Neutral Citation Number: [2009] IEHC 276

THE HIGH COURT

2006 4300 P

BETWEEN

CAROLINE MCCANN

PLAINTIFF

AND

THE JUDGE OF MONAGHAN DISTRICT COURT, THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE CHIEF EXECUTIVE OF THE IRISH PRISON SERVICES, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

AND

HUMAN RIGHTS COMMISSION AND MONAGHAN CREDIT UNION LIMITED

NOTICE PARTIES

Judgment of Miss Justice Laffoy delivered on the 18th day of June, 2009.

The proceedings

In broad terms, there are two major elements in these proceedings. The first is a challenge by the plaintiff to the validity of an order for her arrest and imprisonment made by the first defendant on 14th November, 2005 (the 2005 order) at the suit of the second notice party (the Credit Union) under the Enforcement of Court Orders Acts 1926 and 1940, ordering that the plaintiff be committed to prison for one month for failure to comply with an instalment order which had been obtained by the Credit Union against her. The second is a challenge by the plaintiff to the validity of the legislation under which the 2005 order was made on the basis that it is invalid having regard to the provisions of the Constitution and that it is incompatible with the European Convention on Human Rights (the Convention).

The current structure of the proceedings, which is somewhat unusual, requires explanation. The plaintiff instituted judicial review proceedings, as applicant, naming an individual Judge as first respondent, for whom, by order of this Court (Quirke J.) made on 5th October, 2006, the first defendant was substituted, and naming the second to sixth defendants as the second to sixth respondents (Record No. 2006/1118 J.R.) and these plenary proceedings contemporaneously on 15th September, 2006. Subsequently, by order of this Court made on 19th October, 2006 the judicial review proceedings and the plenary proceedings were consolidated. The Credit Union was joined as a notice party in the judicial review proceedings by order of this Court (Quirke J.) made on 5th October, 2006. Its role was to meet the challenge to the validity of the 2005 order, should it wish to take it on. However, the Credit Union was not made a defendant to the consolidated proceedings. The second to sixth defendants (the State parties) are before the Court to answer the challenge to the validity of the 2005 order and, in the case of the fifth and sixth defendants, to answer the challenge to the validity of the legislation. There was no participation by or on behalf of the first defendant. The first notice party (the Commission) was given notice of these proceedings pursuant to s. 6 of the European Convention on Human Rights Act 2003 (the Act of 2003) and, having been granted leave to do so, is participating in the proceedings as *amicus curiae*.

Another unusual feature of these proceedings is the stance adopted by the State parties. On 13th November, 2007, after the defence had been delivered, the Chief State Solicitor wrote to the plaintiff's solicitor setting out the State's position, stating that it was "obliged to defend the constitutional validity of the legislation … and its compatibility" with the Convention and did assert such validity and compatibility. However, it was not seeking to stand over the 2005 order and it was a matter for the Credit Union whether it wished to stand over that order. The Chief State Solicitor confirmed that he had written to the Credit Union setting out the State's position and recommending that, "in the plaintiff's unfortunate circumstances, the Credit Union might consider agreeing to have the order quashed".

As a notice party, the Credit Union did not deliver a defence in the proceedings. However, around the time it was required to exchange written submissions in connection with the imminent hearing of the proceedings, by an open letter of 28th January, 2009 to the plaintiff's solicitor, the Credit Union proposed that an application be made on behalf of the plaintiff for an order of *certiorari* quashing the 2005 order and stating that the Credit Union would not oppose the application. The proposal was made on the basis that the parties would bear their own costs. It was also suggested that, following the making of the order of *certiorari*, the proceedings should be remitted to Monaghan District Court with a view to an application being made to vary an instalment order. In its written submissions subsequently delivered, the Credit Union made the practical suggestion that it would not oppose an application for an order of *certiorari* to quash the 2005 order on the ground that it was contrary to natural justice by reference to the plaintiff's personal circumstances, in particular, that she suffers from a depressive illness of a recurrent nature, which the Credit Union now accepts as a fact, and has educational inadequacies, which the Credit Union implicitly accepts as being an explanation for her failure to engage with the enforcement process in the District Court.

The plaintiff's solicitor responded on 13th February, 2009 rejecting the proposal made on behalf of the Credit Union, stating, *inter alia*, that the proposal sought to deny the plaintiff the right to pursue reliefs properly raised in these proceedings and of direct and immediate relevance to her. By a further open letter dated 19th March, 2009, the solicitors for the Credit Union clarified the position of the Credit Union. It denied that the 2005 order was obtained in breach of natural justice.

At the hearing of the proceedings, the Credit Union had changed its position somewhat, in that the Court was informed on its behalf that it would consent to the quashing of the 2005 order on the basis of an infringement of natural justice. Further, if the matter was remitted to the District Court under Order 84 of the Rules of the Superior Courts 1986 (the

Rules), the Credit Union would undertake to apply to the District Court to have the instalment order varied. The position of the State parties remained that it was not standing over the 2005 order. However, counsel for the State parties, in the absence of instructions, did not commit to identifying the basis on which this Court could quash the 2005 order without opposition.

Counsel for the State parties submitted that, if the 2005 order was quashed, the plaintiff's challenge to the validity of the legislation under which it was made would be moot. He further submitted that, on the basis of the doctrine of judicial restraint, in that event it would not be appropriate for the Court to consider the constitutional challenge or the challenge by reference to the Convention to the legislation. Counsel for the Credit Union adopted those arguments.

The position adopted on behalf of the Commission on the judicial restraint argument was that the adoption by the Court of the State parties' stratagem of allowing the 2005 order to be struck down would not resolve the issues raised in the proceedings, in that there was no guarantee that the plaintiff would be afforded procedural safeguards, if the matter were to be remitted to the District Court. Serious issues arise in relation to the underlying legislation, it was submitted.

It is convenient at this juncture to give an overview of the approach adopted by the Commission in its submissions. Its objective was to assist this Court's determination of the substantive matters in two key areas: the right to a fair trial (including the classification of the proceedings as criminal or civil) in the context of the liberty of the individual being at stake; and the international principle of the prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation. It was urged by the Commission that the Constitution and the guarantees thereunder should be informed by the Convention and by international treaties ratified by the State, where that is possible.

Both counsel for the Commission and counsel for the plaintiff drew the Court's attention to Article 11 of the International Covenant on Civil and Political Rights (ICCPR), which has been ratified by the State and which provides that no one shall be imprisoned merely on account of inability to fulfil a contractual obligation, a proscription that may not be derogated from even in time of public emergency (Article 4.2). Counsel for the Commission submitted that the legislation being challenged in this case does not incorporate sufficient procedural safeguards to protect against imprisonment merely on the grounds of failure to fulfil a contractual obligation and may, accordingly, be in breach of Article 11. In this context the Court was referred to the concluding observations of the Human Rights Committee, the body at international level entrusted with supervising and monitoring the implementation of the ICCPR in its report of 25th July, 2008, in which it expressed concern that the State, in its replies dated 23rd June, 2008 to issues raised by the Human Rights Committee, "does not intend to amend the laws which may in effect permit imprisonment for failure to fulfil a contractual obligation". There followed a recommendation that the State "should ensure that its laws are not used to imprison a person for inability to fulfil a contractual obligation".

Because of the position adopted by the State parties and the Credit Union, I consider it appropriate to address the issue of mootness and the issue of judicial restraint before addressing the substantive issues. Before addressing those issues, it is necessary to outline the statutory provisions which are impugned in these proceedings and how, in fact, they have been applied to the plaintiff.

The legislation

There are two parallel legislative frameworks in force in this jurisdiction under the provisions of which a person who does not discharge a debt may end up in prison. One is created by sections 6 and 7 of the Debtors Act (Ireland) 1872 (the Act of 1872). The jurisdiction conferred by the Act of 1872 is conferred on the High Court, the Circuit Court and the District Court. In the case of the High Court jurisdiction, the Act of 1872 is supplemented by various provisions of the Rules (for example, Order 44, rules 9 to 14, Order 52, rule 17 and Order 69). The other statutory framework was first put in place in the Enforcement of Court Orders Act 1926 (the Act of 1926) and confers jurisdiction on the District Court alone. As is pointed out in Costello on *The Law of Habeas Corpus* in Ireland (Four Courts Press, 2006) (at p. 240), it is this latter jurisdiction which is more commonly exercised. It was the application of the 1926 Act and the Acts which subsequently varied and expanded it, the Enforcement of Court Orders Act 1940 (the Act of 1940) and certain provisions of the Courts (No. 2) Act 1986 (the Act of 1986), to the plaintiff which gave rise to these proceedings.

A series of steps is discernible in the process which leads to the imprisonment and release of a debtor under the provisions of the Act of 1926, as amended, which are now reflected in the key provisions as follows:

> (A) The first step is the entitlement of the creditor to procure the examination of a judgment debtor as to means under s. 15 of the Act of 1926, which is now to be found in s. 1 of the Act of 1986. A creditor to whom a debt is due on foot of a judgment, order or decree of a competent court can apply to the District Court for the issue of a summons requiring the debtor to attend for examination as to his means by a judge of the District Court. There is a requirement that the debtor, when the summons has been served on him, shall lodge a statement of means in the prescribed form in the District Court not less than one week before the examination.
>
> (B) The next step is the examination process. The relevant provisions govern this process in the following manner:
>
> > (1) Section 16 of the Act of 1926, which has not been amended, sets out the procedure on the examination of the debtor. The statement of means lodged by the debtor is given the status of evidence and viva voce evidence may be given and the debtor may be cross-examined, whether he elects to give evidence or not. An interesting feature of s. 16, although not of relevance to the plaintiff's experience, is that sub-s. (2) provides that, if the Judge is satisfied on the evidence adduced that the statement of means lodged by the debtor is false to the knowledge of the debtor, the Judge may forthwith order the arrest of the debtor and sentence him to imprisonment for any term not exceeding three months.
> >
> > (2) Section 17 of the Act of 1926 deals with the power to make an instalment order and outlines a number of circumstances which may arise, namely, that the debtor –
> >
> > (a) fails to lodge a statement of means, or
> >
> > (b) fails to attend for examination, or

(c) refuses to submit to cross-examination, or

(d) fails on examination to satisfy the judge that he is not able to pay the debt either in one sum or by instalments.

In any of those circumstances, the judge, if requested by the creditor, is mandated to order the debtor to pay the debt and the costs of the proceedings in the District Court, either in one payment or by such instalments and at such times as the judge shall in all the circumstances consider reasonable.

(3) The Act of 1940 expanded the jurisdiction of the District Court in relation to making instalment orders and the provisions then introduced have been amended by the Act of 1986. Section 4(1) of the Act of 1940, as now contained in s. 3(3) of the Act of 1986, provides that the duration of an instalment order shall be twelve years from the date of the relevant judgment, order or decree.

(C) An intermediate step between the examination order and the arrest and committal has been in place since 1940. Section 5 of the Act of 1940 introduced a procedure whereby either the creditor or the debtor could apply to the District Court to vary the instalment order. Subsection (4) of s. 5, which was inserted by s. 3(4) of the Act of 1986, provides that a variation order shall not operate so as to make the instalment order enforceable after twelve years from the date of the relevant judgment, order or decree.

(D) The crucial step in the process leading to imprisonment is the jurisdiction which was originally conferred by s. 18 of the Act of 1926 to imprison the debtor. Section 18 has been repealed by s. 6 of the Act of 1940 and the jurisdiction is now conferred by that section, which is at the core of the plaintiff's case. Paragraph (a) of s. 6 provides that where a debtor is liable, by virtue of an instalment order, to pay a debt and costs by instalments and the debtor fails to pay any one or more of such instalments, the creditor may apply to a Judge of the District Court for the arrest and imprisonment of the debtor. The jurisdiction conferred on the judge is set out in paragraphs (b) and (c) of s. 6 as follows:

"(b) on the hearing of an application under the next preceding paragraph of this section, the [judge] may, if he so thinks proper but subject to the next following paragraph of this section, order the arrest and imprisonment of the debtor for any period not exceeding three months and thereupon the debtor shall be arrested and imprisoned accordingly;

(c) the [judge] shall not order the arrest and imprisonment of the debtor under the next preceding paragraph of this section if the debtor (if he appears) shows, to the satisfaction of such [judge], that his failure to pay was due neither to his wilful refusal nor his culpable neglect;"

Paragraph (d) of s. 6 gives the judge power, if he so thinks proper, to treat the application as an application for the variation of the instalment order.

(E) The final step in the process, the release of the imprisoned debtor, is dealt with in a number of provisions, namely:

(1) Paragraph (e) of s. 6 of the Act of 1940 provides that whenever a debtor is arrested and imprisoned by virtue of an order under s. 6, he shall be entitled to be released immediately upon payment of the sum of money (to be specified in the order) consisting of the amount of all instalments of the debt and the costs which have accrued before and are unpaid at the date of the order, and such further sum (if any) for costs as the judge shall think reasonable.

(2) Section 9(1) of the Act of 1940 confers on the Minister for Justice, Equality and Law Reform (the Minister) power "at any time and for any reason which appears to him sufficient" to direct that a person imprisoned shall be released either, as the Minister shall think proper, forthwith or after payment of a specified part of the sum of money. That provision was pointed to by counsel for the State parties as alleviating the rigours of s. 6. However, in a response dated 30th July, 2008 to particulars sought on behalf of the plaintiff, it was disclosed that, although there had been 1,138 instances of committal to prison for non-payment of debt in the five years from May, 2003, the Minister has not used his power under s. 9 in respect of any of the persons referred to.

(3) Section 87(6) of the Bankruptcy Act 1988 (the Act of 1988) also provides for release of a debtor. Section 87 is contained in Part IV of the Act of 1988, which establishes a framework under which an individual debtor may make an arrangement with his creditors under the control of the Court. Section 87(6) provides that, if a debtor, at the time he petitions for protection, is imprisoned by virtue of s. 6 of the Act of 1940, the Court, on granting protection, may order his release.

The District Court Rules 1997 (S.I. No. 93 of 1997) supplement the provisions outlined above. Order 53 outlines the procedure for the enforcement of judgments and the relevant forms are set out in Schedule C. Counsel for the Credit Union, in the context of emphasising the pivotal importance of the debtor's statement of means, drew the Court's attention to form No. 53.1 (Summons for Attendance of Debtor) to which there is appended a blank form of "Statement of Means", which can be detached, and which draws the debtor's attention to the fact that, if he is unemployed or in receipt of any social welfare assistance or benefit, he should bring his unemployment card or social welfare card and produce it in Court. It was submitted on behalf of the Credit Union that the Statement of Means is in a "user friendly" format. In order to ascertain whether that is the case, and the extent to which a person in the position of the plaintiff is protected by the statutory provisions which I have outlined when they are applied in practice in the District Court, it is necessary to consider the relevant District Court Rules.

