Neutral Citation Number [2006] IEHC 236

THE HIGH COURT

Record Number: 2006 No. 850 SS

IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND

BETWEEN

JAMES O'GORMAN

APPLICANT

AND

THE GOVERNOR OF CORK PRISON

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 19th day of July 2006

1. The applicant has, through his own actions, got himself into what the late Lord Denning, Master of the Rolls, might easily have described as "a bit if a pickle". In one sense he has only himself to blame. However, it can also be said with justification that by virtue of a concatenation of misfortunate circumstances, contributed to at least in part by a somewhat sloppy adherence to detail and the rules of court by the party which moved for the applicant's attachment and committal, and the manner in which court orders have been made and drawn up, the applicant's actions have resulted in his unlawful detention.

2. It is necessary to set out in some detail the history of events which have occurred in order to fully understand why I have reached the conclusion that the detention of the applicant is unlawful. But before doing so I should record that following the applicant being produced to the Court on the 27th June 2006, I released him on bail pending the hearing of submissions and the delivery of my judgment in relation to the legality or otherwise of his detention..

3. Following the commencement of family law proceedings in Cork Circuit Court in 2002 by the applicant's wife, a judicial separation order was granted on the 23rd June 2004. On the 14th March 2005 following re-entry of the proceedings, an order was made by His Honour Judge Sean O'Donnabhain for the sale of what is described in the order as "*the sale of the property at Ballymaclaurence, Ballyhooley, Co. Cork*". This property comprised the family home and some land. That order goes on to state: *"Respondent to vacate - stay until contracts are signed*".

4. The next relevant event appears to be that the matter came before the Circuit Court again on the 12th January 2006, this time before His Honour Judge Harvey Kenny, on an application by the wife wherein she complained that the applicant had failed to vacate the property. It is not clear to me whether the stay referred to in relation to the applicant vacating the property had in the meantime been lifted, but one way or the other an order was made on the 12th January 2006 by His Honour Judge Kenny which ordered, inter alia, the following:

> *"2. That the respondent vacate the property by 1/2/2006".*

5. I note in passing that "the property" is not specified, although by obvious inference it could only be the property described in the previous order dated 14th March 2005.

6. The order also ordered:

> *"6. That the cattle on the land are to be removed."*

7. I note in passing also that the order is silent as to who is to remove the cattle from "the land", or as to what land is being referred to. Again, by inference only, it must be the land which is attached to "the property" referred to in the earlier order.

8. By letter dated the 26th January 2006 the wife's solicitors wrote to the applicant herein and enclosed a copy of the order dated 12th January 2006. That letter simply stated:

> *"We enclose herewith copy order dated the 12th January 2006 for your attention."*

9. There was no "penal endorsement" attached to or written upon the copy order sent to the applicant with this letter, as required by the Rules of the Circuit Court 2001 (O.25???).

10. I infer that at this point in time the applicant herein was not legally represented since the letter was sent directly to the applicant rather than to any solicitor on his behalf. Neither does it appear from the order dated 14th March 2005 already referred to, that the applicant herein (the respondent to that motion) was legally represented.

11. The next relevant event is that the wife's solicitors issued a Notice of Motion dated 30th March 2006, returnable before the Cork Circuit Court on the 25th April 2006 in which a number of reliefs were sought, including an order compelling the applicant herein to comply with the said order dated 12th January 2006 to vacate the property, and if necessary an order attaching the applicant herein and directing him to appear before the Court to show cause why he should not be committed for a breach of that order. The notice of motion and grounding affidavit were personally served upon the applicant herein on the 11th April 2006.

