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Judgment: approved by the Court for handing down
(subject to editorial corrections)

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Delivered:	19/09/2002

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY D FOR JUDICIAL REVIEW AND IN THE MATTER OF DECISIONS OF THE CHIEF CONSTABLE OF THE ROYAL ULSTER CONSTABULARY AND THE DEPARTMENT FOR REGIONAL DEVELOPMENT

COGHLIN J

[1] The applicant in this case is a resident of Glengormley who is compelled to use a wheelchair by reason of disability. The applicant has initiated these judicial review proceedings to challenge a number of decisions taken by the respondents in relation to an Orange Arch which was erected at Antrim Road Glengormley between Farmley Road and Hightown Road on 19 June 2001.

The relevant statutory framework

[2] The relevant articles of the Roads (Northern Ireland) Order 1993 ("the 1993 Order") provide as follows:

> "73(1) Subject to paragraph (2), any person who fixes or places any overhead beam, rail, arch, pipe, cable, wire or other similar apparatus over, along or across any road shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale.
>
> (2) Paragraph (1) does not apply to anything done –
>
> *(a)* with consent of the Department."

[3] Article 73(3) of the 1993 Order provides as follows:

> "(3) Where –

(a) a person has fixed or placed any apparatus in contravention of paragraph (1); and

(b) the Department considers that the apparatus constitutes a danger to persons using the road, then (whether or not proceedings are instituted for an offence under that paragraph) the Department may –

(1) remove that apparatus or carry out such other works as are necessary to obviate the danger; and

(2) recover from that person any expenses thereby reasonably incurred by it."

[4] Articles 73(6) and (7) of the 1993 Order provide:

"(6) A consent under paragraph (2)*(a)* may be given by the Department where it is satisfied that the safety or convenience of traffic using the road, or which may be expected to use the road, will not thereby be prejudiced.

(7) A consent under paragraph (2)*(a)* shall be given subject to such conditions as seem to the Department to be adequate for securing the safety and convenience of traffic."

[5] Article 73(8) of the 1993 Order provides that, without prejudice to the generality of paragraph (7) a consent under paragraph(2)*(a)* may be made subject to conditions relating to insurance, the production of certificates relating to the safety of the apparatus and a specified time limit between the erection and removal of the apparatus.

[6] Article 73(10) of the 1993 Order specifies that failure to comply with a condition to which a consent is made subject shall be a separate offence and where there is non-compliance with such a condition or conditions the Department has power, in accordance with Article 73(11) to revoke the

consent, remove the relevant apparatus and recover the consequent reasonable expenses from the licencee.

[7] Article 73(9) of the 1993 Order affords an indemnity to the Department in the following terms:

> "(9) The person to whom a consent under paragraph (2)*(a)* is given shall indemnify the Department against any claim in respect of injury, damage or loss arising out of the fixing, placing or presence over, along or across a road of apparatus to which the consent relates …"

The factual background

[8] It appears that the Orange Arch, the subject of these proceedings, has been erected annually at this particular location in Glengormley village since approximately 1983. The "legs" of the metal structure are fitted and secured into two sockets set in the footpath on either side of the roadway. When the arch is not in position, appropriate covers are fitted over the sockets. In recent years, it seems that street furniture, in the form of flower holders, has been placed over the covers.

[9] The arch is located in the commercial and geographic centre of Glengormley village which is largely devoid of residential properties and it is generally accepted that this is a "neutral area". It seems that the population to the south of Glengormley village is predominantly nationalist while that on the north side is overwhelmingly unionist.

[10] For many years it seems that the erection of this arch attracted little local attention and was policed by two officers who, in recent years, have been neighbourhood officers from Glengormley.

[11] In the summer of 2000 as a result of an anticipated rise in community tension, the number of officers attending the erection of the arch was increased to 10. All officers were drawn from Glengormley police station under the direction of the local sergeant. The erection and removal of the arch passed off peaceably in 2000. It is accepted by the Department that, prior to the summer of 2001, no consent had been sought or granted in respect of the erection of this Orange Arch under the provisions of Article 73 of the 1993 Order.

