

**THE HIGH COURT
JUDICIAL REVIEW**

Record No. 2018 523 JR

BETWEEN

BRYAN KIRBY

APPLICANT

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Mark Heslin delivered on the 29th day of January, 2021

Background

1. On 02 July 2018, the applicant was granted leave to seek judicial review in respect of the relief set out at para. D in the applicant's statement of grounds dated 28 June 2018 upon the grounds set out at para. E thereof. The relief set out at para. D begins as follows:-
 - "1. *An order of certiorari by way of judicial review, quashing the conviction of the Applicant for an offence contrary to s. 11 of the Road Traffic Act 1961 as amended (hereinafter "the order"), the said conviction having been made at the Blanchardstown District Court on the 30 May 2018 by Judge Walsh, in the matter of The Director of Public Prosecutions (Garda Reynolds) and (hereinafter "the proceedings");*
 2. *A Declaration by judicial review that in a prosecution for an offence created by Regulation, the prosecution must prove the relevant Regulations in the manner prescribed by the Documentary Evidence Act 1925".*

A summary of the facts

2. The following is not in dispute. The applicant was summonsed to appear in Blanchardstown District Court on 06 June 2017 for an alleged offence of non-display of an insurance disc in contravention of Regulation 5 of the Road Traffic (Insurance Disc) Regulations, 1984, as amended by Regulation 4 of the Road Traffic (Insurance Disc) (Amendment) Regulations, 1986, contrary to s. 11 of the Road Traffic Act, 1961 (hereinafter "the regulations"). The offence was alleged to have been committed on 12 July 2016 at South Circular Road, Dublin 8.

02 November 2017

3. The case against the applicant was before Blanchardstown District Court on 02 November 2017 and was called at No. 22. On that date, Gda. David Reynolds, the prosecuting Garda, gave evidence to the court that he observed the applicant driving without an insurance disc on 12 January 2016 and that, when Gda. Reynolds stopped the applicant, the latter did not have an insurance disc displayed on his vehicle. At the close of the prosecution case, the applicant's solicitor, Ms. Margaret MacEvelly, sought "a direction" for the applicant's acquittal, contending that there was absence of evidence of the regulations. Later in this judgment, I will examine the evidence which is before this Court in relation to the handing in, to Blanchardstown District Court, on the morning of 02 November 2017, of the regulations by a Sgt. Hennigan. On 02 November, the learned District Court judge also said that she had read the regulations that morning. The court

was informed that the applicant was pleading "not guilty". The case was adjourned and was next before the District Court on 25 January 2018, at which point the case was adjourned, again, in order for written legal submissions to be prepared by both sides. The case was again before Blanchardstown District Court on 15 March 2018, at which point the learned District Court Judge adjourned the matter to 30 May, 2018 directing that the prosecution's submissions, in response to those prepared on behalf of Mr. Kirby, be furnished within three weeks.

30 May 2018

4. The case came back before Blanchardstown District Court on 30 May 2018. Once the case was called, the applicant's solicitor confirmed to the court that legal submissions had been filed by both sides and the court was asked to rule. At that juncture, the learned District Court Judge confirmed that she had considered both sets of submissions and the relevant case law. The judge ruled that the regulations had not been given the status of an Act and that she could not take judicial notice of them in that context. The judge decided that the regulations had been satisfactorily produced to the court by Sgt. Hennigan. The learned judge went on to say, inter alia, that even if she was incorrect in that view, she retained ". . . a discretion to acquit or allow the prosecution to re-open its case to produce the Regulation . . ." She went on to state that it would "amount to judicial blindness not to permit the prosecution to do so" in respect of a procedural step. The learned District Court Judge also stated: "As I'm satisfied that the Regulations were already produced to the court in accordance with the Documentary Evidence Act 1925, I'm refusing the application for a direction". Gda. Reynolds then took the oath, the judge having confirmed that she wished to hear his evidence. The judge informed Ms. MacEvilly, the applicant's solicitor, that she was entitled to hear this evidence and made clear that the case was going to proceed and asked Ms. MacEvilly "You're in a position to proceed today?" to which the applicant's solicitor responded "yes, Judge". Having taken the oath, Gda. Reynolds gave his evidence and produced the relevant regulations to the court. After the evidence of Gda. Reynolds, the judge asked Ms. MacEvilly whether her client was pleading guilty or not guilty, and the court was informed that the applicant was pleading not guilty. Ms. MacEvilly was afforded the opportunity to question Gda. Reynolds but confirmed that she had already put the case to Gda. Reynolds on the last occasion. At that juncture, the applicant was sworn and was examined by Ms. MacEvilly. During the course of his evidence, the applicant stated inter alia that "I had my insurance disc which is a trade policy on me at all times, and it wasn't actually in the window of the car, but it was actually on my person. And he stopped me, but I actually had put it up on the dashboard by the time he actually came to my car". The applicant was then cross-examined by Gda. Reynolds and, during the course of cross-examination, the applicant acknowledged that he did not have an insurance disc displayed when he drove past Gda. Reynolds but asserted that he did have it displayed when Gda. Reynolds got to him. The applicant was then re-examined by Ms. MacEvilly, following which Ms. MacEvilly made submissions to the judge, arising from the evidence given to the court, as did Gda. Reynolds. It is not in dispute that the applicant engaged with the merits of the case. Nor is it in dispute that, having heard and considered the evidence, the learned District Judge gave the following decision: "I am satisfied that, with the evidence of Gda. Reynolds, that Mr. Kirby did not

have the insurance disc displayed at the time Gda. Reynolds saw him. I believe that Mr. Reynolds may very well have endeavoured to display it at a later stage. I am satisfied that he had it on his person for the purposes of moving the cars in and out of the garage. However, the offence before me is the non-display of insurance disc. In those circumstances, I am going to convict and fine". The judge then asked whether the applicant had any previous convictions and Gda. Reynolds confirmed that there were five and he gave details of these. The applicant's solicitor then made submissions to the court including with regard to the applicant's work, financial circumstances and his receipt of social welfare payments. Having explicitly stated that the foregoing was taken into account, the learned judge stated that she was going to convict the applicant and impose a fine of €200, with three months to pay and the judge also made it clear that the applicant could pay by instalments. The applicant thanked the judge and the case concluded.

Grounds which are not being pursued by the Applicant

5. It is fair to say that several grounds detailed in para. E of the applicant's statement of grounds are no longer being pursued. In particular, the applicant no longer makes any allegation of bias. Nor does the applicant make the case that the learned District Court Judge acted irrationally. In addition, it is no longer asserted that inadequate reasons were provided. It is, however, asserted on behalf of the applicant that the hearing before the District Court was so fundamentally flawed that the applicant is entitled to the reliefs sought, in particular, an order quashing his conviction of 30 May 2018.

Key assertions made by the Applicant

6. It is asserted that the presiding judge failed to vindicate the applicant's rights to natural and constitutional justice and it is fair to say that the key assertions made on behalf of the applicant are as follows: -

- (1) What Sgt. Heneghan did on 02 November 2017 was impermissible and did not adequately meet the obligation on the prosecution to tender the regulations in a manner provided for in legislation (reliance being placed on the Documentary Evidence Act, 1925 and the Statutory Instruments Act, 1947) and it is asserted that the regulations were tendered in the absence of fair procedures and that the applicant's conviction is, as a consequence, void for want of fair procedures:
- (2) It is asserted that what occurred on 30 May 2018 was not a re-opening of the prosecution case and it is submitted that there was neither an application to re-open the prosecution case, nor was there any decision to re-open same. The applicant contends that what occurred on 30 May 2018 was an impermissible rehearing of evidence that had no status.

Relevant legislation

7. Section 11 of the Road Traffic Act, 1961, as amended, provides as follows: -

"(1) The Minister may make regulations in relation to the use of vehicles in public places.

(4) *A person shall not use in a public place a vehicle which does not comply with a regulation under this section applying in relation to the vehicle.*

(5)(a) *A person who contravenes subsection (4) of this section or a regulation under this section shall be guilty of an offence and, where the contravention is of the said subsection (4) and such person is not the owner of the vehicle, such owner shall also, in such cases as may be prescribed, be guilty of an offence”.*

8. The Road Traffic (Insurance Disc) Regulations 1984, provide, inter alia, as follows: -

“5. Use in public place

(1) *A person shall not use a vehicle in a public place, after the expiration of a period of ten days commencing on the date of authentication of the certificate of insurance, unless the vehicle carries an insurance disc in the manner specified in sub – article (2) of this article.*

(2) *The insurance disc shall be carried in a conspicuous position on the windscreen of the vehicle in such manner that it shall be both visible and readily accessible for inspection and be so located that it does not obscure the vision of the driver while the vehicle is being driven or in the case of a vehicle not fitted with a windscreen in a conspicuous position on the near side of the vehicle”.*

9. Section 4 of the Documentary Evidence Act, 1925, provides as follows: -

“(1) Prima facie evidence of any rules, orders, regulations, or byelaws to which this section applies, may be given in all Courts of Justice and in all legal proceedings by the production of a copy of the Iris Oifigiúil purporting to contain such rules, orders, regulations, or byelaws or by the production of a copy of such rules, orders, regulations, or byelaws printed under the superintendence or authority of and published by the Stationery Office.