District Court Rules

Rules 3, 4 and 5 of Order 53 relate to the procedure for an examination under s. 15 of the Act of 1926. Rule 3 closely follows s. 15(1) and sets out the formalities which have to be complied with on an application to a District Court clerk for the issue of a summons requiring the debtor to attend for examination as to his means. The summons is Form 53.1. It is headed "Summons for Attendance of Debtor". After reciting the judgment sought to be enforced and the creditor's contention that it has not been complied with and the creditor's application for the issue of the summons, the summons

tells the person to whom it is addressed: "you are hereby required to attend at the sitting of the District Court to be held at ……. on the ….day of ……at ….am/pm for examination as to your means". The summons also tells the person to whom it is addressed: "You are further required not less than one week before the date of the said sitting to detach the form of Statement of Means attached hereto and, having completed same, to give or send such form to the clerk of the District Court at ….". The form of the Statement of Means (Form 53.3) follows closely the wording of s. 15(3), in that it requires particulars to be given of:

- Income (earned and unearned), per week/month/year and both gross and net.
- The means by which such income is earned and the source from which it is derived. It is at this point that there is an asterisk, which directs attention to the note stressing the importance of bringing the relevant unemployment card or social welfare card to Court, if the person is in receipt of social welfare assistance or benefit.
- Assets (if any).
- Person(s) for whose support the debtor is legally or morally liable, requiring that names and ages be stated.
- A statement as to whether or not the debtor is making payments on foot of other Court orders, requiring details to be given.
- Other liabilities and outgoings.

The form indicates that, where necessary, more detailed particulars may be given on a separate sheet.

Neither the summons nor the form of Statement of Means contains any warning as to what may happen if the debtor does not attend Court or does not complete and lodge the Statement of Means as required. It is not explained that the objective of conducting the examination is to make an appropriate instalment order. There is nothing in the nature of a penal endorsement and there is no mention of the possibility of imprisonment, if an instalment order is not complied with.

Rule 3(2) provides that the summons shall be served upon the debtor in the manner prescribed in Order 10 of the District Court Rules. For present purposes, it is sufficient to note that Order 10 does not require personal service. In the case of the plaintiff, service was effected by registered post. As regards proof of service, rule 3(3) requires lodgment of the original summons and that a statutory declaration as to service shall be lodged with the clerk at least four days before the date of the sitting of the Court.

Rule 5 implements s. 15(6) setting out the "creditor's proofs at the hearing", namely, evidence of the original debt, the amount outstanding (which is required by way of certificate in Form 53.4) and evidence that the debtor is ordinarily resident in the District Court area. There is no requirement of proof of service other than the lodgement of the statutory declaration referred to in rule 3(3).

Rule 6 sets out the form of instalment order which may be made pursuant to s. 17 of the Act of 1926. The instalment order must follow Form 53.5. That form, after reciting that proof has been given of service of the summons, and that a circumstance has arisen in which the Judge is empowered to make a instalment order (by striking out the inapplicable circumstances), and that the creditor has requested the making of the instalment order, orders the debtor to pay to the creditor the sum representing the balance due to the creditor pursuant to the judgment plus costs, by instalments specifying the number of instalments, the amount of each and the date for payment of the first instalment. This form contains a note that the Court has power to vary the terms of the order by altering the amount and times at which the instalments are to be paid and suggests that a party who requires such variation should consult a solicitor or the District Court clerk. However, there is no warning as to what may happen if an instalment is not paid, nor is there any mention of imprisonment or anything in the nature of a penal endorsement. Rule 6(1) provides that the order shall be served upon the debtor in accordance with the provisions of Order 10 of the District Court Rules. In this case, the instalment order was initially served by registered post on the plaintiff, with a covering letter which contained a warning that failure to comply would result in a summons for arrest and imprisonment being issued. Following return of the registered letter undelivered, an order for service by ordinary post was made.

Rule 8 sets out the procedure for an application pursuant to s. 6 of the Act of 1940 for the arrest and imprisonment of the debtor. The application must be preceded by the issue and service of a summons in line with Form 53.8. Once again, the summons is required to be served on the debtor in accordance with the provisions of Order 10 and the proof of service required is the lodgment of the original summons together with the statutory declaration of service with the District Court clerk at least four days before the date fixed for the hearing of the application. The summons in this case was served on the plaintiff by registered post.

Form 53.8 is headed "Summons" with the words "(On application for arrest and imprisonment)" below the heading. There are no recitals in the summons. It merely tells the debtor: "You are required to attend at the sitting of the District Court to be held at …… on the ….. day of …… at …….(am)(pm) upon the hearing of an application on behalf of the Creditor for an order for your arrest and imprisonment for your failure to comply with an order for payment made against you on the …… day of …… or for such further relief as to the Court in the circumstances may seem meet …". The form contains no warning as to what may ensue if the debtor does not attend. There is nothing to suggest that it might be prudent for the debtor to get legal advice. There is no hint as to what "other relief" the Court may grant and, in particular, the debtor is not told that the Court has power to vary the instalment order.

Rule 8(5) provides as follows:

> "Before making an order to which this rule relates, the Court shall be satisfied of the due service upon the debtor of the instalment order, that the debtor has failed to comply with such order and, in the event of the debtor's failure to attend Court on the hearing of the application for arrest and imprisonment, of the due service upon him or her of the summons issued under this rule"

It is suggested by Costello (*op. cit.*, fn. 54 at p. 242) that rule 8(5) providing for imprisonment merely on proof that "the debtor has failed to comply with such order" is *ultra vires*. Insofar as it suggests that, where the debtor attends the hearing, all the Judge has to be satisfied about is that there has been a failure to comply with the instalment order, sub-rule 5 is definitely at variance with s. 6 of the Act of 1940, which directs that the Judge shall not make an order for arrest and imprisonment if the debtor shows, to the satisfaction of the Judge, that his failure to pay was due neither to his wilful refusal nor his culpable neglect. Rule 8(3) provides that the order for arrest and imprisonment shall be in Form 53.9 and the warrant to enforce the order shall be in Form 53.10. Form 53.9 conforms with s. 6(c) of the Act of 1940 insofar as it recites that it appears to the Court that the debtor has failed and neglected to pay the instalments and has not shown to the satisfaction of the Court that such failure to pay was due neither to his wilful refusal nor his culpable neglect.

On the basis of the foregoing analysis of the relevant rules, I would observe that, on the assumption that the user is the debtor, there is nothing "user friendly" about the procedure or about the documentation used in the procedure. On the contrary, from the heading of the first document (Summons for Attendance of Debtor) through the description of the parties as "creditor" and "debtor", the introduction of the descriptions of the dispute between them and other relevant facts by recitals commencing with "whereas", and a statement of means requiring particulars of gross and net earned and unearned income, to the final summons to the debtor, in both format and in language the documentation would not be easily understood by a non-lawyer. Insofar as the rules are intended as guidance for the litigating creditor, they are misleading in that Rule 8(5) does not reflect the import of s. 6(c). Finally, while Rule 8(1) refers to s. 6, Rule 8(5) is a trap for an unwary Judge who does not have the text of s. 6 in front of him or her.

Application of the legislation to the plaintiff
On 20th October, 2003 the Credit Union obtained judgment in default of appearance in the Circuit Court in Monaghan against the plaintiff in the sum of €18,063.09. Subsequently, the Credit Union applied to the District Court in Monaghan for an instalment order. The instalment order was made on 12th January, 2004. It recited that proof had been given of the service of the summons on the plaintiff. That the summons was served is not in dispute. The order then recited that the plaintiff had failed to satisfy the Court that she was not able to pay the sum of €18,063.09 in one sum or by instalments. In fact, the plaintiff had not lodged a statement of means and she had not appeared in Court. The order directed the plaintiff to pay the sum due to the Credit Union by weekly instalments of €82.00.

The plaintiff did not pay any of the weekly instalments. The Credit Union applied for an order under s. 6 of the Act of 1940 for her arrest and imprisonment. It is not in issue that the relevant summons to attend in Court was served on the plaintiff. However, she did not attend and the 2005 order was made in her absence. The 2005 order recited the instalment order, that the plaintiff had failed to comply with it, and that there was then due and owing on foot of the instalment order the sum of €5,658.00. It also recited that it had not been "shown to the satisfaction of the Court that such failure to pay was due neither to her wilful refusal nor culpable neglect". The fact that the plaintiff did not appear before the Court was not alluded to. The 2005 order ordered that the plaintiff be arrested and committed to prison at Mountjoy and that she be imprisoned for a period of one month from the date of her arrest unless the sum of €5,658.00 (the unpaid instalments and costs) was paid to the District Court Clerk or to the Governor of the prison.

The plaintiff knew nothing of the making of the 2005 order until members of the Garda Síochána appeared on her doorstep in May 2006 to arrest her. The Gardaí treated the plaintiff fairly and gave her time to get advice. Through a family connection she heard of the Money Advice and Budgeting Service (MABS), which is an organisation which is funded by the Department of Social and Family Affairs. MABS assessed the plaintiff's capacity to discharge the debt by instalments and concluded that she could afford to discharge it at the rate of €10.00 per week. Weekly payments in that amount were offered on the plaintiff's behalf to the Credit Union and the Credit Union was requested not to proceed with the committal. However, MABS was told that the committal process was proceeding.

MABS then consulted the Northside Community Law Centre, which I understand provides for legal representation on a *pro bono* basis, for advice. On 11th September, 2006 an application was made on behalf of the plaintiff for an extension of time to appeal the 2005 order to the Circuit Court. That application was refused. The complaint of the State parties that, in initiating these proceedings, the plaintiff is, in effect, seeking to circumvent the jurisdiction of the District Court under the Acts of 1926 and 1940 is of no substance in the light of the fact that the plaintiff tried to appeal the making of the 2005 order to the Circuit Court but was prevented from doing so.

These proceedings were then initiated by the Northside Community Law Centre on behalf of the plaintiff.

The plaintiff's circumstances
The plaintiff is a single woman in her mid-thirties. She was one of nine children. Her parents were members of the traveller community who settled in County Monaghan. She attended school for about five years leaving at the age of fourteen. Her evidence was that she learned hardly anything. She described herself as a "bad reader". She worked as a mushroom picker for less than two years and since then has been unemployed.

The plaintiff has two children, a boy who is going on fourteen and a boy who is ten. She has a history of alcohol abuse and psychiatric illness. She has had a number of admissions to St. Davnet's Hospital in Monaghan, which is a psychiatric hospital. She was admitted in September 2005, January, 2006, September, 2007, November, 2007 and January, 2009.

The plaintiff lives now with her mother in accommodation provided by the local authority. Her only income now is, and her only income at any material time was, the social welfare benefits to which she is entitled. Currently she receives €217.00 per week, being one parent family allowance. She also receives child benefit in the sum of €300.00 per month. She gives €150.00 per week to her mother. Since she consulted MABS, €10.00 per week has been deducted at source from her social welfare benefits to meet her indebtedness to the Credit Union.

Having regard to the evidence, including a psychiatric report from a Consultant Psychiatrist in St. Davnet's Hospital, which was admitted in evidence but without any concession on the part of the State parties that it is relevant, I have no doubt that the plaintiff, because of her lack of literacy, her drink problem and her psychiatric problem, could not have dealt with any of the steps in the enforcement process under the Act of 1926, as amended, without advice and assistance. I am satisfied that she was unable to read and comprehend the summonses. She had no understanding of the significance of, and was unable to complete, the statement of means. She was a vulnerable woman, who was incapable of responding to

the summonses in an appropriate manner in her own interest without advice and assistance and she had no appreciation of the need for advice and assistance. She got no advice or assistance until she contacted MABS after the Gardaí came to execute the 2005 order.

The plaintiff admitted that she burned the letters which arrived from the Credit Union and its solicitors.

Mootness
The doctrine of mootness is explained in two passages in *JM Kelly: The Irish Constitution* (4th ed., 2003). The first passage (at para. 6.2.179) underlines the rationale of the doctrine and states:

> "A related feature of the rule of self-restraint is the doctrine of mootness whereby the courts will not deliver what are, in effect, purely advisory judgments on constitutional issues. This in turn means that the court will not generally pronounce on such issues where it has been shown that this is no longer necessary. Outside of the special circumstances inherent in an Article 26 reference, the courts' dislike of anything which smacks of an advisory ruling is manifest."

Having outlined examples of cases in which the Courts have declined to rule on the merits of a matter which was moot, the editors of Kelly summarise the parameters of the doctrine of mootness (at para.6.2.181) as follows:

> "There are, however, definite limits to the mootness doctrine. Thus a case will not generally be moot where the statute has already actually or potentially affected a plaintiff's rights or interests, even though the course of conduct in question has come to an end or even where the statutory provision in question has expired. The application of the doctrine is, in any event, subject to the overriding consideration of doing justice as between the parties."

There was no real divergence between counsel for the plaintiff and counsel for the State parties as to when a proceeding is moot. Counsel for the State parties relied on the following passage from the judgment of Hardiman J. delivering the judgment of the Supreme Court in *G. v. Collins* [2005] 1 I.L.R.M. 1 (at p. 13):

> "A proceeding may be said to be moot where there is no longer any legal dispute between the parties. The notion of mootness has some similarities to that of absence of *locus standi* but differs from it in that standing is judged at the start of the proceedings whereas mootness is judged after the commencement of the proceedings. Parties may have a real dispute at the time proceedings commence, but time and events may render the issues in proceedings, or some of them, moot. If that occurs, the eventual decision would be of no practical significance to the parties."

Later (at p. 16), Hardiman J. stated that the rationale for modern mootness rules was well expressed by the Supreme Court of Canada in *Borowski v. Canada* [1989] 1 S.C.R. 342 in which it was held as follows:

> "An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also where the Court is called upon to reach a decision. The general policy is enforced in moot cases unless the Court exercises its discretion to depart from it."

Hardiman J. then quoted a later passage in the judgment of the Supreme Court of Canada, in which, having stated that the Court should be guided in the exercise of the discretion to hear a moot case by a consideration of the underlying rationale of the mootness doctrine, that doctrine was expressed as follows:

> "The first rationale of the policy with respect to mootness is that a Court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on concern for judicial economy which requires that a Court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for the Courts to be sensitive to the effectiveness or efficiency of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors are present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa."

Counsel for the State parties submitted that, if the 2005 order was quashed, the plaintiff's position would be no different to that of any other judgment debtor. If the matter was remitted to the District Court and the Credit Union complied with its undertaking to have the instalment order varied, before the plaintiff would be at risk of committal, there would have to be a default on her part in complying with the instalment order, and, it was submitted, the Court is not entitled to presume that that would happen. Moreover, there would have to be an application by the Credit Union for a committal order. Because of those factors, it was submitted, the plaintiff is a long way removed from the risk of committal.

