



THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 363

**The President
Finlay Geoghegan J.
Peart J.**

BARRY WHITE

Appeal No.: 2016/437

AND

APPLICANT/RESPONDENT

THE BAR COUNCIL OF IRELAND

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS/APELLANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 6th day of December 2016

1. The Minister has appealed against orders made by the High Court on the 28th July, 2016, relating to the claims against the State respondents to whom I will refer for convenience as the Minister. In this judgment I propose referring to Mr. White, the applicant in the proceedings as the respondent.
2. The orders of the High Court against which the Minister has appealed are:-
 1. An order of *certiorari* quashing the decision of the Minister communicated by letters dated the 29th May, 2015 and the 9th October, 2015, to refuse to include the respondent's name on the panel of counsel eligible to be paid for services provided under the Criminal Justice (Legal Aid) Regulations 1965.
 2. A declaration that there is no requirement in law for the respondent to be a member of the Law Library and subject to the regulatory or disciplinary provisions of the Code of Conduct of the Bar of Ireland before he may be eligible for inclusion on the panel of counsel entitled to be paid for services provided under the Criminal Justice (Legal Aid) Regulations 1965.
 3. A declaration that the decision of the Minister to refuse to include the respondent's name on the panel of counsel entitled to be paid for services provided under the Criminal Justice (Legal Aid) Regulations 1965 was taken *ultra vires* and is bad in law.
 4. A declaration that the decision of the Minister to refuse to include the respondent's name on the panel of counsel entitled to be paid for services provided under the Criminal Justice (Legal Aid) Regulations 1965 is unreasonable in law.
 5. A declaration that the decision to refuse to include the respondent's name on the panel of counsel entitled to be paid for services provided under the Criminal Justice (Legal Aid) Regulations 1965 results in a disproportionate interference with his constitutional rights protected under Article 40.1 and/or 40.3 and/or 43 of the Constitution.
3. The orders were made for the reasons set out in the judgment of Barrett J. delivered on the 22nd July, 2016.
4. By order of the 21st October, 2015 (Noonan J.) the respondent was granted leave to seek multiple reliefs by way of judicial review against the Bar Council and the Minister as set out in a statement of grounds dated the 20th October, 2015. In the High Court the respondent's claims against both the Bar Council and the Minister were pursued and heard together and all evidence adduced was treated as evidence against all respondents in the High Court. The judgment of 22nd July 2016 decided all issues.
5. The claims against the Bar Council were dismissed. They primarily concerned the lawfulness of Rule 5.21 of the Code of Conduct of the Bar of Ireland. The order of the 28th July 2016 does not, however, include an order dismissing the claims against the Bar Council, but rather adjourns same to the Michaelmas term pending a ruling on the costs of the proceedings. The Court was informed at the hearing of the appeal that the ruling has not been given and the question as to whether the respondent intends to appeal the dismissal of his claims against the Bar Council is not decided.
6. The Bar Council did not participate in the Minister's appeal. It was not named as either a respondent or notice party to the appeal. Nevertheless having regard to the issue arising it is, in retrospect, perhaps unfortunate that they were not represented and anything said in this judgement is said without any submission from the Bar Council.
7. Counsel for the Minister and respondent were in agreement that the central issue in the appeal is the proper construction of the Criminal Justice (Legal Aid) Act 1962, and the Criminal Justice (Legal Aid) Regulations 1965 (S.I. No. 12 of 1965) made thereunder and in particular Regulation 5 thereof. Counsel for the respondent, nevertheless drew attention to certain facts which he submits are important to the context in which the challenged decision of the Minister was taken. I propose therefore setting out briefly the background facts and the facts relied upon as leading to the decision of the Minister.
8. The respondent was called to the Bar in 1967 and became a subscribing member of the Law Library; became a senior counsel in 1982; remained in full time practice in the Law Library continuously from his call in 1967 until he was appointed a judge of the High Court in 2002. He retired, on age, from the High Court on the 13th day of September, 2014. Whilst in practice as a barrister, the respondent's name was included on the panel of counsel willing to act for persons to whom certificates for legal aid had been granted under the 1962 Act. His area of practice, expertise, knowledge and specialisation was as a criminal defence barrister and he has deposed that his earnings from practice derived predominantly from payments under the Criminal Legal Aid Scheme.
9. Prior to retirement as a judge of the High Court, the respondent made a decision that he would seek to return to practice at the

Bar. He has deposed that this was by reason of financial necessity and to support his four children who were then in full time education. He wrote to the Bar Council and completed an application form to resume his membership of the Law Library. The initial response was that he could do so on condition that he agreed to be bound by the Code of Conduct of the Bar. This includes at rule 5.21:-

"Judges of the Irish Courts, following retirement or resignation, who return to the Bar may not practice in a court of equal or lesser jurisdiction than the court of which they were a judge."

