

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 74
Record No. 2021/207 JR

BETWEEN

DECLAN KING

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

**EX TEMPORE JUDGMENT OF MS. JUSTICE SIOBHÁN PHELAN DELIVERED ON 9TH DAY
OF FEBRUARY, 2022**

INTRODUCTION

1. In these proceedings the applicant seeks an order of certiorari of the decision made by the District Court Judge on the 6th March, 2021 granting the applicant two separate certificates for legal aid and assigning a solicitor in respect of specific criminal charges. The application for judicial review is advanced on the grounds that an application for a certificate of legal aid was made for one matter only and the District Court Judge ought not to have proceeded to grant two certificates.

STATUTORY FRAMEWORK

2. Section 2(1) of the Criminal Justice (Legal Aid) Act, 1962 (as amended) provides:

“If it appears to the District Court-

- (a) that the means of the person before it 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 Court shall, on application being made to it in that behalf, grant a certificate, in respect of him for free legal aid.”

3. Legal aid may be assigned in respect of separate matters concerning the same client where an application is made and the conditions of eligibility for legal aid are met, however, by reason of Regulation 7(4) of the Criminal Justice (Legal Aid) Regulations, 1965 (S.I. 12/1965) where more than one certificate for legal aid is granted to a person, the default position is that one certificate only shall be deemed to have been granted to the person. Regulation 7(4) provides:

“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.”

4. Accordingly, the court has power to direct separate certificates where satisfied that there is good reason to do so, notwithstanding the deeming provision whereby in the absence of specific direction, a practitioner will be deemed to be entitled to payment on one certificate only.

PROCEEDINGS BEFORE THE DISTRICT COURT

5. The applicant was before the District Court on the 6th March, 2021 charged with an offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 (as amended) and of criminal damage contrary to s. 2 of the Criminal Damage Act, 1991 (as amended). There were three sheets before the court to include a bench warrant dated the 6th March, 2021 which warrant had issued by reason of his failure to appear in respect of a separate matter (under s. 13 of the Criminal Justice Act, 1984 (as amended) (hereinafter "the s. 13 matter").

6. The transcript of proceedings in the District Court is exhibited to the affidavit of Mr. Guckin sworn on behalf of the respondent. It is clear from the transcript that when the matters were called, the District Judge asked the applicant who his solicitor was by asking:

"what solicitor do you want in these matters?"

The applicant responded:

"Bradbury"

Mr. Bradbury then greeted the Court.

7. Thereafter, the court proceeded to take evidence of arrest, charge and caution. The Judge confirmed with Mr. Bradbury that he did not require to speak with the applicant before the matters proceeded. The prosecuting Garda objected to the grant of bail on the basis of significant history outlined to the court and Mr. Bradbury addressed the court on the applicant's behalf.

8. Having refused the application for bail and made directions in relation to disclosure, the judge then heard an application from Mr. Bradbury in relation to legal aid. Mr. Bradbury asked to be assigned just in respect of the s. 13 matter. The judge replied:

"I have asked him who he wants on the matters and he's told me".

She then added:

"I've assigned accordingly."

9. Mr. Bradbury then referred the court to the *Cully* decision. The judge indicated that she was aware of the *Cully* decision but added that she was relying on *State (Freeman) v. Connellan* [1986] I.R. 433 . Mr. Bradbury pointed out that the *Cully* case allowed for an assignment in respect of each offence and the Judge replied:

“I’m not remanding somebody in custody with no solicitor on certain matters. And particularly, when I’ve asked him who he wants in the matters and he’s told me”.

10. The court made orders directing the grant of a certificate for free legal aid and assigning a solicitor on the s. 13 matter (bail - failing to appear on some other date) and also on one further charge sheet.

