s.3(1)(a) the trial Judge must advert to his obligation to consider community service in a clear and public way and indicate why the report is not needed. Counsel for the applicant submits that an accused person is obviously and directly the beneficiary of the statutory requirement and that in order for there to be any confidence that this requirement has been satisfied, there must be some evidence that the judge has addressed the question he was obliged to address. It is submitted that there is a further obligation to give reasons, however brief, for either directing or not directing community service.

In *Rawson v. the Minister for Defence* [2012] IESC 26 the applicant sought an order of certiorari quashing the decision of the respondent to discharge him from the defence forces after testing positive to a random drugs test. The applicant contended that he had ingested smoke as a consequence of being in a vehicle with other people who were smoking cannabis and submitted that it was possible to test positive for cannabis as a result of passive smoking. The relevant regulations provided that where it appears to a commanding officer "*on foot of any representation made, that a reasonable doubt exists, that the individual…may have innocently or inadvertently ingested, inhaled or otherwise introduced the substance, he should recommend that the individual be retained in the service*." The applicant submitted that there was no evidence that his commanding officer had given any consideration to the possibility of passive inhalation and that his recommendation to discharge was therefore invalid. In his decision Clarke J. stated that as follows –

> *"this case is not a "reasons" case as such. Rather it is a case where it is said that the record does not suggest that those involved in the decision making process applied their mind to the right question at all rather than failed to give adequate reasons for their answer to that question…*
>
> *…While the circumstances in which a decision made by a public person or body may be found to be unlawful are varied, it is possible to give a non-exhaustive account of the principal bases by reference to which such a finding might be made. First, the decision must be within the power of the person or body concerned. Second, the process leading to the decision must comply both with fair procedures and with whatever procedural rules may be laid down by law for the making of the decision concerned. Third, the decision maker must address the correct question or questions which need to be answered in order to exercise the relevant power and in so doing must have regard to any necessary factors properly taken into account and must also exclude any considerations not permitted. Fourth, in answering the proper questions raised and in assessing all matters properly taken into account the decision maker must come to a rational decision in the sense in which that term is used in the jurisprudence…*
>
> *There may, of course, be many variations or additions to that very broad description of the matters that need to be assessed in order to decide whether a decision affecting rights and obligations has been lawfully made. However, it seems to me that a party faced with a decision which affects their rights and obligations must be entitled to assess whether they have a basis for challenging the lawfulness of the decision in question. The courts have consistently held that it is an inherent part of the judicial review role of the courts that parties need to know enough about the process and the decision which affects them to be able to mount a challenge to that decision on the grounds of unlawfulness in an appropriate case.*
>
> *The decision does not, on its face, disclose that the decision maker (whether the C.O. or the G.O.C.) considered the question of whether a reasonable doubt had been raised on the innocent/inadvertent issue at all. It is not the sort of case where the court could safely infer that the correct question must necessarily have been asked having regard either to the way the process developed or the materials which were before the decision maker…*
>
> *…the problem in this case is that the court does not even know that the decision maker asked himself any of those questions for we know nothing about the basis of the decision to discharge Airman Rawson except that it was made and that the materials before the decision maker included Airman Rawson's representations.*
>
> *In my view that is insufficient to meet the requirement that the court be able to be satisfied, in the event of a challenge, that the decision maker asked the right question."*

Based on this decision, it is submitted that there must be some evidence that the respondent addressed the question as to whether the applicant was suitable for community service. Without this, it is submitted that there is no way for the applicant to consider whether or not any assessment was fair or reasonable or whether it ought to be challenged. The Supreme Court decision in *Kelly v. Commissioner of An Garda Síochána* [2013] IESC 47 reviewed a decision taken in the context of a disciplinary process involving the applicant whose appeal was peremptorily dismissed without any other reason than that the grounds were "*without substance or foundation*". O'Donnell J. stated –

> *"In exercising a jurisdiction under Regulation 35(2), the Board of Inquiry is required to come to the conclusion that there are no conceivable circumstances in which it can be envisaged that any board of appeal could contemplate the possibility that it might come to a conclusion in some respects different from that of the Board of Inquiry and the*

Commissioner. This is a legal test. It is not a particularly complex text, or one which only a lawyer can perform, but it is probably assisted by the recognition encapsulated in the judgment of Megarry J. in John v. Rees [1970] Ch. 345:

> *'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.' (at p. 402)*

It is entirely possible that the Appeal Board correctly and scrupulously applied this precise test before dismissing the appeal. But, the difficulty in this case, which in my view is fatal, is that neither this Court nor the High Court has any way of knowing that it did so."

