THE HIGH COURT

IN THE MATTER OF AN APPLICATION PURSUANT

TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

[2014 No. 2074 SS]

BETWEEN

ZHONG HE

APPLICANT

AND

THE GOVERNOR OF CASTLEREA PRISON

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

[2014 No. 2075 SS]

BETWEEN

XUE HONG ZHONG

APPLICANT

AND

THE GOVERNOR OF CASTLEREA PRISON

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Mr. Justice McDermott delivered on the 20th day of October, 2015.

1. The respondents seek a wasted costs order against the solicitors representing each applicant pursuant to Order 99 Rule 7 of the Rules of the Superior Courts the relevant part of which provides:-

> "If in any case it shall appear to the court that costs have been improperly or without any reasonable cause incurred, or that by reason of… any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring same, the court may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client and also (if the circumstances of the case shall require) why the solicitor shall not repay to his client any costs which the applicant may have been ordered to pay any other person, and thereupon may make such order as the justice of the case may require…"

2. On the 16th December, 2014 this court directed an inquiry into the detention of the applicants pursuant to Article 40.4.2 of the Constitution. It was ordered that the Director of Public Prosecutions be joined as a notice party because the issue raised concerned orders of convictions and sentence by the Circuit Criminal Court in Mullingar which issued Committal Warrants authorising the imprisonment of the applicants following conviction and sentence. The Governor of Castlerea Prison had no evidence to offer concerning the factual circumstances of the cases which culminated in the making of the orders.

3. The applicants both pleaded guilty to offences contrary to Section 17 of the Misuse of Drugs Act 1977 (as amended) involving the cultivation of cannabis plants and were each sentenced on the 30th September, 2014 (by his Honour Judge Hunt as he then was) to four years imprisonment. In the case of Zhong He it was ordered that part of the sentence would be suspended on certain conditions set out in the Committal Warrant as follows:-

> "The Court Doth Order that the Accused be imprisoned for a period of four years, on count number 3, such sentence to date from 21/10/2013 with the balance to be suspended on Production to the Prison Governor of an airline ticket and travel documents for return to his home country. To enter a bond before the Prison Governor in the sum of €300.00 when these documents are produced, to leave the country and not return for a period of ten years. He is to be released into the custody of the Garda National Immigration Bureau."

The warrant in respect of Xue Hong Zhong was similar in its terms save that the sentence was to date from 5th September, 2013.

4. An application for an inquiry under Article 40 was made by Keith Spencer BL instructed by Mr. Donal Quigley, solicitor in the case of Zhong He, and instructed by Mr. Niall O'Connor in the case of Xue Hong Zhong. In was clearly the intention of the learned trial judge that each applicant would be credited with the terms served on remand prior to sentence and that they would be released upon compliance with the terms set out in the order.

Grounding Affidavit of Mr. Quigley: Zhong He
5. Having recited a short history of the case and the relevant part of the Committal Warrant, Mr. Quigley states that the applicant wished to avail of the suspended portion of the sentence but that it was impossible for him to purchase a one-way ticket to China from prison. It was stated that he had no access to the internet for that purpose or any facilities whereby it could be arranged for him. It was stated that he was not in possession of his passport which was necessary in order to book the flight. It was suggested to the court that a 'State authority' was in possession of his passport.

6. Mr. Quigley stated that the applicant made contact with the Garda National Immigration Bureau (GNIB) and requested that its officers visit him in prison. Though it was accepted that GNIB officers attended the prison, the affidavit states that they informed the applicant that they were not in a position to assist in "deporting" him from Ireland.

7. The central point made in respect of the warrant is set out at paragraph 10:-

> "I say and believe and am advised by Counsel that by making the purchase of a ticket a precondition of the Applicant's release and not a condition of the sentence that could be complied with post-release the learned Circuit Judge has imposed an impossible and unworkable precondition on a suspended sentence that will result in the Applicant not being able to avail of the suspended sentence and his continued imprisonment for the entire period of four years."

