

# THE HIGH COURT

IN THE MATTER OF SECTION 52 OF THE COURTS  
(SUPPLEMENTAL PROVISIONS) ACT 1961

[2022] IEHC 320

[Record No. 2021/1618/SS ]

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS  
(AT THE SUIT OF GARDA LIAM VARLEY)

PROSECUTOR

AND

CIARÁN DAVITT

DEFENDANT

And

ATTORNEY GENERAL

NOTICE PARTY

**JUDGMENT of Ms. Justice Bolger delivered on the 31st day of May, 2022**

1. Judge Miriam Walsh of the District Court has stated a case pursuant to s.52(1) of the Courts (Supplemental Provisions) Act 1961 for the opinion of the High Court. For the reasons set out below I am answering ‘No’ to the question referred.

### **The facts**

2. The defendant appeared before the District Court on 28 August 2021 to answer an allegation that he possessed a small quantity of cannabis. The prosecuting garda was Garda Liam Varley. On the return date, the defendant, through his solicitor, indicated that he was pleading not guilty. There was no appearance by Garda Varley or a solicitor from the Office of the DPP. A Sergeant Riley indicated to the court that he was ‘instructed’ by Garda Varley in the case and that he was not in a position to proceed, but could provide facts to the court in the event of a guilty plea. This was Sergeant Riley’s only involvement in the case. The defendant challenged Sergeant Reilly’s ability to do so as, while O.6, r.1 of the District Court Rules purports to confer a right of audience on any member or An Garda Síochána, the defendant claims that this was *ultra vires* the District Court Rules Committee as s.8(2) of the Garda Síochána Act 2005 provides: -

“(2) Subject to subsection (3), any member of the Garda Síochána may institute and conduct prosecutions in a court of summary jurisdiction, but only in the name of the Director of Public Prosecutions”.

3. The defendant submitted to the District Court judge that while s.8(2) conferred a right of audience on any member of An Garda Síochána to prosecute and conduct proceedings in the name of the Director of Public Prosecutions, it does not provide a power for a member or An Garda Síochána to take instructions from, and appear on behalf of, the prosecuting member. The defendant contended that there was no appearance by the prosecution and invited the District Court judge to strike the case out.

4. The District judge refers the following question to this Court for determination: -

“Did Sergeant Riley have a right of audience to prosecute the case against the defendant?”

5. The DPP contends that Sergeant Riley did not seek to present the case on the date in question but sought a remand to another date, which application was objected to by the defence who sought to have the matter struck out. The DPP accepted that a prosecuting garda will be required to attend in person to give his or her own evidence at the nominated hearing date, if only for the simple reason that his or her evidence will be hearsay if another officer attempts to communicate it to the court.

6. The Attorney General, who participated as notice party, claims that Sergeant Reilly did not seek to present the case on the date in question but sought a remand to another date, which application was objected to by the defence who sought to have the matter struck out.

7. This Court is confined to the facts as found by the District Court judge and set out in the consultative case stated. The prosecutor and the defendant accept that they had the opportunity to review those facts before they were finalised by the District Court judge. I will not therefore take account of any other purported facts identified by the DPP or the Attorney General including those set out at paragraphs 5 and 6 above. The single question the District Court judge has referred to this Court refers only to Sergeant Riley’s right of audience to prosecute the case against the defendant. I am not limiting or qualifying that by reference to a claim that the matter was not in for hearing or that the right of audience of the non prosecuting garda is limited to dealing with matters other than on the nominated hearing date, as seems to be contended for by the DPP. The only question asked is of the right of audience of a member of An Garda Síochána who is not the prosecuting garda, and that is the issue I will address.

## **Legal provisions**

**8.** Order 6 r. 1 of the District Court Rules provides as follows:

“1. The following persons shall be entitled to appear and address the Court and conduct proceedings—

[...]

(e) in proceedings at the suit of the Director of Public Prosecutions in respect of an offence, the said Director or any member of the Garda Síochána or other person appearing on behalf of or prosecuting in the name of the Director.”

**9.** It is common case between the parties that this provision of the Rules permits any member of An Garda Síochána a right of audience before the District Court. If this rule is binding on the District Court judge, then the answer to the question referred is clearly “yes”. The statutory provision which the defendant says limits a right of audience right of audience to the prosecuting garda only is s.8 (1) and (2) which provides as follows:

“8.— (1) No member of the Garda Síochána in the course of his or her official duties may institute a prosecution except as provided under this section.

