THE HIGH COURT
JUDICIAL REVIEW

[2017 NO. 169 J.R.]

BETWEEN

STEPHEN FEENEY

APPLICANT

AND
NATIONAL TRANSPORT AUTHORITY

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 7th day of June, 2018

1. In this case, the applicant seeks an order of *certiorari* by way of judicial review quashing the conviction and sentence of the applicant on foot of case number CA022071, Appeal Number 2016/59085, the said conviction and sentence order having been made by Her Honour Judge Codd (hereinafter "the Circuit Judge") in the Circuit Court at Court No. 16 in the Criminal Courts of Justice, Dublin 8 on 17th February, 2017.

2. Leave was given for the within application by Order of Noonan J. on 27th February, 2017.

3. The factual backdrop is as follows: The applicant is a taxi driver. On 17th February, 2017, counsel instructed by the applicant's solicitors appeared for the applicant in Circuit Court No. 16 in the Criminal Courts of Justice for a contested full *de novo* rehearing of three summonses before the court.

4. The applicant's appeal was in respect of a conviction received in the District Court for one charge of using offensive language towards a named passenger being carried for reward, contrary to Regulation 38(5)(c) of the Small Public Service Vehicle (Consolidation and Reform) Regulations 2014 ("the 2014 Regulations"), thereby committing an offence contrary to s. 20(4)(b) of the Taxi Regulation Act 2013 ("the 2013 Act"), and two charges of acting in an abusive and offensive manner towards the said passenger, contrary to Regulation 38(5)(a) of the 2014 Regulations, thereby committing an offence contrary to s. 20(4)(b) of the 2013 Act.

5. The appeal hearing in the Circuit Court lasted approximately three hours. On behalf of the prosecution, the Circuit Court heard evidence from the passenger and two other witnesses, including a Compliance Officer with the respondent. The court also heard from the prosecuting solicitor after the prosecution closed its case.

6. There followed an application by counsel for the applicant for a direction of no case to answer on the basis that the prosecution had failed to establish that its complaints had been made within the requisite statutory time limit for summary prosecutions of this nature and that the prosecution had sought to rely on the penal regulations to prosecute the applicant which had been revoked and replaced by subsequent penal regulations which came into force after the alleged offences had taken place. Each of these submissions were rejected by the Circuit Judge and do not form part of the within application.

7. Thereafter, the applicant went into evidence in his own defence and provided a full rejection of the allegations made against him by the prosecution witnesses.

8. After reviewing the actual order made by the District Court in respect of the summons alleging a breach of Regulation 38(5)(c) of the 2014 Regulations, the Circuit Judge allowed the applicant's appeal in respect of his alleged use of offensive language towards the passenger in circumstances where it came to light during the currency of the appeal hearing that the applicable District Court order governing the initial conviction contained errors on the face of the record.

9. The Circuit Judge then gave her decision on the facts of the case. As deposed to in the affidavit of the applicant's solicitor, Mr. Brendan Maloney, sworn 27th February, 2017, the learned judge determined that the applicant's evidence was implausible in the extreme whilst the respondent's evidence-the evidence of the passenger-was more plausible and believable. Accordingly, the applicant was convicted on the charges contained in the remaining two summonses, namely of an offence contrary to s. 20(4)(a) of the 2013 Act.

10. As to what next transpired, Mr. Maloney avers as follows:-

> "10. I say and believe and have been advised by counsel that the presiding Judge then proceeded to immediately ask the prosecutor, Mr. Teahan, what the penalties imposed in the District Court were, to which Mr. Teahan responded that a fine of €1,000 had been imposed in respect of each summons with costs measured at €1,000 in favour of the Respondent. I say that the presiding Judge then and without pause affirmed these orders and gave the Applicant four months in which to pay the said fines and awarded the prosecutor an additional €1,000 in measured costs to cover its costs in the appeal…
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> 11. I say and believe and have been advised by Counsel that the presiding Judge gave no opportunity for anything further to be submitted by either party and heard nothing further in relation to the case and immediately rose from the bench and left the courtroom. I say that Counsel for the Applicant was given no opportunity to address the Court in mitigation of penalty and the prosecutor/Respondent did not have an opportunity to address the Court on the status or otherwise of the Applicant's prior record. I say and believe and have been advised by Counsel that as a result of the way the matter was dealt with there was no time and/or any adequate opportunity for Counsel for the Applicant to intervene and request that the Court address matters in mitigation of penalty and an update on the status of the Applicant's prior criminal record."

