Neutral Citation: [2015] IEHC 290

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 452JR]

BETWEEN

PENG LING

APPLICANT

AND

CIRCUIT JUDGE ALISON LINDSAY

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Kearns P. delivered on the 15th day of May, 2015

The applicant seeks an order of *certiorari* quashing the decisions of the respondent made on the 9th April, 2014, 11th April, 2014, and 30th May, 2014 convicting the applicant of the offence of driving without insurance contrary to ss.56 (1) and (3) of the Road Traffic Act, 1961 ('the 1961 Act') as amended by s.18 of the Road Traffic Act, 2006 and imposing a four year disqualification on the applicant.

Declarations are also sought that the respondent erred in law in relation to her interpretation of s.26(5)(a) of the Road Traffic Act 1961 as inserted by s.65 of the Road Traffic Act 2010 and by failing to order a consultative case stated to the Supreme Court under s.16 of the Courts of Justice Act 1947.

BACKGROUND

The applicant is a Chinese national who came to Ireland in 2001. He is the primary carer for his teenage daughter and works as a pizzeria chef in Dublin.

On the 6th December, 2011 the applicant was stopped by Garda Matthew H. Lennon at Lower Mayor Street, Dublin 1 for driving without insurance. On the 11th December, 2011 the applicant was again stopped by Garda Lennon for driving with no insurance, this time at Upper Sheriff Street, Dublin 1. The applicant was prosecuted on two charges under ss. 56 (1) and (3) of the 1961 Act as amended and on the 27th September, 2013 he pleaded guilty in respect of both charges before the District Court. The applicant was fined €100 and disqualified from driving for a period of forty years in respect of the first offence, while the District Judge marked the second offence as "taken into consideration".

The applicant appealed against the severity of the penalty imposed by the District Court and the matter was heard by the respondent at Dublin Circuit Court on the 9th April, 2014. The respondent reduced the driving ban from forty to four years and imposed a €100 fine. The Circuit Court judge indicated that the disqualification was mandatory and was imposed in respect of the 6th December offence by reference to section 26(5)(a) of the 1961 Act as amended.

The matter was re-entered on the 11th April, 2014 when it was contended on behalf of the applicant that the respondent had a discretion not to convict him for one of the offences and that, consequently, the mandatory driving ban would not apply. The respondent indicated that while she held some sympathy for the applicant, section 26(5)(a) was a mandatory provision and she refused to vary her order.

The matter came before the respondent again on the 12th May, 2014 and both parties were directed to file written submissions in advance of a further hearing on the 30th May, 2014. At that hearing the respondent indicated that she had read the submissions and she afforded counsel for the applicant the opportunity to make further oral submissions. Counsel on behalf of the applicant proceeded to make submissions in relation to the correct interpretation of the statute and the possibility of treating both convictions conjointly. It was submitted that the court was not *functus officio* on that date and submissions were made in relation to having a case stated pursuant to s.16 of the Courts of Justice Act, 1947.

The respondent issued an *ex tempore* ruling in which she affirmed the previous orders of the 9th and 11th April, 2014. The respondent declined to refer a consultative case stated pursuant to s.16 of the Courts of Justice Act, 1947. The learned Circuit Court judge stated that the statutory provision was clear and that the penalty was mandatory.

Leave to apply for the reliefs sought by way of judicial review was granted by Baker J. on 28th July, 2014.

RELEVANT STATUTORY PROVISIONS

Section 26(5) of the Road Traffic Act 1961 as inserted by s.65 of the Road Traffic Act 2010 states as follows –

> *"(5) (a) Subject to paragraph (b), the period of disqualification specified in a consequential disqualification order shall, where the person to whom the order relates is convicted of an offence under section 52 or 53 tried summarily or under section 56, be not less than 2 years in the case of a first offence under the section concerned and not less than 4 years in the case of a second or any subsequent offence under the same section committed within the period of 3 years from the date of the commission of the previous offence or, in the case of more than one such offence, the last such offence.*
>
> *(b) Where a person is convicted of an offence under section 52 tried summarily or under section 56, the court may, in the case of a first offence under the section concerned, where it is satisfied that a special reason (which it shall specify when making its order) has been proved by the convicted person to exist in his or her particular case to justify such a course—*

(i) decline to make a consequential disqualification order, or

(ii) specify a period of disqualification in the consequential disqualification order of less than 1 year."