10. The respondent then sought a waiver of rule 5.21 pursuant to rule 13 of the Code of Conduct in September 2014. This was refused in November 2014.

11. Thereafter, the respondent has deposed that "... notwithstanding my preference to be readmitted to the Law Library, I decided to pursue my re-entry to practice without being a member of the Law Library". By letter of the 14th November, 2014, he notified the Bar Council that he wished to be placed on the list of counsel compiled pursuant to the provisions of the 1965 Regulations and sent a copy to the Minister with his Tax Clearance Certificate and his Barrister's PAYE number.

12. By letter of the 5th December, 2014, the Director of the Bar Council forwarded to the Minister the respondent's letter dated the 14th November, 2014 and then stated:-

"Barry White is a recently retired member of the High Court. He is not currently a member of the Law Library. He does not fall under the jurisdiction of the Bar Council and is not subject to the Code of Conduct for the Bar of Ireland. He is, therefore, not subject to the regulatory or disciplinary structures applicable to members of the Law Library. Mr. White was a member of the Law Library before his appointment to the High Court in July 2002.

Without prejudice to this, and strictly on the basis that the Bar Council is named in Regulation 5 of the Criminal Justice (Legal Aid) Regulations 1965, (as amended) and Regulation 4(3) of the Criminal Justice (Legal Aid) (Tax Clearance Certificate) Regulations, 1999, the Bar Council hereby informs the Minister of Mr. White's stated willingness to act for persons to whom certificates for legal aid have been granted. However, by doing so, the Bar Council is not in a position to, and does not, provide any further warranty or representation whatsoever in relation to Mr. White."

13. The respondent deposed that between December 2014 and May 2015, there were a number of contacts with the office of the Minister and he attended a meeting with Mr. Condon, the official in the Department dealing with the matter. The respondent has deposed and it is not in dispute that the fact that there were a number of barristers on the legal aid panel who were not then members of the Law Library was discussed; further there was reference to the fact that such barristers are regulated by King's Inns or the Benchers of the Honourable Society of King's Inns.

14. Counsel for the respondent drew attention to a note exhibited by the Director of the Bar Council to her affidavit in the High Court of a meeting between the same official and members of the Bar Council on the 5th March, 2015. The respondent was not present at that meeting. The same two matters were discussed at that meeting.

15. Mr. Condon, the Principal Officer in the Department dealing with the issue has deposed and explained that prior to receipt of the respondent's application:-

"The Minister and the Department had proceeded upon the assumption and understanding, that all counsel notified to it by the Bar Council for inclusion on the list kept pursuant to the 1965 Regulations were associated with the Bar Council and were subject to regulation by the Bar Council and were, in consequence members of the Law Library."

16. He further deposed that following the application, legal advice was taken and a new form of application put in place requiring counsel seeking to have their name put on the list to confirm that they were subject to regulation by the Bar Council. He deposes that it was in the context of this change that the meeting of the 5th March took place.

17. Ultimately by letter of the 29th May, 2015, the respondent was informed of the Minister's decision. That letter records what was stated to the Minister in the letter from the Bar Council of the 5th December, 2014 and then states:-

"The Minister has taken the view that the Barrister's name could only be added to the defence counsel list where that person is subject to regulation i.e. subject to regulation by the Bar Council as the Council is currently the only regulatory body for counsel.

The Department informed the Bar Council on the 13 February, 2015, that the notification of the 5 December, 2014, did not constitute notice of your wish to be placed on the Criminal Legal Aid panel pursuant to the Criminal Legal Aid Regulations 1965 as the Bar Council only has authority to forward the names of those subject to regulation by the Bar Council.

The Minister therefore is not in a position at this time to add your name or any name to the Counsel list unless the Bar Council is in a position to indicate that you or any such person is subject to regulation by the Council.

You will be aware that under the terms of the Legal Services Regulation Bill it is envisaged that the new Legal Services Regulatory Authority will become the regulatory authority in respect of all legal practitioners including practising Barristers whether they are or not members of the Law Library/Bar Council."