11. The grounds relied on by the applicant for the purposes of the within challenge are:-

> (i) The Circuit Court erred in law and acted contrary to fair procedures and in excess of jurisdiction by proceeding to convict and sentence the applicant without making any inquiry of and/or hearing any evidence by way of mitigation by or on his behalf, any or any adequate details of his previous conviction record and any or any adequate details in respect of his financial and other means;

(ii) The Circuit Court breached fair procedures, constitutional and natural justice in sentencing the applicant by simply asking the prosecutor alone acting on the respondent's behalf to confirm the penalties imposed on the applicant in the District Court and thereafter immediately imposing such penalties on the applicant together with a measured order for costs in the respondent's favour and immediately thereafter rising to end the Court's business for the day without seeking input and/or allowing time for counsel for the applicant to make submissions in respect of penalty.

12. In its statement of opposition, the respondent denies that the Circuit Judge erred in law or acted contrary to fair procedures or in excess of jurisdiction in proceeding to convict and sentence the applicant or that the Circuit Judge breached fair procedures or constitutional or natural justice in her conduct of the hearing or in the sentencing of the applicant. It is further pleaded:-

> "6) Without prejudice to the generality of the foregoing, following the conclusion of the case, the presiding Judge heard extensive submissions by the Defence prior to convicting the Applicant. It was open to Counsel retained to address the Court in mitigation at any stage and he failed to do so. When it appeared that the presiding Judge was proceeding directly to sentence, the Defence ought to have sought an opportunity to address the Court in respect of mitigation and it failed to do so.
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> 7) The presiding Judge heard extensive submissions from counsel retained by the Applicant prior to convicting. In addition, Counsel addressed the Court on the applicable penalty. It was open to the Defence to address the Court in mitigation at any stage and it failed to do so. When it appeared that the presiding Judge was of the view that Counsel had made such submissions on the question of penalty as he deemed appropriate or was not intending to make submissions in mitigation, Counsel ought to have intervened, clarified the position and sought an opportunity to address the Court in respect of mitigation.
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> 8) Following conviction, there was ample opportunity to address the presiding Judge in relation to mitigation and the Defence failed to do so.
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> 9) Following the imposition of sentence, it was open to the Defence to ask the presiding Judge to reconsider the matter to afford it an opportunity [to] address the Court in respect thereof and it failed to do so.
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> 10) The presiding Judge affirmed the sentence in circumstances where no objection was taken and there was an opportunity available to do so.
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> 11) The Applicant acquiesced in the manner in which sentence was imposed and the matter finalise and as a consequence thereof, this Honourable Court should refuse relief on discretionary grounds."

13. It is also pleaded on a without prejudice basis that if the Circuit Judge made any error, same was not of sufficient seriousness to justify the intervention of the High Court in the exercise of its exceptional jurisdiction to grant relief by way of judicial review, having regard to the fact that the applicant declined to make submissions in mitigation in the District Court following conviction.

14. In his replying affidavit, the respondent's solicitor, Mr. Jason Teahan, takes issue with the applicant's contention that his counsel was deprived of the opportunity to address the Circuit Court either prior to or subsequent to the imposition of sentence. He avers as follows:-

