

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 720 JR]

BETWEEN

MARTIN WARD

APPLICANT

AND

HER HONOUR JUDGE LEONIE REYNOLDS AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Ms. Justice Iseult O'Malley delivered 11th day of December 2015.

Introduction

1. In *Carmody v. The Minister for Justice, Equality and Law Reform* [2010] 1 I.R. 635 the Supreme Court held that a defendant in criminal proceedings in the District Court had a constitutional right to apply for legal aid to include counsel, and a right to have such an application determined on its merits. The Criminal Justice (Legal Aid) Act, 1962 did not make provision for a legal aid certificate to include the services of counsel in the District Court. The Court did not find the Act to be repugnant to the Constitution, but it prohibited the further prosecution of the plaintiff in the case until he was afforded such a right.

2. The judgment in *Carmody* was delivered on the 23rd October, 2009. The Minister for Justice, Equality and Law Reform immediately introduced a "Non-statutory District Court (Counsel) Scheme" ("the Scheme") to remedy the deficit identified by the Supreme Court.

3. The issue in these proceedings concerns the availability of the Scheme in District Court appeals. The applicant had the benefit of a certificate covering representation by a solicitor in the District Court but did not seek a certificate for Counsel until part of the way through the hearing of his appeal against sentence in the Circuit Court. The respondent judge ruled that, having regard to the terms of the Scheme, she had no jurisdiction to grant such a certificate.

4. The applicant seeks an order of certiorari quashing the decision of the respondent and a declaration that the Scheme implemented by the second named respondent is *ultra vires* the Criminal Justice (Legal Aid) Act 1962 and/or repugnant to the Constitution.

Background facts

5. The applicant was charged before the District Court with the offences of dangerous driving, driving whilst intoxicated, driving without insurance, failing to produce insurance, driving without a licence and failing to produce a licence. It appears that the charges arose from a road traffic accident. He applied for and was granted a certificate for legal aid, which entitled him to representation by a solicitor.

6. The applicant pleaded guilty to all charges on the 26th June, 2014. The District Court judge imposed consecutive sentences of five months imprisonment on each of the charges of dangerous driving, driving whilst intoxicated and driving without insurance. He also imposed a fine of €2,000 in relation to each of these three charges, with 90 days imprisonment in default. Further, the applicant was disqualified from driving for a period of 40 years. The other charges were taken into consideration.

7. The applicant appealed against sentence to the Circuit Court. The appeal was listed before the first named respondent in the District Court Appeals list on 22nd October, 2014, and was part-heard on that day. The applicant was represented by counsel.

8. The prosecuting officer gave evidence of the circumstances surrounding the road traffic accident which gave rise to the charges against the applicant, and of his previous convictions. The first named respondent also established through her own enquiries of the officer that the applicant was disqualified from driving at the time of the accident.

9. At this stage the first named respondent asked the applicant if he was serious about proceeding with the appeal, warning him that the sentence could be increased. He was afforded an opportunity to consult with his counsel. The applicant says that having sought "detailed advice" from counsel, he confirmed that he wished to proceed. He then gave evidence as to his personal circumstances.

10. The first named respondent requested a report from the Probation Service and adjourned the proceedings to the next District Court Appeals list to be held in March, 2015. She specifically noted that the request for a report was not to be taken as a guarantee as to her ultimate decision.

11. Counsel for the applicant then applied for a legal aid certificate for the appeal. A statement of means was handed into the court. It was confirmed that the applicant had been on legal aid in the District Court. The application was granted.

12. Counsel then made a further application for a legal aid (Circuit Court (Counsel) Appeal) certificate. The judge asked what jurisdiction she had to make such an order. Counsel referred the judge to the non-statutory scheme implemented in response to the *Carmody* decision, and to the form to be signed by a judge granting a certificate for counsel.

13. The judge stated that this application was "novel". Numerous other counsel had appeared before her in the course of the District Court appeals list, and no such application had been moved previously. She granted liberty to counsel to re-mention the matter if he could take the Court through the jurisdiction to grant such a certificate.

14. The matter was re-mentioned on the following day, the 23rd October, 2014. The Supreme Court judgment in *Carmody* and the Criminal Justice (Legal Aid) (Amendment) Regulations 2011(S.I. 362/2011) were opened. Counsel also referred to extracts from Coonan and O'Toole, *Criminal Procedure* in the District Court (Round Hall, 2001).