[12] During the early months of 2000 it became apparent that the erection of a number of Orange Arches at various sites across Northern Ireland had potential to give rise to controversy and meetings took place between the

Department and the police with a view to reviewing the situation and developing policy. As a result of this review, the Department came to the conclusion that many of those involved in the annual erection of Orange Arches did not appreciate the necessity for obtaining prior consent from the Department in accordance with the provisions of Article 73 of the 1993 Order. One of the steps taken by the Department with a view to remedying the situation was to place advertisements in local newspapers drawing attention to the need to obtain such consent. Forty-three such advertisements were placed in newspapers during the week ending 11 June 2000 and similar advertisements were placed in 2001.

[13] In addition, the Department issued interim guidelines for dealing with traditional arches to all divisional road managers on 22 June 2000. Inter alia, these guidelines required the presence of such arches to be recorded during routine inspections, or as a result of a report from a member of the public, and to be checked against a list of "consented arches". The guidelines made provision for arches which might prejudice the safety or convenience of traffic and went on to include the following paragraph:

> "*(7)* If an arch is not considered to prejudice the safety and convenience of traffic, local staff should seek to establish the name of the person(s) responsible for the erection of the arch. This may be achieved through local knowledge or by writing to the local police Superintendent, the Orange Order or AOH depending on the circumstances."

The Department forwarded a copy of these guidelines to the police on 26 June 2000.

[14] Subsequent to these discussions, the police prepared an internal police direction which was approved by Assistant Chief Constable, Alan McQuillan, and copied to regional ACCs and divisional commanders. This direction drew attention to the need to obtain a permit from the Department for the erection of such arches supported by a report from a structural engineer and a valid copy of a public liability insurance certificate. The direction also confirmed that the Department was the enforcement agency for any offences under the provisions of Article 73 of the 1993 Order noting that the Department might require the assistance of the police to identify the "owner" of an arch and/or to provide an assessment of any risk that might be associated with removing an arch. The police directions expressly stated that:

> "There is no need for police to initiate any action regarding arches unless contacted by DRD staff. This is primarily a DRD issue. The DRD are aware

> of the sensitivities involved in local communities and will act accordingly. It is their hope that they can persuade people to become legal rather than have to take punitive or other direct action which might inflame communities."

[15] On 25 May 2001 Mr Bell, representing Carnmoney District LOL ("the Lodge") came to Glengormley police station to discuss the erection of the Lodge's arch at Glengormley with Sergeant Knox and Inspector McInnes.

[16] Mr Bell informed the police officers of the proposed date and time for the erection of the arch in June 2001 and provided some operational details including the arrangements for the arrival of the crane and the number of people likely to be involved in the erection. During the course of this conversation Mr Bell assured the officers that appropriate insurance cover had been obtained. The officers explained to Mr Bell the need to obtain the consent of the Department for the erection of any structure over the road but Mr Bell gave no indication as to whether he would or would not seek such permission observing, according to Sergeant Knox's recollection, "… that's another obstacle in our way".

[17] On 2 June 2001 the applicant's solicitors commenced correspondence with both respondents seeking information in relation to the proposed erection of an arch in Glengormley in 2001 and confirmation that any such operation would require lawful authorisation.

[18] The arch was duly erected in Glengormley on 19 June 2001 without consent being sought from or granted by the Department in accordance with Article 73 of the 1993 Order. It is clear from the affidavit sworn by the applicant's mother, the photographs exhibited to the affidavit of Miss Angela Ritchie, solicitor, and the affidavit sworn by Chief Superintendent Verner that, upon this occasion, there was heightened community tension with mutual hostility reaching such a pitch that a total of 81 police officers were required to preserve the peace and reduce the risk of pubic disorder.