If the course advocated by the State parties was adopted, it may well be that the possibility of this plaintiff facing another application for arrest and committal would be extremely remote. Ms. Orla Nugent, the officer of MABS who advised the plaintiff, testified that, since this case has raised its head, in her experience no debtor has been committed to prison. However, the possibility of the plaintiff being committed in the future is not the test. The test is whether the impugned legislation has already actually or potentially affected the plaintiff's rights or interests. It clearly has. She has already lived for three years under the "sword of Damocles" which is the 2005 order. These proceedings address a range of issues, not a single issue such as arises on, say, an inquiry under Article 40 of the Constitution. She seeks a range of reliefs, including damages. But, in my view, the most important factor is that, if the course advocated on behalf of the State parties is adopted and the matter is remitted to the District Court without the impugned legislation being subjected to the scrutiny which the plaintiff contends should result in it being held to be invalid, the plaintiff's right to liberty will be potentially affected by the very same legislative procedures that gave rise to the 2005 order, which the State parties concede should be quashed but without identifying the precise basis which warrants an order for *certiorari*.

If the Court adjudicates on the validity of the impugned legislation, in my view, it will not be giving what is purely an advisory judgment. On the contrary the Court will be giving a judgment which will determine not only issues as to the plaintiff's historic treatment by the Credit Union and the District Court in reliance on the impugned legislation, but also issues as to her potential treatment in the future as a judgment debtor whose rights and obligations and the sanctions to which she is potentially exposed, which extend to deprivation of liberty for three months, are governed by the impugned legislation. Adopting the language of the Supreme Court of Canada, there remains a live controversy – whether the impugned legislation is valid – affecting or potentially affecting the relationship of the plaintiff and the Credit Union, and, in particular, whether it is open to the Credit Union in the future to pursue a remedy against the plaintiff which may deprive her of her liberty in the circumstances which then prevail. More importantly, there is a live controversy as to the plaintiff's potential treatment as an indigent judgment debtor by State authorities, in particular, the District Court, in the future in the event of the Credit Union pursuing such a remedy.

In short, merely quashing the 2005 order, and the warrant which issued on foot of it, does not address the substance of the plaintiff's complaint.

Judicial restraint
The principle of judicial restraint or "self-restraint" is explained in the following passage from Kelly (at para. 6.2.169):

> "The courts have also articulated the principle of 'self-restraint' with regard to judicial review of legislation, which in general limits the exercise of judicial review to cases where it is necessary for the decision of the issue. The principle that the constitutional validity of a law will be considered by a court only where this is unavoidable is to some extent a product of 'the comity that ought to exist between the great organs of States' and is simply an aspect of the presumption of constitutionality. It is, however, also a product, as Henchy J. put it in *The State (P. Woods) v. Attorney General* [[1969] I.R. 385], of 'the inherent limitations of the judicial process,': a court could invalidate a statute, and thus leave a gap in the law, but could not create a new Act to plug the gap…."

The editors of Kelly also refer (at para. 6.2.175) to the re-statement of the rule of self-restraint by the Supreme Court in *Murphy v. Roche* [1987] I.R. 106, in which Finlay C.J. said that the court ought to decline to decide any constitutional questions which "arise in the form of a moot" and which "were not necessary for the determination of the rights of the parties before it". Finlay C.J. re-stated the rule as follows (at p. 110):

> "Where the issues between the parties can be determined and finally disposed of by resolution of an issue of law other than constitutional law, the court should proceed to determine that other issue first, and, if it determines the case, should refrain from expressing any view on the constitutional issue that may have been raised."

As I have already found, the proposal that the 2005 order be quashed and that the matter be remitted to the District Court does not render moot the issues raised by the plaintiff as to the validity of the impugned legislation. Therefore, on the basis of that proposal alone, issues between the parties cannot be determined and finally disposed of. That is not to say that it will be necessary for the Court to make a finding as to the validity of the impugned legislation having regard to the provisions of the Constitution or its compatibility with the Convention. The main thrust of the defence of the State parties of the plaintiff's constitutional and Convention related attack is that the impugned provisions can be construed in a manner which is consistent with the Constitution and compatible with the Convention. If that argument stands up, the issues raised by the plaintiff will be determined having regard to the proper interpretation of the impugned provisions and the question of their validity will not arise. In that event, the Court will clearly be bound by the self-restraint principle.

Plaintiff's case as pleaded
Before addressing the submissions made on behalf of the State parties in relation to the interpretation of the impugned provisions, it is necessary to consider the basis on which the plaintiff pleads that the impugned provisions are invalid.

Having regard to the manner in which the proceedings evolved, which I have outlined earlier, there were pleadings between the plaintiff and the second to sixth defendants only. While I do not consider it necessary to analyse the pleadings in depth, some observations are apposite.

In the statement of claim the plaintiff claimed various declarations based on her constitutional rights. For example, she sought a declaration establishing what the fulfilment of her right to natural and constitutional justice entailed and pleaded that it entailed an entitlement to free legal aid where she was at risk of being deprived of her liberty. The case made on behalf of the plaintiff in the written submissions differed from the case as pleaded in the statement of claim.

The case was also made on behalf of the plaintiff in the written submissions, and pursued in oral submissions, that the legislation under which the plaintiff's imprisonment was ordered was unconstitutional in that it did not safeguard her right to fair procedures and constitutional justice and that it was a disproportionate interference with her constitutional right to liberty.

Notwithstanding that the plaintiff had not specifically sought a declaration as to the repugnancy to the Constitution of any of the legislative provisions which affected her in the statement of claim, the case made on her behalf, both in written and oral submissions, was that some provisions of the Act of 1926 and the Act of 1940 were unconstitutional. In order to clarify the position, I allowed an amendment of the statement of claim to include a claim for a declaration that s. 6 of the Act of 1940 is repugnant to the Constitution and, in particular, Article 34, Article 38, Article 40.3.1, Article 40.3.2 and Article 40.4.1. The amendment was formally, if not too forcibly, objected to by counsel for the State parties.

The plaintiff has also sought a declaration that s. 6 of the Act of 1940 (assuming that the reference to s. 8 in the statement of claim is a typographical error) is incompatible with the State's obligation under the provisions of the Convention and, in the statement of claim, has cited Articles 6 and 7 of the Convention and Article 1 of Protocol No. 4. No argument of incompatibility was advanced on the basis of Article 7.

Because of the position adopted by the State parties and the Credit Union that an order quashing the 2005 order would be unopposed, the focus of the hearing was on the challenge to the legislation rather than on the challenge to the 2005 order. Suffice it to say that the plaintiff has sought both declaratory relief and injunctive relief to prevent the implementation of the 2005 order. She also sought an order of *certiorari* quashing it.

The plaintiff has also claimed damages for breach of her fundamental rights under the Constitution and under the Convention. Counsel for the plaintiff suggested that the issue of damages be left over until the issues in relation to inconsistency with the Constitution and incompatibility with the Convention have been determined.

The submissions
The Court has had the benefit of very comprehensive and helpful submissions from all of the parties. What follows is merely a summary of the case made on behalf of the plaintiff founded on the plaintiff's rights as protected by the Constitution and the Convention, the response to it and, where relevant, the observations of the Commission. As there is a considerable degree of overlap between the arguments founded on alleged inconsistencies with the Constitution and alleged incompatibility with the Convention, all the arguments are outlined, even though, if s. 6 is struck down for repugnancy to the Constitution, no determination of the issue whether a declaration of incompatibility with the Convention should be made will be necessary.

The sub-headings under which the following summary is structured broadly follow the thrust of the submissions of counsel for the plaintiff.

Article 1 of Protocol No. 4 to the Convention
The primary basis on which the plaintiff contends that s. 6 of the Act of 1940 is incompatible with the Convention is that it contravenes Article 1 of Protocol No. 4 which provides:

> "No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation".

The absolute nature of Article 1 was emphasised by counsel for the plaintiff. Unlike other provisions of the Convention or, indeed, the provisions of the Constitution, for example, Article 40.4, no deviation is permitted, even a deviation or limitation which would satisfy a proportionality test, it was submitted.

The first aspect of the procedure which may result in an order under s. 6 for the arrest and imprisonment of a debtor which counsel for the plaintiff contended gives rise to an infringement of Article 1 is that there is no requirement in s. 6 that the presence of the debtor in Court is necessary to confer jurisdiction on the Judge to make an order. Counsel contrasted the s. 6 procedure with the procedure which is in force under Order 46B of the District Court Rules (as introduced by the District Court (Attachment and Committal) Rules 1998, S.I. No. 124 of 1998 and the District Court (Attachment and Committal) Rules 2000, S.I. No. 196/2000). That order regulates the procedure leading to committal for breach of any order of the District Court, other than a judgment for payment of money. It provides that a litigant who is entitled to the benefit of such an order, or the Court on its own motion, may serve on a party bound by the order, who has failed to comply with its terms, a notice requiring the person so bound to attend Court on a particular day at a particular time "to show cause why he or she should not be committed for his or her contempt in neglecting to obey such an order". Such an order of attachment is only issued with the leave of the Court.

The significance which counsel for the plaintiff attached to the absence of a mechanism, such as an order for attachment of the type provided for in Order 46B, which would ensure the attendance of a defaulting debtor in Court before an order for imprisonment is made is that, on the wording of s. 6(c), the assessment of the debtor's means and the determination as to whether his failure to pay was due to wilful refusal or culpable neglect, on the one hand, or inability to pay, on the other hand, only arises for consideration if the debtor appears. That interpretation of s. 6(c) is bolstered by the existence of Order 53, rule 8(5), which was quoted earlier, it was submitted. That, in turn, leads to the second aspect of the procedure which it is contended gives rise to an infringement of Article 1 – that under s. 6(c) there is no positive obligation on the Judge to ascertain the means of the debtor or his ability to pay, and that there is no requirement that the Judge desist from making an order unless he or she ascertains that the failure to pay is due to wilful refusal or culpable neglect on the part of the debtor, rather than inability.

As to the contention of the State parties that the committal order against the plaintiff was issued not "merely" on the ground of inability to fulfil a contractual obligation, but for non-compliance with a Court order, the instalment order, counsel for the plaintiff pointed to the curial part of the order in question, which followed the standard form of order, Form 53.9, which is expressly stated to be made for the debtor's "default and failure to pay the instalments". Counsel pointed to the symmetry between that form of order and paragraph (e) of s. 6, which provides for the automatic release of the prisoner on the payment of the debt specified in the order.

The nub of the plaintiff's case based on Article 1 is that, as a matter of interpretation of the relevant provisions, s. 6 does allow for the imprisonment of a debtor merely on the grounds of the debtor's inability to repay the debt, as exemplified in the case of the plaintiff. The plaintiff, by reason of her unfortunate personal circumstances resulting in her ignorance and inability to understand what was in her best interest and to act accordingly, failed to attend for the examination, which meant that the instalment order was fixed without reference to her means, and she failed to attend on the application for the committal order, which resulted in the committal order being made notwithstanding that she was unable to discharge the arrears of the instalments. Counsel for the plaintiff submitted that, for the purposes of the application of Article 1, the existence of s. 9(1) of the Act of 1940 and s. 87(6) of the Act of 1988 is irrelevant because those relieving provisions only come into play where a debtor is actually in prison.

There was support for the plaintiff's assertion of incompatibility with Article 1 in the submissions made on behalf of the Commission. In order to ensure Article 1 is complied with, it was submitted, procedural safeguards must be put in place to determine whether a debtor has the requisite means to enable him or her to comply with the instalment order. In this case, compliance with Article 1 must be assessed in the light of the provisions of s. 6. It was submitted that it is questionable, given the terms of s. 6, whether the State can be fully compliant with Article 1, in circumstances where there is no guarantee that there will be a meaningful examination of the debtor's means, accompanied by other fair trial guarantees, before an instalment order is made or, more importantly, before an order for arrest and imprisonment is made.

Article 5 of the Convention
The plaintiff did not invoke Article 5 of the Convention. The reason advanced for not doing so was that, because of the application of Article 1 of Protocol No. 4, Article 5 does not apply to the plaintiff's case. However, the plaintiff adopted a "fall back" position, in that it was submitted that, insofar as it does apply, s. 6 is a disproportionate interference with the plaintiff's right to liberty under Article 5 and is, therefore, unlawful.

Article 5, insofar as it could be relevant to this case, provides:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> …
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a Court or an order to secure the fulfilment of any obligation prescribed by law …"

Counsel for the plaintiff contended that Article 5(1)(b) has no application to the plaintiff's circumstances because it does not cover imprisonment for failure to pay a private debt. That is covered by Article 1 of Protocol 4. Notwithstanding the approach adopted on behalf of the plaintiff, counsel for the Commission submitted that it is useful to consider the relevance of both Article 1 and Article 5 to the system of debt enforcement in this jurisdiction. It was also submitted that, as there is no clear analogous constitutional provision to Article 1 of Protocol 4, an examination of Article 5 may assist the Court in considering the constitutional considerations raised by the plaintiff.

A number of the aspects of the statutory process which may culminate in an order under s. 6(b) for arrest and imprisonment of a debtor were cited by counsel for the plaintiff in support of the contention that it constitutes a disproportionate interference with the debtor's, and, in this case, the plaintiff's right to liberty. First, counsel pointed to the fact that there are other possible means by which payment of a debt may be secured rather than imprisonment, which should be viewed as a last resort. An example of a less drastic mechanism is an order for attachment of earnings or social welfare payments. Secondly, if Article 5.1(b) is engaged in the plaintiff's case, a less restrictive way of ensuring that the debtor faces up to his or her obligations under the instalment order would be the existence of a provision to attach the debtor similar to the provision in Order 46B.

There is support for the analysis conducted by the plaintiff's counsel of Article 5 in the submissions made on behalf of the Commission. Counsel for the Commission submitted that when one tests the scheme of the statutory provisions in issue here, and, in particular, s. 6, against the *indicia* of "lawfulness" under Article 5(1)(b), there may be a divergence between the two. The detention to be lawful must genuinely conform with the purpose of Article 5(1)(b) – to protect the individual from arbitrariness. In this regard counsel for the Commission referred the Court to a recent judgment of the Grand Chamber of the ECtHR in *Saadi v. United Kingdom* (Unreported, 29th January, 2008). There the Court considered the notion of arbitrary detention in the context of Article 5, stating as follows:

> "67. It is well established in the Court's case-law under the sub-paragraphs of Article 5.1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) – (f) be 'lawful'. Where the 'lawfulness' of detention is in issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5.1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness …. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5.1 and the notion of 'arbitrariness' in Article 5.1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.
>
> …
>
> 70 The notion of arbitrariness in the context of sub-paragraphs (b), (d) and (e) also includes assessment whether detention was necessary to achieve the stated aim. The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained …. The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty …. The duration of the detention is a relevant factor in striking such a balance …."

