THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 648 J.R.]

BETWEEN

LEE HEFFERNAN

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 9th day of October, 2018

1. The applicant was summonsed to appear before Kilkenny District Court in respect of a number of road traffic offences and a public order offence alleged to have occurred on 29th May, 2016. The summonses were served and made returnable to 19th June, 2017. The applicant did not personally appear in answer to the summonses but Mr. McCarthy solicitor appeared on his behalf. The applicant seeks orders of *certiorari* quashing his conviction and sentence in respect of Case No. 2016/179018 – the public order charge and Case No. 2016/179028 – the road traffic convictions. A charge alleging driving with no insurance was dismissed by the learned District Judge following the hearing. The applicant was convicted on a charge under s. 106 of the Road Traffic Act 1961 as amended in respect of failure to report an occurrence. A fine of €400.00 was imposed and he was disqualified from driving for one year. He was also convicted of failure to pay road tax and received a further fine of €400.00. Two further offences, one under s. 106 of the Road Traffic Act and another for failure to produce his certificate of insurance were taken into account. The verifying affidavits submitted in support of the application did not exhibit the orders of conviction and sentence nor did they exhibit the summonses upon which the applicant was charged. Subsequently in a replying affidavit Garda Niall Coghlan exhibited the summonses which were before the court on 19th June, 2017.

The Initial Application

2. An application for leave to apply for judicial review by way of *certiorari* was granted on 31st July, 2017. The grounds upon which relief is sought and upon which the application was permitted by the court to proceed are set out at paras. 5(i) to (viii) of the statement of grounds. Grounds (i) to (iv) are based on a complaint that no disclosure was provided to the applicant's solicitor by the investigating Garda or the prosecution prior to the hearing. It is said that the learned judge acted unfairly or in excess of jurisdiction in proceeding to hear the summonses in the absence of the applicant and in circumstances where no disclosure had been provided to his solicitor. It is claimed that the learned judge should have known that the charges before the court required disclosure in order to be defended appropriately. In addition, it is said that the learned judge acted in breach of fair procedures in proceeding to hear the matter even though he had been informed by the applicant's solicitor that he did not have disclosure in respect of the matters listed before the court and that the prosecuting Garda had refused to give him such disclosure as was in his possession. Though Mr. McCarthy deposed to these facts on affidavit it would appear from the transcript of the hearing that the latter suggestion is incorrect. The court was not informed that the applicant's solicitor had been refused disclosure by the prosecuting Garda nor was the court informed that the applicant's solicitor did not have disclosure. No application in respect of disclosure was made at all.

3. The balance of the grounds (v) to (viii) are general in nature and indicate no specific or precise basis upon which it might be said that the applicant is entitled to relief. Ground (v) asserts that the manner in which the trial proceeded was in breach of the applicant's rights under Article 6 of the European Convention on Human Rights. Ground (vi) claims that the trial was not conducted in accordance with Articles 34.1 and 38.1 of the Constitution and that the applicant's rights to constitutional and natural justice and trial in accordance with law and a fair trial and procedures have been breached. Ground (vii) also states that the conviction and sentences were imposed in breach of the applicant's rights to natural and constitutional justice and his rights to a fair trial and procedures. Ground (viii) states that the impugned convictions and sentences are unreasonable, irrational and lacked proportionality and the essential characteristics of a lawful order.

4. The verifying affidavit of the applicant's solicitor states that he appeared before District Judge Daly on behalf of the applicant in respect of the summonses. He had been retained by his client by telephone the previous night and for some reason his client was not in a position to give him full details of the charges set out in the summonses with which he had been served. No affidavit was submitted by the applicant in support of any of these facts or deposing to his knowledge of the charges, the late retention by him of Mr. McCarthy or the reason for his non-attendance at the District Court. There is no evidence from him to suggest that he was not in a position to instruct his solicitor as to the charges which he faced or the circumstances in which he was arrested and detained.

5. When he appeared before the court on 19th June Mr. McCarthy informed Judge Daly that his client was not present but that he expected him to appear because he had contacted him the previous evening to ensure that he would be present in court. The matter was allowed to stand until second calling. He states that the list in Kilkenny District Court was relatively short and that the applicant's case was again called at approximately 12:30pm. In the meantime, Mr. McCarthy had been unable to contact the applicant and the only instructions which he had were to the effect that the applicant was travelling by bus from Waterford and would be late. He had not been contacted by the applicant on the morning of the 19th June at all and was unaware if the applicant had actually boarded the bus. However, it appears from the transcript that Mr. McCarthy had been informed by his client that he was travelling from Waterford but had a job interview and was coming to the court straight afterwards. However beyond that there is nothing in the evidence to suggest that his client's arrival was imminent. He did not appear.

6. The applicant's solicitor then states:-

> "11. As the applicant was not present, I presumed a bench warrant would issue for his arrest and I would not have been in a position to oppose such an application. I say, however, that District Judge Daly indicated that the matter would proceed to hearing in the applicant's absence. I say that I objected to this course of action on the basis that the matter was not listed for hearing, it was the first day in and I had received no disclosure in relation to any of the charges/summonses nor was I fully aware of the nature of the charges/summonses against the applicant. I also indicated that, due to my limited knowledge of the nature of the charges before the court, the applicant could be at risk of a custodial sentence. I say that notwithstanding my objections, the matter proceeded."

7. Mr. McCarthy complains in the affidavit as to the manner in which the hearing was conducted in that he was obliged to conduct a hearing on the first day that the matter was listed before the court without any disclosure. He also contends that this difficulty was exacerbated by the refusal of Garda Niall Coghlan to provide him with copies of the charges or any disclosure. While he appreciated that there was little or no disclosure available for documentary road traffic offences there would be at least a précis provided in relation to the s. 4 public order matter and matters surrounding an alleged hit and run. Garda Coghlan for his part denied that he refused to provide documents as alleged by Mr. McCarthy. There are conflicting affidavits in relation to this matter.

8. It is clear that the statement of opposition delivered on behalf of the respondent is based in large measure upon a transcript of a digital audio recording (DAR) of the hearing before District Judge Daly.