15. No submissions were made on behalf of the prosecution by the state solicitor.

16. The first named respondent refused the application on the basis that she did not have any jurisdiction to grant it. The ruling was made on the basis that, having regard to the terms of the Scheme, she could not grant a certificate in circumstances where a

certificate for counsel had not been granted in the earlier District Court proceedings.

The applicant's case

17. The applicant makes his complaint in the following terms:

"My appeal against sentence stands part-heard and I will have the assistance of solicitor only without the opportunity to apply for the assistance of Counsel also. Submissions on the severity of my sentence have yet to be made and I am advised that there is also a legal point to be raised with regard to the "one transaction rule" and consecutive sentences. I will be returning to Court on an "all options" basis in circumstances where the Court has warned me of the potential to increase my sentence and I am advised I could be exposed to a maximum sentence of 24 months along with substantial fines."

18. The grounds upon which relief is sought are that the first named respondent erred in law in finding that she had no jurisdiction to grant the certificate; that the second named respondent acted ultra vires in implementing the scheme in a manner which imposed as a condition precedent to any legal aid (Circuit Court (Counsel) Appeal) certificate that such certificate must be applied for and granted by the District Court; and that the Scheme is repugnant to the Constitution to the extent that it precludes the applicant from exercising his constitutional right to apply for legal aid to include counsel, and to have such application determined on its merits, by either the District Court or the Circuit Court hearing the appeal.

The respondents' case

19. No affidavit has been filed on behalf of the respondents and there is no dispute as to the facts.

20. It is pleaded that paragraph 2(b) of the Scheme makes clear that counsel may be assigned for an appeal from the District Court only where such a certificate was *"granted in respect of him/her by the District Court"*. The first named respondent therefore was correct in her interpretation and application of the Scheme.

21. The Scheme allows for an application for counsel to be made in the District Court, and for counsel to be assigned in exceptional cases where it is necessary due to the gravity of the charge and the complexity of the case. It also provides, in common with the statutory provisions for legal aid, that any decision made on such an application is final and not appealable.

22. The respondents say that it was open to the applicant to apply for a certificate for counsel in the District Court if the relevant criteria applied. He did not do so and is now precluded from challenging the subsequent refusal by the Circuit Court judge.

23. Without prejudice to that contention, it is pleaded that the Scheme envisages that counsel would be assigned infrequently, in cases of particular gravity or complexity or other exceptional circumstances. The offences charged under the Road Traffic Acts are not of sufficient gravity or complexity to justify a certificate for counsel. *"Equality of arms"* does not arise as an issue since the prosecution was not represented by counsel in either court. Submissions on the severity of sentence, including arguments over the *"one transaction rule"* or on consecutive sentencing, are neither so complex or exceptional as to justify the assignment of counsel under the Scheme.

24. The respondents therefore plead that the applicant had no entitlement in this case to representation by counsel, in either the District Court or on appeal in the Circuit Court. He does not, in the circumstances, have sufficient interest or standing to question the lawfulness of the Scheme.

The Criminal Justice (Legal Aid) Act 1962

25. Section 2 of the Criminal Justice (Legal Aid) Act 1962 (as inserted by s.5(6) of the Criminal Justice (Miscellaneous Provisions) Act 1997) ("the Act") provides in relevant part as follows:

"(1) If it appears to the District Court before which a person is charged with an offence ... –

(a) that the means of a person charged before it with an offence are insufficient to enable him to obtain legal aid, and

(b) that by reason of the gravity of the offence with which he is charged or of exceptional circumstances it is essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence before it,

the said District Court... shall, on application being made to it in that behalf, grant a certificate, in respect of him, for free legal aid (in this Act referred to as a legal aid (District Court) certificate) and thereupon he shall be entitled to such aid and to have a solicitor and (where he is charged with murder and the said District Court... thinks fit) counsel assigned to him for that purpose in such manner as may be prescribed by regulations under section 10 of this Act."

26. Section 2(2) provides that a decision of the District Court in relation to an application under this section shall be final and shall not be appealable.

