Neutral Citation Number: [2013] IEHC 251

THE HIGH COURT

[2013 No. 648 S.S.]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

J. M. (A MINOR)

APPLICANT

AND

MEMBER IN CHARGE OF COOLOCK GARDA STATION

RESPONDENT

JUDGMENT of Mr. Justice Garrett Sheehan delivered on the 3rd May, 2013

Introduction

1. The applicant, J.M., seeks an order of *habeas corpus* arising out of his detention in Coolock Garda Station following his arrest on suspicion of having committed a serious offence under the Misuse of Drugs Act 1977, as amended.

2. It is contended on his behalf that given his particular circumstances, namely that he is a vulnerable minor with mental health problems, the refusal by the gardaí to allow his solicitor to be present during garda interviews is, *inter alia*, in breach of his constitutional right to reasonable access to a solicitor and accordingly, his detention is unlawful.

Background

3. J.M. was arrested on the 16th April, 2013, on suspicion of having committed an offence pursuant to s. 15A of the Misuse of Drugs Act 1977, as amended, and subsequently detained at Coolock Garda Station at around midday pursuant to s. 2 of the Misuse of Drugs Act 1977 (as amended).

4. J.M. is represented by Kelleher O'Doherty Lyons Solicitors. Two solicitors from that firm, Gareth Noble and Maura Kiely, have sworn affidavits grounding this application.

5. The initial application for an inquiry was heard by the President of the High Court, Mr. Justice Nicholas Kearns, at 3.30pm on the 16th April, 2013, and he directed that the applicant, J.M., be produced before the Court at 4.30pm that evening given that he was a minor with a mental health impairment who was then detained in a garda station.

6. When the matter was returned, counsel for the respondent agreed that the applicant be admitted to bail pending a full inquiry which commenced on Friday 26th April, 2013, and continued on Tuesday 30th April, 2013. The matter was further adjourned to Friday 3rd May, 2013, without objection from the respondent to allow the Court to consider the comprehensive submissions made by the applicant and the respondent.

7. It is clear from the affidavit of Gareth Noble, solicitor, that he was aware on the 15th April, 2013, that his client, J.M., was wanted for questioning by the gardaí in connection with the finding of a large quantity of drugs and he wrote by fax to Garda Cummins that day as follows:-

> *"Re: J.M. (a Minor)*
>
> *Dear Garda Cummins,*
>
> *I refer to the above named client and telephoned Coolock Garda Station this morning in an attempt to make contact with you.*
>
> *I am aware that you are investigating a very serious incident involving the interception of a large amount of suspected drugs. I am aware that you are seeking to detain and interview this minor as part of your investigation.*
>
> *Given the serious nature of the charge the fact that my client is a juvenile and, more particularly, that he is someone with particular vulnerabilities and complex needs, I am requesting that I be permitted to be present with him whilst he is being interviewed. Master M. has been deemed suitable for Disability Allowance. He is an early school leaver and meets the criteria insofar as it has been medically established that he is not in a position to take up work or further education as a result of his condition, which is psychological as opposed to physical in nature.*
>
> *I am aware that there have been a number of important judgments from other jurisdictions and from the European Court of Human Rights which support the proposition that individuals detained have a right of access to a solicitor, and that this extends to being present during police questioning. It is acknowledged that you wish to interview Master M. and upon receipt of your response, I will make every effort to advise and take instructions from Master M. as quickly as possible.*
>
> *I look forward to hearing from you.*
>
> *Yours sincerely*
>
> *Gareth Noble."*

8. The following matters relating to the applicant emerged from the grounding affidavit of his solicitor, Gareth Noble:-

(1) J.M. is seventeen years old having been born on the 19th June, 1995;

(2) J.M. ordinarily resides with his mother at a known address;

(3) J.M. is in receipt of a Disability Allowance. His solicitor exhibited a letter to him from the Social Welfare Appeals Office dated the 25th July, 2012, to that effect. A note of the reasons for the Appeals Officer's decision is set out hereunder:-

"Medical

Disability Allowance may be paid where a person is substantially restricted in undertaking work which would otherwise be suitable with reference to their age, experience and qualifications and the specified disability must be expected to continue for at least one year. Having carefully examined all the evidence in this case, including that presented at oral hearing and taking account of the medical evidence available, I have concluded that the appellant has established that he meets the qualifying conditions. In the circumstances I am allowing this appeal."