(2) *This section applies to all rules, orders, regulations and byelaws made under any Act of the Oireachtas by—*

(c) *a Minister, or*

10. Section 3(3) of the Statutory Instruments Act 1947 provides as follows: -

“Where—

(a) *a person (in this subsection referred to as the defendant) is charged with the offence of contravening (whether by act or omission) a provision in a statutory instrument to which this Act primarily applies, and*

(b) *the prosecutor does not prove that, at the date of the alleged contravention, notice of the making of the said statutory instrument had been published in the Iris Oifigiúil,*

the charge shall be dismissed, unless the prosecutor satisfies the Court that at the said date reasonable steps had been taken for the purpose of bringing the purport of the said instrument to the notice of the public or of persons likely to be affected by it or of the defendant.

(4) *The production of a copy (purporting to be published by the Stationery Office or to be published by the authority of the Stationery Office) of a statutory instrument to which this Act primarily applies, having printed thereon a statement that notice of the making of the said statutory instrument was published in a particular issue of the Iris Oifigiúil, shall in any proceedings be prima facie evidence that such notice was published in that issue of the Iris Oifigiúil”.*

The Affidavits

11. I have carefully considered the entirety of the evidence before this Court including all affidavits and exhibits thereto, specifically, the following: -

- The verifying affidavit of the applicant which was sworn on 28 June 2018 in which the applicant confirms the accuracy of the contents of the statement of grounds, the contents of which I have also carefully considered. The applicant’s affidavit also exhibits a copy of the original District Court Summons as well as a copy of the written submissions which were prepared by Ms. MacEville, solicitor, on the applicant’s behalf and furnished to the learned District Court Judge;
- The affidavit of Gda. David Reynolds, sworn 27 November 2018 which, inter alia, verifies the contents of the statement of opposition dated 26 November 2018;
- The affidavit of the applicant, sworn on 25 October 2019;
- The affidavit of Ms. MacEville, solicitor for the applicant, sworn on 24 October 2009;
- The affidavit of Sgt. Brendan Heneghan, sworn 10 January 2020;
- The affidavit of Ms. Alva O’Herlihy, solicitor with the office of the Director of Public Prosecutions (“DPP”), in which reference is made to the legal submissions prepared on behalf of the DPP which were submitted to the Court in advance of 30 May 2018;
- The replying affidavit of Gda. David Reynolds, sworn 24 January 2020 which, inter alia, exhibits a copy of the DPP’s submissions and also exhibits a copy of the transcripts of the District Court hearings dated 02 November 2017, 25 January 2018, 15 March 2018 and 30 May 2018;
- The supplemental affidavit of Ms. MacEville, sworn 17 November 2020.

12. During the hearing, I was informed that Ms. MacEvelly had recently sworn a short affidavit which simply exhibited the District Court's order in respect of the applicant's conviction. Nothing turns on the foregoing.

Relevant legal principles

13. Before looking further at the evidence before this Court, it is appropriate to make reference to certain relevant principles, many of which are not in dispute. At the outset, it is appropriate to observe that it is accepted by all relevant parties that it was necessary to produce the regulations before the District Court. There can be no doubt about the fact that the burden of proof, in this regard, rests on the prosecution in a criminal trial. It is not in dispute that, where a criminal offence being prosecuted has been created by primary legislation, a court will have judicial notice of it. Section 13 of the Interpretation Act, 2005, which deals with "judicial notice" clearly states: - "13 - An Act is a public document and shall be judicially noticed". The position is otherwise insofar as a criminal offence created by statutory instrument is concerned. In *People (DPP) v. Cleary* [2005] 2 IR 189, the Court of Criminal Appeal quoted, with approval, a passage from the judgment of Mr. Justice Davitt in *People (Attorney General) v. Kennedy* [1946] IR 517, as follows: -

"Statutory Orders, such as the emergency orders in question, are not in the same position as statutes, and the courts are not entitled to take judicial notice of them. They must be proved in evidence . . ."

Section 4 of the Documentary Evidence Act 1925 provides two convenient methods of giving prima facie evidence of such fact and it is to be regretted that, with such convenient methods of proof readily and immediately available, counsel for the prosecution did not think fit to adopt one or the other, particularly when the matter had been specifically brought to his attention by the submission of the defendant's solicitor when making his application to the court for a direction . . ."

The burden of proof which rests upon the prosecution in a criminal case cannot, however, be eased in this or any other case. Every fact necessary to establish the guilt of an accused person must be proved clearly and beyond reasonable doubt. Not merely that, it must be proved in evidence at the trial. It is not sufficient if the court satisfies itself otherwise than by the evidence submitted at the trial. The proper way to establish the fact that the orders in question were properly made in exercise of the powers conferred by the Act of 1939 was by proving that fact by evidence, either by one of the methods provided by s. 4 of the Documentary Evidence Act 1925, or otherwise. That was not done. It is not sufficient to establish, if it could be established that the Special Criminal Court itself had knowledge of what ought to have been proved in evidence.

For these reasons this Court is of the opinion that there was not sufficient evidence before the Special Criminal Court upon which the applicant could have been properly convicted of the charges contained in the several counts of the indictment upon which he was convicted. His application for leave to appeal will therefore be granted".

14. There is no dispute between the parties in relation to the applicability of the foregoing principle. More recent authority also confirms that a District Court Judge is not entitled to take judicial notice of regulations creating an offence and that this is an issue which goes to jurisdiction. In *Kelly v. Dempsey* [2010] IEHC 336, at para. 37, MacMenamin J. stated the following: -

"The relationship of the Regulation to the charge in the instant case is, therefore, almost directly analogous to that which obtained in People (Attorney General) v. Griffin [1974] IR 415. I find it is not merely a question of sufficiency of evidence: it goes to the question of whether the charge before the court is sufficiently defined and identified in all its ingredients. On the weight of the authorities, I find that the judge was not entitled to take judicial notice of the Regulations. What was in issue therefore was an error in excess of jurisdiction and not within it. It is thereby amenable to judicial review. I must grant the relief sought".

15. The parties are agreed that the foregoing legal principles apply. It is also appropriate, at this juncture, to point out that, although the learned District Judge stated, on 02 November 2017, *inter alia*, that "*I read the regulations this morning, Ms. MacEvilly*" and, later stated "*I'm familiar with the regulations that was handed in Ms. MacEvilly and that was handed in this morning*", it is not the case that the District Court purported to take judicial notice of the regulations in the context of the applicant's conviction.

Evidence of regulations after a direction is sought by a defendant

16. The decision of Davitt J. in *Kennedy* makes it clear that the appellate court contemplated that the prosecution might still have given prima facie evidence of the regulations even *after* an application for a direction had been made on behalf of the defendant. This is clear from the court's expression of regret that, with two convenient methods of proof readily and immediately available under s.4 of the 1925 Act, counsel for the prosecution did not adopt one or the other "*particularly when the matter had been specifically brought to his attention by the submission of the defendant's solicitor when making his application to the court for a direction...*". It is not asserted by the applicant in the present case that there are no circumstances in which the prosecution can legitimately bring the regulations into a case *after* a direction was sought. Rather, the applicant asserts *inter alia*, that the manner in which this was done in this case was impermissible.

The requirement that regulations be "produced"

17. In *DPP v. Collins* [1981] ILRM 447, the defendant was convicted in the District Court of an offence under s.49(2) of the Road Traffic Act, 1961, as amended, namely, driving a mechanically propelled vehicle in a public place when the concentration of alcohol in his blood exceeded the permitted limit. He appealed to the Circuit Court, where the judge stated a case in respect of, *inter alia*, whether the prosecution must give *prima facie* evidence of the regulations in the manner prescribed by s.4(1) of the Documentary Evidence Act, 1925 by the production of a copy of the Iris Oifigiúil purporting to contain the regulations or by the production of a copy of the regulations printed by the stationery office. In his judgment, Mr. Justice Henchy held, *inter alia*, that a judge was entitled to take judicial notice of the making of regulations when their making was so notorious,

well-established, embedded in judicial decisions and susceptible of incontrovertible proof. Of particular relevance to the present case is that, during the course of his judgment, Henchy J. made it clear that all that was required pursuant to s.4 of the 1925 Act was that regulations be *produced* before the court. His judgment made it clear that the regulations did not need to be adduced formally in evidence and that what was required is the *production* of the regulations to the court enabling the court to treat same as *prima facie* evidence. It is appropriate to quote, verbatim, the following extract from Mr. Justice Henchy's decision (at p.450) as follows: -

"It is to be noted that what s.4(1) of the Documentary Evidence Act, 1925 does is to enable prima facie evidence of rules, orders, regulations, or by-laws to be given with almost the same facility as if they were statutes. All that is necessary is to produce, not to adduce formally in evidence, either the relevant issue of the Iris Oifigiúil or the copy of the relevant documented printed under the Superintendents or authority of and published by the Stationary Office. Compare s.2 of the same Act, which allows prima facie evidence of a statute to be given by the production of the statute printed under the Superintendents or authority of and published by the Stationery Office. In both cases it is the production of the specified version that enables the court to treat that version as prima facie evidence of the document. Thus it is that the courts routinely act on the Stationery Office version of a piece of delegated legislation (such as Rules of Court) no less than they act on the Stationery Office version of a statute. They do so under the enabling powers bestowed on them by the 1925 Act, and it makes no difference whether the case is civil or criminal, or, if criminal, whether the piece of delegated legislation in question has created the offence charged. In the latter event, however, the courts are likely to hold (as they did in Kennedy's Case and in Griffin's Case a conviction to be bad for failure to produce the designated version of the piece of delegated legislation creating the offence, for without such production the existence or the precise ingredients of the offence may be in doubt; and, further the court may be deprived of an opportunity of ensuring that the accused will not be convicted (in breach of Art.15, s.5, of the Constitution) for an Act which had not been declared to be an infringement of the law at the date of its commission.