SCOPE OF JUDICIAL REVIEW
Counsel for the Director of Public Prosecutions submits that even if the respondent erred in her interpretation of the relevant statutory provisions, which is not accepted, such an error was one within jurisdiction and judicial review does not lie. In this regard, counsel referred the Court to the decision in *State (Daly) v. Ruane* [1988] ILRM 117 wherein O'Hanlon J. stated:–

> *"Relief by way of certiorari is only appropriate in a limited category of cases. Generally speaking it involves the applicant in showing that the inferior Court or tribunal acted without jurisdiction, or in excess of jurisdiction, or in disregard of fair procedures, so that the applicant's rights to natural or constitutional justice were violated…*
>
> *…What must be stressed is that the certiorari procedure cannot be utilised to convert the High Court into a court of appeal from all decisions of the District Court, with the court being required to embark upon a re-examination of the evidence given before the lower court and a re-assessment of all submissions made during the course of the hearings in the lower court."*

Counsel for the applicant made lengthy submissions on this point. It was stated that judicial review is appropriate as there is no alternative remedy available to the applicant and that if the applicant's submissions are correct, the error of the respondent is one which goes to jurisdiction. The Court was referred to the principles set out in *State (Holland) v. Kennedy* [1977] IR 193 and to Hogan and Morgan's *Administrative Law in Ireland* textbook wherein the authors state:–

> *"Traditionally not every error committed by an administrative body or lower court will affect the jurisdiction of that body so as to invalidate the resulting decision. The question of which errors are jurisdictional is an intractable one and is linked to questions of statutory interpretation and judicial policies."*

The authors go on to state that:–

> *"No clear picture emerges from a consideration of the modern Irish cases, save that there is a trend towards treating all decisive errors of law as jurisdictional."*

The Court accepts the submissions of the applicant on this preliminary issue and finds that, in all the circumstances of this case, judicial review is an appropriate remedy as the grounds of challenge relate to the jurisdiction of the Circuit Court judge.

FAILURE TO REFER A CASE STATED TO THE SUPREME COURT
Section 16 of the Courts of Justice Act, 1947 provides as follows:–

> *"A Circuit Judge may, if an application in that behalf is made by any party to any matter (other than a re-hearing, under section 196 of the Income Tax Act, 1918, of any such appeal as is referred to in the said section) pending before him, refer, on such terms as to costs or otherwise as he thinks fit, any question of law arising in such matter to the Supreme Court by way of case stated for the determination of the Supreme Court and may adjourn the pronouncement of his judgment or order in the matter pending the determination of such case stated."*

Counsel for the applicant accepts that the Supreme Court in *McKenna v. Deery* [1998] 1 I.R. 62 acknowledged that the Superior Courts should be slow to interfere with the discretion of a Circuit Court judge to state a case. However, it is submitted that the court in *Deery* held that such intervention is appropriate where there are "*substantial weighty and solid grounds calling for a decision by the Supreme Court on the question or questions of law the subject matter if the application by one of the parties to the proceedings*".

In the present case it is submitted that there was conflicting superior court jurisprudence before the respondent judge as well as a significant issue of statutory interpretation which had serious consequences for the applicant. In those circumstances it is submitted that the respondent should have referred a case stated and erred by failing to do so.

The notice party submits that the power to state a case is discretionary and that the respondent, having received written submissions and heard further oral submissions, felt she was in a position to properly interpret s.26(5) herself. Further, it is submitted that no application to state a case was made until after the respondent had made her determination on the 9th April, 2014. In those circumstances, it is argued that the applicant cannot succeed on this ground.

In relation to this ground of challenge, the Court accepts the submissions of the Director of Public Prosecutions that the power to state a case is a discretionary one. In the present case the respondent quite properly directed the preparation of written submissions on the issue of statutory interpretation and also allowed further oral submissions in order to assist her in arriving at a carefully considered decision. The learned Circuit Court judge was entitled to conduct the case in this manner and did not err by electing to decide the issue herself rather than stating a case pursuant to s.16 of the Courts of Justice Act, 1947. In so finding, the Court has had regard to the decision of the Supreme Court in *McKenna v. Deery* [1988] 1 I.R. 62 where it was acknowledged that the Superior Courts should be slow to interfere with a Circuit Court judge's discretion to state a case. It is also of relevance that the application to have a case stated was made quite late in the proceedings and only after the learned judge had reached a decision.