DISCUSSION AND DECISION

11. The applicant relies on the decision of the High Court in *Cully v. the DPP* [2020] IEHC 438 in support of his application. In that case the High Court (Meenan J.) determined under the relevant legislation that the grant and assignment of a certificate of legal aid is not lawful in the absence of a specific application. In *Cully*, the court proceeded on the basis that there was no dispute that an application for legal aid had been made for only one matter but the District Court had proceeded to grant legal aid in respect of the three other matters which were also before the District Court on that day. The court in determining the judicial review proceedings in *Cully* found that the statutory provision was clear and the court had no jurisdiction to grant a certificate in the absence of an application for same. It followed that the District Judge was incorrect in granting certificates in respect of the charges in which no application was made.
12. The respondent seeks to distinguish the decision of the High Court in *Cully* having regard to what transpired in the District Court, particularly the nomination by the applicant of Mr. Bradbury to represent him on the matters (plural) before the court. The respondent relies on the transcript which demonstrates that the applicant himself nominated Mr. Bradbury to represent him on all matters (plural) before the court. It is further clear from the transcript that the District Judge proceeded on the basis that the nomination of Mr. Bradbury by the applicant to represent him in all matters constituted an application for a legal aid certificate in respect of all matters and the respondent relies on the record of what occurred in court and the exchange had with Mr. Bradbury in this regard.
13. The applicant does not accept that this case is properly distinguishable from the *Cully* case based on the fact that an application for a legal aid certificate was made in respect of one matter only in both cases. As regards the District Judge’s reliance on the decision in *State (Freeman) v. Connellan*, it is observed on behalf of the applicant that this case was concerned with the vindication of an accused person’s right to legal representation through the assignment, unless good reason not to, of his or her choice of solicitor. Accordingly, the decision in *State (Freeman) v. Connellan* is not addressed to the precise issue which arises here, namely the requirement for an application for a certificate for legal aid as a pre-condition to the exercise of the court’s jurisdiction under s. 2(1) of the Criminal Justice (Legal Aid) Act, 1962 (as amended).
14. As in *Cully*, the respondent further submits that Regulation 7(4) gives the District Court hearing the matters a discretion not to treat two or more certificates as one certificate upon application being made for a direction to this effect. A separate point is made on behalf of the respondent in written submissions to the effect that the application by way of judicial review is premature because it is possible that the court will not proceed to

deal with the charges together or in immediate succession with the result that Regulation 7(4) does not apply to deem more than one certificate to be one. It is contended that this application by way of judicial review is of a *quia timet* nature and therefore should not be entertained by the court.

15. The respondent makes the further indisputable point that the right to legal aid is a right which inheres to the benefit of the applicant and not his solicitor, albeit that his solicitor derives a financial benefit through payments made on foot of a legal aid certificate. The fundamental objective of the scheme is to ensure that a defendant receives a fair trial, reflecting the constitutional status accorded to the right to free legal aid in *State (Healy) v. Donoghue* [1976] I.R. 325. The respondent contends that there is no prejudice to the applicant through the order of the District Court as his wish to be represented by the solicitor of his choice is respected by the order made and the effect of the order made by the District Court Judge is that he has the benefit of legal aid on all charges. In reply on this point, it is argued on behalf of the applicant that where legal representatives are not paid for their work on separate charges, this has implications for the service which a solicitor can provide. The argument as I understand it is that there is at least a potential for detriment to the applicant where assignment of legal aid is made in a manner which places the solicitor on hazard in respect of payment for his work on the separate charges before the court or does not ensure payment for work in respect of more than one charge.
16. Having studied the transcript, I do not agree that one can properly characterize the exchange with the applicant in the District Court as an application by him for separate legal aid certificates in respect of the different matters before the court.
17. As apparent from the transcript, all the applicant sought to communicate to the court was that Mr. Bradbury had been nominated by him to represent him in court. In essence, he confirmed that Mr. Bradbury was his solicitor of choice and was present to represent him. The applicant made no application for a certificate for legal aid. It is clear the only application made for a certificate for legal aid was made by the applicant's solicitor at the end of the hearing. It is also clear that he expressly made application in respect of one matter only, namely the bail application and in doing so he referred the court to the decision in *Cully* to explain his position. I agree with the submissions on behalf of the applicant that merely because an accused says that he wants a particular solicitor to represent him on various matters, could not, as a matter of law or fact amount to an application for legal aid and for an assignment on the legal aid scheme.
18. As for the reliance placed by the respondent on the court's power under Regulation 7(4) to direct, where there is good reason to do so, that certificates in respect of separate matters not be deemed to be one certificate, it is noted, that in *Cully*, the High Court was not satisfied to accept this submission as "it presupposed that there had been an application for certificates in the first place" which the court found was not the case. It seems to me that the logic of the court's finding in *Cully* must equally apply in this case. If there was no application for more than one certificate in the first place, the fact that the

court has a power under Regulation 7(4) is irrelevant. Quite simply the District Court had no jurisdiction to grant a certificate for legal aid in the absence of applications being presented to the court for same. The fact that the District Court may make subsequent directions to ensure that a solicitor receives the benefit of two certificates issuing in respect of separate matters is no answer to the jurisdictional irregularity which flows from the decision to grant certificates in the first instance without an application for same being before the court.