9. The application is opposed on the ground that there was no failure to make disclosure to the applicant. The applicant's solicitor asked the court to set out the charges laid against his client in the summonses. The court duly informed him of the charges. The court was requested not to proceed in his client's absence. The court notes that the applicant had been served with the summonses and retained his solicitor to represent him in respect of the charges. There was no application made by the applicant's solicitor for disclosure though it was open to him to ask the court to make a disclosure order. It is submitted that the granting of disclosure in summary trials is a matter within the discretion of the trial judge who may order such disclosure as meets the justice of the case. Since the applicant never sought disclosure or a disclosure order from the court it is submitted that it was therefore not open to the applicant to impugn the court for not doing so.

10. Garda Niall Coghlan summarised in his affidavit certain aspects of the content of the DAR transcript which had been obtained. He rejected Mr. McCarthy's contention that he spoke to him and requested a précis of the evidence and copy summonses just prior to the hearing and that he had refused this request. He stated that he did not discuss the case with Mr. McCarthy beforehand and was not asked for disclosure. He noted that such a request would normally be made to the court presenter. He discussed the case briefly with Mr. McCarthy after it had been heard.

11. In Director of *Public Prosecutions v. Doyle* [1994] 2 I.R. 286 Denham J., delivering the judgment of the court as to whether there was a general obligation on the prosecution to furnish on request the statements of the proposed witnesses for the prosecution where an indictable charge is being disposed of by way of summary trial in the District Court, stated at pp. 301-302 :-

> "Request
>
> It is neither for the accused nor his solicitor to determine the procedure of the District Court - that is for the District Court Judge. Thus, a request on behalf of or by an accused cannot be the determining factor in deciding whether or not statements should be furnished to an accused pre-trial. However, the presence or absence of a request may be a factor for the District Court Judge.
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> Duty of District Court Judge
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> The District Court Judge has the duty of ensuring that justice, incorporating fundamental constitutional concepts of fair procedures, is delivered in court. In the absence of legislation, the test for the District Court Judge to apply in each case is whether in the interests of justice on the facts of the particular case the accused should be furnished pre-trial with the statements on which the prosecution case will proceed.
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> The procedures necessary to obtain justice will vary as the cases vary. Many very minor cases may not require that statements be furnished. As O'Higgins C.J. stated in *The State (Healy) v. Donoghue* [1976] I.R. 325, at p. 350:-
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> > 'There are thousands of trivial charges prosecuted in the District Courts throughout the State every day. In respect of all these there must be fairness and fair procedures, but there may be other cases in which more is required and where justice may be a more exacting task-master. The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him.'
>
> The more serious cases, and the more complex cases, may require that copies of statements and other relevant documents be furnished in advance of the trial, to inform the accused of the accusation so that he may prepare his defence.
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> Amongst the matters which a District Court Judge may find relevant when deciding whether or not constitutional justice requires statements or documents to be furnished include:-
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> > (a) the seriousness of the charge;
> >
> > (b) the importance of the statements or documents;
> >
> > (c) the fact that the accused has already been adequately informed of the nature and substance of the accusation;
> >
> > (d) the likelihood that there is no risk of injustice in failing to furnish the statements or documents in issue to the accused."

The court was satisfied that there was no general obligation on the prosecution to furnish, on request, the statements of the proposed witnesses intended to be called by the prosecution or in the absence of same a precis or report summarising the case against the accused. It is a matter for the trial judge in each case to determine whether such an order should be made. The court noted that the procedure by which this matter may be addressed is to be determined by the District Court judge but it was appropriate that a letter requesting such disclosure might be sent by an accused's solicitor and if disclosure is declined or not furnished the matter might then be listed before the District Judge to determine the matter. The late furnishing of disclosure might as a matter of fairness, require an adjournment to provide the solicitor with an opportunity to consider same.

12. The court has been furnished with the transcript of the DAR of the hearing of 19th June, 2017. It is clear that although Mr. McCarthy informed Judge Daly about his difficulties and requested that he be informed of the charges before the court before the matter proceeded in the absence of his client he at no stage sought a disclosure order. The transcript indicates that the judge was informed that Garda Coghlan had been asked what charges were before the court "but that information was not forthcoming". At that stage the judge outlined the nature of the charges before the court. The summonses related to two closely connected events. The first was an alleged intoxication in a public place on 29th May, 2016 and the second was in relation to the fruits of the Garda's investigation of a road traffic incident and related road traffic matters which followed immediately thereafter on the same date. The learned judge informed Mr. McCarthy that the charges concerned allegations of having no insurance, a hit and run incident, failing to give appropriate information, failing to produce an insurance certificate, failing to report an occurrence and no road tax. No application was made at that stage in relation to disclosure and disclosure was not mentioned during the entire hearing. Mr. McCarthy is an experienced practitioner and it seems to me likely that had he thought it was necessary in the circumstances he would have sought a disclosure order. Clearly the District Judge did not consider of his own motion that it was necessary in the circumstances to direct disclosure.

13. I am satisfied therefore that there is no basis in fact or in law upon which to quash the order of the District Court because the learned District Judge proceeded to a hearing without making a disclosure order in favour of the applicant when it was not sought nor were any grounds advanced to the District Court as to why one might be necessary. The District Court was not called upon to exercise its jurisdiction to make such an order on the criteria set out by the Supreme Court. The court was not informed that disclosure had been refused by Garda Coghlan. Insofar as there is a conflict of evidence in relation to that matter on the affidavits, neither party was cross-examined. The burden of proof lies upon the applicant on this matter. I am not satisfied that the applicant has established that such a request was made prior to the hearing. If he had made a request to the Garda and was refused I would have expected a complaint to be made about the refusal to the judge in the course of or followed by an application seeking a direction to the Garda to make disclosure.

14. I am therefore satisfied that the court should refuse an order of *certiorari* on the basis of grounds (i) to (iv) which I am satisfied are not established. Furthermore, insofar as the remaining grounds may be taken to reflect an alleged unfairness in the trial procedures or that the trial did not take place in due course of law I am not satisfied to grant relief on those grounds based on the points raised in respect of non-disclosure.