18. Thereafter the respondent made further attempts to seek a waiver from the Bar Council of rule 5.21. These included giving certain undertakings. The respondent then wrote to the Minister setting out those attempts and the proposed undertakings. The Bar Council by letter of the 28th September, 2015, informed the respondent of its renewed decision to refuse to grant waiver of rule 5.21. By letter of the 9th October, 2015, (addressed to his solicitors) the respondent was informed that the Minister's decision in the terms of the letter of the 29th May, 2015, remained unchanged. A further explanation given was:-

"In this regard the Department is bound to act in accordance with the statutory requirements and the only question for the Department is whether the application it has received has been forwarded by the Bar Council under the Criminal Legal Aid Regulations 1965 ie. on behalf of a party which is subject to regulation by the Bar Council."

19. The letters of 29th May, 2015 and 9th October, 2015 were the only evidence before the High Court of the decision taken by the

Minister and the reasons therefore.

20. Those were the essential facts upon which the trial judge was asked to decide upon the respondent's claims against the Minister.

21. From a full reading of all the affidavits and multiple exhibits it appears, that notwithstanding that reference was made to the regulation of Barristers including those who were not members of the Law Library by the Benchers of the Honourable Society of King's Inns, no one, including it would appear the Bar Council considered the then Rules of King's Inns. The Court drew attention to these at the commencement of the hearing of the appeal.

22. It does not appear to be in dispute between the Minister and the respondent that the respondent upon ceasing to hold office as a judge of the High Court is a barrister. There appears to be some dispute as to whether at the time of the notification by the Bar Council to the Minister he was a practicing barrister. As a barrister, the respondent is a member of King's Inns. Rule 30 of the Rules of King's Inns provides (and did in 2014/15):

"30(1) Concomitant with the rights and privileges conferred on barristers, it is the duty of barristers:

(a) to comply with the provisions of the Code of Conduct for the Bar of Ireland when acting, or holding themselves out, as barristers including but not limited to the provision of advocacy services, legal advices, opinions and drafting of court or other legal documents and all related and connected activities and this duty shall apply notwithstanding any omission of a barrister to comply with the undertaking given to the Society prior to or on the occasion of admission to the degree of Barrister-at-Law, including the undertaking not to embark on practice as a barrister without first becoming a subscribing member of the Law Library, the undertaking to continue in practice only while retaining membership of the Law Library and the undertaking to observe the Code of Conduct of the Bar of Ireland and to submit to the disciplinary jurisdiction of the Bar Council;

(b) not to engage in conduct (whether in pursuit of their profession or otherwise) which is dishonest or which may bring the barristers' profession into disrepute or which is prejudicial to the administration of justice or commit a criminal offence;

(c) to observe the ethics and etiquette of their profession;

(d) to be competent in all of their professional activities;

(e) to conduct their profession as barristers so as to ensure that there is no serious falling short, by omission or commission, of the standard of conduct expected of a barrister;

(f) to be individually responsible for their own conduct and

(g) to co-operate with any investigations conducted by the Bar Council or any Committee established under these Rules including appearing before the Disciplinary Committee established under Rule 31(1) and, if required, giving sworn evidence.

30(2) For the avoidance of doubt a barrister shall submit to the jurisdiction of the Barristers' Professional Conduct Tribunal, the Professional Conduct Appeals Board or any other similar body that may be established under the Code of Conduct for the Bar of Ireland for the purpose of dealing with complaints against the barrister. The Barristers' Professional Conduct Tribunal, the Professional Conduct Appeals Board or any other similar body established under the Code of Conduct for the Bar of Ireland shall be entitled to consider and adjudicate upon a complaint notwithstanding any failure by the barrister to attend or participate in the hearing of a complaint before those bodies. The Society may refer a complaint received by it to the Bar Council or such body of the Bar as is appropriate, and where a complaint is so referred to the body, that body shall act as a body of the Society.

30(3) Failure to comply with the duties set out in Rule 30(1) or elsewhere in these rules maybe professional misconduct or amount to a breach of proper professional standards and render barristers liable to disciplinary measures.

30(4) It is the duty of barristers to co-operate with any disciplinary proceedings under these Rules in relation to their professional conduct in a timely manner whether by way of the furnishing of comment or information when required to do so and it is their duty to attend before the Disciplinary Committee. Failure to comply with this duty of co-operation may be viewed as professional misconduct.

30(5) For the avoidance of doubt these rules do not apply to a complaint against a barrister after appointment as a judge."