(2) Subject to subsection (3), any member of the Garda Síochána may institute and conduct prosecutions in a court of summary jurisdiction, but only in the name of the Director of Public Prosecutions”.

The remainder of s. 8 provides for the manner in which prosecutions are instituted in the name of the DPP and supervised by the DPP in the form of specific and general directions.

**10.** The defendant also relies on s. 9 (1) of the Petty Sessions (Ireland) Act 1851, which the defendant submits provides for the right of audience of a solicitor or barrister for either side in summary proceedings:

“In all cases of summary proceedings the place in which any justice or justices shall sit to hear and determine any complaint shall be deemed an open court, to which the public generally may have access, so far as the same can conveniently contain them; and the parties by and against whom any complaint or information shall there be heard shall be admitted to conduct or make their full answer and defence thereto respectively, and to have the witnesses examined and cross-examined, by themselves or by counsel or attorney on their behalf”.

11. The State parties dispute that s. 9 (1) confers or limits any such right of audience to the accused, their counsel or their solicitor.

#### **Submissions of the defendant**

12. The defendant contends that s. 8 abolished the previous practice of gardaí prosecuting District Court criminal cases as common informers and replaced it with a statutory framework for cases to be prosecuted in the name of the DPP. The defendant contended that s. 8 (2) limits the right of audience before the District Court for members of An Garda Síochána to the prosecuting garda as the right is conferred conjunctively, i.e. “any member may institute and conduct” (my emphasis). Therefore, according to the defendant, there is no separate right of audience for a member of An Garda Síochána to conduct a prosecution where they are not the prosecuting garda. Insofar as O.6 r.1 confers such a right, the defendant maintains that the rule is *ultra vires* the enabling statutory provision of s.8 (2).

13. The defendant argues that the law limits the right of audience before the District Court to solicitors, barristers and specified other persons including the prosecuting garda. Counsel describes this as a significant restriction imposed by the law going beyond mere practice and procedure of the District Court, and therefore not an area over which the District Court Rules

Committee has jurisdiction to make rules. The Supreme Court held in the *State (O'Flaherty) v. O'Floinn* [1954] IR 295 that the rule making authority cannot amend a statute but may only adapt or modify it as may be necessary. Wherever a rule goes beyond an adaptation or modification of a statute it will be *ultra vires* as occurred in *Rainey v. Delap* [1988] IR 470 which was, like here, a consultative case stated. The defendant also relies on the Supreme Court in *DPP v. McGrath* [2021] IESC 66 where O.36 of the District Court Rules providing for a ban on the awarding of costs against the DPP was found to be *ultra vires* the District Court Rules Committee, because it involved a policy decision that a certain limited class of litigants cannot be subject to an order for costs, whatever the circumstances of the case. The defendant argues that applying that law to this case, the introduction of a new class of unregulated advocates would be a radical step which cannot be discerned from the principles and policies of the 1851 Act or the 2005 Act, and would tend to interfere with the administration of justice.

### **Submissions of the State parties**

14. The State parties submit that the legislative purpose of s.8 was to address the situation of the garda as common informer. The State relies on UK and US authorities in arguing that “and” in s. 8 (2) - in referring to prosecuting “and” conducting - is disjunctive and that interpreting s.8(2) to require the prosecuting garda to also conduct the prosecution would lead to an absurdity. The State parties rely on the presumption against radical amendment and on s. 6 of the Criminal Justice (Miscellaneous Provisions) Act 1997, which permits evidence of arrest, charge and caution to be given by certificate if the accused is arrested other than under a warrant, thereby obviating a need for the arresting guard to be in court. The State parties say that this demonstrates the intention of the Oireachtas to relieve gardaí from unnecessary court appearances. The court is urged to favour an interpretation of s. 8 (2) which allows the

long established practice of court presenting to continue, and permits an efficient and effective delegation of duties between officers serving in a single force under a shared command structure, without arbitrarily requiring the personal attendance of the one officer who happened to lay the charge. The State parties contend that a right of audience for non-prosecuting gardaí has been in place since 1948 (by way of the earlier rules of the District Court) and that the defendant's interpretation of s.8 (2) would effectively upend the present system of summary prosecution in the District Court and that if the Oireachtas had intended to do that, or to change the long standing system of summary prosecutions, it would have used clear and unambiguous language to do so.