8. Mr. Quigley was also instructed that the applicant was not in a position to pay for an airline ticket to China and that he would be required to serve an additional three years imprisonment because a travel ticket had not been provided for him. This, it is claimed, gave rise to a disproportionate, unjust and unfair consequence. It is stated that the applicant was willing to comply with all terms of the suspended sentence that it was within his power to fulfil.

9. Mr. Quigley states that he did not represent the applicant prior to the imposition of sentence but that:-

> "a fellow Chinese national requested that I act on behalf of the Applicant and I then took instructions from him. I say that the Applicant was of the view that his sentence had been suspended, however, he does not know how to give effect to this suspended portion."

Grounding Affidavit of Niall O'Connor: Xue Hong Zhong
10. Mr. O'Connor's affidavit contains substantially the same averments as those set out in Mr. Quigley's affidavit. It also states that it was impossible for the applicant to purchase a ticket to China from prison, that he did not have access to the internet for that purpose or the facilities to arrange it, and that he did not have his passport.

11. Mr. O'Connor also states that this applicant made contact with GNIB officers requesting a visit but was similarly informed that they were not in a position to assist in his deportation. He was willing to leave Ireland if provided with a ticket by the authorities. The same point was made on his behalf as set out in paragraph 10 of Mr. Quigley's affidavit. It was also claimed that he was impecunious and not in a position to pay for a ticket to China.

12. Mr. O'Connor also stated that he did not represent Mr. Xue Hong Zhong at any stage of the criminal proceedings which led to the imposition of the sentence.

13. The respondent and notice party sought time on the return to the Order directing the Inquiry under Article 40 to take full instructions concerning the hearing before his Honour Judge Hunt. A transcript of the sentencing hearing was obtained. On the 18th December, 2014 the applicants' counsel indicated to the court that the applications were withdrawn because the solicitors had been "deprived of information".

The Sentencing Hearing
14. The transcript of the sentencing hearing indicates that Zhong He was represented by solicitor, junior and senior counsel and that Xue Hong Zhong was represented by solicitor and junior counsel. As set out in the orders the sentence imposed was one of four years imprisonment in each case, the balance of which would be suspended on fulfilment of the conditions set out.

15. It is clear form the transcript that the learned trial judge sought to address the practical difficulties that might arise from the making of the order and invited counsel for the applicants and the prosecution to address him on these matters. Defence counsel informed the court that an issue had arisen in relation to travel documentation. The solicitor acting for Xue Hong Zhong had spoken with the Chinese Embassy and the court was informed that documentation had been issued to the GNIB. It was also indicated that the applicant did not have a ticket to travel home as he did not have the means to procure one at that time. The learned judge indicated that he did not intend that the applicant should be released from prison unless there was a defined arrangement whereby he was going to leave the country immediately. The learned judge pointed out the practical difficulties from the point of view of the prison authorities. He stated that when making similar orders in other cases it was his practice to set a time and date of departure from the State. A means of delivering the convict to a point of departure was provided following the entry of a bond before the Governor of the prison immediately before leaving the State. It was submitted to the learned judge that once the travel documentation including tickets and lawful travel documents had been arranged and received by the applicants they could then be released into the custody of GNIB. Instructions were taken as to whether the GNIB would facilitate this procedure and the court was informed that it would and that this had been done before. The learned judge then imposed the sentence of four years back-dated in each case, the balance to be suspended on production to the prison Governor of the travel documentation and an airline ticket. Each applicant was to enter a bond before the Governor in the sum of €300.00 to leave the State forthwith and not return for a period of ten years from the date of his release. The applicants were then to be delivered into the custody of GNIB and to be taken to a place of departure from the state. The suspension did not become operative until the applicants entered a bond before the Governor having produced the documents. The onus was clearly placed upon the applicants to obtain and submit the documents. Liberty to apply was sought in respect of "any difficulty" and the learned judge addressed this matter by stating:-

> "if there is any issue with that warrant, perhaps you would come back to me, rather than going elsewhere, and we will

see if we can sort it out."

