Neutral Citation Number: [2007] IEHC 213

THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 303 JR]

BETWEEN

GARETH WHELAN

APPLICANT

AND
DISTRICT COURT JUDGE THOMAS FITZPATRICK AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice Declan Budd delivered on the 13th day of June 2007

Background
1. The applicant seeks an order of certiorari in relation to the decision of the first named respondent District Court Judge made on 15th February, 2006 refusing an application made by counsel on behalf of the applicant for legal aid pursuant to s. 2 of the Criminal Justice (Legal Aid) Act 1962. The applicant was summoned to appear in the District Court in relation to an offence, contrary to s. 13(3) of the Road Traffic Act 1994, in relation to an alleged refusal by him to permit a designated doctor to take from the applicant a specimen of his blood or at his option to provide to the designated doctor a specimen of urine on 3rd December, 2004 at Sundrive Road, Garda Station. The grounds upon which the applicant seeks relief can be summarised as follows:-

> "(a) The first respondent failed to conduct an enquiry into the matters referred to in s. 2(1)(a) of the Act of 1962;
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> (b) The first respondent gave consideration to an irrelevant factor in the exercise of his statutory duty;
>
> (c) The first respondent adopted a strict and irrelevant policy which fettered the proper exercise of his statutory discretion."

Statutory provision
2. Section 2 of the Criminal Justice (Legal Aid) Act 1962, as substituted by s. 5(6) of the Criminal Justice (Miscellaneous Provisions) Act 1997, provides as follows:-

> "(1) If it appears to the District Court before which a person is charged with an offence …
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> (a) that the means of the person before it are insufficient to enable him to obtain legal aid, and
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> (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,
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> the said District Court … shall, on application being made to it in that behalf, grant a certificate, in respect of him, for free legal aid … and thereupon he shall be entitled to such aid and to have a solicitor …"

3. For the sake of clarity and because the term "legal aid" has acquired a number of meanings, I make the point that "legal aid" in this section is best understood as meaning "legal advice and representation".

Factual basis
4. The applicant was summoned to appear before District Court 52 in the Richmond Hospital Court Complex on 15th February, 2006 to answer a complaint that he failed to comply with a requirement to provide a sample of his blood, or urine, an offence contrary to s. 13(3) of the Road Traffic Act 1994, as amended. The maximum sentence which may be imposed on conviction in respect of that offence is six months imprisonment and/or a fine of €2,500.

5. Prior to his appearance in court, the applicant contacted Philip Hannon, of Philip Hannon Solicitors, The Capel Building, Mary's Abbey, Dublin 7. Mr. Hannon agreed to represent the applicant in his defence of the above prosecution, contingent on the applicant being granted legal aid or on payment of appropriate legal fees. Having been made aware of the applicant's circumstances, Mr. Hannon agreed to instruct counsel to appear for the applicant on the above date to seek legal aid and he then did this. Accordingly on 15th February, 2006 counsel appeared for the applicant and indicated that the applicant was pleading not guilty to the complaint and applied to the first named respondent District Court Judge for legal aid, pursuant to s. 2 of the Criminal Justice (Legal Aid)Act 1962 on behalf of the applicant. The statement of the applicant's means (exhibited as Exhibit B in the affidavit of Philip Hannon which was sworn on 13th March, 2006) was handed into court in support of this application. This statement of means of Gareth Whelan appears to have been filled in or at least signed by him on 13th February, 2006 and makes clear that he was living in his mother's house in Kimmage, was unemployed and in receipt of a €165 per week Social Welfare payment, of which he contributed €50 per week to his mother for his lodgings and that he also supported one child aged fifteen months in the sum of €80 per week. His answers to questions 9 and 10 make clear that he has no other money available which could be used for obtaining legal aid and he has no other assets which could be used for the same purpose and that he has neither parents or guardians able to provide or to assist him to provide himself with legal aid. These matters are deposed to, in the affidavit of Philip Hannon sworn on 13th March, 2006 and the court was also informed by counsel that the applicant was in receipt of unemployment assistance and counsel indicated to the first named respondent that "the applicant may be in jeopardy of a custodial sentence" if convicted of the complaint of refusal to give a specimen. This phraseology has a significance in the parlance of District Court practitioners comparable to the use of the phrase "my client intends to take a certain course" as used in the Circuit Court to indicate that Counsel's accused client is likely to plead guilty when arraigned. Such euphemistic phrases are well understood by judges and practitioners, although the actual meaning carried by and implications in the use of the phrase might not be obvious to an uninitiated bystander. I will return to this significant point in due course. The reason for using such a formula is to convey what is believed by Counsel to be likely to happen when his client is arraigned but the choice of plea is the prerogative of the accused and there could be a change of mind before the formal answer "guilty" is given by the client. Hence the use of the phrase by Counsel with its connotations well understood by the judge, registrar, lawyers and cognoscenti in Court, as it precludes the peril of the discharge of a jury panel if an unexpected change of mind should

occur.

6. It is clear that the first named respondent was informed not only of the impecunious situation of the applicant but also specifically that the applicant might be at risk of a custodial sentence in the event that he should be convicted of the complaint before the court. I was informed by Conor Devally S.C.. counsel for the applicant, that one experienced District Court Judge frequently asked the member of the Gardaí responsible for the prosecution case the question "is this person at risk?" which was in fact a euphemism for the question:-

> "Is this accused in peril of receiving a jail term?"

7. If the answer to this euphemism was in the affirmative, then this carried the implication that the accused was on hazard of being incarcerated. Accordingly it followed that if the person was impecunious and, if there were no countervailing exceptional circumstances, then the accused should be informed of the availability of legal assistance. On this aspect I shall return to what Shanley J. said, which he would have carefully considered and written out in his own hand, in the case of *Clarke v. Kirby and the Director of Public Prosecutions* [1998] 2 I.L.R.M. 30 in respect of the matters which should be taken into account by the District Court Judge, bearing in mind the intention of the Legislature and the absence of an appeal of the decision.