Motion to Amend the Grounds

15. By notice of motion dated 1st June, 2018 the Friday before the hearing in this matter which was listed for 6th June, 2018 the applicant sought an order pursuant to O. 84, r. 23(2) of the Rules of the Superior Courts permitting the applicant to amend ground (vi) of the statement of grounds in the following manner:-

> "(vi) The trial of the applicant was not conducted in accordance with Articles 34.1 and 38.1 of the Constitution of Ireland and the applicant's rights to constitutional and natural justice including his right to a trial in accordance with law, and his right to a fair trial and fair procedures in that:-
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> 1. The District Court judge was made aware of the fact that the solicitor defending had no notice even of the charges his client faced but proceeded to conduct the hearing;
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> 2. The District Court judge refused to adjourn the proceedings;
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> 3. The District Judge effectively sought evidence, or in the alternative was made aware, of the fact that the applicant had previous convictions prior to embarking on the hearing;
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> 4. The District Judge stated he was going to or intimated that he was going to convict the applicant prior to his legal representative being allowed to cross examine the only prosecution witness or make any submissions whatsoever;
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> 5. The District Judge informed the applicant's legal representative that he could not seek to test the evidence against the applicant, as given by the Garda witness, and that in the event he could only make legal submissions;"

16. In the affidavit grounding this application Mr. McCarthy indicates that the additional grounds arise solely from an examination by him and counsel of the transcript of the DAR of the hearing of 19th June, 2017.

17. The statement of opposition and grounding affidavit were received by the applicant's solicitor on 30th January, 2018. He then sought a copy of the DAR from the respondent which was furnished in audio format on 30th January and thereafter transcribed by a member of his staff. This unofficial transcript was furnished to counsel on 28th March, 2018. Counsel indicated that it had to be edited appropriately if it were to be relied upon in court. This was done and a further edited copy was sent to counsel in or about April 2018. Junior counsel advised on an unspecified date that there were issues within this transcript which were covered in the original statement of grounds but might be appropriately particularised. Senior counsel's opinion was sought. Senior counsel advised that an application to amend the grounds be made on 30th May, 2018. A letter informing the respondent of an intention to make such an application was sent and the matter was put in for mention before Noonan J. on 31st May, 2018. The application to amend the grounds was opposed by the respondent. Noonan J. gave liberty to issue a motion returnable to the 6th June, 2018 seeking leave to amend the statement of grounds at the hearing of the substantive application which was listed for that date.

18. It is claimed that the original ground (vi) insofar as it refers to breaches of Articles 34.1 and 38.1 of the Constitution and the applicant's rights to constitutional and natural justice and his right to trial in accordance with law embraces the issues which are now contemplated in the particularised amendment of that ground. I do not accept that proposition. It is clear that the amended grounds had not been contemplated by Mr. McCarthy during the course of the hearing or after it or by counsel until the transcript was reviewed: nor were they raised in the grounding affidavit sworn by Mr. McCarthy.

19. Mr. McCarthy acknowledges that there are matters within the transcript which were not referred to in his grounding affidavit and further that at the time of the swearing of that affidavit he did so from memory but was unable at the time to record accurately the entirety of the hearing that took place because he was participating as an advocate in the course of the trial. The entire hearing took place in a matter of minutes.

20. It is claimed that the matters in respect of which the amendment is sought clearly emerge from the transcript.

21. The jurisdiction of the court to grant an amendment to the grounds upon which leave to apply for judicial review was granted was

considered by the Supreme Court in *Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570. Fennelly J., delivering the judgment of the court set out the principles applicable as follows:-

> "33. Once an applicant has obtained an order granting leave to apply for judicial review, he is confined to the grounds permitted. He may not argue any additional grounds without leave of the court.
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> 34. If he applies for an amendment of his grounds within the judicial review time limit, he should, obviously, at least in normal circumstances, have no difficulty obtaining the amendment. If he applies for an amendment outside the time, he will have to justify the application. He will have to explain his delay, just as in the case of a late applicant. The court will expect him to give reasons to explain his failure to include the new proposed ground in his original application.
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> 35. On the other hand, it is difficult to see why an applicant for an amendment of grounds should have to satisfy a more exacting standard in explaining delay than is imposed on an ordinary late application. He may say that the additional ground is based on material of which he was unaware when he was making his original application. On occasion, the respondent reveals a new ground of argument in its answer to the application, as appears to have occurred in *McCormack v. Garda Síochána Complaints Board* [1997] 2 I.R. 489 and *Dooner v. Garda Síochána Complaints Board* … The applicant may offer a different explanation. There is no reason, in logic, to impose on an applicant a criterion of newly discovered fact to justify an application to amend, when an application for an extension of time is not subject to any equivalent condition. This is not to say that the applicant's knowledge of the facts is irrelevant. In some cases, as in *McCormack v. Garda Síochána Complaints Board* discovery of new facts may be an explanation for the omission to include a ground. In other cases, the applicant may have been aware at all relevant times of the facts relevant to the new ground and this will weigh in the balance against him, without being necessarily conclusive.
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> 36. None of this is to take away from the fact that an applic[ant] for an amendment of his grounds for judicial review must explain his failure to include the proposed new ground in his original application. The cases show that the courts are reluctant to admit new grounds which amount to advancing an entirely new cause of action … or a challenge to a different decision …. The nature of the decision under attack may also be relevant. If it is one which benefits the public at large or a large section of the public, a challenge may have corresponding disadvantages for a large number of people. This may explain why special and stricter statutory rules have been introduced in cases of public procurement, planning and development, and asylum and immigration. The courts will have regard to the public policy considerations which have prompted the adoption of such rules.
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> 37. Amendment may be more likely to be permitted where … it does not involve a significant enlargement of the applicant's case. To the extent that leave has already been granted, the public interest in the certainty of a decision is already under question. An additional ground may not make any significant difference, particularly if it is based, as in the present case, on a pure matter of law. A court might take a different view, if the new ground were likely to give rise to further exchange of affidavits relating to the facts. …"

In *Keegan* the court found that the appellant knew that the basis for the proposed amended ground existed but did not include the point in the original application for leave. The question whether the amendment should be permitted depended on whether his lawyer's oversight in failing to include the ground was a sufficient explanation of this omission. The court was satisfied on the facts of that case that the appellant might be significantly prejudiced if he were not permitted to explain delay or failure to include the ground by reference to the lawyer's error, though not every suggested lawyer's mistake would necessarily justify an amendment. The court was satisfied that the additional ground if successfully argued might enable the applicant to prevent an inquiry which might have led to serious disciplinary penalties. There was no significant prejudice to the respondent if it had to reply to the new ground which was a pure question of law. The court therefore found that it would be unjust to deprive the appellant of the right to argue a very significant point of law. A summary of the applicable principles is to be found in the judgment of Costello J. in *Word Perfect Translation Services Limited v. The Commissioner of An Garda Síochána* [2015] IEHC 668 at paragraph 14.

22. As already noted the proposed amended grounds arise in the context of the DAR transcript which has now been made available.