Counsel for the applicant also relies on the decision of Henchy J., in *State (Holland) v. Kennedy* [1977] 1 I.R. 193 which concerned the Children Act 1908. The Act provided that "a young person" shall not be sentenced to imprisonment for an offence "unless the court certified" that the young person was of so unruly a character that he could not be detained in a place of detention. In relation to the obligation on the sentencing judge, Henchy J. stated as follows –

"What the respondent had to be satisfied of before she could sentence this young person to prison was that he is of so unruly a character (not that he has been so unruly) that he cannot be (not that he ought not to be) detained in the provided place of detention. The only evidence bearing on that question was evidence of the part played by him in the assault. While that evidence showed that on that occasion he had been unruly, indeed violently aggressive, there was no evidence that at the time of sentence he was of so unruly a character that he could not be detained in the place of detention provided under the statute. For all the respondent knew, the assault may have been out of character, or it may have been due to the influence of this boy's companions, or it may have stemmed from a personality disorder which is amenable to treatment, or it may have been caused by drink or drugs or some other transient factor. The bare facts of the assault, unrelated to any evidence of a behavioural pattern, could not justify what was in effect a prognosis that this young person would not be amenable to detention in the place provided under the statute for the detention of persons of his age. Therefore, there was no evidence to support the certificate on which the respondent based the sentence of imprisonment.

The real question in this case, as it seems to me, is whether the order of the District Court is reviewable on certiorari. Counsel for the respondent has submitted that as the order is good on its face and as the error, if any, made by the respondent was an error made within jurisdiction, the procedure to remedy it should be held to be by appeal and not by certiorari.

Having considered the authorities, I am satisfied that the error was not made within jurisdiction. The respondent District Justice undoubtedly had jurisdiction to enter on the hearing of this prosecution. But it does not necessarily follow that a court or a tribunal, vested with powers of a judicial nature, which commences a hearing within jurisdiction will be treated as continuing to act within jurisdiction. For any one of a number of reasons it may exceed jurisdiction and thereby make its decisions liable to be quashed on certiorari. For instance, it may fall into an unconstitutionality, or it may breach the requirements of natural justice, or it may fail to stay within the bounds of the jurisdiction conferred on it by statute. It is an error of the latter kind that prevents the impugned order in this case from being held to have been made within jurisdiction.

The statute conferred jurisdiction to impose a sentence of imprisonment only when the court certifies that the young person is of so unruly a character that he cannot be detained in the provided place of detention. It was necessarily the statutory intention that a legally supportable certificate to that effect is to be a condition precedent to the exercise of the jurisdiction to impose a sentence of imprisonment. Otherwise the sentencing limitation imposed by the statute could be nullified by disregarding what the law regards as essential for the making of the certificate. In the present case the certificate, having been made without evidence, is as devoid of legal validity as if it had been made in disregard of uncontroverted evidence showing that the young person is not what he has been certified to be. Therefore, the consequent sentence of imprisonment was imposed without jurisdiction and the order embodying it was correctly quashed in the High Court."

Based on the above authorities, the applicant submits that it was a precondition to the imposition of imprisonment that the respondent consider whether the applicant was suitable for community service and that, similar to the 'unruly child' certificate in *Kennedy*, a report in this regard be obtained to pursuant to s.3(1B). It is submitted that there is no evidence that the respondent Judge complied with this obligation or that he was even aware of it.

Counsel for the second respondent accepts that s.3(1) creates an express obligation to consider making a community service order as an alternative to custody where the sentence being imposed is of twelve months duration or shorter. However, it is submitted that in considering the extent of the obligation the Court must look at the underlying policy and the intention of the legislature which was clearly to discourage sentencing judges from imposing short terms of imprisonment where a community-based sanction would suffice. Had the legislature intended that the judge must openly state in court that they have had regard to s.3(1) then it could easily have done so. An example of such a provision comes from section 5(2) of New South Wales' Crimes (Sentencing Procedure) Act 1999 –

(2) A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender, and make a record of, its reasons for doing so, including:

(a) its reasons for deciding that no penalty other than imprisonment is appropriate, and

(b) its reasons for deciding not to make an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation (if the offender has not previously participated in such a program in respect of the offence for which the court is sentencing the offender).