However, it is important to observe that the power given by s.4(1) of the 1925 Act to treat as prima facie evidence the mere production of the designated version of the instrument in question is enabling only. It does not extinguish or curb the inherent power of a court in certain circumstances to treat particular matters as worthy of judicial notice, and so to be acted on as if they had been formally proved. This is the position when a course of judicial conduct is so inveterate and unquestioned and of such a nature that it necessarily postulates the existence and validity of a statutory instrument. In such circumstances the court is entitled to take judicial notice of the statutory instrument."

"Judicial Blindness"

18. Elsewhere in the same decision, Henchy J. employed the phrase “*judicial blindness*”, which words the learned District Court judge also used on 30 May 2018. The relevant passage from the decision of Henchy J. is as follows: -

“There must have been hundreds of prosecutions in which prima facie evidence of the Regulations was given in accordance with s.4(1) of the Documentary Evidence Act, 1925 by the production of a copy published by the Stationery Office. Our judicial experience so informs us. If, as a result of the mere mischance that such a copy was not produced in this case, a judge were to hold that the prosecution must fail for want of proof of the Regulations, such self-induced judicial blindness would bring the administration of the law into disrepute” (p.451).

19. More recently, in *Lynch v. Fitzpatrick (Unreported, ex-tempore 31 January, 2007)* Mr. Justice Charleton drew a distinction between the Misuse of Drugs Regulations, which were in issue in that case, and other notorious statutory instruments, such as those relating to road traffic offences. In his decision, which emphasised that “production” of regulations is all that is required, Mr. Justice Charleton stated inter alia, that:

“...where a statutory instrument creates an offence, the relevant Regulations should ordinarily be produced at the criminal trial of a person accused of that offence. The production of a Stationery Office is sufficient proof. However, it seems there remains a residual category of cases wherein if Regulations are so particularly notorious, their proof may not be necessary but, in any such cases, the trial judge must give cogent sustainable reasons for deeming such proof unnecessary. In the circumstances it would be best practice to produce the relevant regulations in evidence at each hearing.”

20. It will be recalled that s.3(3) of the 1947 Act mandates proof that, at the date of an alleged criminal offence involving contravention of a provision in a statutory instrument, notice of the making of the statutory instrument in question had been published in Iris Oifigiúil. Subsection 4(4) goes on to state, *inter alia*, that the production of a Stationery Office copy of the statutory instrument to that effect, shall be *prima facie* evidence that notice of same was published in Iris Oifigiúil. It is fair to say, however, that subsection (4) does not exclude the possibility that there may be other means of proof. Clearly, Mr. Justice Charleton’s decision in *Lynch* indicates that, typically, the relevant regulations will be “produced” at a criminal trial where a person is accused of an offence set out in those regulations. It is equally fair to say, however, that his decision contemplates the possibility that certain regulations, so particularly notorious, might not require proof by way of production.
21. In *People (Attorney General) v. Griffin [1974] IR 416*, the Court of Criminal Appeal quashed a conviction against an accused on the ground that there had been a failure on the part of the prosecution to prove, formally, the statutory instrument which created the offence in question and that court directed a retrial of the accused for the offence. Because of such failure, counsel for the accused had applied to the trial judge for a direction at the conclusion of the evidence for the prosecution. The trial judge had refused

the application and the prosecution had failed to take the opportunity to present such formal proof of the relevant statutory instrument. On appeal by the accused from the decision of the Court of Criminal Appeal, it was held by the Supreme Court, in allowing the appeal, that, in the circumstances, the Court of Criminal Appeal had no power under s.5 of the Courts of Justice Act, 1928, to order a retrial. Although the Supreme Court overturned the Appeal Court's direction of a retrial, Mr. Justice Henchy (with whom Mr. Justice Walsh and Chief Justice Fitzgerald agreed) observed that it had remained open to the trial judge to receive evidence subsequent to the defence application for a direction. At p.421, Henchy J. made the following clear: -

"For my part I would point out that, when at the trial counsel for the appellant applied for a direction on the ground that the statutory instrument had not been proved, it was open to the trial judge either to direct an acquittal or to allow the necessary evidence to be given notwithstanding that the case for the prosecution had been closed. He refused a direction, and counsel for the prosecution made no application to be allowed to adduce the necessary evidence. It is in those circumstances that I consider the order of retrial to be outside the jurisdiction created by s.5 of the Act of 1928."

22. Taken together, the dicta in *People (Attorney General) v. Griffin* (at p.421) and in *People (Attorney General) v. Kennedy* (at p.520) makes it clear that, even after the prosecution case has closed and even after a direction has been sought on the basis that a statutory instrument has not been proved, it is open to a trial judge to allow the giving of evidence in respect of the regulations if they decide not to direct an acquittal. I do not understand the applicant to take issue with the foregoing proposition. Rather, the applicant submits that the prosecution's case was not, in fact, re-opened, that no application to re-open the prosecution case was made and that there was no need to re-open same, the essence of the applicant's submission being that the evidence given by the prosecution on 30 May 2018 had no status.

"Formal" evidence regarding a "technical" proof / evidence on a matter "of substance" or "the merits"

23. The proposition that a prosecution case may be re-opened with respect to a "*technical proof*" of a "*formal matter*" is also clear from the Supreme Court's decision in *AG (Corbett) v. Halford* [1976] IR 318. There, the Supreme Court held *inter alia*:

"As the missing evidence was of a formal nature, which affects the technical proof of the making of a valid prohibition and is not a matter of substance going to the question of the defendant's guilt in breaching the prohibition, the Circuit Court judge will have jurisdiction to receive it when this case now goes back to him: See Attorney General v. McTiernan; The People (Attorney General v. Griffin and the cases referred to in Stone's Justices' Manual (103 RDED. - p.362)." (p.320, per Henchy J.).

24. In a separate judgment in the same case, Mr. Justice Kenny went on to say the following:

"The prosecution have closed their case and the question whether that evidence may now be given was not discussed in argument. The decision of this Court in Attorney General v. McTiernan establishes that, in a prosecution in the District Court, the District Justice may allow further evidence of formal matters to be given after the State's case has been closed. He has a discretion in the matter; but he should not allow further evidence to be given if it relates to what Lord Goddard has called "the merits" (Price v. Humphries) while he should allow it if it relates to procedure only. I think that proof that the veterinary inspector who signed the notice had reasonable grounds for his belief and that he believed the matters I have mentioned was a matter of procedure only and that, if the prosecution wish to give it, the Circuit Court judge should allow this evidence to be give when the matter is re-listed before him: Royal v. Prescott Clarke" (p.324, per Kenny J.).

Production of the regulations on 02 November 2017

25. At this juncture, it is appropriate to point out that the case before this court is not an appeal against the decision of the learned District Court Judge. In the present proceedings, the applicant seeks relief by way of *certiorari* which, it is uncontroversial to say, is a relief which should only be granted where the applicant demonstrates that the lower court acted outside or without its jurisdiction or disregarded fair procedures such that there was a violation of the applicant's rights to natural and constitutional justice. Thus, it is not appropriate for this court to approach the matter on the basis of a granular re-examination of the evidence before the lower court with a view to coming to a decision on that evidence. That is not this court's function. It is in the foregoing context that it is appropriate to look at the evidence before this court touching on the production of regulations on 02 November 2017.
26. At the heart of the present application is a contention that the presiding judge erred in law and acted *ultra vires*. In the applicant's statement of grounds, it is asserted, *inter alia* that the regulations were not proved properly or at all. Among other things, the following is stated in respect of 02 November 2017:
- "6. *The learned judge noted that a folder had been handed into court by the court sergeant early in the morning prior to the court list having started and that the said folder purportedly contained regulations.*
 7. *The court sergeant was not prosecuting in the proceedings herein nor was he a witness in the proceedings. It is not clear under what authority the court sergeant's evidence was admissible in the prosecution herein.*
 8. *The court sergeant was not sworn in under oath at the time of handing in the said folder and therefore any purported evidence he sought to give was in admissible.*
 9. *To date, it has never been established in evidence whether the folder handed into Court contained the relevant Regulation ...*

10. *Further, it was never established what the said folder contained, as it was never opened by the prosecution or the court ..."*
27. In an affidavit sworn on 27 November 2018, Garda David Reynolds made the following averment at para. 6:

"At the sitting of the court, sometime after 10.30 am on 2nd November 2017, Sergeant Brendan Heneghan of the DMR Roads Policing Division handed in a booklet containing regulations that pertained to the prosecutions that were due to be heard by the court during the course of that day. The booklet included the Road Traffic (Insurance Disc) Regulations 1984 and the Road Traffic (Insurance Disc) Regulations 1996 (sic) that related to my prosecution. Whereas Sergeant Heneghan is not the court sergeant, he is a sergeant attached to the Roads Policing Division Dublin Castle and it is his normal practice to produce the relevant regulations in this fashion at Blanchardstown District Court. Indeed, I am advised and believe that it is common practice in District Courts throughout the country for regulations to be produced in this fashion."