Section 6 may not protect the debtor against imprisonment which is arbitrary, counsel for the Commission submitted. A relevant consideration, it was submitted, is whether the law has been formulated with sufficient precision to reasonably allow a debtor to foresee the consequences of his acts. It was suggested that the provisions in issue here have not been, if an order for arrest and imprisonment under s. 6(b) may be made without the debtor ever being present in Court before the order is made and without the debtor having been formally been put on notice of a possible penal sanction being imposed in the course of the enforcement proceedings. Counsel for the Commission contrasted the position under s. 6, supplemented by Order 53, with the position under Order 46B, which, apart from mandating that an order for attachment to bring a person before the Court to answer for contempt is a pre-requisite to making an order for committal, provides that every order requiring a person to do an act served on the person to whom it is directed shall carry a penal endorsement (rule 6) and that the notice of the application to attach shall be served personally in all cases unless the Court for good cause orders otherwise (rule 1(1)).

Counsel for the Commission also submitted that a divergence between s. 6 and the *indicia* of lawfulness under Article 5(1)(b) may be indicated by reason of the fact that an order for imprisonment must be necessary to achieve the stated aim and there is arguably little relationship between detention under s. 6 and compliance with an instalment order where there is an inability to pay. Further, imprisonment is not necessarily the only measure to ensure repayment of a judgment debt, but less severe measures do not appear to have been put in place.

Article 6 of the Convention

Counsel for the plaintiff submitted that enforcement proceedings for non-payment of a debt constitute criminal proceedings within the meaning of Article 6 of the Convention when assessed against the criteria set out in the jurisprudence of the European Court of Human Rights (ECtHR) for identifying criminal proceedings, even if classified as civil proceedings under domestic law, for the following reasons:

(1) section 6 of the Act of 1940 is not addressed exclusively to a specific group but is of general application;

(2) the true nature of the proceedings is criminal because there is a punitive element, citing the decision of the ECtHR in *Benham v. United Kingdom* (1996) 22 E.H.R.R. 293 (at para. 56);

(3) the severity of the penalty which will result from execution of a warrant for imprisonment, a factor on which much emphasis was placed by the ECtHR in *Engel v. Netherlands* (1976) 1 E.H.R.R. 647, justifies that conclusion, because the maximum term of imprisonment allowed under s. 6(b) is three months and, in fact, the 2005 order ordered the imprisonment of the plaintiff for one month.

On the basis that an application under s. 6(b) constitutes criminal proceedings so as to engage Article 6, it is the plaintiff's contention that the process leading to an order under s. 6(b) is incompatible with Article 6 and, in particular, Article 6.2 and Article 6.1 and 6.3(c).

Article 6.2 provides:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

It is the plaintiff's case that, on its proper construction, s. 6(c) places the burden of proving that failure to pay the debt was due neither to wilful refusal nor to culpable neglect on the debtor and cites the following passage from Costello (op. cit.) (at p. 244):

"There is at least a *prima facie* incompatibility between the statutory imposition of the burden of proof upon the debtor and the European Convention requirement that the burden of proof be carried by the prosecuting party."

Article 6. 1 and 3, insofar as is relevant to this case, provides:

"1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ….

…

3 Everyone charged with a criminal offence has the following minimum rights:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

Counsel for the plaintiff cited the decision of the ECtHR in *Benham* (and in particular paragraphs 60 – 64 of the judgment) as authority for the proposition that the plaintiff, as a person who lacks sufficient means to pay for legal assistance herself, should have an automatic right to be provided with free legal representation. It was submitted that neither the Attorney General's Scheme, nor the Civil Legal Aid Scheme nor the principles upon which the Courts award costs, constitute sufficient or adequate vindication of the plaintiff's rights, as was asserted on behalf of the State parties. Counsel for the Commission, in the context of considering the constitutional right to fair procedures, questioned whether a discretionary scheme, such as the Attorney General's Scheme and the Civil Legal Aid Scheme, would satisfy constitutional requirements.

In relation to the invocation by the plaintiff of the protections afforded by Article 6, counsel for the Commission pointed out that there is a degree of overlap between those protections and the protections afforded by the Constitution. Further, it was submitted that the constitutional guarantee of fair procedures can be assessed by this Court by reference to the jurisprudence of the Superior Courts and the jurisprudence of the ECtHR, both on the concept of the equality of arms and the nature of the debt enforcement proceedings in issue and the procedural safeguards in relation thereto.

Constitutional right to fair procedures

As I have outlined, counsel for the plaintiff, in the context of advancing the plaintiff's case on the basis of Article 6 of the Convention, submitted that the enforcement procedures under s. 6 constitute criminal proceedings within the meaning of Article 6 of the Convention. In invoking Article 38 in the amendment to the statement of claim, the plaintiff could be seen to be making the case that, as a matter of national law, a debtor against whom an order under s. 6(b) is sought is on trial for a criminal charge, without distinguishing between the concept of criminal proceedings under the norms of national law and under the jurisdiction of the ECtHR, if there is such a distinction.

As counsel for the Commission pointed out, if it is the case that applying s. 6 amounts to *de facto* criminal proceedings, various protections under Article 38 come into play: the right not to be tried *in absentia* unless the accused has decided to consciously absent himself or herself from trial; the right to have the legal burden of proof rest with the prosecution; the right to fair procedures; the right to be informed of the charge against him or her; the right to defend oneself; the right to be legally represented; and the right, if impecunious, to be legally aided at the expense of the State.

As I understand the plaintiff's position, however, it is that it is not necessary, as it was put, for the Court to come down on one side or the other in the "criminal" and "civil" nomenclature. Rather, the Court should take a functional approach, and look at the substance of the process. If an individual is at risk of being sent to prison in the enforcement of debt process, that process should afford him the safeguards which ensure him the right to fair procedures guaranteed by Articles 34 and 40.3 of the Constitution. The plaintiff's case is that the schema of the enforcement process suffers from a fatal lack of safeguards for a debtor, because the operative ability to stop an order being made under s. 6 depends on the debtor appearing before the District Court.

Counsel for the plaintiff urged that the Court should adopt the approach adopted by the Supreme Court in *D. K. v. Crowley* [2002] 2 I.R. 744, where the issue was the validity, having regard to the provisions of the Constitution, of certain provisions of the Domestic Violence Act 1996, (the Act of 1996) which permitted the District Court to grant what

was, in effect, a perpetual barring order on an *ex parte* application, thereby not affording the person affected any opportunity to be heard in his defence. The decision of the Supreme Court was that subs. (1), (2) and (3) of s. 4 of the Act of 1996 were invalid having regard to the provisions of the Constitution, in that the procedures thereby prescribed, in failing to prescribe a fixed period of relatively short duration during which an interim barring order made *ex parte* was to continue to force, deprived the person against whom the application was made of the protection of the principle of *audi alteram partem i*n a manner and to an extent which was disproportionate, unreasonable and unnecessary.

In the context of the decision of the Supreme Court in that case, counsel for the plaintiff highlighted the position of the plaintiff as of 14th November, 2005. She had a constitutional right to be heard on the application under section 6. She did not attend the District Court to exercise that right, but at that time she did not enjoy the basic right of legal representation at the expense of the State. It was submitted that she should have been entitled to legal aid as of right and to be actively informed of such right.

Further, once the order for arrest and imprisonment was made, the plaintiff was faced with only three options: to seek her release pursuant to s. 9 of the Act of 1940; to seek the protection of the Court under s. 87 of the Act of 1988; or to pay the money due and owing. An option which was not open to the plaintiff was to return to the District Court. Therefore, it was submitted, on the authority of *D.K. v. Crowley*, the statutory provisions for enforcement of debt are invalid because they do not have, on their face, any provision entitling the debtor to re-enter the matter before the District Court to make such submissions as are appropriate, in order to obviate being imprisoned by having the order discharged or to secure release from imprisonment.

There is support for the plaintiff's contention that the fact that she did not have an entitlement to legal aid and a right to be told that she had such entitlement when facing proceedings for an order under s. 6(b) is in breach of the plaintiff's constitutional right to fair procedures in the submissions made on behalf of the Commission. Counsel for the Commission referred to the observations of Hardiman J., with whom the other Judges of the Supreme Court concurred, in *J. F. v. Director of Public Prosecutions* [2005] 2 I.R. 174, on the connection between the requirement of fair procedures under the Constitution and the concept of "equality of arms" under the Convention, albeit in the context of a criminal trial. Having stated (at p. 182) that *égalité des armes* is not a new concept but rather a new and striking expression of a value which has long been rooted in Irish procedural law, Hardiman J. quoted paras. 50 and 59 of the judgment of the ECtHR in *Steel and Morris v. United Kingdom* (2005) 41 E.H.R.R.403 and also, at para. 61, addressing the question of legal aid, in which the Court stated:

> "The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend *inter alia* on the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself or herself effectively."

In relation to the reliance of the State parties and the Credit Union on the fact that in this case the plaintiff made no attempt to engage with the District Court process, counsel for the Commission, to some extent replicating the submissions made on behalf of the plaintiff, drew the Court's attention to a number of authorities. First, reference was made to the following passage from the judgment of O'Higgins C.J. in *The State (Healy) v. Donoghue* [1976] I.R. 325 (at p. 350):

> "Facing, as he does, the power of the State which is the accuser, the person charged may be unable to defend himself adequately because of ignorance, lack of education, youth or other incapacity. In such circumstances his plight may require, if justice is to be done, that he should have legal assistance. In such circumstances, if he cannot provide such assistance by reason of lack of means, does justice under the Constitution also require that he should be aided in his defence? In my view it does."

Counsel for the Commission also pointed out that in *Cahill v. Reilly* [1994] 3 I.R. 547, Denham J. expressed the view that where imprisonment was likely the District Judge "should inform the accused … of his right to be legally represented or his right to apply for legal aid" (at p. 552). While *Cahill v. Reilly* concerned a criminal trial, counsel for the Commission suggested that in a case involving civil legal aid, *S. v. Landy* (High Court, Lardner J., 10th February, 1993, Unreported) and in *Kirwan v. Minister for Justice* [1994] 2 I.R. 417, which was a case concerning the provision of legal aid to pursue an application for release from the Central Mental Hospital to a ministerially appointed advisory committee, both of which decisions were relied on by the plaintiff, the issue of the individual's disadvantage or vulnerability was a key factor in the decision of the Court being favourable to the applicant. It was suggested that this may have been in deference to the need to safeguard the dignity of the person. It was also pointed out that, in cases of deprivation of liberty, it is increasingly the position that legal aid assistance is made available to individuals. By way of example, it was pointed out that, prior to a committal hearing conducted before a Mental Health Tribunal under the Mental Health Act 2001, the individual is automatically appointed legal representation without having to apply for the same.

Constitutional right to liberty
Articles 40.4.1 of the Constitution provides:

> "No citizen shall be deprived of his personal liberty save in accordance with law."

There is a considerable overlap between the arguments advanced on behalf of the plaintiff in support of the contention that the statutory provisions at issue here are incompatible with Article 5 of the Convention, if that Article is applicable to the circumstances of the case, and the arguments advanced in support of the contention that the legislation is inconsistent with Article 40.4.

Recognising that the right conferred by Article 40.4 is not absolute, it was submitted that the application of a proportionality test, as enunciated by the Supreme Court in *Re The Employment Equality Bill 1996* [1997] 2 I.R. 321, to s. 6 illustrates that it does not intrude on the right to liberty "as little as reasonably possible" for the reasons set out earlier when Article 5 was being considered.

Counsel for the plaintiff reiterated that s. 6 provides no mechanism such as is to be found in Order 46B for ensuring the

attendance of the debtor in Court. It places the burden of disproving wilful refusal or culpable neglect on the debtor, contrary to the approach adopted by the Courts in this jurisdiction in comparable cases involving contempt of Court. In such cases Article 40.4 requires that the burden of proof must lie on the party seeking to have the debtor deprived of his liberty. Further, the standard of proof is the standard which must be satisfied to find a person guilty on a criminal charge: proof beyond reasonable doubt. That submission was made in reliance on the decision of National Irish Bank Limited v. Graham [1994] 1 I.R. 215, a case in which there was an application to this Court for an order for attachment and/or committal of the defendants for allegedly failing to obey an injunction restraining them from disposing of any interest in a herd. The plaintiff relied, in particular, on the following observations of Keane J. in refusing the reliefs sought (at pp. 220 – 221):

> "The present application is unusual in that there is no direct evidence of the alleged contempt. It is clear that before the court takes the serious step of depriving a person of his or her liberty for failure to comply with an order of the court, it must be satisfied beyond reasonable doubt that he or she has in fact committed the alleged contempt. (See the observations of Lord Denning M.R. in *In re Bramblevale Ltd.* [1970] 1 Ch. 128)."

It was also submitted on behalf of the plaintiff that, in the application of the proportionality test, the Court should assess whether the term of imprisonment imposed in this case was proportionate to the sum due to the Credit Union. It was suggested that it would be of assistance to consider that question in the light of the level of damages awarded to persons who have successfully claimed false imprisonment. It was submitted that the term of imprisonment imposed in the plaintiff's case was *prima facie* disproportionate.

The fact that a debtor can be deprived of his liberty in the implementation of s. 6, without having a right to legal representation at the expense of the State, if indigent, and without having the right to be informed of entitlement to legal aid, was also relied on by counsel for the plaintiff as a factor which renders the process provided for in s. 6 inconsistent with Article 40.4. It is unnecessary to reiterate the submissions made by the plaintiff, and supported by the Commission, on this point save to emphasise, as counsel for the plaintiff did, that the passage from the judgment of O'Higgins C. J. in *The State (Healy) v. Donoghue* quoted earlier is preceded by the following statement in which the right to liberty as protected by Article 40.4 is inferentially, if not, expressly, considered:

> "The requirements of fairness and justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him. Where a man's liberty is at stake, or where he faces severe penalty which may affect his welfare or his livelihood, justice may require more than the application of normal fair procedures in relation to his trial."

King v. Attorney General

In the submissions on behalf of the plaintiff, the Court was urged that, on both limbs of the constitutional challenge (the right to fair procedures and the right to liberty), the decision of the Supreme Court in *King v. The Attorney General* [1981] I.R. 233 is relevant, in particular, in giving a definition to when a person is deprived of liberty other than "in accordance with law" within the meaning of Article 40.4.1.

In the *King* case, the plaintiff who had been convicted in the District Court of loitering with intent contrary to s. 4 of the Vagrancy Act 1824, as amended, brought an action in the High Court seeking a declaration that the provisions of s. 4 were inconsistent with the provisions of the Constitution and had not been continued in force by Article 50. He was successful in the High Court and in the Supreme Court. Counsel for the plaintiff pointed to the passage in the judgment of Henchy J. in which he dealt with the lack of specificity in the creation of the offence in s. 4 by targeting "every suspected person or reputed thief" frequenting places mentioned, as follows (at p. 247):

> "In my opinion, the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, ….and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and the mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying particular constitutional provisions with which such an offence is at variance."