27. Section 4 of the Act deals with District Court appeals as follows:

"4. –(1) Where—

(a) a person is convicted of an offence, and

(b) a certificate for free legal aid (in this Act referred to as a legal aid (appeal) certificate) is granted in respect of him by the District Court or by the judge of the court before which he was tried or under subsection (3) of this section,

the person shall be entitled to free legal aid in the preparation and conduct of an appeal from the conviction or the penalty (if any) imposed on conviction and to have a solicitor and (where the appeal lies to the Court of Criminal Appeal) counsel assigned to him for that purpose in such manner as may be prescribed by regulations under section 10 of this Act.

(2) A legal aid (appeal) certificate shall be granted in respect of a person convicted of an offence if (but only if)—

(a) application is made therefor,

(b) it appears to the District Court or the judge of the court before which the person was tried that his means are insufficient to enable him to obtain legal aid, and

(c) either—

(i) the conviction is of murder, or

(ii) it appears to the District Court or the judge of the court before which the person was tried that, by reason of the serious nature of the offence or of exceptional circumstances, it is essential in the interests of justice that the person should have legal aid in the preparation and conduct of an appeal.

(3) Where a person is, on being convicted of an offence, refused a legal aid (appeal) certificate, he may apply for the certificate to the court to which an appeal from the conviction lies either—

(a) by letter addressed to the registrar of that court setting out the facts of the case and the grounds of the application, or

(b) to the court itself,

and the court shall grant the certificate if (but only if)—

(i) it appears to the court that the means of the person are insufficient to enable him to obtain legal aid, and

(ii) either—

(I) the conviction is of murder, or

(II) it appears to the court that, by reason of the serious nature of the offence or of exceptional circumstances, it is essential in the interests of justice that the convicted person should have legal aid in the preparation and conduct of an appeal."

The Supreme Court decision in Carmody

28. The plaintiff in Carmody had been charged with 42 offences under various regulations, deriving from domestic and European law, concerning the protection of cattle from brucellosis. All of the offences were triable summarily only. Each carried a potential maximum sentence of either six or twelve months plus a fine.

29. The plaintiff applied for, and was granted, a certificate for legal aid but, in accordance with s.2 of the Act, the certificate was for solicitor only. The solicitor retained was a person with considerable experience as a practitioner, who rarely instructed counsel in the District Court. However his view was that he required the services of counsel to deal with this particular case, on the basis that the charges were unusual and exceptional by comparison to the generality of charges in the District Court and would be more difficult to defend than a trial on indictment. This view was supported by the evidence of another very experienced practitioner. The State had a panel of senior and junior counsel to prosecute such matters, and prosecuting counsel had been briefed in the case.

30. In finding in the plaintiff's favour, the Supreme Court referred to *The State (Healy) v. Donoghue* [1976] I.R. 325 as establishing that the right to legal aid was a constitutional right, rather than one stemming purely from the statute. If the interests of justice required that an accused person be afforded legal aid, then a trial without legal aid could not be said to be "in due course of law".

31. The Court considered the relative specialisation and expertise of solicitors and barristers, noting that most solicitors do not appear regularly as advocates in the jury courts. The judgment continues:

"Solicitors, as well as barristers, are of course professionally skilled to deal with cases in the District Court, particularly those who are on legal aid panels, because that is where they have professionally exercised and developed their skills in the course of their career. The fact is that District Court cases are heard in a local court and are in the main short cases (as opposed to criminal trials which can last many weeks). Again they are in general less complex and there is less at stake. That is not in any way to suggest that they are not important or serious cases which at times will give rise to complex legal issues.

There are many criminal cases which come before the District Court which are serious and complex. Solicitors are professionally well qualified to represent and conduct defences on behalf of defendants in such cases so as to meet the requirements of constitutional justice. But the question, as properly raised by the defendant, is whether that can be said of all cases where there is a confluence of the gravity of the charges and particular complexity or other factors."

32. The Court analysed the case-load of the District Court according to the then most recently available figures. It noted that the number of persons sentenced to detention or imprisonment was indicative of the seriousness of offences which could be tried in that court.

"It would still be true to say that the District Court does deal with thousands of relatively trivial cases and also that, as a general rule, the more serious or complex criminal cases requiring legal aid could not, in the court's view, require more than the services of a professional solicitor to meet the essential requirements of justice."

33. Having said that, the Court acknowledged that a wide range of potentially complex offences has been created in recent years, in relation to which the District Court has jurisdiction.

