AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2022:000074

O'Donnell C.J.

Dunne J.

Charleton J.

O'Malley J.

Collins J.

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

Between/

THE DIRECTOR OF PUBLIC PROSECUTIONS

(AT THE SUIT OF GARDA LIAM VARLEY)

Appellant

AND

CIARÁN DAVITT

Respondent

AND

THE ATTORNEY GENERAL

Notice Party

Judgment of Ms. Justice Dunne delivered on the 14th day of July 2023

Introduction

1. This appeal arises from a case stated by Judge Miriam Walsh to the High Court from the District Court. The case stated presented a net question as to whether a member of An Garda Síochána, who was not the prosecuting member and had not initiated the proceedings, had a right of audience to appear in criminal proceedings against Mr. Davitt ("the respondent") in the District Court.

2. In the High Court, Bolger J. found that only the prosecuting guard had a right of audience to appear and prosecute in the case against the respondent, and therefore answered the question posed in the negative. The judgment had the effect of ending a long-established practice in the District Court of non-prosecuting guards acting as "court presenters". In response, the Oireachtas passed the Garda Síochána (Amendment) Act 2022 ("the 2022 Act"), reversing the effect of the High Court judgment. As a result, section 8(2A) of the Garda Síochána Act 2005 ("the 2005 Act") now provides:

> *"Where a prosecution is instituted by a member of the Garda Síochána pursuant to subsection (2), the prosecution may be conducted by that member or any other such member."*

Background

3. The respondent was charged with the possession of a small quantity of cannabis on 13th February 2020, contrary to s. 3 and s. 27(1) of the Misuse of Drugs Act 1977. The prosecution was brought in the name of Garda Liam Varley. On 28th September 2021, the matter came before the District Court. The respondent, represented by his solicitor, indicated that he was pleading not guilty. There was no appearance by Garda Varley or by the Office of the DPP. Sergeant Brendan Riley instead 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. The respondent challenged Sergeant Reilly's ability to appear for the prosecution. On 29th October 2021, counsel appeared on behalf of the respondent. It was argued that insofar as Order 6 rule 1 of the District Court Rules purports to confer a right of audience on any member of An Garda Síochána, this was *ultra vires* the District Court Rules Committee as s.8(2) of the 2005 Act 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."*

The respondent submitted that there was no legal basis providing for the power of a non-prosecuting guard to take instructions from and appear on behalf of the prosecuting guard. It followed that on the return date, there was no appearance by or on behalf of the prosecution, and the respondent invited the District Court Judge to strike out the proceedings.

4. The District Court Judge referred the following question to the High Court by way of a case stated pursuant to s. 52 of the Courts (Supplemental Provisions) Act 1961 ("The 1961 Act"):

> *"Did Sergeant Riley have a right of audience to prosecute the case against the defendant?"*

The Legislative Provisions and the Rules

5. There is broad agreement between the parties as to the legislative provisions which arise to be considered in this case.

6. Section 9(1) of the Petty Sessions (Ireland) Act 1851 ("the 1851 Act") provides that:-

> *"The right of the public to have access to the place in which justices shall sit shall be subject to the following provisions:*

> *(1) 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…"*

A key issue of contest between the parties is whether s. 9(1) of the 1851 Act provides an express legislative right of audience.

7. The 1851 Act governed District Court proceedings outside of the Dublin Police District. In 1924, the Petty Sessions were abolished, and in their place, a single District Court was created, and the Courts of Justice Act 1924 ("the 1924 Act") was the governing Act. Section 90 of that Act provides for the power of the District Court Rules Committee and s. 91 empowers the Committee to make rules:

> *"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 conditions which a party who requires a case stated or an appellant must comply with in civil cases or in criminal cases or in licensing cases as the case may be and the practice and procedure of the District Court generally including questions of costs and the times for taking any step in the District Court, the entering-up of judgment and granting of summary judgment in appropriate cases and the use of the national language of Saorstát Eireann therein and the fixing and collection of fees and the adaptation or modification of any statute that may be necessary for any of the purposes aforesaid and all subsidiary matters."*

8. Empowered by this provision, the current District Court Rules were adopted by the Committee in 1997. Order 6, Rule 1(e) of those rules provides:

"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. Section 8 of the 2005 Act carries with it a marginal note or heading as follows: *"Prosecution of offences by members of Garda Síochána"*. Prior to its amendment pursuant to the 2022 Act, it read 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 or conduct prosecutions in a court of summary jurisdiction, but only in the name of the Director of Public Prosecutions."*

10. Following the decision of the High Court, the 2022 Act amended section 8(2) of the 2005 Act and inserted section 8(2A) into the Act. Thus, the relevant parts of the section now read:

> *"(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.*
>
> *(2A) Where a prosecution is instituted by a member of the Garda Síochána pursuant to subsection (2), the prosecution may be conducted by that member or any other such member."*

Finally, s. 2(2) of the 2022 Act provides that these provisions shall apply in respect of prosecutions instituted pursuant to subsection (2) of that section irrespective of whether

such prosecutions were instituted before or after the coming into operation of the section.

High Court Judgment ([2022] IEHC 320)

11. In her judgment, Bolger J. identified five issues that required consideration:

i. Whether Order 6 Rule 1 of the District Court Rules 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 the 2005 Act, 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. District Judge McGrath* [2021] 2 I.L.R.M. 345, and is part of the administration of justice or is part of the District Court practice and procedure.

v. Whether Order 6 rule 1 purports to modify or amend a statutory provision.

12. On the first point, Bolger J. held that the High Court had the power to rule on the *vires* of Order 6 where that question arises by way of a case stated. She found that, while there are limits to the case stated procedure, it did not exclude a ruling on the *vires* of court rules. In support of this conclusion, the trial judge relied on the case of *Thompson v. Curry* [1970] I.R. 61, where the High Court ruled on the *vires* of the District Court Rules in answer to an appeal by way of case stated. She also relied on the decisions in *State (O'Flaherty) v. O Floinn* [1954] I.R. 295 and *Rainey v. District Judge Delap* [1988] I.R. 470, both of which were judicial reviews resulting in the same conclusion. While the State parties in the High Court sought to distinguish the

findings in *O Floinn* and *DPP v. District Judge McGrath* on the basis of the nature of the rights engaged or having regard to whether the issues raised went to the jurisdiction of the District Court, Bolger J. was not satisfied that this was an appropriate basis to define the limits of the jurisdiction of the High Court to consider *vires* of court rules.

13. Secondly, tracing the history of the right of audience of a police informer prior to the 2005 Act, Bolger J. relied on the judgment of Kenny J. in *DPP v Roddy* [1977] I.R. 77. *Roddy* outlined that traditionally the common informer was the only one entitled to conduct the prosecution rather than any other member of the force, which Bolger J. found to be significant. Following this, a right of audience of any member of An Garda Síochána was incorporated into the District Court Rules 1948 and re-enacted in the 1977 Rules. The State parties argued that regulation of a right of audience was within the scope of the rule making authority of the District Court Rules Committee, as it is a matter of "practice and procedure" within s. 91 of the 1924 Act. Bolger J. agreed with the respondent's submission that rights of audience in court were expressly regulated by s. 9(1) of the Petty Sessions (Ireland) Act 1851, which encompassed the practice of police as common informers which existed at the time. She found that this continued up until the 2005 Act.

14. Thirdly, Bolger J. found that the words in s. 8(2) of the 2005 Act were to be given their plain and ordinary meaning, empowering only the guard in whose name the prosecution is brought to appear to conduct the proceedings. She was not satisfied that she had to adopt any other canon of statutory interpretation. She rejected the State's argument that the presumption against radical amendment suggests that the Oireachtas did not intend to up-end the court presenter system that operated in the District Court for many years. Further, she found that the 2005 Act did not radically

amend the status quo, having previously held that only the prosecuting garda historically had a right of audience.

15. Fourthly, Bolger J. found that regulating a right of audience is more than practice and procedure and constitutes the administration of justice. Therefore, the District Court Rules Committee was not empowered to expand rights of audience not granted by the Oireachtas under s. 91 of the 1924 Act. The trial judge found support for this approach by identifying a number of legislative provisions and cases regulating rights of audience in the District Courts, for example, the right of audience of barristers in *Heinullian v. Governor of Cloverhill Prison* [2011] 1 I.L.R.M. 1, and the right of audience of solicitors by virtue of s. 17 of the Courts Act 1971. She also relied on the decision of Fennelly J. in *Coffey v Environmental Protection Agency* [2014] 2 I.R. 125, where 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. Having considered these factors, she concluded that the grant of a right of audience is closer to the administration of justice.

16. Fifthly, Bolger J. held that s. 8(2) of the 2005 Act was the enabling provision for Order 6, rule 1 of the District Court Rules. She found that Order 6 rule 1 was an impermissible amendment of the 2005 Act and went beyond the adaptation or modification permitted by s. 91 of the 1924 Act, and therefore, was *ultra vires*.

17. In conclusion, Bolger J. ruled that Sergeant Riley did not have a right of audience to appear against the respondent in the District Court.

Leave to Appeal

18. The State parties applied for and were granted leave to appeal to this Court ([2022] IESCDET 105). In the course of case management, the parties agreed that the following eight issues arise in this appeal:

i. Whether the appeal is moot and, if so, whether it should be heard as an exception to the mootness doctrine.

ii. Whether the consultative case stated procedure is appropriate for determining whether Order 6, Rule 1 of the District Court Rules 1997 is *ultra vires* its enabling Act.

iii. Which Act should be considered to be the enabling Act for the purpose of assessing the *vires* of said District Court Rules.

iv. Whether the effect of Order 6, Rule 1 is to amend or modify s. 9(1) of the Petty Sessions Act 1851 and whether on its true construction s. 9(1) permitted or excluded a right of audience for a Garda who did not initiate a prosecution.

v. Whether on its true construction s. 8(2) of the Garda Síochána Act 2005 provided for a right of audience for a garda who did not initiate the prosecution and, ultimately, whether Sergeant Riley had a right of audience in the proceedings at issue.

vi. Whether the granting of a right of audience is a matter of practice and procedure within the meaning of s. 91 of the Courts of Justice Act 1924 and accordingly does not interfere with the law-making function of the Oireachtas and whether, in approaching this issue, the learned High Court judge correctly applied the decision of this Honourable Court in *DPP v District Judge McGrath* [2021] 2 I.L.R.M. 345.

vii. Whether prior to the enactment of the 2005 Act, gardaí other than prosecuting gardaí enjoyed a right of audience to prosecute cases;

viii. Whether s. 9 of the Petty Sessions (Ireland) 1851 conferred a right of audience on police who were not complainants.

Submissions of the Parties

Issue 1

19. The DPP and the Attorney General accepted that the amendment to s. 8 by the 2022 Act limited the impact of the decision of the High Court insofar as the right of audience of gardaí was concerned. However, they both argued that the judgment had ongoing implications for the right of audience of others mentioned in Order 6, Rule 1 of the District Court Rules, such as the Revenue Commissioners, or, under Rule 1(e), *"any other person appearing on behalf of or prosecuting in the name of the Director."* The DPP argued that this encompasses a broad category of people. The State parties also submitted that even if the proceedings are moot, they raise a point of law of exceptional public importance, which is an exception to the mootness doctrine identified in *Irwin v Deasy* [2010] IESC 35. It was submitted that the issues go beyond the right of audience of non-prosecuting guards, concerning such matters as whether a consultative case stated is the appropriate conduit to challenge the *vires* of Order 6 Rule 1, and the scope of the powers of the Rules Committee under s. 91 of the 1924 Act, amongst others. The respondent argued that the proceedings are moot by virtue of the 2022 Act, and to this end, they relied on the definition given to mootness by Denham J. in *Lofinmakin v Minister for Justice* [2013] 4 I.R. 274, where at para. 51 she said: *"a case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of*

some tangible and concrete dispute then existing." The respondent argued that the matter of controversy in these proceedings has been resolved beyond doubt by the 2022 Act and that the matter is not one of systematic relevance.

