

## THE HIGH COURT

## JUDICIAL REVIEW

[2013 No. 956 J.R.]

BETWEEN

TONY KING

APPLICANT

-AND-

DISTRICT JUDGE MICHAEL COGLAN

RESPONDENT

-AND-

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

**JUDGMENT delivered by Mr. Justice Hanna on the 14th day of May, 2015.****Reliefs Sought**

1. This matter comes before the Court pursuant to the Order of Peart J. made on 16th December, 2013. By it, leave was granted for judicial review seeking an order of *certiorari*, quashing a ruling of the respondent Judge of 21st November, 2013, at Court 44, Chancery Street Courthouse (Bridewell), Dublin Metropolitan District Court. This ruling, and the central focus of the applicant's complaint, is the respondent's refusal to issue a Legal Aid (District Court) Certificate to the applicant. The applicant had been charged with, and pleaded guilty to, an offence pursuant to s. 3 of the Misuse of Drugs Act 1977 (as amended) ("the 1977 Act"). He seeks a number of ancillary reliefs, including:

- i) A Declaration that the applicant has satisfied the criteria for the grant of a legal aid certificate, as provided for by the Criminal Justice (Legal Aid) Act 1962 ("the 1962 Act") and under Article 38.1 of the Constitution;
- ii) A Declaration that the Respondent's Order refusing the applicant legal aid on the aforementioned date in respect of case number 2013/86469 amounted to a breach of the applicant's right to a fair trial in due course of law, pursuant to both Article 38.1 of the Constitution and Article 6 of the European Convention on Human Rights ("the ECHR") (as incorporated by the provisions of the European Convention on Human Rights Act 2003 ("the 2003 Act"));
- iii) A stay pending the determination of these judicial review proceedings;
- iv) An Order providing for all necessary and/or incidental directions in relation to this application; and
- v) Costs.

**Background Facts**

2. The applicant is Mr. Tony King, who is described as a 25 year old trainee barber and musician of 17 Mornington Crescent, Mornington, Co. Meath. The respondent is a judge of the District Court assigned to the Dublin Metropolitan District. The notice party is the Director of Public Prosecutions.

3. The applicant was represented by a solicitor and counsel. A guilty plea was entered in relation to the matter and Garda Egan, the prosecuting Garda, outlined the facts and informed the District Court that the applicant had previous convictions, including a conviction contrary to s. 3 of the 1977 Act.

4. Counsel for the applicant made a plea in mitigation in which it was stated that the applicant was in receipt of social welfare but worked as a trainee barber one day a week for which he received payment of €40. Counsel for the applicant also outlined to the District Court that the applicant was a musician and was a member of a band who had recently won a prize to record music in Germany. Mention was made of a possible album deal in Texas, USA. This starry prospect might well have been imperilled by the fact of conviction and the extent of the penalty imposed.

5. The respondent ordered the applicant to pay €300 to Focus Ireland and assigned a period of time in which to do so. The respondent stated that if this direction was complied with, the matter would be struck out on the next date of 16th January, 2014. If the direction was not complied with, the applicant would be convicted and fined €600.

6. The crux of the present matter arrived when the respondent had finished deciding the sentence to impose. Counsel for the applicant asked the respondent to consider an application for legal aid. It is alleged by the applicant that the respondent refused this application immediately and was of the opinion that the applicant could afford legal representation. The details of this "passage of arms" are set out in more detail hereunder.

7. Thus arises the matter in contention. The applicant seeks an order of *certiorari* as the necessary remedy upon judicial review proceedings which will quash the respondent's refusal to grant District Court criminal legal aid pursuant to the 1962 Act.

8. Leave was granted to apply for judicial review on 16th December, 2013. The Order granting leave reflects that a stay was applied for but the Order records that no stay was granted. On the 16th January, 2014, the applicant came before the District Court again. An unsuccessful application was made on behalf of the applicant to adjourn the case pending judicial review. €300 was paid by the applicant in cash and the prosecution was struck out.