(4) J.M. was assessed by a Senior Clinical Psychologist attached to the Department of Child and Family Psychiatry at the Mater Hospital who reported in January, 2007 that at that time J.M. had significant behavioural difficulties both at home and at school. The Senior Clinical Psychologist stated that the result of tests completed by J.M.'s mother and teacher indicated an above average correspondence to the DSM IV criteria for Combined Inattention and Hyperactive Impulsive Type ADHD, and at that time the diagnosis could be supported along with an accompanying diagnosis of Oppositional Defiant Disorder. The report of the consultant psychologist was exhibited in the grounding affidavit of Gareth Noble, and the said report was dated the 23rd January, 2007.

(5) By letter dated the 15th February, 2007, a consultant psychiatrist attached to the Department of Child and Family Psychiatry at the MaterHospital wrote to the Senior Area Medical Officer of the Northern Area Health Board stating that J.M. had a diagnosis of ADHD and additional Periorbital Tics. She stated he had been started on a trial of Ritalin LA20mg in October, 2006 and had shown some improvement. She further stated that based on his special needs, his parents were entitled to receive Domiciliary Care Allowance.

(6) At para. 5 of his affidavit Mr. Noble stated that contained within the medical report for a Carer's Allowance for the applicant's mother dated the 10th August, 2011, it was confirmed that the applicant, J.M., had severe mental health/behavioural difficulties and severe learning and intellectual disabilities.

Submissions on behalf of the applicant

9. The case which the applicant puts forward is essentially that there exists an entitlement for him to have his solicitor present during questioning. The applicant in this specific case was not allowed to have his solicitor present during his interview with the gardaí whilst in custody, in circumstances where he is a minor and operating under a mental impairment and therefore the applicant's detention is rendered unlawful. Counsel advanced the applicant's case on three grounds.

10. With respect to the first of these grounds, counsel submitted that a solicitor is not expressly prohibited by virtue of any statute or subordinate legislation from attending on a suspect during the course of questioning. Counsel opened various legislative provisions to the Court in this respect, namely s. 5A of the Criminal Justice Act 1984 (as inserted by s. 9 of the Criminal Justice Act 2011), the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, and lastly s. 61 of the Children Act 2001. Counsel also referred the Court to the Supreme Court decision in *Lavery v. Member in Charge, Carrickmacross Garda Station* [1999] 2 I.R. 390 and acknowledged that this was generally cited in support of the blanket policy adopted by An Garda Síochána for refusing to allow solicitors to be present during interview. Counsel argued, however, that the question of a solicitor's presence during interview did not form part of the case advanced by the applicant in *Lavery v. Member in Charge, Carrickmacross Garda Station* and as such the comment that a solicitor is not entitled to be present was obiter. Counsel further sought to distinguish *Lavery v. Member in Charge, Carrickmacross Garda Station* from the facts in this particular case, in particular that the applicant was a minor suffering from a mental impairment. The Supreme Court stated in their decision in *Lavery v. Member in Charge, Carrickmacross Garda Station* that the gardaí must exercise their powers of interrogation reasonably. Counsel queried whether a blanket ban on allowing solicitors to be present particularly in the case of a vulnerable and intellectually disadvantaged minor, could ever be regarded as reasonable and that no attempt had been made by the gardaí to justify the position either in the specific circumstances of this case or as a general policy. This refusal to allow access to a solicitor during questioning amounted to a restriction on the right of access to a lawyer particularly having regard to European and International standards and practices including the jurisprudence of the European Court of Human Rights, the European Committee for the Prevention of Torture and the UN Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This restriction is imposed on a systematic basis and counsel therefore submitted that the key issue in this case was whether such a restriction is justifiable in general or at the very least in the specific case of the applicant. Counsel submitted that when a suspect was being questioned by the gardaí following his or her arrest on suspicion of having committed an offence contrary to s. 15A of the Misuse of Drugs Act 1977, as amended, two specific matters could arise which would require careful advice. The first possibility was in a situation where the gardaí decided to invoke ss. 18 and 19 of the Criminal Justice Act 1984, as amended. These sections of the Criminal Justice Act 1984 constitute an encroachment on the right to silence. The manner in which a suspect answers questions, when these sections are invoked by the gardaí, may form a significant part of the prosecution case in the event of the suspect being charged. The second possibility relates to the situation that arises regarding the imposition of a minimum mandatory ten year sentence following a conviction for an offence contrary to s. 15A of the Misuse of Drugs Act 1977, as amended. The manner in which a person has answered certain questions while being interviewed may give rise to a situation in which the sentencing judge is not required to impose the mandatory minimum sentence. Counsel submitted that especially in light of these possibilities, as well as taking the applicant's personal circumstances into account, it was necessary for him to have his solicitor present during garda interviews in order to ensure that his right of reasonable access to a solicitor was effective and meaningful.