Counsel for both applicants agreed that this was the appropriate procedure. Counsel for Zhong He informed the court that the Chinese Embassy had indicated to the instructing solicitor that "that the travel documents are in being" but that they "had no indication of an airline ticket that would take him from the State". The court indicated that it was his obligation to produce a ticket.

16. It is clear from the correspondence later opened to the court that Mr. Conleth Harlow, solicitor, who acted on behalf of both men in the criminal proceedings engaged with the GNIB and the Chinese Embassy in Dublin concerning the proposed repatriation of his clients following their guilty pleas. He wrote on the 28th April, 16th May, 29th May, 27th June and 22nd October to the GNIB outlining the progress made in his contacts with the Chinese Embassy seeking to procure travel documents for his clients and in procuring funds for the purchase of tickets.

17. On the 29th May he wrote to the GNIB informing them that he had communicated with the Department of Justice and the Chinese Embassy concerning the cases and had been informed that the Chinese Embassy would visit the applicants if they were invited by the GNIB to attend with them at Castlerea Prison. This would enable Embassy officials to interview them and assess their circumstances and status to facilitate the submission of applications for travel documentation.

18. On the 22nd October, 2014 Mr. Harlow was in a position to inform Gardaí at Roscommon that he held a sum of €1,200.00 for Mr. Xue Hong Zhong which was available for arranging a flight ticket on his behalf. He sought advice as to where he should send this money in order to procure a ticket.

19. It was indicated by letter dated 16th May that Xue Hong Zhong did not have a passport or valid travel document. It was also indicated in correspondence that Zhong He had entered the United Kingdom illegally in May 2012.

20. In affidavits submitted in the course of these motions it was stated on behalf of the GNIB that they understood that neither applicant had a valid Chinese passport and there was no basis upon which it could be asserted that "passports remain in State custody". From the evidence it is clear that on 10th January, 2014, Detective Garda Rogers of GNIB, accompanied by two officials from the Chinese Embassy, travelled to Castlerea Prison for the purpose of interviewing a number of prisoners who were Chinese nationals. While attending the prison the applicants became aware that other Chinese nationals were being interviewed and sought an interview with the embassy officials and Detective Garda Rogers. This was accommodated but no prior request had been submitted for such an interview. Both applicants were interviewed and completed a form, giving personal details for verification of their status, which was common procedure with the Chinese Embassy. This form is completed by a Chinese national who does not have a passport or any identification documents. The forms were retained by the Embassy officials in order to verify the details provided and to assist with the issuing of a travel document. Both applicants were presented at that time with forms consenting to the making of deportation orders in their cases but they declined to sign same, as was their right.

21. On the 6th August, 2014 Detective Garda Rogers accompanied by two officials from the Chinese Embassy visited the prison and met with the applicants. Both applicants signed a form consenting to the making of a deportation order and stated that they were aware that the date of the sentencing hearing had been fixed for the 30th September, 2014. On 3rd September, 2014 Detective Garda Rogers collected the travel documents for both applicants from the Chinese Embassy which had been issued on the 2nd September. These remained the property of The People's Republic of China and were issued to GNIB on the understanding that should deportation orders issue, the GNIB would use these documents for the purpose of enforcing the orders.

22. The Chinese travel documents that were issued therefore, were for this limited purpose. However, it must be noted that the exclusion envisaged by the trial judge was one of ten years from date of release and not of the more permanent kind made under section 3 of the Immigration Act 1999 as amended. Furthermore, it is clear that the learned trial judge did not make and was not asked to make any recommendation that the applicants be deported under section 3 as persons who had been convicted of criminal offences. In addition, the Court was informed that there was no difficulty about travel documentation which "had apparently been issued to the GNIB" according to defence counsel. It would appear that while the applicants were facilitating their deportation for a greater period than that envisaged by the trial judge this was not brought to his attention. In fact, the applicants represented to the court that they wished to make their own arrangements and sought and submitted to conditions that would enable them to leave the State voluntarily. The court knew nothing of the proposed deportation of the applicants.