> "7. Between the conclusion of the evidence and the finalisation of the case, Counsel appearing on behalf of the Applicant interjected and sought to address the Court on at least one occasion and at no time was he criticised for so doing.
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> 8. At no point did Counsel retained on behalf of the Applicant seek to make submissions in mitigation or seek to address the court once it became apparent that the Court was proceeding from conviction directly to sentence or ask the Court to reconsider the matter when it became clear that the Court had imposed sentence. After affirming the sentence imposed in the District Court, your deponent sought the costs of the prosecution and again no submissions were made by Counsel appearing on behalf of the Applicant.
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> 9. The sequence described at paragraph 10 of [Mr. Maloney's affidavit] is not correct. The presiding Judge was aware of the penalties imposed in the District Court, as the Order had been opened to the Court, and it was your deponent who sought the costs of the prosecution, rather than the costs being awarded by the presiding Judge of her own motion, as is suggested.
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> 10. It is not your deponent's belief that Counsel retained on behalf of the Applicant was denied an opportunity to make submissions in mitigation nor was the matter dealt with at such speed that it was no open to Counsel to address the Court in respect thereof or ask the Court to reconsider its decision in light of subsequent submissions and such an interpretation of the final stages of the hearing does not accord with digital audio recording, a transcript of which is being sought.
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> 11. The suggestion of undue hast or speed is contrary to what occurred as evidenced the fact that the evidence concluded at 14:41; however, the prosecution was only finalised at 15:11."

15. On 1st June, 2017, the applicant's solicitors received the appropriate login instructions from the respondent's solicitors allowing them to access an aural electronic copy of the Digital Audio Recording (DAR) of the appeal hearing. With the respondent's consent, they requested Gwen Malone Stenography Services to produce a written transcript for the afternoon portion of the appeal hearing. The said transcript is exhibited in Mr. Maloney's second affidavit, sworn 4th January, 2018.

16. As recorded in the transcript, the Circuit Judge's ruling on sentence, following conviction, is as follows:-

> "[Judge Codd]: In the circumstances I am going to affirm those two District Court orders insofar as they impose fines of a €1,000 with four months to pay and there's a Costs Order. I am affirming the Costs Order as well.
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> Mr. Teahan: I'm also seeking costs of a 1,000 just for today's purposes.
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> Judge Codd: A €1,000.
>
> Mr. Teahan: which I have to submit is simply a contribution to the costs. It does not reflect the costs of today's hearing.

Judge Codd: I'll make that Order for costs.

Mr. Teahan: That's the District Court and the Circuit Court costs?

Judge Codd: Yes, thank you, measured at €1,000 for today. Thank you.

HEARING CONCLUDED"

17. With regard to same, Mr. Maloney avers:-

"10. I say that following on from its ruling, immediately, the court proceeded to pronounce at 3.10pm &10 seconds that it was affirming the orders of the District Court…

11. I say that following on from its ruling, immediately, the court had pronounced by 3.10pm & 26 seconds that it (1) affirmed the District Court orders, (2) affirmed the fines of €1,000 with four months to pay attaching to each of these orders & (3) affirmed the costs order made in the District Court… I therefore say that the court's pronouncement took 16 seconds from beginning to completion…

12. I say that immediately thereafter the solicitor on record for the Respondent sought its costs from the court to which the court had formally acceded to by 3.10pm & 49 seconds…I therefore say that this costs application was (1) sought and (2) acceded to in some 23 seconds.

13. I say that immediately thereafter the Trial Judge's tipstaff announced in open court 'All Rise' at 3.10pm & 50 seconds.

14. I say and believe and have been advised by Counsel that the Trial Judge immediately rose from the bench and exited the courtroom in a somewhat hasty manner in a matter of seconds."

The applicant's submissions

18. On the applicant's behalf, it is not disputed that the applicant was afforded a careful hearing of his appeal, albeit on occasions fractious, over an extended period of three hours, sufficient to cover all matters pertaining to his conviction. It is submitted however that the difficulties which give rise to the within application arose after the Circuit Judge's finding of guilt. Counsel contends that what ensued immediately after the affirmation of guilt was a highly accelerated consideration, tantamount to a lack of a hearing regarding the issue of sentence. The rapidity was such that it took up a mere twelve lines of the transcript of the DAR.

19. It is submitted that the transcript records that the applicant's counsel did not have an opportunity to intervene on his behalf to address the issue of penalty before the Circuit Judge exited the courtroom. It is submitted that in the space of time it took counsel to make notes of the ruling on guilt, the Circuit Judge had dealt with sentence and risen, thereby leaving counsel with no opportunity to make submissions on penalty or with regard to the issue of costs. Moreover, no opportunity was afforded to counsel to apprise the Circuit Judge of the applicant's personal circumstances, in particular, his clean record up to the time of the offence of which he was convicted.