[19] According to his affidavit, on 20 June 2001, Richard Joseph Hyde Hamilton, a section engineer employed by the Department, spoke to Mr Bell of the Lodge in the course of making enquiries as to the identity of the organisation responsible for the erection of the arch. Mr Hamilton understood Mr Bell to be the Treasurer of the Lodge. Mr Hamilton explained to Mr Bell that the erection of the arch had taken place without the appropriate consent from the Department and that such a consent would be dependent upon obtaining an engineer's certificate as well as a certificate of insurance. In Mr Hamilton's words:

> "Mr Bell did not appear to be acquainted with the procedure involved as he asked me to explain it to him, which I did."

[20] On 22 June 2001 Mr Hamilton inspected the arch and confirmed to his superiors that the footway was not being obstructed. Mr Hamilton subsequently provided a report, dated 2 July 2001, which confirmed that the structure was not at risk of collapse due to self weight or wind forces although he did point out that there might be a risk to road users resulting from an uncontrolled vehicle mounting vehicle mounting the pavement and striking the supporting legs.

[21] On 25 June 2001 the Department received an application for consent to the erection of the arch signed by a Mr Pinkerton, district secretary of the Lodge and dated 21 June 2001. The application was processed by Mr Hamilton who replied to Mr Pinkerton on 4 July 2001 pointing out that, since the arch had been unlawfully erected, the Department was considering whether a prosecution should be initiated under the provisions of Article 73(1) of the 1993 Order. However, in the same letter, Mr Hamilton indicated that the Department would be prepared to grant consent provided that the appropriate insurance and engineering certificates were forthcoming. Such documents were produced dated, respectively, 10 and 6 July 2001 and, on 10 July 2001, the appropriate consent was issued and signed by Mr Hamilton. This consent authorised the arch to be erected between 19 June and 31 July 2001 but, at paragraph *(12)* of his affidavit, Graham Fraser, acting Chief Executive of the Roads Service, subsequently conceded that the consent could only operate on a prospective basis and that, consequently, it was accepted by the Department that between 19 June and 10 July 2001 the arch was in position without consent.

[22] On 30 July 2001 the Lodge informed the Department that the removal of the arch would have to be postponed because of the murder of Gavin Brett at Hightown Road Glengormley on 29 July 2001. As a result of this murder it appears that the police advised the Lodge that it would not be appropriate to remove the arch on 31 July 2001 since, in the prevailing atmosphere, there would be a real risk of a breach of the peace and a further exacerbation of community sensitivities. The arch was removed on 7 August 2001.

The submissions of the parties

[23] The applicant was represented by Mr Treacy QC and Ms Quinlivan while Mr Closkey QC and Mr Maguire appeared on behalf of both respondents. I am indebted to both sets of counsel for the industry which was devoted to the preparation of the case and the succinct manner in which the issues were presented to the court. The Order 53 statement set out a large number of detailed grounds upon the basis of which a number of decisions

were challenged involving both domestic provisions as well as breaches of obligations imposed by the European Convention on Human Rights ("the Convention"). However, in presenting the application to the court, Mr Treacy QC concentrated upon three areas of discretionary decision making by the respondents and limited his attack to the context of domestic law principles.

The decision by the police not to prevent the erection of the arch

[24] The police were clearly aware that the arch was to be erected on 19 June 2001 and Mr Treacy QC submitted that the only reasonable inference to be drawn from the evidence was that, on that date, the police must also have known that, in the absence of a permit from the Department, the erection of the arch would be unlawful. In such circumstances, Mr Treacy QC argued that the only reasonable course of action open to the police would have been to physically intervene to prevent the erection of the arch and, as an alternative, he characterised the police failure to do so as "facilitating" the erection of the arch which, in his submission, amounted to "aiding and abetting a criminal offence".

[25] In the circumstances of this particular case, I do not accept this submission.

