

**THE HIGH COURT**  
**JUDICIAL REVIEW**

**[2012 No. 1042 JR]**

**BETWEEN**

**MIROSLAV HORVATH**

**APPLICANT**

**AND**

**DISTRICT JUDGE BRYAN SMYTH**

**FIRST RESPONDENT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**SECOND RESPONDENT**

**JUDGMENT of Kearns P. delivered on the 16th day of January, 2015**

This is an application brought on behalf of the applicant to quash the decision of the first respondent to refuse to issue a separate legal aid (District Court) certificate to cover the expenses of the applicant's legal representation in the District Court in respect of charges prosecuted by one Garda Kevin Kennedy, the respondent judge instead having determined to "extend" an existing District Court legal aid certificate to this case, the same having been granted in separate prosecutions involving different offences, dates and prosecutors.

While the relief sought in the statement required to ground the application for judicial review is one seeking a declaration that the "policy" being applied by the first named respondent as just stated has no statutory basis, the Court is disposed, notwithstanding that no personal remedy has been sought in the case and that there has been no evidence as such of any "policy", to treat this application as one seeking certiorari on the grounds that the respondent judge lacked jurisdiction to make the order in question.

**BACKGROUND FACTS**

The applicant was due to appear in District Court 44 in Dublin on the 14th June, 2012 in respect of a series of road traffic summonses prosecuted by Garda Kevin Kennedy from Ballymun Garda Station. The applicant failed to appear on the date in question and a bench warrant issued for his arrest. He was subsequently arrested on the 19th August, 2012 and charged with an offence under s.6 of the Criminal Justice (Public Order) Act 1994 by Garda Brendan Gilligan of Cabra Garda Station. The applicant was kept in custody overnight and was conveyed to Court 4 in the Criminal Courts of Justice (CCJ) on the 20th August, 2012 where his solicitor Mr. Aonghus McCarthy, appeared on his behalf and made a bail application and a legal aid application. A legal aid (District Court) certificate was granted in relation to Garda Gilligan's charge sheet.

The applicant was further remanded on bail to Court 3 in the CCJ on the 24th September, 2012 before the first named respondent. On that date, the applicant sought a hearing date in relation to all matters and was further remanded on bail to Court 3 in the CCJ on the 1st November, 2012.

On the 1st November, 2012, Garda Gilligan's charge sheet was struck out and the applicant entered a guilty plea to Garda Kennedy's summonses. Mr. McCarthy made a plea in mitigation on behalf of his client whereupon he was convicted, fined and disqualified from driving for a period of four years.

Once the matter had concluded, Mr. McCarthy made an application for a legal aid certificate in respect of Garda Kennedy's road traffic summonses. At this point it should be noted – and has been noted by this Court in respect of another case – that a practice has developed in Dublin, and perhaps beyond Dublin, of applying at the end of a hearing for a legal aid certificate. The reasons for the development of this practice need not be further explored in this judgment, but the Court understands that the underlying philosophy for this practice is to facilitate the expeditious hearing of cases by judges and to save court time.

When Mr. McCarthy made the application in question, he was informed by the respondent judge that he had already been assigned legal aid "on these matters". Mr. McCarthy deposes in his affidavit that he then informed the Court that he had only been assigned legal aid in relation to Garda Gilligan's public order charge and that he was making the current application on foot of Garda Kennedy's road traffic summonses. The respondent informed Mr. McCarthy that he was extending the legal aid from Garda Gilligan's public order charge to cover Garda Kennedy's road traffic summonses. Mr. McCarthy argued that they were completely different offences arising out of different facts, having occurred on different dates and involving different prosecuting members of An Garda Síochána, and that he was thus entitled to a separate certificate of legal aid in respect of Garda Kennedy's matters. The respondent judge ruled that he was "extending" the legal aid certificate already granted and the matter thereupon concluded.

Mr. McCarthy in his affidavit deposes that, for every separate prosecution of an accused person, a number of steps must be taken by his office in order to prepare for the prosecution. The work involved in this process depends upon the nature of the charge and upon a client's instructions. On every occasion in court, the progress of each individual charge requires to be monitored. He further deposes that if each of the prosecutions relating to the applicant had been brought separately before individual District Courts and had not been joined up with each other, a legal aid (District Court) certificate would have been assigned for each given that the applicant had satisfied the usual statutory requirements in relation to the granting of legal aid. Furthermore, if the applicant had requested a new solicitor to deal with Garda Kennedy's offences, a new certificate would have had to have been granted. He deposes that this certificate would cover the cost of the initial consultation with the client and would also cover the cost of correspondence with the Garda and of reviewing disclosure and taking instructions in the light of this disclosure. He argues that it is illogical to assert that the

work involved in representing an accused in respect of a new prosecution, arising from a completely different incident, with a new prosecuting garda, diminishes simply due to the fact that he/she already has another matter before the court.