8. The first named respondent's reaction to counsel's application was to say that if the applicant could afford a car, he could afford a solicitor. Counsel for the applicant thereupon advised the first named respondent that the applicant's instructions were that he was not driving his own car, that there was no evidence that he was driving his own car and that his means were such that he could not afford legal assistance unaided. Counsel also made submission that, in the light of the offence alleged, to which there are a number of technical legal defences, the applicant would not be able to defend himself adequately should he not be legally represented. None of this was controverted. The first named respondent reacted to the submissions by stating that he "did not give legal aid in driving cases". The legal aid application was declined with no other reasons being given by the first named respondent. I propose to set out paras. 8 and 9 of Mr. Hannon's affidavit but before doing this I should make it clear that counsel for the Director, Sunniva McDonagh has made it clear that the first named respondent has not taken issue with the matters as set out in the affidavit of Philip Hannon grounding this application which was sworn on 13th March, 2006. From his affidavit it is clear that although the first named respondent queried the applicant's means as set out in the statement of means (by referring to his ability to afford a car), legal aid was not refused on the basis that the applicant did have the means to afford legal representation. Furthermore, this is not a case which deals with the applicant's right to be informed of his right to apply for legal aid. Nor was it a case in which an applicant was unrepresented in making his application for legal aid. Rather, Counsel submits that this is a case in which the applicant was represented by solicitor and counsel for the specific purpose of applying for legal aid. In that regard she suggests that the first named respondent was entitled to presume that relevant matters touching on the application would be put before him by counsel. She stresses that there is a contrast between a judge conducting an enquiry in relation to an unrepresented and perhaps inarticulate litigant, unfamiliar with court practices and the circumstances where an accused has procured legal representation in order to have his case presented. She makes a good point well but perhaps paints a picture of a rather Utopian District Court untroubled by the constraints and pressures of a long series of difficult and complex cases of infinite human variety and at times poverty and misery. The intrusion of Junior Counsel, with legal points of nicety in a legal aid application, into a harrowing list of fraught cases may perhaps not always be the most welcome interlude. Maybe decorum and patience prevail now and memory fades in respect of the occasional tornado-like reception awaiting Counsel making inept legal points and holding up a list.

Submission on behalf of the applicant

9. The applicant seeks *certiorari* by way of judicial review in respect of the above decision of the first named respondent District Court Judge to refuse the application for legal aid. I should mention that the applicant's solicitor in his affidavit makes clear that his agreement to instruct counsel to appear on 15th February, 2006 did not amount to an agreement to represent the applicant in the conduct of his case should the applicant fail to obtain legal aid and that it was clear that the applicant was not in a position to engage Mr. Hannon privately from his personal funds in the event of legal aid being refused.

10. The applicant advanced four grounds in support of his application for relief:-

> (i) The submission was made that the first named respondent, in making the above decision failed to conduct an adequate enquiry into those matters referred to in s. 2(1)(a) of the Criminal Justice (Legal Aid) Act 1962, i.e. whether the means of the applicant, and the gravity of the charge or the existence of exceptional circumstances, require that legal aid be assigned in the interests of justice.
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> (ii) The submission was made that the first named respondent gave consideration to an extraneous and irrelevant factor in the exercise of his statutory duty to determine whether the grant of legal aid was appropriate; this was in the context that he had stated that the application before the Court was in respect of a driving offence and that he did not grant legal aid in driving cases.

11. The submission was made that the first named respondent adopted a strict and irrelevant policy, which fettered the proper exercise of his statutory discretion in determining whether to grant legal aid, in that he had stated that he did not grant legal aid in driving cases and he did not resile from this pronouncement and he did refuse the application.

> (iv) The submission was made that the first named respondent, by reason of the foregoing words and actions acted unreasonably and erred in law so as to fall into excess of jurisdiction, and furthermore that he failed to vindicate the applicant's rights to natural and constitutional justice.

12. The constitutional right to a trial in due course of law and the State's constitutional duty to vindicate, by its laws, the rights of the citizen as far as practicable, were held by the Supreme Court in the *State (Healy) v. Donoghue* [1976] I.R. 325 to provide for a right to legal aid in the preparation of an accused's defence, where required by the interests of justice. In that case at p. 349 Chief Justice O'Higgins said;-

> "What then does justice require in relation to the trial of a person on a criminal charge? A person charged must be accorded certain rights. In referring to these in his judgment [in this matter in the High Court], Mr. Justice Gannon said:-
>
> > 'Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. By mentioning these I am not to be taken as giving a complete summary, or

as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence.' "

13. The Chief Justice then commented, at 349 – 351, that:-

> "It seems to me that this puts very clearly what one would expect to be the features of any trial which is regarded as fair. However, criminal charges vary in seriousness. There are thousands of trivial charges prosecuted in the District Courts throughout the State every day. In respect of all these there must be fairness and fair procedures, but there may be other cases in which more is required and where justice may be a more exacting task-master. The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him. Where a man's liberty is at stake, or where he faces a very severe penalty which may affect his welfare or his livelihood, justice may require more than the application of normal and fair procedures in relation to his trial. 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.
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> The general view of what is fair and proper in relation to criminal trials has always been the subject of change and development. Rules of evidence and rules of procedure gradually evolved as notions of fairness developed. The right to speak and to give evidence, and the right to be represented by a lawyer of one's choice were recognised gradually. To-day many people would be horrified to learn how far it was necessary to travel in order to create a balance between the accuser and the accused.
>
> If the right to be represented is now an acknowledged right of an accused person, justice requires something more when, because of a lack of means, a person facing a serious criminal charge cannot provide a lawyer for his own defence. In my view the concept of justice under the Constitution, or constitutional justice (to use the phrase used in the judgments of this Court in *McDonald v. Bord na gCon*, [1965] I.R. 217, in *East Donegal Co-Operative v. The Attorney General* [1970] I.R. 317 and in the majority judgment of this Court in *Glover v. B.L.N.* [1973] I.R. 388 requires that in such circumstances the person charged must be afforded the opportunity of being represented. This opportunity must be provided by the State. Only in this way can justice be done, and only by recognising and discharging this duty can the State be said to vindicate the personal rights of the person charged. To hold otherwise would be to tolerate a situation in which the nature and extent of a man's ability to defend himself, when accused, could depend on the nature and extent of his means; that would be to tolerate injustice. That this view is now commonly held in most countries of the Western World is clear from the provisions of the European Convention on Human Rights, which was ratified by Ireland on the 25th February, 1953, and from the development in recent years of judicial opinion in the Supreme Court of the United States."