### The Applicant's Submissions

9. The applicant contends that the respondent, in reaching his determination on the issue of legal aid, did not conduct an inquiry into the applicant's financial circumstances. The applicant also contends that the respondent failed to consider the necessary statutory criteria regarding the applicant's financial means. Further, the applicant argues that the respondent failed to take into account the gravity of the charge against the applicant. The applicant also submits that his Counsel was not afforded an opportunity to proffer the applicant's completed Statement of Means to the respondent. The applicant states, in his written submissions, that the Statement of Means was in his counsel's hand, but that the respondent "foreclosed any further discussion or submission in deciding the matter without proper inquiry." The applicant's solicitor, Ms. Eleanor Kelly, swore a replying affidavit dated 28th July, 2014, in which it is stated at para. 7:

*"I say and believe and am advised by counsel that a full statement of means had been completed by the Applicant. I say that this statement was in Counsel's hand and he was in the process of handing that physically to the Court when the Respondent made his decision refusing legal aid."*

At para. 9 of the same affidavit, Ms. Kelly outlined the contents of the aforementioned Statement of Means, stating:

*"I say and believe that the completed statement of means outlined the Applicant's income in full, that he is a trainee barber working one day a week receiving €40 and that he receives the sum of €136 in social welfare payments. I say that his statement of means indicates that he pays rent to his parents in the sum of €70. I say that the Applicant has no savings or monies available to him to avail of legal aid and has no assets."*

10. Essentially, the applicant contends that his Counsel was not allowed to address the District Court in relation to the gravity of the charge levelled against the applicant. The applicant asserts that the respondent had a statutory duty to conduct an inquiry into the matters specified in s. 2(1) of the 1962 Act and failure by the respondent to conduct any such inquiry, adequately or at all, will afford grounds for quashing such a refusal. The applicant also cites some "exceptional circumstances" which accrue in this case, namely: the failure of the respondent to consider the gravity of the offence; the serious consequences for the band's album deal in Texas, USA and the applicant's ability to travel to that jurisdiction; and the ramifications for the applicant's reputation that a conviction would bring. It is contended that the onus of demonstrating the existence of exceptional circumstances does not rest upon the accused person and that the court should take the initiative to inquire as to whether such exceptional circumstances exist (*O'Neill v. Butler* [1979] I.L.R.M. 243).

### The DPP's Submissions

11. The Notice Party submits that if one analyses the exchanges between the respondent and the applicant in court on the 21st November, 2013, the applicant's argument is not correct. The respondent had adjourned sentence in the matter until 16th January, 2014, to allow the prosecution to be struck out in the event that €300 was paid to Focus Ireland or for a fine in default. Thereafter the legal aid application was pursued as follows:

"COUNSEL: Judge, I wonder would the Court consider an application for legal aid in the matter—

JUDGE: No he can pay you.

COUNSEL: Very good, Judge.

JUDGE: Either that or he can give you a share of the band, maybe that might work out better.

COUNSEL: Thank you.

JUDGE: Thanks."

12. The Director of Public Prosecutions ("the Director") contends that the applicant, in seeking a declaration that he was a suitable candidate for legal aid, is imploring the Court to conduct an appeal against the refusal to grant legal aid by the respondent. The Director argues that apart from the statutory prohibition on appealing a decision to refuse legal aid pursuant to s. 2 of the 1962 Act, the application is also lacking in that it is not the appropriate subject matter for judicial review proceedings.

13. The Director therefore submits that the merits of the decision in relation to legal aid are not amenable to judicial review. Furthermore, the Director argues that legal aid was correctly refused for the following reasons:

- i) The applicant made immediate full admissions and pleaded on the first date. Therefore, legal costs would be minimal;
- ii) There was no evidence put before the Court as to how much his legal bill might have been against which the Court could have made a determination that his means were insufficient;
- iii) The respondent commented to the effect that the applicant was of sufficient means to which counsel did not take the opportunity of contradicting;
- iv) The applicant was apparently of limited means (he receives social welfare and €40 weekly but was able to pay the €300 as ordered by the respondent; and,
- v) The applicant had been given the benefit of s. 1 (1) of the Probation Act, 1907 two months prior to this offence so was fully aware of the consequences of any other infringement on his music career.