19. Regarding the further mooted possibility that the court will not proceed to deal with the charges together or in immediate succession with the result that Regulation 7(4) does not apply to deem more than one certificate to be one, I do not consider that such an eventuality, were it to arise, addresses the jurisdictional issue in relation to the grant of a certificate without an application being made for same in the first instance.
20. Accordingly, I do not accept that this application by way of judicial review is of a *quia timet* nature as contended on behalf of the respondent. The jurisdictional issue complained of cannot be cured by future order of the District Court, albeit the apprehended effects of same may be mitigated.
21. Whilst not material to my decision in this regard but as the issue of prejudice was canvassed, it also strikes me from the perspective of the public interest in the proper administration of justice that the mere fact that payment for legally aided work is on hazard has the potential to impact on the resources committed to the representation of the legally aided client.
22. In this case the District Court judge was properly concerned to vindicate the applicant's right to legal representation in accordance with his nomination. The District Judge is undoubtedly under an ongoing duty to ensure that the right of effective access to the court is vindicated through access to legal representation when remanding an accused person in custody. The applicant's established right to legal representation was respected in this case by the appearance on his behalf of a properly instructed solicitor who had been retained by the accused person and had agreed to act. Having regard to the transcript evidence before me in these proceedings, there is no question in this case but that the applicant's legal representative had agreed to act in all matters before the court. Therefore, the fact that no application for a certificate of legal aid was made in respect of all matters before the court on that date did not result in the applicant being unrepresented before the court or being remanded in custody without legal representation albeit that this was likely to have been the legitimate concern of the District Judge.
23. An application for a certificate for legal aid may be made on a second or subsequent appearance in court in accordance with the statutory scheme and an order "shall" be made on the court being satisfied on foot of an application that the prescribed conditions of eligibility have been met. The court's power to grant a certificate is limited to circumstances in which an application is duly made, as is clear from the terms of s. 2(1) of the Criminal Justice (Legal Aid) Act 1962 (as substituted by s. 5 of the Criminal Justice (Miscellaneous Provisions) Act 1997.

24. Finally, I agree with the submissions made on behalf of the respondent that the rates of payment to solicitors under the Criminal Legal Aid Scheme is irrelevant for the purposes of the present application before this Court and that setting the rates of payment is a matter for the political branches of government and the representative bodies of the legal professions or by members of the legal profession individually. However, although the manner in which criminal legal aid is delivered and the adequacy of its resourcing, are clearly matters for the political branches of government, the responsibility for safeguarding the constitutional rights of accused persons appearing before the Court is undoubtedly a responsibility shared by the Courts. Should practice before the Courts demonstrate that the system is failing to ensure effective representation for accused persons remanded in custody, it will inevitably result in the Court being mandated to intervene where the evidence before the Court establishes that the constitutional interest in the proper administration of justice and the duty to vindicate personal rights so requires.
25. Whilst the background to these proceedings is acknowledged by both parties, namely that where a certificate is made in respect of more than one matter on the same day, the legal representative is deemed to be entitled to payment in respect of one matter only no matter how many matters or how complex representation in respect of the different matters before the court may be, I am not being asked to make an order requiring that the legal aid scheme be enhanced by improved terms as to payment. Rather, I am being asked to vindicate the right of the applicant to have the question of his representation before the court dealt with in accordance with law and, in the case of his entitlement to legal aid, that it be determined on the basis of an application made in that regard to the court as prescribed by statute.
26. Accordingly, I will grant an order of certiorari in terms of para. 1 of the notice of motion. I will hear the parties in relation to any other consequential matters.