14. The courts recognise the Criminal Justice (Legal Aid) Act 1962 as State recognition and vindication of the constitutional right to be aided in a person's defence where the person's means are such that one cannot otherwise afford to engage such assistance and where the circumstances require it. Henchy J. noted that:-

> "The 1962 Act effectuated the implied guarantee that no citizen would be deprived of his liberty in circumstances where he was shut out of a reasonable opportunity of establishing his innocence or of receiving a sentence appropriate to his degree of guilt and his circumstances. At p. 353 Henchey J. said, that the implied guarantee in Article 38 s. 1, Article 40 s. 3(1) and (2) and Article 40 s. 4(1) all necessarily imply at the very least the guarantee that the 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 sentance appropriate to his degree of guilt and relevant personal circumstances. That implied guarantee is effectuated in the case of poor persons by the Criminal Justice (Legal Aid) Act, 1962. Section 2, sub-s. 1, of that Act mandates that the District Court, on application being made to it, shall give a certificate of entitlement to free legal aid to a person charged before it, if it appears to the court that his means are insufficient to enable him to obtain legal aid and 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."

15. Henchy J. went on to articulate the duty judges of the District Court have in respect of the application of the Act of 1962 and of the underlying constitutional guarantee, saying at p. 354 that :-

> "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."

16. At p. 357 Griffin J. agreed with the thrust of both judgments and made it clear that once the necessary conditions stated as being required in s. 2 of the Act of 1962, had been fulfilled then the grant of a legal aid certificate becomes mandatory. He said:-

> "The principles enshrined in these provisions of the Constitution 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? It seems to me 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. Very few laymen, when charged in court where their liberty is in jeopardy, can present adequately their own cases, much less identify and argue legal questions.

Prior to 1962, there must have been many cases in which legal aid for poor persons charged with offences was necessary and was not available to them. The Oireachtas, recognising the necessity to implement the provisions of the Constitution to which I have already referred and to ensure a fair trial for persons too poor to engage a lawyer to defend them, enacted the Criminal Justice (Legal Aid) Act, 1962. Under s. 2, sub-s. 1, of the Act of 1962 if it appears to the District Court that the means of a person charged before it with an offence are insufficient to enable him to obtain legal aid and that, by reason of the gravity of the charge or exceptional circumstances, it is essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence, the District Court shall, on application being made to it, grant a certificate for free legal aid to that person and, thereupon, he becomes entitled to have a solicitor assigned to him. …

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.

The provision of free legal aid to a poor person charged in the District Court enables him to meet the charges made against him, to obtain advice as to the proper plea to make to the charges, to ensure that only properly admissible evidence is given in the District Court, to have the witnesses for the prosecution cross-examined on his behalf, and to have his case presented in the best possible light and, generally, to ensure a fair trial for him."

17. I have quoted the words of Mr. Justice Griffin at length as the three judgments make it very clear that where the person is impecunious and meets the prerequisites set out in the Act and where it is essential in the interests of justice that a person should have legal aid, then the Oireachtas has used the phrase "the District Court shall, [emphasis added] on application being made to it, grant a certificate for legal aid to that person and thereupon he becomes entitled to have a solicitor assigned to him". In the present case it was clear that the necessary conditions had been satisfied in that the statement of means made it clear that the unemployed applicant did not have the funds to retain a solicitor by virtue of his lack of means and, furthermore, the District Judge had been informed by counsel that his suggestion, that the applicant owned a motorcar and so had sufficient assets to be able to engage a solicitor himself, was incorrect as he did not own the car. Furthermore counsel had reminded the learned District Court Judge that the charge, being that of refusing to give a sample, was an offence to which there are a number of technical defences and that the applicant would not be able to adequately defend himself in the absence of legal assistance. I have no doubt that the first named respondent had little difficulty in accepting that there can be many technical defences to this charge and that this particular offence is one in which many an accused has paid fees to engage the most ingenious of counsel who may spot a deficiency or lacuna in the State's proofs and thus try to avoid being convicted and so escape suffering the shame and inconvenience of being convicted for such an offence and probably disqualified from driving for a period of time.

18. On reflection, it is fair to say that the number of statutes involved in the making of amendments to the provisions in respect of this offence is such that one might have expected the Oireachtas to pass a consolidated statute including all the provisions in one Act so that in this, a democratic representative parliamentary republic, a citizen is able to read the one Act and know that the basic Act and the many amendments thereto are to be found simply in one consolidated statute and not concealed in a maze of amendments.

19. The contention being made on behalf of the applicant is that the learned District Court Judge failed to embark on a proper inquiry about the case which was being made for legal aid by guillotining the inquiry before he embarked on it at all. The Judge indicated a predetermined idiosyncratic view that "he did not give legal aid in driving cases" and this ruling appears to have governed the matter and thus precluded any proper inquiry being undertaken as to the merits of the application on foot of the terms of s. 2 of the Criminal Justice (Legal Aid) Act 1962. There are the factors mentioned by the Oireachtas in the Section as being the criteria set out by the legislature as matters which at least deserve consideration, such as the means of the applicant or the existence of special circumstances. In fact counsel did alert the first named respondent to the very important risk of imprisonment which is usually recognised as a decisive or significant factor but the critical importance of this factor as to the applicant being on hazard of a custodial sentence does not seem to have caused the respondent to unfasten or free himself from the fetters which he had imposed on the proper exercise of his discretion. He failed to release himself from the spancels which he had himself imposed on the proper exercise of his discretion by inserting and acting on a self-imposed predetermining extraneous rule which was never intended by the legislature or mentioned by it in the legislation.

20. In view of the importance of the facility of being able to use a motorcar, particularly in remote parts of the country and as an attribute of employability, one would have thought that in this day and age the importance of being represented so that all that can be said for one as a client is said by counsel and solicitor would be particularly significant in such a complex area of case law and legalistic prerequisites about the mode of extraction of blood or the taking of urine procedures. No doubt such safeguards may be justified by the serious nature of intrusions on liberty and bodily integrity of the suspect.