11. With respect to the second of these grounds, counsel argued that in the absence of any such express prohibition the Court is obliged to consider this issue in light of the jurisprudence emanating from the European Court of Human Rights concerning Article 6 of the Convention and relied upon s. 2 of the European Convention on Human Rights Act 2003 in this regard. Section 3 of the Act of 2003, imposing an obligation on the organs of State to perform its functions in a manner compatible with the State's obligations under the Convention provisions, was also opened to the Court. Case law concerning the interpretation of s. 2 of the Act of 2003 in this

jurisdiction was effectively summarised as being that the Court is under an obligation to interpret the relevant statutory provisions in accordance with the European Convention on Human Rights but only so far as it does not do so in *contra legem; G.T. v. K.A.O.* [2008] 3 I.R. 567, *Donegan v. Dublin City Council & Others* [2012] I.E.S.C. 18 and *Dublin City Council v. Gallagher* [2008] I.E.H.C. 354 relied upon.

12. Counsel for the applicant relied upon case law emanating from the European Court of Human Rights concerning the right of access of an accused person to their lawyer during questioning. Reliance was placed upon case law in which the Court held that Article 6 applied to the pre-trial stage of criminal proceedings and that an accused person must be offered legal access at the initial stages of police questioning. Counsel sought to rely on the case of *Salduz v. Turkey* (2009) 49 E.H.R.R. 19 in particular in its *dicta* that a breach of the right of access to a lawyer at the pre-trial stage is, in principle, irremediable irrespective of whether an accused receives a fair trial thereafter. Counsel submitted that the factual circumstances present in *Salduz v. Turkey* were similar to those present in the applicant's case. The decision of the Supreme Court in the United Kingdom in *Cadder v. Her Majesty's Advocate (Scotland)* [2010] U.K.S.C. 43, [2010] 1 W.L.R. 2601 was also relied upon as authority for the interpretation of the principles enunciated in *Salduz v. Turkey*.

13. With respect to the third ground, counsel for the applicant argued that in the absence of domestic legislation prohibiting a solicitor attending an accused during questioning and on foot of the recent case law from the European Court of Human Rights, the State was obliged to explicitly justify any restrictions on such a right on a case by case basis.

14. Counsel's final submission was that this right had been denied in the circumstances of the instant case, not by reference to any specific justification nor consideration of the applicant's own personal circumstances but rather by reason of the operation of a blanket policy on the part of An Garda Síochána.

Submissions on behalf of the respondent

15. Counsel on behalf of the respondent refuted any breach of rights under Irish law or the European Convention on Human Rights. Counsel made submissions on seven distinct grounds in resistance of this application.

16. Counsel for the respondent submitted that the use of the Article 40.4.2. procedure to litigate this issue was inappropriate; *Lavery v. Member in Charge, Carrickmacross Garda Station* [1999] 2 I.R. 390 relied upon. The *habeas corpus* procedure should not be used to carry out a legal audit or review of the conduct of interviews while they are taking place. Counsel further submitted in the same tenet that any claim advanced on behalf of an accused person that he or she suffers from a mental illness or defect such as would impair their cognition, comprehension or their fitness to properly deal with the various aspects of criminal proceedings would be established in evidence by way of an appropriate report from a suitably qualified person and the prosecution would be given adequate opportunity to satisfy themselves of the position by means of their own independent examination.

17. In respect of the second ground which counsel for the respondent sought to rely upon, it was noted that the applicant was at all material times entitled to be accompanied during the garda interview by a parent or other suitable adult in the event that a parent was not available or suitable as provided for by various legislative instruments including the Criminal Justice Act 1984, as amended, and the Regulations thereunder and s. 61 of the Children Act 2001. Furthermore, the detention and interview of the applicant were arranged in advance by way of appointment. Therefore, the applicant was afforded access to legal assistance prior to the commencement of his interview.

