Neutral Citation Number: [2011] IEHC 64

THE HIGH COURT

JUDICIAL REVIEW

2009 818 JR

BETWEEN

STUART TIGHE, A MINOR, (APPLYING BY HIS NEXT FRIEND AND GUARDIAN ANN MARIE TIGHE)

APPLICANT

AND

JUDGE GERARD JOHN HAUGHTON AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Hanna delivered the 18th day of February, 2011

Background Facts
The applicant in this case was born on the 20th July, 1992, and was a minor at the relevant time. On the 3rd July, 2009, the applicant appeared before Dublin Children's Court, charged with one offence of threatening, abusive or insulting behaviour in a public place contrary to s. 6 of the Criminal Justice (Public Order) Act 1994, as amended. At all material times, the applicant was represented by solicitor and counsel.

The arresting Garda gave evidence of arrest, charge and caution and counsel for the applicant entered a plea of guilty. Counsel for the applicant gave a brief outline of the applicant's circumstances and the first respondent asked the applicant if he was prepared to apologise to the Garda. At that point the applicant stated "I'm guilty but I'm not saying anything to him". The first respondent stated that he would have considered applying the Probation Act 1907, but for the applicant's attitude. Counsel for the applicant applied for legal aid, stating that the applicant was not in a position to defend himself and the first respondent refused, stating that the applicant was "not at risk". I am satisfied - in reality there was no dispute on this - that in using these words the first respondent was indicating that the applicant did not face the risk of incarceration. The matter was remanded to the 25th September, 2009, for the preparation of a probation report.

The applicant sought and obtained leave to bring these judicial review proceedings by order of Peart J. made on the 27th July, 2009.

The applicant is unemployed and resides with his sister, who is single, unemployed and the parent of a child. She has been appointed as the applicant's legal guardian as the applicant's mother had difficulty controlling him. The applicant left school after the Junior Certificate and is not enrolled in any educational courses.

A number of details of the applicant's circumstances have come to light since the hearing in the Children's Court but were not put before the first respondent at the hearing. First, despite being taught in a small class, the applicant required the aid of a special needs assistant. Secondly, the applicant has previously attempted suicide and underwent a period of treatment where he was described an anti-depressant. Thirdly, he has recently been coughing up blood as a result of haemoptysis. Fourthly, the applicant is described by his solicitor and counsel as immature.

Applicant's Complaints
Mr. Rogers S.C. for the applicant, complains that the first respondent failed correctly to apply the provisions of s. 2 (1) of the Criminal Justice (Legal Aid) Act 1962, as substituted by s. 5(6) of the Criminal Justice (Miscellaneous Provisions) Act 1997, (hereafter "the Act of 1962, as amended") in that he had regard only to the fact that the applicant would be at risk of a custodial sentence and he failed to have any adequate regard to the means of the applicant and, in particular, to his age. The applicant claims that, in doing so, the first respondent acted in excess of jurisdiction and, accordingly, that the purported order is *ultra vires*. The applicant claims that, due to the exceptional circumstances of the applicant, including his age, immaturity and education, he is unable to adequately appreciate the gravity of the charge, to understand the directions of the Court as to his rights, or to follow and test the evidence tendered against him or to speak on his own behalf at sentencing. In addition, the conduct of the applicant when invited to apologise should have alerted the judge to the foregoing.

The applicant submits that the first respondent failed to apply correctly the provisions of s. 2 of the European Convention on Human Rights Act, 2003, in that he failed to interpret and apply the law, insofar as is possible, in a manner compatible with the State's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). In particular, the applicant claims that the first respondent failed to interpret s. 2 of the Act of 1962, as amended, in a manner consistent with Article 6 of the ECHR and give sufficient regard to the applicant's right; (i) to have adequate time and facilities for the presentation of his defence and to defend himself in person or through legal assistance of his own choosing; and (ii) as the applicant has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so requires.

