

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 190 JR]

BETWEEN

LOUISE KARADAG

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 1st day of March, 2019**Background**

1. On 7 December 2017 the applicant appeared before the District Court in respect of a charge of drunk driving contrary to ss. 4(4) (a) and (5) of the Road Traffic Act 2010. The matter had been adjourned on a number of occasions on the basis that a legal point arising in the case was referable to another case, namely *Director of Public Prosecutions v. Mihai Avedenei* which was awaiting a decision of the Supreme Court (the decision was ultimately delivered on 20 December 2017 (*Director of Public Prosecutions v Avedenei* [2017] IESC 77)).

2. The following is the relevant part of the transcript of the hearing: -

"Counsel: Judge, I appear for Ms. Karadag instructed by Jacqueline McManus Solicitors. The position is that this a matter where the Supreme Court decision in Avedenei

Judge: Yes, I am dismissing the case.

Counsel: Dismissed. Judge, I am also ... have an application for legal aid. I understand that it was ... there was ... an application was made on the last day but there wasn't a statement means available."

There then followed an exchange between the District Judge and counsel as to the means of the applicant and to the fact that the applicant had no previous convictions.

The hearing continued: -

"Counsel: ... this particular legal point. Though it is an offence which would usually create a risk of, in my respectful submission, a risk of custodial sentence.

Judge: No, well, it wouldn't create a risk of a prison sentence in this Court on a first offence. And in every single case I have dealt with, on a first offence.

Counsel: I fully appreciate that ...

Judge: ... I only impose a fine, so she is not at risk at all of imprisonment on this charge. And she was driving a car, so in my view, it is not an appropriate case for legal aid."

Application for judicial review

3. The applicant was granted leave to seek judicial review for, *inter alia*, the following reliefs: -

"(a) An order of *certiorari* by way of judicial review quashing the order of the District Judge ... on 7th December, 2017 which order refused the applicant's application for a legal aid (District Court) certificate in respect of a charge of drunk driving contrary to s. 4(4) (a) and (5) of the Road Traffic Act, 2010 bearing the national charge sheet no. 16031263.

(b) A declaration that the District Judge erred in law in refusing the application for a legal aid (District Court) certificate without having any due regard to the statutory provisions of the Criminal Justice (Legal Aid) Act, 1962."

Statutory provisions

4. Section 2 of the Criminal Justice (Legal Aid) Act 1962 ("the Act of 1962") provides: -

"(1) If it appears to the District Court—

(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 charge 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 Court shall, on application being made to it in that behalf, grant in respect of him a certificate for free legal aid"

The relevant authorities

5. Decisions of a District Judge to grant a certificate of legal aid under s. 2 of the Act of 1962 have given rise to a number of authorities.

6. The applicant relies upon the Supreme Court decision in *Joyce v. Judge Brady and the Director of Public Prosecutions* [2011] IESC 36. In this case the defendant was charged with the theft of products, the value of which were just under €300. The second named respondent consented to the summary disposal of the charge and the applicant applied for a legal aid certificate under the Act of 1962. It was accepted by the District Judge that the applicant did not have sufficient means to pay for legal representation. The District Judge, having been provided with a summary of the facts by a member of the Gardaí, refused the application for legal aid on the basis that the applicant was "not at risk", i.e. that the applicant was not at risk of being given a custodial sentence in the event that he was convicted. The decision of the District Judge to refuse the legal aid certificate was subsequently appealed. Delivering the judgment of the Supreme Court, O'Donnell J. stated: -

"(22) ...There is no doubt that the real risk of imprisonment is one compelling indicator that a trial without legal aid would be unfair, but the perceived absence of such a risk is not the sole or decisive test justifying a refusal of legal aid. Furthermore, the refusal of legal aid following an inquiry by one District Justice of one member of the gardaí as to whether that member perceived the accused to be 'at risk' (particularly when the trial may proceed before another District Judge and be prosecuted by another garda) falls in my view short of what the Constitution requires."