The Transcript

23. The transcript contains four pages. At the commencement of the short hearing it became clear that the applicant was not present. His solicitor stated that he was coming from Waterford but had a job interview. Mr. McCarthy had been informed that he was coming immediately afterwards to the court. The matter was called at 12:23 p.m. The judge let the matter stand to enable the solicitor to contact his client by telephone. Shortly afterwards the matter was called. Mr. McCarthy informed the court that he had called his client but had no explanation for his client's absence. The learned judge indicated that he would proceed in the applicant's absence. There was no objection at that stage.

24. However, at that point Mr. McCarthy asked the judge to inform him of the charges before the case proceeded. He indicated that he had asked Garda Coghlan, the investigating Garda for that information but it was not forthcoming. The judge then informed Mr. McCarthy of the charges as set out in the earlier part of the judgment. Mr. McCarthy then asked the judge not to proceed in the absence of his client because:-

> "… he may be a person; I am not sure about previous convictions but he may be in jeopardy".

This was an obvious reference to the fact that the court might contemplate imposing a custodial sentence if his client were to be convicted on the charges if he had relevant previous convictions. The judge replied:-

> "well obviously I don't know anything about Mr. Heffernan's previous convictions. Now that it has been opened to me, is Mr. Heffernan or might he be considered to be at risk?"

Reference was then made to the applicant's two previous convictions as follows:-

> "Sergeant: I don't think so. He has two previous convictions is that correct?
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> Garda: Yes, sorry I am just checking my notes here judge, I am just looking to see what the previous convictions are.
>
> Sergeant: judge I would doubt that he would be in jeopardy in relation to those two.

Judge: Okay on that basis then I will proceed."

Mr. McCarthy applied for an adjournment on the basis that the applicant might be in "jeopardy" of a custodial sentence due to previous convictions. The judge clearly pointed out to Mr. McCarthy that he had no knowledge of prior convictions as would be the norm. These matters are the subject of grounds (vi)1, (vi)2 and (vi)3 of the proposed amended grounds.

25. There is no evidence that Mr. McCarthy requested information about his client's prior convictions from his client when retained, or from the prosecuting sergeant or Garda Coghlan during the morning in advance of the hearing. He chose to canvass the issue of his client's possible previous convictions in open court with the learned judge as the basis for an adjournment of the trial. He knew that this would inevitably lead to some discussion in open court about his client's prior convictions. It is clear from his submission that he did so because he was apprehensive that a prior conviction might affect any sentence that might be imposed if his client were to be convicted. Mr. McCarthy was clearly advocating an adjournment if such were the case. If Mr. McCarthy was anxious to ensure that the judge did not explicitly hear that his client had two previous convictions, he could have canvassed that issue much more discretely with the sergeant or Garda Coghlan. It was not a matter relevant to the determination of guilt but was relevant to the sentencing stage of the trial. The issue of criminal liability did not depend in any way on his client's previous convictions. Mr. McCarthy must have known that evidence of his client's previous convictions was normally inadmissible unless introduced by the accused and clearly would not have been introduced but for his intervention and canvassing of the issue with the learned judge.

26. If at the conclusion of the evidence a conviction followed and a custodial sentence was contemplated by the court, sentence could not have been imposed until such time as the applicant's presence before the court was secured either by adjournment or warrant. In that regard it was clear from the submission made by the prosecuting sergeant and accepted by the learned judge that the applicant was in no such jeopardy.

27. The court then heard evidence from Garda Coghlan concerning the events of 29th May, 2016. Having observed Mr. Heffernan in an intoxicated state on the Main Street in Stoneyford, Co. Kilkenny he formed the opinion that he was intoxicated to such an extent as to be a danger to himself and others in a public place and arrested him for being drunk and a danger to himself and others.

28. Garda Coghlan gave evidence that en route to Thomastown Garda Station with the applicant he came across a crashed silver Ford Focus about 1km from Stoneyford which was abandoned at an area known as Knocknabooly just outside the village. It had sustained material damage and was not in a drivable condition. It had crashed into a gatepost causing considerable damage. He checked the vehicle's registration and discovered that the applicant was the registered owner. There was no evidence of the involvement of any other vehicle in the collision nor was there anyone present at the scene who had either been injured or witnessed the crash. He noticed that the tax disc displayed in the window had expired in January 2016 and that the insurance disc was valid until 11th November, 2016. At that stage he cautioned Mr. Heffernan in relation to the driving of the vehicle. Mr. Heffernan was so intoxicated that he was unable to deliver an intelligible answer. Garda Coghlan arranged for the seizure of the vehicle under s. 41 of the Road Traffic Act 1961 as amended. Having conveyed Mr. Heffernan to Thomastown Garda Station at approximately 9:50am he was handed over to the member in charge Garda Kerin. The applicant remained in Thomastown Garda Station for a number of hours. When he was released a requirement was made of him under the Road Traffic Act to account for the driving of the vehicle at the time of the collision. Garda Coghlan investigated the circumstances of the collision and returned to the scene at Knocknabooly. He observed skid marks from which it appeared that the car had failed to take a corner and crossed to the other side of the road crashing into the pillar which caused the damage. During a search of Mr. Heffernan following his arrest at Thomastown Garda Station a set of keys was found which Garda Coghlan brought back to the scene: they fitted the crashed vehicle. He then requested that Mr. Heffernan arrange to meet him to provide a statement concerning the driving of the car on 29th May. He also made a demand under the Road Traffic Act that Mr. Heffernan provide the relevant details and produce a certificate of insurance or exemption for the relevant period which he failed to do. He stated that he later outlined to Mr. Heffernan his obligations to give information on demand to a Garda as set out under s. 107 of the Road Traffic Act 1961 as amended and the penalties for failing to do so. Mr. Heffernan informed him he was not going to speak to him and he had nothing else to add in relation to the matter. That concluded Garda Coghlan's evidence.