23. The reference to the undertaking in the above is an undertaking given to the Benchers since approximately 1985 by every person seeking admission to the degree of barrister-at-law and called to the Bar. It is not my intention to make any finding as to the obligations of the respondent having regard to the rule 30 of the Rules of King's Inns. Nevertheless it would not be appropriate for this Court to decide the appeal without referring to same. This is particularly so as the respondent has submitted, and the trial judge took into account in his reasoning the fact that barristers who are not members of the Law Library are nevertheless regulated by King's Inns or perhaps more accurately the Benchers but did not consider the manner in which they are so regulated. I am also conscious that Rule 30 may not have been adverted to by the Bar Council when informing the Minister that the respondent was not subject to regulation by the Bar Council. As the Bar Council was not a party to the appeal it has not been given the opportunity of explaining whether or not this is so.

24. At the time of the Minister's decision she had been informed that the respondent was not subject to regulation by the Bar Council and upon that basis decided that the notification sent by the Bar Council was not a valid one pursuant to the 1965 Regulations. Irrespective of whether that information was correct it is necessary for the purposes of this appeal to consider and decide whether or not the Minister was correct in law in her decision.

Statutory scheme

25. The statutory scheme for free legal aid in criminal cases is provided for in the Criminal Justice (Legal Aid) Act 1962, as amended. The scheme provides for the granting by the District Court or judges of certain other courts of legal aid certificates to persons

charged with criminal offences or where convicted for the purposes of appeals and for certain cases stated. In slightly differing ways the sections provide that a person to whom a certificate for free legal aid has been granted is entitled to free legal aid in the preparation and conduct of his defence at trial or in appeal etc. and "to have a solicitor and counsel assigned to him for that purpose in such manner as may be prescribed by regulations under section 10 of this Act". This later phrase is one which appears repeatedly in ss. 2, 3, 4 and 5 of the Act. "Counsel" is not defined for the purposes of the Act.

26. Section 10 as originally enacted provided:-

"10(1) The Minister may make regulations for carrying this Act into effect and the regulations may, in particular, prescribe

- (a) the form of legal aid certificates,
- (b) the rates or scales of payment of any fees, costs or other expenses payable out of moneys provided by the Oireachtas pursuant to such certificates,
- (c) the manner in which solicitors and counsel are to be assigned pursuant to such certificates.

(2) Regulations under this section in relation to the matters specified in paragraph (b) of subsection (1) of this section shall not be made without the consent of the Minister for Finance.

(3) Every regulation made by the Minister under this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next subsequent twenty-one days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to anything previously done thereunder."

27. The Criminal Justice (Legal Aid) Regulations 1965 (S.I. No. 12/1965) were made by the then Minister for Justice on the 12th January, 1965 and consented to by the Minister for Finance as required. The Regulations established a scheme for the compilation of lists of solicitors and of counsel who had notified their willingness to act for persons to whom certificates for free legal aid are granted. The scheme for each profession was slightly different. For solicitors, Regulation 4 required each county registrar to compile a list "of the solicitors practising in the county . . . who have notified him of their willingness to act for persons . . .". The county registrar then had to forward the list to the registrars of other courts and the secretary of the Incorporated Law Society. Regulation 4(2) permitted a solicitor to request to have his name deleted from the list and also for the registrar to delete the names of any solicitors in respect of whom an order had been made removing them or striking them off the Roll of Solicitors pursuant to the Solicitors Act 1954 or if suspended from practice. Regulation 5 in relation to counsel provided:-

"5(1) As soon as may be after the making of these Regulations, the Council shall send to the Minister the names of the counsel who have notified it of their willingness to act for persons to whom certificates for free legal aid are granted.

(2) The Minister shall keep a list of the names aforesaid and shall send a copy of the list to—

- (a) the registrar of the Supreme Court,
- (b) the registrar of the Court of Criminal Appeal,
- (c) the registrar of the High Court managing the Central Office of the High Court,
- (d) the registrar of the Central Criminal Court,
- (e) each county registrar, and
- (f) each District Court clerk.

(3) Where, at any time after the compilation of a list in pursuance of this Regulation, the Council is notified by a counsel of his willingness to act for persons granted certificates for free legal aid or of his wish to have his name deleted from the list, the Council shall notify the Minister of such wish and the Minister shall amend accordingly the list kept by him pursuant to this Regulation by adding thereto or deleting therefrom, as the case may be, the name of the counsel and the Minister shall notify the officers mentioned in paragraph (2) of this Regulation of the amendment.