He argues that the notion of "extending" legal aid is not recognised either in the Criminal Justice (Legal Aid) Act, 1962 or in the regulations made thereunder (the Criminal Justice (Legal Aid) Regulations, 1965, S.I. No. 12/1965).

The application of a policy of extending legal aid has the result that the solicitor on record remains unpaid for the additional work done in respect of the second case, which can be quite substantial, even in the context of a seemingly uncomplicated set of proceedings.

An affidavit in response was sworn by Ms. Ann Hopkins on the 29th April, 2014. She is a civil servant attached to the Courts Policy Division of the Department of Justice and Equality and her duties include oversight of the administration of the criminal legal aid scheme.

She states that, by virtue of Regulation 7(4) of the Criminal Justice (Legal Aid) Regulations 1965 (S.I. 12/1965), as it is routinely operated, the total sum to which the applicant's solicitor would have been entitled for his appearance on the 1st November, 2012, even if two separate certificates were granted, is €201.50. She argues therefore that the applicant's challenge by way of judicial review is futile.

The statement of opposition is to like effect, maintaining there is no evidence that the first named respondent had adopted any fixed, inflexible or irrational policy in respect of the extension of legal aid, or that the respondent failed to have regard to relevant statutory provisions. His decision is stated to be within the terms of Regulation 7(4) of S.I. 12/1965.

Joining issue with these contentions in a supplemental affidavit, Mr. McCarthy deposes that the assertions made by Ms. Hopkins confirm that, had the respondent correctly applied the provisions of the Act of 1962, the remuneration receivable on foot of a legal aid certificate granted on that date would amount to no less than four times what, in the event, was payable. In this regard he makes reference to a copy of a letter received from Ms. Ann Lawler of the Courts Policy Division of the Department of Justice & Equality which states:-

*"The position in relation to the District Court legal aid system is that a Day 1 fee of €201.50 is paid for the first appearance in court under a certificate for free legal aid. A refresher fee of €50.39 is paid for each subsequent appearance under a certificate. A new Day 1 fee will only apply where a new certificate is granted to the defendant in respect of new charges."*

## **SUBMISSIONS**

On behalf of the applicant it is submitted that once the application for a legal aid certificate is made and the court is satisfied that the statutory requirements have been complied with, a legal aid certificate must be granted. Furthermore, in considering a legal aid application, a District Court Judge is confined to the considerations elaborated in s. 2 of the Criminal Justice (Legal Aid) Act 1962. The concept of an "extension" of a legal aid certificate is one unknown to the law.

While the Criminal Justice (Legal Aid) Regulations 1965 provided that where two or more certificates for free legal aid are granted to a person and the cases in relation to which they are granted are heard together or in immediate succession, only one certificate should issue, the Regulations deal only with the situation where two, or more, legal aid certificates have already been granted. The wording of the particular regulation could not be invoked other than in those circumstances. It was submitted that this was clearly not the situation in the instant case where a second certificate was never granted to the applicant. The wording of the text in both the Act of 1962 and in the 1965 Regulations made thereunder were clear and unambiguous and therefore should be interpreted literally.

While Ms. Hopkins had suggested that the proceedings were "futile" on the basis that the maximum the applicant solicitor would have received on foot of two certificates was €201.50, she was correct in respect of that assertion in relation to the events which took place in the District Court on the 1st November, 2012. Had an additional certificate been assigned on Garda Kennedy's matter on the 1st November, 2012, only €201.50 would have been payable notwithstanding the existence of two certificates. However, as the first named respondent did not assign a new certificate, but simply "extended" the certificate already assigned with respect to Garda Gilligan's matter, the fee receivable by the applicant's solicitor reverted to the fee of €50.39 for the day which does not remunerate – nor was ever calculated to remunerate – the applicant's solicitor for all the preparatory work done and advices and representation provided in respect of the Road Traffic charges contained in Garda Kennedy's summonses.

However, if the applicant had requested a different solicitor to deal with Garda Kennedy's offences, a new legal aid certificate would have had to have been assigned, as the first named respondent would not have been able to "extend" legal aid to cover this scenario. It was submitted that this of itself is the clearest indication that there is no legal basis for the first named respondent's decision to "extend" the certificate on Garda Gilligan's matter to cover Garda Kennedy's charges.

On behalf of the Director it was submitted that the applicant had no complaint to make as to the conduct or outcome of the proceedings. Any dispute which may have arisen was one between the applicant's solicitor and the respondent, and not the applicant himself.