SUBMISSIONS OF THE APPLICANT

Statutory Interpretation
The applicant states that the hearing conducted by the respondent was entirely fair and accepts that he was guilty of the offences charged. The matter in dispute primarily relates to the respondent's interpretation of the relevant statutory provisions. It is submitted that in imposing a four year driving disqualification the respondent erred in law and fettered her sentencing discretion.

Counsel on behalf of the applicant submits that the respondent judge indicated her view that a four year disqualification of the applicant was mandatory pursuant to s.26(5)(a) because the applicant was convicted of two s.56 offences. It is submitted however that s.26(5)(a) does not apply to the applicant because, while he was convicted of two charges, the convictions under s.56 came into being simultaneously on foot of the respondent's order. Therefore, it is submitted that there was no 'second' or 'subsequent'

offence within the meaning of the section.

It is further submitted that when the matter came before the respondent by way of District Court appeal, the District Court convictions had been stayed and were therefore no longer live, as a result of Order 101, rule 6 of the District Court Rules which states that an appeal to the Circuit Court shall operate as a stay of execution in criminal proceedings. Therefore, it is contended on behalf of the applicant that the respondent was entitled to treat both convictions conjointly and exercise her discretion as outlined under s.26(5)(b) of the 1961 Act as amended.

The applicant contends that the proper interpretation of the relevant statutory provision is that a 'second' or 'subsequent' offence for the purposes of attracting a mandatory four year disqualification means an offence committed after a previous *conviction* for an offence under the section and not only after the date of commission of such an offence. The applicant in the present case had no relevant or any previous convictions prior to the 27th September, 2013 and therefore, the mandatory disqualification under s.26(5)(a) was not engaged. In this regard, it is submitted that the second line of the section clearly states that it relates to a person who is "*convicted*".

It is submitted that the interpretation of the section as advanced by the respondent would lead to an absurdity, whereby a person stopped by gardaí on the same date within an interval of minutes or hours would be subject to a mandatory four year ban because two offences had been committed. It is submitted that this could not be the legislative intention and that a previous conviction is what is relevant to section 26(5)(a).

Counsel for the applicant submits that criminal statutes, and in particular those dealing with sanctions and restrictions on liberty, must be clear and certain and that any ambiguity in the wording should be resolved in favour of the least restrictive and draconian construction. It is submitted that the provision in question relates to a fettering of a sentencing judge's discretion and that in the absence of any definition or direction as to what is meant by the words 'second' or 'subsequent', the provision should be interpreted reasonably and fairly and in a manner which least restricts the sentencing judge's discretion.

During the hearing before the respondent, the notice party relied on the Supreme Court decision of *Attorney General (Ó Muireadhaigh) v. Boles* [1963] 1 I.R. 431. The applicant submits that this decision is entirely distinguishable and irrelevant to the present case. In *Boles*, the defendant committed two offences under s.2 of the Intoxicating Liquor Act, 1927 which concerned keeping a premises open after hours. One offence was committed on the 10th July, 1960 while another took place on 7th August 1960. He was convicted of both offences on 13th September 1960. Section 2 of the 1927 Act states as follows:–

> *"Every person who shall sell or expose for sale any intoxicating liquor or open or keep open any premises for the gale of intoxicating liquor or permit any intoxicating liquor to be consumed on licensed premises in contravention of this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof, in the case of a first offence, to a fine not exceeding twenty pounds or, in the case of a second or any subsequent offence, to a fine not exceeding forty pounds."*

Section 25(4) of the 1927 relates to the endorsement of a conviction on the licence and states:–

> *"(4) Notwithstanding anything contained in sub-section of this section, where a person is convicted in relation to any premises in respect of which he holds a licence for the sale of intoxicating liquor by retail of an offence to which this Part of this Act applies and the conviction is the first conviction of that person in relation to those premises of an offence to which this Part of this Act applies, the conviction shall not be recorded on the licence."*

The defendant appealed to the Circuit Court. The issue before the court was whether the conviction in respect of the August offence could be regarded as a 'first conviction' in circumstances where the order convicting the defendant for the 10th July offence was made on the same date. The Circuit Court judge stated a case to the Supreme Court on this point. It was held by Kingsmill Moore J. that:–