12. That motion was grounded upon an affidavit of the wife's solicitor which I will not set forth in detail, but it recites her instructions that as of that time the applicant herein had not vacated "the property". It appears that on the return date the motion was adjourned until the 9th May 2006 on which date an order was made for the attachment of the applicant herein and directing him to appear the Court on the 11th May 2006. On that date it appears that the applicant, appearing in person, gave an undertaking to the Court (His Honour Judge James O'Donohoe) that he would vacate the property by 9pm on the same date, the 11th May 2006, and the matter was adjourned to Judge Harvey Kenny's list for the week commencing the 16th May 2006. The order made on the 11th May 2006 directed that the wife was to be allowed to enter the property after 9pm on the 11th May 2006 and to change the locks. An affidavit sworn by the wife on the 15th June 2006 tells us what happened following that undertaking dated 11th May 2006. She arrived at the property at 9.30pm and left again at about 11.30pm, and that the applicant herein had not vacated the property by that time. However it appears that on the 15th May 2006 the applicant herein telephoned his wife to say that he wanted to give her the keys to the property, and she states that later that night at about 8pm after she had obtained the keys, she arranged for a locksmith to change the locks and that the house was secured, but that the locksmith was unable to change the lock on a Pvc door at the rear of the house. She states that she returned the house on the following morning the 16th May 2006 in the company of her sister and the locksmith, and on that occasion the locksmith was able to secure the windows and the rear door by drilling brackets into the Pvc. She states also that on that occasion she checked and confirmed that all windows were closed and all blinds were up.

13. On the 17th May 2006, His Honour Judge Kenny adjourned the matter generally with liberty to re-enter on short notice in the event that there was any further interference by the applicant herein with the sale of the property.

14. The wife's affidavit then records that on the 25th May 2006 she went back to the house with two auctioneers, and that as soon as she arrived at the premises she knew that the house was still occupied since the blinds in the bedroom were pulled down and were not as she had left them on the 16th May 2006. When she went to the rear of the house she saw the applicant herein emerging from a window. She told him that to leave the property and to open the front door since she had people to see the house. She said she would return and requested him in the meantime to remove himself and his belongings from the house. When she returned in due course she found that the brackets which had been placed on the Pvc door and windows were broken and she could not secure the house.

15. The applicant herein was again seen to be in the house by a locksmith on the 3rd June 2006, and he was reluctant to enter the house in those circumstances. The wife arrived in due course and observed the applicant herein in the yard, and she saw also that his belongings which she had removed from the house and placed in a plastic bag in a shed, had been returned to the house. She also saw that the back door had been opened, but that a door between the utility room and the kitchen had been locked, and this prevented her from gaining access to the house.

16. On the application of the wife on the 14th June 2006, and in the absence of the applicant herein, His Honour Judge Kenny ordered that:

> *"1. liberty be granted to re-enter Motion of applicant dated 30.3.2006 and to make it returnable for 12.30pm on 15.6.2006;*
>
> *2. That liberty be granted to attach documents to front door of family home or through a letter box if possible;*
>
> *3. That An Garda Siochana be asked to assist in the notification of the respondent."*

17. That motion and order was served by a summons server on the 14th June 2006 by delivery through the letter box at the house.

18. On the 15th June 2006, an order was made by His Honour Judge Kenny attaching the applicant herein and directing him to appear before the Court on that same day or as soon as possible thereafter in order to show cause why he should not be committed for his breach of the order dated 12th January 2006. A warrant then issued and in view of the non-Appearance by the applicant herein the matter was adjourned until the following day the 16th June 2006. On that date the learned judge ordered that the wife be allowed to enter the family home for the purpose of changing the locks and that An Garda Siochana should accompany the wife on that occasion.

19. It appears that the respondent consulted a solicitor on the 19th June 2006, and that even though he had not by this time seen a copy of the warrant which had been issued for his arrest, he presented himself by arrangement to the Garda Station at Fermoy, Co. Cork, whereupon he was arrested and kept in custody in that Garda Station overnight. On the following morning the applicant herein was brought under arrest to the Courthouse in Cork where he was brought before His Honour Judge Moran, who was there presiding. It appears that on that date His Honour Judge Kenny was sitting at Galway Circuit Court, and that Judge Moran, having spoken to Judge Kenny, directed that the warrant be executed in Galway before Judge Kenny. These facts appear in an affidavit sworn for the purpose of the present application by the Acting Court Clerk in Cork Circuit Court who states that he is familiar with the case.