Issue 2

20. The DPP and the Attorney General submitted that the trial judge was not entitled to make a finding that Order 6, rule 1 of the District Court Rules was *ultra vires* the District Court Rules Committee, and that judicial review was more appropriate. Both the State parties rely on *DPP v Dougan* [1996] 1 I.R. 544, where Geoghegan J. stated at page 549:

> *"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 a Case Stated and the former Supreme Court of Justice has made this absolutely clear in Foyle Fisheries Commission -v- Gallen cited above."*

The DPP and the Attorney General emphasised that the text of s. 52 of the 1961 Act makes provision for a District Court Judge, in the course of proceedings, to refer any question of law "arising in such proceedings" to the High Court. Both parties submitted that the *vires* of the District Court Rules could never arise in the course of proceedings in the District Court as it does not have the jurisdiction to consider that question. It was submitted that a similar limitation arises on the jurisdiction of the District Court under Article 34.3.2° of the Constitution.

21. The respondent argued that the State's approach limits the full and unlimited jurisdiction of the High Court by reference to a statutory provision (section 52) that regulates the District Court. It was argued that judicial review would not be a more appropriate legal route for the determination of these issues by the High Court, as it would be unclear when the time under Order 84 of the Rules of the Superior Courts would begin to run, and what kind of relief should be sought. The Attorney General argued that these issues are not insurmountable or difficult to overcome from the respondent's point of view.

22. The State parties submitted that the reliance placed by the trial judge on *Thompson v Curry* [1970] I.R. 61 is misplaced as it concerned a separate statutory regime under s. 2 of the Summary Jurisdiction Act 1857 ("the 1857 Act"), which specifically provided for the making of orders by way of an appeal by case stated that were wider than the answer to the question posed. The DPP pointed to other statutory regimes which expressly allow the High Court to make any order that it thinks fit. It is submitted that if section 52 of the 1961 Act provided for such a regime, it would have been open to the trial judge to make a finding of *ultra vires*, but section 52 of the 1961 Act does not contain such a provision.

Issue 3

23. The State parties both submitted that the trial judge erred in concluding that s. 8(2) of the 2005 Act is the enabling Act for assessing the *vires* of the District Court Rules. Both parties submit that the enabling provision is s. 91 of the 1924 Act, relying on *State (O'Flaherty) v O Floinn* [1954] I.R. 295 and *DPP v District Judge McGrath* [2021] I.L.R.M. 345. Further, they argued as a matter of chronology, the 2005 Act could not be the enabling Act for the purposes of Rules that were drafted in 1997, and therefore, Order 6 Rule 1 cannot be considered an impermissible

"amendment/modification" of the 2005 Act as it predates that Act. The DPP argued that even if the court presenter system is outside of the literal terms of s. 8(2), it does not conflict with any existing laws, and Order 6 is capable of being legally justified as a 'regulation' of practice and procedure within the meaning of s. 91 of the 1924 Act.

24. The respondent submitted that the trial judge was correct in concluding that the 2005 Act was the enabling legislation for the 1997 Rules, as it altered the status of guards acting as common informers in the prosecution of summary offences in Ireland. Therefore, a right of audience for members of An Garda Síochána could only have been provided for in accordance with section 8 of the 2005 Act.

Issues 4, 7 and 8

25. In their written submission, the DPP dealt with issues 4, 7, and 8 together, and the Attorney General dealt with issues 4 and 8 together. It is proposed here to deal with the submissions of all of the parties in relation to these three issues here. All three of these issues relate to the historical position of the right of audience of members of an Garda Síochána.

26. The DPP and the Attorney General both submitted that s. 9 of the 1851 Act was not relevant to this case, and submitted that it concerned access to courtrooms, and should not be read as an exhaustive list of who was empowered to address the court, as was urged by the respondent.

27. The State parties also submitted that the 1851 Act applied only to courts outside of the Dublin Metropolitan Districtprior to 1924. That system was later replaced with the modern courts system under the 1924 Act. The state parties submitted, given this historical statutory context, it was unclear whether s. 9 of the 1851 Act applied to the District Court as constituted under the 1924 Act. Therefore, it could not be said that

Order 6 Rule 1 amended or modified s. 9(1) of the 1851 Act, and it does not relate to a right of audience at all.

28. The DPP submitted that before the District Court Rules of 1948, there was no identifiable measure addressing the right of audience of police officers or gardaí, and the court was empowered to regulate it. To this end, the DPP relies on the commentary of this Court in *DPP v Roddy* [1977] I.R. 177 where at page 183 it was stated:

> *"In Ireland however the role of the policeman as prosecutor and even as quasi-advocate had been firmly established nearly two decades earlier when the following circular dated August 29th 1870 was issued to justices in Ireland:-*
>
> > *'A question having arisen respecting the right of a member of the Royal Irish Constabulary Force, without professional assistance, to conduct cases before magistrates and to examine and cross-examine the witnesses, I am directed by the Lords-Justices to Inform you that the law officers of the Crown are of opinion that in cases of summary proceedings the constabulary have such right when they are themselves the complainants, but not otherwise; but that in cases of proceedings for indictable offences, whether they are the complainants or informants or not, they not only have the right, but it is their duty, as representing the Crown, to conduct the case and to examine and cross-examine the witnesses without the intervention or assistance of any professional man.'"*

It was said that the mention of the 1870 Circular suggested that the right of audience of a constable was something that the court had the power to regulate rather than a matter that required statutory underpinning. Therefore, the DPP submitted that the 1948 and 1997 District Court Rules were within the rule-making power of the District Court Rules Committee and provided the legal basis for a general right of audience for members of An Garda Síochána.

29. The Attorney General took the view that since 1924 gardaí have been empowered to bring prosecutions in their own name, or in the name of the DPP (or prior to the establishment of the Office of the DPP, the Attorney General).

30. The respondent submitted that prior to the enactment of s. 8(2) of the 2005 Act, gardaí had a right to prosecute summarily as complainants or common informers, but not otherwise, and relied on *R (Lawlor) v. Dunsterville and King's Co. JJ* (1907) 1 I.LT.R. 77. The respondent took the position that non-prosecuting gardaí did not have a right of audience prior to the amendment of the 2005 Act in 2022, and therefore the introduction of the right of audience in the 1948 Rules and repeated in the 1997 Rules was impermissible.

31. It was the respondent's case that Order 6 Rule 1 was an impermissible modification/amendment to s. 9(1) of the 1851 Act. The respondent argued that s. 9 of the 1924 Act did not permit the amendment of a statutory provision by the District Court Rules Committee, but only the adaptation or modification of a statute. The respondent cited the judgment of O'Donnell J. (as he then was) in *DPP v District Judge Elizabeth McGrath* [2021] 2 I.L.R.M. 345**,** where he observed that the adaptation or modification of a statute might be necessary *"to ensure that the effective reception of the existing body of law into the law of Saorstát Éireann was not hampered or possibly prevented by the fact that it contained references or provisions to bodies, institutions, and procedures which no longer existed or, perhaps, no longer operated in the same way under the new system".* The respondent submitted that the adaptation or modification would only occur where it was "reasonably necessary" according to the text of s. 91 of the 1924 Act. In that context, the respondent suggested that it was impossible to conceive of how the creation of a previously non-existent right of audience to members of An Garda Síochána

constituted a reasonably necessary adaptation to s. 9(1) of the 1851 Act into the twentieth-century legal order.

Issue 5

32. The State parties urged this Court to depart from Bolger J.'s interpretation of s. 8(2) of the 2005 Act so that a guard cannot conduct proceedings unless they have also instituted them. The State parties submitted that in interpreting the section, the courts must presume that the Oireachtas was aware of the provision made for the right of audience of non-prosecuting guards in Order 6 Rule 1 and judicial criticism of the common informer regime in cases such as *DPP v Roddy* [1977] I.R. 177. Against that backdrop, it was submitted that it was unlikely that the Oireachtas intended to radically amend the position of the court presenter, and that if this was the intention of the Oireachtas, that s. 8(2) is an oblique way of achieving this. The DPP submitted that there are surrounding circumstances that provided an alternative reading of s. 8(2), and to this end, she cited s. 6 of the Criminal Justice (Miscellaneous Provisions) Act 1997 ("the 1997 Act"), which provides for a certificate of arrest to be tendered in evidence by a member not below the rank of sergeant. This provision was described in *DPP (Ivers) v Murphy* [1999] 1 I.R. 98 as obviating *"the necessity of the arresting guard being in court."* It was submitted that it can be deduced from a provision such as s. 6 that the Oireachtas has a general intention to relieve gardaí from unnecessary court appearances, and viewed in this context, it would be strange for provision to be made in the 2005 Act to the contrary position.

33. The respondent argued that the text of s. 8(2) is clear and unambiguous and clearly does not provide for a right of audience for a non-prosecuting guard. The respondent disagreed with the DPP and her reliance on the 1997 Act, noting that s. 6 is a statutory exception to the rule against hearsay and provides no assistance for

interpreting s. 8(2). In fact, the respondent argued that this provision supports the case made by him, as the 1997 Act does not permit one guard to give evidence of arrest, charge, and caution on behalf of another, but rather, submit a certificate as to the truth of its contents.

Issue 6

34. The State parties argued that the regulation of the right of audience of members of An Garda Síochána is a matter of practice and procedure within the meaning of s. 91 of the 1924 Act. While the respondent takes the position that the statutory regulation of rights of audience in the District Court can be traced back to s. 9 of the 1851 Act, the State parties disagreed. The DPP and the Attorney General suggested that if this Court does not have a clear and reliable view as to the state of the common law and the prevailing practice as it existed in 1924, then the same approach as that taken in *DPP v District Judge McGrath* [2021] 2 I.L.R.M. 345 would be most appropriate, and the matter should be resolved by reference to the question of whether the measure has the characteristics of legislation, or whether it could more properly be considered to display characteristics of a regulation which concerns "the manner in which litigation was conducted." On this point, the State parties argued that giving a right of audience to gardaí is not a broad-ranging policy decision that lies within the function of the Oireachtas under Article 15.1.2°. The respondent argued that the effect of Order 6 is to create a new class of unregulated advocate, however, the DPP argued that this is expressly permitted by s. 8 of the 2005 Act already and that Order 6 simply extended this right further. Further, the DPP submitted that Order 6 permits people who work within the same statutory body to conduct cases on behalf of that statutory body. Finally, the DPP submitted that a court presenter cannot act in litigation generally and can only appear within the parameters that they are

empowered to do so. The respondent argued that "practice and procedure" within s. 91 could not encompass the creation of a right of audience for members of An Garda Síochána where none had existed previously. It follows that the 1948 and 1997 Rules of the District Court granting such an audience are impermissible amendments/modifications. It was only in the 2005 Act that the possibility members of An Garda Siochana could prosecute their own cases was put on statutory footing. Relying on the decision of O'Donnell J. in *DPP v. District Judge McGrath* [2021] 2 I.L.R.M 345, where this Court recognised that a Rules Committee could regulate matters within their permitted delegation of power, the respondent argued that the introduction of a right of audience for members of An Garda Síochána generally could not be said to fall within the "principles and policies" or rule-making power contained in s. 9(1) of the 1851 Act or the 2005 Act and would tend to interfere with the administration of justice. The Attorney General submitted that the trial judge did not explain why she concluded that the grant of a right of audience was closer to the "administration of justice" than to "practice and procedure". The Attorney General observed that the administration of justice usually involves the adjudication of a dispute through the exercise of judicial power. It was submitted that the grant of a right of audience does not engage any of the traditional characteristics of the administration of justice.