It is submitted that while there is an obligation to consider the imposition of community service, this does not amount to an obligation to expressly state the reasons for not so doing. Even if such an obligation did exist, which is not accepted, it is submitted that it does not follow that the reasons must be stated in any particular form and that remarks made by the judge in relation to matters such as the seriousness of the offence or the previous record of the accused may suffice as indicators of why the judge felt a custodial sentence was appropriate. In *Lyndon v. Judge Collins* [2007] IEHC 487 Charleton J. stated –

> *"…it is not essential that district judges give reserved decisions or in every case to give reasons to a high standard of academic excellence. What is essential, however, is that people know going out of any district criminal court what they have been convicted for and why they have been convicted, and in this instance I think it is clearly implied in what the learned district judge said that she was convicting the accused because of the fact that she completely rejected his testimony and accepted instead the testimony of the prosecution."*

In *Kenny v. Coughlan* [2014] IESC 15 the Supreme Court considered the obligation of the District Court to give reasons. Having considered Irish and European jurisprudence, Denham C.J. stated –

> *"As the case-law of the European Court of Human Rights indicates, and as also stated earlier in this judgment, the degree and extent to which a decision of the District Court must be explained by giving reasons will depend in turn on the nature and circumstances of the case."*

Counsel for the DPP further submits that the failure of the applicant's legal representative to make any effort to draw the provisions of the 2011 Act to the attention of the first-respondents attention disentitles them to the relief sought. While the prosecution bears the burden of proving the case beyond reasonable doubt, it is submitted that the duty to assist the court is not confined to the prosecution and that the defence has its own obligations in this regard. In circumstances where the applicant is interpreting s.3(1) of the 2011 Act as conferring a right on a convicted person to be expressly considered for community service, it is submitted that it is incumbent on a solicitor or barrister representing a person at risk of receiving a short custodial sentence, as was clearly the case here, to bring the relevant provisions to the judge's attention. Importantly, the applicant had the benefit of legal representation throughout. The second respondent contends that the appropriate remedy in circumstances such as this is an appeal rather than a judicial review. An appeal to the Circuit Court involves a full rehearing of the case if the conviction is being contested or a rehearing of so much of the evidence as is necessary where the appeal is confined to sentence. Any legal error said to be made by a District Judge in relation to sentence, provided he or she is acting within jurisdiction, is most appropriately addressed by way of appeal.

DECISION

It goes without saying that judges must provide reasons for their decisions and this obligation has been emphasised repeatedly by the superior courts. Obviously this obligation is particularly present when a custodial sentence is being imposed at the conclusion of a criminal trial or sentencing hearing. There is no challenge made in this case to the reasons offered by the respondent judge for imposing a custodial sentence, rather it is a challenge based on the fact that, although required by law to consider the option of community service, the judge did not explicitly state in his ruling that he had done so. That is akin to arguing that a judge must in every case enumerate every legal responsibility which devolves on him or be taken as not having discharged that onus. That would be an unrealistic requirement when judges must be assumed to know the statutory regime under which they operate.

I have carefully considered the submissions of both parties in relation to the obligation under s.3(1) of the 2011 Act and am satisfied that the first respondent was not required to expressly state reasons for not imposing community service where the same was not sought or consented to. The clear legislative intention behind the provision is to reduce the number of short term custodial sentences imposed and it therefore places an onus on all judges to consider community service as an alternative. Judges of the District Court deal with a large number of cases on a daily basis and are often required to consider the imposition of a short custodial sentence and so s.3(1) is of particular relevance to their work. It must be presumed that District Judges are aware of their obligation to consider community service as an alternative without the need to openly and in detail articulate the reasons why community service is not suitable in every individual case. As made clear in the decision of Charleton J. outlined above, the reasons for a District Judge's decision can be clearly implied in some cases without being expressly stated in any particular form. I am satisfied that the District Judge, having regard to all of the evidence before him in relation to the seriousness of the offence and the applicant's previous offences, considered all of the sentencing options available to him and was of the view that a custodial sentence was merited. Community service was simply a less severe alternative than a four month sentence in the same way a sentence of one to three months duration would have been. There was no requirement to openly articulate particular reasons for not imposing a community service order – it may be an obvious inference – as in this case - from the undisputed facts that the judge felt a custodial sentence was necessary. This is particularly the case when the issue of community service is never raised or consented to by a defendant's legal representatives. Any other approach might be extremely difficult for judges to operate. Imposing requirements such as those sought could make the already difficult work of a District Judge even more cumbersome and prompt a flood of judicial reviews where reasons offered were regarded as lacking or inadequate.