20. The applicant herein was then brought in custody by members of An Garda Siochana to Galway Courthouse and appeared before His Honour Judge Kenny. He was legally represented before the learned judge. It appears that on this occasion the applicant herein himself apologised to the learned judge for his breach of any order or undertaking to the court. Submissions were also made on his behalf by Counsel. The Court Clerk's note of what happened contains the following note: "apology accepted in Court). The solicitor who instructed Counsel on behalf of the applicant herein has sworn also that the learned Judge accepted this apology but that he stated also that the applicant had to be punished for his behaviour in breaching the order. The learned judge committed the applicant herein to Cork Prison for a period of four weeks, and further ordered that the applicant was not to go within a five miles of the house until after the sale of same is completed.

21. By way of reminder, this order was made following leave being granted on the 14th June 1006 for the re-entry of a motion dated 30th March 2006. That motion it will be recalled sought an order compelling the applicant herein to comply with the said order dated 12th January 2006 to vacate the property, and if necessary an order attaching the applicant herein and directing him to appear before the Court to show cause why he should not be committed for a breach of that order.

22. The Warrant of Arrest and Committal which issued from Galway Circuit Court on the 20th June 2006 following the order made by his Honour Judge Kenny, and on foot of which the applicant is detained, authorises the taking into custody of the applicant and his delivery to Cork Prison and directs the Governor there to *"safely keep him/her in the said prison for a period of 4 weeks or until such time as he has been deemed by this Court to have purged his contempt for his failure to obey his undertaking given to this Court on the 20th day of June 2006……."*

23. This warrant has been certified by the respondent herein to be the basis of the detention of the applicant.

24. Aileen Donnelly SC on the applicant's behalf raises four issues as to why the detention of the applicant should be found to be unlawful, such that his release should be directed by this Court.

25. The first two points can be taken together in that they each relate to what are submitted to be errors on the face of the warrant of arrest and committal which issued from Galway Circuit Court following the order made on the 20th June 2006 by His Honour Judge Kenny. Ms. Donnelly refers to the fact that there is first hand evidence before this Court both from the solicitor who was in the court in Galway when this matter was dealt with, and who took instructions from the applicant and instructed Counsel to appear on his behalf, namely Maureen Harewood, as well as from a Court Registrar, Brian Caden who was in Court on the 20th June 2006, and that there is no doubt emerging from these affidavits as to what actually occurred in the Circuit Court in Galway and as to what order was made by the learned judge on that occasion. The latter has helpfully exhibited a copy of his hand-written notes of the order made. This note reads:

> *"20/6/06 - Galway (Judge Kenny)*
>
> *Commit to prison for four weeks from today.*

Restrained from within 5 miles of family home until sale is complete and closed.

(apology accepted in court)

Costs to applicant."

26. Ms. Harewood's affidavit states that Counsel urged on the learned judge that the applicant was truly sorry for breaching the orders of the court, and that the applicant had left the lands and presented himself to the Gardai when he became aware that they were looking for him. The affidavit goes on to state that the applicant, without any prompting informed the court that he was sorry for breaching any orders or undertakings. This affidavit also states that Counsel referred to the fact that the applicant had not been in receipt of legal advice as to the gravity of what he was doing, and states also that the apology was accepted by the learned judge but that he had stated that the applicant had to be punished for his behaviour in breaching the order. Ms. Donnelly submits that it is clear that what the judge intended was to punish the applicant for his past breaching of the order of the 12th January 2006, but that having accepted the applicant's apology in this regard, it was not the intention of the learned judge to continue to regard the applicant as being in breach of the order such that it was necessary for him to yet purge his contempt. In other words, it is submitted that one of the purposes of attaching and committing the applicant, namely to coerce compliance with the order was no longer in existence, and there remained only the question of punishing the applicant for his past behaviour. It is not argued that the learned judge was not entitled to punish in a summary manner the past admitted breach of the order. What is urged is that the warrant on foot of which the applicant is held directs the Governor of Cork Prison to hold the applicant "*for a period of four weeks or until such time as he has been deemed by the court to have purged his contempt for his failure to obey his undertaking given to this court on the 20th day of June 2006…..*"