Consultative Case Stated

35. Before embarking on a consideration of the principal issues in this case, I want to make some preliminary observations about the nature of a consultative case stated. Section 52 of the 1961 Act provides for the making of a consultative case stated when the opinion of the High Court is sought relating to any question of law arising in

proceedings (other than those arising in indictable proceedings not being dealt with summarily).

36. The Rules of the District Court in relation to cases stated are to be found in Order 102 of the District Court Rules, as amended. Order 102, Rule 12, now provides as follows:

> *"Where a Judge grants an application pursuant to section 2 of the Act of 1857 or a request pursuant to section 52 of the Act of 1961, or decides pursuant to the said section 52 to refer, without request, a question of law to the High Court for determination, such Judge shall prepare and sign the case stated … To secure agreement between the parties as to the facts the Judge may, if he or she thinks fit … submit a draft of the case to or receive a draft from such parties. In the event of a dispute between the parties as to the facts, such facts shall be found by the Judge."*

37. As can be seen, the District Judge provides the parties with a draft of the case stated to enable them to agree the facts set out in the draft case stated. In the event that there is disagreement, the facts are to be found by the judge. There is no suggestion that the parties herein were not in a position to furnish submissions on the facts set out in the consultative case stated. Indeed the parties accepted the fact that they had had the opportunity to review the facts before they were finalised by the District Court Judge. Notwithstanding this, it appears that in the course of submissions to the High Court a submission was made on behalf of the DPP to the effect that Sergeant Riley did not seek to present the case on the relevant date "*but sought a remand to another date which application was objected to by the defence who sought to have the matter struck out*". It was accepted on behalf of the DPP that the prosecuting garda would have to attend in person to give evidence. A similar contention as to the facts appears to have been made on behalf of the Attorney General.

38. It is unfortunate that, prior to the finalisation of the consultative case stated by the District Judge, the DPP did not seek to amend or add to or alter the findings of fact, if it was to be contended that certain other facts not mentioned in the consultative case stated were of relevance. In the course of the hearing before her, the trial judge observed at para. 7 of the judgment as follows:

> *"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."*

39. The importance of finding the facts for the purpose of determining a consultative case stated was described in the case of *DPP (Travers) v. Brennan* [1998] 4 I.R. 67. In that case, a consultative case stated was submitted by the District Judge who had not heard the evidence and had not found the facts relevant to the point of law which had arisen. The Supreme Court (Lynch J.) said, at page 70, as follows:

> *"The proper procedure leading to the stating of a consultative case for the opinion of the Superior Courts is for the District Judge to hear all the evidence relevant to the point of law arising, to find the facts relevant to such point of law in the light of such evidence, then to state the case posing the questions appropriate to elucidate the point of law and finally, on receiving the answers*

to those questions to decide the matter before him on the basis of those answers."

40. It goes without saying that for the purpose of any consultative case stated that the findings of fact set out therein are of crucial importance to the High Court in giving its opinion on the issue of law raised. It follows, therefore, that if either of the parties have an issue about the facts set out in the consultative case stated this should be dealt with before the draft case stated is finalised. Matters of fact raised subsequently, by way of submissions or otherwise, simply cannot be taken into account as they are not part of the findings of fact determined by the District Judge relevant to the point of law raised in the consultative case stated.

41. Having said that two observations can be made. The first observation is that it is clearly the case, as was accepted by the DPP, that Sergeant Riley could not give evidence to the District Court as to the circumstances of the case. Only the prosecuting garda could have given the necessary evidence, as anything else would have been hearsay. The second point to make is that, as it has already been pointed out, the parties had an opportunity to invite the District Court Judge to amend the draft consultative case stated if it contained a finding of fact that was contended to be wrong, or alternatively, if some fact which was material to the issue had been omitted. This was not done, and therefore the observations of the trial judge at para. 7 of her judgment set out above seem to me to be correct.

42. A second issue will arise later on as to the scope of a consultative case stated, and whether it is open to the High Court, on a consultative case stated, to consider an argument as to whether there is jurisdiction in such a hearing to find that a rule of the District Court is *ultra vires* or not. I will return to this issue subsequently in the course of this judgment.

Mootness

43. In circumstances where the provisions of s. 8(2) of the Act of 2005 were amended by the 2022 Act, on the day following the delivery of the judgment of the High Court, it is contended on behalf of the respondent that the proceedings are moot, while the DPP contends that the proceedings are not moot but, even if they were, that the proceedings should be heard as an exception to the mootness doctrine. In that context, reference has been made in the submissions to the decision in the case of *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274, and in particular the judgment of Denham C.J., who set out a number of considerations that should be taken into account when deciding whether or not to hear an appeal that has been rendered moot. She noted in particular that the Court would not "*offer purely advisory opinions or opinions based on hypothetical or abstract questions*". She added that that rule was not absolute and that there was a discretion to hear and determine a point even if otherwise moot. She described a two-step analysis in that regard, and added as follows:

> *"in conducting this exercise, the court will be mindful that in the first instance it is involved in potentially disapplying the general practice of supporting the rule, and therefore should only do so reluctantly, even where there is an important point of law involved. It will be guided in this regard by both the rationale for the rule and by the overriding requirements of justice."*

44. She then went on to set out a number of matters which would influence a decision to hear a case, notwithstanding that it would appear to be moot. The appellant has argued strongly that the appeal is not moot, but that, even were it to be considered to be moot, there is a wider significance to the decision of the High Court, such that it would be appropriate to hear the appeal, and in that regard cited, *inter alia*, *Condon v. The Minister for Labour & Anor* [1981] I.R. 62, and *O'Brien v.*

Personal Injuries Assessment Board [2007] 1 I.R. 328, while the Attorney General in his submissions referred to the decision of this Court in *Irwin v. Deasy* [2010] IESC 35, where it was stated by Murray C.J. in his judgment as follows:

> *"The general practice of this Court is to decline, in principle, to decide moot cases. In exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance, the Court may in the interests of the due and proper administration of justice determine such a question."*

45. It seems to me, that the issues raised in this case go beyond the simple and straightforward question as to the rights of audience of members of the gardaí before the District Court, as issues such as the *vires* of the Rules Making Committee, and questions as to whether or not the granting of a right of audience is a matter of "*practice and procedure*", within the meaning of s. 91 of the 1924 Act, are of systemic relevance and importance and require to be determined, not to mention the role of the High Court in relation to a consultative case stated. Therefore, on that basis, I would reject the argument that the appeal , in this case, is moot.

46. It would be remiss of me not to mention the recent decision of this Court in the case of *Odum & Ors. v. The Minister for Justice & Equality* [2023] IESC 3 which was delivered subsequent to the hearing of this appeal. At para. 43 *et seq.*, O'Donnell C.J. commented as follows:

> *"However, in this case, it is an important, and indeed, decisive consideration in my view, that leave to appeal to this Court has been granted, and an appeal is ready for hearing. This has a number of consequences. First, and most importantly, it means that there has been a determination that the decision appealed against involves an issue of law of general public importance. Indeed, as discussed above, it can be said that the function of this Court since 2014 has been to hear and determine such cases. The purpose of an appeal is to clarify and settle the law for all such cases raising or having the potential to raise the*

same or similar points. If, however, the appeal is treated as moot, and dismissed, then these objectives will not be achieved. The law will remain unsettled, and in a state of uncertainty. That uncertainty will remain at least until a further case is brought and makes its way through the appellate process and is finally determined by this Court. In the meantime, the decision-making process in respect of applications for permissions to remain in this country which have the potential to engage with family rights will be conducted under a cloud of uncertainty. A decision in the High Court cannot resolve that uncertainty. Instead of performing its function as the court having full and original jurisdiction to administer justice, a decision in the High Court would be merely a vehicle to bring the legal issue back to the point at which it stands now, awaiting the hearing of the appeal and decision of this Court. By that point however, in addition to the wasted resources expended on this case, there might either be a proliferation of decisions in the High Court or cases raising the point would have to be kept in a holding pattern awaiting the final resolution of the issue.

44. It is apparent that this is an undesirable scenario. ... Finally, there is no sense in which it could be said the determination of this case would amount to or have the flavour of an advisory opinion or still less an impermissible expansion of the proper function of courts in the separation of powers. ..."

47. I appreciate that, given that the above judgment was delivered after the hearing in this case, the parties have not had an opportunity to consider its implications. It is, however, an important clarification on the issue of mootness in the light of the function of this Court since the changes brought about by the 2013 Referendum on the creation of the Court of Appeal and the new jurisdiction of this Court. However, as I have already concluded that, in my view, even if one was to consider this to be a moot case, that a hearing is nonetheless appropriate, given that it has implications for other rights of audience conferred by the relevant rule of the District Court, and, perhaps more importantly, it has importance in relation to the rules-making authority

for the District Court. While the decision in *Odum* reinforces my views, I would have taken the same course in any event.

Garda Rights of Audience prior to the Act of 2005

48. The judgment of the High Court referred to the judgment in the case of *DPP v. Roddy* [1977] I.R. 177. That case followed the introduction of the Prosecution of Offences Act 1974, which created the office of the Director of Public Prosecutions. An issue arose in those proceedings as to the title of certain prosecutions, and a consultative case stated was submitted to the High Court for its opinion. That case does not deal directly with the question that arises in these proceedings, but it is of assistance in considering the history of the role of the police as prosecutors. As the trial judge herein pointed out, O'Higgins C.J., in his dissenting judgment at page 14, said as follows:

> *"At common law any person who could give information with regard to a breach of the law had the right to prosecute in respect of that breach. Because it was any person with information who had the right, such person became known as a common informer. This rule of the common law extended to statutory offences unless the statute creating the offence negatived or limited the right. The right was a general one and applied to all prosecutions where the offence charged was one against the public in general. …*
>
> *With the development of the summary jurisdiction in magistrates courts throughout the country it became the practice for members of the former Constabulary to prosecute in their own names as complainants for breaches of the law. This they were enabled to do not because they were police officers but because they were members of the public and acted as common informers: See R (Lawlor) v. Dunsterville and King's Co. JJ 1 I.L.T.R. 77. Prosecutions were thus conducted by police officers not only in relation to summary offences but also in relation to indictable offences.*

Indeed so widespread was the practice of police officers engaging in a wide range of prosecutions both in England and in Ireland that the problem arose of such officers acting not only as complainants and witnesses but even as advocates."

49. O'Higgins C.J. then went on to quote from a number of English judgments which expressed concern in relation to that practice going back to the end of the nineteenth century. O'Higgins C.J. continued, at page 183:

"In Ireland, however, the role of the policeman as prosecutor and even as quasi-advocate had been firmly established nearly two decades earlier when the following circular (dated 29th August, 1870) was issued to Justices in Ireland:-

> *"A question having arisen respecting the right of a member of the Royal Irish Constabulory* (sic.) *Force, without professional assistance, to conduct cases before magistrates and to examine and cross-examine the witnesses, I am directed by the Lords-Justices to Inform you that the law officers of the Crown are of opinion that in cases of summary proceedings the constabulary have such right when they are themselves the complainants, but not otherwise; but that in cases of proceedings for indictable offences, whether they are the complainants or informants or not, they not only have the right, but it is their duty, as representing the Crown, to conduct the case and to examine and cross-examine the witnesses without the intervention or assistance of any professional man."*

50. O'Higgins C.J. then went on:

"This then was the general picture of how prosecutions were conducted in courts of summary jurisdiction in Ireland in the days before the establishment of the State. All minor offences and many indictable offences were in fact prosecuted by individual members of the Constabulary in accordance with their duties as police officers and acting as common informers. In all of this the Attorney General, as such, played little or no part. He was one of the law officers of the Crown and had general duties to discharge in safeguarding the

public interest in so far as this was involved in legal matters, and in seeking the assistance of the courts to enforce the law in the general interest of the public."