34. Looking at the provisions of the Act, the Court said:

"There is no doubt that s. 2(1) of the Act of 1962 accords only limited jurisdiction to the District Court to grant legal aid in criminal cases being tried before it. If legal aid is necessary in the interests of justice the certificate for legal aid granted by the District Court may only provide for representation by a solicitor. It has no jurisdiction whatsoever to provide for representation by counsel in a criminal trial in that court.

That is to say that whatever 'the gravity of the charge', whatever 'exceptional circumstances' may exist and whatever 'the interests of justice' might require, a defendant in a trial before the District Court has no right to apply for legal aid to include counsel.

Unless it could be assumed that no criminal case which comes before the District Court could ever require representation by counsel, in order to ensure that the trial was in accordance with the requirements of constitutional justice, this limitation on a poor defendant's right to apply for legal aid must be considered arbitrary.

Having regard to the extremely wide scope and range of offences which come within the jurisdiction of the District Court in the field of criminal law and the increased complexity of modern legislation and regulatory measures, with which the court is by no means unfamiliar, the court is satisfied not only that the necessity in the interests of justice for a defendant to be represented by counsel as well as solicitor cannot be excluded but that cases, however infrequently that may be, will inevitably arise where it would be essential that an indigent defendant be afforded such legal aid.

In order to vindicate the constitutional right of an indigent defendant in the District Court to a fair trial he or she must be entitled to legal aid with representation by counsel as well as solicitor where it is established that because of the particular gravity and complexity of the case or other exceptional circumstances such representation is essential in the interests of justice. It follows that any such defendant must have a right to apply for such legal aid and have the application determined on its merits."

35. The Court went on to make it clear that the right in question would be vindicated by the provision of legal aid to obtain

"such representation for the preparation and conduct of a defence which is essential to the interests of justice but no more. The State is not bound to provide what might be perceived by an individual defendant to be the optimum form of representation or that which he or she desires."

36. At paragraph 105 of the judgment, the Court said:

"As earlier emphasised, the court is of the view that in those criminal cases in which the District Court grants legal aid, the right of a defendant to such legal aid will normally continue to be met when he or she is awarded legal aid for a solicitor only. This is so even where the case may be considered to be grave, complex or involve other exceptional circumstances."

37. The Court considered that the Act, insofar as it went, vindicated a constitutional right in permitting defendants to apply for free legal representation by a solicitor in trials before the District Court. That would be sufficient *"in the vast majority of cases"*. However, the Act was deficient in failing to provide for the possibility, in an appropriate case, of representation by counsel. That did not mean that the Act was repugnant to the Constitution, since it did not in its provisions prohibit the grant of legal aid for such representation. The Court therefore granted a declaration that the plaintiff had a constitutional right to apply, prior to being tried, for legal aid and to have the application determined on its merits. It also made an order prohibiting the prosecution from proceeding unless and until that right was afforded.

The Criminal Legal Aid Non-statutory District Court (Counsel) Scheme

38. The Scheme was introduced on the day the Supreme Court delivered judgment in *Carmody*. Clause 1 sets out the criteria and procedure for the grant of a certificate for counsel and in relevant part reads as follows.

"1. - (1) If on written application by a solicitor appearing for the defence at any time during a case, it appears to the District Court before which a person is charged with an offence -

(a) that the means of the person before it are insufficient to enable him or her to obtain legal representation by counsel, and

(b) that the solicitor has established that the gravity of the charge and complexity of the case, as well as any other exceptional circumstances, make it essential in the interests of justice that he or she should have the assistance of counsel in the preparation and conduct of his or her defence of the case before it,

the said District Court or the alternative court, as may be appropriate, shall, where no procedural options exist to assist the defence in the preparation and presentation of the case such as would avoid the necessity for the defendant to be assigned counsel, consider whether the assignment of counsel is necessitated by the gravity of the charge and complexity of the case, as well as any other exceptional circumstances. If it deems it appropriate on these grounds the court may grant a certificate, in respect of the defendant, for free legal representation (referred to as a legal aid (District Court (Counsel) certificate) and thereupon he or she shall be entitled, where the said District Court or the alternative court, as the case may be, thinks necessary, to have counsel assigned to him or her for that purpose.

2) A decision of the District Court in relation to an application under this section shall be final and shall not be appealable.

(3) Before a legal representation certificate may be granted, the prosecution may be asked to make a submission to the court stating whether they object to the granting of a certificate for counsel in the case and the court shall take this into account in reaching its determination."