27. It is submitted that a number of errors have crept into this document. Firstly, there is the fact that nowhere in the evidence of what was ordered by the learned judge was there reference made to detaining the applicant until he shall have purged his contempt. In fact, it is submitted, the applicant by proffering an apology in court and which was accepted by the Court, the contempt of the Court order by the applicant was already purged, and no further coercion was required.

28. Secondly, the warrant refers to the failure of the applicant to obey an undertaking given to the court on that very day, the 20th June 2006. It is submitted firstly that there is no evidence that any such undertaking was given; secondly, even if there was there was no evidence of any breach thereof; thirdly that it is clear that the reference to such an undertaking is simply an error made by the County Registrar who has signed the warrant; but fourthly that the application served on the applicant by the wife, and on foot of which the attachment and committal order was made, made no reference to any undertaking (overlooking the error in the date thereof), and that therefore if the applicant is committed for breach of an undertaking he was given no notice that this was the complaint being made, and therefore the necessary formalities relating to an application for attachment and committal were lacking. It will be recalled that the original application for attachment and committal of the applicant was for his failure to comply with the Court's order dated 12th January 2006, and not for the breach of any undertaking. It was that application, which was re-entered by order of the 15th June 2006, which was before the learned judge on the 20th June 2006, and no other application.

29. Apart from this clear error as to what order was pronounced by the learned judge, Ms. Donnelly has submitted that the length of time for which the applicant is to be detained in Cork Prison is unclear and ambiguous. She submits that the Governor cannot know whether he is to detain the applicant for "four weeks" or for some period beyond that period, or perhaps within that period, when the Court might yet deem the applicant to have purged his contempt.

30. Ms. Brennan on behalf of the respondent herein has submitted in relation to these points that the history of the case is relevant, and that the present aspect of the case relates back to a judicial separation order made in 2004, followed a year later by an order for the sale of the family home. She submits that the applicant can have had no lack of understanding as to what property he was required to vacate. She submits that the order was made on foot of the application grounded not only upon the affidavit which grounded the application in March 2006 which was adjourned generally, but upon the further affidavit of the wife sworn on the 15th June 2006 which referred to the undertakings given to the court by the applicant since the order of the 12th January 2006. She submits that the applicant can have been under no misunderstanding as to what the complaint was to the court on the 20th June 2006, namely that he had breached the order of the 12th January 2006 as well as his various undertakings given to the court since that order.

31. Ms. Brennan also refers to the uncontroverted evidence that the applicant himself in Court on the 20th June 2006 offered an apology to the Court for his breach of the order and undertakings, and that he cannot now complain that he was not on notice of the fact that it was being alleged that he had breached certain undertakings. She submits that it is clear that the learned judge looked at the overall picture presented by the evidence before him, and that he concluded that a period of four weeks imprisonment was the appropriate punishment for the admitted breach of the order and undertakings, and that it is clear from the warrant that the period for which the applicant is to be detained is four weeks from the 20th June 2006, and that the Governor would know that.

32. My view is that the warrant for arrest and committal of the applicant is entirely unsatisfactory as a document forming the authority for the respondent to hold the applicant in custody. It is carelessly prepared, and in two respects fails to record what was ordered and intended to be ordered by the learned Circuit Judge on the 20th June 2006. What the Court clearly stated was that the applicant should be committed for a period of four weeks for his failure to comply with the order dated 12th January 2006. While his apology appears to have been accepted, the learned judge went on to say that it was necessary to punish the applicant herein for his conduct. That is what ought to be reflected in the Warrant of Arrest and Committal on foot of which the applicant was held in detention. It would appear therefore that the learned judge was intending to punish the present applicant for his past disobedience of the order, and having accepted his apology there was no need to detain him for the purpose of coercing compliance.