28. In an affidavit sworn on 10 January 2020, Sergeant Brendan Heneghan made the following averments at paras. 3 and 4:

"Garda David Reynolds, at para. 6 of his affidavit, as sworn by him on 27th November 2018, has given a true and accurate account of my actions in this case. In her affidavit sworn on 24th October, 2019, the applicant's solicitor appears to accept that account, however, in his own affidavit sworn on the same date as that of his solicitor, the applicant takes issue with Garda Reynolds' account as being 'hearsay', and so, for the avoidance of doubt, I say that at the sitting of Blanchardstown District Court, presided over by District Judge Miriam Walsh, on Thursday, 2nd November, 2017, I handed into court a booklet containing the Statutory Instruments and Regulations that pertained to the Road Traffic Prosecutions that were due to be heard by the court during the course of that day. When handing the booklet into court I expressly so informed Judge Walsh. The booklet that I handed into the court included official Stationary Office copies of the Road Traffic (Insurance Disc) Regulations, 1984, and the Road Traffic (Insurance Disc) Regulations, 1986, that were relevant to the prosecution of the Applicant that he impugns herein. I also handed in the Bye-Laws for the Dublin Region in relation to speeding matters, but these did not concern the applicant.

I am aware that Judge Walsh presided over the road traffic list at Blanchardstown District Court. I regularly attended that court in my capacity as Sergeant in the Road Policing Division and I am aware that she has dealt with very many road traffic prosecutions, including documentary and regulatory offences of the type and nature such as those with which the applicant was charged. As a result, I believe the judge is very experienced in such matters and is well familiar with the relevant regulations. However, it is nonetheless my common practice to formally produce and tender the relevant regulations to the judge in open court at the outset of the

proceedings, so that our parties were aware of what is happening and so that the Regulations are before the judge when she is dealing with individual cases. I followed that practice in this case. I believe this course assists in efficient running of the court list and ensures that the Regulations are formally produced and that the judge has a copy to hand."

29. In my view the foregoing averments by Gda. Reynolds and Sgt. Heneghan constitute clear evidence of the production of the specified version of the regulations, on 02 November 2017, which production enabled the District Court to treat same as *prima facie* evidence of the regulations. The dicta of Henchy J. in *DPP v. Collins* is particularly relevant in this regard wherein the learned judge observed that "*all that is necessary is to produce, not to adduce formally in evidence...*". In my view the averments by Gda. Reynolds and Sgt. Heneghan, in light of the Supreme Court's decision in *DPP v. Collins*, evidence compliance with the relevant statutory requirements in the Documentary Evidence Act, 1925 and Statutory Instruments Act of 1947, and wholly undermine the aforesaid grounds (at 6 – 10) advanced by the applicant as a basis for relief.
30. I have carefully reviewed all DAR transcripts and it cannot be disputed that on 02 November 2017 the presiding judge confirmed the fact that the regulations were handed in that morning and the fact that she was familiar with them. It is also true to say that on 02 November 2017 the presiding judge stated that she had read the regulations that morning. In an affidavit sworn by the applicant's solicitor, Ms. MacEvilly, on 24th October, 2019, issue was taken with this statement insofar as it could be interpreted to mean that the judge read them in open court in the context of any particular case. There is no evidence before this court in respect of how other cases were dealt with but it seems to me that nothing can turn on the foregoing. The 1925 Act certainly does not impose any requirement that the Regulations be read out in open court. Later in the same affidavit, Ms. MacEvilly avers that it is not clear to her what regulations the learned judge was referring to when she stated that she had read them and she avers that it is not obvious to her why the judge would have had cause to read or consider the regulations on the morning. Such averments by Ms. MacEvilly do not constitute evidence which controverts in any way the clear statement made by the presiding judge on the day. Furthermore, nothing whatsoever turns on that issue for the purposes of the application before this court. This is because, in the present case, the lower court did not take judicial notice of the regulations. Rather, reliance was placed on their production. That said, and although nothing turns on it for the purposes of this court's decision, it would hardly be surprising for a presiding judge to read relevant regulations in advance of taking a list which contained a case to which such regulations were relevant.
31. In written and oral submissions at the hearing of the matter before this court, counsel for the applicant asserted that the regulations were handed into court in the absence of the accused and his solicitor. On behalf of the applicant it was submitted that there is no authority for evidence being called in the absence of an accused and counsel described what occurred as being trial "*in absentia*". It was submitted that Sergeant Heneghan handed in the regulations without having being "sworn in" to do this and the applicant in

the present proceedings presumes Sergeant Heneghan purported to do so as an advocate. In circumstances where it was submitted that there was nobody present in court appearing for the applicant at the time, it was asserted that a portion of the trial, albeit a small portion, proceeded in the absence of the applicant, rendering his subsequent conviction and sentence the result of an unfair trial and, consequently a nullity. Insofar as the foregoing submissions are concerned, it is the production of the specified version of the regulations which is required and there is clear evidence before this court that this occurred. In my view, nothing turns on the fact that Sergeant Heneghan was not "sworn in" when he produced the regulations and this view is consistent with the principles emerging from the authorities I have referred to.

32. Having carefully considered the entirety of the evidence before this court, it would be wholly unsafe to conclude that there was nobody present for the applicant when Sergeant Heneghan handed in the regulations. Furthermore, I am entirely satisfied that this is not a ground of relief which the applicant pleaded when he applied for and was granted leave to seek judicial review. If one looks carefully through the grounds at para. E of the applicant's statement of grounds, nowhere is it asserted that the applicant and/or his solicitor were not present in court when a folder was handed into court by Sergeant Heneghan. It is uncontroversial to say that the court is limited, in judicial review proceedings, to the grounds ordered for review on the initial application unless those grounds were amended. This is clear from *inter alia* the Supreme Court's decision in *A.P. v. DPP* [2011] 1 I.R. 729 and the Supreme Court's decision in *Keegan v. GSOC* [2015] IESC 68. In the latter case, Mr. Justice O'Donnell stated (at para. 42):

"It is not merely a procedural complaint that the ground upon which the case was decided was not one upon which leave was sought or indeed granted nor was there an appropriate amendment. The purpose of pleadings is to define the issues between the parties, so that each party should know what matters are in issue so as to marshal their evidence on it, and so that the Court may limit evidence to matters which are only relevant to those issues between the parties, and so discovery and other intrusive interlocutory procedures limited to those matters truly in issue between the parties. This is particularly important in judicial review, which is a powerful weapon of review of administrative action. But administrative action is intended to be taken in the public interest, and the commencement of judicial review proceedings may have a chilling effect on that activity, until the issue is resolved one way or another. Because of the impact of such proceedings, it is necessary to obtain leave of the court before commencing proceedings. It is important therefore that the precise issues in respect of which leave is obtained should be known with clarity from the outset. This also contributes to efficiency so that judicial review is a speedy remedy."

33. In my view, the submission that part of the trial occurred in the absence of the applicant, based on the contention that the applicant and/or his solicitor were not present when the Sergeant handed the relevant folder into court, is not something which was pleaded in the statement of grounds and is not an issue in respect of which leave was granted. Despite

being satisfied that the issue falls outside the applicant's pleaded case and is not properly before the court, it must also be said that there is evidence before this court which undermines the proposition that Sergeant Heneghan handed in the Regulations without the applicant and/or his solicitor being present. For example, in para. 8 of his statement of grounds the applicant positively asserts that "*The Court Sergeant was not sworn in under oath at the time of handing in the said folder...*", an assertion which, it seems to me, could not be made unless the party making the assertion witnessed the sergeant handing in the folder in court.

The Digital Audio Recording ("DAR") 02 November 2017

34. In her 17 November 2020 affidavit, Ms. MacEvilly avers that she was provided with a copy of the digital audio recording ('DAR') of the list of criminal cases before Blanchardstown District Court on 02 November 2017. In para. 4 she avers *inter alia*, as follows:

"As can be heard from the DAR, at the outset the first case is called. Then a male voice (who presumably is Sgt. Heneghan) can be heard interrupting the list just after the first case is called by the clerk and saying: 'Sorry, I just wanted to hand in the statutory instruments in relation to various matters before the court. And in relation to the speeding matters, the by-laws'".