[26] It is clear that both respondents appreciated the need to develop an agreed policy and procedure to deal with the erection of Orange Arches in Northern Ireland and, to this end, meetings between officials from both bodies were arranged. Both bodies accepted that the Department should take the lead role as the enforcement agency in relation to any offences contrary to Article 73 of the 1993 Order and the agreed role of the police was to help identify the "owner" of a particular arch, if the Department were unable to do so, as well as to advise the Department in relation to threats to Department workers, the likelihood of public disorder etc. The policy produced as a result of these meetings and authorised by the Assistant Chief Constable on 21 June 2000 contained the following specific paragraph relating to the role of the police:

> "There is no need for police to initiate any action regarding arches unless contacted by DRD staff. This is primarily a DRD issue. The DRD are aware of the sensitivities involved in local communities and will act accordingly. It is their hope that they can persuade people to become legal rather than to have to take punitive or other direct action which might inflame communities."

It seems to me that, as a policy, this is unexceptional and that, in any event, it clearly falls within the discretionary range open to the police in relation to operational matters.

[27] Furthermore, in this case it seems that, when Sergeant Knox met Mr Bell on 24 May 2001 he took the opportunity to ensure that Mr Bell was aware of the need to obtain the consent of the Department and, in the context of the policy, I consider that the police were entitled to rely upon the assumption that Mr Bell would comply with the advice that he had received unless they were informed otherwise by the Department. With hindsight, it is clear that the Lodge intended to erect the arch without seeking consent from the Department but, even had they done so, again with hindsight, it is clear that consent would have been granted. In such circumstances I am satisfied that, as a result of inter-community hostility, exacerbated by the recent elections, there would still have been a necessity for a substantial police presence on 19 June 2001. As it is, I am satisfied from the affidavits sworn herein by Chief Superintendent Verner, Chief Superintendent McGuigan and Sergeant Knox that, in accordance with the policy agreed between the respondents, as set out in the affidavit of Assistant Chief Constable McQuillan, the police were entitled to assume that the issue of consent in accordance with Article 73 of the 1993 Order would be dealt with by the Department prior to the erection of the Orange Arch and that, consequently, they reasonably discharged their duty on 19 June 2001 by seeking to keep the peace and prevent public disorder.

The decision by the Department to consent to the erection of the Orange Arch

[28] As I have noted earlier, subsequent to the conversation between Mr Hamilton and Mr Bell on 20 June 2001, the Lodge applied to the Department for consent in accordance with Article 73 of the 1993 Order on 21 June 2001 and, after the specified conditions had been met, the appropriate consent was issued on 10 July 2001. Mr Treacy QC sought to impugn this exercise of the Department's discretion on the basis that the Department had failed to take into account a relevant consideration, namely, that it had failed to carry out any or adequate consultation with the nationalist population of Glengormley.

[29] Mr Treacy QC sought to base the duty to consult upon the provisions of Section 75(2) of the Northern Ireland Act 1998 ("the 1998 Act").

[30] Section 75 of the 1998 Act deals with the duty of a public authority to have due regard to the need to promote equality of opportunity in carrying out its functions and sub-section (2) provides as follows:

> "(2) Without prejudice to its obligations under sub-section (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group."

Mr Treacy QC emphasised the importance of complying with this duty particularly in an area which was regarded as "neutral" by both sides. He further submitted that the complete absence of any reference to the type of consideration that might be relevant in relation to the duties of a public authority under Section 75(2) of the 1998 Act from the "interim guidelines" formulated by the Department, coupled with the statement in the Department's advertisements that consent would normally be given provided that there was compliance with the safety and insurance conditions, confirmed that the Department had not turned its mind to this factor.

[31] On behalf of the Department Mr McCloskey QC submitted that the dominant purpose of Article 73 of the 1993 Order was to ensure that the relevant structure did not compromise the safety or convenience of pedestrians or vehicles and he reminded the court of the words of Lord Reid in Padfield v Minister of Agriculture (1968) AC 997 at page 1030B:

> "The policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court."