33. There is also no doubt but that the order sought in the application before the Court was for the committal of the applicant for his failure to comply with the order dated the 12th January 2006. There is no reference in the Court Registrar's note of the order made that there was punishment being meted out for the breach of any undertaking given to the court subsequent to the date of the order; although the learned judge could, if he saw fit, have taken that conduct into account also when considering what an appropriate period of imprisonment would be for the breach of the order dated 12th January 2006.

34. It has been urged also by the applicant that the terms of the order dated 12th January 2006 itself is unclear, in as much as it fails to state with any particularity what property is to be vacated, and by whom and from what property the cattle referred to are to be removed. In this particular regard, while agreeing that it is highly desirable these details be included in the warrant, each case must be considered on its own particular facts and circumstances. In this particular case I am satisfied that the applicant was not disadvantaged in any way by the manner in which that order was drafted. As it happens in this case, this applicant was in no doubt as to what he had to do and by when. But I would caution that since each case will have to be considered individually, great care

must be taken in the preparation of orders which require a person to do or abstain from doing an act, a breach of which can result in the loss of liberty. Such orders must be clear and unambiguous.

35. But I return to the form of the warrant itself which is the sole authority for the detention of the applicant by the respondent herein. As I have already stated, this document has not been prepared with care and attention to detail. There is no prescribed form for this type of warrant contained in the Consolidated Rules of the Circuit Court, 2001. The form used appears to be a form prepared in the Circuit Court Office and tailored in each case to the particular facts and circumstances of each case. There is no prescribed form of Warrant of Arrest and Committal contained in those Rules.

36. However, in the form used there is provision for certain alternatives to be chosen, others being deleted, and other details to be inserted manually. The form allows for the detention of the applicant for a specified time "or until such time as he has been deemed by the Court to have purged his contempt". I suspect that it was intended to cover two different situations, the first being where as in this case a defined period of sentence is imposed for contempt, and the other where the contempt has not been purged and in order to coerce compliance with an order or undertaking the person is to be detained until such time as the contempt is purged. In the circumstances of the present case these words ought to have been deleted and replaced with the words "for his contempt of Court in failing to comply with the order of this Court dated 12th January 2006", or some such wording in order to reflect what was ordered by the Court.

37. A person detained is entitled to know from the document detaining him why and for how long he is being detained. How else could he properly take legal advice as to the legality of his detention? It must be recalled that a person at all times during his/her detention retains all his/her rights to make a complaint that the detention is unlawful. It cannot be acceptable to say, such as in the present case, that the infelicity with which the warrant has been prepared does not matter because after all the applicant was in court and accepted that he breached the order and knew that he was being punished for that by a period of imprisonment of four weeks.

38. This warrant lacks the integrity worthy of a document whose effect is to authorise the deprivation of a person's liberty. On this ground alone. I am not prepared to regard this Warrant as a sufficient authority for his detention

39. A further ground urged for the illegality of detention is based on the failure of the wife to have served upon the present applicant a copy of the order dated 12th January 2006 containing endorsed thereon the penal endorsement as required by Order 36, r. 25 of the Consolidated Circuit Rules 2001. It is further contended that in as much as a further copy of the said order was served on the present applicant on 11th April 2006 which contained this penal endorsement, the wording of the endorsement did not conform with the wording prescribed in the said rule, and furthermore by the time such a further copy order was served, the time for complying with the terms of the order, namely to vacate the property by the 1st February 2006 had long since expired. The need to serve an order which orders that a certain act be done within a specified time, before that period has expired, was the subject of the judgment in *Duffield v. Elwes* [1840] Ch.268.

