THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 151 JR]

BETWEEN

IGNATIUS FORDE

APPLICANT

AND

HER HONOUR JUDGE ALICE DOYLE

FIRST RESPONDENT

AND

COURTS SERVICE

SECOND RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Ms. Justice Murphy delivered on the 28th day of November, 2017.

1. This is an application for an order of *certiorari* quashing a warrant issued by a nominee of the County Registrar of Carlow Circuit Court directing the imprisonment of the applicant for non-payment of a statutorily mandated fine of €39,527.32 and for ancillary declaratory relief.

The parties

2. The applicant, Ignatius Forde is the subject of a warrant of imprisonment issued on 8th September, 2014. The first respondent is the Circuit Court judge by whom he was sentenced on 19th March, 2013. The second respondent is an independent statutory body created by the Courts Service Act 1998 whose function is to manage the courts, provide support services for the judges, provide information on the courts system to the public, provide, manage and maintain court buildings, and provide facilities for users of the courts.

3. The impugned warrant was issued by an employee of the second respondent. At the hearing of this application the Director of Public Prosecutions, acting as a notice party, purported to defend the actions of both respondents in the role of *legitimus contradictor*. It is a well established practice that where a judicial decision is sought to be impugned the Director of Public Prosecutions, as a notice party, defends the order of the court. This practice is a by-product of judicial independence. The core value of judicial independence makes it undesirable that a judge would step into the arena as a litigant to defend a judgment or decision made. Thus the practice of permitting the Director of Public Prosecutions to defend the order of a court evolved.

4. Such a consideration does not arise where the respondent is an independent statutory body, which is specifically authorised by statute to sue and be sued (s. 4(2) of the Courts Service Act 1998). The Court can see no reason in circumstances where the Courts Service is the respondent, that that body should not be responsible and answerable for its own actions. In this case, the Court has no evidence from either the County Registrar of Carlow Circuit Court, nor from his nominee as to the basis for and the process by which a warrant for the applicant's imprisonment was issued by that office. The Court is thus forced to rely on the hearsay evidence of an officer of the notice party who had no direct involvement in the issuing of the warrant which is now sought to be impugned. While no specific objection was taken by the applicant to the role of the Director of Public Prosecutions in defending the actions of the respondents, he did complain of the absence of direct evidence from those who had issued the warrant of imprisonment. The Court observes that in circumstances such as obtained in this case it is not appropriate for the Director to seek to defend the actions of another independent statutory body, the Courts Service. Having chosen to do so, the Director, as a minimum, should have ensured that direct evidence from the court officials who issued the impugned warrant was placed before the Court.

Background

5. On 7th May, 2008, officials of the Office of Customs Investigations attended at the premises of Sleaty Distribution Limited, a company of which the applicant was company director, to carry out an inspection on excisable products on the premises pursuant to s. 136(3) of the Finance Act 2001. During the inspection, one of the officers noted large quantities of beer in one warehouse and additional beer and wine in an adjacent warehouse. When asked to produce the relevant documentation for these items, the applicant stated that the beer in question, which amounted to 7484.4 litres, had been obtained from a local supplier. Contact with the named supplier revealed to the customs officer that it had not supplied the beer to Sleaty Distribution Limited. When confronted with this information, the applicant admitted that the beer had been purchased in Holland and had come into the State without payment of the relevant excise duty. Similarly, a large quantity of wine, amounting to 661.5 litres, had been supplied by a Spanish trader without payment of the relevant excise duty. The wine and beer were seized and the applicant was charged with evasion of excise duty contrary to s. 119(2) and s. 119(3) of the Finance Act 2001 as amended by s. 138 of the Finance Act 2002.

6. The applicant came before Carlow Circuit Court on 11th December, 2012, where he was arraigned and pleaded guilty to count no. 2 on the indictment. The particulars of the offence were as follows:-

> *"That you, Ignatius Forde on the 7th day of May 2008 at Barrowside Business Park, Sleaty Road, Graiguecullen in the county of Carlow were concerned in the evasion of excise duty on excisable products, namely 7,484.4 litres of beer and 661.5 litres of wine upon which a duty of excise was for the time being payable, with intent to defraud, either directly or indirectly, the State of such duty."*

He was remanded on bail for sentencing on 19th March, 2013.