23. At the time of sentencing therefore, GNIB were in possession of travel documents enabling the applicants to travel on the making of deportation orders. The applicants had signed consents to the making of those orders. Ultimately deportation orders were signed by the Minister on 30th April, 2015 and the applicants were deported to China on the 13th May.

24. Two cheques of €500.00 each were forwarded to Mr. Quigley solicitor by the Governor of Castlerea Prison on 30th April, 2015 under cover of a letter which stated "this money was authorised by your clients to be taken from their prison accounts and given to you to purchase flight tickets, if same sanctioned". However, the Court was also informed by GNIB that upon the making of deportation orders, the applicants would not be burdened with the cost of flights which would be paid for by the INIS (as set out in paragraph 10 of the affidavit of Mary Delmare).

25. It seems to me that Mr. Harlow, who was acting on behalf of the applicants during the course of these criminal proceedings made every effort possible to ensure that his clients would be in a position to comply with the conditions of the suspended sentence which were agreed by both parties before the learned judge. A difficulty arose in relation to the implementation of these conditions. The parties were not only invited but directed to return to the court in that event and the court would then endeavour to resolve the difficulty.

26. At this point new solicitors were retained and without very much inquiry, applications were initiated in this Court for an inquiry under Article 40. Apart from the fact that Article 40 relief is available to convicted persons on a much more restricted basis than applies in other cases (see *The State (McDonagh) v. Frawley* [1978] I.R. 131), the conditions set for their release were in ease of the applicants and framed in terms which they sought on the basis of information furnished to their solicitors and the court. The court indicated that it would make any reasonable order to facilitate their release and departure from the country and obtain the benefit of the suspended term. The implementation of the conditions gave rise to the problems which had been anticipated by the learned trial judge. It is completely unacceptable to the court, having regard to the extensive history of this case, the extensive correspondence between the applicants' solicitors and the GNIB, the Gardaí in Roscommon and the Chinese Embassy that no inquiry was made by the new solicitors concerning these events. They did not seek or obtain detailed instructions from their clients concerning their respective case histories. They did not contact the solicitors who represented the applicants in the course of these hearings who had made strenuous efforts and devoted considerable energy to ensuring that the conditions could be fulfilled. They were not informed or did not obtain instructions to the effect that Mr. Harlow had €1,200 on account for the purchase of a ticket in respect of one of the

applicants. No contact was made with the investigating Gardaí, or the office of the Director of Public Prosecutions, or counsel on behalf of the Director of Public Prosecutions with a view to obtaining a history of the case or an understanding of the present circumstances before making an application to the High Court. No contact was made with the GNIB who had contact with both applicants. No contact was made with the Chinese Embassy in respect of travel documentation. Counsel did not advise in relation to any of these matters prior to advising an immediate application to the High Court under Article 40 of the Constitution. All relevant matters were within the knowledge of the applicants prior to the making of these applications and would have been available to the respective solicitors had they made any reasonable inquiry. It is incumbent upon solicitors acting on behalf of applicants to seek all reasonable and necessary instructions in order to ensure that the facts of the case are fully disclosed to this court. This is especially important when the case concerns a challenge to an Order made following conviction and sentence under Article 40. I am satisfied that the failure to make those inquiries and secure full instructions was a serious error, as was the failure of counsel to advise them to do so before advising and initiating this application.

27. The grounding affidavits and the original application complained that the learned trial judge had imposed an impossible and unworkable precondition on a suspended sentence. That simply was not the case. It imposed a condition which he had been told was workable. He expressed some doubts about this but indicated that if any difficulty arose, application should be made to him rather than some unnecessary application "elsewhere". It is completely unacceptable that an order is obtained from a Criminal Court, at one level, imposing conditions to which the applicants indicate their willingness to submit, and they advance as workable, and which is then traduced and challenged before another Court on the basis of a bald assertion that the learned judge had imposed "an impossible and unworkable pre-condition on a suspended sentence". This is particularly so when a simple remedy existed. The applicants could have returned to the learned trial judge as directed. It is in those circumstances that the respondent and notice party seek a wasted costs order against the applicants' solicitors.

