



# THE HIGH COURT

Record No. H.JR.2024.0001301

Neutral Citation [2025] IEHC 94

BETWEEN:

LINDA ROGERS

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS & ORS

RESPONDENTS

**JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 18<sup>th</sup> of February, 2025**

## **1. Introduction**

1.1 This Applicant seeks a recommendation that she be afforded legal representation under the Legal Aid – Custody Issues Scheme (“the Scheme”) in respect of a proposed judicial review. She has not confirmed any application to the Legal Aid Board, nor has she identified lawyers who will be instructed, but she has handed in a form including her financial details, in order to persuade the Court to make the recommendation.

1.2 The Scheme applies to certain types of cases where an applicant cannot afford legal representation but there is a requirement that the case is at least arguable and warrants legal assistance. The application is noted before the case begins but the recommendation is made at the conclusion of the case. A court may decide not to recommend payment under the Scheme if a case fails.

## **2. Previous Judicial Review of the same District Court Case**

- 2.1 The Applicant was convicted in the District Court of public order offences arising out of an incident in Store Street Garda Station on 15<sup>th</sup> March 2023. The Applicant sought judicial review on over 100 grounds in respect of the investigation and subsequent court hearings in advance of the trial. Hyland J. refused to prohibit her trial in *Rogers v D.P.P. and others* [2024] IEHC 316 and adjourned the application for leave for certiorari and mandamus remedies. The remaining matters came before me on the 11<sup>th</sup> of July, 2024. I refused leave to apply for judicial review on 30<sup>th</sup> July 2024: *Rogers v Cowen and others* [2024] IEHC 474. The Applicant has appealed both decisions to the Court of Appeal and has appealed her convictions, which appeal is pending in the Circuit Court.
- 2.2 On 20<sup>th</sup> January 2025, the Applicant made a further application in the judicial review *ex parte* list on grounds arising from the same events. She also applied for a recommendation under the Scheme. The Applicant filled out the Legal Aid – Custody Issues Scheme Form CI 3, giving name, address, details of assets and income, dependants and expenses. On that form one reads: Further information on the Scheme’s provisions (including eligibility requirements) is available at [www.legalaidboard.ie](http://www.legalaidboard.ie) There, one finds that the cases in which the Scheme can be applied include: “*Such Judicial Reviews as consist of or include Certiorari, Mandamus or Prohibition and concerning criminal matters or matters where the liberty of the applicant is at issue*”. This description could be applied to this case, which is an application for reliefs in respect of a criminal investigation and subsequent trial in the District Court, albeit one that has been the subject of an earlier unsuccessful application, made by the same Applicant.

## **3. The Legal Aid Custody Scheme: Timing of the Application and Test?**

- 3.1 The Legal Aid Custody Scheme has been considered in detail by the Supreme Court in *O’Shea v. The Legal Aid Board, Ireland and others* [2020] IESC 51, [2023] 2 IR 304. There, Baker J. set out the history of the scheme, noting that its earliest

iteration arose out of the *Application of Woods* [1970] IR 154. Mr. Woods made a *habeas corpus* application described by Walsh J. as “so devoid of substance and difficulty” that legal representation was not necessary but where the court noted with gratitude the offer of the Minister for Finance and the Attorney General to provide legal representation to those not in a financial position to retain lawyers: “whenever the High Court or this Court, as the case may be, considers it proper that solicitor and counsel should be assigned by the court concerned to make submissions in support of the application.” I note the phrases that a case may be “devoid of substance” and that the Court “considers it proper” to assign lawyers.

3.2 Baker J. goes on to describe, in detail, the provisions of the Scheme. This is a non-statutory, administrative scheme. She sets out the guidance information available from the Board in relation to the most recent version of the Scheme and the various considerations for the Board in deciding whether to make a payment, noting the role of the Court to recommend the Scheme and the timing of such an application, namely, at the commencement of proceedings. The recommendation, however, is made at the close of proceedings. Baker J. held that the role of the Court is to recommend only and, while that is a “weighty and valuable matter”, the Board retains a discretion as to whether to make payment.