7. The applicant was sentenced in the Circuit Court on 19th March, 2013, pursuant to s. 119 of the Finance Act 2001 which provides:-

> *"(1) It is an offence under this subsection for any person to take possession, custody or charge of, or to remove, transport, deposit or conceal, or to otherwise deal with, excisable products in respect of which any duty of excise is for the time being payable, with intent to defraud, either directly or indirectly, the State of such duty.*
>
> *(2) It is an offence under this subsection for any person to be concerned in the evasion or attempted evasion of a duty of excise on excisable products with intent to defraud either directly or indirectly the State of such duty.*
>
> *(3) Without prejudice to any other penalty to which a person may be liable, a person convicted of an offence under this subsection is liable–*
>
> > *(a) on summary conviction, to a fine of £1,500, or, at the discretion of the court, to imprisonment for a term not exceeding 12 months or to both,*
> >
> > *(b) on conviction on indictment, to a fine of 3 times the value of the excisable products concerned, including any duty or tax chargeable thereon, or £10,000, whichever is the greater, or, at the discretion of the court, to imprisonment for a term not exceeding 5 years or to both."*

While s. 119(3) sets out a formula for assessing the fine payable by a convicted person, s. 130(3) of the same act confers on the Court a discretion to mitigate the fine or penalty imposed by a maximum of 50%. In the instant case, the value of the excisable products concerned came to a total of €26,351.55, three times the value of same being €79,054.65, which if mitigated to the maximum 50%, provided for a statutorily mandated minimum fine of €39,527.32.

8. During the sentencing hearing on 19th March, 2013, counsel for the applicant specifically requested that the court impose a fine rather than a custodial sentence. In his plea in mitigation, submissions were made on behalf of the applicant to the court requesting that the minimum permissible fine be imposed. Counsel for the applicant referred to the applicant's income and to the fact that his wife was entirely reliant on him. It was brought to the attention of the court that the applicant was a self-employed accountant. There was reference to the applicant's previous fraud convictions and to the irrelevance for the purpose of sentencing, of a conviction subsequent to these events. It was submitted a fine was more appropriate than a term of imprisonment. Based on his income and his age, being 60 at the time of sentencing, counsel for the applicant specifically requested the court to allow twelve months for payment of the fine and to exercise its discretion to reduce the mandatory statutory fine by 50%. Taking into account his financial and personal circumstances, the Circuit Court judge adopted the course proposed by counsel for the applicant and imposed the following sentence:-

> *"That the [Applicant] pay for fine the sum of €39,527.32 on Count No. 2 such fine to be paid within 12 months from this date. In default of such payment to be imprisoned in Midlands Prison for a period of 1 year*
>
> *That the said [Applicant] be imprisoned for the period of 3 years on Count No. 2 BUT suspend said sentence on his entering a bond for the sum of 100 EURO to keep the peace and be of good behaviour for 6 years"*

The imposition of a period of imprisonment of one year in default of payment of the fine is authorised by s. 195 of the Criminal Justice Act 2006.

9. At the sentencing hearing counsel for the Director sought liberty to apply which suggests that he took the view that in the event of default in payment of the fine, a further court hearing would be required. It appears to be accepted by the parties that liberty to apply was granted in respect of the order even though that is not recited on the face of the order of the court.

10. The applicant did not appeal the sentence imposed.

11. An undated notice of imposition of penalty is exhibited in the notice party's affidavit, the implication being that it was sent to the applicant by the Circuit Court office. The notice recites the fact and terms of the sentence, including the requirement to pay the fine in the sum of €39,527.32 within twelve months of 19th March, 2013, and it further specifies that in default of such payment, the applicant be imprisoned in the Midlands Prison for a period of one year. The notice also provides the information that the fine is payable to the *"Combined Office Manager, Carlow Circuit Court, Courthouse, Carlow".*

12. It is agreed between the parties that no part of the fine was paid within the twelve month period nor was there any application to extend the period for payment within that twelve month period or at all.

13. In May, 2014, almost two months after the period for payment of the fine had expired, the applicant appeared before another judge of the Circuit Criminal Court in respect of unrelated offences. On that occasion, the Director of Public Prosecutions sought to re-enter the matter of this conviction and the non-payment of the fine. It was admitted on behalf of the applicant that the fine had not been paid. The Circuit Court judge, not being the judge who had imposed the original sentence, declined to deal with the matter on the ground that he had no jurisdiction to interfere with the order made by the first respondent on 19th March, 2013. No order was made on that date. The judge commented that the "default of payment process would take its normal course".