21. In para. 9 of his affidavit Mr. Hannon made it clear that the first named respondent, in refusing the application for legal aid, stated that he "did not give legal aid in driving cases" and that he gave no other reason in his refusal to assign legal aid. This was despite the fact that the applicant was impecunious since the suggestion that he owned a car had been negated. This was a significant and serious charge in the light of the fact that counsel had intimated that the applicant may be in jeopardy of a custodial sentence if convicted. This type of phrase is used in the District Court to indicate that the applicant is at risk of a custodial sentence and carries the implication that there is a previous blemish on his record or some other factor which would put him in jeopardy of incarceration as a penalty.

22. In summary the applicant's case is that in adopting a policy of not giving legal aid in "driving cases", the first named respondent took into consideration and acted upon an irrelevant consideration, which was extraneous to the matters set out by the Oireachtas and thus improperly fettered his own statutory discretion by erecting this additional predetermining factor at the threshold before his embarking on a consideration of the relevant factors in the case.

23. Mr. Hannon also says at para. 11 of his affidavit that the decision of the first named respondent is final and that no appeal lies in respect of his refusal to assign legal aid. His belief would appear to be incontrovertible in that it is obviously based on s. 2(2) of the Act of 1962 which states:-

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

24. Many decisions of the District Court are appealable but in this instance the legislature has chosen to make the exercise of discretion and the decision unappealable except insofar as an applicant may, as in this case, be entitled to move for judicial review in the High Court on the basis that the learned District Court Judge may have erred in the exercise of his jurisdiction or have exceeded his jurisdiction in the process. Mr. Hannon's second factual contention in the next paragraph, para. 12, is also incontrovertible in that he says that this is a case in which it is expected that a solicitor from the office of the Chief Prosecution Solicitor will represent the prosecution and that this is the normal practice in cases of this type. His second proposition on this aspect is that the applicant would be at a marked disadvantage if he were to attempt to contest this case without legal assistance. Counsel for the applicant made the point to the first named respondent that there were a number of technical defences which made the defence in this type of case complex and if ever there were a true understatement of the practical situation, this is the reality in relation to such road traffic offences in connection with drunken driving as there is a myriad of stipulations and technical requirements involved in the taking of samples for testing. If ever there was a technical Scylla and Charybdis in a legal strait for the Garda investigative ship to navigate safely, it has been the navigation over the last 40 years of this channel in trying to reduce deaths and serious injuries on the roads caused by people driving under the influence of intoxicating liquor or drugs. By reason of the intricacy of the legislation and the failure of the Oireachtas to introduce a consolidating statute, lawyers have difficulty in treading their way through the labyrinth of statutes and one can only wonder at the bemusement of even the well educated citizen who tries to find and thread a way through this labyrinthine mass of statutes and regulations. If Marcus Bourke, the experienced parliamentary draftsman, could consolidate the Income Tax Acts and put them into simple, intelligible, plain language, then surely the time has come for the Oireachtas to request another skilled and expert parliamentary counsel to tackle the thirteenth labour of Hercules and slay this minotaur, the plethora of the Road Traffic Acts. Mr. Hannon's contention is quite correct that the applicant or any other citizen without legal and technical expertise in respect of road traffic laws would be at a disadvantage in conducting his own case when pitted against the might and experience of trained lawyers daily dealing with this particular area of the law. Ignorance of the law may not excuse but the corollary to this is that a citizen who is not defended by a skilled practitioner may have a perfectly valid excuse or genuine defence which, if brought to the attention of the court, would secure an acquittal. If the accused is unrepresented then there is every danger that this item may not be brought to the attention of the court or may be presented in such an inarticulate or insensitive way as to receive scant attention from the court, despite its actual merits.

Failure to inquire into or to consider the appropriate factors

25. In addition to the contention that the first named respondent had precluded himself from embarking on a proper inquiry in relation to the factors affecting his decision, counsel for the applicant also submitted that the principle is that a decision making authority must consider all relevant factors and disregard all irrelevant factors and that this is clearly stated in the decision of Finlay C.J. in *P. and F. Sharpe v. Dublin City and County Manager* [1989] I.R. 701, at pp. 717/8 where he held that:-

> "The practical consequences of that are that the decision-making authority must have regard to all relevant and legitimate factors which are before it and must disregard any irrelevant or illegitimate factor which might be advanced."

26. This was said in the context of the right of a county manager to exercise discretion in a judicious manner after the making of a direction under s. 4 of the City and County Management (Amendment) Act 1955 and the Chief Justice added that parties affected by such a decision must get a fair and proper opportunity of having their views conveyed to the decision making authority which must act fairly in all respects in arriving at its decision. Here counsel for the applicant submitted that the effect of the Supreme Court decision in *The State (Healy) v. Donoghue* [1976] I.R. 325, with regard to legal aid, was to ensure, from a constitutional viewpoint, the right to a trial in due course of law and to fulfil the judicially determined clear purpose of the Act of 1962 by the provision of legal aid where necessary. Accordingly then the discretion of the District Court, which is of vital importance in determining whether legal aid is appropriate, lies in deciding whether:-

> (a) The means of an applicant preclude him from otherwise obtaining legal aid, and either
>
> (b) The gravity of the charge, including the likely consequences on conviction, warrants the grant of legal aid, or
>
> (c) There are exceptional circumstances consequent to which the interests of justice require that legal aid be assigned.

27. His submission went on to the effect that the applicant's means were such that he was unable to engage legal assistance otherwise than through the criminal legal aid scheme and that this was represented to the first named respondent both by counsel and by the submission of the statutory declaration of the applicant's means (Exhibit B). His contention was that, at this point and, in the light of the application made, the first named respondent ought to have considered the gravity of the charge and should have inquired into whether exceptional circumstances existed in this case. It is not controverted that the first named respondent was informed that the applicant was at risk of receiving a custodial sentence and I have explained why it was implicit in this guarded phrase that there was a blemish on the applicant's record which, in the event of his conviction, could place him in jeopardy of incarceration.

28. In *Cahill v. Judge Reilly* [1994] 3 I.R. 547 Denham J. considered the principles set out in *The State (Healy) v. Donohue* [1976] I.R. 325 in respect of s. 2 of the Act of 1962 and said at p. 551 - 552 having quoted Griffin J. at [1976] I.R. 325, p. 360:-

> "In my opinion, when the circumstances are such that if, in the event of a conviction or on a plea of guilty, a sentence of imprisonment is likely, a District Justice should inform an indigent defendant of his right to legal aid under the Act. If such defendant indicates that he does not wish to have legal aid, the District Justice should satisfy himself that the defendant intelligently and understandingly waives his right to legal aid."