14. The Director further contends that in all the circumstances there was no unfairness meted out to the applicant which would constitute a breach of his right to a fair trial under Article 38.1 of the Constitution or Article 6 of the ECHR, as incorporated into Irish law by the 2003 Act.

15. The Director argues mootness to the legal point as his prosecution is over. It is argued that there is no contentious issue between the prosecution and the applicant which requires to be resolved as the right to legal aid is grounded within the context of a right to a fair trial.

16. The Director deals in their written submissions with the applicant's contention that the matter is not moot as he still must pay legal fees to his representatives. In rebuttal, the Director argues that in the affidavits of Ms. Eleanor Kelly, solicitor for the applicant,

no suggestion was ever made of fees or that the applicant could not discharge such a charge.

### The Law

17. Section 2 of the 1962 Act, as amended, provides as follows:

"(1) If it appears to the District Court before which a person is charged with an offence or an alternative court within the meaning of section 5 of the Criminal Justice (Miscellaneous Provisions) Act, 1997 before which a person is appearing—

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

(b) that by reason of the gravity of the offence with which he is charged 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 said District Court or the alternative court, as may be appropriate, shall, on application being made to it in that behalf, grant a certificate, in respect of him, 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 to have a solicitor and (where he is charged with murder and the said District Court or the alternative court, as the case may be, thinks fit) counsel assigned to him for that purpose in such manner as may be prescribed by regulations under section 10 of this Act.

(2) A decision of the District Court in relation to an application under this section shall be final and shall not be appealable."

18. The applicant relies upon a number of decisions of the Superior Courts in furtherance of his application. It is intended to briefly summarise the thrust of the cited authorities in the following paragraphs.

19. The Supreme Court in *The State (Healy) v. Donoghue* [1976] I.R. 325 held that the constitutional right to a trial in due course of law imports the requirement of fair procedures which in turn imports the right to an adequate opportunity to defend oneself against any charge made. The Court in *Donoghue* further held that where an accused faces a serious charge and requires the assistance of a qualified lawyer in the preparation and conduct of his defence, and the accused is unable to pay for such assistance, the accused should be offered the opportunity of obtaining the required assistance for which the State authorities must pay.

20. O'Higgins C.J. stated in *Donoghue* at p. 350:

"Facing, as he does, the power of the State which is his accuser, the person charged may be unable to defend himself adequately because of ignorance, lack of education, youth or other incapacity. In such circumstances his plight may require, if justice is to be done, that he should have legal assistance. In such circumstances, if he cannot provide such assistance by reason of lack of means, does justice under the Constitution also require that he be aided in his defence? In my view it does."

21. Griffin J. in *Donoghue* emphasised at p. 358 that, although the grant of a legal aid certificate becomes mandatory once conditions required by s. 2 of the 1962 Act, as amended, are fulfilled, it is within the jurisdiction of the District Judge to decide whether the charge is sufficiently grave or whether there exists "exceptional circumstances":

"Therefore, free legal aid is available to a poor person charged in the District Court where it is essential in the interests of justice either because the charge is a grave one or 'by reason of ... exceptional circumstances.' These words are not defined and the District Justice is left at large to consider the particular circumstances of each case including such matters as the age, infirmity, mental capacity, education and illiteracy or some other handicap of the person charged."

22. McMahon J. in *O'Neill v. Butler* [1979] I.L.R.M. 243 analysed the considerations which the District Judge ought to entertain in deciding whether or not to grant a legal aid certificate. McMahon J. stated at p. 245:

"S. 2 of the Criminal Justice (Legal Aid) Act, 1962 requires the District Justice in considering whether it is essential in the interests of justice that the defendant should have legal aid to have regard not merely to the gravity of the charge but also to any exceptional circumstances. It would not be proper to leave the onus of establishing such exceptional circumstances upon a defendant who may be ignorant or inarticulate and the Justice should enquire into the matter himself ... Where the interests of justice require that the defendant should have legal aid the Constitution requires that he be afforded the opportunity of being legally represented and it is the duty of the Justice on behalf of the State to see that this opportunity is afforded. When the Justice is considering whether the interests of justice require the granting of Legal Aid it would not be right to base his decision solely upon the ability of a defendant whose need for Legal Aid is in question to put forward a claim based on special circumstances."