The applicant further claims that the first respondent failed to adhere to the principles of natural and constitutional justice. In particular, the applicant submits that he had no jurisdiction to deny the applicant legal aid as this amounted to a denial of the applicant's right to be tried in due course of law in accordance with Article 38.1.1° of the Constitution, this right including the application of basic principles of justice which are inherent in the proper course of the exercise of the judicial function and accordingly, the purported order is *ultra vires*.

Second-named Respondent's Submissions
For the second respondent, Mr. Kieran Kelly submits that the provisions of the Act of 1962, as amended and the European Convention on Human Rights Act 2003, have been properly applied and that no infringement of his right to be tried in due course of law in accordance with Article 38 of the Constitution has occurred.

The second respondent claims that the first respondent considered and refused the application for legal aid in accordance with the Act of 1962, as amended. It is also claimed that the first respondent was of the view first that s. 2 of the Act of 1962, as amended, does not provide an unrestricted entitlement to free legal aid and secondly that the case was not of sufficient gravity and that there existed no other exceptional circumstances to warrant the granting of free legal aid under the Act.

The second respondent contends that the applicant was represented throughout the trial and that the issue in the case at hand relates to the solicitor's fees not being paid under the statutory scheme rather than the applicant being denied representation. The second respondent further submits that there is nothing in the applicant's affidavit or pleadings to suggest that he will be left without representation at the sentencing hearing and that it will be open to a District Judge at any future sentence hearing to revisit the question of legal aid should he deem it necessary.

The Law
Section 2(1) of the Act of 1962, as amended, provides that:-

> *"If it appears to the District Court before whish a person is charged with an offence or an alternative court within the meaning of s. 5 of the criminal Justice (Miscellaneous Provisions) Act 1997, before which a person is appearing (a) that the means of a 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 legal aid (District Court) certificate) and thereupon he shall be entitled to such aid and to have a solicitor and (where he is charged with murder and the 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."*

The section is conjunctive; in order to qualify for legal aid, first, the accused must have insufficient means to obtain legal aid, and, secondly, the charge must be sufficiently grave or there must exist exceptional circumstances.

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 further held that where an accused faces a serious charge and requires the assistance of a qualified lawyer in the preparation and conduct of a defence, and the accused is unable to pay for that assistance, the accused should be offered the opportunity of obtaining such assistance at the expense of the State.

O'Higgins C.J. stated 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."*

O'Higgins C.J. went on to state at p. 350:-

> *"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… requires that in such circumstances the person charged must be afforded the opportunity of being represented.*
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> *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."*

Griffin J. at p. 358, emphasised that, although the grant of a legal aid certificate becomes mandatory once conditions required by s. 2 of the Act of 1962, 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 Judge 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 considerations which should be taken into account by a District Judge in deciding whether or not to grant legal aid have been dealt with by McMahon J. in *O'Neill v. Butler* [1979] I.L.R.M. 243 where he 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. The circumstances contemplated by the Act would include the personal circumstances of the defendant such as the nature of his employment which might render a conviction more serious than it would otherwise be and also circumstances which might affect the defendant's ability to understand the charges against him and conduct his defence. 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."*

The Supreme Court recently confirmed in *Carmody v. Minister for Justice* [2009] I.E.S.C. 71(Unreported, Supreme Court, 23rd October, 2009), that the right to criminal aid is constitutional in nature, but may be qualified by the nature of the charge, Murray C.J. stated at pp. 20-21:-

> *"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 that right may be affected by the gravity and complexity of the charge."*

The court held that the Act of 1962, as amended, reflected the requirements of constitutional justice and recapitulated that the right may depend to a certain extent on the gravity of the charge, Murray C.J. stated at p. 24:-

> *"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.*
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> *These criteria are very close to if not substantially the same as the criteria set out in s. 2(1) of the Act for the grant of legal aid in the District Court . . ."*

In *D.P.P. (Kearns) v. Maher* [2004] 3 I.R. 512 the High Court (Smyth J.) upheld a decision by a District Judge to assign a solicitor on sentence only where the District Judge, upon inquiring into the previous convictions of the accused, felt that a custodial sentence was a possibility. Smyth J. stated, in relation to s. 2 of the Act of 1962, as amended:-

> *"The section does not provide an entitlement to legal aid in all circumstances. Nor do the decided cases determine its application irrespective of the nature of the charge, even to indigent defendants, but only when the gravity of the offence or exceptional circumstances appear to warrant such aid."* (See pages 516-517).