(4) A counsel who is willing to act for persons granted certificates for free legal aid and who wishes to have his name included in the list kept by the Minister pursuant to this Regulation and a counsel who wishes to have his name deleted from such list shall notify the Council in writing and upon receipt of the notification the Council shall notify the Minister and the Minister shall amend accordingly the list kept by him pursuant to this Regulation and shall notify the counsel of the amendment.

(5) In this Regulation "the Council" means the General Council of the Bar of Ireland."

28. The 1965 Regulations made further provisions for the forms of legal aid certificates, matters to be recorded, the payment of fees and expenses and permitted the assignment of counsel in certain cases.

29. Section 10(1) of the 1962 Act was amended by s. 132 of the Finance Act, 1998, by the addition of subsections which insofar as is relevant included "a requirement that a barrister, the willingness of whom to act for persons for whom legal aid certificates are granted has been notified to the Minister by the General Council of the Bar of Ireland in accordance with the Criminal Justice (Legal Aid) Regulations, 1965, must, when required to do so by the Minister, furnish to the Minister [a tax clearance certificate]. . .".

High Court decision

30. The issue of statutory construction, in the High Court as in this Court was whether the above provisions and in particular

Regulation 5(3) of the 1965 Regulations permitted the Minister to take the view that the Bar Council is only authorised to submit to her the name of a barrister who had notified it "of his willingness to act for persons granted certificates for free legal aid" if such barrister was subject to regulation by it. The trial judge decided that Regulation 5 of the 1965 Regulations did not permit the Minister to take such a view. He accepted that "counsel" in the 1965 Regulations means a barrister who is qualified to practice in Ireland had observed that such persons are subject to "twin regulation by way of judicial oversight and supervision, on the one part, and the disciplinary committee of the Benchers of the Honourable Society of King's Inns on the other part". He considered the Minister was in error in reading into the statutory provisions an additional requirement that an applicant counsel must be regulated by the Bar Council.

Issues on appeal

31. The first issue on appeal is whether or not the Minister was correct in construing the Regulation 5(3) of the 1965 Regulations as meaning that the Bar Council is only obliged to notify to the Minister the name of a barrister regulated by it.

32. The resolution of the issue appears to turn primarily on the proper meaning of "counsel" in the 1962 Act and 1965 Regulations. It is not in dispute that counsel for the purpose of the 1965 Regulations must have the same meaning as it has in the 1962 Act.

33. Similarly there was no dispute about the applicable principles of construction. They are the general principles set out by Blayney J. in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 at 151 and often since repeated. The court was referred in particular to the judgments of Denham J. (as she then was) and McGuinness J. in *D.B. v. Minister for Health* [2003] 3 I.R. 12, in referring to *Howard* and summarising the principles. Denham J. at p. 21 having referred to the judgment of Blayney J. in *Howard* stated:-

"He emphasised that the cardinal rule for the construction of statutes was that they be construed according to the intention expressed in the Acts themselves. If the words of the statute are precise and unambiguous then no more is necessary than to give them their ordinary sense. When the words are clear and unambiguous they declare best the intention of the legislature. If the meaning of the statute is not plain, then a court may move on to apply other rules of construction; it is not the role of the court to speculate as to the intention of the legislature."

34. As appears from the judgment of Blayney J. in *Howard* and in particular the extract from Craies on *Statute Law* (1971) (7th ed.) cited in the context of determining the intention of the legislature as expressed by the words used, it is "natural to enquire what is the subject matter with respect to which they are used and the object in view". This approach is of some assistance in seeking to determine the intention of the legislature in the 1962 Act and 1965 Regulations by use of the term "counsel" as distinct from "barrister" in conjunction with solicitor.

35. Counsel for both parties accepted at the appeal hearing that the Oireachtas in using the term "counsel" in the 1962 Act in the context of that Act intended to refer to practising barristers. Counsel for the Minister in submission went further than that. He submitted that having regard to the purpose of the Act and certain of the requirements of the 1962 Act e.g. that it "is essential in the interests of justice" that a person should have legal aid in the preparation and conduct of his defence that the Oireachtas in using the term "counsel" intended that such a person be not just a practising barrister but a competent practising barrister. He submitted that such competency may be established by the fact that the barrister is regulated by the Bar Council.