Nowhere does the applicant aver that he was not present in court when Sgt. Heneghan handed in the regulations despite the fact that, in addition to his statement of grounds which was verified by means of his 28 June 2018 affidavit, the applicant swore a second affidavit on 25 October 2019. Nor, is it fair to say, does the applicant's solicitor explicitly aver that she was not present in court when Sgt. Heneghan handed in the regulations. It is beyond doubt, however, that Ms. MacEvilly made a submission to the court on 02 November 2017 to the effect that the regulations had not been proved. Ms. MacEvilly's submission was made with clarity and obvious professionalism as is clear when one reads the entirety of the DAR recording for 02 November, 2017. The key elements of Ms. Evilly's submission to the court were as follows (employing the Page and Line number for the DAR recording):

"It is an offence created by regulation, judge, and the regulations have not been proved in this particular prosecution" (P.1, L.33-34);

"...they must be proved in each and every prosecution and I understand that there is a case that leave has been granted in relation to a similar matter, judge, that is before the High Court. I would also say that I don't know what was handed into the Court this morning, I don't know if this particular regulation was handed in" (P.2, L.3-7);

It is clear from the DAR that the presiding judge stated, at that point: "*I'm familiar with the regulations that were handed in [Ms. MacEvilly] and it was handed in this morning.*" Ms. MacEvilly went on to submit that she did not know "*...if they're in compliance with the Documentary Evidence Act either, judge*" (P.2, L.15-16). The learned judge then asked Ms. MacEvilly about her reference to the High Court matter, in response to which Ms.

MacEvilly stated: "*I am saying, judge, that there is a case before the Court similar to this and I understand a leave was granted last week in relation to it, to see whether this handing the regulations at the beginning of a court sitting* (P.2, L.18-20). The immediate response of the presiding judge was to say: "*Alright. So you need an adjourned date in relation to this then?*" (P.2, L.21). The response by Ms. MacEvilly was to say: "*I am in the court's hands*" (P.2, L.22). There followed an exchange between the presiding judge, Ms. MacEvilly, the Registrar and Garda Reynolds in relation to finding an appropriate date, being 25 January, 2018 at 10.30. The learned judge also clarified with Ms. MacEvilly that the applicant was pleading not guilty, on the basis that he did have the insurance disc displayed.

35. It is not in dispute that the matter came back before the District Court on 25 January, 2018 at which point the presiding judge put the matter back, requesting written submissions from both sides. The DAR in respect of 25 January, 2018 records Ms. MacEvilly as informing the court that her understanding was that the relevant High Court case was conceded by the State. It is not in dispute that the matter was again before the District Court on 15th March, 2018, by which point the applicant had furnished written submissions which the prosecution received notice that morning. The matter was then put back to 30 May 2018. It is not in dispute that, in advance of 30 May 2018, the District Court Judge read the submissions furnished by both sides. It is appropriate at this juncture to refer to the written submissions which were provided to the District Court.

Written legal submissions on behalf of the defendant- furnished to the District Court

36. Exhibit "BK2" to the applicant's verifying affidavit, sworn on 28 June 2018 comprises a copy of the written legal submissions which his solicitor furnished to the District Court. They refer to the matter having come before the District Court on 02 November, 2017 and it is submitted that, at no time on 02 November 2017, did Garda Reynolds seek to prove the regulations in any way during the prosecution. Reference is made to the application to dismiss the charges on the part of Ms. MacEvilly on the basis that a necessary proof had not been proved properly or at all by the prosecution and reference is made in the submissions to the judge having noted that a booklet of regulations had been handed in that morning. The submissions identified two issues for the District Court to determine, firstly, are the regulations a necessary proof for the prosecution and, secondly, if the answer to the first question is positive, were the regulations proved in accordance with law. Section 4 of the 1925 Act was quoted and reference was made to the dicta of McGuinness J., in *DPP v. Cleary* [2005] IECCA 51, wherein the court referred to the *People (Attorney General) v. Kennedy*. Reliance was also placed on the decision of McMenamin J. in *DPP v. Kelly* and it was submitted that the decision in *Cleary* was authority for the proposition that the regulations are a mandatory proof in a prosecution such as the one before the District Court. It was submitted that the regulations were not proved and were not mentioned by the close of the prosecution case. It was submitted that the practice of a member of An Garda Síochána handing in a booklet of Road Traffic Regulations into court at the start of the day was without legal foundation and was not lawful. It was submitted that it is not clear if the prosecution is relying on the regulations handed into court at the start of the day or whether the relevant regulation in the

prosecution was contained in the booklet handed in. It was submitted that the court should dismiss the prosecution for failure to prove the regulations in accordance with the decision in *Cleary*. It was also submitted that a similar issue was considered in judicial review proceedings referred to as "*Cullen v. DPP [2017/757 JR]*". It was submitted that the matter was uncontested by the DPP and that, on consent, an order of *certiorari* was made on 30 January 2018 by Mr. Justice Noonan in circumstances where the relevant regulations were not proved properly or at all in a prosecution in Blanchardstown District Court on 26 September, 2017. Among the submissions made were that: "*The prosecution case is now closed and it is therefore not possible to clarify this issue, since it goes to the core of the case and not a mere detail that could be clarified by recalling a witness.*"

Written submissions on behalf of the prosecution

37. Exhibit "DR-1" to the affidavit sworn by Garda David Reynolds on 24 January, 2020 comprises the written submissions on behalf of the prosecution as furnished in advance of 30 May, 2018. These refer to the matter having been before the court on 02 November, 2017 and to the offence which the applicant in these proceedings was alleged to have committed on 12 July, 2016. A copy of the relevant summons was attached. Reference was made to the production by Sgt. Brendan Heneghan of a booklet containing the regulations which the sergeant handed into court that day. Reference was made to the evidence given by Sgt. Reynolds and to the direction for dismissal which was sought. In the submissions it was accepted on behalf of the prosecution that the regulations are a necessary proof in the case but it was submitted that the relevant regulations were proved as provided for under s.4(1) of the 1925 Act when formally submitted to the court by Sgt. Heneghan at the beginning of the court sittings. It was submitted that, in circumstances where the regulations were handed in and were before the court and the court had acknowledged that they were handed in, then the regulations must be considered to have been properly produced in accordance with the 1925 Act. Reliance was placed on the dicta of Mr. Justice Charleton in *Lynch v. Fitzpatrick*. The prosecution's submissions concluded in the following terms:

- "8. *In the event that the court has a doubt about whether the Regulations were properly produced to it, then in those circumstances the Prosecution asks that the court exercise its discretion and allow the prosecution to re-open its case to prove the regulations.*
9. *If the court were to rule that the regulations have not been properly produced, then the Prosecution contends that the absence of the Road Traffic Regulations from its evidence is a purely technical defect (the said Regulations already being in existence and well known) and that re-opening the case to produce same does not in any way prejudice the accused. The High Court has ruled that in circumstances where 'evidence' of a formal matter was omitted during the Prosecution case then it is not inappropriate to allow the case to be re-opened to allow production of such matters – Kerry v. District Judge Gillian Hussey and Anor. [(2000) ILRM 401].*

This court has discretion to re-open the case where the evidence to be adduced 'is merely formal of technical evidence' per O'Caomh J. at p.11 in Edward Bates v. Judge Patrick Brady and the DPP [(2003) 4 IR 111, (2003) IEHC 20] and does not relate to the merits of the case.

In the court of appeal decision of James O'Keeffe and Judge Mangan and the DPP [(2015) IECA 31] at para. 18 on p.6 Ryan P. discusses the case law relating to circumstances in which a judge may exercise discretion to re-open the prosecution case. He refers to decision in Attorney General (Corbett) v. Halford [(1976) IR 318 at 324] and the words of Kenny J. in that case at p.324.. -

'the prosecution have closed their case and the question whether evidence may now be given was discussed in argument. The decision of this Court in Attorney General v. McTiernan established that, in a prosecution in the District Court, the District Justice may allow further evidence of formal matters to be given after the State's case has been closed. He has a discretion in the matter; but he should not allow further evidence to be given if it relates to what Lord Goddard has called 'the merits' (Price v. Humphries) while he should if relates to procedure only'.

At para. 32 Ryan P. goes on to say:-

'Price v. Humphries [1958] 2 QB 353 is another case stated that came before the court of appeal, Devlin J. endorsed the proposition that if the matter that is the subject of the application to re-open the case is one of substance, the prosecution ought not to be allowed to do so, but if it one of technicality 'such as the proof of a statutory rule or order' (emphasis added), or something of that sort, than the justices should allow the Prosecution case to be re-opened.'

It is submitted by the Prosecution that an absence of the Road Traffic Regulations is formal evidence of a technical nature and in the event that the Court is not satisfied that the regulations have not been properly produced then the court should exercise its discretion to re-open the prosecution case to allow that evidence.