18. The third issue which counsel for the respondent addressed was in respect of the anticipated role of the solicitor if he or she were admitted into the formal interview. It had not been specified with any particularity in correspondence and pleadings, the role which it was anticipated that the solicitor would have if he were to be admitted into the formal interview and such a role could range from being a mere observer to an adversarial role involving active counselling and advice on each and every question which is put to the accused. Such a role would clearly have implications as to how a jury should be advised in their consideration of the content of such interviews as evidence in a criminal trial. Counsel placed reliance on the fact that such a scenario was not provided for by any protocols or procedures legislated for by the Criminal Justice Act 1984 and the Custody Regulations thereafter.

19. The fourth issue which counsel for the respondent addressed the Court upon concerned the right of access to a solicitor in Irish law. Counsel for the respondent submitted that this right is well settled in this jurisdiction and cited the following case law in this regard; *The People (at the suit of the Director of Public Prosecutions) v. Madden* [1977] I.R. 336, *The People (at the suit of the Director of Public Prosecutions) v. Healy* [1990] 2 I.R. 73, *The People (at the suit of the Director of Public Prosecutions) v. Buck* [2002] 2 IR 268 and *The Director of Public Prosecutions at the suit of Garda Brian Lavelle v. McCrea* [2010] I.E.S.C. 60. The right of access to legal advice at garda stations is a qualified right and is a right to reasonable access only. Counsel acknowledged the limited circumstances where it has been found to be acceptable to deny a detainee actual access to a solicitor prior to commencing an interview. The settled case law on the right of access to a solicitor has never indicated that such a right might extend to the right to have a solicitor present during the course of the interview; *Lavery v. Member in Charge, Carrickmacross Garda Station* [1999] 2 I.R. 390 relied upon. Counsel rejected the applicant's submission that this aspect of the judgment was of an obiter nature and thus did not form part of the *ratio decidendi* on the matter. The solicitor's presence at interviews would necessarily have given him access to the notes of interview and the statement in question and therefore it went to the substance of the applicant's claim in *Lavery v. Member in Charge, Carrickmacross Garda Station*.

20. The fifth point which the respondent noted to this Court was that there is an absence of authority for the proposition that unlawfulness which arises during a detention is necessarily such that it vitiates the entire detention. This would only result if the denial of access to legal advice was complete, deliberate and egregious. It was further submitted that the legislature has already considered the appropriate requirements in respect of a minor who is being questioned and had addressed such concerns through s. 61 of the Children Act 2001 which provided that a minor be accompanied by a parent or other suitable adult during interview.

21. Counsel addressed the reliance placed upon the jurisprudence of the European Court of Human Rights, in particular *Salduz v. Turkey (2009)* 49 E.H.R.R. 19, and submitted that while the right to access legal advice at the pre-trial stage and in particular prior to interview or interrogation was well-established, that right did not extend to the entitlement to have a legal representative attend during the conduct of the interview itself. Counsel for the respondent also considered the case of *Cadder v. Her Majesty's Advocate (Scotland)* [2010] U.K.S.C. 43, [2010] 1 W.L.R. 2601 which reviewed the effect of the law of the European Court of Human Rights in a common law context and submitted that that decision did not confirm that such a right existed. The case of *Panovits v. Cyprus* [2008] E.C.H.R. 1688 was distinguished on its facts and counsel submitted that the decision did not establish a right for the minor to have the actual presence of a lawyer during the course of his interviews. Counsel concluded that the jurisprudence from the European Court of Human Rights stated that the question in each case to be determined was whether the restriction was justified and, if so, whether in the light of the entirety of the proceedings it had not deprived the accused of a fair hearing. Essentially, it was counsel's submission that at this stage it is simply not possible to assert that an unfair trial will follow from an unaccompanied interview. Article

6 rights can only be assessed by reviewing the manner in which the investigation stage actually affected the trial of the accused. Counsel for the respondent further submitted that the jurisprudence of the European Court of Human Rights was clear and that while Article 6 guarantees the right to a fair hearing it does not lay down any rules on the admissibility of evidence as such which has been acknowledged as being primarily a matter for regulation under domestic law within each Member State; *Sharkunov and Mezentsev v. Russia* [2010] E.C.H.R. 892 and *Gafgen v. Germany* [2010] E.C.H.R. 759 relied upon.