36. Considering the Act of 1962 alone and without the 1965 Regulations, it appears to me that the Oireachtas in using the term "counsel" in the context in which it is used namely, specifying that a person to whom a free legal aid certificate has been granted is then to be entitled "to free legal aid in the preparation and conduct of his defence at the trial and to have a solicitor and counsel assigned to him **for that purpose**" [emphasis added] intended at minimum that a counsel be a practising barrister i.e. a barrister holding himself out as available to conduct a defence at a criminal trial.

37. It appears to me that the Court is entitled to take judicial notice of the fact, as would have been well known to members of the Oireachtas in 1962 that there are many persons who have been admitted to the degree of Barrister at Law by the Benchers of King's Inns and called to the Bar by the Chief Justice and thereby admitted to practice in the Courts of Ireland, but who have never either sought to practice as barristers or held themselves out as practising barristers and hence being available to conduct the defence of a criminal trial. Accordingly, I have concluded that in using the term "counsel" in the context of the 1962 Act, the Oireachtas intended it to mean a practising barrister i.e. a barrister holding himself out as available to conduct a defence at a criminal trial and not as the trial judge put it, "a barrister who is qualified to practise in Ireland" which would include all barristers whether practising or not.

38. I cannot, however, accept the submission of counsel for the Minister that in the 1962 Act, the term "counsel" must be construed as meaning a "competent practicing Barrister".

39. Rather, it appears to me that the Oireachtas in the phrases used in ss. 2, 3, 4 and 5, when describing the entitlement of a person to free legal aid as including "to have a solicitor and counsel assigned to him for [the preparation and conduct of his defence at trial or an appeal] in such manner as may be prescribed by regulations under s. 10 of this Act" and having regard to s. 10(1)(c), intended to confer on the Minister the power to determine by regulation the manner in which a solicitor and a practicing barrister, may be assigned for the purposes of conducting the defence or appeal as the case may be.

40. I accept the submissions made on behalf of the Minister that the policy or purpose of the 1962 Act in providing for free legal aid in the form of assignment of solicitors and practising barristers to assist in the preparation and conduct of a defence of those charged with offences may include an intention that any solicitors or barristers assigned be competent to provide the relevant assistance. However the Act itself by the use of the word "counsel" does not indicate the manner in which a practising barrister is to be determined as eligible to be assigned to a person to whom a legal aid certificate has been granted. Rather the wording of ss. 2, 3, 4, 5 and 10(1)(c) of the 1962 Act evidence an intention that it is the Minister by regulation who should determine such matters.

41. If I am correct that the Minister was empowered by s.10(1)(c) to regulate which counsel or practising barristers might be eligible for assignment then logically the next question is whether, as submitted by counsel for the Minister, the system established by regulation 5 of the 1965 Regulations for the compilation of the list of the names of counsel who might be assigned to persons to whom legal aid certificates were granted is confined to practising barristers who are subject to regulation by the Bar Council. Counsel for the Minister submitted that the Court should take judicial notice of the fact that in 1965 all practicing barristers were members of the Law Library and subject to regulation by the Bar Council. Counsel for the respondent submitted that the court should not do so and that there was no evidence to this effect. He submitted that regulations 4 and 5 of the 1965 Regulations properly construed for the purpose of carrying the 1962 Act into effect are intended as administrative mechanisms to identify those solicitors and practising barristers willing to act for persons to whom legal aid certificates have been granted. He submitted that the intent of the 1965 Regulations is to give to every practising solicitor and every practising barrister the right to decide whether s/he wishes to put her/himself onto the list as a solicitor or barrister willing to act for persons to whom free legal aid certificates are granted.

42. What then was the purpose of the Minister in providing that counsel be notified to him via the Bar Council? In a context where counsel means a practising barrister, regulation 5 at minimum, identifies the Bar Council as the body which can with authority identify for the Minister which barristers are "counsel" within the meaning of the 1962 Act i.e. practising barristers. It must also be recalled that in 1965 unlike solicitors practising barristers were not regulated by Statute and were not required to hold practising certificates. There was no objective way of the Minister deciding who was a practising barrister. Hence, the system established by the Minister by regulation 5 does appear to include an intention by the Minister that the Bar Council would identify for her/him those persons who are practising barristers. It would be reasonable to take judicial notice of the fact that the Bar Council was in 1965 the recognised professional body for practising barristers as was the Incorporated Law Society (referred to in Regulation 4) for solicitors.

43. Can the 1965 Regulations also be construed as including an additional intention that the practising barristers who might notify are limited to those subject to regulation by the Bar Council?