- 10. In relation to the Cullen case referred to at para. 21 of the defence submissions, this case was not contested by the Director and an Order of certiorari was made. No ruling was handed down on this issue and there is no written judgment available. Furthermore, that case had a different factual matrix and there were different issues at play that do not pertain to this case and so the case has no applicability.*
- 11. In summation the Prosecution contends that the relevant Road Traffic Regulations have been produced and proved by submission of the booklet of regulations by Sgt. Heneghan to the court at the outset of the court sittings. If the court has a doubt that the regulations were properly produced, then the prosecution submit that the*

court has a discretion to re-open the prosecution case to receive that evidence and it should do so.

The prosecution reserves the right to reply to further submissions by the defence”.

Explicit request by the prosecution to re-open the case

38. In paragraphs 8 and 9 of the prosecution’s submission, which I have quoted above, explicit requests are made of the court to exercise its discretion to allow the prosecution to re-open its case to prove the regulations. Nor cannot it be disputed that, in para. 9, a detailed submission is made with regard to the District Court’s discretion to re-open the case to allow evidence to be adduced of a “*formal*” matter.

30 May 2018

39. It is not in dispute that, immediately after the case was called on 30 May, 2018, the applicant’s solicitor reminded the presiding judge of the request for submissions and confirmed that both sides had made written submissions. The applicant’s solicitor then sought a ruling. At this juncture, it is appropriate to point out that, in very skilled submissions to this Court, counsel for the applicant in the present proceedings submitted *inter alia*, that there was no application to re-open the prosecution case. I am satisfied that this submission is factually incorrect. On the contrary, the contents of paras. 8 to 11 of the prosecution’s written submissions explain the fact of and nature of the District Court’s discretion to re-open the prosecution case and explicitly ask the court to exercise its discretion in that regard.

40. It is appropriate to quote, verbatim, what the learned trial judge said on 30 May 2018, immediately after the applicant’s solicitor referred to both sets of written legal submissions and invited the court to rule. The following is a verbatim setting out of same as is clear from p.1, lines 8-27 of the DAR:

“Judge: Very good. I have reviewed the submissions, State submissions, and I have reviewed your submissions as well, Ms. MacEvilly, I’ve also reviewed the relevant case law in relation to the matter and the People AG v. Quirkan and Crawford, Collins, Judge Dempsey and the DPP, and the Kelly case, and the Peart case.

I have read the submissions on behalf of the parties and my ruling is as follows. That the regulation in issue in the instant case creates the offence, at least in part, the regulation had not been given the status of an Act so I cannot take judicial notice of this. The regulation must produce to court in a general manner by Sgt. Heneghan, and once it was produced that is evidence in terms of the prosecution meeting its burden as per s.4.1 of the Documentary Evidence Act of 1925.

And even I might add, Ms. MacEvilly, if I was incorrect in this, which I am not, and the case law dictates that while I have a discretion to acquit, or allow the prosecution to re-open its case to produce the regulation, it would and I quote ‘amount to judicial blindness not to permit the prosecution to do so for a period of procedural step’. As I am satisfied that the regulations were already produced to

the court in accordance with the Documentary Evidence Act 1925, I am refusing the application for a direction.

I would also say this: That producing the regulations in court in advance of these cases is not unusual. I have been, as you are aware, around the country, and this is not – this practice is not merely particular to Blanchardstown Court Two.

MS. MACEVILLY: I appreciate that, Judge, I would say that the practice may have been – may have become habitual but it does not make it lawful, but I am in the court's hands.

JUDGE: Well, you've heard what I've said.

MS MACEVILLY: Yes, Judge.

JUDGE: The regulations were produced in court, I am not entitled to take judicial notice of them, I am satisfied that the regulations were produced. So, in relation to that then, we can proceed with the matter. Very good.

GARDA REYNOLDS: Do you wish to hear evidence again, Judge?

JUDGE: Yes, please."

41. It is perfectly clear from the foregoing that prior to informing the applicant's solicitor that the application for a direction was being refused, the learned District Court Judge explicitly referred to the court's discretion to allow the prosecution to re-open its case to produce the regulations. Indeed, the presiding judge went further, indicating that it would amount to "*judicial blindness*" not to permit the prosecution to do so in respect of a procedural step, the foregoing phrase being one employed by Mr. Justice Henchy in the Supreme Court's decision in *DPP v. Collins*. Thus, the evidence before this Court is that the District Court's discretion to allow the prosecution to re-open its case and the appropriateness of that being done to permit proof of the regulations was to the fore when the learned District Court Judge gave her ruling. It is also beyond doubt that the prosecution had, in fact, invited the court to exercise its discretion to allow the prosecution to re-open its case to prove the regulations. This is perfectly clear from the prosecution's submissions to which I have referred. Furthermore, Garda Reynolds, for the prosecution, explicitly asked if the learned District Court Judge wished to hear evidence again and it is beyond doubt that the judge agreed that she did. The following then occurred as confirmed by the relevant extract from the DAR (beginning P.2 l. 9):-

"GARDA DAVID REYNOLDS (SWORN) EXAMINED BY MS. MACEVILLY.

MS. MACEVILLY: The evidence was already heard judge, I understood.

JUDGE: Well I'll hear it again Ms. MacEvilly, which I am entitled to do because we're going to proceed today. Is that what we're going to proceed in relation to – you're in a position to proceed to day?

[MS. MACEVILLY]: Yes, Judge.

JUDGE: Yes. That's fine.

GARDA REYNOLDS: Yes, Judge on the 12/7/2016, on South Circular Road in a public place, I observed a mechanically propelled vehicle 09 DL 11978, Judge. This vehicle was driven by a male who I now know to be Bryan Kirby of 1 Ashleigh Hall, Lucan, Dublin, Judge, the defendant before the court. Judge, at no time on the windscreen there was no insurance displayed on the vehicle. Judge, I issued an SEPN for the offence committed to the driver non-display of an insurance disc and that notice remains unpaid. A copy of the regulations, Judge, which are required, Road Traffic (Insurance) (Amendment) Regulations 1986 and the Regulations of 1984, Judge, are before the court. And then the court a copy of them also.

JUDGE: Very good. Are we pleading not guilty or guilty?

MS. MACEVILLY: We are pleading not guilty, Judge.

JUDGE: Very well, we'll hear from your client then. Have you any questions for Garda Reynolds?"

42. At this point it is appropriate to note that there is no question, in the case before this Court, of the learned District Court Judge having permitted Garda Reynolds to give, on 30 May, 2018, any additional evidence in relation to what could be called "the merits". This is clear if one compares the DAR recordings of 30 May, 2018 and 02 November, 2017. The only additional evidence by Garda Reynolds, on 30 May, 2018, was in respect of the "formal" or "technical" matter of producing individual copies of the relevant regulations. It is also a matter of fact that the applicant did not seek to examine the documents produced and did not make any submission in respect of same, via his solicitor. Rather, the applicant engaged with the merits of the case, pleading not guilty.

Prosecution case re-opened on 30 May 2018

43. A number of other comments can fairly be made in relation to what occurred on 30 May, 2018. It is plain that, as a matter of fact, the prosecution case was re-opened. It could not be said to have created the slightest unfairness to the applicant for Garda Reynolds to have repeated, on 30 May, 2018, the evidence which he gave almost eight months earlier, on 02 November, 2017. In my view, this could only have contributed to the fairness of the process, given the lapse of time and taking account of the numerous cases which the learned District Court Judge must have had to deal with in the intervening period of eight months. There was no question of the District Court Judge having permitted additional evidence as to the merits. I am entirely satisfied that the District Court Judge had the discretion to re-open the case. It cannot be disputed, in my view, that the prosecution did, in fact, re-open the case and proved the regulations afresh and individually. Insofar as counsel submits that the prosecution case was not re-opened, such submission is not borne out by the evidence before this Court and is wholly undermined by it. Indeed, the submission that the prosecution case was not in fact re-

opened is undermined by the very pleadings in this case. I say this for the following reasons.