> *"Unless some strained or unusual meaning is to be given to the words of subs. 4 it is perfectly clear that the conviction on the 13th September of the offence committed in August was not the first conviction of Francis Boles in relation to his premises of an offence to which 'this Part of this Act applies', for earlier in the same day he had been convicted of an identical offence in respect of the identical premises, which had taken place in July."*

He went on to hold that:-

> *"Sect. 25, sub-s. 4, is unambiguous and was, I think, deliberately framed so as to exclude the possibility of ambiguity. A 'first conviction' can have no two meanings. Every conviction except a first conviction must be recorded. The conviction in this case of the offence in July was a first conviction and so, correctly, was not recorded. The subsequent conviction in respect of the offence in August was not a first conviction and must be recorded. That the two convictions were made on the same day is immaterial."*

Counsel on behalf of the applicant submits that it is unsurprising that the Supreme Court had no difficulty in rejecting the defence argument in *Boles*. However, it is submitted that the facts of *Boles* are entirely distinguishable from the present case and that the Director of Public Prosecution's reliance on *Boles* is misplaced. In *Boles*, the defendant was seeking to benefit from an exemption to the rule that convictions were required to be recorded on his liquor licence. The applicant contends that the decision of the High Court in *Attorney General (at the suit of Superintendent McConville) v. Brannigan* [1962] 1 I.R. 337 is more relevant to the facts of the present case.

It is submitted that the critical difference between *Boles* and *Brannigan* is that the legislation in *Boles* referred to a 'first conviction' whereas *Brannigan*, like the present case, related to "second or subsequent offences" and the imposition of harsher penalties for such offences. The applicant submits that while the meaning of a 'first conviction' as considered in *Boles* is unambiguous, the issue in the present case is not and any ambiguity should be resolved in favour of the applicant.

In *Brannigan* the High Court considered whether the conviction of the accused on the 3rd October, 1957 for two separate offences which occurred on the 28th April, 1957 and 1st May, 1957 should be considered together as a singular offence for the purposes of s.28(1) of the Transport Act 1958, which states as follows:–

> *"Where a person is convicted of an offence under section 9 of the Road Transport Act, 1933, the fine to be imposed by the court in respect of a second offence committed by him within five years after the commission of the first shall be*

> *not less than ten pounds and the fine in respect of each subsequent offence committed by him within any period of five years shall be not less than twice the minimum fine prescribed by this section in respect of the immediately preceding offence, subject to a maximum fine of three hundred and twenty pounds in lieu of the maximum fine specified in the said section 9."*

Teevan J. held that the words, "second offence" and "subsequent offence", in s.28, subs. 1, of the Transport Act, 1958, mean an offence committed after conviction or convictions under s.9 of the Road Transport Act, 1933, for similar offence or offences. Teevan J. made reference to a relevant decision of Lord Alverstone in *South Shields Licensing Justice Case* [1911] 2 KB 1 which was concerned with a decision of licensing justices on the application for the annual renewal of a liquor licence. They held that as the applicant had been convicted, in the course of the year, of two offences, his licence was forfeit by reason of s.3 of the Licensing Act, 1872, which provided that for a second offence of the kind the licensee had been convicted of, the offender, in addition to other prescribed penalties, should be disqualified for any term not exceeding five years from holding any licence for the sale of intoxicating liquors. The applicant had been convicted at the same time of two offences and the question was whether those two offences were to be taken as first and second offences. Lord Alverstone stated that:–

> *"The enactment aims at a persistent breach of the law after a previous conviction, and though the section does not in terms say that the offence to be punished with the heavier penalty must be one committed after a previous conviction for a similar offence, it is not reasonable to say that where a person commits three offences under the section on the same day a different penalty attaches to each of those offences. Apart therefore from the assistance which is to be derived from the weighty authority of 2 Co. Inst., p. 468, note 5, I have come to the conclusion that in this particular part of the section a 'second offence' means an offence committed after a previous conviction for an offence under the section."*

Applying this reasoning to the case before him, Teevan J. held that:–

> *"…the offences of 28th April, 1967, and 1st May, 1957, should not be reckoned as first and second offences in relation to any further offence committed thereafter but before the 3rd October, 1957 (the date of the convictions for the said offences). But in relation to any further offences committed after the latter date they come within the dictum I have just isolated from the last passage quoted from Lord Alverstone. A further offence committed after the 3rd October, 1957, will be a third offence —an offence committed after two convictions. Until the 3rd October, 1957, they should be treated conjointly: thereafter, that is, in relation to offences committed thereafter, they take their separate places in the series of previous offences, for such purposes as this case is concerned with."*