51. O'Higgins C.J. then went on to consider the position that pertained following the establishment of the Irish Free State. Following the establishment of the Free State the provisions of s. 6 of the Ministers and Secretaries Act 1924 vested the various functions of former law officers in the Attorney General for Saorstát Eireann. He was also given responsibility for the enforcement of law and the punishment of offenders. Subsequently, s. 9 of the Criminal Justice (Administration) Act 1924 provided as follows:-

"(1) All criminal charges prosecuted upon indictment in any court shall be prosecuted at the suit of the Attorney-General of Saorstát Eireann.

(2) Save where a criminal prosecution in a court of summary jurisdiction is prosecuted by a Minister, Department of State, or person (official or unofficial) authorised in that behalf by the law for the time being in force, all prosecutions in any court of summary jurisdiction shall be prosecuted at the suit of the Attorney-General of Saorstát Eireann."

52. As was noted by O'Higgins C.J. in his judgment, the provisions of s. 9 of the Criminal Justice (Administration) Act 1924 were held not to affect the existing right of the common informer to prosecute in the new courts, as had been the case previously, subject only to the express provision laid down in s. 9, sub-section 1, of that Act. As he pointed out:

"In fact prosecutions for summary offences continued to be brought by members of the Garda Síochána in precisely the same way as they had formerly been brought by members of the former Constabulary. ... That this should have been so is not surprising in view of the wording of s. 9(2) of the Act of 1924. While this sub-section gives the Attorney General the right to prosecute in courts of summary jurisdiction, it is a restricted right which cannot be exercised where a

prosecution is brought by a Minister, Department of State or other authorised person (official or unofficial) - these words in brackets have been held in Wedick's Case [1935] I.R. 820 to include the common informer. In other words, under the sub-section the Attorney General, in relation to a court of summary jurisdiction, is the prosecutor of last resort and may only prosecute in those cases which otherwise would not be prosecuted."

53. As O'Higgins C.J. pointed out, the provisions of the Constitution of Ireland 1937, relating to the role of the Attorney General, did not alter or add to the provisions of s. 9 of the Criminal Justice (Administration) Act 1924. O'Higgins C.J. concluded, as to s. 9, sub-section 2, as follows:

"What it did was to ensure that the Attorney General had the clear right to prosecute in the District Court when no one else did so. This covered both the situation in which there was a failure, or default, to prosecute by others and the situation in which the Attorney General, by instructing the guards not to prosecute, was enabled to take over the prosecution of a particular case himself. Such prosecutions were then, in accordance with the sub-section, "at the suit of the Attorney General" and required his active participation or that of his officers. It could be said, therefore, that s. 9, sub-s. 2, of the Act of 1924 gave the Attorney General, as the prosecutor of last resort in summary courts, both a role which was passive when he took no step to interfere with what the Gardai were doing and a role which was active when he stepped in to mount a prosecution at his own suit."

54. I have referred at length to that outline of the background to the role of gardai prosecuting as common informers because it illuminates to some extent the position that has pertained in practice going back as far as the latter decades of the nineteenth century.

55. In the course of her judgment, the trial judge also referred to the judgment of Griffin J., which was the judgment of the majority in *Roddy*. He commented at p. 190 as follows:

"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."*(Emphasis in original)

56. The trial judge observed as follows, at para. 27 of her judgment:

"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."

57. The trial judge then went on to refer to another passage from the judgment of Griffin J. where he said:

"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."

58. As the trial judge observed, that recommendation was ultimately acted upon by the legislature in its enactment of s. 8 of the 2005 Act.

59. Before leaving this part of the discussion, I should refer for completeness to a comment from O'Connor, *The Irish Justice of the Peace: A treatise on the Powers and Duties of Justices of the Peace in Ireland* (Ponsonby, Dublin, 1914) which had some observations on "police advocacy". Having referred to the English authorities referred to by O'Higgins C. J. in *Roddy* and having referred to the Circular of 1870 referred to above, O'Connor commented at p. 164 as follows:

> *"It is, however, submitted that a police officer has no right to interfere as advocate in cases in which he is not a party; and that this rule applies to indictable as well as to summary cases; and further, where one officer is the complainant, no other police officer has the right to act as advocate on behalf of such complainant. If it is deemed desirable that the district inspector should conduct the case, there is nothing whatever to prevent the prosecution being brought in his name, whether he is, or is not, a witness to the acts charged."*

It should be noted that no authority is given for this proposition. It appears to have been influenced by the judgments in the English cases referred to by O'Higgins C. J. in *Roddy*.

60. Before the Act of 2005 became law, the Public Prosecution System Study Group ("PPSSG") was appointed by the Government under the auspices of the Office of the Attorney General to review, *inter alia*, the legal and organisational arrangements for the public prosecution system, and in particular to consider whether there was a continuing role for gardaí to prosecute, as well as to investigate crime, and whether all prosecutions should be conducted by lawyers. Its report was a comprehensive examination of the prosecution system then operating in the State. Insofar as the role of the gardaí was concerned, it had a number of observations to make. It noted at para. 2.2.6 as follows:

> *"The gardaí prosecute the great majority of summary offences and indictable offences tried summarily without reference to the DPP's Office, but in the name of the DPP. In total, about 500,000 cases are dealt with each year in the District Courts."*

61. At para. 2.2.7 it was stated:

> *"It is important to recognise the supervisory role played by the more senior ranks in the force. Thus, in very minor cases, the garda prosecutes without seeking higher authority, although normally the sergeant in charge will have*

looked at the case and allotted a garda to prosecute it. Where civilian witnesses have been involved, in the provinces the superintendent (or in his absence the inspector acting for him) would take the decision to prosecute. In Dublin, that role is played by the inspector or a sergeant acting for him. In more serious cases, the decision of the DPP is sought."

62. Also of significance is the following paragraph where the following is set out:

"2.2.8 While the vast majority of summary cases – consisting of such minor offences as simple traffic infringements – are presented both in Dublin and in the country by the detecting member of the Garda Síochána, an extensive range of summary cases outside the Dublin Metropolitan Area are presented almost exclusively by garda superintendents or inspectors. In the Dublin area, some 70 to 80 per cent of cases are prosecuted by the arresting officer, usually of garda or sergeant rank. The remainder of those cases are presented by solicitors from the Chief State Solicitor's Office, either because the gardaí have specifically requested this or because the file has been referred to the DPP for directions."

2.2.9 The Steering Group on the Efficiency and Effectiveness of the Garda Síochána (June 1997) recommended that a system be introduced under which evidence of charge and caution could be presented in court by an officer of the Garda Síochána of rank not lower than sergeant, partly to reduce the time spent in court by gardaí. This procedure obviates the necessity for the arresting officer to appear in court in person to give that evidence and, where an accused pleads guilty to a minor charge, to give the facts of the case. It is being implemented on a phased basis under the 'court presenter' system introduced under Section 6 of the Criminal Justice (Miscellaneous Provisions) Act, 1997. The system has been introduced in seven District Courts in the Dublin Metropolitan Area and all District Courts outside that area. It has increased policing effectiveness and reduced the number and cost of gardaí in courts."

63. As was noted by the report, the Steering Group recommended that the government should clearly define the roles of the Garda Síochána and suggested an encapsulation of those roles, which included the following duties: "to detect and investigate crime" and "to prosecute offenders". According to the PPSSG, that

statement of the role of the gardaí was accepted by the government as recently as 1997.

64. Later on, having considered the position in other jurisdictions, the study group made the following observation at para. 4.5.4:

> *"The use of members of the Garda Síochána as prosecutors has benefits for the operation and management of the force. Gardaí who have to present the prosecution case in open court and face the rigour of court procedures and judicial supervision and criticism are likely to be diligent in assembling and assessing evidence. In cases where a senior garda officer prosecutes, the normal managerial supervision of performance is strengthened when the manager, in his or her role as prosecutor, has to be comprehensively briefed by the investigating garda. The beneficial effect of the present system on garda operations, discipline and administration would be difficult to overemphasise. ..."*

65. In their conclusions, the PPSSG went on to recommend that the present arrangement under which gardaí prosecute the vast majority of summary offences in the District Court be continued.

66. It should be noted that the PPSSG in its report referred to the basis upon which gardai prosecute, and referred to the fact that they had the right to prosecute in their own name as common informers, and reference was also made to the case of *DPP v. Roddy* [1977] I.R. 177, referred to above. Further reference was made to the then applicable rules of the District Court, namely, Order 6, Rule 1(e) of the 1997 District Court Rules, which provided:

> *"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."

67. It is of interest to note that there was, at the time of the PPSSG's considerations, a recognition of the widespread use of the court presenter, sometimes the local superintendent or inspector, and in the Dublin Metropolitan area, a sergeant. The PPSSG was conscious of the large number of cases dealt with by the gardaí (some 500,000 per annum at that time) and noted that a change to the prevailing system would have placed huge pressures on the offices of other bodies within the State charged with the function of prosecuting, including the Chief State Solicitor's Office through the State Solicitors System, and the Office of the DPP. All of this emphasises that, as of the time when the PPSSG presented its report, there was in existence a system of prosecution by the gardaí of the vast majority of summary offences, and the system relied on court presenters to enable the system to work as efficiently as it did.

68. At this point, it would be useful to look at some of the statutory provisions that may have a bearing on the issues in this case. First of all, I think it would be helpful to look once more at the provisions of s. 9(1) of the 1851 Act, which have been set out above. It is a part of the respondent's case that this section provided for a right of audience in court, whereas the State parties contend that it regulated access to court by members of the public. In this context, it will be recalled that s. 9(1) commences by saying:

"The right of the public to have access to the place in which justices shall sit shall be subject to the following provisions:

…"

69. Thus, on the face of it, it would appear that it does indeed regulate rights of access. However, as pointed out by the respondent, it goes on then to say that included

amongst those who have a right of access to the court are the parties in any particular proceedings who are allowed to attend to "*conduct or make their full answer and defence to any complaint or information*", and it adds "*to have the witnesses examined and cross-examined, by themselves or by counsel or attorney on their behalf …".* Thus, it is contended on behalf of the respondent that the provision limited the rights of audience to the parties themselves, or their counsel or attorney. The trial judge in this context agreed with the submission of the respondent on this point and was of the view that rights of audience were expressly provided for by s. 9(1) of the 1851 Act in summary proceedings. She was of the view that there was "*a clear legal basis for affording rights of audience before the District Court to limited categories of persons*" (see para. 39 of the High Court judgment). It seems to me that, looking at s. 9(1) of the 1851 Act, it is very much more about controlling access to the court as opposed to conferring rights of audience on specific persons. This is made clear, if there was any doubt about it, by the provisions of s. 9(2), which deal with indictable offences, and which provides that:

> *"In all cases of proceedings for indictable offences the place in which any justice or justices shall sit to take any examination or statement relating to any such offence shall not be deemed an open court for that purpose; but it shall be lawful for such justice or justices, in his or their discretion, to order that no person (the counsel or attorney of any person then being in such court as a prisoner only excepted) shall have access to or be or remain in such place without the consent or permission of such justice or justices, if it appear to him or them that the ends of justice will be thereby best answered."*

70. Thus, one can see that the provisions of s. 9 of the 1851 Act were very much focused on who could be present in court and the right of members of the public to be present, and the power of the justice or justices to limit those who would otherwise be permitted to be in court. In both s. 9(1) and (2) reference is made to what is

described as "*open court*", and thus, in the case of summary proceedings, the court is deemed to be an open court, and in the case of indictable offences the court is not deemed to be an open court. While the description of a court as an "*open court*" may seem somewhat unusual to us now, It seems to me that what the provision was regulating was access to court as opposed to providing for rights of audience.