29. She commented:-

> "Thus I consider an indigent accused is entitled to apply for legal aid in the event of a possible custodial sentence. If a person does not know of his right to legal aid and consequently does not apply for legal aid then his constitutional right is violated.
>
> The sentence in a case such as this could have been a fine or other non-custodial determination. It was open to the first

respondent initially to consider the case to be one which may not or would probably not require a custodial sentence. Clearly this case became serious, from the point of view of a custodial sentence, when the court considered the previous convictions.

In this case, after the conviction, it became apparent that this was a possible custodial case and at that time the first respondent should have taken steps to ensure that the applicant's constitutional rights were not violated. It appears to me that this was what was envisaged by Griffin J. in *The State (Healy) v. Donoghue* [1976] I.R. 325, 361 where he stated:-

> 'In my opinion, when the circumstances are such that if, in the event of a conviction or on a plea of guilty, a sentence of imprisonment is likely, a District Justice should inform an indigent defendant of his right to legal aid under the Act.'"

30. Counsel submits that in the present case the first named respondent was made aware of the possibility of a custodial sentence and that there was no suggestion of any contradiction of the representations made by counsel to this effect nor was any doubt cast on the accuracy of the instructions about this which he had been given. Accordingly the first named respondent was required to grant the respondent legal aid. In short the submission is that in acting as he did, the first named respondent failed to consider the application for legal aid properly and failed to exercise his discretion in the manner provided for pursuant to s. 2 of the Act of 1962.

Taking in to account of an irrelevant and predetermining consideration

31. Counsel for the applicant then submitted that the first named respondent, in having regard to the fact that the instant case was a "driving case" and in refusing legal aid on that basis, took an irrelevant consideration into account which was extraneous and was not germane to the crucial issues and lead to a predetermination of the decision and accordingly made his decision on the basis of an erroneous consideration. He enlarged on this by submitting that the first named respondent's policy not to grant legal aid in "driving cases" amounts to the imposition of an additional criterion in that a criminal case, (when the applicant would otherwise be suitable for the grant of legal aid) must be a case which does not involve an offence contrary to the Road Traffic Acts. While counsel accepted that a number of offences created by the Road Traffic Acts (the prosecution of which may be considered "driving cases") are of a minor nature when compared to the full range of criminal offences created by statute and it is accepted that in the case of those minor offences the grant of legal aid might not have been appropriate in the circumstances, nevertheless the submission was that the first named respondent should have considered the specific offence charged in the present case and should have assessed its real gravity. Counsel enlarged on this by saying that the factors to be included in consideration when assessing the gravity of the offence are:-

> The potential custodial sentence available to the court on conviction, and the social opprobrium which attaches to those convicted of such an offence of driving while having intoxicating liquor in one's blood over and above the prescribed limit."

32. Counsel submitted that the judgment of the Supreme Court in *Dunne v. Donohoe* [2002] 2 I.R. 533 is relevant to the imposition of additional conditions to a statutory duty which circumscribe the appropriate exercise of its jurisdiction. In the *Dunne* case, the applicant challenged the validity of a Garda circular from an Assistant Commissioner of An Garda Síochána to Garda Superintendents requiring a policy whereby the Superintendents (the persons designated under the Firearms Act to grant firearms licences) were to consider the security of the firearms concerned and their storage in addition to the considerations set out in the relevant statutes. Keane C.J. held, at p. 543, as follows:-

> "That legislation empowers the superintendent to grant the firearm certificate where he is satisfied as to three matters i.e., that the person has a good reason for requiring the firearm, can be permitted to possess, use and carry it without danger to the public safety or to the peace and is not one of the persons disentitled by the statute to hold a firearm certificate. For a superintendent to add, in effect, a fourth condition, by requiring every applicant to provide a gun safe which would be available for inspection by the gardaí, would be to place the applicants in the same position as if, in the case of that particular district, the Oireachtas had so prescribed by primary or secondary legislation. Neither the Commissioner nor the district officers have been empowered by the legislature to impose such pre-conditions."

33. Counsel compared this ruling to the situation in the present case and submitted that the first named respondent erred in law and was acting ultra vires in imposing an additional condition to the grant of legal aid, where the legislature had clearly articulated the appropriate applicable considerations in respect of the granting of legal aid and also where the Superior Courts had considered these conditions and determined that, consequent to the satisfaction of those conditions and, I would add, in the absence of some extraordinary excluding factor, the grant of legal aid is mandatory.

The operation of a strict policy

34. Counsel submitted that the first named respondent, in making a determination consequent to an inflexible policy not to grant legal aid in "driving cases" did so without reference to the circumstances of the instant case and therefore fettered himself in the exercise of his discretion pursuant to s. 2 of the Act of 1962. He said that, even had the first named respondent been entitled to proclaim such a policy, that he erred in the inflexible application of that pre-ordained policy by his pronouncement being made prior to engaging in an enquiry and without reference to the circumstances of the case before the court.

35. Counsel submitted that the general principle as regards the operation of an inflexible policy is illustrated by the classic statement of Bankes L.J. *in R. v. Port of London ex parte Kynoch* [1919] 1 K.B. 176, where he held at p. 184, that:-

> "There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes."

36. Counsel then suggests that clarification as to the requirements of a tribunal to consider the facts of each case before it, even if intent on the application of a legitimate policy, is to be found in the latest edition of the Court of Appeal in respect of litter licensing in *R. v. Windsor Licensing Justices ex parte Hodes* [1983] 2 All ER 551, where Slade L.J. held at 557, that:-

> "The power conferred on licensing justices by [statute] to grant justices licenses 'as a new license or by way of renewal'

> to such properly qualified persons 'as they think fit and proper' is a power expressed in permissive terms, and which is exercisable or not at their discretion. The authorities showed that this discretion is a very wide one, both in the case of an original grant and of a renewal ….. Nevertheless it is a discretion which must be exercised according to reason and justice, not in an arbitrary manner …. It is therefore well established that licensing justices must exercise their discretion in each case that comes before them and cannot properly determine an application simply by reference to a pre-ordained policy relating to applications of a particular class, without reference to the particular facts of the application before them."