3.3 The most relevant passage, in the circumstances, is paragraph 9 of the Scheme:

The purpose of the Legal Aid - Custody Issues Scheme is to provide, in certain circumstances, legal representation for persons who need it but who cannot afford it. It is not an alternative to costs. It should be noted that access to the Scheme is not automatic and a person wishing to obtain from the Court a recommendation to the Legal Aid Board that the Scheme be applied shall:

- (a) make his or her application (personally or through his or her lawyer) at the commencement of the proceedings,
- (b) obtain the Court’s acknowledgement of such an application at the commencement of such proceedings, and
- (c) at the end of the proceedings receive a recommendation in the final Court Order that the Scheme be applied to the applicant.

It is advisable for a person wishing to obtain from the Court a recommendation that the provisions of the Scheme be applied, to make his / her application (personally or through his / her lawyer) at the commencement of the proceedings as legal aid will only be considered for reimbursement from the date of the making of the first Order acknowledging the application ....”

3.4 As is clear from the above, the application must be made at the outset but the recommendation is received at the end of the case. A crucial statement by Baker J., insofar as this case is concerned, is set out at paragraph 36:

*“The court, then, must be satisfied as to two matters identified in the last paragraph of Clause 9: that the case falls within the scope of the Scheme and that it warrants the assignment of counsel and/or solicitor, and, in some cases, senior counsel, payment for whose services must be specifically recommended.”*

3.5 To echo the words of O’Donnell J. (as he then was) in *Minister for Justice and Equality v. O’Connor* [2017] IESC 21, the provision of legal aid, in certain circumstances, is not just a generous gesture on the part of the State, but a constitutional obligation. That obligation is not without restrictions, however. The State is not required to provide legal aid in all cases, no matter how weak or misconceived. While an applicant must be impecunious, she must also satisfy the Court that the case *warrants* the assignment of lawyers before a recommendation will be made. *Woods* itself is a case in point. Although it was the first case in which an earlier version of the Scheme was offered, it was not applied as that applicant’s case was devoid of substance or difficulty.

3.6 The law prevents a litigant from relitigating matters which have already been the subject of a final determination by the courts, matters that are *res judicata*. This preclusion extends to matters newly raised which should have been litigated in the first case, and which have been the subject of a determination by a court of competent jurisdiction. See Hardiman J. in *A.A. v. The Medical Council* [2003] IESC 70, [2003] 4 I.R. 302, where he held that:

*“...the Court requires the parties to [...] litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case.”*

3.7 It is well established that a decision of the High Court is not amenable to judicial review. The Supreme Court has confirmed this principle in *Blackall v Grehan* [1995] 3 I.R. 208. Henchy J. identified this limit to the remedy of judicial review in *People (DPP) v Quilligan*, [1989] IR 46, stating (at page 57):

*“The High Court, whether sitting as the Central Criminal Court or otherwise, is not an inferior court subject to corrective orders such as mandamus.”*

3.8 These principles are applicable to the current case and will be considered in coming to a view as to whether the Applicant has a case which warrants the assignment of solicitor and counsel. As to the test in this regard, while the language used in *Woods* might suggest that an applicant must have a case of substance, that issue was not argued in *Woods* and it is a matter for the Board as to whether a recommendation will be followed. In the circumstances, it appears to me that the same test should be used here as applies in all judicial review applications for leave and to ask: does the Applicant have an arguable case, in the sense that it has some prospect of success?

#### **4. Conclusion**

4.1 The case will be listed on 10<sup>th</sup> March, 2025 at 12.30pm. This Court notes the application for the Scheme made on the 25<sup>th</sup> of January and will invite the Applicant to make submissions on whether she has an arguable case, one that is not comprehensively answered by the principles set out above: she may not re-litigate her first case (or a variation of it which could have been litigated in earlier proceedings) and this Court cannot review decisions of the High Court. If an arguable case remains, I will make a recommendation under the Scheme.