71. The trial judge proceeded to consider some of the case law and other statutory provisions in which the issue as to rights of audience generally have arisen. Thus, reference was made to the decision of this Court in *Coffey v. Environmental Protection Agency* [2014] 2 I.R. 125, a case which concerned the issue of rights of audience of "McKenzie friends". Fennelly J., in the course of his judgment in that case, said at para. 38 of his judgment, on page 138, 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, The present case comes nowhere near justifying considering the making of an exception. Mr. Podger seeks nothing less than the general right to appear on behalf of a group of thirteen litigants and to plead their cases to precisely the same extent as if he were a solicitor or counsel, which he accepts that he is not, but without being subject to any of the limitations which would apply to professional persons".*

72. An earlier passage from the judgment of Fennelly J. in that case explains the nature of a McKenzie friend, and it is of some interest. He said:

> *"The notion of a McKenzie friend originates in the decision of the Court of Appeal in England in McKenzie v. McKenzie [1970] 3 W.L.R. 412. Davies L.J. recalled the following statement of Lord Tenterden C.J. in Collier v. Hicks (1831) 2 B & Ad 663, at page 669:*
>
> > *"Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and*

give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices."

73. While that reference is to the role of a so-called "*McKenzie friend*" acting as an advocate, what is interesting to note is the latter part of the sentence, to the effect that no one can take part in the proceedings "*contrary to the regulations of the court as settled by the discretion of the justices*". That statement is important, and I will come back to it again.

74. The trial judge came to the conclusion that the case of *Coffey* was authority for the proposition that rights of audience conferred on persons, including members of An Garda Síochána, was "*not an element of the court practice and procedures. It is more significant and is akin to the administration of justice".* In particular, she relied on paras. 30 and 31 of the judgment of Fennelly J. in that case, where it was said as follows:

"It would be inimical to the integrity of the justice system to open to unqualified persons the same rights of audience and representation as are conferred by the law on duly qualified barristers and solicitors. Every member of each of those professions undergoes an extended and rigorous period of legal and professional training and sits demanding examinations in the law and legal practice and procedure, including ethical standards. Barristers and solicitors are respectively subject in their practice to, and bound by, extensive and detailed codes of professional conduct. Each profession has established a complete and active system of profession discipline. Members of the professions are liable to potentially severe penalties if they transgress.

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."

75. There are a couple of observations to make at this stage. I think it is fair to say that the role of a garda prosecuting a summary offence is significantly different, in my view, to the person who purports to represent a litigant before the courts as a McKenzie friend. The report of the PPSSG to which reference has already been made describes in detail the training and the professionalism of the gardaí in prosecuting summary offences. It is clear that, in carrying out the prosecuting function, the garda concerned is subject to the supervision of more senior officers, and I think that the position of a member of An Garda Síochána prosecuting a summary offence is far removed from the person who purports to act as an advocate or a McKenzie friend for a lay litigant. Thus, the concerns expressed by Fennelly J., valid and important as they are in the context of a McKenzie friend appearing as an advocate for a lay litigant, do not appear to be easy to compare with the role of a member of An Garda Síochána prosecuting a summary offence or, indeed acting as a court presenter.

76. I now want to look in more detail at Order 6, Rule 1 of the District Court Rules. In considering the status of Order 6, Rule 1 of the District Court Rules, it is necessary to look at the history of the Rule, and also at the rule-making power that led to the Rule in its present form. The District Court was established by the 1924 Act, and it was provided therein (s.77) that the District Court would have all the powers, jurisdictions, and authorities which were vested in the justices or a justice of peace sitting at Petty Sessions. Section 90 of that Act set up the rule-making authority for the District Court. Section 91 of the 1924 Act then provided as follows:

"... In particular rules may 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 conditions which a party who requires a case stated or an appellant must comply with in civil cases or in criminal cases or in licensing cases as the case may be and ***the practice and procedure*** *of the District Court generally including questions of costs and the times for taking any step in the District Court, the entering-up of judgment and granting of summary judgment in appropriate cases and the use of the national language of Saorstát Eireann therein and the fixing and collection of fees and the adaptation or modification of any statute that may be necessary for any of the purposes aforesaid and all subsidiary matters."* (My emphasis)

77. It appears that prior to 1948 the then extant District Court Rules of 1926 provided, at Rule 6, under the heading "Open Court", as follows:

"In all cases of summary jurisdiction the place in which any Justice 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."

78. Rule 7 provided, under the heading "Right to Exclude Public", and continued as follows:

"In all cases of proceedings for indictable offences the place in which any Justice shall sit for the preliminary investigation of any such offence shall not be deemed an open Court, and such Justice may, in his discretion, order that no person save the person conducting the prosecution and the Counsel and Solicitor of the person charged shall have access to or be or remain in such place without the consent or permission of such Justice."

79. Sandes in *Criminal Practice, Procedure & Evidence in the Irish Free State* (1st ed., London, 1930), commented at page 29 as follows:

"The Petty Sessions (Ir.) Act, 1851, s.9, is in similar terms, and declares that the place of investigation of indictable offence is not to be deemed an open Court, and gives the Justice power to exclude the public therefrom. Apart from the provisions of any statute to the contrary, the general rule regarding the trial

of every offence, whether indictable or summary, is that the trial must take place in open court. It is one of the essential qualities of a court of justice that its proceedings shall be public …".

80. The point to note, however, is that, in relation to indictable offences, the Justice had the power to exclude the public from the court. Such a power did not appear to exist in relation to summary offences, but the point to bear in mind is that the Rule was focused on access of the public to court proceedings. The rule to a large extent mirrored the provisions of the 1851 Act.

81. It should be noted that the 1924 Act also provided, at s. 77, for the jurisdiction of the District Court, and for the transfer of certain other jurisdiction previously exercised under specific legislation (see s. 78).

82. A further transfer of jurisdiction took place by means of the 1961 Act. I mention this merely to set out the historical sequence of events in relation to the establishment of the District Court in the first instance, and the development of the Rules of that Court over the years.

83. Reference has already been made to the provisions of the Rules of the District Court in 1926, and in particular to Rule 6 and Rule 7 of those Rules. I should also refer to Rule 177 of those Rules which contained the following provision:

"The party to a suit or other proceeding in the District Court or any solicitor for such party or a barrister by or on behalf of such party, and instructed by his or her solicitor, and when the proceedings are in relation to Revenue any person employed authorised or directed by the Revenue Commissioners or the Revenue solicitor, may appear and address the court and conduct the case."

84. Thereafter it is of interest to consider the Rules of the District Court which were introduced in 1948. It contained the provision which is the nearest precursor of the one at issue in these proceedings. Rule 7 rovides as follows:

"Any party to any proceedings in the District Court or the solicitor for such party or a barrister retained by or on behalf of such party and instructed by his solicitor, or, in proceedings in respect of offences brought at the suit of the Attorney General or of an officer or member of the Garda Síochána, any officer or member of the Garda Síochána, or, when the proceedings are in relation to the taxes and duties under the care and management of the Revenue Commissioners, or to any fine penalty or forfeiture incurred in connection therewith or otherwise incurred under the Customs Acts, any person employed authorised or directed by the Revenue Commissioners or the Revenue Solicitor, may appear and address the court and conduct the proceedings. In summary proceedings the father, son, husband, wife or brother of the complainant or defendant may appear on his behalf, provided that any such person has the leave of the Justice to appear and be heard and that the Justice is satisfied that such complainant or defendant is from infirmity or other unavoidable cause unable to appear.

In proceedings brought in the name of a sanitary authority such authority may appear and be represented by an officer acting under its authorisation express or implied."

85. This was the first provision in which it was expressly stated that, in the case of proceedings brought at the suit of the Attorney General or of a member of the Garda Síochána that any "officer or member of the Garda Síochána" could appear and address the court and conduct the proceedings. It will be noted that others were also given leave to appear in certain proceedings. Thus, for example, staff authorised by the Revenue Commissioners could appear in relation to certain matters as was also provided for in the 1926 Rules. Equally, in the case of sanitary authorities, it was provided that the authority could be represented by an officer acting under its authorisation. Finally, it is relevant to note that provision was made for the representation of a party in summary proceedings where the party was unable to

proceed, permitting certain named persons to appear where the Justice was satisfied that the complainant or defendant was unable to appear as a result of infirmity or other unavoidable cause.

86. The next iteration of this provision is to be found in the 1997 version of the District Court Rules, in which Order 6 refers to right of audience. Again, it would be helpful to set it out in full:

> *"1. The following persons shall be entitled to appear and address the Court and conduct proceedings -*
>
> *(a) any party to the proceedings; or*
>
> *(b) a solicitor for such party; or*
>
> *(c) a counsel instructed by the solicitor for such party; or*
>
> *(d) where the proceedings are in relation to the taxes and duties under the care and management of the Revenue Commissioners, or in relation to any fine, penalty or forfeiture incurred in connection therewith or otherwise incurred under the Customs Acts, a duly authorised officer of the Revenue Commissioners or the Revenue solicitor; or*
>
> *(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.*
>
> *2. Save where otherwise provided by statute or by rules of court, the father, mother, son, daughter, husband, wife, brother or sister of any party may appear on behalf of that party provided that any such person has the leave of the Court to appear and be heard and that the Court is satisfied that the party is, from infirmity or other unavoidable cause, unable to appear."*

87. There are a couple of brief observations to make in relation to this version of the Rule. First of all, there is no longer any reference to an officer of a sanitary

authority being able to appear and represent a sanitary authority. Secondly, the 1997 District Court Rules reflect the fact that prosecutions are now brought at the suit of the Director of Public Prosecutions and there is no longer any role for the Attorney General in that regard. Finally, it might be noted that mothers and sisters may also appear on behalf of any party who is unable to appear, if given leave to do so by the District Judge, in addition to the persons previously mentioned who might be permitted to appear subject to leave of the Court.

88. At this stage, I think it is clear that, prior to the enactment of the 2005 Act, the right of the garda in his/her role as a common informer to prosecute, present and conduct a case before the District Court was well established and beyond any doubt. It is also clearly the case that a system was well-established whereby court presenters frequently appeared in court and prosecuted summary offences, as described by the PPSSG in the report referred to previously. That this practice was widespread is readily apparent from that report, particularly outside the Dublin Metropolitan area.

89. One other statutory provision should be referred to, as it has a bearing on this issue. Section 6 of the 1997 Act provided for certificates of evidence to be provided in relation to certain matters. Thus, s. 6(1) provides:

> *"6(1) Where a person, who has been arrested otherwise than under a warrant, first appears before the District Court charged with an offence, a certificate purporting to be signed by a member and stating that that member did, at a specified time and place, any one or more of the following namely -*
>
> *(a) arrested that person for a specified offence,*
>
> *(b) charged that person with a specified offence, or*
>
> *(c) cautioned that person upon his or her being arrested for, or charged with, a specified offence,*
>
> *shall be admissible as evidence of the matters stated in the certificate."*

90. Section 6(5) goes on to provide that:

> *"A certificate under this section shall be tendered in evidence by a member not below the rank of sergeant."*

91. I have already referred to the observations of the PPSSG on that particular provision above. For convenience, I have referred only to the provisions of s. 6(1) of the 1997 Act, but it is worth bearing in mind that it provides for a number of potential certificates to be relied on. What is of significance is the fact that any certificate can be tendered in evidence by another member of the gardaí. It seems to me to be implicit in the provisions of s.6(5) that the case before the District Court is being prosecuted by a member other than the garda originally involved. *Walsh on Criminal Procedure* (2nd ed., Round Hall, Dublin, 2016) makes the following comment, at para. 21-103:

> *"A District Court certificate can be tendered in evidence where a person has been arrested without warrant and charged for the first time before the District Court. The certificate will state that the member who signed it did one or more of the following with respect to the person concerned, namely: arrested him for a specified offence, charged him with a specified offence, or cautioned him on arrest or charge for a specified offence. The signed certificate is then admissible as evidence of the matters stated in it when tendered by a member of the Garda Síochána not below the rank of sergeant. It follows that where a number of individuals are being charged for the first time at the same sitting of the District Court, a single member, not below the rank of sergeant, can appear and tender the duly signed and completed certificates of arrest, charge and caution with respect to each accused. There will be no need for the gardaí who affected the actual arrests, charges and caution to appear".*

92. The practice described by Walsh, brought about by the provisions of s. 6 of the 1997 Act, to my mind, clearly presupposes the existence of a right of audience for a member of the Garda Síochána, in that case not below the rank of garda sergeant, to

appear and conduct at least part of the criminal proceedings in relation to a particular accused.