39. Clause 2 deals with appeals from the District Court to the Circuit Court.

"2. - Where -

(a) a person is convicted of an offence in the District Court, and

(b) a certificate for free legal representation (referred to as a legal representation (Circuit Court (Counsel) Appeal) certificate) is granted in respect of him/her by the District Court,

the person shall be entitled to free legal representation in the preparation and conduct of an appeal from the conviction or the penalty (if any) imposed on conviction and, where counsel was assigned for the District Court hearing, counsel assigned to him or her for that purpose."

40. Clause 3 deals with the retainer of counsel by the solicitor in the case.

41. Clause 4 provides for a notification of refusal to the registrar.

"4. - Where an application by a person under section 2 (of this Scheme) for a certificate for free legal representation is refused, the registrar of the court to which the person may then apply for a certificate shall be notified of such refusal by the court officer concerned."

42. The effect of this clause appears to be that if the District Court judge refuses a certificate for the purposes of appeal, the fact of that refusal is to be notified to the registrar of the Circuit Court hearing the appeal.

43. Clause 5 deals with the determination by the Minister of fees payable to counsel. Clause 6 empowers the court to require the defendant to complete a statement of means.

Submissions on behalf of the applicant

Ground (i) – Condition precedent

44. On behalf of the applicant, Mr. Christle SC submits that on the facts of the case, the gravity of the case was such as to entitle the applicant to the assistance of counsel. It is suggested that an application to that effect should have been made in the District Court, and that the result in that court brought about a greater appreciation of the gravity. This was amplified by the indication from the first named respondent that the sentence could be increased. The first named respondent did not consider the nature of the case but simply ruled that she had no jurisdiction. In the light of the judgment in Carmody, she was not bound by the terms of the Scheme but could have overridden it on the basis that it was essential in the interests of justice so to do.

45. It is pointed out that the first named respondent granted a legal aid certificate to the applicant for the purposes of the appeal, despite the fact that no application for such a certificate was made to the District Court (as required by s.4(2) of the Act). She then refused to grant a certificate for counsel. The applicant submits that if the Circuit Court judge had the jurisdiction to grant the first certificate, she must also have had jurisdiction to grant a certificate for counsel.

46. The applicant submits that the issue of legal aid in the context of appeals from the District Court did not arise for consideration in *Carmody*. However, in circumstances where s. 4 of the 1962 Act provides only for representation by a solicitor for the purposes of an appeal to the Circuit Court, it is submitted that an applicant must also have a constitutional right to apply, prior to his appeal being heard, for legal aid to include solicitor and counsel in an appeal from the District Court and to have that application heard and determined on its merits by either the District Court or the Circuit Court.

Ground (ii) - Ultra Vires

47. It is submitted that the second named respondent acted ultra vires in implementing the Non-Statutory Scheme in a manner which imposes a condition precedent to the granting of any legal aid (Circuit Court (Counsel) Appeal) certificate that a legal aid (District Court (Counsel) Appeal) certificate was granted for the purposes of the District Court hearing.

48. Section 4 of the 1962 Act imposes no such condition for the granting of the solicitor-only legal aid certificate for the purposes of an appeal to the Circuit Court. An accused may be unrepresented in the District Court, or may be represented on the basis of a private retainer, without legal aid, and may still apply to the Circuit Court for a legal aid certificate for his or her appeal. Alternatively, an accused who pleaded guilty in the District Court might wish to change plea on appeal. In each of these situations the accused would be entitled to apply for representation by a solicitor but would have no right, under the Scheme, to apply for a certificate for counsel. The appellant submits that clause 3 of the Non-Statutory Scheme, which does not envisage any change of circumstance as the case progresses to appeal, and provides no right to re-apply in the Circuit Court, is therefore arbitrary and unlawful.

49. The applicant says that in appeals from the Circuit Court to the Court of Appeal accused persons routinely have their legal aid extended to include the assistance of a Senior Counsel.

Ground (iii) Constitutionality

50. The applicant submits that the Scheme is repugnant to the Constitution to the extent that it precludes the applicant from exercising his constitutional right to apply for legal aid to include counsel and to have such application determined on its merits by either the District Court or Circuit Court hearing the appeal. It also deprives the Circuit Court of the opportunity to consider whether, in the particular circumstances of a given case, it is essential in the interests of justice that an appellant is represented by counsel.

51. The applicant argues that the lack of a right to appeal is also in violation of his right to a trial in due course of law.