The Law

28. The jurisdiction to make an order under Order 99 Rule 97 stems from the exercise by the High Court of its inherent jurisdiction over solicitors. It may be invoked where it is established on the balance of probabilities that a solicitor having carriage of proceedings has been guilty of improper conduct. This requires proof that the solicitor is in breach of his/her duty to the Court or at least gross negligence in respect of that duty.

29. In *Kennedy v. Killeen Corrugated Products Ltd*. [2007] 2 I.R. 561, Finnegan P. considered the nature and extent of the jurisdiction. He reviewed the decision of the House of Lords in *Myers v. Elman* [1940] A.C. 282 and the occasions upon which solicitors had been fixed with costs in the past. He noted that Lord Atkin considered that it was sufficient to demonstrate a breach of the duty owed to the Court committed by the solicitor's gross negligence. Lord Wright considered that the solicitor must be guilty of professional misconduct but not of such seriousness as would justify striking him/her off the role of solicitors. He quoted Lord Wright' s view that:

> "…The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which is a solicitor's duty to ascertain with accuracy may suffice. Thus a solicitor may be held bound in certain events to satisfy himself that he has a retainer to act, or as to the accuracy of an affidavit which his client swears. It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve a personal obliquity. The term professional misconduct has often been used to describe the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the Court and to realise his duty to aid in promoting in his own sphere the cause of justice. …"

30. Finnegan P. also quoted with approval the following extract from the judgment of Sachs J., in *Edwards v. Edwards* [1958] 2 W.L.R. 956 at page 964:

> "it is of course, axiomatic, but nonetheless something which in the present case should be mentioned, that the mere fact that the litigation failed is no reason for invoking the jurisdiction; nor is an error of judgment, nor even is the mere fact that an error is of an order which constitutes or is equivalent to negligence. There must be something that amounts in the words of Lord Maughan, to a "serious dereliction of duty", something which justifies according to other speeches in that case, the use of the word "gross". It is not, however, normally necessary to establish *mala fides* or other obliquity on the part of the solicitor; though it may be that if *mala fides* is established that might turn the scale in a particular case; and it is right at this stage to make it clear that no imputation whatever is made against the solicitors' honesty.
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> No definition or list of the classes of improper acts which attract the jurisdiction can of course, be made; but they certainly include anything which can be termed an abuse of the process of the Court and oppressive conduct generally."

31. Finnegan P. concluded that the power of the Court to make an order under Order 99 Rule 7 requires that the Court be satisfied that a solicitor is guilty of misconduct in the sense of a breach of his duty to the Court or at least of gross negligence in relation to that duty. In the instant case counsel had furnished a detailed advice on proofs directing that, in the absence of admissions by the plaintiff, an application should be made for the delivery of interrogatories. Each of the interrogatories raised failed the appropriate legal test, namely, whether it was essential for the proper presentation of the applicant's case that the information be furnished at that juncture. However, Finnegan P. considered that the solicitor's behaviour in the case fell "far short" of "gross negligence". He had regard to the fact that the solicitor acted on the advice of counsel and that acting on such advice would in general be an answer to a charge of negligence. Consequently, he declined the order sought.

32. These principles were applied by the Supreme Court in *HO (an infant) v. The Minister for Justice, Equality and Law Reform and the Refugee Applications Commissioner [2013] IESC 41* (unreported, Supreme Court, 23rd October, 2013).

33. The respondent and notice party submit that the solicitors for the applicants were guilty of gross negligence because they failed to take adequate instructions as to how and why the conditions of the suspended sentence were imposed and the direction of the learned trial judge that the applicants should return to the court if any difficulties arose concerning their implementation. They failed to communicate at all with the previous solicitors instructed in the criminal proceedings or to ascertain what efforts had been made to procure the travel documents and tickets. The affidavits set out very little of the history of the case which was readily ascertainable from numerous sources. The claim made that the applicants did not know how to advance matters and that it was impossible to comply with the conditions of the suspended sentence were not investigated to any extent. A scenario that was completely at variance with the facts as evidenced by the transcript and correspondence was, as a result, presented to this court. The court was as a result, not informed that funds were held by Mr. Harlow on behalf of Xue Hong Zhong. The withdrawal of the Article 40 applications on the basis that the solicitors claimed that they were "deprived of information" ignores the reality that they invoked the Article 40 jurisdiction without making any relevant enquiries or seeking detailed instructions beyond the bald assertions made by their

clients. This was compounded by the failure of counsel to advise the solicitors and their clients that relevant and reasonable inquiries be made prior to making the applications.