44. I do not consider it necessary to decide whether the Court should take judicial notice of the fact for the purpose of construing the 1965 Regulation that all practising barristers were then members of the Law Library without evidence.

45. The earliest Code of Conduct of the Bar of Ireland exhibited in the affidavit of Ciara Murphy is the 1985 Code. That code makes it the duty of every barrister to comply with the provisions of the Code. That obligation does not appear to be confined to a practising barrister which it defines (r. 2.1) as "... one who holds himself out as willing to appear in court on behalf of or to give legal advice and services to clients for reward" and also a person holding the position of Attorney General. It provides that the Law Library is the central and primary place for practice for the Bar of Ireland and that it is desirable that all practising barristers should be members of the Law Library. Those rules appear to have been adopted in July 1985. The 1985 rules at 7.10 provided: "a barrister shall not have his name placed on the Legal Aid Panel until he has completed six months devilling or until he has been a member of the Law Library for one year".

46. Irrespective, of whether or not all practising barristers were members of the Law Library subject to regulation by the Bar Council in 1962, it does not appear to me that the Court can construe regulation 5(3) of the 1965 Regulations as limiting eligible counsel to those regulated by the Bar Council or only permitting the Bar Council to notify the Minister where it receives notification from a practising barrister whom it perceives to be subject to its jurisdiction. It appears to me that counsel for the respondent is correct in his submission that the scheme established by the 1965 Regulations and in particular regulations 4 and 5 is that it gives to each practising solicitor or practising barrister the right to decide whether he or she wishes to notify his or her willingness to act for persons to whom certificates of legal aid are granted. The difference in the notification systems for solicitors and barristers is explicable in the context of the Statutory control and practising certificates applicable for solicitors and the absence of same for barristers. In accordance with the words used, the Bar Council, when it receives notification from a person whom it is satisfied is then a practising barrister of such willingness, "shall notify the Minister of such wish". The Bar Council must of course satisfy itself for the purposes of the 1965 Regulations that the person concerned is a "counsel" i.e. a practising barrister but the 1965 Regulations construed in accordance with the words used and principles set out do not intend any greater control by the Bar Council in determining eligibility to go on the list

47. In the course of submissions, counsel for the Minister submitted that the respondent in any event did not appear to satisfy the requirement of being a practising barrister. That is disputed on his behalf and our attention was drawn to the decision deposed to by him in his affidavit "to pursue my re-entry to practice without being a member of the Law Library". There is no evidence before the Court that the Bar Council prior to writing to the Minister addressed the question as to whether or not the respondent was a practising barrister at the relevant time. It is not an issue for decision on this appeal.

48. It follows from my above conclusions that the trial judge was correct in concluding that the Minister's decision to refuse to include the respondent's name on the panel of counsel entitled to be paid for services provided under the 1965 Regulations, for the reason then given, was *ultra vires*, and that the respondent was entitled to an order of certiorari quashing the decision of the Minister communicated by the letters dated the 29th May, 2015 and the 9th October, 2015.

The right to earn a livelihood

49. In addition to the order of certiorari the trial judge granted a declaration that the Minister's decision results in a disproportionate interference with the respondent's constitutional rights protected under Article 40.1 and/or 40.3 and/or 43 of the Constitution.

50. It appears from the judgment that the primary right protected by the Constitution considered by the trial judge was the right to earn a livelihood. The appellant does not dispute the summary of the relevant principles which emerge from the case law set out at para. 18 of the judgment of the trial judge. However, it is submitted that the trial judge erred in his application of those principles to the facts herein. It is submitted that the decision of the Minister does not even preclude the respondent from practising as a barrister, but rather precludes him from acting as a criminal defence lawyer or in the conduct of an appeal for those to whom a legal aid certificate has been granted. It is well established that the unspecified constitutional right to earn a livelihood protected by Article 40.3 of the Constitution does not extend to a right to earn a livelihood by any particular means or through the exercise of any particular occupation: *Nurendale Limited t/a Panda Waste Services v. Dublin County Council* [2009] IEHC 588 at para. 193 and *Greally v. Minister for Education (No. 2)* [1999] 1 I.R. 1, 10. Notwithstanding the evidence before the trial judge of the particular area of specialisation of the respondent whilst in practice at the Bar and his primary source of income at that time, having regard to the evidence adduced as to other sources of paid work for persons who previously held judicial office, I have concluded that the trial judge was in error in concluding that the challenged decision, in accordance with the principles set out in the authorities which he cited could be considered as an interference with the respondent's right to earn his livelihood protected by Article 40.3 of the Constitution. There are no other rights protected by Article 40.1, 40.3 or 43 of the Constitution which on the evidence before the trial judge could justify the declaration made. Accordingly I would propose that the appeal be allowed against that declaration.