44. In para. 17 of the statement of grounds the applicant pleads *inter alia* that: "*If the Regulations were approved, there was no necessity to re-open the prosecution case and yet the judge directed that this be done.*" The foregoing is an explicit acknowledgment that the learned District Court judge, in fact, directed that the prosecution case be re-opened. It is one of several explicit pleas which acknowledge the fact that the prosecution case was re-opened on 30 May 2018 and all of these pleas are entirely consistent with the evidence of what actually occurred on 30 May 2018. For example, in para. 19 of the statement of grounds the following is explicitly pleaded in respect of what occurred on 30 May, 2018: "*The court then allowed the prosecution to open it [sic] case again.*" This plea, as verified by the applicant in his affidavit sworn 28 June, acknowledges the fact that the court allowed the prosecution to re-open its case. Lest there be any doubt about the matter, it is explicitly pleaded in para. 21 of the statement of grounds that "*the court erred in law in directing that the prosecution case should re-open and begin again in circumstances where the defence solicitor had advised the prosecution of a missing essential proof in their case.*" Once again, the foregoing constitutes an acknowledgement on the part of the applicant of the fact that the court directed the re-opening of the prosecution case and there is no doubt about the fact, accepted by the applicant, that the prosecution re-opened its case.
45. Even taken at face value, the plea made at para. 21 of his statement of grounds calls to mind the dicta of Davitt J. in Kennedy wherein the learned judge stated *inter alia*, that "*Section 4 of the Documentary Evidence Act 1925 provides to convenient methods of giving prima facie evidence...and it is to be regretted that, with such convenient methods of proof readily and immediately available, counsel for the prosecution did not think fit to adopt one or the other, particularly when the matter had been specifically brought to his attention by the submission of the defendant's solicitor when making his application to the court for a direction...*". In the present case, the evidence demonstrates that the prosecution relied on the relevant provisions in the 1925 Act not once, but twice.
46. Even if I am entirely wrong in considering that the production by Sgt. Heneghan on 02 November 2017 was not sufficient, there can be no doubt about the sufficiency of the production of the regulations on 30 May 2018 when the prosecution's case was re-opened and when the only additional evidence given by the prosecution was with respect to formal proof, individually, of the relevant regulations.
47. The fact that the prosecution case was re-opened is also plain from the DAR record of 30 May 2018. Immediately after the learned District Court Judge asked whether the applicant's solicitor had any question for Garda Reynolds, the following response was given (beginning at p.2, l.30): "*MS MACEVILLY: At this stage, judge, I understood that the case, the prosecution case was closed. I don't understand why it's being re-opened but I do have one question I have to put to Garda Reynolds.*" The foregoing statement acknowledges the fact that the prosecution's case was being "re-opened". No other

interpretation is reasonable. The acknowledgement of that fact, which was made in court on 30 May 2018, is entirely consistent with the applicant's pleaded grounds.

48. In para. 7 of his affidavit sworn on 25 October 2019, the applicant avers *inter alia* that "*the learned District Court judge permitted the prosecution to re-open and give its evidence again including the relevant Regulations.*" Once more, this is a clear acknowledgment of the fact that the prosecution case was re-opened and that the learned District Judge permitted this.
49. In short, I am entirely satisfied of the learned District Court's discretion to permit the re-opening of the prosecution case and entirely satisfied that this is a discretion which she exercised on 30 May 2018 and I am entirely satisfied that the relevant provisions in the 1925 and 1947 Acts were complied with insofar as the requisite production of the regulations was concerned.
50. In para. 6 of the applicant's 25 October 2019 affidavit, the applicant avers *inter alia* "*...that the Court gave its ruling before the garda applied for and was permitted by the court to give his evidence again at which point he handed in what he said was a copy of the relevant regulations.*" The thrust of the foregoing and of similar submissions made at the hearing of this case is that the learned District Court judge ruled that she would not grant the direction which the applicant's solicitor had sought and, that being so, anything that happened thereafter, specifically the formal proof by Garda Reynolds of the regulations in his evidence given on 30 May 2018, had, according to the applicant, no status. I am bound to reject that submission and I do so for several reasons. Firstly, it ignores the very clear request which was made repeatedly in the prosecution's written legal submissions, which the learned District Court judge considered prior to her ruling, to the effect that the court should exercise its discretion to permit the prosecution case to be re-opened for the regulations to be formally proved. It also ignores the specific question which Garda Reynolds put to the court on the day. It also ignores the undoubted discretion which the District Court enjoys to permit the prosecution case to be re-opened as well as the fact that the learned district judge exercised that discretion. It ignores, too, not only the fact that the prosecution case was re-opened, but the applicant's acknowledgement, in paras. 17, 18, 19 and 21 of his statement of grounds, that the court allowed the prosecution to re-open its case and that the court directed that the prosecution case should be re-opened. The applicant's submission also ignores the fact that, even before ruling that she would not grant the direction sought by the applicant's solicitor, the learned District Court judge explicitly referenced the court's discretion to allow the prosecution to re-open its case to produce regulations and referred to the importance of permitting same, something which, moments after refusing the direction sought by the applicant's solicitor, the learned District Court judge did in fact permit. It also seems to me that this submission by the applicant in effect invites this court to conduct a wholly impermissible and inappropriate analysis of the manner in which the learned District Court judge expressed herself and the sequence in which the learned District Court judge delivered elements of her rulings during the course of a trial. In my view, the gravamen of the applicant's submission is to invite a far reaching and wholly

impermissible intrusion into the District Court's exclusive domain, where there is no evidence that the learned District Court judge acted outside of, or without, jurisdiction. What cannot be in doubt is that the District Court had the relevant discretion to permit the prosecution to re-open its case and exercised it in advance of reaching any conclusion as to the merits, having ensured full participation by and fairness to the applicant.

51. Insofar as the applicant criticises the respondent for not exhibiting, in the present proceedings, the regulations which were handed into court by Garda Reynolds, during the course of his evidence on 30 May, 2018 and/or the Stationery Office copies which Sgt. Heneghan avers that he handed into court in a booklet on 02 November, 2017, I must reject any such criticism as without merit. This is not an appeal against the applicant's conviction in the District Court. It is, at its root, a claim that the District Court lacked jurisdiction to act as it did and that the applicant's rights to fairness were traduced. Having regard to the evidence before this Court, it is an application without merit. This is to take nothing away from the skilled and professional submissions made in the District Court by the applicant's solicitor and made to this Court by the applicant's counsel but, in my view, this Court does not have before it the evidence which would entitle the applicant to the reliefs sought. Indeed, a careful analysis of the evidence before this court, including the relevant DAR recordings, demonstrates the conduct of the prosecution with scrupulous fairness by the learned District Court Judge acting *intra vires* with the full participation of the applicant and the applicant's solicitor whom, it is clear, upheld the highest standards of the solicitor's profession in her commitment to the applicant's case.
52. The fact that the applicant fully engaged after the prosecution case re-opened is also evident from the DAR in respect of 30 May 2018. Having been afforded the opportunity to question Garda Reynolds, even though the only additional evidence given by Garda Reynolds related to formal proof of the regulations, the applicant's solicitor indicated that, in fact, she had no questions to put. That is clear from p.3 of the DAR which records the following:

"MS. MACEVILLY: Yes, Judge. But I was happy with where we had left it, Judge.

JUDGE: Alright, okay, okay.

MS. MACEVILLY: And I had put the case, I had already put the case to Garda Reynolds on the last occasion.

JUDGE: Alright, so that's fine. So we'll just put your client into evidence there, please."

53. The applicant was then sworn and examined by Ms. MacEvilly under oath. He was then cross-examined by Garda Reynolds and re-examined by Ms. MacEvilly, following which submissions were made to the court. It is not necessary to set out, verbatim, the contents of the DAR transcript. Suffice to say that the applicant, who had entered a plea of not guilty, on the basis that his insurance disc was displayed gave, *inter alia*, the following evidence: *"I had my insurance disc which is a trade policy on me at all times*

and it wasn't actually in the window of the car, but it was actually on my person. And he stopped me, but I actually had put it up on the dashboard by the time he actually came to my car."

54. It is clear from the learned District Judge's decision that she preferred the evidence of Garda Reynolds. As I mentioned earlier in this decision, the applicant no longer contends that inadequate reasons were given or that there was bias or irrationality. As I have been at pains to emphasise in this judgment, the present case does not involve an appeal against the applicant's conviction but it is clear that the reason for the learned District Court Judge's decision is that she preferred the evidence of Garda Reynolds to the effect that the applicant did not have the insurance disc displayed at the time Garda Reynolds saw him. The learned District Court made it clear that she was satisfied that the applicant had the insurance disc on his person for the purposes of moving cars in and out of the relevant garage and she also believed that the applicant may very well have endeavoured to display it at a later stage. However, in the context of an offence for the non-display of an insurance disc, the learned District Court Judge was satisfied, on the basis of the evidence given by Garda Reynolds, that the applicant did not have the insurance disc displayed. It is not in dispute that the learned District Court Judge decided to convict and fine but, before fixing an amount or deciding on a period of time to allow for payment, the learned District Court Judge expressly sought information including as to previous convictions and the applicant's financial circumstances, ultimately fining the applicant €200, but giving him three months to pay same. The very final exchange as between the learned District Court Judge, the applicant's solicitor and the applicant was as follows (as is clear from p.6, l, 16-24 of the DAR in respect of 30 May, 2018.):

"JUDGE: Very good. Taking into account then Mr. Kirby's financial circumstances I am going to convict him, to be fined €200 and I will give him three months to pay that.

MS. MACEVILLY: Sorry, Judge, how many months?

JUDGE: Three months.

MS. MACEVILLY: Three months.

JUDGE: And he can pay it by instalments – thank you.

MR. KIRBY: Thank you, Judge.

JUDGE: Thank you.

Case concluded."