52. It is submitted that clause 4 of the Scheme, in arbitrarily failing to provide for legal aid to include counsel in an appropriate case, should be declared repugnant to the Constitution.

Standing

53. The respondents contend that the applicant does not have sufficient interest or standing in relation to the reliefs sought, in that the offences with which he is charged are not of sufficient gravity or complexity to justify a claim to be entitled to the assistance of counsel. In response it is submitted that it was incumbent on the first named respondent to consider the application on its merits and that she did not do so. It is not now open to the respondents to plead that the relevant threshold has not been met.

54. The applicant argues that he must be considered to have sufficient interest, since he was granted leave to apply for judicial review under O.84 r.5 of the Rules of the Superior Courts.

55. The District Court had imposed a 15 month custodial sentence, substantial fines and a 40 year ban from driving. The applicant submits that the Supreme Court in *Carmody* specifically considered the jurisdiction of the District Court to impose consecutive sentences in excess of 12 months to be an instance of increasing the seriousness and complexity of a District Court criminal case, referring to paragraphs 82 – 85 of the judgment.

"[82] It would still be true to say that the District Court does deal with thousands of relatively trivial cases and also that, as a general rule, the more serious or complex criminal cases requiring legal aid could not, in the court's view,

require more than the services of a professional solicitor to meet the essential requirements of justice.

[83] Account must however be taken of the fact that the legal environment to which the District Court exercised its criminal jurisdiction has changed significantly since the Act of 1962 was introduced.

[84] In 1962 any consecutive term of imprisonment which could be imposed by the District Court could not exceed twelve months, by virtue of s. 5 of the Criminal Justice Act 1951. The section provided that where two or more sentences passed in respect of a defendant by the District Court were ordered to run consecutively "the aggregate term of imprisonment shall not exceed twelve months".

[85] This section was amended in 1984 by s.12 of the Criminal Justice Act 1989 which substituted the period of two years for the aforementioned period of twelve months. Thus, since 1984 where the District Court imposes two or more sentences to run consecutively the aggregate term of imprisonment may be twice the amount which it was in 1962. No change was made as regards the provision of legal aid."

Submissions on behalf of the respondents

56. On behalf of the respondents, Mr. John Fitzgerald BL relies upon the view expressed in *Carmody* that representation by counsel on legal aid in the District Court should rarely be necessary. The Scheme was introduced to deal with cases of exceptional gravity or complexity, such as those in *Carmody* itself. Reliance is placed on the observation of the Supreme Court that representation by a solicitor will suffice in the "vast majority" of cases.

57. It is submitted that the Scheme follows the wording of s. 2 of the Criminal Justice (Legal Aid) Act 1962. Under that section, a decision on the grant or refusal of a certificate is final and unappealable. Reliance is placed on the decision of Hogan J. in *Brett v. District Judge Coughlan* [2011] IEHC 540 for the proposition that, absent a material change of circumstances, a decision on a legal aid application in the District Court creates a *res judicata* on the matter.

58. In *Brett*, the applicant had originally been charged with drunk driving. An application for legal aid was refused, although it was recognised by the court that the application was "financially a borderline case". The applicant was subsequently charged with dangerous driving causing death and it was indicated by the prosecution that the matter was to proceed on indictment. A fresh application for legal aid was not successful, with the judge who heard it being, apparently, of the view that the issue had already been determined.

59. Having regard to the provisions of s.2 of the Act, Hogan J. said (at paragraph 7):

"The effect of s. 2(2) would appear to be that a decision on a legal aid application by a particular District Judge is a final decision of that Court on that set of facts which is not appealable and which, to that extent, creates a res judicata. Certainly, in the absence of a material change of circumstances, it was not open to the first respondent to alter the decision of District Judge Brady, even if he had wanted to do so. In that sense, the first respondent was quite correct to observe that he could not operate as a form of appellate court from a decision of one of his colleagues." (Emphasis in the original.)

60. However, Hogan J. considered that there had been a material change of circumstances. There was a new and significantly more serious charge, not previously ruled on by the court, which would be dealt with on indictment. The original drunk driving charge would now also proceed on indictment. These were material new factors to be taken into account, and the District Judge had, in the circumstances, fallen into error by failing to recognise them as such.