22. With regard to the incorporation of the European Convention on Human Rights into domestic law, counsel for the respondent referred to ss. 2 and 3 of the European Convention on Human Rights Act 2003. The Act of 2003 places an obligation on organs of the State to perform their functions in a manner compatible with the Convention. Counsel submitted that a court is not entitled to interpret the Convention as a substitute for the Irish Constitution nor is a court empowered to "*directly apply*" Convention provisions; *Mulligan v. Governor of Portlaoise Prison & Another* [2010] 1 I.E.H.C. 269 relied upon.

Conclusion

23. The Supreme Court decision in *Lavery v. Member in Charge, Carrickmacross Garda Station* [1999] 2 I.R. 390 is the recognised authority for a suspect's right of reasonable access to a solicitor whilst in garda custody. This Court was referred to the judgment by both counsel for the applicant and for and respondent and the key point of variance with respect to their submissions related to the following passage from the judgment where it was stated by O'Flaherty J. at pp. 395 and 396 that:-

> *"However, the garda must be allowed to exercise their powers of interrogation as they think right, provided they act reasonably. Counsel for theState submitted to the High Court Judge that in effect what Mr. MacGuill was seeking was that the garda should give him regular updates and running accounts of the progress of their investigations and that this was going too far. I agree. The solicitor is not entitled to be present at the interviews. Neither was it open to the applicant, or his solicitor, to prescribe the manner by which the interviews might be conducted, or where. The point of whether there were adequate notes taken of any interview might, or might not, be of significance if there was a subsequent trial." (Emphasis added).*

24. While I agree with the applicant's submissions that the circumstances of this particular case are considerably different to those in *Lavery v. Member in Charge, Carrickmacross Garda Station* [1999] 2 I.R. 390 and can be distinguished on that basis, I nevertheless hold that the relevant passage in *Lavery v. Member in Charge, Carrickmacross Garda Station* is not an obiter comment made by the Supreme Court. I, therefore, agree with the submissions of the respondent in this regard that the judgment in *Lavery v. Member in Charge, Carrickmacross Garda Station* represents the law in this jurisdiction concerning whether or not one is entitled to have a solicitor present when being interviewed by the gardaí while in custody.

25. Counsel for the applicant in the course of his submissions also queried what appeared to be the policy of An Garda Síochána to have a blanket ban on allowing solicitors to be present at garda custody interviews. The applicant's query in this regard has, to a certain extent, been met by the respondent's concession that there might be cases where the gardaí will decide to allow a suspect to have a solicitor present for all or some of the garda interviews. This, however, simply refers to the manner in which the gardaí may decide to conduct interviews. It does not confer any right on a suspect either to have a solicitor present or impose any obligation on the gardaí to consider whether or not a solicitor should be present.

26. While the respondent submitted that the minor in this case could be adequately protected by having his mother present at all the interviews as well as having reasonable access to a solicitor, counsel for the applicant queried as to whether this regime was sufficient to provide adequate and effective assistance with difficult legal issues if they arose, and in particular with issues which might arise if inference sections were put or a matter arose that would have a significant bearing on sentence in the event of a conviction. This Court is of the view that neither the evidence nor the submissions established the likelihood of unfairness arising in the course of the interviews as a result of the absence of a solicitor during those interviews.

27. Having considered the jurisprudence of the European Court of Human Rights which was opened to this Court, in particular *Salduz v. Turkey* (2009) 49 E.H.R.R. 19 and *Panovits v. Cyprus* [2008] E.C.H.R. 1688, it is important to note that none of these judgments go so far as to say that there is a right to have one's solicitor present at police interviews. It is likewise important to note that both applicants in the case of *Salduz v. Turkey* and the case of *Panovits v. Cyprus*, whilst being seventeen year old minors facing serious charges, had been denied access to legal counsel prior to the initial police interviews whilst in custody. This is quite simply not the case in respect of J.M. In a similar vein, the reliance placed upon *Cadder v. Her Majesty's Advocate (Scotland)* [2010] U.K.S.C. 43, [2010] 1 W.L.R. 2601 by counsel for the applicant is similarly misconceived in respect of this applicant.

28. Accordingly, and for the above reasons, I refuse to direct the release of the applicant.