Henchy J. then went on to identify constitutional provisions with which s. 4 was at variance stating:

> "… that the offence, both in its essential ingredients and in the mode of proof of its commission, violates the requirements of Article 38, s. 1, that no person shall be tried on any criminal charge save in due course of law; that it violates the guarantee in Article 40, s. 4, sub-s 1, that no citizen shall be deprived of personal liberty save in accordance with law – which means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution; that, in its arbitrariness and its unjustifiable discrimination, it fails to hold (as is required by Article 40, s. 1) all citizens to be equal before the law; that it ignores the guarantees in Article 40, s. 3, that the personal rights of the citizens shall be respected and, as far as practicable, defended and vindicated, and that the State by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

Counsel for the plaintiff submitted that the fundamental norms of the legal order postulated by the Constitution must be understood in the light of prevailing international norms, citing *O'Leary v. Attorney General* [1993] 1 I.R. 102, in which Costello J., in considering the constitutional status of the presumption of innocence held that he was entitled to construe "the Constitution in the light of contemporary concepts of fundamental rights".

Counsel for the Commission, as I have already indicated, urged that, when considering the constitutionality of the impugned provisions, the interpretation and understanding of the relevant provisions ought to be informed by the provisions of international treaties ratified by the State, including the relevant provisions of the ICCPR. Of course, as counsel for the Commission pointed out, in the event of any conflict between the provisions of an international treaty, which has not been incorporated into domestic law, and any provision within the domestic legal framework, effect must be

given to the domestic provisions. It was also submitted on behalf of both the plaintiff and the Commission that the decision of the Constitutional Court of South Africa in *Coetzee v. The Government of the Republic of South Africa* (1995) (4) S.A. 631 and its assessment of the legislation under attack there by reference to the right of liberty guaranteed by s. 11 of the South African Constitution should be of assistance to this Court.

Coetzee v. The Government of the Republic of South Africa

The statutory provision under scrutiny in the *Coetzee* case was similar in many respects to the enforcement of debt procedures at issue in this case, but differed in others. The major difference discernible is that it was a one stage process, unlike the process at issue here which is a two stage process, involving, as it does, the making of an instalment order in the first instance followed by an application for arrest and imprisonment in the event of default. As outlined in the judgment of Kriegler J. (at para. 6) the provisions in issue, ss. 65A to 65M of the Magistrates' Courts Act 1944, provided for a system of enforcement of judgment debts under which a debtor, who had failed to satisfy the judgment debt within ten days of the date of the judgment, could be required to attend at a hearing at which an inquiry would be conducted by a magistrate into the financial position of the debtor, his ability to pay and his failure to do so. A number of options were given to the magistrate: he might authorise that the property of, or debts due to, the judgment debtor be attached, or that emoluments which would accrue to the debtor from his employment be garnisheed; he might order that the debtor pay the debt in full or by instalments; or he might issue an order to commit the debtor to prison for contempt of court for failure to pay the debt, with power to suspend the sentence for committal. It was the option to order committal which was the subject of the constitutional challenge.

At para. 7, Kriegler J. outlined the procedure which might lead to a committal order and the criteria which the magistrate had to apply in the exercise of his discretion. A notice to appear at the hearing called upon the debtor to show cause why he should not be committed for contempt of court and why he should not be ordered to pay the judgment debt in instalments or otherwise. Like the procedure in this jurisdiction under Order 53, the notice was drawn up by the creditor, signed by the clerk of the court and served on the debtor in accordance with the rules for service of process under which the notice need not have been served personally. The magistrate had discretion whether to order committal to prison unless the debtor proved at the hearing that he or she:

> (1) was under the age 18,
>
> (2) was unaware of the original judgment for debt against him, or
>
> (3) had no means of satisfying the judgment debt.

In order to show absence of means of satisfying the judgment debt, the debtor also had to show that such lack of means was not due to wilful disposal of goods in order to avoid payment, wilful refusal to pay, squandering of money or living beyond his means, or incurring additional debts (except for household goods) after the original judgment date.

A number of the provisions of the Constitution of the Republic of South Africa of 1993 had been invoked on behalf of *Coetzee*: s. 10 (the right to dignity), s. 11(1) (the right to freedom); and s. 25(3) (the right to a fair trial). Kriegler J. focused on s. 11(1) on the basis that, obviously, the most fundamental right limited by imprisonment is the right to freedom. Section 11(1) provides:

> "Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial."

The first issue for the Constitutional Court was whether the impugned legislation limited the right to freedom. The second issue was whether the limitation could be justified in terms of s. 33(1) of the Constitution which provides as follows:

> "The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation -
>
> (a) shall be permissible only to the extent that is
>
> (i) reasonable; and
>
> (ii) justifiable in an open and democratic society based on freedom and equality; and
>
> (b) shall not negate the essential content of the right in question, and provided further that any limitation to
>
> (aa) a right entrenched in s. … 11 …
>
> …
>
> shall, in addition to being reasonable as required in para. (a)(i), also be necessary."

Having held that the impugned provisions constituted a radical encroachment on the right guaranteed by s. 11, Kriegler J. went on to consider whether the provisions came within s. 33. He recognised that the goal of the provisions was to provide a mechanism for enforcement of judgment debts and that such goal is a legitimate and reasonable governmental objective. He then considered whether the means to achieve the goal were reasonable and held that the answer was clearly in the negative. The fundamental reason for that conclusion was that the provisions were over-broad. The sanction of imprisonment was ostensibly aimed at the debtor who would not pay, but it was unreasonable in that it also struck at those who could not pay and simply failed to prove this at a hearing, often due to negative circumstances created by the provisions themselves. He set out (in para. 14) seven distinct reasons why the provisions were indefensible, namely:

(1) They allowed persons to be imprisoned without having actual notice of either the original judgment or of the hearing, because of the absence of a requirement of personal service.

(2) Even if a person had notice of the hearing, he could be imprisoned without knowing of the possible defences available to him and accordingly without any attempt to advance any of them, because what he described as the "so called notice to show cause" did not spell out what the defences were, or how they could be established.

(3) The burden cast on the debtor with regard to inability to pay, although possibly defensible in principle as pertaining to matters peculiarly within his knowledge, was so widely couched that persons genuinely unable to pay were nevertheless struck.

(4) The provisions which spelt out what the debtor was required to prove were not only unreasonably wide, but also unreasonably punitive. In that context he referred to "the nakedly punitive retribution" inherent in the provisions which required the debtor to show that his lack of means was not due to his squandering his money or living beyond his means or having incurred debts after the judgment date.

(5) The provisions allowed a person to be imprisoned without knowing that he had the burden to prove his defence or how to discharge such burden. On this point, he commented that it could possibly be contended that the magistrate ought to explain a debtor's rights and duties to an undefended layman and would probably do so. But the fact remained that there was no express obligation on the magistrate to do so.

(6) It was hardly defensible to treat a civil judgment debtor more harshly than a criminal, who under s. 25(3) of the Constitution was entitled to a fair trial with procedural safeguards, including the right to legal assistance at public expense if justice so required. A debtor who faced imprisonment had to fend for himself as best he could.

(7) The procedure made no provision for recourse by the debtor to the magistrate or higher authority once an order for committal had been made. There was no mechanism whereby a debtor, even one who had been committed *in absentia*, was entitled to approach a court for relief.

While separate judgments were given by Didcott J. and Sachs J., the Court was unanimous that the impugned provisions were invalid by reason of their inconsistency with the Constitution.

In summarising the relevance of the assessment by the Constitutional Court of similar legislation to the legislation at issue here, counsel for the Commission noted that, while not enunciating an entitlement on the part of an impecunious debtor facing a committal order to be legally aided, the Constitutional Court had clearly considered that there was a heightened obligation on the State to protect the procedural safeguards available to the debtor by casting the obligation on the State to inform the debtor of his rights and by the debtor not having to bear an overly onerous burden of proof. It was submitted that the provision of legal aid or assistance may be the only way to discharge such an obligation in an adversarial system such as exists in this jurisdiction.

The decision in *Coetzee* was considered and distinguished by the Supreme Court of Zimbabwe in *Chinamora v. Angwa Furnishers* (Private) Ltd. (1997) BHRC 460, in which, in the judgment of Gubbay C.J., there is an informative outline of the history of civil imprisonment, as well as a review of the laws in force in common law jurisdictions and civil law jurisdictions (including within the European Union) and of international instruments, such as the ICCPR. It is interesting to note the following conclusion of Gubbay C.J. at p. 471:

"It is, in my opinion, difficult to discern a modern trend towards imprisonment for civil debt. Some countries have abolished the remedy entirely while others, like Zimbabwe, have prohibited it only with respect to the indigent debtor. These latter countries recognise that to commit a debtor to prison who through poverty is unable to satisfy the judgment debt is contrary to the purpose of the civil incarceration which is to coerce payment. Thus the only real effect of imprisonment of an impoverished debtor is that of punishment. It is a punishment that can be avoided by a debtor who is able but unwilling to pay; for satisfaction of the judgment remains within his power. But it becomes mandatory against one without the means to pay. It discriminates between one and the other."

In the *Chinamora* case it was held that the statutory provisions in issue and the relevant rules of court, taken together, did not violate the guarantee of personal liberty contained in the Declaration of Rights (Zimbabwe) by failing to adequately distinguish between debtors who could not and would not pay. The court interpreted the relevant rules in their entirety as putting the onus on the creditor to establish the debtor's liability to pay. The court would only order imprisonment if it was satisfied that the debtor could but would not pay, or if he failed to prove inability. The procedure under the rules required the debtor to produce evidence of his financial position, warned him of the possibility of imprisonment and, by enjoining the court to conduct a meticulous inquiry into the debtor's ability to pay, ensured that that issue was properly addressed and examined. A decree of civil imprisonment would not be made unless the court was satisfied that the summons to attend court was served on the debtor personally. The procedure, accordingly, contained sufficient safeguards to prevent a poverty-stricken debtor being consigned to jail.

Interpretation of section 6
The Act of 1940, being a post-1937 Act of the Oireachtas, carries a presumption of constitutionality. In consequence, it must be construed in accordance with the principles enunciated by Walsh J. in *East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317 in the following passage of his judgment (at p. 341):

"An Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both appear to be open, but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt."

But Walsh J., in the next passage of his judgment, indicated the limits of what has come to be known as the "double

construction rule" as follows:

> "It must be added, of course, that interpretation or construction of an Act or any provision thereof in conformity with the Constitution cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by any other provision with a different context, as that would be to usurp the functions of the Oireachtas. In seeking to reach an interpretation or construction in accordance with the Constitution, a statutory provision which is clear and unambiguous cannot be given an opposite meaning."

Walsh J. went on to point to another feature of the presumption of constitutionality of an Act of the Oireachtas, which was emphasised by counsel for the State parties as being of particular relevance to the proper construction of s. 6, in the next passage in the following terms:

> "At the same time, however, the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts."

Since the coming into operation of the Act of 2003 the Court must give effect to s. 2 in interpreting laws. Sub-section (1) of s. 2 provides as follows:

> "In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

Sub-section (2) provides that the section applies to a statutory provision or a rule of law. Section 3 of the Act of 2003 provides that, subject to any statutory provision, other than the Act of 2003, or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

In *D.K. v. Crowley,* Keane C.J., delivering the judgment of the Supreme Court, referred to the fact that the impugned provisions of the Act of 1996 enjoyed the presumption of constitutionality. He referred to the double construction rule of interpretation and the presumption that the Oireachtas intended that proceedings, procedures, discretions or adjudications would be conducted in accordance with the principles of constitutional justice. In reaching the conclusion, as outlined earlier, that the impugned provisions breached the principles of constitutional justice, Keane J. highlighted (at p. 760) the fundamental failure in that case – the failure of the legislation to impose any time limit on the operation of an interim barring order, even when granted *ex parte* in the absence of the respondent, other than the provision that it was to expire when the application for a barring order itself was determined – and he described that failure as inexplicable. Later, addressing the applicability of the presumption that the District Court, and the Circuit Court on appeal, in dealing with such applications would ensure that the requirements of constitutional justice would be observed, Keane J. stated (at p. 761):

> "Where, however, the statute conferring jurisdiction on the District Court expressly provides that the interim order is to continue until the determination by the Court of the application for a barring order, the District Court has no jurisdiction to impose a shorter time limit at the expiration of which the interim order is to expire."

That paragraph, counsel for the State parties submitted, identified the crux of the problem. It was submitted that, by contrast, in the case of s. 6, a very broad discretion is conferred on the Judge. There is no frailty in s. 6, similar to the frailty in the provisions being considered by the Supreme Court in the D.K. case. This Court must presume that the Judge will exercise his discretion under s. 6 in accordance with constitutional justice and there is nothing to inhibit him from so doing, it was submitted.

Counsel for the State parties analysed s. 6 as follows:

> (a) Nothing arose on paragraph (a).
>
> (b) Paragraph (b) was the lynchpin of the State parties' argument. Counsel pointed to the fact that discretion conferred on the Judge is that he may order the arrest and imprisonment of the debtor "if he so thinks proper". The exercise of the discretion is, of course, subject to paragraph (c), but it was the position of the State parties that paragraph (b) is silent as to the circumstances in which the Judge will make an order and it must be presumed that he will only make it in circumstances in which it is proper to do so, and that he will exercise his discretion in accordance with constitutional justice.
>
> (c) It was submitted that sub-section (c), in providing that the Judge "shall not order" arrest and imprisonment in the circumstances outlined, is a prohibition on the making of an order in the particular circumstances. There is no reversal of the onus of proof in that, it was submitted, the onus remains on the creditor to establish that it is proper for the Judge to make the order. It was further submitted that there is no difficulty in reading into the section that the standard of proof which is to be applied is the criminal standard – proof beyond reasonable doubt. It was submitted that the observations of Costello (op. cit.), to which I have referred earlier, that there is a reversal of the onus of proof, which may give rise to incompatibility with the Convention, is incorrect. It was also suggested that the statutory provision in issue in *Coetzee* is distinguishable, in that notice served on the debtor under the South African provision called on him to "show cause why he should be committed for contempt of court". The key to the proper construction of paragraph (c), it was submitted, is that it is silent on the circumstances in which an order may be made, that being dealt with in paragraph (b). Paragraph (c) merely prohibits the making of an order in the circumstances outlined.
>
> (d) The alternative discretion of making a variation order was not applied in the plaintiff's case and was not analysed.

(e) Although paragraph (e) provides that the debtor is entitled to be released immediately on payment of debt, it was submitted that it is not correct to infer that the reason the debtor is imprisoned, if an order is made under paragraph (b), is failure to pay. Further, it was submitted that paragraph (e) is advantageous, almost a bonus, to the debtor in that the debtor does not have to purge his contempt before the Court. Irrespective of the attitude of the Judge who made the order, he is entitled to be released.

In the context of that analysis, counsel for the State parties commented on some of the authorities relied on by counsel for the plaintiff.

The relevance of the decision of the ECtHR in the *Benham* case in interpreting s. 6 for compatibility with the State's obligations under the Convention was questioned. In that case, the applicant was liable to pay a community charge of £325. When he did not pay it, enforcement proceedings were commenced against him. After an unsuccessful attempt to seize goods, there being none of any value, an application was made by the charging authority, Poole Borough Council, to the magistrate's court for a committal warrant against him. The applicant appeared in court, but he was not assisted nor represented by a lawyer and the Court made no order for his assistance by way of representation, which it was free to do had it thought it necessary. The magistrates concluded that the applicant's failure to pay the community charge was due to his culpable neglect "as he clearly had the potential to earn money to discharge his obligation to pay". He was committed to prison for 30 days.