61. Mr. Fitzgerald submits that the test to be applied in considering whether a certificate for counsel should be granted is not whether such representation might be desirable, but whether it is essential in the interests of justice – that is, whether there would be a real risk of an unfair trial if the accused were not represented by counsel.

62. It is argued that the charges against the applicant are of a sort commonly dealt with by the District Court. There is no evidence of any circumstances of complexity or gravity causing a risk of an unfair trial if counsel is not assigned under the Scheme. Any arguments in relation to the 'one transaction rule' or on consecutive sentences, do not come even close to the level of complexity such as was envisaged by the *Carmody* case.

63. It is submitted that the manner in which the Scheme provides for the right to seek certification for counsel is more than adequate to discharge the obligation of the State to ensure a fair trial for the applicant. In making the decision that she had no jurisdiction to consider the application, the first named respondent was acting clearly within the terms of the Scheme.

64. However, it is important to note that Mr. Fitzgerald accepted (in answer to a question from the court) that, notwithstanding the terms of the Scheme, a Circuit Court judge should read it with regard to the potential significance of a change in circumstances, as discussed in *Brett v. Coughlan*, with a view to considering whether the interests of justice required the grant of a certificate.

Discussion and conclusions

65. I consider that this latter concession by counsel for the respondents was correctly made. Having regard to the overall thrust of the decision in *Carmody*, and to the analysis of the significance of a material change in circumstances in *Brett*, it is, I believe, necessary that a Circuit Court judge should be entitled to grant a certificate for counsel for the purposes of an appeal *where it is, in the court's view, essential in the interests of justice*. The potential circumstances in which this might arise, despite the fact that a case was run in the District Court without an application for counsel having been made, may well be even rarer and more exceptional than the grant of a certificate for counsel in the District Court. However, if the terms of the Scheme were to be read as precluding the possibility, it would potentially be vulnerable to the same challenge as the pre-Scheme regime.

66. In this scenario, the fact that it was not thought necessary to apply in the District Court, or that a certificate was refused in the District Court, would not be binding on the Circuit Court if there are proper grounds for finding that such a certificate is necessary on appeal. This is not inconsistent with s.2(2) of the Act – that provision simply bars the bringing of an appeal from a refusal of a certificate in the District Court where the application relates to a hearing in the District Court. The Act has never been construed, for example, as preventing the re-visiting of the issue in the trial court to which a matter may be sent forward. The words emphasised by Hogan J. in the passage quoted above from *Brett* make it clear that he did not believe that a more extensive *res judicata* was created.

67. I note that this view of the Scheme was not put before the respondent judge, and accordingly she did not, in making her ruling, consider that she had any discretion in the matter. However, I do not believe that that fact assists the applicant in this case, as I accept the argument that he does not have sufficient legal interest to bring this challenge.

68. The fact that the applicant was granted leave to seek judicial review does not amount to anything more than a *prima facie* finding that he has *locus standi*. It is in no way binding on the court that considers the substantive proceedings. In this instance, it would be for the applicant to demonstrate, at the least, the possibility that he might have benefited from the exercise of the respondent's discretion. However, he has adduced no evidence of any matter tending to show that his case is either graver or more complex than the norm for District Court cases.

69. Given the statutory and Constitutional limitations on the sentencing powers of the District Court, it is difficult to imagine that relative gravity on its own will ever be sufficient for an argument that the interests of justice require the grant of a certificate for counsel.

70. Charges under the Road Traffic Acts constitute a very significant proportion of the case-load of the District Court. I do not say that they are not capable of giving rise to complex legal issues but there is nothing to suggest complexity of any sort in the instant case.

71. It is of relevance that the point at which the application for the certificate in this case was made was mid-way through a sentence hearing. I do not wish to be taken as suggesting that the fact that an accused person pleads guilty necessarily means that there was no prior requirement to advise on difficult matters of law. However, again, there is no evidence that such issues arose here. A sentence hearing in the District Court, or in the Circuit Court on appeal, is manifestly something that any solicitor whose name is on the legal aid panel must be capable of conducting. The so-called "one transaction" principle is not a concept that requires specialist advocacy to address.

72. Having regard to the observations of the Supreme Court in *Carmody* as to the exceptional nature of the cases where the assistance of counsel in District Court cases will be considered to be essential in the interests of justice, the applicant in the instant case has not established that he could, even potentially, be entitled to legal aid for such assistance.

73. I therefore refuse the reliefs sought.