The applicant has a remedy by way of appeal to the Circuit Court in this case where his legal representatives can argue for a community service order, something that they never did at the hearing in the District Court. For those reasons I would refuse *certiorari* on this limb of the case.

LEGAL AID

Section 2 of the Criminal Justice (Legal Aid) Act, 1962 provides as follows –

> *"2.—(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."*

Section 9 of the Act relates to the statement of means –

> *"9.—(1) Before a person is granted a legal aid certificate he may be required by the court or judge, as the case may be, granting the certificate to furnish a written statement in such form as may be prescribed by the Minister by regulations under section 10 of this Act about matters relevant for determining whether his means are insufficient to enable him to obtain legal aid."*

In the grounding affidavit of Matthew Byrne, solicitor for the applicant in the District Court proceedings, it is stated that prior to the case being called the applicant completed a statement of means for the purpose of applying for legal aid. Mr Byrne states that the

applicant is unemployed and has no children but pays €34.00 per week in rent. It is submitted that when legal aid was applied for the respondent refused to look at the statement of means and said that he would not grant legal aid without first seeing full bank statements from the applicant and his wife together with social welfare documentation. The respondent stated that he was not refusing the request and then moved on to the next case. The solicitor's request for an adjournment was refused.

Counsel for the applicant submits that the respondent failed to conduct a proper inquiry into whether the applicant was entitled to legal aid and that his order amounted to a *de facto* refusal. It is submitted that the decision was not 'postponed' and that the respondent made no attempt to set a further date for the issue of legal aid to be determined. The order convicting and sentencing the applicant finalised proceedings and thereafter court was *functus officio* and could not make any further inquiry into whether the applicant was entitled to legal aid. In *The State (Healy) v. Donoghue* [1976] I.R. 325 Henchy J. considered the duty that district judges have in the application of s.2 of the 1962 Act –

> *"As is the case with all statutes, save those held to be unconstitutional, it is the duty of the District Court to give full effect to the provisions of the Act of 1962. But as this Act is designed to give practical implementation to a constitutional guarantee, the judicial function in respect of the Act would be incompletely exercised if a bare or perfunctory application of it left the constitutional guarantee unfulfilled. The guarantee of protection from unjust attack is declared by the Constitution to be given by the State; and the judiciary, no less than the legislature, is an organ of the State. The legislative requirement of s. 2 of the Act is literally complied with when a legal-aid certificate is granted in the District Court: but it is clear that the judicial function does not begin and end there. Having regard to the scope and purpose of the Act of 1962 and the solemnly declared duty of each judge to uphold the Constitution and the laws, it is implicit that it is the duty of each District Justice not simply to grant a legal-aid certificate when an application is made for one on satisfactory statutory grounds but also to see that an accused who appears, from the circumstances disclosed by a due hearing of the case, to be qualified for one is informed of his right to apply for it; and, 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. The Act would be but a hollow and specious expression of the constitutional guarantee if it is not given at least that degree of judicial implementation. An accused person who has been convicted and deprived of his liberty without the benefit of legal aid in such circumstances may be heard to say that his constitutionally-guaranteed rights have been violated or ignored."*

Counsel for the applicant submits that the respondent fettered his discretion by refusing to look at the statement of means. In her affidavit, Garda Cassin, the prosecuting Garda, states that the respondent asked for bank statements in all cases where legal aid was applied for on the morning in question. It is submitted that if this is correct, then it would suggest that the respondent adopted a fixed policy in respect of legal aid regardless of whether bank statements were available or not. The applicant does not have a bank account and such a policy was therefore unreasonable. Counsel refers the Court to the case of *Whelan v. Fitzpatrick* [2008] 2 I.R. 678 as authority for the proposition that the adoption of a fixed policy in respect of legal aid has previously been criticised by this Court. Budd J. granted an order of certiorari and held that the district judge had "*improperly fettered his own discretion and predetermined his decision and failed to embark on a proper inquiry as to the applicant's entitlement to legal aid*."