The text of the secondary legislation which regulated an application for committal of a debtor to prison in the *Benham* case, regulation 41, is quoted in the judgment of the ECtHR (at p. 300). Counsel for the State parties focused on paragraphs (2) and (3) of the regulation. Paragraph (1) provided for an application being made to a magistrates' court for the issue of a warrant committing the debtor to prison, where the charging authority had sought to levy the amount of the debt by distress and was unsuccessful because there were no, or insufficient, goods of the debtor to be found on which to levy the amount. Paragraphs (2) and (3) dealt with the hearing of the application for the warrant and provided:

"(2) On such application being made the Court shall (in the debtor's presence) inquire as to the means and inquire whether the failure to pay which led to the liability order concerned being made against him was due to his wilful refusal or culpable neglect.

(4) If (and only if) the Court is of opinion that his failure was due to his wilful refusal or culpable neglect it may if it thinks fit -

a. issue a warrant of commitment against the debtor, or

b. fix a term of imprisonment and postpone the issue of the warrant until such time and on such conditions, if any, as the Court thinks just."

The distinction which counsel for the State parties drew between paragraph (c) of s. 6 and paragraphs (2) and (3) of regulation 41 is that paragraph (c) of s. 6 prohibits the making of an order for arrest and imprisonment unless non-payment is due to wilful refusal and culpable neglect, whereas regulation 41 does not contain a prohibition. Insofar as I understand the suggested distinction, I consider it to be specious. At the risk of triteness, the language of regulation 41, which avoids the double negative to be found in s. 6(c), is much more readily understood, even by a lawyer, than the language of s. 6. More importantly, on any objective comparison of regulation 41 and s. 6, the procedure provided for in regulation 41 has considerably more regard for affording the debtor fair procedures and the avoidance of unlawful deprivation of liberty and gives far more guidance to the adjudicating party than s. 6. Yet, the decision of the ECtHR, set out in paragraphs 60 to 64 of the judgment of the Court was as follows:

"60. It is not disputed that Mr. Benham lacked sufficient means to pay for legal assistance himself. The only issue before the Court is, therefore, whether the interests of justice require that Mr. Benham be provided with free legal representation at a hearing before the magistrates. In answering this question, regard must be had to the severity of the penalty at stake and the complexity of the case (see the *Quaranta v. Switzerland* judgment of 24th May 1991 ….)

61 The Court agrees with the Commission that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation (see the above-mentioned *Quaranta* judgment p. 17, para. 33). In this case, Mr. Benham faced a maximum term of three months' imprisonment.

62 Furthermore the law which the magistrates had to apply was not straightforward. The test for culpable negligence in particular was difficult to understand and operate, as was evidenced by the fact, in the judgment of the Divisional Court, the magistrates' finding could not be sustained on the evidence before them.

63 The Court has regard to the fact that there were two types of legal-aid provision available for Mr. Benham. Under the Green Form scheme he was entitled to up to two hours' advice and assistance from a solicitor prior to the hearing, but the scheme did not cover legal representation in Court …. Under the ABWOR scheme, the magistrates could at their discretion have appointed a solicitor to represent him, if one had happened to be in Court …… However, Mr. Benham was not entitled as of right to be represented.

64 In view of the severity of the penalty risked by Mr. Benham and the complexity of the applicable law, the Court considers that the interests of justice demanded that, in order to receive a fair hearing, Mr. Benham ought to have benefited from free legal representation during the proceedings before the magistrates. In conclusion, there has been a violation of Article 6, paragraphs 1 and 3(c) of the Convention taken together ….."

It is proper to record that Mr. Benham's situation differed from that of the plaintiff, in that the debt he owed was a public charge, not a private debt, a factor which the ECtHR took into account in applying the second criterion to determine whether Mr. Benham was "charged with a criminal offence" (para. 56). The ECtHR found Article 5 was not violated because it did not find that it was established that the order for detention was invalid and, thus, the detention which

resulted from it was unlawful under national law (para. 46). Article 1 of Protocol No. 4 was not in issue, because it has not been ratified by the United Kingdom.

In support of the contention that it is possible to read and apply s. 6 in a manner which is consistent with the Constitution, counsel for the State parties submitted that the approach advocated by the State parties is the approach which was adopted by the High Court and the Supreme Court in *The State (Healy) v. Donoghue.* It was a classic case of reading into the statute the requirement that the business of a Court will be conducted, and discretions exercised, in accordance with the principles of constitutional justice.

The provision under scrutiny in *The State (Healy) v. Donoghue* was s. 2 of the Criminal Justice (Legal Aid) Act 1962 (the Act of 1962), which empowers District Court, on an application made to it, to grant a certificate of free legal aid. One of the prosecutors in that case, a youth aged eighteen years whose formal education had ceased when he was thirteen years old and who was unable to pay for legal advice, had pleaded guilty to a charge in the District Court and was sentenced to three months' detention. He had not applied for legal aid, nor had he been informed of his right to apply for legal aid, nor was he represented at the trial. The other prosecutor had pleaded guilty when he was brought before the District Court on a charge of larceny and he was remanded in custody for sentencing. Subsequently, he applied for, and was granted, a legal aid certificate and a solicitor was assigned to him. However, at the sentencing hearing he was sentenced to six months' detention, although he was not represented by the solicitor assigned to him or any solicitor because, in colloquial terms, the solicitors on the legal aid panel were on strike, although he sought a further adjournment for the purpose of obtaining advice of a solicitor. The conviction of each of the prosecutors was quashed by order of *certiorari*. The Supreme Court held that, if an accused person is unable to pay for legal assistance, the administration of justice requires that the accused should be afforded the opportunity of obtaining such assistance at the expense of the State in accordance with the Act of 1962 even though the accused has not applied for it and that the trial should not proceed without such assistance if a certificate has been granted.

In relation to the duty of a Judge of the District Court in implementing the Act of 1962, Henchy J. stated (at p. 354):

> "As in the case with all statutes, save those held to be unconstitutional, it is the duty of the District Court to give full effect to the provisions of the Act of 1962. But as this Act is designed to give practical implementation to a constitutional guarantee, the judicial function in respect of the Act would be incompletely exercised if a bare or perfunctory application of it left the constitutional guarantee unfulfilled. The guarantee of protection from unjust attack is declared by the Constitution to be given by the State; and the judiciary, no less than the legislature, is an organ of the State. The legislative requirement of s. 2 of the Act is literally complied with when a legal-aid certificate is granted in the District Court: but it is clear that the judicial function does not begin and end there. Having regard to the scope and purpose of the Act of 1962 and the solemnly declared duty of each Judge to uphold the Constitution and the laws, it is implicit that it is the duty of each District Justice not simply to grant a legal-aid certificate when an application is made for one on satisfactory statutory grounds but also to see that the accused who appears, from the circumstances disclosed by a due hearing of the case, to be qualified for one is informed of his right to apply for it; and, when a legal-aid certificate has been granted to an accused, the duty extends to ensuring that the accused will not be tried against his will without the benefit of that legal aid. The Act would be a hollow and specious expression of the constitutional guarantee if it is not given at least that degree of judicial implementation. An accused person who has been convicted and deprived of his liberty without the benefit of legal aid in such circumstances may be heard to say that his constitutionally-guaranteed rights have been violated or ignored."

Counsel for the State parties categorised the approach adopted by the Supreme Court in the *King* case as the highpoint in the striking down by a court of legislation for arbitrariness and vagueness. It was implicit in the position adopted by the State parties that such approach was not warranted in relation to s. 6, which comes at the end of a series of procedures and which gives to the District Court, a Court with particular expertise in the area of enforcement of debt, an appropriate discretion. The absence of stipulations in s. 6 spelling out how the Judge should act in its implementation does not render s. 6 unconstitutional or in breach of the Convention, it was submitted.

Finally, counsel for the State parties relied on the decision in *X v. Federal Republic of Germany*, which was the decision of the European Commission on Human Rights given on 18th December, 1971 (Application No. 5025/71, Yearbook of the European Convention on Human Rights, pp. 692 – 698). Counsel for the Credit Union also relied on this decision. It is one of only three decisions on Article 1 of Protocol No. 4 to which the Court has been referred. Counsel for the plaintiff ascribed the absence of case law at European level to the fact that there is broad acceptance that imprisonment of a debtor who is unable to pay a debt is unacceptable. Another factor is that some countries, for example, the United Kingdom, have not ratified the Protocol.

Before considering the *X* case, I mention briefly an argument advanced on behalf of the Credit Union, which I reject. It was that after judgment was marked against the plaintiff in the Circuit Court office, the contractual obligation of the plaintiff to the Credit Union merged in the judgment and became extinguished, so that in the enforcement process the plaintiff is not being pursued to fulfil a contractual obligation. That argument ignores the fact that the basis of the judgment is a contractual obligation and nothing else.

The basis of the complaint made by *X* which is of relevance for present purposes was that in August 1970 the County Court at Bochum ordered his detention on the basis of Article 901 of the Code of Civil Procedure, which provided that, at the request of a creditor, the Court could order the detention of a debtor who failed to make an affidavit of his possessions. His application to the Commission was based on an alleged violation of Article 5(1)(b) of the Convention. The Commission held that his complaint was inadmissible. The Commission found that the detention of *X* was covered by Article 5(1)(b) as having been decided in order to secure the fulfilment of a specific obligation imposed on him by law. It went on to state:

> "The Commission is, however, of the opinion that Article 1 of Protocol No. 4, which came into force later than the Convention itself, could to some extent limit the scope of the conditions set out in Article 5 of the Convention justifying arrest and detention. The Commission has, therefore, also examined the complaint under Article 1 of the said Protocol …. It is, however, clear from the view expressed by the Committee of Experts on their report to the Committee of Ministers explaining the draft of Protocol No. 4 that Article 1 of this Protocol is 'aimed at prohibiting as

> contrary to the concept of human liberty and dignity, any deprivation of liberty for the sole reason that the individual had not the material means to fulfil his contractual obligations'…. In the minutes of a meeting of the Committee of Experts, held from 2 – 10 March 1962, it is further stated that deprivation of liberty is not forbidden if another factor is present in addition to the inability to fulfil a contractual obligation, e.g. if a person deliberately refuses to fulfil an obligation ….

In the present case, the applicant was detained in order to secure the fulfilment of his obligations to swear an affidavit. His detention was, therefore, not merely based on the ground that he was unable to fulfil a contractual obligation."

Counsel for the plaintiff submitted that the decision in the *X* case cannot be used as a formalistic distinction. The 2005 order made under s. 6 in this case was made for non-compliance with the instalment order, which, in reality, was for non-payment of debt. Therefore, as I understand the argument, the imprisonment of the plaintiff was ordered "merely" for "inability to fulfil a contractual obligation" contrary to Article 1. Counsel for the Commission also pointed to the difference between the issue in the *X* case and the issue in this case, in that what the order in the *X* case was designed to do was to coerce the fulfilment of a legal obligation to complete an affidavit of means, rather than to compel the payment of debt.

Conclusions on interpretation of section 6 of the Act of 1940
What happens in the District Court on an application under s. 6 is governed by paragraphs (a) to (d) inclusive of section 6. On an ordinary interpretation of those paragraphs without reference to constitutional or Convention requirements, paragraph (a) stipulates the pre-conditions which must be satisfied in order for the jurisdiction to make an order for arrest and imprisonment to arise: that the application is brought during the currency of an instalment order or within twelve months thereafter; and that the debtor has defaulted in one or more of the instalments for which he is liable. The burden of proving these matters is clearly on the creditor. Apart from the discretion conferred by paragraph (d) on the Judge to treat the application as an application for the variation of the instalment order, the exercise of the power to order arrest and imprisonment is governed by paragraphs (b) and (c). Having regard to the structure of those paragraphs, in my view, they must be read together.

The only guidance given to the Judge in paragraphs (b) and (c) is that he may make the order if he thinks it is proper to do so but he must comply with paragraph (c). Paragraph (c) prohibits him from making the order where two criteria are met: that the debtor appears; and that the debtor shows to the satisfaction of the Judge that his failure to pay was due neither to his wilful refusal nor to his culpable neglect. On an ordinary reading of paragraph (c), in my view, it is impossible to construe it in the manner suggested by counsel for the State parties. It is clear and unambiguous. One could only interpret paragraph (c) as not reversing the onus of proof so that it is borne by the debtor rather than the creditor, by eliding the words "if the debtor (if he appears) shows, to the satisfaction of such [judge]". To do so would be to give an opposite meaning to what was intended by the Oireachtas.

In construing s. 6 in accordance with the Constitution and, in particular, on the basis that the Oireachtas intended that proceedings in the District Court under s. 6 and the exercise by the Judge of his discretion would be conducted in accordance with the principles of constitutional justice, it has to be borne in mind that it is not permissible to rewrite the legislative provision in a manner which amounts to usurping the functions of the Oireachtas. Contrasting the approach adopted by the Supreme Court in *The State (Healy) v. Donoghue* and the approach adopted by the Supreme Court in *D.K. v. Crowley* illustrates what is permissible and what is not permissible in reading into a constitutional provision with a view to giving it a meaning which is consistent with the Constitution.

In *The State (Healy) v. Donoghue* there was general acceptance in the Supreme Court that, in the case of poor persons, the Act of 1962 gave effect to the guarantee implicit in the Constitution that an accused person is entitled to fair procedures and is to be afforded an adequate opportunity to defend himself on a criminal charge. What the Supreme Court read into s. 2 of the Act of 1962 is an obligation on the part of the Judge of the District Court to apprise the accused, who appears to qualify under the Act of 1962, of his entitlement to apply for a legal aid certificate, which the Judge is mandated to grant him, if an application is made for it and there is compliance with the requirements of the Act of 1962. The implication of such a duty clearly does not alter the meaning of s. 2 of the Act of 1962 to the extent that it gives rise to a different statutory provision to that enacted by the Oireachtas in section 2.

In *D.K. v. Crowley* the combined effect of sub-sections (1), (2) and (3) of s. 4 of the Act of 1996 was that the District Court was given power in exceptional cases to grant an interim barring order on an *ex parte* application, which was only limited in time to the extent that it was expressly provided that it would cease to have effect on the determination by the Court of the application for a barring order. On the application of the *East Donegal* principles, Keane C.J. stated (at p. 761):

> "It is, of course, the case that the court in accordance with the principle of *East Donegal* …, must presume that the District Court, and the Circuit Court on appeal, in dealing with such applications will ensure that the requirement of constitutional justice will be observed. Where, however, the statute conferring jurisdiction on the District Court expressly provides that the interim order is to continue until the determination by the court of the application for a barring order, the District Court has no jurisdiction to impose a shorter time limit at the expiration of which the interim order is to expire."