23. The Supreme Court in *Carmody v Minister for Justice & Ors.* [2009] IESC 71 held, *inter alia*, that the right to criminal legal aid is constitutional in nature, but may be qualified by the nature of the charge. Murray C.J. stated at para. 69:

"The right is a constitutional right. Everyone has a right to be represented in a criminal trial but justice requires something more than the mere right when a person, who cannot afford legal representation, is facing a serious criminal charge. Such a person has a constitutional right to be granted legal aid by the State to enable him or her to have legal representation at the trial. The nature and extent of the right may be affected by the gravity and complexity of the charge."

Murray C.J. continued at para. 78:

"The Court reiterates the view that the principles of constitutional justice require that a person who is charged with an offence before the District Court and who does not have the means to pay for legal representation be provided by the State with legal representation that is necessary to enable him or her to prepare and conduct the defence to the charge. The legal representation provided must be that which is essential in the interests of justice having regard to the gravity of the charge, the complexity of the case, including the applicable law, and any exceptional circumstances. These criteria are very close to, if not substantially the same as, the criteria set out in s. 2 (1) of the Act of 1962 for the grant of legal aid in the District Court..."

24. In *Carmody*, the appellant had been charged with 42 offences relating to the wrongful movement of cattle, failure to keep a register of certain cattle or failure to deliver an identity card in respect of cattle. The appellant contended that s. 2 of the 1962 Act was unconstitutional because it arbitrarily precluded the District Court from ever considering the possibility of providing the assistance of counsel to legally aided defendants in District Court proceedings, even if it could be shown that the interests of justice required the defendant to be provided with such counsel because of the gravity, complexity or exceptional circumstances of the case. Dealing with this argument, the Supreme Court, per Murray C.J., noted that, as a result of *The State (Healy) v. Donoghue*, the right to criminal legal aid was derived from the Constitution and not just from statute and that the 1962 Act was merely a means of vindicating this constitutional right. The nature and extent of this right was affected by the gravity and complexity of the charge. The Supreme Court held, *inter alia*, that in order to vindicate the constitutional right of an indigent defendant in the District Court to a fair trial, he or she must be entitled to legal aid with representation by counsel as well as a solicitor where it is established that because of the particular gravity and complexity of the case or other exceptional circumstances such representation is essential in the interests of justice. It follows that any such defendant must have a right to apply for such legal aid and have the application determined on its merits.

25. In *Costigan v. Brady* [2004] IEHC 16, the High Court refused an application for judicial review of a District Judge's decision not to grant legal aid to the accused. In *Costigan*, it had already been accepted that the accused did not possess sufficient means to enable her to obtain legal representation. Quirke J. stated:

The question of the gravity of the charge was entirely a question for Judge Brady. He duly investigated that question on two occasions and it is clear that it appeared to him that the gravity of the charge facing Ms. Costigan did not make it essential in the interests of justice that she should have legal aid in the preparation and conduct of her defence.

Quirke J. continued:

"There is no doubt that a District Judge to whom an application is made for [a] certificate for free legal aid pursuant to the provisions of section 2 of the Act of 1962 must, in addition to considering the means of the person charged and the gravity of the charge, investigate the question of whether or not any exceptional circumstances exist which would make it essential in the interests of justice that the applicant should be granted legal aid."

In refusing to grant the relief sought, Quirke J. stated:

"This is not a case where an applicant for legal aid is inarticulate, disadvantaged and unable to discharge an onus of establishing 'exceptional circumstances' which may make it essential in the interests of justice that she should be granted legal aid.

Ms. Costigan was represented by solicitor and counsel on each occasion when the matter came before Judge Brady."

26. *Joyce v. Brady & Anor.* [2007] IEHC 149 similarly concerned an application for judicial review of a refusal to grant criminal legal aid. In rejecting the application, Feeney J. held that the District Judge had considered the gravity of the offence and whether any "exceptional circumstances" existed, and stated at para. 2.6.:

"It was clearly open to counsel appearing on behalf of the Applicant/Accused to make all or any submissions to the first Respondent."