Counsel for the respondent submits that a denial of legal aid did not occur. Rather, the first respondent deferred a decision on the matter pending the presentation of certain documents that would enable him to make an informed decision as to whether the applicant qualified on grounds of means for legal aid. While s.9 of the 1962 Act provides for the presentation of a statement of means, it does not preclude the possibility that a judge may seek further evidence of means if he or she considers there is a good reason for doing so. It is denied that the court was *functus officio* and submitted that there was nothing which prevented the applicant's solicitor from returning to the court after obtaining the relevant documents to have the matter decided. The second respondent contends that the applicant's claim in this regard is premature as he has failed to exhaust all possibilities in the District Court.

Counsel for both parties informed the Court that a practice has developed in some District Courts around the country whereby cases are heard before the issue of legal aid is decided upon. The Court notes the submissions of counsel that it would be preferable that such applications be made at the outset of a hearing. Further, it is accepted by the second respondent that it is unusual for a statement of means not to be considered sufficient for the purposes of a legal aid application. Nevertheless, it is clear that the first respondent did not issue a final determination on the matter of legal aid and the Court accepts that there was nothing which prevented the applicant's legal advisers from mentioning the matter before the District Court after the order of conviction was made and after the relevant documentation had been obtained. If this is unsatisfactory from the point of practitioners it is perhaps a matter to be pursued by their professional body, the Law Society. However, the plain fact of the matter is that the applicant did in this case have the benefit of legal advice and representation in this case. Certiorari on this ground is therefore refused.

DISQUALIFICATION FROM DRIVING

Counsel for the applicant submits that a 40 year driving ban is excessive, disproportionate, unreasonable, and constitutes an error of law. It is contended that the disqualification order is so outside the range of normal sentencing parameters that it was imposed without jurisdiction.

In *Conroy v. Attorney General* [1965] I.R. 411 the Supreme Court held that a court must act judicially when imposing a period of disqualification. As per Walsh J. (at p.440) –

> *"In all these cases the Act clearly indicated that the making of any such disqualification order is a judicial act and it follows, therefore, that before any such order is made the court concerned must act judicially in respect of the disqualification order in addition to hearing and determining the charge with leads to the conviction referred to in sects. 26 and 27."*

In *R v. St. Albans Crown Court* [1981] 2 WLR 681 the applicant had been disqualified for twenty one months for careless driving. There was no statutory limit for the period of disqualification which could be imposed. Three months was mandatory as the applicant had been convicted of driving offences within the three years immediately preceding the commission of the offence. An order of *certiorari* was sought on the grounds that the respondent had erred in law or alternatively had exceeded its jurisdiction. Donaldson L.J. held that where the crown court had imposed a sentence which, although within the statutory limits, was so far outside the normal discretionary limits that it amounted to an error in law, an order of certiorari may be granted, (p.483) –

> *"…so far as is known, this is the first case in which in England a sentence by a Crown Court has been challenged in this court in circumstances such as these. When I say "circumstances such as these" I mean in circumstances in which there is no doubt that the sentence imposed by the Crown Court was within the limits permitted in terms by the statute. I say that because there is a power to disqualify in relation to careless driving and there is no limitation on the period which can be imposed. In terms of the statutory jurisdiction there could have been a disqualification here for life,*

but of course that did not happen…

It appears that in Scotland where there is an appeal by case stated under the Summary Jurisdiction (Scotland) Act 1954 in relation to the imposition of a sentence of imprisonment or indeed any other sentence, the court will intervene if it is satisfied not only that the sentence is wrong but that it is, to use the words used by the judges in those cases, "harsh and oppressive." If authority is needed for that proposition, it is to be found in Fleming v. MacDonald, 1958 J.C. 1.

For my part, I think that this court is empowered to exercise a similar jurisdiction, probably subject to rather similar restrictions, namely, that it is not sufficient to decide that the sentence is severe, perhaps even unduly severe or surprisingly severe. It is necessary to decide that it is either harsh and oppressive or, if those adjectives are thought to be unfortunate or in any way offensive, that it is so far outside the normal discretionary limits as to enable this court to say that its imposition must involve an error of law of some description, even if it may not be apparent at once what is the precise nature of that error."