37. Counsel referred to two decisions which indicate that a similar approach has been taken in this jurisdiction to that enunciated by Slade L.J. In *Mishra v. Minister for Justice* [1996] 1 I.R. 189, Kelly J. was dealing with the imposition of a policy on the exercise of a statutory discretion. This case concerned an application for naturalisation pursuant to the Irish Nationality and Citizenship Act 1956, as amended, which provided the Minister for Justice with an "absolute" discretion in respect of such an application. As to the exercise of this, Kelly J. said at p. 205, that:-

> "In my view, there is nothing in law which forbids the Minister upon whom the discretionary power under s. 15 is conferred to guide the implementation of that discretion by means of a policy or set of rules. However, care must be taken to ensure that the application of this policy or rules does not disable the Minister from exercising her discretion in individual cases. In other words, the use of a policy or a set of fixed rules must not fetter the discretion which is conferred by the Act. Neither, in my view, must the application of those rules produce a result which is fundamentally at variance with the evidence placed before the Minister by an applicant."

38. Counsel then submitted that there was assistance to be derived in respect of the judicial exercise of discretion in sentencing from a statement of general principle applicable to the exercise of judicial discretion in *Director of Public Prosecutions v. W.C.* [1994] 1 I.L.R.M. 321 at p. 325 when Flood J., sitting in the Central Criminal Court, said that:-

> "It is not open to a judge in a criminal case when imposing sentence, whether for a particular type of offence or in respect of a particular class of offender, to fetter the exercise of his judicial discretion through the operation of a fixed policy, or to otherwise pre-determine that issue."

39. On the basis of these principles, counsel submitted that the first named respondent had adopted a fixed policy in respect of the grant of legal aid in driving cases and, in the light of his response to the making of the application for legal aid, he had applied this policy without regard to the circumstances of the actual case. In doing so and, on the above authorities, he submitted that the first named respondent had erred in law in so doing and had acted *ultra vires* in refusing the application in the manner in which he had done this.

The consequence of the *ultra vires* decision

40. Counsel then submitted that the first named respondent, in failing to have regard to the legitimate and relevant factors before him, in making his decision based on a legally inappropriate and irrelevant factor and by operating an inflexible policy which pre-determined the outcome of his considerations and enquiry, had acted unreasonably and *ultra vires*. He referred the court to the decision of Henchy J. in *The State (Cussen) v. Brennan* [1981] I.R. 181, as being helpful. In that case the Supreme Court held that the decision of the Local Appointments Commissioners to give extra credit to otherwise qualifying candidates with Irish speaking ability, where this went outside the terms of reference laid down for the Commissioners by the Minister, was ultra vires the discretion vested in them. On this basis counsel went on to submit that, since the determinative consideration of the case had been that it was a "driving case" and in such a case the first named respondent had adopted a policy of non eligibility for legal aid, then this caused the decision to be *ultra vires* of the statutory function of the first named respondent pursuant to the terms of the Act of 1962.

41. Counsel concluded his submission by contending that the applicant, charged with an offence of gravity and at risk of a custodial sentence and otherwise unable to avail of legal assistance, was entitled to legal aid in the vindication of his right to a fair trial. At the very least, should the first named respondent have properly exercised his discretion and had determined that legal aid was not required, the applicant was entitled to the proper consideration of his application for legal aid and to the proper consideration of the grounds raised by him in his application for legal aid. Counsel submitted that, in refusing legal aid in the manner in which he did, the first named respondent failed to vindicate the applicant's rights to natural and constitutional justice.

Response of the second named respondent

42. As is usual in such cases there has been no appearance entered by the first named respondent and in this particular case the second named respondent has not put in a replying affidavit and accordingly the averments set out in the affidavit of Philip Hannon have been uncontroverted. Counsel for the respondent D.P.P. has very properly outlined the consequences of this to the court, as I related above. She accepted that legal aid was not refused on the basis that the applicant did have the means to pay for his own legal representation, nor was this a case involving any issue as to the accused's right to be informed of his entitlement to apply for legal aid. On the contrary, she pointed out that the first named respondent was entitled to presume that relevant matters touching on the application would be drawn to his attention by counsel. The simple answer to this point is that this expectation was actually fulfilled. Counsel for the applicant did draw attention to and concisely cover the relevant considerations; he dealt with the applicant's lack of means and corrected the misconception that the applicant was the owner of a motor car. The statement of means handed in made it abundantly clear that the applicant was unemployed and drawing Social Welfare. It was manifest that the applicant was a person capable of driving and in these times it is obvious that the capacity to drive a motor car may be relevant to a person's employability. Crucially counsel used a time honoured phrase to the effect that the applicant "may be in jeopardy of a custodial sentence if convicted", to convey, by the use of this formula, the clear message that the applicant was on serious risk of a custodial sentence. The information was implicit in the formulaic phrase used that his client had a previous conviction for such an offence or a similar blemish on his record which would put him in jeopardy of incarceration. There can be no suggestion that counsel on behalf of the applicant failed to draw the pertinent considerations to the attention of the first named respondent.

43. Counsel for the D.P.P. then submitted that the District Court Judge must consider the gravity of the charge and whether there are any exceptional circumstances and in relation to the latter aspect she drew attention to Costi*gan v. Judge Patrick Brady and The Director of Public Prosecutions* (Unreported, High Court, Quirke J., 6 February 2004) a decision of Quirke J. in which he said at p. 7:-

> "In most cases an applicant for legal aid will not have professional legal representation and may be nervous, inarticulate, or otherwise handicapped in his or her capacity to protect his or her interests. In such circumstances an onus certainly rests upon the District Judge to conduct an inquiry into the applicant's means, the gravity of the charge preferred and whether or not any "exceptional circumstances" exist of the kind referred to earlier."

44. He went on to say at pp. 7 - 8:-

> "He, (the Judge) also heard and considered representations and submissions made by counsel on behalf of Ms. Costigan who argued that there were exceptional circumstances in her case
>
> This is not a case where an applicant for legal aid, is inarticulate, disadvantaged and unable to discharge the onus of establishing "exceptional circumstances" which may make it essential in the interest 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. Submissions were made to Judge Brady by counsel on behalf of Ms. Costigan on the issue of means, gravity of offence and "exceptional circumstances". Judge Brady having heard such submissions refused to grant relief which was sought on behalf of Ms. Costigan."