**15.** The State parties suggest that the consultative case stated procedure is not appropriate to deal with the defendant's challenge, that the District Court judge should have proceeded to a hearing and the defendant could then have judicially reviewed the process or the outcome. If the matter was before this court by way of judicial review, it would be open to the court to make a declaration that the rules were *ultra vires*. The State parties argued that this cannot be done within a consultative case stated as the District Court judge has no such jurisdiction. The State relies on the principle that a consultative case stated cannot determine the constitutionality of legislation, as confirmed by the Supreme Court in *DPP v. Dougan* [1996] 1 IR 544.

**16.** The State parties dispute that O.6 r. 1 of the District Court Rules is *ultra vires* or that this court can make any such finding in a consultative case stated. They argue that the rights of audience conferred by O.6 r.1 is part of the practice and procedure of the District Court, and therefore within the jurisdiction of the District Court Rules Committee in accordance with s.91 of the Courts of Justice Act, 1924. O.6 r.1 does not amend any statutory position,

but rather reflects what the law already was since the change in the District Court Rules in 1948 to provide for a right of audience for all members of An Garda Síochána.

17. The State parties distinguish the decisions in which the rules of the District Court had been struck down by this court as *ultra vires* (whether in judicial review proceedings or a consultative case stated) on the basis that those cases engaged fundamental rights such as the right to liberty (*The State (O’Flaherty) v. O’Floinn*) and the right to costs (*DPP v. McGrath*), which they describe as part of a citizen’s constitutional rights and/or directly related to the administration of justice. They contend the defendant here has no such fundamental rights engaged in the issue of who has a right of audience to conduct the case against him, and that such a right of audience does not form part of the administration of justice but is simply and properly part of the District Court’s practice and procedures.

### **Discussion**

18. Consideration is required of the following:

- (i) Whether O.6 r.1 can be found *ultra vires* in a consultative case stated or whether that can only be done in judicial review proceedings.
- (ii) The history of the police informer and garda rights of audience prior to 2005.
- (iii) The interpretation of s. 8 (2) of An Garda Síochána Act, 2005 and in particular its legislative purpose and whether “and” should be interpreted conjunctively or disjunctively.
- (iv) Whether the right of audience is akin to costs, as addressed in *DPP v. McGrath*, is part of the administration of justice or is part of the District Court practice and procedure.



- (v) Whether O.6 r.1 purports to modify or amend a statutory provision.

(i) **The appropriateness of the consultative case stated procedure**

19. The State parties contend that the District Court judge should not have stated the case when she did, but should have proceeded to a hearing after which it would have been opened to the defendant to judicially review the process and/or the outcome. Whether a judicial review would have been open to the defendant in that hypothetical situation may be an interesting question, but not one that is required to be answered here as the District Judge did choose to state the case during the hearing and was entitled to do so.

20. The real issue for the State parties seems to be around whether the District Court Rules can be declared *ultra vires* in a consultative case stated. The State relies on the decision of Geoghegan J. in *DPP v. Dougan* where he stated that

“There is absolutely no doubt that a District Court Judge is not entitled to state a case to the High Court on a question of the validity of a statutory provision having regard to the Constitution. The direct effect of the constitutional provision already cited prevents him deciding the question himself and he can obviously only state a case on questions which he himself would be entitled to decide independently of the case stated. The mere fact, therefore, that the High Court is given jurisdiction under the Constitution to determine a question of the constitutionality of a statutory provision does not mean that this can be done by way of case stated”

21. There are limitations in the consultative case stated procedure, but they do not preclude a finding that a rule of the District Court is *ultra vires*. Such a finding has been

made by this Court previously both in judicial review and in consultative cases stated. The decisions in *State (O’Flaherty) v. O’Floinn* and *Rainey v. Delap* [1988] 470 were judicial reviews. *Thompson v. Curry* [1971] IR 61 was a consultative case stated. In all three cases the court held that a rule of the District Court was *ultra vires*.

22. Those authorities cannot and should not be distinguished by reference to the nature of the rights engaged or because the issues raised went to the jurisdiction of the District Court. The court’s previous exercise of that jurisdiction has never been limited by this court to questions of fundamental rights or jurisdictional issues only. This court can make a finding that a District Court Rule is *ultra vires* for the purpose of answering a question referred by a district judge where that question engages a rule of the District Court. Any other approach could leave a district judge without recourse to the consultative process that is provided to them by s. 52 (1) of the Courts (Supplemental Provisions) Act, 1961. That could not have been the intention of the legislature in enacting this statutory procedure.