In this context, Mr McCloskey submitted that both the interim guidance and the advertisements conformed with the dominant purpose of Article 73.

[32] Mr McCloskey QC went on to submit that, in the absence of a statutory obligation to consult, an unequivocal representation or promise that consultation would take place or an established practice of consultation, the Department was not under a legal obligation to consult with anyone. He accepted that Section 75(2) if the 1998 Act required the Department to "have regard to "the desirability of promoting good relations" but submitted that, bearing in mind the absence of any complaint to the Department prior to the letter from the applicant's solicitors of 2 June 2001, the information which had been placed before the Department as a result of these proceedings had enabled the Department to comply with any such duty.

[33] I do not accept that Section 75(2) of the 1998 Act, in itself, placed the Department under a formal legal obligation to consult with any particular person, body or section of the community prior to granting a consent under the provisions of Article 73 of the 1993 Order.

[34] However, it does seem to me that, when considering an application for consent under Article 73 of the 1993 Order in respect of structures erected as a means of identifying with a particular religious, political or cultural tradition the Department should do so in the context of Section 75(2) of the 1998 Act. Compliance with this duty under Article 75(2) will depend very much upon the circumstances of each particular case. The original letter from the applicant's solicitors of 2 June 2001 focussed upon an allegation that the restriction of the pavement by the arch constituted a hazard for persons compelled to use wheelchairs. However, subsequent correspondence, together with the affidavits and exhibits in these proceedings set out in detail representations which the applicant's solicitor sought to make on behalf of the local community. Paragraph 7 of his affidavit sworn on 4 December 2001 by Mr Fraser, the Acting Chief Executive of the Road Service, confirmed, inter alia, that the Department was satisfied that in the course of exercising its powers in relation to the Glengormley arch it had not offended against the provisions of Section 75 of the 1998 Act. In accordance with the well known observations of Lord Wilberforce in Secretary of State for Education and Science v Metropolitan Borough of Thameside [1977] AC 1014 this document is to be read fairly in bonam partem. Accordingly, I also reject the submission that the Department failed to consider any obligations that it might be under by virtue of Section 75(2) of the 1998 Act.

[35] However, I do not think that the Department should be under any illusion that, in rejecting Mr Treacy QC's second submission, the court has no criticism to make of the circumstances in which the Department came to grant consent in accordance with Article 73 of the 1993 Order. This particular arch has been erected since 1983 apparently without consent and this should have been known to the Department long before June of 2001. In the unlikely event that the Department did not have such knowledge it should have been obtained as a result of the Department complying with paragraph 3(*iii*) of its own guidelines. No attempt appears to have been made to establish the name of the persons or body responsible for the erection of the arch in accordance with paragraph 3(*vii*) of the same document. The latter omission becomes even more difficult to understand after the applicant's solicitors letter of 2 June 2001 put the Department upon specific notice that an issue was likely to arise in relation to the authorisation for the erection of this arch. In fact, to use his own words it was only "as a result of the arch's erection" that Mr Hamilton made any enquiries at all as to what organisation might be responsible for its erection. The fact that he was able to contact Mr Bell of Carnmoney District LOL on the day following the erection of the arch does not suggest that these enquiries were particularly time consuming or difficult.

The Department's decision not to prosecute Carnmoney District LOL

[36] In attacking this decision by the Department Mr Treacy QC advanced the submission that there was absolutely no evidence to support the conclusion set out at paragraph 7(*ii*) of Mr Fraser's affidavit that Carnmoney District LOL had not been aware of the requirements of Article 73 and had sought the appropriate consent as soon as those requirements had been drawn to its attention. Mr Treacy QC further argued that, since this was clearly a crucial factor in the Department's decision making process, if it was incorrect, the decision could not stand.