It is submitted on behalf of the applicant that, similar to the approach adopted in *Brannigan*, the offences of the 6th December, 2011 and 11th December, 2011 should be treated conjointly up until the date of conviction, *i.e.* 27th September, 2013. Thereafter, any offence committed by the applicant under the same section should be treated as a third offence attracting the relevant mandatory penalty. As the applicant had no previous convictions on the 27th September and as both offences should be treated conjointly, he had not committed a 'second' or 'subsequent' offence which engaged the mandatory provisions of section 26(5)(a).

Counsel for the applicant submits that the operation and statutory scheme of suspended sentences provides further guidance as to the parliamentary intention. It is submitted that when a suspended sentence is imposed, according to s.99(9) of the Criminal Justice Act, 2006, the triggering offence must occur after the imposition of the suspended sentence in order to avoid harsh scenarios where the person benefiting from the suspended sentence faces potential imprisonment as a result of past behaviour.

Further reliance is placed on a decision of the Supreme Court of Canada in *R. v. Skolnick* [1982] 2 S.C.R. 37 wherein it was stated:–

> *"Where two offences arising out of the same incident are tried together and convictions are entered on both after trial, they are to be treated as one for the purpose of determining whether a severer penalty applies, either because of a previous conviction or because of a subsequent conviction…The rule operates even where two offences arising out of separate incidents are tried together and convictions are entered at the same time."*

It is submitted that the interpretation contended for by the applicant herein will not inhibit the discretion of a sentencing judge to impose a more severe penalty where the circumstances of a particular case so require. Rather, it will simply allow deserving and repentant convicted persons to escape the automated sentencing parameters of our road traffic legislation. As the applicant in the present case had no previous convictions under the relevant section, the mandatory requirements of s.26(5)(a) were not engaged and the sentencing judge therefore erred and fettered her discretion. As the applicant had no previous convictions, the Circuit Court judge retained a discretion not to impose a disqualification order if there is a special reason, as per section 26(5)(b). If there is no special reason, then the appropriate mandatory minimum disqualification order is two years.

Error on the face of the record
The applicant submits that there are two errors on the face of the Circuit Court orders of the 9th April and 11th April, 2014 which warrant the granting of *certiorari*.

The first error is that the four year disqualification was imposed in relation to the earlier offence in time *i.e.* that committed on the 6th December, 2011. As s.26(5)(a) is to be imposed in respect of a second conviction, this is a clear error on the face of the record. Secondly, there is no reference on the court orders to the four year disqualification being imposed as mandated by s.26(5)(a) and the orders therefore fail to show jurisdiction on their face.

The applicant submits that the respondent was invited to amend the orders using the slip rule so as to record the four year disqualification as being in respect of the second conviction and imposed pursuant to section 26(5)(a). However, this was opposed by the notice party and the errors remain.

In relation to the applicant's contention that there is an error on the face of the record because the four year disqualification is recorded on the first offence in time rather than the second and/or because s.26(5) is not expressly cited as the basis for the disqualification, the Director of Public Prosecutions submits that the statute does not preclude a longer disqualification than the mandatory minimum two or four years stated in respect of either of the convictions.

The applicant pleaded guilty to two charges of driving with no insurance and a four year disqualification automatically ensued. The fact that the respondent recorded the four year disqualification on the first offence in time did not cause her to exceed her jurisdiction as it was open to the judge to impose a four year disqualification in respect of the first offence even if it had been the only offence before her. Therefore, it is submitted that there has been no injustice caused and there is no valid basis for complaint.

It is further submitted that even if the disqualification order merited an order of *certiorari*, which is denied, it does not follow that the conviction and penalty imposed on the 9th April should also be quashed. In this regard, counsel for the Director refers the Court to the decision of Walsh J. in *Conroy v. Attorney General* [1965] 1 I.R. 411 which states that disqualification cannot be regarded as a punishment, but rather is a finding of unfitness. Therefore, the conviction and penalty should remain even if the disqualification order were to be quashed.