It was not being asserted on behalf of the respondents that the applicant had no entitlement to legal aid. That had been granted in respect of the charges prosecuted by Garda Gilligan which were ultimately struck out. However, it was relevant that the applicant was, in fact, being represented by the same solicitor in respect of the other charges also.

However, the Regulations of 1965 made clear that where two or more certificates for free legal aid are granted and the cases are then heard together, one certificate only shall (unless the Court for good reason directs otherwise) be deemed to have been granted. Accordingly, it was submitted that, in the present case, if the applicant's solicitor had been granted two legal aid certificates, they could, and almost certainly would, have been deemed as one for the purpose of payment. There were in this instance two sets of charges involving the same defendant represented by the same solicitor being heard simultaneously in the same court by the same judge. One charge was struck out and the remaining set of charges were dealt with following a guilty plea. Insofar as any policy consideration arose whatsoever, the clear policy of the rule contained in the Regulations was to allow payment in such circumstances for one legal aid certificate only.

In effect, the only complaint the applicant could make was to the effect that the respondent did not go through the motions of granting two certificates rather than one, even though payment would ultimately have issued in respect of one only. For that reason, this was not a suitable case in which a remedy should be granted by way of judicial review because any such remedy would scarcely

confer any worthwhile benefit on the applicant. Even if the trial judge were ordered to issue two certificates, the terms of the rule under the 1965 Regulations would still apply. The judge could certainly consider an application to the effect that payment should be made on foot of both certificates, but in this case the judge had already heard such an application from the applicant's solicitor and had refused it.

A remedy should not be granted by way of judicial review where it would serve no practical purpose. As O'Higgins C.J. had stated in *State (Abenglen) v. Corporation of Dublin* [1984] I.R. 381 at 392:-

*"The purpose of certiorari is to supervise the exercise of jurisdiction by such bodies and tribunals and to control any usurpation or action in excess of jurisdiction. It is not available to correct errors or to review decisions or to make the High Court a Court of Appeal from the decisions complained of. In addition, it remains a discretionary remedy."*

## DECISION

Any consideration of this matter must commence with a consideration of the relevant terms of the Criminal Justice (Legal Aid) Act 1962 and the regulations made thereunder by S.I. No. 12/1965.

The clear entitlement of an applicant to legal aid in the District Court is contained in s. 2 of the Act which provides:-

*"(1) If it appears through 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 (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 Court thinks fit) counsel assigned to him for that purpose in such manner as may be prescribed by regulations under s. 10 of this Act.*

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

No issue arises in this case but that the applicant was entitled to legal aid in respect of the charges brought against him by both Garda Gilligan and Garda Kennedy. The question, critically, is whether the adjudication on the granting of legal aid was correctly conducted.

In this respect the regulation contains the following provision at Regulation 7(4):-

*"Where two or more certificates for free legal aid are granted to a person and the cases in relation to which they are granted are heard together or in immediate succession, one certificate only shall (unless the Court, being satisfied that there is good reason for so doing, otherwise directs) be deemed, for the purposes of these Regulations, to have been granted to the person."*

It seems clear that the wording of Regulation 7(4) requires, as a necessary precondition to it being invoked, that two or more certificates have already been granted in respect of the same person. This is clearly not the situation in the instant case where a second certificate was never granted to the applicant. Had that been the situation, an application could have been made under the Regulations that it be held there was good reason not to deem the existence of only one certificate to be adequate or sufficient in the particular circumstances. The applicant, or more accurately, his legal representatives, were deprived of the opportunity to make that case.

It seems to this Court that the appropriate course for the District Judge to have adopted was to grant a legal aid certificate in respect of the second set of offences, whereupon an application could have been made under the regulations that the "unless" clause applied and that in the particular circumstances arising there was good reason for the Court to take the view that the particular case was not one for deeming two or more certificates to be treated as one only. Any decision on such an application would have to be rationally based and factually sustainable. However, that option was foreclosed by the District Judge's decision to "extend" the existing certificate to cover both cases.

While counsel on behalf of the State have argued that the complaint of the applicant is with regard to a distinction without a difference, I am not satisfied that such contention could be correct. Neither the Act or Regulations speak to "extensions" of legal aid certificates, and the Court is not clear where any jurisdiction for adopting such a procedure could be said to arise.

For those reasons, I propose to grant relief to the applicant in the amended form indicated at the outset, that is to say, the Court will grant an order of certiorari quashing the order of the District Judge to "extend" the legal aid certificate in this case.

The matter may then be remitted to the District Court for further submissions which may be seen to arise under Regulation 7(4) of the Criminal Justice (Legal Aid) Regulations, 1965 (S.I. No. 12/1965).