20. It is submitted submits that due to mistake on the part of the Circuit Judge, howsoever it occurred, it appears to have been impressed upon her that conviction was all that was in the mind of the parties. As a result of this mistake, the Circuit Judge slipped into error in failing to afford counsel time to indicate his views on sentence by way of plea in mitigation and in respect of costs.

21. It is submitted that a purpose of the within application is not an attempt by the applicant to make a case that could have been made on his behalf in the Circuit Court but which either through tactical failure or oversight on the part of his legal representative was not made. Nor can the applicant's present application be deemed as an attempt to raise in issue that only occurred to his counsel after the appeal ended and which could have been made in the course of the appeal. That is not the position. For whatever reason, no opportunity was afforded to the applicant's counsel to make submissions on penalty and costs. This was in circumstances where counsel had received particular instructions to address the issue of costs, particularly in light of the fact that the applicant had had a measure of success in the appeal in respect of the striking out of one of the summonses. It is contended that the quick affirmation by the Circuit Judge of the District Court's fines and costs orders, together with the Circuit Court's own award of costs against the applicant, meant effectively that the applicant had no hearing on sentence. Accordingly, there was no opportunity for post-conviction intervention by the applicant's counsel which is part of the trial process. Essentially, therefore, while the hearing as to fact was properly conducted, the summary manner in which the issue of fines and costs were addressed meant that there was no sentence hearing. It is submitted that the entitlement to audi alteram partem applies as much to a hearing on sentence as it does to the rest of the trial process. All in all, the applicant's counsel was taken by surprise and deprived on an opportunity to participate in the sentence hearing.

22. While the respondent criticises the lack of alacrity of the applicant's counsel, it is submitted that that criticism is not borne out by the transcript of the trial.

23. In aid of the submission that there was a denial of fair procedures, the applicant relies on the decision of the Supreme Court in *Nevin v. Crowley* [2001] 1 I.R. 113.

24. It is further submitted that the respondent as the prosecutor in this case at no point in time addressed the Circuit Court, attempted to address the Circuit Court, or indeed made any submissions whatsoever to the effect that the applicant's details in mitigation, namely his previous record and financial means, be heard or outlined prior to or during the sentencing phase of the trial. It is submitted that this should have been done, as the prosecuting authorities and all other persons or bodies charged with the administration of the criminal justice system must exercise their functions subject to and in accordance with the rules of fair procedures.

25. It is submitted that it is impossible to ascertain whether or not the applicant received a proportionate sentence in view of the fact that his mitigation, previous record and financial means were never opened to, or invited to be opened, by the Circuit Judge. For all these reasons, it is submitted that the prosecution in this case should have equally been given an opportunity to intervene in these regards. It is contended that the haste in affirming the District Court fines and costs Order suggests that the prosecution got no such opportunity.

26. Albeit that it is not being suggested that the Circuit Judge's inadvertence was wilful, it nevertheless impacted on the applicant in circumstances where he had appealed both the conviction, sentence and costs order of the District Court.

27. Contrary to the respondent's claims, it is not correct that the applicant's counsel failed to bring about an intervention; the speedy nature of the sentence hearing and the hasty departure of the Circuit Judge from the bench deprived him of such an opportunity. Thus, there is no case to be made that the applicant's counsel himself fell short in putting representations to the Circuit Judge. It is not the applicant's case that he had inadequate legal representation, or that his counsel failed to act to his best endeavours. As the trial transcript demonstrates, there passed a mere second between the last utterance of the Circuit Judge and her departing the bench.

28. While it is not for the applicant to say whether a different outcome would have ensued, an opportunity should have been afforded his counsel to make the case to ameliorate the effect of the applicant's conviction. The purpose of the sentence hearing is to allow for a tailoring of the sentence to the applicant's behaviour and circumstances, but such an opportunity was lost to the applicant.