It is interesting to note that Keane C.J. had observed earlier (at p. 760) that, if a model were needed for a provision which would not infringe constitutional rights, it was readily to be found in s. 17 of the Child Care Act 1991, enabling the District Court on the application of a health board to make a care order in respect of a child without notice to the parent where required in the interests of justice or the welfare of the child. However, such order must not be for a period exceeding eight days without the consent of the health board and the parent having custody.

Although some are not strictly within the parameters of the impugned provision, which is s. 6 of the Act of 1940, it may be helpful at this point to summarise the alleged deficiencies, irregularities and improper (having regard to the Constitution and the Convention) provisions which were identified by counsel for the plaintiff, in some cases supported by counsel for the Commission, in the statutory scheme for enforcement of civil debts which may culminate in an order for arrest and imprisonment under section 6. Some of the complaints are specific to Article 1 of Protocol No. 4, in that it was suggested that the implementation of the statutory scheme may give rise to a debtor being imprisoned notwithstanding that he is unable to pay the debt, and merely on that account, contrary to that Article. Other complaints are founded on the

contention that the implementation of the statutory scheme may give rise to the deprivation of liberty of the debtor, without the debtor having any meaningful opportunity to defend himself. The totality of the complaints, some of which have been identified by reference to the authorities referred to earlier, are the following:

(1) There is no positive obligation on the Judge to assess the means of the debtor and ascertain whether his or her failure to pay is due to wilful refusal or culpable neglect, either at the examination stage before the instalment order is made or when an application is made for an order for arrest and imprisonment under s. 6.

(2) No provision is made for giving a warning to the debtor at any stage that a possible outcome of the failure to discharge the debt is that he or she may be imprisoned for a term of three months.

(3) There is no requirement for personal service of the application for a committal order on the debtor.

(4) There is no prohibition on the debtor being committed *in absentia*, irrespective of the reason for failure to appear.

(5) There is no requirement that the debtor is entitled to have the benefit of legal representation if he or she wishes to have it, and, if impecunious, that he or she be provided with legal aid at the expense of the State and be apprised of the entitlement to legal aid.

(6) The burden of proof that failure to pay is not due to his or her wilful refusal or culpable neglect is, effectively, imposed on the debtor, so that there is no onus on the creditor to establish that the failure to pay the debt is not due to lack of means or inability to pay on the part of the debtor. Such onus should be borne by the creditor and should only be discharged by the application of the standard of proof in a criminal matter, proof beyond reasonable doubt.

(7) There is no provision whereby, if an order to arrest and imprison him is made, the debtor has recourse to the court in which the order was made to vary or discharge the order.

(8) Imprisonment of the debtor and deprivation of his liberty is not, as it should be, a "last resort" remedy for the creditor, in that there is no requirement to pursue less serious remedies, such as attachment of earnings or social welfare benefits.

(9) No mechanism of the type contained in Order 46B for attachment of the debtor and requiring personal service of the application for the attachment order on the debtor is provided for. Such a mechanism would be likely to result in the vulnerable debtor who is unable to pay the debt engaging with the Court process. It would be less intrusive of the debtor's right of liberty than imprisonment on foot of an order under s. 6.

(10) There is no provision for ensuring that the duration of the imprisonment is proportionate to the amount owing to the creditor.

Bearing in mind that the objective of the creditors' application to the District Court pursuant to paragraph (a) of s. 6 is to procure that the debtor is deprived of his liberty for a period which may extend to three months, it is necessary to identify the fundamental safeguards which, if not incorporated in the process, may result in s. 6, when implemented, infringing the constitutional rights of the debtor, as a first step in assessing whether the argument of the State parties on the interpretation of s. 6 stands up. It is then necessary to consider whether, as a matter of construction of the provision, s. 6 confers jurisdiction on the Judge of the District Court to afford such safeguards to the debtor.

It is difficult to identify any rational basis for treating a person facing the possibility of imprisonment for three months for non-payment of debt at the suit of a creditor differently from a person facing a criminal charge and the possibility of the imposition of a criminal sanction. In my view, there is none. Therefore, the fundamental safeguards which must be in place before the Court may properly, and without violating the constitutional rights of the debtor, make an order for the arrest and imprisonment of the debtor under para. (b) of s. 6 are:

(1) that the debtor is present before the Court, unless he or she has consciously, that is to say, with full knowledge and understanding that arrest and imprisonment is a possible outcome of the application, absented himself or herself;

(2) that the debtor is apprised by the Judge of his entitlement to legal representation and is provided by the Court with the means of obtaining legal aid at the expense of the State if he or she is impecunious and incapable of representing himself or herself; and

(3) that the Court applies fair procedures in the hearing of the creditors' application and does not make an order for arrest and imprisonment unless it is satisfied that the failure to pay is due to wilful refusal or culpable neglect.

The State parties' argument that s. 6 can be interpreted in a manner consistent with the Constitution falls at the first hurdle. Paragraph (c) of s. 6, as enacted, expressly envisages that an order may be made under para. (b) notwithstanding that the debtor does not appear. That being the case, one is entitled to ask how the Judge, if challenged by the creditor who has proved that the debtor has failed to comply with the instalment order, could conclude that he does not have jurisdiction to make an order if the debtor does not appear in Court in answer to the summons. Even if the Judge is disposed to adjourn the application, he has no jurisdiction to compel the attendance of the debtor with a view to ascertaining whether his absence is due to a conscious decision or not.

It also falls at the second hurdle, because no jurisdiction is conferred on the Judge to grant legal aid to the debtor if he or she has not the means to retain a lawyer to represent him or her. I did not understand it to be the position of the State parties that an impecunious debtor facing an application under s. 6 would not be entitled to legal aid at the expense of

the State, although there was no formal concession on this point. Such a position would clearly be wholly untenable in the light of the decision of the Supreme Court in *The State (Healy) v. Donoghue*. It would also be at variance with the decision of the ECtHR in the *Benham* case, which recognises that, where deprivation of liberty is at stake, the interest of justice, in principle, calls for free legal representation for a party who does not have the means to pay for representation. Even if it is acknowledged that, in the circumstances outlined, there is an entitlement on the part of the debtor to legal aid at the expense of the State, the question which remains is what jurisdiction does the Judge in the District Court have to make provision for free legal aid for the debtor. The answer is that he has none.

Unlike the situation which arose in *The State (Healy) v. Donoghue*, the problem is not solved by merely telling the debtor that there is a statutory scheme in place which provides for legal aid and that he is entitled to apply for legal aid. There is no scheme in place to which the Judge of the District Court may resort to provide legal aid for the debtor. Section 2 of the Act of 1962, which was at issue in *The State (Healy) v. Donoghue,* only empowers the District Court to grant a legal aid certificate in the case of a "person charged before it with an offence". A defaulting debtor facing a creditor's application for an order under s. 6 does not come within that category.

A defaulting debtor without means may qualify for civil legal aid under the Civil Legal Aid Act 1995 (the Act of 1995). However, there is no automatic right to a legal aid certificate under that Act. Further, it is the Legal Aid Board, not the Court, which grants a legal aid certificate and the grant of such a certificate is dependent on the applicant fulfilling the criteria set out in that Act. It may well be that a debtor without means facing an application for an order under s. 6 would be able to compel the Legal Aid Board to grant him legal aid. The decision in *S. v. Landy* referred to earlier would certainly seem to support that proposition. In that case, Lardner J. quashed a refusal by the non-statutory Legal Aid Board, which operated under a non-statutory scheme prior to the enactment of the Act of 1995, and remitted the matter to the Legal Aid Board for re-consideration in judicial review proceedings, having outlined the applicant's position as follows:

> "Here there are wardship proceedings brought by the Eastern Health Board against the natural mother in respect of a child and the Court is asked to make Orders in relation to the future custody, residence, maintenance and welfare of the child and it is accepted that the mother, wishing to be heard in the wardship proceedings and applying for legal aid, has not the means to be legally represented. The Legal Aid Certifying Committee and the Appeals Committee on appeal should consider applications for legal aid in the light of the views which I have expressed above. It is in my view necessary that this should be done in order that the constitutional requirement that the Court should administer justice with fairness be given efficacy."

Lardner J. had quoted the passage from the judgment of O'Higgins C.J. in *The State (Healy) v. Donoghue* which has been quoted earlier, stating that, while the case before him was different in nature from a criminal prosecution, having regard to the circumstances of the applicant and the circumstances in which the application for legal aid to be represented in the wardship proceedings was made, he considered that the *dicta* of O'Higgins C. J. were applicable, *mutatis mutandis*, to the wardship proceedings.

Even if it is the case that an impecunious debtor does not come within the scope of either the criminal legal aid scheme or the civil legal aid scheme, the decision of Lardner J. in *Kirwan v. Minister for Justice*, which was also referred to earlier, points to the fact that it is incumbent upon the executive under the Constitution to afford such legal aid as is necessary to enable the debtor to defend a creditor's application under section 6. An impecunious debtor who is facing the possibility of imprisonment at the suit of a creditor under a legislative scheme put in place by the Oireachtas as a matter of public policy to assist creditors, in my view, has as much entitlement to State funded legal aid as a poor person who is facing a criminal sanction. That conclusion meets the criteria outlined by Hardiman J. in the *J.F.* case, in which there are echoes of the judgment of ECtHR in the *Benham* case, in that –

> (i) what is at stake, the liberty of the debtor, is of the highest importance,
>
> (ii) a law which stipulates an absence of wilful refusal or culpable negligence as a defence to an application for imprisonment involves legal concepts of considerable complexity, and
>
> (iii) the likelihood of a debtor whom the creditor has made the subject of an instalment order in the District Court having the capacity to represent himself or herself or the means to acquire legal representation is extremely remote.

Finally, for completeness, the Attorney General's Scheme, which is an *ex gratia* administrative scheme under which legal aid is made available out of funds provided by the Oireachtas for persons who cannot afford it, has no application to the District Court. It is administered by the Department of Justice, Equality and Law Reform, not by the Superior Courts, in relation to forms of litigation to which it applies. The Attorney General is not bound by a recommendation of this Court or the Supreme Court.

Accordingly, while I have no doubt that an impecunious debtor facing an application for an order for arrest and committal under s. 6 has a constitutional entitlement to be provided with legal aid at the expense of the State, the problem is that there is no legislative or administrative structure in place under which the Judge can make provision for legal aid for the debtor at the expense of the State. In the absence of such a structure, in my view, s. 6 cannot be interpreted as conferring jurisdiction on the Judge to sanction the retainer of a solicitor on the basis that the fees will be paid out of public monies. Such interpretation would usurp the function of the Oireachtas.

In relation to the third hurdle which the State parties have to overcome on the interpretation argument, the crucial question is whether the constitutional right to fair procedures is infringed where there is imposed on a debtor, who is required to respond to an application for an order under s. 6, the burden of disproving that the default in payment of the instalments was not due to his wilful refusal or culpable neglect and, if so, whether paragraphs (b) and (c) can be interpreted in such a way that the burden of proving wilful refusal or culpable neglect is on the creditor. I have already rejected the submission made on behalf of the State parties that there is no reversal of the burden of proof in paragraphs (b) and (c). If, in order to avoid violating the defaulting debtors' constitutional rights, paragraphs (b) and (c) must be capable of being interpreted as meaning that the burden of disproving failure to pay due to wilful refusal or culpable neglect is not on the defaulting debtor, and, for the reasons outlined later, they must be capable of being so interpreted,

such interpretation is not open. It is instructive, on this point, to compare s. 6(b) and (c) with s. 6 of the Act of 1872. That section, which empowers any Court to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due in pursuance of an order or judgment of a competent Court, contains a proviso in the following terms:

> "That such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same".

There was clearly a shift in policy in relation to the treatment of defaulting debtors between 1872 and 1940. In fact, there was a shift in policy between 1872 and 1926, in that s. 18(1) of the Act of 1926 gave the District Court jurisdiction to make an order for arrest and imprisonment for a period not exceeding three months on failure of the debtor to pay the debt and costs or any one or more of the instalments without making any allowance for the inability to pay. Moreover, subs. (2) of s. 18 provided that the debtor was entitled to be released only if he paid the whole of the outstanding debt. Sub-section (2) was considered by the High Court (Johnston and O'Byrne JJ.) in *Cafferkey v. Campbell* [1928] I.R. 444, in which, on a case stated, it was held that, where a debtor had made default in payment of the first instalment on foot of an instalment order and the Court had ordered him to be imprisoned for three months, and he was imprisoned for that period, the Court was correct in subsequently committing him to prison in respect of non-payment of the second instalment for a period of three months. Johnston J. recognised in his judgment that the new legislation, that is to say, the Act of 1926, was much more drastic in its operation than the provisions of the Act of 1872, which was a matter of policy. In section 6 of the Act of 1940, the Oireachtas enacted measures which were less draconian than the provisions in s. 18 of the Act of 1926. However, while the Oireachtas provided that failure to pay on the ground of wilful refusal or culpable neglect was an essential ingredient of the wrongdoing which could lead to the arrest and imprisonment of a debtor, it clearly, presumably as a matter of policy, put the burden of disproving the existence of that ingredient on the debtor. In my view, to interpret paragraphs (b) and (c) as not imposing the burden of proof on the debtor is to rewrite s. 6 in a manner which is patently at variance with the policy of the Oireachtas which underlies paragraph (c) of section 6.

As s. 6 is silent as to the standard of proof applicable, on the authority of *National Irish Bank v. Graham*, s. 6 is probably open to the interpretation that proof beyond reasonable doubt is required to confer jurisdiction on the District Court to make an order for the arrest and imprisonment of a defaulting debtor.

For the foregoing reasons, I consider that s. 6 cannot be interpreted in the manner suggested by the State parties.

Constitutional right to fair procedures: conclusions
There are fundamental deficiencies in s. 6 which render it invalid having regard to the provisions of the Constitution because it violates the debtor's constitutional guarantee of fair procedure.

First, on its proper construction, it confers jurisdiction on the District Court to make an order for the arrest and imprisonment of a defaulting debtor even if the debtor is not present before the Court and even if the Judge is not in a position to determine whether the absence of the debtor is due to a conscious decision.

Secondly, it confers jurisdiction to order the arrest and imprisonment of an impecunious debtor without there being in place some legislative or administrative scheme under which the District Court is empowered to make provision for the legal representation of the debtor at the expense of the State.