(ii) **The history of the police informer and garda rights of audience**

23. The history of police informers in Irish criminal law is set out in the dissenting judgment of O’Higgins C.J. in *DPP v. Roddy* [1977] 1 IR 177, where he explains how the Irish system developed to having gardaí prosecuting summary cases as common informers. I consider it significant that this practice only provided for the police informer (now known as the prosecuting gardaí) to conduct the prosecution, rather than for any other member of the force to conduct it in the absence of that police informer. A right of audience for any member of An Garda Síochána to conduct District Court proceedings was incorporated into the District Court Rules for the first time in 1948 and re-enacted in the 1977 Rules.

**24.** The State parties contend that no statutory basis for that right of audience was required, as it was merely an element of District Court practice and procedures and therefore within the jurisdiction of the District Court Rules Committee. I will return to that point below. The defendant relies on what he contends were express legislative rights of audience before the 2005 Act which did not provide for any express right of audience for members of An Garda Síochána, namely s.9 (1) of the Petty Sessions (Ireland) Act 1851:

“In all cases of summary proceedings the place in which any justice or justices shall sit to hear and determine any complaint shall be deemed an open court, to which the public generally may have access, so far as the same can conveniently contain them; and the parties by and against whom any complaint or information shall there be heard shall be admitted to conduct or make their full answer and defence thereto respectively, and to have the witnesses examined and cross-examined, by themselves or by counsel or attorney on their behalf”

**25.** The State parties dispute that this section confers a right of audience but rather that it regulates the access of the public to the District Court. I do not agree. As well as providing for the right of the public to have access to the court, the section also provides for the right of audience of solicitors, barristers and the parties themselves. The police informer practice was in place at that time. In providing for a right of audience of the parties, section 9(1) included the existing right of audience of the police, which was limited to that of the common informer, within the category of the parties to the case.

**26.** That situation whereby a garda could only bring a case in their own name as a common informer prevailed up to the enactment of the Garda Síochána Act 2005. In *The People (DPP) v. Roddy* [1977] 1 IR 177, the majority decision of Griffin J. confirmed that in stating:

“During the course of the argument, Mr. Barrington drew attention to the undesirability of prosecutions which are essentially public prosecutions, paid for out of public funds, being brought in the name of what has come to be known as "the prosecuting Garda" as a common informer. In such cases, if a member of the Garda Síochána is to bring proceedings in his own name, he can do so *only* as a common informer”

27. Griffin J.’s analysis of the basis of a garda’s involvement in prosecuting a case did not refer to the District Court Rules which, at that time, afforded a right of audience to all members of the gardaí to appear and to address the court. Griffin J. did not seem to consider that the right of a garda to prosecute a case was affected by the rights of audience conferred by the existing rules of the District Court.

28. Griffin J. went on to make an observation as to the desirability of legislative change and stated:

“If the practice of bringing proceedings in the name of a member of the Garda Síochána is to be continued, it would be far more desirable that he should be given statutory power to do so, rather than having to prosecute as a common informer”.

29. Griffin J. did not identify any need for the legislature to make provision for a statutory power for a garda to conduct a case that they did not prosecute. The recommendation he did make was ultimately acted upon by the legislature when it enacted s. 8 of the Garda Síochána Act 2005, the interpretation of which will be considered further below.

**(iii) Interpretation of s. 8 (2)**

**30.** The default rule of statutory interpretation is that the words of a statute should be given their ordinary and natural meaning unless there is good reason to do otherwise (*Howard v. Commissioner of Public Works* [1994] 1 IR 101).

**31.** The defendant contends that the ordinary and natural meaning of “institute and conduct” in s. 8 (2) allows a garda to bring and conduct a case, but in not decoupling “institute” from “conduct”, it does not permit a garda to conduct a case that they have not prosecuted.

**32.** The State parties contend that “and” in subs. 2 must be read disjunctively, firstly in order to avoid an absurdity and secondly to give effect to the legislative intention of the provision which, they say, was to address the situation of the garda as common informer. They claim any other interpretation would lead to a breach of the presumption against radical amendment and would be inconsistent with the pre-existing rules, of which the Oireachtas must be presumed to have been aware. They emphasise that any other interpretation would result in a fundamental overhaul of the courts presenter system currently operating in the District Court.