29. The following exchange then occurred:-

> "Judge: Okay.
>
> Garda: That is my evidence judge.
>
> Judge: That's your evidence? Sergeant do you have any questions for the witness.
>
> Sergeant: No further questions, no judge.
>
> Judge: Okay on the s. 4 intoxication convict and fine €400 hun –
>
> AMC: I have number of submissions sorry judge …
>
> Judge: You don't have a client.
>
> AMC: I'm instructed to represent him and appear on his behalf today judge.
>
> Judge: He's not, he's not present before the court.
>
> AMC: Yes, but I am present on his behalf judge and I am …
>
> Judge: But if your client is not present then what submissions can you make?
>
> AMC: I can make legal submissions judge. I am entitled to do so I believe.
>
> Judge: When on questions of law only.
>
> AMC: Of course judge. I am not advancing any facts; I'm simply testing the evidence of the garda to see if he has proved the case or not. I'm asking the court if I can make submissions on that.
>
> Judge: Well you can't test the evidence if your client is not before the court.
>
> AMC: Well I can make submissions …

Judge: You can make submissions on points of law only. …"

30. Mr. McCarthy then made submissions in relation to the evidence which had been given by Garda Coghlan on behalf of the applicant. His first submission was in respect of the s. 4 public order charge. Mr. McCarthy submitted that on the evidence adduced the charge had not been proven beyond reasonable doubt. He submitted that the Garda's opinion that Mr. Heffernan was intoxicated to the degree that he was a danger to himself or others was not determinative of the issue. The evidence was limited to testimony that the applicant was intoxicated simpliciter and that he was staggering. The court was invited to conclude that the standard of proof beyond reasonable doubt had not been reached "absent any evidence of danger to Mr. Heffernan or putting another person in danger." That submission was rejected and the judge was satisfied beyond reasonable doubt that the charge had been proved and in those circumstances convicted the applicant and fined him €400.00 with 90 days to pay.

31. Arising from this exchange the applicant claimed in grounds (vi) 4 and (vi) 5 of the proposed amended grounds that since the learned judge stated or intimated an intention to convict the applicant without allowing a cross-examination of the Garda or the making of any submissions and informed Mr. McCarthy that in the absence of his client he was not permitted to "test the evidence" by cross-examination he demonstrated bias and a pre-determination of guilt on that charge prior to hearing all relevant evidence and submissions. I will return to this issue later in the judgment.

32. The second submission was a legal submission that the arrest of the applicant was unlawful and/or unconstitutional and that consequently the evidence obtained as a result thereof ought to be excluded and the charges dismissed. This submission was rejected.

33. The learned judge dismissed the charge of no insurance as the disc appeared to indicate that he was covered by insurance on 2nd November, 2016. That summons was "struck out". The applicant was convicted on the balance of the charges as set out above. There was then a further exchange as to the reasons for the rejection of the legal submission concerning the applicant's arrest in the course of which the judge stated that he was not satisfied that the applicant was unconstitutionally detained. The hearing then concluded.

34. It is against that background that an application is now made to amend the grounds as originally advanced.

35. The court is satisfied that none of the grounds which the applicant now seeks to advance were considered by the applicant's solicitor at the time he swore his affidavit in respect of the original application for leave to be of significance to this application. Having reviewed the transcript he and counsel considered that though these new matters might be covered in the original ground (vi) it ought to be particularised: the failure to do so was said to be an error by omission due to the solicitor's failure to recall the matters set out in the transcript. I am satisfied that on occasion a rapid hearing in which a solicitor is involved alone as advocate may not be recalled with the detail that might be facilitated by the assistance of a careful note taken by another and that the concerns summarised in each of the proposed amended grounds apart from ground (vi) 3 may to a limited degree be interpreted as the subject of exchanges during the hearing. However, I am also satisfied that the applicant's solicitor did not seek to cross-examine Garda Coghlan and made no complaint at the time or in the initial application for leave that his client was denied that right by the judge. The issue of previous convictions was raised firstly by the applicant and the reference to those convictions was not the subject of any complaint by his solicitor: no application was made to the judge to recuse himself.

36. I am satisfied in respect of the criteria to be considered on an application for leave to amend the grounds that the respondent is not prejudiced if required to address these new grounds which concern matters of law rather than extensive new issues of fact. In addition, if the amendments are granted the relief sought is not expanded beyond that originally claimed – an order of *certiorari* of the same orders. However, I am not satisfied that these matters were in error omitted from the original application due to the solicitor's frailty of recollection or in respect of ground 3 the belated recognition that the issue of previous convictions was relevant to the conduct as opposed to the adjournment of the trial. It is clear that the applicant's solicitor simply did not consider these matters as in any way relevant to the fairness of the trial at the time. The retrospective attribution of magnified importance to these matters following a review of the transcript in order to challenge the trial's fairness is undermined by that reality. I do not regard the transcript as new evidence in that regard. These matters were reasonably within the knowledge or understanding of the applicant's solicitor at the time of the initial application. I am not satisfied that a good or sufficient reason has been advanced as to why these grounds were not included in the original application and remain concerned that the present application is entirely prompted by a retrospective interpretation of the course of the hearing which is transcript driven. In *Keegan* Fennelly J. approved the approach taken by Finlay Geoghegan J. in *Muresan v. Minister for Justice, Equality and Law Reform* [2004] 2 ILRM 364, stating at para. 43:

> "At this point I find the reasoning of Finlay Geoghegan J. helpful. She accepted that an oversight or error by an applicant's lawyers might, depending on the facts, provide a sufficient explanation. In a situation where a client might be significantly prejudiced if he could not explain delay or failure to include the ground by reference to such an error, I believe that she was right. She was also rightly sceptical where new lawyers had merely taken a different view of the law. Not every suggested lawyer's mistake will necessarily justify an amendment."

I am therefore satisfied that leave to amend the grounds should not be granted in the circumstances of this case.

37. I consider it appropriate having regard to the extent of the arguments advanced in the matter to consider the substance of the amended grounds notwithstanding the refusal to grant leave to amend the statement of grounds for the reasons stated above.

Refusal of Adjournment

38. An application for an adjournment is a matter for the discretion of the presiding judge. There was no issue as to the service of the summonses on the applicant or the adequacy of notice given to him of the charges set out therein. He chose to retain a solicitor at a late stage on the evening before the hearing. He decided not to attend the District Court at the appointed time. No prior notice of his intention to arrive late at the District Court was given to the prosecution or the court. The applicant retained a solicitor to act on his behalf who travelled to Kilkenny on the morning of the hearing. He was not furnished with any instructions by his client as to the nature of the charges he faced nor apparently did he obtain such instructions from his client or any instructions in relation to the charges other than that he would contest them. The applicant gave no indication as to when he might reasonably be expected to arrive at the District Court from Waterford. An opportunity was given to his solicitor to contact the applicant during the morning. However, the only information furnished to the court was that he was attending for a job interview that morning of which he clearly had prior notice and would travel to Kilkenny by bus after the interview. It was not indicated to the court at what time the interview would take place or the time at which the applicant hoped to arrive in Kilkenny. It was the applicant's responsibility to consider how he wished to deal with the summonses served upon him. He was entitled to elect not to attend and to retain a solicitor to act on his behalf. It was his responsibility to instruct his solicitor fully in respect of the charges made against him, any relevant facts relating thereto, whether he wished to contest the charges and whether he intended to be present at the hearing. It was his solicitor's

responsibility to seek and obtain adequate instructions on these matters in so far as he could. Section 22(4) of the Courts Act 1991 provides that a District Court may adjourn the hearing if the court "considers it undesirable in the interest of justice, whether because of the gravity of the offence or otherwise" to proceed.