40. I find both of these points to be well made. The situation is that by letter dated 26th January 2006 a copy of the order dated the 12th January 2006 was sent to the present applicant by the wife's solicitors. That copy order was not endorsed with any kind of penal endorsement at all. I am satisfied that the wife could not have successfully applied for the committal of the applicant based on that service, even though the applicant himself was in court when that order was made. It must be properly served upon him following the making of the order. O. 36, r. 25 of the Rules provides:

> *"Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be endorsed a memorandum in the words or to the effect following, viz.:*
>
> > *'If you, the within-named A.B. neglect to obey this judgment (or order) by the time herein limited, you will be liable to process of execution including imprisonment for the purpose of compelling you to obey the said judgment."*

41. As I have said there was no penal endorsement set forth at all on the copy order served on the 26th January 2006.

42. On the 11th April 2006 it appears that a further copy of the said order was served, and which contained a penal endorsement in the following terms:

> *"If you the within named James O'Gorman fail to comply with the within order you will be liable to a process of execution."*

43. It will be noticed immediately that there is no reference whatsoever to the possibility that non-compliance with the terms of the order may result in imprisonment. The absence of such information cannot in my view be excused on the basis of the words "or to the effect" as appearing in the rule.

44. The requirement to include the reference to imprisonment in a penal endorsement was absent from the wording of the equivalent rule in the 1950 Circuit Court Rules. O. 33, r. 25 of those Rules provided for the following endorsement:

> *"If you, the within named A.B. neglect to obey this judgment (or order) by the time herein limited, you will be liable to process of execution for the purpose of compelling you to obey the said judgment."*

45. Even before these rules came into existence it was long held to be necessary to serve upon a person ordered to do a certain act a copy of the order so requiring, and that it contain an endorsement as to the consequences for failure to comply. Early cases, and to which it is not necessary to refer in any detail, include *Prior v. Johnston* 27 ILTR. 108, and *Century Insurance Co. Ltd v. Larkin* [1910] Ch. 91.

46. In England, prior to 1991, the requirement to endorse an order with a penal endorsement similar to the old form in the 1950 Circuit Court Rules existed, but a similar change to that appearing in the 2001 Rules, was made to the wording of the penal endorsement in the Supreme Court Practice 1991, Volume 1, with effect from 1st June 1992. The question of the adequacy of the words used in the penal endorsement following that change to the English Practice Rules has been the subject of judicial determination following the introduction in England of the new wording as provided in Order 47, rule 7(4) of these Rules, and it is useful to refer to same. In *Moerman-Lenglet v. Henshaw*, The Times Law Reports, 23 November 1992, Chadwick J. stated:

> *"It must have appeared to the Supreme Court Rules Committee that the old form of penal notice – with its reference to*

process of execution -- was insufficient to bring home to a person on whom it was served the penalty to which disobedience to the order might give rise, namely imprisonment.

In those circumstances I do not think I can take the view that the penal notice, which was endorsed on the copy of the order served, was in terms which complied with the new rule 7(4)."

47. This was a view with which Lord Bingham in the Court of Appeal (Civil Division) agreed in his judgment in *Re O (a minor)* 5th May 1994.

48. There can be no doubt about the absolute necessity to comply in every respect with the terms of the wording of the penal endorsement set forth in the current Rules, whether in the Circuit Court or the High Court. The current Rules in each jurisdiction make a deliberate alteration to the wording which was previously prescribed. That was deliberate. In fact, my own recollection from daily practice in the High Court prior to the introduction even of the 1986 Rules, was that for some years prior to the new Rules coming into effect it was a requirement, perhaps by virtue of some Practice Direction in this regard, that the words "including imprisonment" be added to the wording of the penal endorsement which appeared in the earlier rules.