55. Among the authorities relied on by the applicant is the decision in the State (O'Callaghan) v. O'hUadhaigh [1977] 1 IR 42, wherein, at p. 54, Finlay P. (as he then was) stated the following in respect of a case where the prosecution entered a *nolle prosequi* in relation to all matters and purported to recommence the prosecution: -

"If the Director, having entered a nolle prosequi, is entitled to institute an entirely fresh prosecution in respect of the same alleged offence without restriction from any court then, if it appeared likely that a contention of the prosecution would fail, there would appear to be nothing to prevent the Director from entering a nolle prosequi and availing himself of the opportunity in a fresh prosecution, on additional or different evidence, to succeed where he had been about to fail: that situation might arise in a discretionary matter involving a decision of mixed fact and law which falls to be determined by the trial judge rather than by the jury – such as the admissibility of a statement alleged to have been made by the accused. Viewed in this light, the basic unfairness of such a contention appears to me to become clear. Therefore, I am satisfied that on the facts of this particular case the Director of Public Prosecutions has not got a right to institute a fresh prosecution against the accused in respect of the matters which were the subject matter of the three charge sheets, and in respect of which the accused was returned by the learned District Justice for trial to the Circuit Court".

The facts in the present case are entirely different. There was no nolle prosequi entered. There was no fresh prosecution. Rather, having carefully considered written legal submissions by both sides, in which the prosecution specifically asked the court to exercise its discretion to allow the prosecution to re-open its case to prove the regulations, the trial judge, in refusing the applicant's application for a direction, emphasised the existence and importance of the court's discretion in that regard and, in response to the prosecution's request, permitted and directed the re-opening of the prosecution case – facts acknowledged by the applicant - during which re-opening no additional evidence was given other than formal proof of the regulations in question. Far from being an example of basic unfairness of the type described by Finlay J. in *The State (O'Callaghan) v. O'hUadhaigh*, the learned District Court Judge ensured fairness to all parties as the totality of the evidence before this Court attests.

Decision summarised

56. It is clear from the evidence that this was a case conducted in the District Court with scrupulous fairness and with full participation by the applicant and by a solicitor whose skill and commitment to her client's case could not be in doubt. It ultimately resulted in a conviction which the applicant chose not to appeal. The District Court Judge did not err in law. In my view, Sgt. Heneghan's production of the booklet containing the regulations on 02 November 2017 was sufficient proof of same, having regard to the uncontroverted averments made by him to which I have referred, but even if I am entirely wrong in that view, it is beyond doubt that the District Judge had the discretion to allow the prosecution to re-open the case to permit the regulations to be proved. This undoubtedly occurred on 30 May 2018 and it is not in dispute that the applicant's conviction was only recorded *after* formal proof of the regulations and after full engagement by the applicant who gave evidence in respect of the merits and who also engaged fully in respect of the sentence hearing. Although the learned District Court Judge did not take judicial notice of the relevant regulations, it is also plain from the evidence before this court that the trial judge was very familiar with same and that familiarity, indeed the fact that the learned District

Court Judge read the regulations on the morning the matter was first before the court, could hardly be said to create unfairness.

57. The evidence before this court reveals that the applicant's conviction was based on a full spectrum of all of the evidence including two separate methods of production of the regulations. The learned District Court Judge neither made contradictory decisions nor took into account irrelevant considerations. Rather, she exercised a discretion undoubtedly enjoyed by the District Court and did so properly, consistent with the relevant authorities and in a manner which ensured fairness.
58. There was nothing inconsistent in the learned District Court Judge taking the view that the regulations had been properly proved on 02 November 2017 but also permitting the prosecution to re-open their case on 30 May 2018 in circumstances where the only additional evidence given related to formal proof of the regulations and the foregoing neither created unfairness, nor was an ultra vires the learned District Judge's powers. The fact that the court allowed the prosecution to re-open its case, indeed directed that the prosecution should re-open its case, is clear from the evidence before the court and is something which is acknowledged in the applicant's statement of grounds and in the applicant's affidavit, something also acknowledged on 30 May 2018 by the applicant's solicitor when she and the applicant fully engaged with the prosecution's case.
59. Insofar as the applicant claims that the prosecution was allowed to have two opportunities to present their evidence and that this was fundamentally unfair, it is a matter of fact that on 30 May 2018 no evidence whatsoever touching on the merits was given which had not previously been given on 02 November 2017. Given the eight months' hiatus between 02 November 2017 and 30 May 2018, it could hardly be said to be unfair to the applicant that he was afforded the opportunity to hear, once more, the evidence by Garda Reynolds, particularly given the fact that the learned District Court judge explicitly afforded the applicant's solicitor the opportunity to cross-examine Garda Reynolds on 30 May 2018, before the applicant took the oath and was, himself, examined and cross-examined. Far from being fundamentally unfair, the manner in which the learned District Court judge conducted the case ensured fairness to all parties, the only additional evidence given on 30 May 2018 being the formal proof by Garda Reynolds of the relevant regulations, individually.
60. Far from being so fundamentally flawed that the applicant is entitled to the reliefs sought, I am obliged, for the reasons set out in this decision to dismiss the applicant's case. In so doing, it is also appropriate to refer to certain authorities in relation to the scope of judicial review by this Court of lower court decisions. In *The State (Daly) v. Ruane* [1988] ILRM 117 at 124, O'Hanlon J. noted that:

"Relief by way of certiorari is only appropriate in a limited category of cases. Generally speaking, it involves the applicant in showing that the inferior court or tribunal acted without jurisdiction, or in excess of jurisdiction, or in disregard of fair procedures, so that the applicant's rights to natural or constitutional justice were violated. Entitlement to the remedy may also arise where there is an error on the

face of the record, or where an order has been obtained by collusion or fraud. What must be stressed is that the certiorari procedure cannot be utilised to convert the High Court into a court of appeal from all decisions of the District Court, with the court being required to embark upon a re-examination of the evidence given before the lower court and a re-assessment of all submissions made during the course of the hearings in the lower court."

61. In the present case, there is no question of the learned District Court Judge acting without jurisdiction or in excess of jurisdiction or in disregard of fair procedures. I am entirely satisfied that the applicant's rights to natural and constitutional justice were scrupulously upheld. In the Supreme Court's decision in *Killeen v. DPP* [1997] 3 IR 218, Mr. Justice Keane stated: "*It may be that an error of law committed by a tribunal acting within its jurisdiction is not capable of being set aside on certiorari: see State (Davidson) v. Farrell* [1960] IR 438. *It is otherwise where the error of law has as its consequence the making of an order which the tribunal had no jurisdiction to make (p.227).*" In the present case the learned District Court Judge made no decision outside the District Court's jurisdiction. More recently, in *Hughes v. Judge Garavan* [2004] 1 ILRM 401, McGuinness J. stated: "*...it is clear that where a district judge, having considered the materials for him, forms an opinion either that there is a sufficient case to put the accused on trial or there is not, his order sending the accused forward for trial or discharging him cannot be set aside on certiorari.*" For the reasons set out in this decision, there are no grounds which would justify the setting aside, on *certiorari* of the applicant's conviction of 30 May 2018, nor is the applicant entitled to the declaratory order sought at para. 2 of this statement of grounds.
62. In *O'Neill v. Judge McCartan* [2007] IEHC 83, Mr. Justice Charleton noted that the function of the High Court in exercising its jurisdiction to ensure the proper application of constitutional and legal principles by lower tribunals is strictly limited. In the recent Supreme Court decision in *Reen v. Murphy* [2017] IESC 67, Ms. Justice Dunne cited, with approval, the dicta of O'Hanlon J. in *The State (Daly) v. Ruane*. In her decision, the learned judge also made the following clear:

"It is important to bear in mind that the purpose of judicial review proceedings is not to embark on a further appeal or re-hearing of proceedings that have already been concluded. As was pointed out by Lynch J. in Gill v. Connellan [1988] ILRM 448 *at page 454:*

'An application for certiorari by way of judicial review is not to be regarded as a readily available alternative to an appeal by way of rehearing to the Circuit Court. The ordinary remedy for a person who is dissatisfied with a District Court decision is to appeal to the Circuit Court where a complete rehearing will take place. Alternatively, if the facts of a case are not in issue but a point of law arises then an appeal by way of case stated to the High Court is appropriate.'"

The foregoing principles seem to me to be very appropriate in the present case and, in my view, nothing advanced by the applicant brings his complaints into the realm of judicial review. The District Judge, in my view, undoubtedly acted within jurisdiction. It is plain that the applicant was dissatisfied with her decision, but the appropriate route to have taken was an appeal by way of a rehearing to the Circuit Court. That was not done. In light of the evidence before this Court and guided by the relevant legal principles which emerge from the authorities, I am satisfied that the applicant is not entitled to any of the reliefs sought and his application must be dismissed for the reasons set out in this judgment.

63. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."*
64. Having regard to the foregoing, the parties should correspond with each other, forthwith, regarding the form of the final order including the appropriate costs order to be made. In default of agreement between the parties on any such issue, short written submissions should be filed in the Central Office no later than 21 days from today.