**33.** The State parties cite one UK and one US authority in support of reading “and” disjunctively; *Blackpool Council v. Howitt* [2008] EWHC 3300 (Admin); *Peacock v. Lubbock Compress Company* 252 F.2d 892 (Fifth Cir. 1968) (U.S. Court of Appeals for the Fifth Circuit). In both cases the court had a valid reason for interpreting “and” as they did. In the UK decision of *Howitt*, the interpretation of the section was required by the same statute to have regard to guidance issued by the Secretary of State, which provided the court with the broader purpose behind the wider Government strategy in question. The court decided to interpret “and” as meaning “or”, as anything else “might effectively lead to an authority having to ignore that guidance from the Secretary of State, which by definition the licensing

authority and indeed the court has to have regard to by virtue of section 4". In the US decision of *Peacock*, certain employee rights only applied to persons employed by employers engaged in specific agricultural activity including "the ginning and compressing of cotton". The court found that the legislative concern was to exempt agricultural activities subject to certain accepted agricultural activity and expressly found that there was "no basis for concluding that the exemption was to be confined to those engaging in *both* ginning and compression. Indeed, the contrary appeared." The court ultimately held:

"For us to conclude that Congress meant "and" in a literal conjunctive sense is to determine that Congress meant in fact to grant no relief. To do this is to ignore reality, for Congress has long been acutely aware of the manifold problems of the production, marketing and distribution of cotton. The commodity is one of the most important in the complex pattern of farm parity and production control legislation. It is inconceivable that Congress legislated in ignorance of the distinguished nature of the physical operations of ginning of cotton as compared to the compressing of cotton, or that, with full consciousness of these practicable considerations, it meant to lay down a standard which could not be met in fact. Literalism gives way in the face of such consideration."

**34.** In the instant case, no similarly clear legislative intention has been identified such as to persuade this court to depart from the normal rule of statutory interpretation that "and" should bear its ordinary and natural meaning. Applying that rule to the phrase "institute and conduct" in s.8 (2) may possibly result in the overhaul of the court presenter system as currently (and for many years previously) operating in the District Court, but something more than a need or desire for efficiency must be identified to enable a court to hold that the legislature meant "and" to be interpreted as "or". If this means that s. 8 (2) changed the system of summary prosecutions in the District Court, then that must be assumed to have

been the intention of the legislature in spite of the presumption against radical amendment (if such a change could really be described as radical) and the presumption that the Oireachtas was aware of the provisions of the District Court Rules.

**35.** The State identifies the legislative purpose of the 2005 Act as addressing the situation of gardaí as common informer. That “situation” only applies to a garda both prosecuting and conducting a case as that was what a common informer could do at the time the legislation was enacted. It does not address the ability of a non-prosecuting garda to conduct a case or any desirability of the efficient and effective delegation of duties between officers serving in the single force under a shared command structure, on which the DPP in particular laid heavy emphasis. The desirability of efficiency may be laudable but it does not equate to a legislative purpose in the absence of a clear basis for it.

**36.** The State parties maintain that had the legislature intended what the State parties claim was a radical change in the law, that clear and unambiguous language would have been used in s. 8 (2). The law prior to 2005 was as described by Griffin J. in *People (DPP) v. Roddick* as referred to above at para. 26. I am not satisfied that a conjunctive reading of “and” in s.8 (2) represents a radical change to that law whereby a garda could only bring proceedings in his own name as a common informer. There was no provision made at all for a non-prosecuting garda to conduct the proceedings and in those circumstances, the changes brought about by s. 8 (2) were not all that radical.

**37.** Even if I am wrong in that, I am satisfied that the language used by the legislature in s.8 (2) of “institute and conduct” is clear and unambiguous in requiring “and” to be interpreted as “and” rather than “or”. Some of the remaining subsections in s.8 do use “or”, for example subs. 3, 5 (8), 6 and 6 (b) . This supports the conclusion that in using “and” in

subs. 2, the legislature intended it to mean both institute and conduct rather than institute or conduct.

**(iv) The rights of audience before the District Court**

**38.** The State parties claim that rights of audience in the District Court are part of the court's practice and procedure and not part of the administration of justice and that, therefore, the District Court Rules Committee was entitled to regulate the issue pursuant to s. 91 of the Court of Justice Act 1924. Before considering s. 91 further it is necessary to assess if that right of audience is part of the District Court practice and procedure or if it is part of the administration of justice.