Reasonableness

51. The trial judge also granted a declaration that the Minister's decision is unreasonable in law. The Minister submits that the trial judge did not consider the legal principles applicable to the question as to whether or not the Minister's decision was unreasonable in law. The Minister relied upon the well known principles set out in a number of authorities including the judgment of Henchy J. in the *State (Keegan and Lysaght) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 and Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] I.R. 39. Those authorities require a person challenging a decision of a public body for want of reasonableness to satisfy the court that the impugned decision is "fundamentally at variance with reason and common sense" or "indefensible for being in the teeth of plain reason and common sense". The respondent in its submissions correctly points out that the question as to whether or not the Minister's decision was unreasonable in law only arises if the Minister has a discretion under the 1965 Regulations. The Minister did not purport to exercise a discretion on the facts herein. Rather she took the view that she did not have before her a valid notification from the Bar Council. In those circumstances the declaration of unreasonableness was not well founded and should be set aside.

Issues not decided

52. Having regard to the manner in which this appeal was heard in the absence of the Bar Council; without consideration of the lawfulness or otherwise of rule 5.21 of the Code of Conduct of the Bar of Ireland and without consideration as to whether the respondent is subject in accordance with rule 30 of the rules of King's Inns to the Code of Conduct of the Bar of Ireland including rule 5.21 when practising as a barrister it is important to emphasise what has not been decided. Those potentially relevant issues include:-

1. Whether the respondent is or was at the date he notified the Bar Council of his willingness to act for persons to whom a legal aid certificate is granted a practising barrister;
2. Whether the respondent as a practising barrister is now subject to the Code of Conduct of the Bar of Ireland including rule 5.21;
3. The lawfulness of rule 5.21 of the Code of Conduct of the Bar of Ireland;
4. If the respondent is a practising barrister, but is not permitted in accordance with the Code of Conduct of the Bar of Ireland to practise in the High Court, Circuit Court or District Court, the entries if any, which the Minister may or should make on the list of counsel maintained by her pursuant to regulation 5 of the 1965 Regulations and of which copies are sent to the Registrars of the relevant courts pursuant to regulation 5(2).

Final observation

53. The trial judge in the course of his consideration of the claims against the Bar Council and the 1929 decision of Kennedy C.J. in *In the matter of the Solicitors (Ireland) Act 1898 and In the matter of an Application by Sir James O'Connor* [1930] I.R. 625 made a number of observations which do not arise for decision. However, there is one matter to which I consider I must make reference as it is inconsistent with the Constitution and should not stand. The trial judge at para. 7 of his judgment having referred to the fact that Kennedy C.J. referred to the role of judge as a "sacred office" then stated:-

"Being a judge is undoubtedly a responsible job, and it is a privilege to be given the job, but ultimately it is just a job. . . ."

54. A person appointed as a judge under the Constitution is appointed as the holder of judicial office. He or she is an office holder in the judicial arm of Government. The declaration made by the respondent as required by Article 34.6.1 when appointed a judge included that "I will duly and faithfully and to the best of my knowledge and power execute the office of judge of the High Court without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws". Further Article 35.2 of the Constitution stipulates "All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law". It is a fundamental misconception to consider being a judge to be "just a job".

55. The position of a person who had previously practised as a barrister, has been appointed to judicial office and upon retirement wishes to recommence practice as a barrister remains for consideration.

Relief

56. I propose that the appeal against the order of *certiorari* quashing the decision of the Minister communicated by letters dated the 29th May, 2015 and the 9th October, 2015, to refuse to include the respondent's name on the panel of counsel eligible to be paid for services provided under the Criminal (Legal Aid) Regulations 1965 and the related declarations at paragraphs 2 and 3 of the High Court Order be dismissed and that the appeal against the declarations in the order of the High Court as to the unreasonableness of the decision and interference with constitutional rights of the respondent be allowed and the declarations in that respect granted by the High Court vacated.

57. It follows from the order of *certiorari* and this judgment that the respondent's entitlement to have his name placed upon the list of counsel maintained pursuant to Regulation 5 of the 1965 Regulations remains to be further considered and decided by the Minister.