39. In *O'Brien v. District Judge Coughlan* [2016] IESC 4 the Supreme Court considered the entitlement of the District Court to proceed with a criminal trial in the absence of the defendant and upon conviction to sentence him to a term of imprisonment. In that case the applicant had a considerable criminal record and was present when his date was fixed for trial in the District Court. On the hearing date he was represented by an experienced solicitor who was surprised that his client was absent. The solicitor applied for an adjournment which was not granted. The judge heard the prosecution evidence and proceeded to a conviction. It was then submitted by the defence solicitor that a bench warrant should issue to secure the presence of the applicant before the court sentenced him. The trial judge disagreed and sentenced the applicant to five months imprisonment.

40. Charleton J., delivering the judgment of the court stated:-

> "8. Where either prosecution witnesses or an accused fail to attend, the first enquiry by a judge will be as to notice and as to whether there is any evidence that some unavoidable or very serious issue has intervened. Thereafter, acting judicially, a judge has the option when satisfied as to notice to proceed with the trial. In the District Court, there may be particular issues to which the accused must consent before a criminal trial may take place within jurisdiction. Usually, such issues as the minor nature of the offence, the consent of the Director of Public Prosecutions to summary disposal and any right there may be in an accused to have a jury trial, if applicable, will have been decided before any trial date is set by earlier decisions in the presence of the accused. Where the presence of the accused is needed for such decisions, but he or she chooses not to attend, the appropriate response is to cause his or her arrest through a bench warrant; *Lawlor v District Judge Hogan* [1993] ILRM 606. Any issue as to when it may be appropriate to continue with, or even commence, a trial on indictment are entirely separate and do not now arise for decision.
>
> 9. In this case, there is nothing to demonstrate that the trial judge exercised his discretion incorrectly in proceeding with the case in the absence of the accused. Jason O'Brien manifestly knew of the date, he had been present when it was set and he was represented by a solicitor who must be presumed to be both efficient and capable of using mobile communications. Anyone can mistake the date of an appointment, be it for a personal or work engagement, but there are few events more solemn, and thus worthy of notice, than a criminal trial. Such mistakes in everyday life may tend to occur, in any event, where it is only on the person themselves to remember or note it. Legal aid in the form of an experienced solicitor renders the chance of a mistake much less. An averment by Jason O'Brien of a mistake in a replying affidavit was not regarded by Kearns P. as convincing. Of itself, in any event, it offers little in the way of a reason why a judge should adjourn a criminal trial."

41. I am satisfied that the applicant in this case was fully aware that the summonses were returnable to 19th June at Kilkenny District Court. That is clear from the fact that he retained Mr. McCarthy to represent him at the hearing. He also decided that he would not be present at the time appointed for the hearing. He did not swear an affidavit outlining his reasons for his absence beyond what was conveyed by his solicitor to the District Court. I am not satisfied in the circumstances set out above that the learned judge erred in law or exceeded his jurisdiction in declining to adjourn the summons, duly served, in the exercise of his judicial discretion.

42. Following conviction, different considerations apply when it is contemplated that a custodial sentence may be imposed upon the accused. In *Brennan v. Judge Desmond Windle* [2003] 3 I.R. 494 the Supreme Court determined that where an accused was convicted, but was not present at his trial, the consideration of sentence should be adjourned if the judge is of the view that a prison sentence may be appropriate in circumstances when this might not be predictable from the nature of the offence. As stated by Geoghegan J. (Murray and Hardiman JJ. concurring) at p 509:-

> "… Once the [District Judge] would have had in mind to impose a prison sentence and particularly a sentence as long as four months and, particularly also in the circumstances, that the offence in question would not invariably attract a prison sentence, the [district judge] failed in my opinion to afford the applicant due process and/or fair procedures or natural/constitutional justice."

43. It is clear from the transcript that the applicant was not at any stage at risk of a custodial sentence and thus there was no basis upon which to adjourn the case before imposing a sentence following conviction. I am also satisfied that this issue properly arises at the sentencing stage of the trial.

44. I am therefore satisfied that the applicant would not have been entitled to the relief claimed on grounds (vi)1 and (vi)2 on the basis of the refusal of an adjournment by the learned District Judge.

Prior Convictions

45. It is submitted that the learned judge sought evidence of the applicant's prior convictions or in the alternative was made aware that the applicant had prior convictions prior to embarking on the hearing. It is claimed that such information or evidence of bad character on the part of the applicant was inadmissible and undermined the applicant's presumption of innocence and the requirement that only such evidence that is relevant of the proof of the offence charged should be admitted.

46. I am satisfied that the issue of previous convictions was first referred to by the applicant's solicitor. Mr. McCarthy introduced the topic by requesting an adjournment because he was not sure about the previous convictions of the accused and "he may be in jeopardy". That jeopardy clearly referred to the issue of sentencing were his client to be convicted. It was clearly not an issue relevant to his trial on the offences contained in the summonses. Those offences were minor and not of such a nature that one might anticipate a custodial sentence if convicted. That was clearly the view of the prosecuting sergeant and the learned judge. The learned judge was told that there were two previous convictions but was not informed of their nature. It was only after Mr. McCarthy raised the issue of convictions that the learned judge stated that he did not know anything about them but because it had been opened to him asked the question whether Mr. Heffernan "might be considered to be at risk" which was again a clear reference to potential risk of a custodial sentence were he to be convicted. Having been satisfied that there would be no such jeopardy he decided to proceed with the case. A submission was not made to him that he ought to recuse himself because of the prejudice that had thereby arisen. However, it is now submitted that having been informed about the existence of two prior convictions the judge ought to have recused himself. It is submitted that since he did not do so the applicant's trial was thereby prejudiced and the trial was not conducted in accordance with law.