Section 8(2) of the 2005 Act

93. As can be seen above, there has been a long-standing practice of gardaí prosecuting as common informers which goes back for many years. It also is apparent that for many years there has been a practice of gardaí, and, in particular, gardaí of the rank of sergeant and above, acting as court presenters. Leaving aside for a moment the provisions of the 1948 District Court Rules, it also appears that there has been statutory recognition of this fact by means of the provisions of s. 6 of the 1997 Act. While it is beyond doubt that a member of the gardaí could prosecute as a common informer, as described in the case of *Roddy*, it also appears to me to be implicit in the 1997 Act that other members of the gardaí could represent the prosecuting garda from time to time. Provision is made therein in relation to matters such as certificates in respect to preserving the scene of a particular crime, but, bearing in mind the provisions of s. 6(1) of that Act, which specifically provides for a certificate as to arrest and charge and caution, it seems to me to be difficult to avoid the implication that that will include the person who is the prosecuting garda and therefore, necessarily involves another member being involved in conducting the prosecution. In that context then, it is necessary to look once again at the provisions of s. 8(2) of the 2005 Act. Although I have previously set out the provisions of s. 8(2), as a matter of convenience I propose to set them out again, and indeed to refer to a number of the other provisions of s. 8 of the 2005 Act. Thus, it is provided by s. 8 as follows:

> *"(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.

(3) In deciding whether to institute and in instituting or conducting a prosecution, a member of the Garda Síochána shall comply with any applicable direction ... given by the Director of Public Prosecutions under subsection (4).

(4) The Director of Public Prosecutions may give, vary or rescind directions concerning the institution and conduct of prosecutions by members of the Garda Síochána.

(5) Directions under subsection (4) may be of a general or specific nature and may, among other things, prohibit members of the Garda Síochána from -

(a) instituting or conducting prosecutions of specified types of offences or in specified circumstances, or

(b) conducting prosecutions beyond a specified stage of the proceedings.

(6) If a prosecution is instituted or conducted by a member of the Garda Síochána in the name of the Director of Public Prosecutions -

(a) the member is presumed, unless the contrary is proved, to have complied with this section and any applicable direction given by the Director under this section, and

(b) nothing done by the member in instituting or conducting the prosecution is invalid by reason only of the member's failure to comply with this section or that direction.

..."

94. One point will be apparent straight away. In s. 8(2) the phrase "*institute and conduct*" appears. A similar phrase also appears in s. 8(4). In s. 8(3) the phrase "*instituting or conducting*" appears, and that phrase is also replicated in s. 8(6).

95. The trial judge considered the interpretation of s. 8(2), and accepted the argument on behalf of the respondent to the effect that the ordinary and natural

meaning of "*institute and conduct*" in that provision 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. She rejected the contention on behalf of the State parties to the effect that the word "*and*" in sub-section (2) must be read disjunctively, despite the fact that it was contended on behalf of the State parties that the purpose of introducing s. 8(2) was to address the position of a garda as a common informer. She also rejected the argument that to conclude otherwise would lead to a breach of the presumption against radical amendment and would be inconsistent with the pre-existing Rules. Indeed, she went on to say, at para. 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."*

96. She concluded this section of her judgment by saying, at para. 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."*

97. I agree with the basic rule of statutory interpretation cited by the trial judge at para. 30 of her judgment to the effect that the words of a statute should be given their ordinary and natural meaning, unless there is good reason for doing otherwise. In that context, she cited the case of *Howard v. Commissioner of Public Works* [1994] 1 I.R. 101. Having said that, I would not be so sure that the word "*and*", as used in s. 8(2), in its ordinary and natural meaning, can only be understood to have a conjunctive meaning. As *Bennion on Statutory Interpretation* (8th Edition, LexisNexis, London, 2020) at page 570 comments:

> *"In most contexts, the sense in which "and" or "or" are used will be apparent from the context and the application of basic common sense, but they can occasionally give rise to doubt. …*
>
> *There are also many instances where "or" is used in an exclusive or disjunctive sense. An example is where it is used in relation to alternatives which are mutually incompatible, as where there is a power to "vary or revoke" an order. Similar issues can arise with "and" which can be used in a joint and several sense or a joint sense, or, to put it another way, it may be used disjunctively and well as conjunctively".*

98. I am not convinced therefore that the natural and ordinary meaning of the word "and" as used in s. 8(2) inevitably requires to be read conjunctively and cannot be read disjunctively. One has to look at the objectives of the legislation in order to assist in considering the interpretation of the section. Clearly the legislation was designed to regularise the manner in which prosecutions are carried out in the State by members of the gardaí bearing in mind the comments made in the case of *Roddy*. It was made clear that prosecutions should only be carried out by members of the gardaí in the name of the Director of Public Prosecutions.

99. I find it difficult to reconcile the approach of the learned trial judge to the interpretation of s. 8(2) and the phrase "*any member of the Garda Síochána may*

institute and conduct prosecutions in a court of summary jurisdiction" with the phrase used in s. 8(3), which seems to me to expressly contemplate that different members of the gardaí may be involved in the institution and conduct of a prosecution, as it provides that "*in deciding whether to institute and in instituting or conducting a prosecution, a member of the Garda Síochána shall comply with any applicable direction … given by the Director of Public Prosecutions …".*

100. Obviously, only one member of the gardaí may institute the proceedings in the name of the DPP, but it seems to me that by using the subsequent phrase "*and in instituting or conducting a prosecution*" the legislation clearly contemplates the possibility that more than one garda may be involved in the "*institution and conducting*" of a prosecution. I am fortified in this view by the other argument relied on by the State parties, namely, that in relation to radical amendments. In that context, it is probably of assistance to refer to Dodd, *Statutory Interpretation in Ireland* (Bloomsbury Professional 2008) In paragraph 4-110, the following is said:

> *"It is presumed that the legislature does not intend to make any radical amendment to the law beyond what it declares, either in express terms or by clear implication. Where provisions give rise to plausible alternative constructions, one of which is a narrow interpretation and one of which is a wider interpretation that radically changes the law, the narrow interpretation may be preferred. It is considered improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intentions with irresistible clarity. It is presumed that the legislature does not intend to change the law beyond the immediate scope and object of an enactment. The more radical a change, the more weight may be assigned to the presumption. There are many examples of this presumption being applied in Ireland."*

101. If the interpretation contended for in these proceedings by the respondent was correct, then it would follow that the system of prosecution of summary offences in

the District Court, which heretofore had been carried out by members of the gardaí who instituted proceedings in such case and on many occasions involved other members of the gardaí who conducted the prosecution of the case, had been abolished. However, as we have seen, the system of prosecution of summary offences involving members of the gardaí is one that goes back to, at the very least, 1948, if not indeed before that date. As was seen previously when looking at the report of the PPSSG referred to above, some 500,000 prosecutions per annum were conducted in that way before the District courts. The system of court presenter was well-established. In its report, the PPSSG had regard to the practical effects of a change in that system, and whilst it is not necessary here to refer in detail to the contents of its report in that regard, I think it will be readily apparent that any change to the system then in existence would have required considerable changes to be made. If, for example, it was envisaged that prosecutions would thereafter be conducted by state solicitors, or possibly barristers on behalf of the state solicitors, it would be apparent that there would be a need to increase significantly the personnel involved if the system was to continue to work. That is to say nothing of the potential costs implications of such a change. That such a change to the system of prosecution of summary offences would have been radical is, to my mind, an understatement. Such a change would require to have been considered, planned for, and provided for by taking on new staff in the Office of the DPP, or reorganising the operation of the system of state solicitors, not to mention the possibility of the creation of panels of barristers who might be in a position to conduct such prosecutions. One can get a flavour of the type of changes that might be necessary by examining the report of the PPSSG. Suffice it to say that any such change would have required a great deal of planning and preparation. Is it conceivable, in those circumstances, that the use of

the word "and" in s. 8(2) of the 2005 Act was intended by the legislature, and understood by the legislature, to bring about such a radical change in the system of prosecution of summary offences in the District Court? I find it impossible to agree with the conclusions of the trial judge, as set out in para. 36 of her judgment, in respect of this issue. This is reinforced when one looks at the provisions of s. 8(2), along with the other provisions to be found in s. 8 as a whole, and which, to my mind, clearly contemplate the possibility of different members of the gardaí both instituting and conducting proceedings in the District Court. I would, therefore, reject the suggestion made on behalf of the respondent to the effect that s. 8(2) had the effect of depriving members of the gardaí, other than the prosecuting garda, from conducting a prosecution in the District Court.

Rights of Audience

102. Another issue that arose in the course of these proceedings relates to the provisions of the District Court Rules, and the power of the District Court Rules Committee to make a Rule such as that to be found in Order 6, Rule 1, of the Rules of the District Court. The arguments under this heading centred around the power of the rules-making committee and whether or not the making of Order 6, Rule 1, was *ultra vires* the committee's powers. Part of the argument of the respondent in this case was that the permitting of members of the gardaí to conduct prosecutions on behalf of other members of the gardaí was, in effect, the creation of a third and unregulated legal profession. Reference was made to the provisions of s. 17 of the Courts Act 1971, which provided explicitly for the right of audience of solicitors in "*an action, suit, matter or criminal proceedings in any court*". In essence, it is contended on behalf of the respondent that only a legal practitioner has a right of audience. By contrast, the State parties contended that rights of audience were part

of a court's practice and procedure, and not part of the administration of justice, and therefore the power to provide for rules in relation to rights of audience directly flowed from s. 91 of the 1924 Act. Thus, the question arises as to whether a right of audience before a court can be described as a matter of practice and procedure, or whether it is part of the administration of justice.

103. On this issue, the learned trial judge placed reliance on the decision of the Supreme Court in the case of *Coffey v. Environmental Protection Agency* [2014] 2 I.R. 125, referred to previously. She highlighted the paragraph of the judgment, at para. 31, which is set out above, and in particular the observation to the effect that, if completely unqualified persons had complete, parallel rights of audience in the courts, it would defeat the purpose of the controls in respect of the legal professions and "*would tend to undermine the administration of justice*". She found support from that passage to the effect that a right of audience was more significant than being simply an element of court practice and procedures and was more "*significant and akin to the administration of justice*" (see para. 44 of her judgment).

104. The observations of Fennelly J. in the case of *Coffey* are of significant importance in the context of rights of audience before the courts in general. The reason why rights of audience are limited as they are, is clearly rooted in the regulation of the legal professions, and to ensure that the protection of litigants before the courts is not set at nought by the intervention of untrained and unregulated persons purporting to represent litigants in legal proceedings. This judgment is not the place to articulate the problems that this could cause both to litigants and the courts. However, it has to be said that the members of the Garda Síochána are not an unregulated, undisciplined body who have little or no regard for rules and regulations, and who are not subject to any disciplinary or regulatory controls. I therefore have a

problem with the analogy drawn between those who purport to represent litigants with members of the gardaí carrying out their functions in prosecuting and conducting summary proceedings before the District Court.