The respondent's submissions
29. Contrary to the case being made on the applicant's behalf, there was no automatic ruling on sentence in the present case. It is submitted that this is borne out by the exercise conducted by the applicant's solicitor, Mr. Maloney, in his second affidavit. A perusal of the transcript shows that there were some 40 seconds from the affirmation of guilt to the conclusion of the hearing. The respondent contends that there was thus a period of time in which the applicant's counsel could have entered the fray and dealt with the question of sentence. This could have done the second after conviction was affirmed. The applicant had legal representation. As such, there was a heavy onus on his counsel to speak up at the sentencing stage as volubly as he had done when addressing the merits of the prosecution. In this regard, counsel for the respondent points to the code of conduct for the Bar of Ireland which provides that barristers have an overriding duty to the court to ensure in the public interest that the proper and effective administration of justice is achieved and they must assist the court in the administration of justice.

30. It is submitted that a period of 40 seconds was ample time for counsel to intervene. There was no question in the instant case of the Circuit Judge having stated that she did not wish to hear from the applicant's counsel. Earlier in the hearing (prior to conviction), Mr. Teahan on behalf of the prosecution had put the parameters of the penalties (in an abstract fashion) to the Circuit Court. It is submitted that at any time thereafter Counsel for the applicant could have addressed matters.

31. It is further submitted that the applicant's reliance on Nevin v. Crowley is misplaced since on its facts that case is entirely distinguishable from the applicant's circumstances.

32. It is further submitted that the transcript of the appeal hearing, as before this Court, is evidence of the fair manner in which the applicant's trial was conducted. It shows that in the course of the trial, counsel for the applicant intervened on a number of occasions, all of which interventions were permitted and engaged with by the Circuit Judge and no impediment was raised to his interjecting throughout the trial process. It is asserted that this is a complete indicator that the Circuit Judge would have allowed applicant's counsel to make whatever case he wished to make on the issue of penalty and costs. Therefore, there can be no criticism of the Judge's handling of the matter in circumstances where the applicant's counsel did not avail of the opportunity to intervene and be heard on the issue of penalty and costs. It was counsel's duty to use his "best endeavours" in this regard, as per McGuinness J. in *Director of Public Prosecutions v. P.J.* [2003] 3 I.R. 550. In aid of its submissions, the respondent relies on the dictum of Lord Bridge of Harwich in *R. v. Home Secretary, EX P AL-MAHDAWI* [1990] 1 AC 876, as approved by Herbert J. in *McCann v. Groarke* [2001] 3 I.R. 431. Counsel also cites the decision of Hedigan J. in *Balaz v. His Honour Judge Kennedy* [2009] IEHC 110.

Considerations
33. It is well established that sentencing is part of the trial process as a whole, and for this reason it must be conducted in accordance with due course of law, as required by Article 38.1 of the Constitution. Furthermore, the doctrine of proportionality dictates that by reason of a plea in mitigation, convicted persons should be given credit for any mitigating factors arising. As stated by Henchy J. in the *State (Healy) v. Donoghue* [1976] IR 325 a defendant is entitled to have his or her trial conducted in the manner which would not "*shut him out from a reasonable opportunity of establishing his innocence; or…of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances*".

34. In this case, the principal claim made on behalf of the applicant is that he was deprived of a hearing on sentence and costs to which he was lawfully entitled and that the Circuit Judge was not entitled to abrogate her duty to conduct a sentence hearing.

35. It is not the applicant's case that the Circuit Judge displayed any particular attitude or bias towards him. The case that is made by the applicant is that, howsoever it happened, the Circuit Judge did not advert to the requirement to conduct a sentence hearing. It is also the applicant's contention that there can be no suggestion that there was acquiescence on his counsel's part in the face of the Circuit Judge's inadvertence. This is so, the applicant submits, in circumstances where the Circuit Judge's oversight occurred effectively in a matter of seconds, and her hasty departure of the Judge from the bench deprived counsel of any opportunity to intervene.

36. On the other hand, the respondent's case is that there was ample time for counsel for the applicant to intervene which was not availed of.

37. The respondent also contends that as it is common case that in the District Court there was a disposal of the matter without any plea in mitigation having been given by the applicant, which was not challenged by the applicant or put in issue at the hearing of the appeal, the applicant's claim for relief should be refused on this basis alone. However, I do not find particular merit in this argument having regard to the fact that the appeal was a de novo hearing of all matters.