47. In *King v. Attorney General and others* [1981] I.R. 233 McWilliam J. stated in holding that part of s. 4 of the Vagrancy Act 1824 which permitted an accused to be convicted on the basis of evidence of prior criminal behaviour was inconsistent with the

Constitution *inter alia*:-

> "… One of the concepts of justice which the courts have always accepted is that evidence of character or of previous convictions shall not be given at a criminal trial except at the instigation of the accused, as that could prejudice the fair trial of the issue of the guilt or innocence of the accused."

The reasons given by McWilliam J. in reaching his conclusion on the substantive issue were adopted by the Supreme Court in upholding his decision.

48. In *The People (DPP) v. McKeown* (1984) 3 Frewen 2, the Court of Criminal Appeal quashed a conviction in circumstances where two members of the Special Criminal Court which convicted the accused, had previously tried and acquitted him in another trial but declined to recuse themselves in the second. The court held that having regard to the seriousness of the charges facing the accused and their similarity to those in respect of which the court had shortly before acquitted him, there was a possibility of prejudice to him. Since justice must not only be done but seen to be done the court was of the opinion that the conviction and sentence should be quashed. It stated (at p. 10):-

> "This Court is satisfied that the members of the Special Criminal Court presiding over this trial, all of whom are experienced members of the judiciary, would in fact have no difficulty, and almost certainly had no difficulty, in excluding from their minds the evidence which they had heard in the previous trial of this applicant which resulted in his acquittal. Quite apart from the Special Criminal Court, the trial of persons necessarily takes place in the District Court on summary charges by a judge sitting without a jury, and in the Circuit Court on appeal by way of rehearing, from summary convictions by a judge sitting without a jury, on different charges at different times the particular judge being inevitably aware of a previous trial and frequently of a previous conviction. That fact could not be taken as necessarily or inevitably disqualifying the judge concerned or vitiating the fairness of the hearing before him."

The respondent submits that the simple mention of two previous convictions in circumstances when the issue was canvassed inappropriately by the applicant's solicitor should be considered by this Court within the terms of the extract quoted from *McKeown*.

49. There are a number of statutory and common law exceptions to the introduction during the course of a trial of evidence of the accused's bad character. (See for example *The People (DPP) v. B.K.* [2000] 2 I.R. 199 and *DPP v. McNeill* [2011] 2 I.R. 669). In addition, if the bad character of an accused is inadvertently referred to or accidentally elicited during the course of a trial, the decision whether or not to discharge a jury in a trial on indictment is one for the discretion of the trial judge on the particular facts of the case and that discretion will not be easily interfered with on appeal. If a judge sitting alone or a jury were to be discharged on every occasion upon which they became aware of an accused's prior conviction(s) or previous bad character, it would be very easy to orchestrate a scenario whereby a judge would feel constrained to recuse himself/herself or in a trial on indictment to discharge the jury and thereby disrupt the proper conduct of a trial. This could give rise to particular problems in cases of co-defendants. (See *R. v. Weaver and Weaver* [1968] 1 Q.B. 353; *R. v. Sutton* 53 C.R. App. R. 504 and *R. v. Box and Box* [1964] 1 Q.B. 430).

50. It is clear that Mr. McCarthy could have adopted the normal procedure of requesting a list of the previous convictions of his client from Garda Coghlan or the prosecuting sergeant. Invariably this information is furnished in the course of prosecutions. There was no need to raise this matter with the District Judge at all. He did so in seeking to procure an adjournment of the trial. I am not satisfied that a defence solicitor having raised the issue of his client's previous convictions when applying for an adjournment of the substantive hearing is entitled, when the judge seeks the information necessary to determine that application to later claim that his client has been prejudiced by the knowledge of previous convictions conveyed to the judge as a result. It is quite unrealistic to argue that the sergeant should not have mentioned the previous convictions to the judge in circumstances where the adjournment application was predicated on a proposition that the seriousness of the previous convictions might warrant the adjournment of the trial. Indeed Mr. McCarthy made no complaint about the furnishing of this information at the time: no application was made that the judge should recuse himself on this basis. I am also satisfied that an application for an adjournment on this basis was only appropriate if the learned judge, having convicted the applicant contemplated the imposition of a custodial sentence on the applicant who was absent. This simply did not arise. Therefore, an adjournment at the sentencing stage was also unnecessary. I am not satisfied that the applicant would have been entitled to relief on the basis of ground (vi)3.

The Right to Cross Examine and alleged bias

51. Grounds (vi) 4 and 5 of the amended ground are linked. Ground (vi)4 contains an allegation of subjective bias on the part of the District Judge because he stated that he was going to convict the applicant prior to affording his solicitor an opportunity to cross-examine Garda Coghlan or make any submissions. In addition, it is said that the applicant's solicitor was denied a right to cross-examine Garda Coghlan and was only permitted to make legal submissions.

52. It is notable that Mr. McCarthy does not make any complaint in his affidavits that he was denied a right to cross-examine Garda Coghlan. That complaint arises from a submission based on the transcript of the hearing furnished after the delivery of the statement of opposition. In the supplemental affidavit grounding the application for leave to amend the grounds, Mr. McCarthy again does not complain of a denial of a right to cross-examine Garda Coghlan. It is also clear that he made no such complaint during the course of the hearing. He informed the trial judge that he was not advancing any facts and was simply testing the evidence of the Garda to see if he had proved the case or not. He was asking the court for an opportunity to make submissions in respect of the evidence already given. However, it is clear that the learned judge expressed an incorrect view that the solicitor was not entitled to make legal submissions that there was no case to answer or that the case had not been established beyond reasonable doubt. It is also clear that when Mr. McCarthy objected to that proposed course of action, the learned judge relented and permitted him to make submissions "on points of law only". Thereafter, Mr. McCarthy made the two submissions outlined above both in relation to fact and issues of mixed fact and law.