[37] By way of response, Mr McCloskey QC submitted that the decision not to prosecute, which was taken by Mr Fraser in consultation with his senior colleague James Carlisle, Director of Corporate Services in the Road Service, was not based solely upon a belief that the Lodge had not been aware of the Article 73 requirements but also took into account the Department's view that prosecutions might inhibit those who erect arches applying for consent and thereby revealing their identities, the need to obtain co-operation from such persons and bodies and the view that considerations of retribution and deterrence did not warrant a prosecution in the particular circumstances.

[38] In a further affidavit, sworn on 26 June 2002, James Carlisle explained that the belief which he and Graham Fraser had reached that the Lodge had not been aware of the requirements to obtain consent for the arch was formed on the basis of information with which they had been provided by Richard Hamilton, Section Engineer, who had spoken to Mr Bell of Carnmoney District LOL on 20 June 2001. In his own affidavit dealing with that aspect of the case, Mr Hamilton recorded how he had informed Mr Bell, the Treasurer of the Lodge, that it was essential to apply for a consent which further required the support of an engineer's certificate and a certificate of insurance. Mr Hamilton went on to say:

> "Mr Bell did not appear to be acquainted with the procedure involved as he asked me to explain it to him, which I did."

However, in the context of the affidavit sworn by Sergeant Knox relating to his conversation with Mr Bell on 24 May 2001 I am driven to the conclusion that, insofar as he represented to Mr Hamilton that he was not aware that consent was required from the Department, Mr Bell was being disingenuous, if not deliberately deceitful.

[39] At page 316 of the 7th Edition of Wade and Forsythe Administrative Law the learned authors state:

> "Mere factual mistake has become a ground of judicial review, described as 'misunderstanding or

> ignorance of an established and relevant fact', or acting 'upon an incorrect basis of fact'."

[40] In support of this proposition the learned authors cite the judgments of Scarman LJ and Lord Wilberforce in Secretary of State for Education and Science v Thameside MBC [1977] AC 1014 and an interesting article by Timothy H Jones [1990] PL 507. Despite being cited by Lord Slynn in R v Criminal Injuries Compensation Board ex part A [1999] 2 WLR 974 (see also R (Alconbury) v Secretary of State [2002] 2 All ER 929 and, in particular, Lord Slynn at para [53] and Lord Clyde at para [169]), I think that it must remain at least arguable as to whether the jurisdiction is as wide as this in the domestic context, given the essentially supervisory nature of judicial review. A somewhat less ambitious approach appears to be taken by the learned authors of de Smith, Woolf and Jowell, Judicial Review of Administrative Action 5th Edition who observe at page 288:

> "The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base a decision upon any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention."

[41] This was the type of approach which appears to have attracted Hutton J, as he then was, in R (Thallon) v Department of the Environment [1982] NI 26 when he said, at page 49:

> "In giving evidence Mr Hawker stated that when he considered the 1980 planning application and advised that it should be granted, he personally did so without regard to the existence of the 1977 planning permission. But Mr Hawker also stated that two other officials in addition himself had the final responsibility of deciding whether the 1980 application should be granted, and even if Mr Hawker did not take into account the existence of the 1977 planning permission, I consider that the documentary evidence to which I have referred points overwhelmingly to the conclusion that regard was had to the existence of the 1977 planning permission in the decision-making process in relation to the 1981 planning permission, and therefore, as the 1977 planning permission was void and nullity, the

> Department took into account a matter which it should not have taken into account."

[42] In Simplex GE (Holdings) Limited v Secretary of State for the Environment and the City of St Albans District Council [1988] COD 160 the Minister mistakenly thought that a study recommended by a planning inspector relating to the question of whether a site should be retained in the green belt had formed the basis of the Council's decision when, in fact, no such study had been carried out by the time of the Minister's decision. The Court of Appeal accepted that the mistake had been a significant factor in the Minister's decision. It was sufficient for the appellant to show, as was done in that case, that the decision might have been different had the relevant consideration not been taken into account. Purchas LJ observed that, even if the Minister's error was not the dominant reason for the decision, it could not be excluded as insubstantial or insignificant and, at page 161, he went on to say:

> "It is not necessary for [the appellant] to show that the Minister would, or even probably would, have come to a different conclusion. He had to exclude only the contrary intention, namely that the Minister necessarily would still have made the same decision."