O'Donnell J. continued: -

"(23) The factors in this case which appear to have led to the conclusion that the accused was not 'at risk' and therefore told against the application for legal aid - the absence of previous convictions and the accused's lack of familiarity with a courtroom - were factors which in my view should have led to the opposite conclusion."

7. The respondent referred the Court to the decision of the High Court in *Costigan v. Brady* [2004] IEHC 16 wherein the applicant was charged with an offence contrary to the provisions of s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The District Judge therein conducted an inquiry into the means of the applicant and reached the conclusion that there were insufficient means available to the applicant to enable her to retain professional legal advisors. On the issue of the quality of the charge, the District Judge sought the assistance of two members of An Garda Síochána. Having heard the evidence and submissions of the members, the District Judge refused legal aid. In his judgment, Judge Quirke stated: -

"Ms. Costigan was represented by solicitor and counsel on each occasion when the matter came before Judge Brady. Submissions were made to Judge Brady by counsel on behalf of Ms. Costigan on the issues of means, gravity of offence and 'exceptional circumstances'.

Judge Brady, having heard such submissions refused to grant the relief which was sought on behalf of Ms. Costigan.

It is not the function of this court in an application for a judicial review of the order of Judge Brady to consider or revisit the merits of the application made to him.

It is the function of this court to consider whether the order made by Judge Brady was lawful or was, as contended on behalf of Ms. Costigan, made without jurisdiction, or in excess of jurisdiction or in breach of principles of natural and constitutional justice.

This court is quite satisfied that in making the order which is sought to be impugned Judge Brady, for the reasons outlined above, acted lawfully, within jurisdiction and in accordance with the power conferred upon him by s. 2 of the Criminal Justice (Legal Aid) Act, 1962."

Consideration of issues

8. In reaching a decision under s. 2 of the Act of 1962 as to whether to grant a certificate for legal aid, the District Justice has to consider the means of the applicant, the gravity of the offence with which he/she is charged and whether or not there are any exceptional circumstances. In the instant case, there were no exceptional circumstances.

9. The District Judge carried out an inquiry into the means of the applicant and, in referring to the fact that the applicant owned a car and was in receipt of social welfare (including rent allowance), concluded that means were not an issue. These are judicial review proceedings and not an appeal whereby this Court could substitute its decision for that of the District Judge which, in any event, would not be permissible under the Act of 1962. I am satisfied that the District Judge carried out the appropriate inquiry into the means of the applicant and reached a decision that was neither irrational nor unreasonable.

10. A conviction under ss. 4(4)(a) and (5) of the Road Traffic Act 2010 does carry the risk of a term of imprisonment. The existence of this risk does not, of itself, satisfy the test of the gravity of the offence. In the instant case, the District Judge stated with clarity that, having dismissed the charge, the applicant was not at risk of receiving a prison sentence on a first offence.

11. In the course of submissions, the applicant argued that by stating that the applicant was not at risk of receiving a prison sentence on a first offence the District Judge was "fettering her discretion" and thus acted unlawfully. I do not accept this proposition. A District Judge indicating how they intend to exercise their discretion is not "fettering her discretion". Further, it seems to me that by giving such an indication the District Judge was acting in the interests of justice and in the interests of the parties appearing before her.

12. The decision in *Joyce v Brady* is clearly distinguishable on its facts. Firstly, in *Joyce*, the District Judge who refused legal aid was not the same District Judge who was going to hear the case. Secondly, the prosecution of the charges that were before the District Court herein were not proceeding as the District Judge had already dismissed them.

Conclusion

13. I am satisfied that the District Judge carried out the appropriate inquiry into the means of the applicant. The District Judge clearly had full regard to the gravity of the offence with which the applicant was charged and had indicated that, if convicted, the applicant would not be facing a custodial sentence. Further, all of this occurred in the context of a charge that had already been dismissed.

14. By reason of the foregoing, I refuse the reliefs sought.