SUBMISSIONS OF THE NOTICE PARTY

Statutory Interpretation
Counsel on behalf of the Director of Public Prosecutions submits that the rules for the proper construction of statutes as set out by the Supreme Court in *Howard v. Commissioner for Public Works* [1994] 1 I.R. 101 have been followed by that court in a number of cases since. In *Minister for Justice v. Dundon* [2005] 1 I.R. 261 Denham J. (as she then was) stated as follows:-

> *"The rules for the construction of statutes are well established. In Howard v. Commissioners of Public Works [1994] 1 I.R. 101 at p. 151, Blayney J. referred to the general principles to be applied in the interpretation of statutes and cited Cross on Statute Law (1971) (7th ed.) at p. 64:-*
>
> > *'The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver. "The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is material to enquire what is the subject matter with respect to which they are used and the object in view". [Per Lord Blackburn in Direct United States Cable Co. v. Anglo - American Telegraph Co.(1877) 2 App. Cas. 394 at p. 412].'*
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> *I have expressed my view before in Howard v. Commissioners of Public Works [1994] 1 I.R. 101, at p. 162, that:-*
>
> > *'Statutes should be construed according to the intention expressed in the legislation. The words used in the statute best declare the intent of the Act. Where the language of the statute is clear we must give effect to it, applying the basic meaning of the words.'*
>
> *In Cross on Statutory Interpretation, (3rd. ed.), at p. 40, interpretative aids are given as follows:-*
>
> > *'(i) In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase.*
> >
> > *(ii) 'Then [in case of doubt] rules of construction are relied on. They are not rules in the ordinary sense of having some binding force. They are our servants, not our masters. They are aids to construction, presumptions or pointers. Not infrequently one "rule" points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular "rule".*
> >
> > *(iii) It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond that you must not go.'"*

It is submitted that in the present case the phrase in issue is "*any subsequent offence under the same section committed within the period of 3 years from the date of the commission of the previous offence*" as it appears in section 26(5)(a). The notice party contends that, applying the principles set out in *Howard*, the phrase should be interpreted to mean exactly what it says – *i.e.*, a second or subsequent offence committed within the period of three years from the date of the commission of the previous offence attracts the mandatory disqualification. Contrary to what the applicant contends, the provision does not refer to a previous 'conviction' but, rather, it expressly refers to the date of 'commission'.

Counsel refers the Court to the decision of *Damache v. D.P.P.* [2012] 2 I.R. 266 where the Supreme Court accepted the reasoning of the Court of Criminal Appeal in *People (D.P.P.) v. Birney & Ors*. [2007] 1 I.R. 337 where that court declined to read additional words into a statute. Delivering judgment, Hardiman J. stated that:–

> *"For the applicant's contention to be correct, it would be necessary to read into the words of the statute a proviso that the Superintendent concerned should not be one involved in the particular investigation. This court can see no basis for so doing."*

In relation to the applicant's reliance on the *Brannigan* decision, the notice party contrasts this decision with the case of *Attorney General (Ó Muireadhaigh) v. Boles* [1963] 1 I.R. 431, which it is submitted supersedes the High Court ruling in *Brannigan*.

In Boles, Kingsmill Moore J. teased out the problem in the following manner:–

> *"It was, however, strenuously argued that 'first conviction' must be interpreted as meaning 'conviction of any offence committed at a time before any conviction had taken place in respect of an earlier offence'; and that, where a person was convicted of an offence after a prior conviction, the second conviction ranked as a first conviction unless the second offence had been committed after the actual conviction of the first offence."*

After considering the decision in the *South Shields Licensing Justices* case which was relied upon by the applicant in Boles, Kingsmill Moore J. went on to state:–

> *"It is easy to understand and sympathise with the beneficial construction favoured by Lord Coke and Lord Alverstone. A man, like a dog, may be allowed one bite before a heavy penalty is incurred. Indeed, until after his first conviction the offender may not have been aware that he had committed any offence. A scale of increasing penalties is particularly*

suitable to meet the case where the penalty provided on conviction of the earlier offence or offences has proved insufficient. The alternative construction that 'second offence' means 'an offence committed after an earlier offence has been committed' would often involve an investigation into two offences occurring at widely different times before the larger penalty was inflicted. Mr. MacBride urged on us all these considerations in favour of a beneficial construction of s.25, and, if the wording of the section fairly admitted of such a construction, I should be disposed to accede to his argument. In the type of wording considered by Lord Coke and Lord Alverstone, 'second, third, or subsequent offence' may fairly be regarded as ambiguous—second to what? Subsequent to what? An offence which has merely been committed or an offence which has been the subject of conviction?