45. This case was followed by Feeney J. in Joy*ce v. District Judge Brady and The Director of Public Prosecutions* (Unreported, High Court, Feeney J., 20th April, 2007). At p. 11 of that judgment, Feeney J. stated:-

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

46. In *Joyce*, certain matters were raised for the first time in the judicial review proceedings in relation to "gravity of the offence", namely, the fact that it was an indictable offence and legal advice was required on the question of election as to whether to be tried by a jury. Feeney J. stated, at p. 13, as follows:-

> "Those matters are matters which must be considered as part of the exceptional circumstances which might entitle a person to legal aid. However on the facts of this case such matters were not raised notwithstanding that the Applicant/Accused was legally represented. This court is not and must not act as a Court of Appeal from the District judge's decision to refuse legal aid. It was open to the Applicant/Accused through counsel to raise such matters if they were deemed exceptional circumstances. … On the facts the court is satisfied that the District Judge conducted an appropriate inquiry into whether or not the Applicant was entitled to legal aid. 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. … It is not the function of this court in an application for judicial review of the order refusing legal aid to consider or revisit the merits of the application."

47. I respectfully agree with the sentiments expressed in both these cases which clarly were factually very different from the present case.

48. Both these cases are clearly distinguishable since in the present case the first named respondent added a criterion not authorised by statute and so never crossed the threshold so as to enter on a proper enquiry in relation to the relevant factors.

49. The situation in the applicant's case differs greatly from the situation in Rose Costigan's case in that she was also represented, but in her case submissions were made to the District Court Judge by her counsel on the issues of means, gravity of events and the "exceptional circumstances" and, having heard these submissions he refused to grant the relief which was sought. He had made no pre-emptive decision before embarking on the debate about the issues in respect of means, gravity of offence or exceptional circumstances. I agree with Quirke J. that it is not the function of this court in an application for a judicial review of the order of and procedures adopted by a District Court Judge to consider or revisit the merits of the application made to him. It is the function of this court to consider whether the order made by the District Court Judge was lawful or whether it was made without jurisdiction or in excess of jurisdiction or in breach of the principles of natural and constitutional justice.

50. In *Clarke v. District Judge Kirby and The Director of Public Prosecutions* [1998] 2 I.L.R.M. 30, the applicant instituted judicial review proceedings claiming that at no time during the hearing in the District Court was he informed of his entitlement to apply for legal aid or legal representation. He submitted that as soon as the judge of the District Court contemplated the imposition of a custodial sentence, he ought to have informed the applicant of these entitlements. He also submitted that before a Community Service Order is made the judge must have formed the opinion that the appropriate sentence would be one of, *inter alia*, imprisonment. At p. 34 Shanley J. commented on what Denham J. had said in *Cahill v Reilly* [1994] 3 IR 547, 552 to the effect that when a custodial sentence becomes probable, or likely after conviction, or on a plea of guilty, in a situation where it may not have been likely before, then at that stage of the sentencing the district justice should inform the accused, if he has not before, of his right to be legally represented or his right to apply for legal aid in relation to the sentence. In that case a distinction was made between the possibility and the probability of a custodial sentence being imposed. It suggests that in cases where there was a mere possibility of a custodial sentence being imposed, there was not necessarily an obligation upon the judge hearing the charges to inform the accused of his right to legal representation. However, Shanley J. commented that one only had to refer to the uncontradicted statement in the applicant's affidavit regarding Judge Kirby's question, as to whether there was any reason why he should not be sent to prison for fourteen days, to show that there was a real possibility of a prison sentence being imposed if a Community Service Order had not been made. He went on to say at p. 35:-

> "… I do not accept that there is any useful distinction to be drawn between circumstances where a District Court Judge is actually considering imposing a custodial sentence and those where such a sentence may be imposed. In all cases where a judge is empowered to impose a custodial sentence and there is a possibility that such a sentence may in fact be imposed, he should advise the person before him of his right to legal aid and legal representation."

51. In the present case nobody questioned or contradicted the assertion by counsel for the applicant that his client may be at risk of a custodial sentence and I am quite satisfied that this should have been warning enough that the applicant had a blemished record and that this meant that the risk of a custodial sentence arose and was looming over the case.

52. Counsel also referred me to the approach taken by Feeney J. In *Moore v District Judge Brady* (Unreported, High Court, Feeney J., 16th November, 2006) in which he spoke of "crystallisation" of a potential prison sentence by saying at p. 7:-

> "The court approaches this case on the facts that once it had crystallised that a potential suspended prison sentence was the potential outcome of the prosecution and in circumstances where legal aid had been requested on that date and where there was reference to a solicitor not being present, that the district justice should have had, and did have, the obligation to make further enquiries in relation to the position."

53. In Moore the applicant was also seeking an order of *certiorari* quashing the order of the first named respondent made on 8th November, 2005 refusing an application made on behalf of the applicant for legal aid and for an order pursuant to O. 84 remitting the matter back to the first named respondent. In that case the District Court Judge did consider the issue of the gravity of the offence

and the issue of damage to reputation was raised before him and formed part of his consideration.

54. On p. 13 at para. 2.10 of the unreported judgment, Feeney J. said that:-

> "It was at no time suggested to the District Judge that in considering the entitlement to legal aid that the issue of election to be tried by a jury should form part of the consideration. That was raised for the first time in this court. There is no doubt but that there are certain additional matters to be considered both legally and factually where there is an option to elect for trial by jury. Those matters are matters which must be considered as part of the exceptional circumstances which might entitle a person to legal aid. However on the facts of this case such matters were not raised notwithstanding that the Applicant/Accused was legally represented. This court is not and must not act as a Court of Appeal from the District Judge's decision to refuse legal aid. It was open to the Applicant/Accused through counsel to raise such matters if they were deemed exceptional circumstances. Indeed to some extent the elements which would require to be considered, if the issue of election had been expressly raised, formed part of the individual items raised on behalf of the Applicant/Accused to support a claim for exceptional circumstances."