38. In the present case it is undisputed that the applicant appeared at and fully contested the evidence against him in the District Court, and appeared at and fully contested the evidence presented against him in the Circuit Court on appeal. Accordingly, his appeal was demonstrably de novo. In this regard, I agree that the applicant's position can be distinguished from *Maguire v. Governor of Dóchas Centre* [2016] IEHC 378, where the High Court (Eagar J.) held that a Circuit Court Judge hearing a District Court appeal had the authority to affirm a sentence (under appeal and originally imposed before the District Court) without rehearing the evidence where the applicant failed to appear before the court to prosecute his or her appeal. Eagar J. accepted as "*common case*" that when an appeal is presented before the Circuit Court hearing is it a de novo hearing but that "*what is not common case, however, that when an accused fails to appear at their appellate court, that the court should proceed with a de novo hearing*".

39. The applicant invokes the decision of the Supreme Court in *Nevin v. Crowley* [2001] I IR 113 in his favour. The facts of that case were as follows: the defendant was convicted of a serious road traffic offence on one date where upon sentencing was adjourned by

the District Court to a later date to allow time for the preparation of a probation and welfare services report in consideration of community service. Upon leaving the courtroom there was an interaction between the defendant and the prosecuting garda at which point the garda immediately brought the defendant back to court and proceeded to give evidence what had been said. The District Judge then imposed a custodial sentence together with a disqualification from driving without hearing submissions from the defendant or his legal representative in respect of mitigation. On judicial review, it was argued that neither the defendant's solicitor nor his Counsel were afforded an opportunity to either cross-examine the garda in respect of what had been said or to make submissions to the court in mitigation. The High Court granted an order of *certiorari.* The matter was appealed to the Supreme Court. The High Court's ruling was upheld. In the course of his judgment, Murray J. stated:-

> "The right of an individual, charged with an offence before a court, to test by examination the evidence tendered on behalf of the prosecution, to be allowed to call evidence, to be heard in argument or submission before judgment is a fundamental right guaranteed by the Constitution. (see O'Higgins C.J. in The State (Healy) v. Donoghue [1976] I.R. 325 at p. 349).
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> As Henchy J. observed in The State (Healy) v. Donoghue [1976] I.R. 325, there is an onus on a District Judge to see that the accused is not subjected to the risk of injustice. In this case there was a positive duty on the first respondent to ensure that the constitutional right to a fair hearing was observed and indeed there is an onus also on State prosecuting authorities to proceed with due respect for such right.
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> In my view, in the circumstances of this case, the first respondent should have expressly asked the applicant before him whether he wished to consult his legal advisors or expressly invited those advisors to participate in this part of the case on behalf of their client before formally hearing the evidence of the garda and imposing a prison sentence.
>
> In not doing so, he failed to respect the fundamental principle of constitutional justice of a right to fair hearing which is essential to the proper administration of justice in our courts.
>
> Accordingly, in my view the learned High Court Judge was correct to quash the decision of the District Court." (at p.118)

40. While it is acknowledged by the applicant that *Nevin v. Crowley* may well be considered as a stark example of a breach of audi alteram partem, it is nonetheless submitted that the principle upon which *certiorari* was granted in that case is apposite to the applicant's circumstances. Thus, the question for this Court is whether what occurred on 17th February, 2017 in Court No. 16 in the Criminal Courts of Justice amounted to a breach of the *audi alterem partem* rule.

41. The portion of the audio recording of the appeal hearing as put before this Court shows that the learned Circuit Judge was aware that the applicant was appealing conviction and penalty. It is also common case that, pre-conviction, in the course of submissions being made by the applicant's counsel, including with regard to the summons alleging that the applicant had used offensive language towards the passenger (ultimately struck out by the learned Circuit Judge), the learned Circuit Judge invited the prosecutor, Mr. Teahan, to address her on the penalties, a dialogue in which the applicant's counsel also intervened. Thus, albeit that it was hypothetical at that stage, there is no doubt that the learned Judge was apprised of the range of available penalties, were the applicant to be convicted in respect of Regulation 38(5)(a)of the 2014 Regulations /s.20(4)(b) of the 2013 Act. In the within proceedings, the applicant makes no objection to this discussion having taken place, albeit that it was pre-conviction.