Sect. 25, sub-s. 4, is unambiguous and was, I think, deliberately framed so as to exclude the possibility of ambiguity. A 'first conviction' can have no two meanings. Every conviction except a first conviction must be recorded. The conviction in this case of the offence in July was a first conviction and so, correctly, was not recorded. The subsequent conviction in respect of the offence in August was not a first conviction and must be recorded. That the two convictions were made on the same day is immaterial."

Counsel for the Director of Public Prosecutions also referred the Court to the recent *obiter dicta* comments of Finlay Geoghegan J. in the case of *People (DPP) v. Geraghty* [2014] IECA 2 where the Court of Appeal considered the consecutive sentencing provisions in the Misuse of Drugs Acts for two s.15A offences. The appellant in that case had committed two offences within a few months of each other but had not been convicted of the first offence by the time he committed the second offence. Finlay Geoghegan J. noted at para. 25:–

"Section 27(3E) then provides that the provisions of s. 27(3C) and s. 27(3D) 'apply and have effect only in relation to [an adult] convicted of a first offence under s. 15A.' Section 27(3F) then provides that where an adult

'(a) is convicted of a second or subsequent offence under section 15A or 15B of this Act, or

(b) is convicted of a first offence under one of those sections and has been convicted under the other of those sections, the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.'

It is quite clear from the actual language of s. 27(3F) ("…convicted of a first offence…") that the entire context of these provisions is that the mandatory ten year imprisonment applies only where the accused has previously been convicted of either a s.15A (or, for that matter, a s. 15B) offence prior to the commission of the second s. 15A (or, as the case may be, s. 15B) offence. This is underscored by the use of similar language ("….in relation to a person convicted of a first offence….") in the saving clause provisions of s. 27(3E). The entire object of this provision is to deter a further breach of the law after an earlier conviction."

It is submitted that insofar as this *obiter* interpretation focuses on 'conviction' it is entirely consistent with the specific terminology used by the legislature in section 27 of the Misuse of Drugs Acts and thus it fully accords with the principles outlined in *Howard*. It is submitted that *Boles*, on the other hand, represents a binding Supreme Court authority and must be preferred to *Brannigan*. In any event, it is submitted that section 26(5) of the 1961 Act expressly refers to the date of 'commission' rather than the date of 'conviction'.

Counsel on behalf of the Director submits that the applicant's contention that there was no "second or subsequent" conviction by reason of the fact that the second offence was marked as 'taken into consideration' is untenable and can be readily rejected. The applicant pleaded guilty to the two offences in the District Court and his Circuit Court appeal related only to the penalty imposed rather than the validity of either conviction.

DISCUSSION

The Court has carefully considered the submissions of both parties in relation to the correct interpretation of s.26(5)(a) and is satisfied that each reference to an 'offence' throughout the section must be interpreted as meaning an offence for which a person has already been convicted.

The provision states that the period of disqualification "*shall…be not less than 2 years in the case of a first offence*". Obviously, as the provision relates to sentencing, this is an offence for which the person has been convicted. The provision goes on to state "*…and not less than 4 years in the case of a second or subsequent offence under the same section committed within the period of 3 years from the date of commission of the previous offence…*". While the provision expressly refers to the date of commission, reading the section as a whole, this must be taken to mean the date of commission of an offence for which a person has already been convicted. That is to say, the mandatory 4 year penalty only applies where a person is convicted of a second or subsequent offence after having already been convicted of the first offence. The reference to the date of commission is intended to fix a time limit within which a conviction for a second or subsequent offence attracts the mandatory penalty. If a second or subsequent offence is committed *outside and after* a three year period from the date of commission of the previous offence, for which a person has been convicted, then the mandatory provisions of the section do not apply.

If the notice party is correct, a situation could arise where a person is convicted of a second offence in time and subject to the mandatory ban, only to be acquitted of the first in time alleged offence at a later date. This could not have been what was intended by the legislature.