**39.** There is a clear legal basis for affording rights of audience before the District Court to limited categories of persons. The defendant cites s. 9 (1) of the Petty Sessions (Ireland) Act 1861 as providing for the right of audience of a solicitor or barrister for either side in summary proceedings. The defendant also cites the decision of the Supreme Court in *Coffey v. Environmental Protection Agency* [2014] 2 IR 125 where Fennelly J. addressed the issue of rights of audience in the context of McKenzie Friends and observed as follows:

"In conclusion, the general rule is clear. Only a qualified barrister or solicitor has the right, if duly instructed, to represent a litigant before the courts. The courts have, on rare occasions, permitted exceptions to the strict application of that rule, where it would work particular injustice".

**40.** The defendant cites s. 17 of the Courts Act 1971 as providing explicitly for the right of audience of solicitors and refers to the rights of audience of barristers by virtue of their call to the bar having been confirmed in *Heinullian v. Governor of Cloverhill Prison* [2011] 1 ILRM 1. The defendant relies on the Legal Services Regulation Act 2015 as providing for



detailed regulation of legal practitioners defined in s. 2 as a practising solicitor or practising barrister.

**41.** The defendant claimed that an interpretation of the 2005 Act allowing a right of audience for members of An Garda Síochána of any rank in any prosecution would create a third and unregulated legal profession. I do not accept that allowing rights of audience to members of An Garda Síochána is prohibited *per se* as the Act clearly allows the prosecuting garda to institute and conduct a District Court case. The question is whether a non-prosecuting garda can also conduct such a case. That might expand the number of gardaí with a right of audience before the District Court but it does not unlawfully expand the category of persons with such a right of audience beyond what the law clearly permits, in that members of An Garda Síochána can undoubtedly appear before the District Court in specified circumstances.

**42.** The rights of specified persons to an audience in court is a highly regulated entitlement conferred by the law on specific categories of qualified professionals who satisfy onerous criteria. This is far more significant than a mere matter of practice and procedure as contended for by the State.

**43.** The Supreme Court recognised in *DPP v. McGrath* that a rule that a certain class of litigant could not be subject to an order for costs was not merely practice and procedure but rather was an issue that intrudes “both upon an area of decision which is required to be made, if at all, by the Oireachtas if a general rule is sought to be made, and by the courts in individual decisions in particular cases.” The State seeks to distinguish that decision on the basis that costs are a significant issue with potential for disadvantage to a litigant. They highlight the absence of any similar disadvantage to the defendant in this case if a non-prosecuting garda is entitled to prosecute the case. I make no finding on whether there is or is

not any such disadvantage, but it is not necessary to do so in order to find that rights of audience is a far more significant issue than constituting a mere part of the District Court practice and procedure. It is an issue more akin to the administration of justice. I find the support for that in the decision of the Supreme Court in *Coffey v. Environmental Protection Agency* [2014] 2 IR 125 where a non-lawyer had applied to represent the applicant. Fennelly J. described it as “inimical” to the integrity of the justice system to open the same rights of audience and representation, conferred by the law on qualified barristers and solicitors, to unqualified persons. He referred to the extended and rigorous period of legal and professional training to which barristers and solicitors are subjected and the fact they are subject to codes of conduct and professional discipline. He concluded, at para. 31:

“There would be little point in subjecting the professions to such rules and requirements if, at the same time, completely unqualified persons had complete, parallel rights of audience in the courts. That would defeat the purpose of such controls *and would tend to undermine the administration of justice* and the elaborate system of controls” (my emphasis).

44. I therefore conclude that the right of audience before the District Court, conferred on members of specified groups including certain members of An Garda Síochána, is not an element of the court practice and procedures. It is more significant and is akin to the administration of justice.

(v) **Does O.6 r.1 purport to amend or modify a statutory provision?**

45. Having determined that rights of audience are not part of the practice and procedures of the District Court, I move to a consideration of what O.6 r.1 does and how it fits into s.8 (2), which all parties agree is the enabling section for that rule.

46. Section 91 of the Courts of Justice Act, 1924 allows rules to be made:

“for all or any of the following matters, viz., for regulating the sittings and the vacations and the districts of the Justices and the places where proceedings are to be brought and the forms of process, summons, case stated, appeal or otherwise... and the practice and procedure of the District Court generally including questions of costs... and the adaptation or modification of any statute that may be necessary for any of the purposes aforesaid and all subsidiary matters”.