Thirdly, s. 6 is also invalid in that, while it recognises that an order for arrest and imprisonment should only issue if the default on the part of the debtor is attributable to wilful refusal or culpable neglect, it expressly puts the onus on the debtor to disprove such conduct on his part. If, instead of leaving it to the creditor to pursue the committal of a defaulting debtor for non-compliance with an instalment order, the Oireachtas had made it an offence punishable on three months' imprisonment to wilfully or culpably negligently fail to comply with the instalment order, the hypothetical provision would be invalid having regard to the provisions of the Constitution if it purported to put the onus of disproving the offence on the debtor. As was recognised by the Supreme Court in *Hardy v. Ireland* [1994] 2 I.R. 551, the "well-established criminal law jurisprudence in regard to having trials in due course of law" applies to a statutory offence with the following consequences (*per* Hederman J. at p. 565):

> "It protects the presumption of innocence; it requires that the prosecution should prove its case beyond all reasonable doubt; but it does not prohibit that, in the course of the case, once certain facts are established, inferences may not be drawn from those facts and I include in that the entitlement to do this by way even of documentary evidence. What is kept in place, however, is the essential requirement that at the end of the trial and before a verdict can be entered the prosecution must show that it has proved its case beyond all reasonable doubt."

By analogy, when the Oireachtas considers it appropriate to provide for a party in civil litigation a remedy in the case of contumacy on the part of the debtor, and, if granted, the remedy will result in the imprisonment of the debtor, fair procedures must require that the burden of proof of contumacy is on the creditor availing of the remedy.

Having regard to the aspects of s. 6 which I have outlined, in my view, s. 6 fails to uphold the guarantee of fair procedures implicit in Article 34 and Article 40.1.3 of the Constitution and to vindicate the rights of the defaulting debtor. In the light of that finding, I consider that it is unnecessary to determine whether Article 38.1 has any application to the process provided for in s. 6. Therefore, the question whether the s. 6 process constitutes criminal proceedings under national law is obviated.

Constitutional right to liberty: conclusions
In considering whether s. 6 also violates the right to personal liberty guaranteed by Article 40.4.1, it must be acknowledged that in s. 6 the Oireachtas has implicitly recognised that a debtor should not be imprisoned if the failure to pay the debt is due to inability to pay. The absolute proscription in para. (c) on making an order for arrest and imprisonment if the debtor shows that his failure to pay was due neither to his wilful refusal nor his culpable neglect gives rise to that implication. Therefore, to that extent, it is not the case that, in enacting s. 6, the Oireachtas could be said

to have put in place a mechanism for depriving a person of his or her personal liberty which ignores the fundamental norms of the legal order postulated by the Constitution. The problem, however, is that the combination of the statutory enforcement of debt process which culminates in s. 6 and the formulation of s. 6 by the Oireachtas is not structured in a manner and does not contain safeguards, such as the implementation of the debtor's constitutional right to fair procedures, so as to ensure that a debtor who is unable to pay the debt is not imprisoned.

As was found in the *Coetzee* case, in s. 6 the sanction of imprisonment is ostensibly aimed at the debtor who will not pay, but it also strikes at those who cannot pay and simply fail to prove this at the hearing due to negative circumstances created by the provisions themselves. The application of s. 6 to the plaintiff bears that out. The fact that the warrant on foot of the 2005 order could have been, and probably would have been, executed against the plaintiff if these proceedings had not been brought, illustrates that a person in the position of the plaintiff can be deprived of personal liberty even though he or she is not deliberately or in a culpably negligent manner flouting the law, but is merely unable to discharge the instalment arrears.

Adopting an analytical approach to the question whether s. 6 violates the guarantee of personal liberty contained in Article 40.4, the core question is whether s. 6 constitutes a disproportionate interference with the right to liberty. That question may be answered by applying the well-established proportionality test first enunciated by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593 in the following terms (at p. 607):

> "In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court on Human Rights … and has recently been formulated by the Supreme Court in Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionately test. They must:-
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right as little as possible, and
>
> (c) be such that their effects on rights are proportional to the objective."

Having in place an effective statutory scheme for enforcement of contractual obligations, including the payment of debt, is unquestionably a reasonable and legitimate objective in the interests of the common good in a democratic society. The means by which effectiveness is achieved may reasonably necessitate affording a creditor a remedy which entitles him or her to seek to have a debtor imprisoned, but such means will constitute an infringement of the debtor's right to personal liberty guaranteed by Article 40.4.1 unless they pass the proportionality test.

The application of elements of the test to s. 6 illustrates that it is a disproportionate interference with the constitutionally protected right to liberty for the following reasons:

> (a) The objective of imprisoning a debtor for failure to comply with an instalment order is to procure the discharge of the arrears of instalments. A statutory procedure under which a debtor who is unable to discharge the arrears is imprisoned because of the absence therein of procedures, including procedures which give effect to the debtor's right to fair procedures under the Constitution, which ensure that the Judge ascertains that the debtor is unable to discharge the arrears, cannot be said to be rationally connected with the objective. Such a procedure is arbitrary, unfair and not based on rational considerations. It is an unreasonable and unnecessary interference with the debtor's right to personal liberty.
>
> (b) In circumstances in which a debtor has some resources to meet the debt, a statutory scheme which does not require the creditor to seek redress by attaching those resources, does not impair the debtor's right to liberty as little as possible. Similarly, the failure to impose on the creditor pursuing an application for an order for arrest and imprisonment the obligation to go through an Order 46B type process, including personal service of an order with the penal endorsement, does not impair the debtor's right to liberty as little as possible. The rationale of the ECtHR in the *Saadi* case, that the detention of an individual is such a serious measure that it is justified only as a last resort where less severe measures have been considered and found to be insufficient to safeguard the individual or public interest, is equally applicable in considering the right to liberty guaranteed by the Constitution.

For those reasons alone, the restriction on the right to liberty in s. 6 goes beyond what is permitted by the Constitution and is invalid. There are other factors which it is necessary to comment on, in the light of the submissions made on behalf of the parties.

The absence of a mechanism in s. 6 for re-entering the application for arrest and committal before the District Court after the order is made, as the plaintiff's case clearly demonstrates, infects the provision with arbitrariness and unfairness. If, however, s. 6 provided that the debtor had to be present before the Court and had to be provided with legal aid at the expense of the State if unable to fund legal aid himself or herself, and, if the applicant creditor had to satisfy the Court that the default of the debtor in relation to the debt was due to wilful refusal or culpable negligence, in my view, the absence of a provision for re-entering the matter before the District Court after the order was made would be unlikely to perpetrate an injustice to the debtor, unless the circumstances of the debtor were to change after the making of the order, for example, if the debtor was made redundant.

In any event, the statutory mechanisms which are currently in place under which the debtor can procure his or her release from prison are inadequate to vindicate the constitutional rights of the debtor. First, the reliance of the State parties on the option available under s. 87 is wholly lacking in reality, because the likelihood of the plaintiff or any debtor in similar circumstances to her seeking protection from the High Court under s. 87 is so remote as to be non-existent. Secondly, s. 9 of the Act does not confer any right or entitlement on a prisoner. It merely gives the Minister a discretion to release the prisoner and the discretion extends to requiring the prisoner to pay so much of the sum referred to in the

order for arrest and imprisonment "which appears to [the Minister] sufficient". The indisputable reality of the plaintiff's position was that she was unable to pay the sum representing the accumulated arrears of the instalment order and costs which came to €5,658, because she lacked the means to do so.

As the plaintiff's case illustrates, a statutory procedure for enforcement of debt under which the debtor may be imprisoned without there being a positive requirement that the Court determine whether non-payment is due to inability to pay before making an order for arrest and imprisonment is not only futile in terms of securing the creditor's remedy, but it imposes unnecessary expense both on the creditor and the State. If the warrant for the imprisonment of the plaintiff had been executed, the plaintiff would have spent a month in Mountjoy. However, the Credit Union, which its counsel described as a not for profit co-operative financial service provider governed by the Credit Union Act 1997, as amended, would not have received €5,658, or probably even "one brass farthing", from the plaintiff. The Credit Union would have borne the cost of the proceedings for the instalment order and the application for the order for arrest and imprisonment. The State would have borne the cost of two District Court sittings, the execution of the warrant, and the accommodation of the plaintiff in Mountjoy for one month. Not only would the process have no practical value in securing payment of the outstanding debt or any part of it, but it is difficult to see how it could be said to have any deterrent value.

It is difficult to understand why procedure of the type provided for in Order 46B of the District Court Rules has not been introduced in relation to enforcement of debt. However, the fact that the Order 46B type procedure does not apply to enforcement of a judgment for payment of money is not unique to the District Court. In relation to the High Court, Order 44, which deals with attachment and committal, provides for two distinct procedures: rules 9 to 14 exclusively govern the implementation of s. 6 of the Act of 1872, whereas rules 1 to 7 govern attachment and committal for breach of Court orders generally. Compliance with Order 41, rule 8 in relation to service of an order with a penal endorsement would appear not to be a pre-condition to an application for committal under the Act of 1872. It is a curious state of affairs that, if, say, a plaintiff, which is the supplier of construction plant and equipment, obtains an order directing a defendant builder whose contract has terminated for failure to meet periodic payments to return the plant or equipment in question, an order for attachment will not issue under Order 44, rule 1 unless there is proof of the service on the defendant of the order with the penal endorsement in the terms set out in Order 41, rule 9, including reference to imprisonment, whereas there is no express requirement in the rules for service of a judgment for money with a penal endorsement or, if there is an instalment order in place, the instalment order with a penal endorsement, as a pre-condition to the initiation of an application for arrest and imprisonment of the debtor.

I can see no rational basis for the distinction which is provided for in the rules of the courts at all levels between enforcement of orders directing a person to do or refrain from doing an act, on the one hand, and enforcement of debt, on the other hand, where the enforcement process is aimed at depriving the person of his or her liberty. In a case to which the analogous rule of the Consolidated Circuit Court Rules 2001 to Order 46B applied, on an application for an inquiry under Article 40.4 of the Constitution, Peart J. held that, in a situation where a person was at risk of losing his

liberty in the event of not complying with an order of the Court directing him to do some act, it was essential that he was fully aware of that possibility and that strict compliance with the service of the relevant order and the terms of the penal endorsement could not be overlooked (*J. O'G. v. Governor of Cork Prison* [2007] 2 I.R. 203). Surely a debtor who is the subject of an instalment order and may be the subject of an application, at the suit of the creditor, to imprison him or her for a period of three months for non-compliance with the instalment order must, as a matter of constitutional justice, be entitled to be afforded the same protection. In my view, he is.

By analogy to the decision of the ECtHR in the *Saadi* case, the principle of proportionality under the Constitution dictates that a balance must be struck between fulfilment of the legitimate objective which permits the restriction of the right to liberty guaranteed by Article 40.4.1 and the importance of the right to liberty and the duration of the detention is a relevant factor in striking such balance. Having said that, I do not think it would be appropriate to comment in the abstract on the proper duration of imprisonment for deliberate and culpable failure to discharge an instalment order. It does not arise in this case, because the plaintiff is simply unable to discharge the arrears of the instalment order and, therefore, cannot lawfully be committed to prison. However, I do not accept the submission made on behalf of the plaintiff that, in a case of committal to prison for contumacious default in payment of debt, the term of imprisonment should be related to the amount of the debt. A scheme of enforcement which properly allows for imprisonment for failure to discharge an instalment order, that is to say, where the failure is attributable to wilful refusal or culpable neglect, involves a state of mind on the part of the debtor akin to *mens rea*. That factor, it seems to me, must be the primary factor in measuring the appropriate duration of the detention.

Finally, in this case, the State parties and the Credit Union now acknowledge that the plaintiff should not be committed to prison for failure to comply with the instalment order and are agreeable to the 2005 order being quashed. I find it inexplicable that the State should countenance continuation of a scheme of enforcement of debt which, apart from being, as I have found, inconsistent with the Constitution, is vague and gives no guidance to either of the proponents in the enforcement process, the creditor and the debtor, or to the Judge who has to make a determination on such an important matter as whether the debtor should be imprisoned for three months, when a scheme which has the specificity and incorporates the safeguards designed to ensure that the Judge of the District Court makes a determination which is not bad in law could be substituted for the existing scheme. While a determination which is bad in law may be quashed by this Court on an application for judicial review, there is a cost involved in achieving that result. Even if an award of costs is not made against the State, the applicant for judicial review may be entitled to the benefit of the Attorney General's Scheme, in which case the State will bear two sets of costs. Moreover, there is also the potential unfairness to the litigating creditor who has to bear his or its own costs of the wasted procedure in the District Court. Such unfairness is particularly stark in the case of a non-profit lender, such as the Credit Union. Those factors are subsidiary to the fundamental point which the plaintiff's case has established – that s. 6 is invalid having regard to the provisions of the Constitution. However, the observations are apposite, given that the Court was told that there are four other cases similar to the plaintiff's case which are awaiting hearing in this Court.

Compatibility with the Convention: conclusions

In view of the fact that I have found that s. 6 is invalid having regard to the provisions of the Constitution and propose making an order to that effect, it is not appropriate to consider whether a declaration of incompatibility with the Convention should be made, because s. 5 of the Act of 2003, which confers jurisdiction on this Court to make a declaration of incompatibility, does so only "where no other legal remedy is adequate and available". Accordingly, it is not necessary, and it would be inappropriate, for the Court to express a view on whether s. 6 is incompatible with the obligations of the State under the Convention.

Similarly, subs. (2) of s. 3 of the Act of 2003, which provides that a person who has suffered injury, loss or damage as a result of a contravention by any organ of the State of its obligation under subs. (1) to "perform its functions in a manner compatible with the State's obligations under the Convention provisions" may institute proceedings to recover damages in respect of the contravention, confers such entitlement only "if no other remedy in damages is available". The plaintiff, as I have stated, claims damages for breach of her fundamental rights under the Constitution and also under the Convention, but without expressly invoking s. 3. While, in their defence, the State parties deny that the plaintiff has suffered any damage or is entitled to damages, the issue as to whether she is entitled to maintain a claim for damages for breach of her constitutional rights, having regard to the findings I have made, was not debated at the hearing. It is not possible at this juncture, for the purposes of the application of s. 3(2) of the Act of 2003, to determine whether a remedy in damages for breach of her constitutional rights will be available to the plaintiff. Therefore, until such time as it is determined whether the plaintiff has a remedy in damages for breach of her constitutional rights, it is not necessary, and it would be inappropriate, to determine whether the making of the 2005 order was in contravention of the duty of the Judge of the District Court or any other organ of the State to perform his or its functions in a manner compatible with the State's obligations under the Convention and, in particular, under Article 1 of Protocol No. 4 which was primarily invoked on behalf of the plaintiff. However, depending on the position adopted by the State parties, that may still be an issue.

Order

There will be an order that s. 6 of the Act of 1940 is invalid having regard to the provisions of the Constitution and, in particular, the provisions of Article 34, Article 40.3 and Article 40.4.1. Having regard to the finding of invalidity in relation to s. 6, the District Court had no jurisdiction to make the 2005 order. There will be an order of *certiorari* quashing the making of the 2005 order and the warrant to enforce it for lack of jurisdiction.

I will hear further submissions from the parties in relation to the issue of damages and, in particular, whether, in the context of the plaintiff's claim for damages, having regard to s. 3(2) of the Act of 2003, it would be appropriate to make a determination as to whether there has been a breach of sub-s. (1) of s. 3, so as to give rise to a claim for damages.