49. It is essential in a situation where a person is at risk of losing his liberty in the event of not complying with an order of the court directing him/her to do some act, that he/she is fully aware of that possibility. It seems obvious that the new wording was regarded by the Rules Committees in question, and the legislature subsequently, as bringing home to such a person the seriousness of any failure to observe the terms of the order. I cannot countenance a situation where, even though a person may in fact be aware of the consequences of his/her failure to comply with an order, the strict compliance with service of the order and the terms of the penal endorsement could be overlooked so as to facilitate the incarceration of the defaulter. On this ground also I would find that the detention of the applicant is unlawful.

50. A final point raised by Ms. Donnelly on the applicant's behalf is an unusual one and which arises from the fact that, as already stated, when the applicant was arrested and brought before the Cork Circuit Court, the sitting judge was not His Honour Judge Kenny, since he was sitting in Galway Circuit Court on that date. According to the affidavit of the Acting Chief Clerk in Cork Circuit Court, His Honour Judge Moran, having communicated with Judge Kenny, directed that the warrant be executed in Galway before Judge Kenny. The applicant was then brought to Galway Circuit Court for that purpose. The point being made is that the proceedings out of which the present matter arises is a family law matter in the Cork Circuit Court, and that since the Circuit Court is a court of limited and local jurisdiction, it was not open to His Honour Judge Kenny to hear any part of the matter outside the Cork Circuit Court area, and that therefore in making the order for committal in Galway the learned judge acted outside jurisdiction.

51. Section 21(9) of the Courts (Supplemental Provisions) Act, 1961 provides that a judge even of his own motion, if he thinks fit, may by order change the venue for the trial of any action pending before him "from one place of hearing to any other within his circuit…."; but that does not apply in the present case since the matter went to another circuit altogether rather than to another place within his circuit.

52. Section 21(12) of the same Act provides that where an 'action' is pending before a judge of the Circuit Court "for the time being assigned to a particular circuit", and an application is made by any party to such action for the transfer of same to another circuit for hearing by the judge of the Circuit Court for the time being assigned to such other circuit, the first-named judge may, with the consent of such other judge transfer 'such action' so that it may be heard by that other judge. But, again, that does not fit the present situation since, firstly, no party applied to have the matter transferred to another circuit, and moreover 'action' is by s. 15 of the Act defined in a way which possibly excludes an application for attachment and committal, which may, without expressing a final view on the matter since it has not been fully argued, fit more within the definition of 'matter' as set forth in s. 15.

53. Ms. Brennan has sought to argue that this issue is determined by reference to s. 21(11) of the Act which provides:

"(11) A judge of the Circuit Court may, outside his circuit, hear and determine any application which he has power to hear and determine within that circuit and which, in his opinion should be dealt with as a matter of urgency."

54. At this point the Court is lacking a vital piece of factual information as to the particular circuit, if any, to which His Honour Judge Kenny is presently assigned, and if this point was necessary to determine for the purpose of deciding upon the lawfulness of the applicant's detention, it would be necessary to obtain the necessary evidence in this regard. Ms. Donnelly has stated that it may well be that at the moment the said judge is not specifically assigned to any particular circuit but hears cases in different circuits as may be required, and can therefore not be said to be "assigned to a particular circuit" for the purpose of s. 21(11). As I have said, the factual basis for determining that point is absent at the present time.

55. I therefore prefer to leave this issue to one side, and express no view upon it, since on other grounds I have already concluded that I am not satisfied as to the lawfulness of the applicant's detention.

56. Accordingly I direct the applicant's release, while at the same time pointing to the obvious fact as far as I am concerned that there can be no room for doubting that the applicant failed to comply with the order made on the 12th January 2006. It is simply because the necessary procedures have not been properly adhered to, and other formalities observed that his detention is unlawful. It goes without saying that the order of the 12th January 2006 is a subsisting and valid order, and that it must be obeyed and observed in every respect by the present applicant, if he is to avoid further risk to his liberty and/or other penalty.