47. The meaning of “practice and procedure” in the section was considered by Kingsmill Moore J. in *The State (O’Flaherty) v. O’Floinn*, which he said meant:

“the manner in which, or the machinery whereby, effect is given to a substantive power which is either conferred on a Court by statute or inherent in its jurisdiction.” (at p. 304).

48. Kingsmill Moore J. went on to apply the canon of construction that general words or expressions following specific words or expressions take their colour from the specific instances. He therefore held that the phrase “practice and procedure” generally:

“must be confined to ‘things of the same kind’ as the specific subjects enumerated, which are all matters strictly procedural in the narrowest sense. They do not warrant the rule-making authority in framing a rule which in the guise of an alteration in practice or procedure, nevertheless operates to extend enormously a substantive power which the Legislature was careful to confer in a restricted form.”

49. More recently in *DDP v. McGrath*, O’Donnell J. (as he was then) in the Supreme Court reserved the question of whether Kingsmill Moore J.’s formulation as to what constitutes practice and procedure should be applied more generally, notwithstanding its

application in subsequent cases. O'Donnell J. suggested that the formulation is arguably too narrow and difficult to reconcile with the outcome of the cases.

**50.** S. 91 gives examples of what comes within the concept of practice and procedure including questions of cost but does not identify rights of audience.

**51.** Given the interpretation of s.8 (2) set out above, I am satisfied that it, as the enabling legislation for O.6 r.1, only affords a right of audience to the garda who initiates and conducts the prosecution. Therefore, insofar as O.6 r.1 purports to give a right of audience to all members of An Garda Síochána and not just the garda who initiated prosecution, the rule is an impermissible amendment of the statute and goes beyond the adaptation/modification permitted by s.91, as recognised in the decisions of *State (O'Flaherty) v. O'Floinn, Thomson v. Curry, Reiney v. Delap* and *DFC Commissioner of An Garda Síochána* [2015] 2 IR 487.

**52.** Order 6 r. 1 is *ultra vires* this enabling legislation and cannot be relied on by the district judge in affording a right of audience to a garda who had no involvement in initiating the prosecution.

### **Conclusions**

**53.**

- i. The consultative case stated procedure has been properly invoked by the district judge. The question she has referred must be answered by this court, including if necessary on the basis of any finding that O.6 r.1 that permits a non-prosecuting garda to have a right of audience to prosecute a case, is *ultra vires*.
- ii. The ordinary and natural meaning of “and” in s.8 (2) of An Garda Síochána Act, 2005 which permits a garda to initiate and conduct a District Court prosecution, means that

the garda must have both initiated and conducted the prosecution in order to have a right of audience before the District Court.

- iii. Rights of audience are not merely part of the District Court practice and procedure. Rights of audience conferred by law on specified people is part of the integrity of the judicial system and is necessary to ensure the proper administration of justice. Those specified individuals include a garda who has initiated a prosecution before the District Court.
- iv. Insofar as O.6 r.1 of the District Court Rules purport to confer a right of audience on any member of An Garda Síochána, that is an impermissible amendment of s. 8 (2) which limits that significant right to the garda who has initiated the prosecution.
- v. The outcome of this case may adversely affect the way in which criminal prosecutions are managed before the District Court. This court does not underestimate or disregard the administrative challenges in managing the system of District Court criminal prosecutions and the need for an efficient and effective system to do so. However, the desirability of efficiency cannot be permitted to overlook the application (even over many years) of a rule that goes impermissibly beyond what is permitted by s.8 (2).
- vi. For the avoidance of doubt this court makes no criticism of the right of audience that is conferred on members of An Garda Síochána and has no concerns about what the defendant refers to as a creation of a third legal profession that is unregulated. The difficulty is with the impermissible amendment of s.8 (2) by O.6 r.1 to allow for a right of audience wider than that which is conferred by s.8 (2). It is a matter for the legislature as to what rights of audience it wishes to give to members of An Garda Síochána or any other person. Once the legislature have done that by statute, the District Court Rules Committee cannot go beyond what the legislature has done.

vii. In those circumstances the answer to the question referred by the District Court judge on the fact that she found them is: “No”; Sergeant Reilly did not have a right of audience to prosecute the case against the defendant.

**54.** I will list the matter for mention at 10 a.m. on 16 June for the making of any final orders that may be required.