[43] The belief that the officers of Carnmoney District LOL did not know that it was necessary to apply to the Department for consent to erect the Orange arch would clearly be a material and significant factor to be considered when deciding whether to prosecute and this has been formally confirmed by the affidavits sworn by Mr Carlisle and Mr Fraser. While it may not have been the only factor taken into account in relation to that decision, I am quite unable to hold that, had they known the true extent of Mr Bell's knowledge so recently imparted in the course of police advice, the officers of the Department would have reached the same decision.

[44] Mr McCloskey QC submitted that even if I was persuaded by any of the arguments put forward by the applicant, the court should exercise its discretion to withhold relief upon the grounds of:

(*i*) The applicant lacked the necessary standing by reason of anonymity.

(*ii*) The applicant's unreasonable delay.

The applicant's standing

[45] This issue appears to have been first raised during the hearing. So far as the court is concerned, the applicant has remained anonymous, being known by the alphabetical letter D. However, I was informed by Mr Treacy

QC that this was a result of an earlier application which had been granted and, at all material times, the true identity of the applicant has been known to the police.

The applicant's delay

[46] The letter before proceedings from the applicant's solicitor was written on 2 June 2001 and on the following day the applicant applied for Legal Aid. The application for Legal Aid was refused on 5 June and an appeal was entered on 11 June. The appeal was refused on 18 June and, on 4 July, the applicant initiated judicial review proceedings relating to the refusal by the Legal Aid Department. On 21 September the applicant was granted leave to pursue the judicial review proceedings against the Legal Aid Department. On 20 November the Legal Aid Department were asked to review their refusal of Legal Aid in the context of further material but on 12 December the Legal Aid Department filed an affidavit confirming that it had no power to review its refusal in such circumstances. On 5 January 2002 the applicant lodged a fresh application for Legal Aid and on 15 January Legal Aid was granted in respect of these proceedings. During the month of April 2002 further affidavits were lodged by both sides and the hearing date fixed as 31 May 2002. While the particular application in this case was a good deal more protracted, it seems to me that the words of Ackner LJ in R v Stratford on Avon DC ex parte Jackson [1985] 1 WLR 1319 at 1324 are still apposite:

> "We agree with Forbes J that it is a perfectly legitimate excuse for delay to be able to say that the delay is entirely due to the fact that it takes a certain time for a certificate to be obtained from the Legal Aid authorities and that, despite all proper endeavours by an applicant, and those advising her, to obtain a legal certificate with the utmost urgency, there has been some delay about obtaining it through no fault at all of the applicant."

[47] In the circumstances I do not consider that either of the grounds relied upon by Mr McCloskey QC would justify a refusal of relief if it were otherwise warranted.

[48] A declaration must serve some useful purpose and, usually, that is to establish the rights of the parties and resolve any uncertainties. Even where a defence is abandoned, clarification of the law may be of value in the future, both as guidance for those charged with the performance of public duties and an assurance for the public that those duties would be carried out in a fair and lawful manner. Both the decision not to prosecute and the particular arch itself have now been relegated to history and, even had certiorari been sought and granted at the material time the result would have been a reconsideration

of the decision by the Department which might, or might not, have produced a different outcome having regard to the particular circumstances of this case. In this context, it is arguable that it is not easy to identify the extent of any benefit in terms of clarification and/or guidance which would be produced by granting a declaration at this stage. On the other hand, to refuse relief would be to preserve a decision taken by the Department which has now been shown to have been based upon the false premise that the officer of the lodge did not know that it was necessary to obtain consent and was taken without being aware that the arch had apparently been erected without any attempt being made to comply with the police advice that consent should be obtained. Ultimately, I am persuaded that both justice and fairness require me to grant a declaration that the decision by the Department not to prosecute this Lodge was unlawful.