34. The solicitors claim that the court should take into account the difficulties that solicitors face when called on to act for impecunious prisoners and the onerous obligations they assume in ensuring that any detention to which their clients are subjected is in accordance with law. The court fully understands that issues concerning the lawfulness of detention or imprisonment often arise under difficult circumstances in which time may be of the essence to the making of the application. The opportunity to obtain full instructions may be constrained by the fact that advices are sought by a family member or through a third party when the full facts may not be available for the instructing solicitor. The priority placed by the Constitution on the right to personal liberty and that persons may only be detained in accordance with law is exemplified by the informality of the procedure available to a prisoner, the absolute right of a prisoner to communicate with a judge of the High Court in relation to his detention and the recognition that such an application may be made on his behalf by a third party. In those circumstances, it is submitted that the court should be even more reluctant to make a wasted costs order in cases of this kind in case it causes a "chilling" effect on the making of such applications. A solicitor is under a duty to take steps to vindicate his client's constitutional rights when furnished with instructions which indicate that his detention may be unlawful.

35. It is submitted that when Mr. Quigley obtained a copy of the order of sentence it raised issues on its face and had resulted in the continued imprisonment of his client beyond the period envisaged by the learned trial judge when imposing sentence. It was submitted that it was his duty in those circumstances to initiate the applications under Article 40.

36. It is also submitted on behalf of the solicitors that they acknowledged their error in not contacting the applicants' former solicitor. As a result of that error it is submitted the solicitors were not in possession of all relevant information for preparing grounding affidavits and seeking the enquiry under Article 40. However it is submitted that as soon as the error was realised, these applications were withdrawn.

37. The applicants' solicitors and junior counsel must have known that these applications could only succeed in exceptional circumstances as set out in *Ryan v. Governor of Midlands Prison* [2014] IESC 54 (unreported, Supreme Court, 22nd August, 2014). As stated by Denham C.J., (at para. 18):-

> "Thus the general principle of law is that if an order of a Court does not show an invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In such circumstances the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."

In this case a further straightforward and simple remedy was available in the liberty to apply granted by the learned trial judge concerning any practical difficulty that might arise for the applicants in fulfilling the conditions of the order (see *F.X. v. Clinical Director of the Central Mental Hospitals* [2014] IESC 1 and *Roche (also known as Dumbrell) v. Governor of Cloverhill Prison* [2014] IESC 53.

38. In *O.J. v. Refugee Applications Commissioner* [2010] 3 I.R. 637 leave to apply for judicial review was refused on the basis that proposed grounds of review were misconceived. The respondents applied for the costs of the proceedings and made an application for a wasted costs order fixing the applicant's solicitor with liability for the costs. Cooke J. granting the order, acknowledged that the first duty of legal practitioners was to ensure that the legitimate interests of their clients were secured in exercising their rights of access to the courts, but that practitioners also had a duty to the court to ensure that the right of access to the courts was not abused by vexatious, wasteful or speculative litigation. He accepted that the jurisdiction under O. 99 r.7 should not be used in such a way as to impose an additional burden on legal practitioners, particularly in asylum proceedings where the administration of justice required that legal representation from experienced and competent practitioners be available to those claiming asylum. The learned judge stated:

> "23. It is obvious, therefore, that the Court should be cautious not to allow a sense of dismay at the way in which a particular case has been brought or conducted to lead to a situation in which the issue of costs, which is in any event a precarious one in such cases, should impose an added burden of uncertainty upon practitioners.
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> 24. The first duty of legal practitioners is, of course, to ensure that the legitimate interests of their clients are secured in exercising their right of access to the courts. In asylum cases their duty is to see that throughout the asylum process appropriate steps are taken to ensure that an application for asylum receives full and fair consideration and results in a lawful determination of the claim. Practitioners have also, however, a duty to the court to ensure that the right of access to the court is not abused by vexatious, wasteful or speculative litigation. There is no obligation to pursue litigation at all costs simply because it is possible to do so especially when it has no purpose other than that of prolonging the process and postponing a final determination of the asylum application.
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> 25. Whenever the Court has good reason to conclude that there has been a failure in the discharge of this latter duty such that proceedings have been unnecessarily commenced or wastefully continued, it should be made clear that recourse will be had to O. 99, r. 7 in order to protect the integrity and effective operation of the asylum process in the interests of the proper administration of justice and of the interests of those genuinely in need of protection and whose determination is likely to be delayed by abuses of process in other cases."

It was accepted by the respondents that there had not been "gross misconduct" on the part of the solicitor but it was claimed that costs had been unnecessarily incurred by the respondents without any reasonable cause and that the costs of appearing on various dates, and then at the hearing, were effectively wasted because the legal representatives of the applicant were afforded numerous opportunities to reconsider the proceedings and to withdraw them before such costs were incurred by the respondents. Cooke J. accepted that the case was not one to be characterised as gross misconduct in the sense of professional misconduct. However, he held that there had been "a clear default in the discharge of the duty owed by legal practitioners to the court in commencing and continuing the proceedings." He was satisfied that where no consideration had been given to the legal objectives to be achieved by the proceedings they continued when they could not possibly have succeeded.

39. I am satisfied that having regard to the nature of the issues that arise under Article 40, that a similar caution should be exercised by this court in considering the making of a wasted costs order. In this case it is clear that the applicants' solicitors did not continue with an unmeritorious application when the full background and circumstances were made known to the court by the respondents. The difficulty is that this material was readily available to the applicants' solicitors had they bothered to make reasonable enquiries.

40. I am not satisfied that the averments made by the solicitors in the case, to the effect that clear instructions had been received that the relations with the former solicitor had broken down, adequately explain why the former solicitor was not contacted concerning what had occurred or whether steps had been taken to assist the applicants in complying with the conditions imposed. If the solicitors were taking over the matter from the former solicitor, one would expect some form of contact with a view to obtaining a clear understanding as to the progress, if any, which he had made. It is clear that Mr. Harlow had been in constant correspondence with the authorities and the Chinese Embassy up to the 22nd October, 2014. There is no evidence before the court as to how or to what extent the relationship between the applicants and their solicitor had broken down. Indeed he had contacted the Chinese Embassy officials on numerous occasions to try and advance matters. No reasonable excuse whatsoever has been given to the court other than to acknowledge this as an error.

41. The court is satisfied that costs have been unnecessarily incurred by the respondents "without any reasonable cause". There has been a serious breach of duty by the solicitors to the court. The entire burden of adducing evidence concerning the circumstances in which these committal warrants issued and exploring the contacts made by and on behalf of the applicants with GNIB, An Garda Síochana and the Chinese Embassy fell upon the respondents. Most of these facts were peculiarly within the knowledge of the applicants. They most certainly were within the knowledge of the former solicitor who was never contacted. I am therefore satisfied that a wasted costs order covering one day of costs of the hearing, under Order 97 rule 7, against each of the solicitors might have been appropriate. I am satisfied that there was ample opportunity and time to reflect on the proofs required and to make reasonable enquiries prior to initiating these applications. These are steps which a reasonable and prudent solicitor would take in a post conviction and sentence application. I am satisfied that the solicitors have failed in their duty to the court in commencing these proceedings in that they failed to take the minimal steps to inform themselves of the facts of their clients' cases. The court will exercise its discretion however, and refrain from making the order sought having regard to the fulsome apology made to the court by each of the solicitors and the fact that the applications were withdrawn at an early stage. The court is concerned that applications of such a serious nature would be made without proper cause or preparation and any repetition of such conduct will inevitably influence the exercise of the court's discretion in the future.