The particular difficulty which arises in the present case is that, even though the offences were committed on different dates, namely the 6th and 11th December, the applicant was convicted of both offences on the same date. So the question for the sentencing judge in imposing a disqualification order was - is there both a first offence and a separate second or subsequent offence which must attract the mandatory penalty under section 26(5)(a)? Counsel for the Director relies on the case of *Boles* as authority for the proposition that it is immaterial that the convictions for both offences were entered on the same date. The applicant however contends that *Boles* is distinguishable and irrelevant in the present proceedings and that the decision in *Brannigan* is applicable. In that case Teevan J. held that the two offences, while committed on different dates, should not be regarded as 'first' and 'second' offences until after the date of conviction. Until that date, they should be treated conjointly. Thereafter, the two offences take their separate places in the series of previous offences so that another offence under the relevant section is to be regarded as a 'third offence' and attracts the penalty as set out.

The Court does not accept that the *Boles* decision is irrelevant to the present proceedings. It is a Supreme Court decision which considers the consequences where a person is convicted on the same date of two separate offences which were committed on

different dates. The Supreme Court held that the first offence in time should be regarded as a 'first offence' under the relevant section while the second offence in time must be regarded as a 'second offence' and it is immaterial that both convictions were entered on the same day. The 'second' offence in that case was therefore endorsed on the defendant's liquor licence despite being entered on the same date as the first offence. *Boles* was decided after the decision in *Brannigan* and in my view it must be preferred to the decision of the High Court in *Branningan*. Applying this reasoning to the present case, the offence of 6th December is a first offence under the section and the offence of 11th December is a second offence, thereby attracting the mandatory four year disqualification. The applicant pleaded guilty to both offences and has not challenged the validity of either conviction. It is immaterial that the two convictions were entered simultaneously.

To otherwise hold that, merely because the two convictions were entered on the same date it follows that there was no 'previous' conviction and thereby no 'second' conviction, and the applicant can therefore escape the mandatory requirements of the section, would give rise to obvious difficulties which could not have been intended by the legislature. For example, if another person had been stopped for driving with no insurance in one Garda District on the 6th December, 2011 and then stopped for the same offence in a different Garda District on the 11th December, 2011, they could subsequently be convicted of the two offences in different courts on different dates. Such a person, on conviction for the second offence, would be subject to the mandatory four year disqualification even though a person such as the applicant would be able to avoid the mandatory requirements of the section just because his convictions were entered on the same date in the same court. A similar disparity could arise where, for any number of reasons, the prosecutions in respect of two separate offences, although committed within a short space of time, are held on different dates.

The Court therefore finds that the applicant was properly convicted of two offences, albeit on the same date, the second of which, *i.e*. the offence of the 11th December, 2011, attracts a mandatory four year disqualification. The respondent correctly interpreted s.26(5)(a) as being applicable in this case and the Court therefore refuses to grant the relief sought on this ground of challenge.

However, as advanced by counsel for the applicant, the four year disqualification in the present case was recorded as being imposed in respect of the first offence in time, *i.e.* the offence of the 6th December. While a four year ban is permissible in respect of a first offence, in the present case the respondent clearly indicated that the four year ban was imposed not because she felt it was warranted, but because it was mandatory under section 26(5)(a).

In addition, not only is the disqualification recorded in respect of the first offence in time, no reference is made on the order to section 26(5)(a). The Court does not accept the argument of the Director of Public Prosecutions that these defects are immaterial because a four year ban is permissible in respect of a first offence in any event and therefore no prejudice arises. The respondent indicated that she felt she had no discretion as to the duration of the disqualification as it was imposed under s.26(5)(a), and it is clear therefore that there is an error on the face of the record. The four year disqualification is wrongfully recorded as being in respect of the offence of the 6th December, 2011 and there is no reference to the disqualification having been imposed pursuant to section 26(5)(a). The order of the Circuit Court is valid as to conviction and penalty and the validity of neither conviction has been challenged by the applicant. However, because of the defects identified on the face of the record, the Circuit Court orders must be quashed in circumstances where the amendment of the order under the slip rule was opposed by the notice party.

DECISION
In light of the foregoing, an order of *certiorari* quashing the orders of the Circuit Court is granted and the matter is to be remitted to that Court pursuant to Order 84 of the Rules of the Superior Courts for sentencing and the imposition of the appropriate period of disqualification in respect of the second conviction. The applicant remains properly convicted of the two offences pursuant to s.56 of the 1961 Act.