Feeney J. continued at para. 3.1.:

"The Applicant was represented and was in a position to raise any matters which were considered relevant in relation to the issue of the gravity of the offence or the identification of exceptional circumstances during the application for legal aid. The first named Respondent heard the submissions and refused to grant the relief. It is not the function of this court in an application for judicial review of the order refusing legal aid to consider the merits of the application."

Several applications for legal aid had been made but not dealt with in *Joyce & Brady* until a vouched statement of means was provided to the judge. Once this had been done, the judge asked the prosecuting Garda if the applicant was "at risk", meaning whether he was at risk of facing a custodial sentence if convicted. At para. 23 of the Supreme Court judgment of Fennelly J. (*Joyce v. Brady* [2011] IESC 36, [2011] 3 I.R. 376), it was held that the District Judge erred in law in reducing the inquiry to the basic inquiry as to whether the appellant was "at risk".

### **The European Convention on Human Rights**

27. Article 6 of the ECHR protects the right to a fair trial. Article 6(3) states:

"Everyone charged with a criminal offence has the following minimum rights:

...

(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."

Section 2(1) of the 2003 Act provides:

"In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is 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."

This aspect was neither pressed nor developed.

### **Decision**

28. In *Tighe (A Minor) v. Judge Haughton & Anor.* [2011] IEHC 64, I decided in relation to s. 2 of the 1962 Act that:

"It is trite law that judicial review is concerned not with the decision, but with the decision making process. In the case at hand, the question is not whether or not the first respondent was correct on the merits of the case in refusing to grant legal aid, but whether, in deciding on the matter, he acted in accordance with the applicant's right to fair

procedures.

The applicant submits that the first respondent failed correctly to apply the provisions of s. 2(1) of the Act of 1962, as amended in that he had regard only to the fact that the applicant would not be at risk of a custodial sentence and he failed to have any, or any adequate, regard to the means of the applicant and to his particular circumstances. The statutory scheme grants a discretion to the District Judge in relation to granting legal aid. So long as a District Judge takes into consideration the means of the applicant, the gravity of the offence and whether there are any exceptional circumstances, his decision as to whether to grant legal aid is made within the four corners of the legislation. It is common case that the first respondent stated that the applicant was 'not at risk', meant that he was not in danger of a custodial sentence. It is clear from this statement that the first respondent had considered the gravity of the offence and the manner of sentence which it would attract."

29. After citing both *O'Neill v. Butler* and *Costigan v. Brady*, which held that there was an onus on a District Judge to enquire into the existence of any exceptional circumstances where an unrepresented accused is incapable of protecting his interests, I held:

"The applicant has failed to discharge the burden of proof in relation to the assertion that the first respondent failed to consider all relevant factors and disregard all irrelevant factors. The first respondent, having considered the means of the applicant, the gravity of the offence, and whether there existed any 'exceptional circumstances' to warrant the grant of legal aid, took the view that legal aid was not essential in the interests of justice in this case and therefore correctly applied the provisions of the Act of 1962, as amended."

30. It seems from the evidence proffered to the Court that the respondent took into account the gravity of the offence and the implications for the applicant in that he appears to have departed from what purportedly was his usual course of action in applying the Probation of Offenders Act, 1907 to the applicant. This is an action that would not have been engaged in nor entertained if the gravity of the offence had not been considered.

31. Neither has the applicant shown that there was any failure to consider his lack of means. The respondent acted upon the evidence before him in circumstances where there was full legal representation of the accused party. Failure to consider the applicant's Statement of Means, in so far as it might have made a difference, only occurred because counsel did not bring it to the Judge's attention. There is no suggestion that the respondent acted impulsively or oppressively to the point of unlawfulness. If counsel thought at the time that the Judge was being over-hasty in drawing proceedings to a conclusion, counsel should have brought the Statement of Means to the respondent's attention. Failing that, the matter could have been raised at the return date and dealt with then or referred back to the respondent. The respondent cannot be faulted for not considering what was never put before him.

32. This matter is now concluded. The fine has been paid. Texas never happened. The applicant's case must fail and I dismiss it.