42. There is no dispute between the parties but that no plea in mitigation was in fact put before the Circuit Court post the applicant's conviction. The salient question in this case is whether this was as a result of unfair procedures on the part of the Circuit Judge in not affording the applicant's counsel an opportunity to be heard. The issue is net: whether the fact that the Circuit Judge did not invite further submissions on the issue of mitigation merits the quashing of the convictions.

43. To a considerable extent, the answer to this question must be based upon a consideration as to whether in fact the applicant's counsel had a sufficient period of time in which to indicate that he wished to make a plea in mitigation of sentence.

44. It is undoubtedly the case that the time period from the affirmation of guilt to the Circuit Judge departing the bench was approximately 40 seconds. As deposed to by Mr. Maloney, the first 16 seconds of this time period was taken up by the Circuit Judge's pronouncement that she was affirming the fines and costs Order imposed by the District Court. It is clear therefore that there was no invitation from the court for a plea in mitigation to be made.

45. The next 29 seconds, it appears, were taken up with Mr. Teahan's submission that he was seeking costs in the appeal and the exchange that took place between the Circuit Judge and Mr. Teahan in this regard, with the Circuit Judge thereafter departing the bench. The Court is told that during this 39/40 second timeframe counsel for the applicant was engaged in taking a note of the Circuit Judge's pronouncement of guilt.

46. The respondent contends that it is only in the course of the within hearing that it is suggested that the applicant's counsel was taking notes at the time when the ruling on penalty and costs was pronounced. Counsel for the respondent points to the fact that this assertion is not set out in either of Mr. Maloney's affidavits, nor is it in the statement of grounds. It is submitted that in those circumstances the Court should not have regard to this particular factor. The respondent also maintains that in any event, even if it was the case that counsel was busy note-taking, it had to be the case that he heard the Circuit Judge pronouncing on sentence and costs and the tipstaff calling "All Rise".

47. It is well established that there is an obligation on legal representatives to assert themselves on behalf of their clients, as set out by Lord Bridge of Harwich in *R. v. Home Secretary, EX P AL-MAHDAWI* [1990] 1 AC 876:

> *"A party to a dispute who has lost the opportunity to have his case heard through the default of his own advisors to whom he has entrusted the conduct of the dispute on his behalf, cannot complain that he has been the victim of a procedural impropriety or that natural justice has been denied to him, at all events in the subject matter of the dispute raises issues of private law between citizens. Is there any principle which can be evoked to lead to a different conclusion where the issue is one of public law and where the decision taken is of an administrative character rather than the resolution of a lis inter partes? I cannot discover any such principle and none has been suggested in the course of argument".*

48. This approach was approved by Herbert J. in *McCann v. Groarke* [2001] 3 I.R. 431. In *McCann*, the applicant's appeal had been dismissed by the Circuit Court and the District Court Order affirmed in the absence of the applicant, whose solicitors had not been aware of the case being listed for hearing. He stated:

> *"I do not consider that there is anything in our constitutional jurisprudence which would render the application of these principles inappropriate in the present and in similar cases of the type illustrated by Lord Bridge of Harwich. In my judgment, there is no evidence offered by the applicant in this case, upon whom the onus of proof lies, which would satisfy me on the balance of probabilities that the first respondent failed to see that the applicant was not subjected to a risk of injustice."*

Herbert J. further remarked:

> *"If the applicant was not heard on this occasion it was entirely due to his own failure to attend before the court, or alternatively or additionally, due to his solicitors' failure to notify him of the adjourned date or to appear before the court. In the absence of some compelling evidence which would establish that the decision of the first respondent was in the circumstances irrational, unreasonable or tainted with bias - and there is no such evidence to be found in this case - the proper administration of justice must require that the court has and utilises the power to strike out or to dismiss an appeal for default of appearance on the part of the applicant or anyone on his behalf."*

49. In *R v. Komsta & Murphy* 12 CR App R (S) 63, the UK Court of Appeal opined that it was the duty of both counsel for the defendant and counsel representing the prosecution "*to ensure that no order is made that the court has no power to make*". In *R. v. Cain* [2007] 2 Cr App R (S)25, the UK Court of Appeal opined as follows:

> *"It is the duty of a judge to impose a lawful sentence, but sentencing has become a complex matter and a judge will often not see the papers very long before the hearing and does not have the time for preparation that advocates should enjoy. In these circumstances a judge relies on advocates to assist him with sentencing. It is unacceptable for advocates not to ascertain and be prepared to assist the judge with the legal restrictions on the sentence that he can impose on their clients. This duty is not restricted to defence advocates. We emphasise that advocates for the prosecution also owe a duty to assist the judge at the stage of the sentencing."*

50. While the aforesaid jurisprudence is not altogether on point since there is no case being made that the Circuit Judge did not have power to impose the fines and costs order actually imposed, it nevertheless reinforces the duties and obligations that counsel for the prosecution and counsel for a defendant have in the matter of sentencing.

51. Accepting that no plea in mitigation was invited by the Circuit Judge, and that the prosecutor did not prompt the Circuit Judge in this regard, I am nevertheless not persuaded that what occurred in the present case can be deemed a breach of fair procedures such as merits the quashing of the applicant's convictions. On the evidence before me, I cannot fathom how, in the immediate aftermath of the affirmation of the District Court's ruling on fines and costs, the applicant's counsel could have remained unaware of the fact that Mr. Teahan had risen to his feet to seek the respondent's costs in the appeal. At the very least, that action should have been the trigger for counsel's intervention on behalf of the applicant, in my view. I also have to have some regard to the paucity of evidence before the Court as to what in fact the applicant's counsel was doing at the time the Circuit Judge was delivering her ruling on sentence, although I accept the submission that counsel was engaged in note-taking during the pronouncement on sentence.

52. Even accepting that counsel for the applicant was indeed busy note-taking, and even if I am wrong in finding that the actions of Mr. Teahan in seeking costs were sufficient to alert the applicant's counsel that representations were being made to the Circuit Judge on costs, it seems to me that once counsel became aware that the Judge was leaving the bench, as he must have, given that the Judge's tipstaff heralded as much, it was open to him to then intervene at that stage and request that the Circuit Judge hear him on the question of penalty and costs and the applicant's particular circumstances. It seems to me that it is not, as the applicant suggests before this Court, a question of forty seconds being insufficient time for his counsel to make representations: all that was required to ensure an effective hearing on sentence would have been a couple of word from counsel so as to alert the Circuit Judge to the fact that he had not been heard on the question of mitigation of sentence. Having regard to the timeframe put before the Court, I am satisfied that that opportunity was there. Furthermore, even accepting that counsel was caught unawares, I see no reason why he could not have approached the court registrar as the Circuit Judge was exiting the bench and request that she be recalled, if, as contended by the applicant, the Judge had departed the bench before counsel could react. In my view, even taking the applicant's case at its height, there was therefore a mechanism available to counsel to ensure that his voice would be heard. There is no suggestion, from the available evidence, and given that all agree that the Circuit Judge afforded a fair hearing on the question of the applicant's guilt or innocence, otherwise but that had this approach been adopted by counsel, that he would have been afforded an opportunity to address the question of penalty and costs. In *Balaz v. His Honour Judge Kennedy*, Hedigan J. addressed the obligation to raise matters at the time of the hearing. He stated:

> *"The respondents have made the case that since the applicant failed to raise his concerns in relation to the first named respondent's impartiality at the time of the hearing, he is prohibited from seeking judicial review on such a basis. This is a submission with which I am inclined to agree. It is clear that a party's entitlement to rely on certain procedural infirmities of a criminal trial being challenged on judicial review may be waived where he failed to object to the particular practice at the time of the trial itself. In D.P.P. v. O'Donnell [1995] 2 IR 294, Geoghegan J. accepted that there might be circumstances in which a failure to challenge a tribunal's jurisdiction to consider a particular matter would constitute a waiver of the right of objection, although such did not arise on the facts before the High Court in that case." (at para. 23)*

53. In all the circumstances, I find, on balance of probability, that there was sufficient opportunity for the applicant's counsel to make his plea in mitigation. The fact that this opportunity was not availed of by way of intervention during or immediately after the Circuit Judge's ruling on sentence, or at least by an effort to seek the return of the Circuit Judge to the bench, to my mind, deprives the applicant of his right to discretionary relief in this case.

54. The relief sought in the notice of motion is thus denied.