53. The issue of subjective bias is said to arise from comments made at the outset of the exchange relating to these grounds in which the judge indicated that on the s. 4 intoxication change he proposed to convict and fine the applicant €400.00. At that stage Mr. McCarthy interjected stating that he had a number of submissions to make. The judge then indicated that because his client was absent, Mr. McCarthy was not entitled to make any submissions. Mr. McCarthy then insisted that he was entitled to make submissions. The judge stated that Mr. McCarthy could not test the evidence if his client was not before the court. However, Mr. McCarthy restated that he could make submissions to which the judge replied that he could make submissions on points of law only. It is clear that Mr. McCarthy then made submissions in respect of issues of law and fact concerning the public order offence which were received and considered by the learned judge. He also made submissions concerning the arrest underpinning the Road Traffic Act offences and the admissibility of any evidence obtained as a result of the alleged unlawful and/or unconstitutional arrest. The judge ruled on these issues.

54. The court is invited to conclude that by indicating an intention to convict the applicant on the intoxication offence, the judge displayed subjective bias and in particular did so prior to receiving the submissions ultimately made by Mr. McCarthy. I am not satisfied that this is so. The test applicable to the assessment of whether a judge is biased or not is an objective one set out by the Supreme Court in a number of decisions including *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412, *O'Neill v. Beaumont Hospital Board* [1990] IRLM 419 and *Dublin Well Woman Centre Ltd. v. Ireland* [1995] 1 IRLM 408. The question is not whether the presiding judge considered he was biased or whether the applicant considered the judge was biased or whether a person in a position of the applicant in this case, should apprehend that his chance of a fair and independent hearing by reason of the actions of the trial judge in the course of the hearing prevented a completely fair and independent hearing of the issues which arose. It is "the apprehension of a reasonable person in the position of the [applicant] which has to be considered." (per Denham J. at p. 421 of *Dublin Well Woman Centre Ltd.* The court must consider whether a

> ".... reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds in the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial."

(*per* Denham J. in *Bula Ltd*. quoting from para. 48 of the judgment of the Supreme Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union* [1999] (4) S.A. 147).

55. These principles were considered and applied in *Fogarty v. O'Donnell* [2008] IEHC 198 in which McMahon J. considered whether the use by a District Court judge of the word "irrefutable" in describing the evidence of three prosecution witnesses in a summary trial when the defendant sought to contradict them in evidence and prior to the calling of an additional witness relevant to the defendant's case, refused relief on the grounds of bias stating:-

> "In assessing the significance of the language used by the respondent it is important to understand the nature of the decision making process engaged in by the respondent, or indeed any decision maker in a similar position, at the trial. It is not unusual in cases where a judge has to adjudicate in the adversarial process, to come to a tentative conclusion at the end of the plaintiff's case in a civil matter, and at the end of the prosecution's case in a criminal matter. The nature of the adversarial process means that the plaintiff or the prosecution goes into the evidence first and before the defence has presented its case and at that stage it would be quite normal that there will be a case to answer. It would not be unusual in these circumstances for the judge to take a tentative view on the case. Just because he does so, however, does not mean he is biased. The process is a protracted one and the judge's view may vacillate as the evidence unfolds. What is important, indeed vital, however, is that the judge does not in such circumstances make a definitive determination before all the evidence has been heard. To do so would be in clear breach of fair procedures and in particular would be contrary to the basic principle *audi alterem partem*. Moreover, it is important also that the judge does not give the appearance that he has prejudged a decision and in this respect he should take great care when expressing himself during the course of the trial that he does not express himself in language which would suggest that he has come to a hasty decision in the matter.
>
> Whether the language used by a judge during the course of a trial is such that it indicates bias in the sense that it shows that the judge has made up his mind before he has heard all the evidence, depends on the facts and circumstances of each case. The use of an infelicitous word or phrase during the trial by the judge should not always compel such a conclusion. To define bias one must look at the overall picture and in the present case one must contrast the use of that single word with the action of the respondent, in insisting that a further witness should be called to give evidence on the sequence of the traffic lights. Such action does not speak of bias. At most it suggests to the reasonable observer that the judge was impressed by the three independent witnesses' evidence but was prepared to hear evidence which would undermine the assumption that informed his tentative conclusion, … Clearly having listened to the applicant/defendant's evidence he harboured some doubt in relation to the sequencing of the traffic lights and, rather than dispose of the matter without investigating this aspect of the case, he called for another witness and adjourned the matter for another day. This, in my view, was not the action of a man who had made a premature decision that was tainted with bias."

56. The essential question is whether the District Judge formed a final judgment in relation to the conviction and sentence of the applicant in respect of the public order offence prior to hearing the submissions of the applicant's solicitor. At the conclusion of the prosecution case he expressed an intention to convict the applicant of the s. 4 offence and fine him €400.00 at a stage when he considered incorrectly that the applicant's solicitor did not have a right to make submissions on the evidence adduced. Mr. McCarthy then made a submission that he was entitled to make submissions prior to judgment. The judge accepted that submission and heard the submissions as set out above. No evidence was offered on behalf of the defence prior to the making of those submissions. The ruling made by the judge on that issue does not evince bias against the applicant. It indicates an acceptance that prior to rendering his judgment in the case in respect of the charges Mr. McCarthy was entitled to make submissions which the learned judge was obliged to consider. The judge then considered these submissions and gave reasons as to why he rejected them. While the language used by the learned judge might appear to be unequivocal it is clear from the overall circumstances of the case that he had not reached a final determination and did so only after hearing the submissions of the applicant's solicitor. He also acquitted the applicant of the offence in respect of having no insurance. Furthermore, it is again clear that Mr. McCarthy made no submission at the time the comment was made or following conviction that the learned judge acted unlawfully or had pre-judged the matter and made no such averment or allegation when formulating the original application for leave in this case. He offers no reasonable or credible explanation for not doing so. I would expect a solicitor to be immediately alert to what is now presented as demonstrable bias or pre-judgment if that were his real apprehension at the time: the fact that it was not the subject of any application then or at the leave stage suggests to me that it was not then interpreted in the manner now presented. Furthermore, I do not consider that the principle that justice should not only be done but be seen to be done has been breached in this case. I am not satisfied that the applicant has established bias. I would not have been satisfied to grant an order of *certiorari* on this ground.

57. Finally, the failure by the applicant's solicitor to raise the new grounds or the original grounds upon which leave was granted with the District Judge during the course of the hearing to which I have already referred is, in the circumstances of this case, evidence sufficient to satisfy me that the applicant has waived his right to challenge the hearing on those grounds. That of itself would be a sufficient basis upon which to refuse this application (see *Balaz v. His Honour Judge Kennedy* [2009] IEHC 110 at paras. 22-26 per

Hedigan J.).

Conclusion
58. For all of the above reasons the application is refused.