It is submitted that that a forty year disqualification represents such a disparity with the normal range of penalties imposed in this jurisdiction for similar offences and similar offenders that it constitutes an error of law. Counsel for the applicant contends that disqualifications of more than ten years are rare in the District Court while anything in excess of fifteen years is almost unheard of. The applicant contends that the ban imposed is effectively a lifetime ban.

It is further submitted that the Superior Courts have held that a disqualification from driving is not a punishment per se but rather, it is a finding of unfitness of a person to drive a motor vehicle. It is argued that there was no evidence before the respondent that the applicant would be unfit to drive for such a lengthy period and the ban therefore represents a punishment made without jurisdiction. In *Conroy* Walsh J. stated, (p.441) –

"One must not lose sight, however, of the real nature of the disqualification order which is that it is essentially a finding of unfitness of the person concerned to hold a driving licence. Apart from the statutory minimum which is imposed in certain cases, this is a matter which must be determined by the Court in the light of evidence which it hears on this aspect of the case and in the light of that evidence it may determine what period of disqualification will be appropriate. A motor car, if not driven properly, is a potential danger not merely to the driver himself but to all other persons using the highway. It is obvious that the protection of the common good requires that the right to drive a motor car cannot be unrestricted. The right may therefore be lost if a Court, on a consideration of the relevant facts and materials, determines that the person concerned, by reason of his general recklessness or thoughtlessness or of his propensity to drink, or by reason of disease or other disability or his abuse of the right by exercising it in the furtherance of criminal activities, is unfit to exercise the right to drive a motor car. Such disqualification is not a punishment notwithstanding that the consequence of such finding of unfitness might be both socially and economically serious for the person concerned. The passage in the judgment of The State of Minnesota v. Moseng, *already referred to, correctly indicates that in modern society a motor vehicle has become a necessity for many people. It is also correct, as was observed in that judgment, that if a person is unreasonably kept off the highway one might say that his right to liberty is curtailed. The operative word, however, is "unreasonably" and it can scarcely be disputed that it would not be unreasonable to keep off the highway a person who has shown himself to be and has been proved to be unfit to be on it. As is provided in s. 28 of the Act, that may be quite clearly established where there is no question of conviction at all even though the results may be just as severe for the person concerned as they would be if he had been disqualified under ss. 26 or 27 following a conviction. Undoubtedly disqualification may have a deterrent quality but that does not make it a punishment. It is a regulation of the exercise of a statutory right in the interest of public order and safety. This view is also borne out by the provisions of s. 29 which provide machinery for the removal of consequential and ancillary disqualification orders. The machinery is also in the form of a judicial act which includes a judicial consideration of the character of the applicant, his conduct since his conviction, the nature of the offence and such other matters as may appear to the Court to be relevant. This is clearly designed to ascertain whether the applicant has ceased to be unfit to hold a driving licence."*

In England it has been found that a lifetime ban from driving is bad in principle. Granting leave to appeal in *R v. North [*1971] RTR 366 Phillimore L.J. stated as follows –

"There is another aspect of this case which influenced this court in giving leave. It is, of course, true that the appellant is a man with a bad record of motoring offences, and indeed he has offences of other types also, but when he appeared before Thames Magistrates' Court on 23 May 1966 and was dealt with for taking and driving away a motor vehicle without consent, no insurance, driving while disqualified and dangerous driving, he was sentenced to three months' imprisonment and then disqualified from driving for life. Unless, of course, there was some very unusual circumstance, which it does not appear that there was, that was a sentence which in the view of this court was clearly wrong in principle.

It has the result, with a man like this and in modern conditions when driving in almost essential for so many people, that inevitably he is going to be caught every year or so driving and sent back to prison. If authority were needed it is to be found in Reg. v. Shirley [1969] 1 WLR 1357 , and the matter is very clearly put in the judgment of Sachs LJ, at p 1348 D–F."