55. At para. 3.1 Feeney J. went on to say:-

> "On the facts the court is satisfied that the District Justice conducted an appropriate inquiry into whether or not the Applicant was entitled to legal aid. 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 or revisit the merits of the application. On the facts there was no failure to consider the potential damage to reputation that a conviction might cause. The failure to make express reference to the issue of damage to reputation is on the facts of no import and judicial review is inappropriate."

56. He went on to point out that the issue of election by the applicant/accused had yet to occur and that it was open to the applicant to renew an application for legal aid and to highlight the circumstances, either factually or legally, which would amount to "exceptional circumstances" for the purpose of the Act of 1997. As yet the issue of the right to elect being an exceptional circumstance had never been ventilated before the District Court and the application for relief was refused. While illuminating as another case with regard to *certiorari* in respect of a refusal to grant legal aid, this *Moore* case is very different on its facts from the present case. In *Moore* the District Court Judge did embark on a very full enquiry. He did not make a pre-emptive determination by enunciating the proposition that he did not give legal aid in driving cases, nor did he erect a further criterion over and above those set out in s. 2 of the Act of 1962 and also thereby fetter the exercise of his own proper discretion.

57. In my view in the present case counsel had intimated that his client was on risk of a prison sentence and this was apparently accepted by all present and if the District Judge had any doubts about this or, if indeed the prosecution were not satisfied about this, then this premise should have been explored further. However, no such doubt was expressed.

58. It is accepted by both parties that there is no automatic entitlement to legal aid simply because a term of imprisonment is a statutory possibility. Counsel for the respondent suggests that in the present case where s. 13(2) of the Road TrafficAct 1994 provides for a term of imprisonment on conviction not exceeding six months means that there is a mere possibility of a custodial sentence being imposed. This might be so in circumstances where the applicant has an unblemished record and is the bread winner for a dependent family. That is not the situation prevailing in this case as counsel for the applicant had quite correctly pointed out that his client was impecunious, being on Social Welfare and unemployed, and it was implicit that he also had a blot on his record by Counsel informing the court that his client "may be in jeopardy of a custodial sentence if convicted". In fact public opinion has undergone a sea-change in respect of the former tolerance for drunken driving. The media now are more quick to censure people found guilty of this particular offence and there is no longer the former acquiescence and complacency towards people who drink and then choose to drive. The serious obloquy now attached to this offence adds to the situation of gravity for a person at risk on such a charge. I do not accept in the circumstances of this case, where the applicant had a blemish on his previous record, that this was anything other than a charge of a grave second offence carrying the risk of a custodial sentence on conviction.

59. Counsel for the respondent submits that there was no improper fettering of the first named respondent's discretion in that his statement that he did not give legal aid in driving cases should not be interpreted as a fixed policy when coming to consider an application for legal aid in such cases. She urged that his remarks should be interpreted as a general view that legal aid would not be granted automatically. She suggests that if the first respondent had been operating such a fixed policy as contended for by the applicant there would have been no need for him to embark on a consideration of the matter in the first instance. She submits that the first named respondent did entertain the application for legal aid and actually queried the means of the applicant. She points out that no submissions were made by the applicant's counsel regarding the consequences of a conviction for his client, nor regarding any exceptional circumstances which might arise. I do not accept these propositions. The simple and clear meaning of the pronouncement that the first named respondent did not give legal aid in driving cases, is that he meant what he said and so had made up his mind to refuse the application for legal aid. A judge is expected (and obliged by law as decided by the Supreme Court) to give reasons for his decision. The learned District Court Judge in this case gave no other reason for his decision. He did explore the means of the applicant to the extent that he said that if the applicant could afford a car, he could afford a solicitor. However this misconception on his part was cleared up by counsel informing the court of his instructions that the applicant did not own the car in question and from the context of the statement of means the court must have been well aware that the applicant, who may be in jeopardy of a custodial sentence if convicted, also was relatively impecunious. Furthermore it was clear that he was facing a grave offence of a nature that there may be technical defences available or even defences on the merits which an experienced lawyer would be able to draw to the court's attention. The tenor of the proceedings as outlined in the affidavit is that the learned District Court Judge did improperly fetter his discretion at the threshold by asserting and imposing a fourth criterion namely that "being charged in a driving case was a bar to receiving legal aid".

60. As for the suggestion that a renewed application could be made to the District Court to review again the question of legal aid in view of the seriousness of a charge in respect of drunken driving and the consequences from the point of view of a custodial sentence where the applicant has a previous conviction as indicated by his counsel when he informed the court that his client "may be in jeopardy" of a custodial sentence if convicted, it seems to me that the circumstances in which legal aid are required to be granted had already crystallised. After all, if legal representation is granted and enables the applicant to be acquitted then the question of the opprobrium and a custodial sentence are both negated. In summary, on the basis of this determination there is a finding that the first named respondent improperly fettered his own discretion and predetermined his decision and failed to embark on a proper enquiry as to the applicant's entitlement to legal aid. The court does not go further than that and does not endeavour to determine whether there was in fact an entitlement to legal aid but has indicated the criteria likely to be applicable.

61. It follows from that determination that when one looks at the reliefs which have been sought in the application herein and in respect of which leave was granted by Peart J. on 13th March, 2006, that:-

> (a) The first named respondent failed to conduct any adequate enquiry into those matters referred to in s. 2(1)(a) of the Criminal Justice (Legal Aid) Act, 1962 i.e. the means of the applicant were insufficient to enable him to obtain legal aid; and that by reason of the gravity of the charge or of exceptional circumstances it was essential in the interests of justice that he have legal aid in the preparation and conduct of his defence
>
> (b) The first named respondent gave consideration to an irrelevant factor in the exercise of his statutory duty in relation to the application for legal aid, namely, that he indicated at the threshold of the case that he did not give legal aid in driving cases and gave no other reason in his refusal to assign legal aid.
>
> (c) The first named respondent adopted a strict and irrelevant policy which fettered the exercise of his statutory discretion in relation to the application for legal aid.

62. On the basis of these reliefs it is appropriate to make an order of *certiorari* directing the respondents to bring to the High Court for the purpose of being quashed the order of the first named respondent made on 15th February, 2006 refusing application made by or on behalf of the applicant herein for legal aid pursuant to s. 2 of the Criminal Justice (Legal Aid)Act 1962. I will hear counsel as to the form of the appropriate orders to be made and as to the question of costs.