In *Costigan v. Brady* [2004] I.E.H.C. 16, (Unreported, High Court, Quirke J., 6th February, 2004), refused an application for judicial review of a District Judge's decision not to grant legal aid to the accused. It was accepted that the accused in that case did not have sufficient means to enable her to obtain legal representation. Quirke J. said at p. 5:-

> *"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. also held at pp. 6-7:-

> *"There is no doubt that a District Judge to whom an application is made for certificate for legal aid pursuant to the provisions of s. 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.*
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> *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.*
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> *In the instant case I am quite satisfied on the evidence that District Judge Brady conducted such an inquiry and whilst it is likely that it appeared to him that Ms. Costigan's means were insufficient to enable her to retain professional legal advisors he was clearly satisfied that the gravity of the charge which Ms. Costigan faced did not render it essential in the interests of justice that she should have legal aid and he was further satisfied that no exceptional circumstances existed which made it essential in the interests of justice that she should have such legal aid and accordingly he refused to grant the certificate which was sought."*

In refusing to grant the relief sought, Quirke J. stated at p. 8:-

> *"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.*
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> *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 issues of means, gravity of offence and 'exceptional circumstances'."* (See page 8).

In *Joyce v. Brady & D.P.P.* [2007] I.E.H.C. 149, (Unreported, High Court, Feeney J., 24th April, 2007), 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…*

He 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."*

Turning to the ECHR, Article 6 of the ECHR protects the right to a fair trial. Article 6(3) provides:-

> *"Everyone charged with a criminal offence has the following minimum rights:*
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> *. . .*
>
> *(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 European Convention on Human Rights Act 2003 provides the following:-

> *"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."*

The applicant claims that the first respondent failed to correctly apply the above provision in that he failed to interpret s. 2 of the Act of 1962, as amended, in a manner consistent with Article 6 of the ECHR. The respondent submits that although Article 6 does envisage legal representation at all stages of a criminal trial, it does not provide an absolute right to free legal aid.

In *Poitrimil v. France* (1993) E.H.R.R. 130 it was stated at para. 34:-

> *"Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial."*

However, as the Supreme Court recently pointed out in *Carmody*, (see above) the protections afforded an applicant for free legal aid under Article 6 must be viewed in light of Ireland's derogation, Murray C.J. stated at p. 16:-

> *"When Ireland ratified the European Convention on Human Rights in February 1953 the State must have foreseen that the absence of legal aid for poor persons in nearly all cases might place it in breach of Article 6 of the Convention on the right to a fair trial because, as regards that Article, it inserted in its instrument of ratification a reservation pursuant to Article 15 of the Convention that Ireland did not 'interpret Article 6.3.c of the Convention as requiring the provision of free legal assistance to any wider extent than is now provided in Ireland.':*
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> *. . .*
>
> *Curiously that derogation appears to have remained in place to this very day and even more curious it was not relied upon by the Respondents when addressing the appellant's claim for a declaration of incompatibility with the Convention as regards s. 2(1) of the Act of 1962*

The Court went on to address the public policy reasons for restricting the scope of legal aid and stated at p. 31:

> *"Undoubtedly a reason why the State would limit the provision of legal aid, as it has sought to generally in the Act of 1962, to that which is required in the essential interests of justice, is the burden which the public purse would otherwise have to bear if the scheme had too broad a criteria for the grant of legal aid. In this context it must be said that a Court when considering whether to grant legal aid usually has little more to rely on other than the required form which has been filled out by the defendant/applicant. A Court, such as the District Court, is only rarely in a position to go behind what is stated in the application form or in an uncontradicted statement made in court. The D.P.P. understandably, is given no particular role in relation to the grant or refusal of legal aid. A Court is not an investigatory body but the State has investigatory means at its disposal. Rarely does the State raise any objection at the time of the initial application for legal aid, or subsequently, concerning the means of a defendant to pay for his or her own defence. That said, it is probably the situation in most such cases that the circumstances of a defendant as known by the Gardaí make it obvious that he or she is a person who cannot afford their own representation*

Decision

European Convention on Human Rights Issue
I turn, firstly, to the claim advanced in the pleadings that the refusal of the application for legal aid contravened the applicant's right to a fair hearing under Article 6 of the ECHR. I have set out above what I consider to be some of the material law on that particular issue. In the final analysis, although properly relied upon by counsel for the applicant, that case was not vigorously pressed at the hearing. In light of Ireland's reservation that Article 6.3(c) widened the extent of the free legal aid provision and the finding of the Supreme Court in *Carmody*, the impugned refusal of legal aid to the applicant is not in breach of the applicant's rights under the ECHR.

Section 2 of the Criminal Justice Act, 1962
Section 2(1) of the Act of 1962, as amended, provides for free legal aid to be granted where a District Judge is of the opinion that the accused is impecunious and, due to the seriousness of the offence or to "exceptional circumstances", such aid is essential in the interests of justice.

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.

It was held in *O'Neill v. Butler* [1997] I.L.R.M. 243, and in *Costigan v. Brady* [2004] I.E.H.C. 16 (Unreported, High Court, Quirke J., 6th February, 2004), that there is on onus on a District Judge to enquire into the existence of any exceptional circumstances where an unrepresented accused is incapable of protecting his interests. However, this is not a situation where the accused was impecunious and unrepresented at trial and unable to discharge an onus of establishing "exceptional circumstances". The issue is not that the applicant was denied legal representation or tried without access to a trained lawyer. The applicant partook in a pre-trial consultation and was represented throughout the trial by counsel instructed by a solicitor. At every step of the proceedings up to and including the adjournment for the obtaining of a probation report and the application for legal aid the applicant's counsel "fought his corner". The District Judge had before him all relevant material presented professionally on behalf of the applicant. The material gathered subsequently relating to the applicant's background and intellectual disposition can have no bearing on any scrutiny of the decision. It may, of course, loom large at a later stage.

I reject the suggestion that the judge should, in some way, have gleaned from the applicant's refusal to apologise to the garda that something was afoot which would mandate the provision of legal aid. District Judges have wide experience on a day to day basis in observing with the vast array of people who come before them. They are not behavioural psychologists. There may, perhaps, be circumstances where obviously bizarre or inappropriate behaviour by an unrepresented defendant could cause a judge to exercise his discretion and to grant legal aid. But here there was representation. There is no suggestion, even, that the judge was invited by counsel to draw any conclusion from the applicant's conduct. To impose an obligation of the sort contended for on the second respondent would, in my view, be neither appropriate nor realistic in the circumstances here obtaining.

Counsel for the applicant argues that he now faces the prospect of an adverse probation report. Be that as it may, this Court can only and does only assume that the applicant's legal and constitutional rights will be fully respected by the court during the sentencing phase. No doubt additional materials will be received by the court. Legal aid may be applied for again. It would be wholly inappropriate, on the facts of this case, for this Court to interfere on a *quia timet* basis with the future exercise of the jurisdiction of the District Court.

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.

Conclusion
The first respondent has acted within jurisdiction and has adhered to the principles of natural and constitutional justice. The provisions of the Act of 1962, as amended, and the European Convention on Human Rights Act 2003, have been properly applied. The applicant has not been denied his right to be tried in due course of law in accordance with Article 38 of the Constitution. The relief sought is denied and the matter is remitted to the District Court for sentencing.