The second respondent submits that this matter is more appropriately dealt with by way of appeal. Counsel contends that in order for the applicant to successfully challenge this portion of the District Court order he must show that it was unreasonable to the extent that it "plainly and unambiguously flies in the face of fundamental reason and common sense" before an order of certiorari will be granted (*(State) Keegan v. Stardust Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 39). In O'Keeffe the Supreme Court held that in order to establish that a decision is void on grounds of unreasonableness or irrationality "it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision." The second respondent submits that in the present case the applicant had an appalling record of serious driving offences which create substantial risks for other road users which the first respondent was entitled to have regard to. Any challenge to the sentence imposed is therefore one of merits which is a matter to be dealt with on appeal. It is further submitted that the English authorities relied upon by the applicant simply do not apply here as we have an effective system of appeals.

The Court accepts the submission of the second respondent that a challenge to the duration of the disqualification is a matter to be dealt with on appeal. The order may only be challenged in this Court on the basis that it is so far outside normal parameters of sentencing as to be irrational. There is no evidence that lengthy periods of disqualification are rarely, if ever, imposed so as to provide

a concrete basis for the court to intervene by way of judicial review. There is an effective appeals system in place which the applicant can avail of. To hold otherwise would be an undesirable use of the judicial review process.

ERROR ON THE FACE OF THE RECORD
Counsel for the applicant contends that the applicant was convicted in the District Court of an offence that is not known to law and that the order convicting and sentencing the applicant to four months imprisonment and disqualifying him from driving for forty years contains an error on the face of the record and does not show jurisdiction as it recites an incorrect statutory basis for the purported offence and applicable penalties. It is further submitted that the charge was also grossly prejudicial as it recites that he had previously been convicted of a related offence and that this was a violation of the applicant's Constitutional right to a trial in due course of law and the presumption of innocence.

Counsel for the applicant relies on *State (Cunningham) v. O'Floinn & Ors* [1960] I.R. 198 as authority for the proposition that it is a requisite of a valid order of the District Court that it shows jurisdiction.

As per Ó Dálaigh J.:-

> "The learned President in his judgment in the present case accepted it as well settled that at common law a justice's conviction in respect of an offence created by statute must show that the matters charged do constitute a criminal offence by referring to the statute which makes them such or at least to the fact that there is such a statute. What the President says is this:—"The District Court is, of course, a statutory Court unknown to the common law; and the offences in question are likewise the creation of statute and unknown to the common law. The prosecutor invokes the common law rule, which is undisputed, that any conviction by such a Court of an offence unknown to the common law must show jurisdiction, and must show that the matters charged do constitute a criminal offence, by referring to the statute which makes them such, or at least to the fact that there is such a statute.""

The second respondent submits that the applicant cannot claim to be in any way prejudiced by the manner in which the order of conviction is phrased. Section 38(1) of the Road Traffic Act 1961 makes it an offence to drive a mechanically propelled vehicle without holding a licence while section 38(5), as substituted by s.12 of the Road Traffic Act 2006, provides that a person who is convicted of an offence under s.38(1) and who was at the time of that offence disqualified from holding a licence is subject to a defined penalty. It is therefore submitted given that the range of penalties available is different, the order recording the conviction of a person driving without a licence while disqualified should so state.

It is further submitted that while there is undoubtedly a requirement that an order of conviction must be good on its face, this requirement must be applied and interpreted in a reasonable and pragmatic matter. It is imperative that the convicted person and any higher court from which he may seek redress must not be left in any state of uncertainty as to the offence of which he has been convicted. In the present case, the relevant sections of the Road Traffic Acts are referred to and it is further stated that he was driving while disqualified and therefore no reasonable interpretation could claim that there is any doubt that he was convicted of driving without a valid licence.

Counsel for the second respondent denies that the phrasing of the charge was in any way prejudicial to the applicant. It is submitted that there are a number of statutory provisions which provide for progressively heavier penalties on second or subsequent convictions where the previous conviction is a necessary ingredient of the offence charged. Moreover, the applicant in the present proceedings accepted the charges and pleaded guilty.

The Court accepts the submissions of the second respondent in relation to the order of conviction. The relevant statutory provisions are expressly referred to and there is no doubt surrounding the offence of which the applicant was convicted *i.e.* driving without a valid licence contrary to s.38 (1) of the Road Traffic Act 1961. That the order further details that he was driving without a valid licence while disqualified does not render the order void or erroneous and nor did the wording of the charge create any prejudice to the accused.

For the reasons outlined above, I would refuse all the reliefs sought.