105. The critical question is whether or not the District Court Rules Committee had the power to provide for rights of audience as it did in the 1948 District Court Rules, and subsequently in the 1997 District Court Rules. If, in fact, the provision of rights of audience can be described as part of the practice and procedure of the courts, then it seems to me to follow that s. 91 of the 1924 Act provided the power to make such a rule, and therefore the rule would not have been *ultra vires* the rule-making powers of the District Court Rules Committee. In this context, it should be noted that the practice and procedure before the District Court is somewhat different to that which pertains in the Circuit Court and in the other courts in this jurisdiction. In addition, far more cases, both civil and criminal, are dealt with on a daily basis in the District Court. Many of those appearing before the District Court are unrepresented in any form. That that is so is a long-standing feature of the practice and procedure in the District Court. It is to be noted that the rights of audience conferred in Order 6, Rule 1, are not confined to members of the gardaí alone, but include representatives of the Revenue Commissioners. In addition, as has been seen from the Rule as set out previously, reference is made to representation by other members of the public, in circumstances where an individual before the courts cannot be present. The rules provide, as we have seen, that this can only be done by leave of the Court. The critical point, however, is that this is something provided for having regard to the reality of court proceedings in the District Court. In truth, if the contentions on behalf of the respondent are correct, one would have to query whether or not that provision, which is of such practical importance, was likewise within the power of the District Rules

Making Committee. The rule reflects the practice and the practical reality that has pertained in the District Court for many years. On a day-to-day basis, it is not unusual for a court dealing with litigation, be it on the civil side or the criminal side, for someone such as a family member to appear on behalf of an individual who has been unable to attend, and to explain the reason for their non-attendance. A judge controlling what may well be a busy list will frequently take note of what is said by someone in such circumstances, even though, strictly speaking, other than as provided for in the District Court Rules, one might make the observation that the person purporting to represent the litigant before the Court has no right of audience. It is part of the reality of dealing with busy lists in courts throughout the country. I referred earlier to the judgment of the Supreme Court in *Coffey*, where Fennelly J. described the nature of a McKenzie friend by reference to the judgment of Lord Tenterden in the case of *Collier v. Hicks* (1831) 2 B. & Ad. 663, described above. Part of what he said seems to me to be critical to the discussion in this area. Although it is referred to above, I propose to set it out again, as I think it is of significance:

> *"No one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the Justices."*

106. For me, that phrase encapsulates what the District Court Rules sought to do in providing for Order 6, Rule 1. This is one of the rules and regulations to be applied on a day-to-day basis, and seems to me to be all about the practice and procedure before the District Court, as opposed to the administration of justice before those courts. It is the regulations of the court that have permitted, in certain limited circumstances, persons other than the party before the court to "*take part in the proceedings*".

107. It must be recalled that s. 91 of the 1924 Act conferred the power on the District Court Rules Committee to make such rules regulating, *inter alia, "the practice and procedure of the District Court generally*". The question of who has or does not have a right of audience before that court seems to me to be a matter which is quintessentially a matter of practice and procedure of the District Court. That is not to say that legislation could not alter the position in relation to rights of audience, but I cannot see any basis upon which it could be said that the rights of audience of a member of An Garda Síochána, as provided for in Order 6, Rule 1 of the Rules of the District Court, were altered and curtailed by the provisions of s. 8(2) of the 2005 Act, in the manner contended for by the respondent herein. I therefore reject that contention.

108. Before concluding on this issue, I should refer to one further aspect of the argument in this regard. In the course of her judgment, reference was made by the trial judge to s.8(2) "*which all parties agree is the enabling section for that rule*". In her submissions, counsel for the DPP explained that this was an error. It had been argued that s.91 of the 1924 Act was the enabling legislation. It was admitted that the DPP had argued for the validity of the prevailing system on a dual basis: that its original legislative underpinning was s. 91 of the 1924 Act, and that that long-prevailing system was acknowledged and/or affirmed by subsequent legislation such as the 2005 Act. It was on that basis that the learned trial judge concluded:

> *"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."*

109. The respondent made the point that when the 1997 District Court Rules were made, there was no primary legislation providing for the exercise of a right of

audience by members of An Garda Síochána. He added that the 2005 Act did not confer a right of audience on gardaí generally. Therefore, his argument was to the effect that any rules of the District Court which purported to create a right of audience to gardaí generally were *ultra vires*, and consequently invalid. In support of his contention, reliance was placed by the respondent on the decision in the case of *DPP v. District Judge McGrath* [2021] 2 I.L.R.M. 345, in which the Supreme Court held that the provisions of Order 36 of the District Court Rules providing for a ban on the rewarding of costs against the DPP was *ultra vires* the District Court Rules Committee. In that case, comment was made by O'Donnell J. (as he then was) on s. 91 of the 1924 Act, as follows:

> *"It seems plausible, therefore, that the power given by the 1924 Act to rule-making authorities to modify and adapt prior statutes was particularly apt to ensure that the effective reception of the existing body of law into the law of Saorstát Éireann was not hampered or possibly prevented by the fact that it contained references or provisions to bodies, institutions, and procedures which no longer existed or, perhaps, no longer operated in the same way under the new system. This suggests why anything which amounted to an amendment of the pre-existing law was not permitted and, furthermore, that the level of interference permitted by the statute was limited. Not only was the area of such adaptation or modification identified and limited (the making of rules for specified purposes), but any modification or adaptation had to be "reasonably necessary" for that purpose and amount to something adapting or modifying the statutory provision to make it fit more easily and work more smoothly within the new system. While the power of adaptation and modification was not limited to pre-1922 or pre-1937 provisions, this context, which was obvious in 1924, provides a useful guide to the type of modification or adaptation permissible under the section."*

110. There is no doubt that that is a useful explanation of the powers of the Rule Making Committee, and in particular the power to modify or adapt legislation.

However, it seems to me that that judgment was concerned with a very specific matter, namely, the adaptation or modification of any statute. At issue in these proceedings is not that aspect of the rule-making power conferred by s. 91, but the making of rules in relation to the practice and procedure of the District Court generally, as I have explained previously. To my mind, what is at issue here is not an adaptation or modification of any statute, but simply the provision of a rule in relation to the practice and procedure of the District Court in relation to those who may appear before the Court. It is not, in my view, an attempt by the Rules Making Committee to modify any pre-existing legislation, such as s. 9(1) of the 1851 Act, as was suggested by the respondent in his submissions. Accordingly, the Rule Making Committee in this instance was dealing with practice and procedure and was not involved in the adaptation or modification of any statute.

Order 6, Rule 1 and Section 9(1) of the Petty Sessions Act, 1851

111. One of the other issues raised in this case was whether or not Order 6, Rule 1 had the effect of amending the Petty Sessions Act 1851, and whether s. 9(1) of that Act permitted or excluded a right of audience for a member of the Garda Síochána who did not initiate a prosecution. For reasons I have already explained, I do not believe that s. 9(1) permitted or excluded a right of audience for members of the gardaí. As I have explained above, it seems to me that s. 9(1) was concerned with controlling a right of access to the court, as opposed to providing for rights of audience. I accept and acknowledge that insofar as one of those to whom a right to be admitted to court includes a party by and against whom any complaint or information was to be heard, and that that person was expressly allowed to have "*witnesses examined and cross-examined by themselves, or by counsel or attorney on their behalf*", thereby making it clear that the person who laid the complaint, such

as a member of the police acting as a common informer, was entitled to be in court and to examine and cross-examine witnesses. However, for the reasons I have already explained, it does seem to me that Order 6, Rule 1, insofar as it conferred a right of audience on members of the gardaí, other than the member who initiated the prosecution, was doing no more than regulating the practice and procedure before the Court. To some extent, the fact that practice and procedure before the courts was a matter to be regulated by the Justices themselves is reflected in s. 9(2) of the 1851 Act, insofar as it dealt with proceedings for indictable offences. As will be recalled, the Justices in such cases had the power to determine who could have access to or remain in the Court. Again this reinforces the concept that it is the Justices who regulate the practice and procedure before the court. Accordingly, nothing in s. 9(1), to my mind, restricts the right of audience as contended for by the respondent.

112. Finally and for completeness, I should point out that when this matter was before the Court, the Court enquired as to whether there was any example of a court presenter presenting proceedings before a court prior to the introduction of Order 6, Rule 1, by the District Court Rules in 1948. Two examples of cases were produced from newspaper archives showing that this was something that had indeed happened. Reference was made to a case involving a clergyman travelling in the period of the First World War, who was of German nationality and who did not have the requisite travel permit. The report of the case which appears in the newspaper archive appears to indicate that the case was presented before the police court by a superintendent of the police while the information appears to have been provided by a sergeant. A further reference to the newspaper archives concerned particular difficulties that had arisen in the District Court in relation to a lack of clerical staff. The article made it clear that in the particular case at issue a "*court sergeant*" presented the case, whilst

the summons in the case had been sought to be issued by another member of the gardaí. The issue that prompted the report in the newspaper of the complaint by the District Judge as to the lack of staff related to the fact that the garda, who was in effect the prosecuting garda, had attempted to have the summons issued by laying the appropriate information before the Court, but the lack of staff led to a situation where no such summons had been issued. However, what is apparent from the report is that there was an initiating garda and a "*court sergeant*". This practice appears to have existed to some extent, although I accept it is virtually impossible to say to what extent, before the introduction of the 1948 District Court Rules.

Consultative Case Stated and their Scope

113. At an earlier part of this judgment I referred to the nature of a case stated, and the way in which it should be presented. A more fundamental issue is whether the consultative case stated procedure is appropriate where the matter at issue concerns the question as to whether or not a rule of the District Court is *ultra vires* or not. This was an issue that was considered by the trial judge, at paras. 19 to 22 of her judgment. Having referred to a number of authorities, including *The State (O'Flaherty) v. O'Floinn* [1954] I.R. 295, *Thompson v. Curry* [1970] I.R. 61, and *Rainey v. Delap* [1988] I.R. 470, the learned trial judge concluded as follows:

> *"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."

114. The submissions of the DPP in this regard rely heavily on an analogy between an application which involves a conclusion that a particular rule was *ultra vires* the rule-making authority, and an application which seeks to have a statutory provision declared to be unconstitutional. This approach was also relied on by the Attorney General. Counsel on behalf of the respondent took the view that the approach being taken by the State parties sought to limit the jurisdiction of the High Court in dealing with a case stated, and noted that s. 52 of the 1961 Act provides that the District Judge shall, if requested, "*refer <u>any question of law</u> arising in such proceedings to the High Court for determination*". Further, counsel on behalf of the respondent argued that it was not suggested on behalf of the DPP what approach would be appropriate in order to determine the issue that arose in these proceedings.

115. Reference was made in the course of the submissions to the decision in *DPP v. Dougan* [1996] 1 I.R. 544, where Geoghegan J. said as follows, at page 549, in relation to raising a constitutional issue by way of case stated:

"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 and the former Supreme Court of Justice has made this absolutely clear in Foyle Fisheries Commission v. Gallen [1960] Ir. Jur. Rep. 55 cited above. This case was subsequently followed by O'Hanlon J. in Minister for Labour v. Costello [1988] I.R. 235 …"

116. Thus, the argument strongly made on behalf of the State parties is that, in circumstances where a District Court Judge does not have jurisdiction to find a rule of the District Court *ultra vires*, then *a fortiori* the High Court, on a case stated, has no such jurisdiction. In this context, reliance was placed by the State parties on the case of *Shell E&P Ireland Limited v. McGrath* [2013] 1 I.R. 247, and in particular to paras. 57 and 58 of the judgment in that case. In that context, an issue had arisen as to a challenge to a public law measure. At para. 57, Clarke J. stated as follows:

> *"The rules of court are, of course, a form of secondary legislation. They are made with the authority of the Oireachtas in the form of the enabling provisions of the Courts of Justice Acts 1924-36 and the Courts (Supplemental Provisions) Act 1961. That does not, of course, give the rules-making authority carte blanche. It is possible that an argument might be made that measures adopted in the rules go beyond the legitimate delegated powers of rules-making authorities. It might also be, as the trial judge correctly pointed out, that limitations, whether to be found in legislation or in the rules, which affect the ability of a party to maintain or defend proceedings in a reasonable way, might amount to a breach of the rights of such party either to access to the court or to the fair conduct of proceedings (as to the distinction between which see Farrell v. Bank of Ireland [2012] IESC 42 (Unreported, Supreme Court, 10th July, 2012)).*
>
> *58. However, the Oireachtas has conferred on the rule-making authority power to make rules of court. Those rules have, unless declared invalid, the force of law. If it is suggested that a time limit for bringing judicial review proceedings which is to be found only in rules of court is of a different status to a time limit to be found in legislation then such an argument really could only have validity if it were to bring into question the power of the rule-making authorities to introduce those time limits in the first place. If the introduction of time limits for bringing judicial review is intra vires the rule-making authority then it is a legitimate exercise of secondary legislation and amounts to a legal barrier to the bringing of such proceedings outside such time limits subject, of course, to*

the power contained in the rules themselves to extend time. The fact that such a legal power is to be found in secondary as opposed to primary legislation does not seem to me to affect its status. If it is said that the rule-making authorities do not have the power to impose such time limits then it is hard to see how that point would not apply to all judicial review cases save those where there is an express time limit to be found in primary legislation. There was, of course, no challenge to the validity of the rules of court, which provide for time limits in respect of judicial review proceedings, before this court. The court must proceed therefore, on the basis that the rules in relation to judicial review time limits are a valid exercise of the power delegated to the rule-making authorities by the Oireachtas.

117. Emphasis is placed on the statement that the Rules, unless declared invalid, have the force of law. As such, therefore, the District Court is bound to act in accordance with the law as set out in the District Court Rules and is not entitled to find that a District Court Rule is *ultra vires* the parent Act, or that it would require primary legislation. Accordingly, it is argued on behalf of the State parties that a consultative case stated is not the appropriate mechanism by which to seek to have a Rule of the District Court declared invalid.

118. I should also refer to the case of *Thompson v. Curry* [1970] I.R. 61, which was relied on by the trial judge in coming to her conclusion on this particular issue. That was a case in which there was an appeal by way of case stated pursuant to the provisions of s. 2 of the 1857 Act. At issue in that case was the fact that under s. 2 a sequence of events was required as a condition precedent to the exercise by the High Court of its jurisdiction. Order 62, Rule 5, of the Rules of the Superior Courts altered the sequence set out in s. 2 of the Act of 1857, and in those circumstances, it was concluded that the terms of Order 62, Rule 5, were *ultra vires* insofar as those terms

purported to alter the sequence of events required by s. 2 of the Act of 1857. The issue was succinctly stated by Walsh J. in his judgment, as follows, at page 65:

> *"The jurisdiction of the High Court to hear a Case stated under s. 2 of the Act of 1857 is created by that section. Can the rule-making authority, by rule, dispense with the statutory condition precedent of giving notice of the appeal in writing to the respondent before transmission of the Case Stated, as distinct from prescribing the form of such notice, the service of such notice or the interval to elapse between the giving of such notice and the transmission of the Case?"*
>
> *...*
>
> *"In my view the abolition of a statutory condition precedent to jurisdiction is something outside "the hearing of...cases stated by the District Court" referred to in s. 36 of the Act of 1924 and is not for the purpose of carrying Part 1 of the Act of 1924 into effect. The provisions of Order 62, r. 5, contained in the words "or within three days after" are ultra vires. In my view the judgment of the President of the High Court was correct and this appeal should be dismissed."*

119. One of the points made on behalf of the DPP is that an appeal by way of case stated pursuant to the provisions of the 1857 Act is broad enough to encompass the High Court making a finding of *ultra vires*, whereas the provisions of s. 52 of the 1961 Act do not go so far. Secondly, the point was made that no issue had been raised as to the *vires* of a rule of court by the District Judge in that case. Rather, it was a situation which the Court found, both in the High Court and in the Supreme Court, that there was no jurisdiction to entertain the appeal by way of case stated, because the provisions of s. 2 of the 1857 Act had not been complied with. It was in that context that the appellant in that case had relied on the Rules of Court which altered the sequence provided for in the Act, that the Supreme Court ultimately concluded that the Rule was *ultra vires* the Act.

120. For completeness, I should also refer briefly to the case of *Rainey v. Delap* [1988] I.R. 470 referred to above. It should be said, of course, that this was a decision in judicial review proceedings, as opposed to a consultative case stated. That case concerned a power conferred on a District Court clerk to receive a complaint and to decide whether or not to issue a summons in a criminal case, and whether it went beyond an adaptation or modification of the Act of 1851. In the course of the judgment in that case, it was concluded that Rules 29 and 30 of the Rules of the District Court of 1948, insofar as they purported to grant to the District Court clerk powers of receiving a complaint and of issuing a summons, were invalid as being *ultra vires* the rule-making authority. However, in the course of his judgment, Finlay C.J. made the following observation in relation to s. 91 of the 1924 Act:

> *"Dealing with this Section in the former Supreme Court in the case of The State (O'Flaherty) v. O Floinn [1954] I.R. 195, Kingsmill Moore J. at p. 304 stated as follows:*
>
> > *"What is meant by the words 'practice and procedure'? Broadly, I would answer: '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'. Such a definition may not remove all difficulties. A statute conferring a power on the Court may at the same time circumscribe the generality and extent of such power by imposing a limitation which is in form procedural. It can be said with force that a rule abolishing that limitation is a rule concerned with practice and procedure. Yes, but it is not only concerned with practice and procedure if it operates to enlarge the extent of the substantive power, and so it cannot be properly classed with the restrictive heading of a rule of practice and procedure."*
>
> *I am satisfied that this statement constitutes a correct interpretation of the provisions of s. 91 of the 1924 Act and that I should apply it to this case."*

121. I find it interesting that, in the context of practice and procedure, as defined in that case, reference is made to a "*substantive power which is either conferred on a court by statute or inherent in its jurisdiction*". I cannot escape from the view that matters relating to a right of audience before the courts are very much matters which are inherent in the jurisdiction of the court concerned. Of course, there is a power on the part of the legislature to regulate the professions and to provide for a right of audience so far as may be necessary for members of the professions. That, however, does not interfere with, or limit, the inherent jurisdiction of the courts to regulate rights of audience before the courts, and that is precisely what has been done in the provisions of Order 6, Rule 1. It will be recalled that, whilst that conferred a right of audience on members of the gardaí, and members of the Revenue Commissioners who were duly authorised to appear on behalf of the Revenue Commissioners, the rule also provides for other persons to appear where the District Court is satisfied that it is appropriate to permit such people to have a right of audience.

122. The question, however, for me to consider at this stage is whether or not it is appropriate for an issue as to the *vires* of a District Court Rule to be considered on an application by way of a consultative case stated. There are a number of observations to be made in this regard. First of all, I am of the view that the authorities relied upon by the trial judge in this regard do not support the view that she took. Two of the cases concerned were proceedings by way of judicial review, and the other case, which indeed was a case stated, was a case stated under the procedure provided for by s. 2 of the Act of 1857. The only *vires* issue that arose in that case involved the Rules of the Superior Courts which did not arise (and could not have arisen) before the District Court. Secondly, it should always be borne in mind that the District Court is a court of limited and local jurisdiction and that necessarily

implies significant restrictions on its jurisdiction in this context: see, for example, the decision in this Court in *People (DPP) v MS* 2002 1 I.R. 606. It will be recalled that s. 52 of the Act of 1961 provides for a consultative case stated in respect of "any question of law arising in such proceedings". There may be circumstances in which the District Court is entitled to consider the validity of secondary legislation-see the decision of this Court in *Listowel UDC v McDonagh* 1968 IR 312, as well as the decision in *Boddington v British Transport Police* 1999 2 AC 143. This issue was not argued before us and therefore it would not be appropriate to express any definitive view – the circumstances here were, on any view, very different to the circumstances in that case. The Respondent was not being prosecuted for a breach of the District Court Rules. Furthermore, the challenge to Order 6, Rule 1 here appears to have been based, at least in part, on Article 15. 2 of the Constitution. In the circumstances, I am of the view the District Court did not have the jurisdiction to entertain a challenge to Order 6, Rule 1 of the District Court Rules. Rather, it was obliged to give effect to that Rule. As the Supreme Court pointed out in the case of *Shell E&P Ireland Limited v. McGrath* [2013] 1 I.R. 247, referred to above, the Rules have the force of law, unless declared invalid. Therefore, they must be complied with. If the issue arising is one that cannot be determined in the District Court such as the *vires* of the District Court Rules in the circumstances here, there cannot be a basis for raising that issue in a consultative Case Stated. Third, there is merit in the argument made on behalf of the State parties that the case stated procedure is an unsuitable vehicle by which to challenge the validity of secondary legislation in any event. As pointed out, the parties are confined to the facts as found by the District Judge, and there may have been relevant evidence that could have been adduced on an application to have the rules declared invalid, which by virtue of the manner in which

the case came before the High Court, simply could not be adduced in these proceedings. That problem would not have arisen in the context of judicial review proceedings. Overall, therefore, I am satisfied that the consultative case stated procedure, as utilised in this case for the purpose of challenging the *vires* of the relevant rule of the District Court, was not and could not have been the appropriate procedure to have used herein. In the circumstances, I think it would have been preferable not to reach any conclusion on the case stated, but rather to have ruled that this was not the appropriate course to take in the circumstances here.

Conclusion

123. I am satisfied that the provisions of Order 6, Rule 1(e) of the District Court Rules are valid, having been made in accordance with the power of the rules-making authority conferred by s. 91 of the 1924 Act. The practice of a court presenter is one that has been in existence at the very least since 1948, and it appears to have pre-dated that time to some extent. In any event, it is a matter which is, in my view, quintessentially one within the inherent jurisdiction of the Justices of the District Court to regulate and to provide for rights of audience before that court. Thus, it comes expressly within the provisions of s. 91 of the 1924 Act.

124. Further, given that the provision contained in Order 6, Rule 1(e) of the District Court Rules of 1997 is one that adopted the previous rule set out in the 1948 Rules, and given the importance of the role of garda presenters, it seems to me that had the Oireachtas intended to eradicate that long-standing practice, clear language would have been used in the 2005 Act to do so. Further, looking at the provisions of the 2005 Act as a whole, it seems to me that the other provisions of s. 8 of that Act, insofar as they refer to the institution or conduct of proceedings, clearly encompassed a position which recognised the pre-existing practice. It will be recalled that the report

of the PPSSG recognised the importance of the role of court presenter, which operated in a vast amount of prosecutions before the District Court in any given year. It seems to me to be inconceivable that the Oireachtas would abolish that without express and explicit provision within the statute. In any event, I am fortified in my view by the fact that emergency legislation was enacted the day following this decision of the High Court in order to put back in place the position that existed prior to the decision of the High Court.

125. Finally, I would conclude that this case highlights the limitations of the consultative case stated procedure in its present form for a finding as to the *vires* of the Rules of the District Court. Whether a procedure could or should be developed that would allow a broader range of issues to be the subject of a request by the District or Circuit Court to permit such court to deal in the most efficient way with cases coming before it , is a matter for the Oireachtas .

126. In all the circumstances, I would allow the appeal herein.