14. No subsequent application was made to the first respondent.

15. Approximately four months later, on 8th September, 2014, it appears that a nominated signatory on behalf of the County Registrar, Carlow Circuit Criminal Court purported to issue a warrant for the imprisonment of the applicant at the Midlands Prison for a period of one year unless the sum of €39,527.32 be sooner paid. The warrant reads as follows:-

> *"Warrant*
>
> *AN CHÚIRT CHUARDA*
>
> *(THE CIRCUIT COURT)*
>
> *SOUTH EASTERN CIRCUIT COUNTY OF CARLOW*

BILL NO CW0006/2011

THE PEOPLE AT THE SUIT OF THE DIRECTOR

OF PUBLIC PROSECUTIONS

-V-

IGNATIUS FORDE

WHEREAS at a sitting of the Carlow Circuit Criminal Court held at The Courthouse, Carlow on the 19th date of March 2013 IGNATIUS FORDE was convicted of an offence on Count No. 2: Evasion of excuse [sic] duty contrary to Section 119(2) and (3) of the Finance Act 2001 as amended by Section 138 of the Finance Act 2002 and was ordered to pay as penalty therefore [sic] the sum of €39527.32 on Count No.2 such sum to be paid within 12 months from the 19th of March 2013 in default of payment within that time HE be imprisoned for a period of 1 year unless said sum be sooner paid AND WHEREAS no such sum whatever has been paid on foot of the penalty this is to command you to whom this Warrant is addressed to lodge the said IGNATIUS FORDE of 54 BURREN STREET, CARLOW in the prison at THE MIDLANDS PRISON, to be imprisoned for the period of 1 YEAR unless the said sum of €39527.32 be sooner paid and for so doing this present Warrant shall be sufficient authority to all whom it may concern.

Dated this 8TH day of SEPTEMBER 2014

[Name of civil servant]

Nominated Signatory on Behalf of the County Registrar

Carlow Circuit Criminal Court

The Superintendent,

Garda Síochana

CARLOW"

The warrant does not specify any provision or power pursuant to which it is issued. It merely recites the fact of the conviction and the fact of non-payment.

The arrest

16. The Court has no evidence as to what occurred after the warrant was issued. It is however clear that the applicant was given no notice of an intention to issue a warrant nor was he notified of the fact that a warrant had been issued. The applicant was arrested on foot of the warrant on 5th March, 2015, almost six months after the warrant was issued, and was lodged in the Midlands Prison.

17. Following his arrest, an application was made to the first respondent, then sitting at Carlow Circuit Criminal Court for a production order. It appears to have been argued before the Circuit Court that:-

"(i) the Applicant was entitled to have the matter re-entered before the Court and was entitled to make representations to the Court prior to his committal; and

(ii) the committal to prison for failing to comply with a conditional order was a judicial power and could not be carried out by an administrative act;"

Having heard submissions, the court held that it was *functus officio* and accordingly did not have jurisdiction to deal with the matter. The court recommended that the matter be dealt with by recourse to the Superior Courts.

18. On 19th March, 2015, an application pursuant to Article 40.4 of the Constitution was brought before the President of the High Court. The court did not direct an inquiry into the legality of the applicant's detention but instead granted liberty to the applicant to seek leave to challenge the warrant by means of judicial review, such application to be on notice to the respondent parties. The applicant was admitted to bail pending the hearing of the application for judicial review.

19. Notice of motion was served returnable for 20th March, 2015, in which the following reliefs were sought:-

"(i) An Order granting to the Applicant Leave to proceed by way of Judicial Review;

(ii) An Order of certiorari sending forward to this Honourable Court for the purpose of being quashed: the Committal Warrant made by the Respondents, each or either of them, on the 8th day of September, 2014

(iii) A Declaration that the First Named Respondent erred in law by imposing a default period of imprisonment for non-payment of a fine imposed pursuant to section 119 of the Finance Act 2001;

(iv) A Declaration that the actions of the Second Named Respondent were ultra vires wherein it issued a Committal Warrant for the arrest and detention of the Applicant on the 8th day of September 2014;

(v) A Declaration that the Second Named Respondent in arriving at its decision to issue the Committal Warrant breached the rules of natural and constitutional justice;

(vi) A Declaration that the arrest and detention of the Applicant constituted an unlawful deprivation of the Applicant's liberty;

(vii) An Order admitting the Applicant to Bail pending the determination of the within proceedings;

(viii) If required an, Order extending the time prescribed for making an Application pursuant to Order 84 of the Rules of the Superior Courts;

(ix) An Order providing for an award of the costs of these proceedings to the Applicant."

20. The statement of grounds filed with the notice of motion seeks the same leave as specified in the notice of motion but with different numbering. This appears to the Court to have given rise to some confusion. By order of the court dated 1st May, 2015, leave was granted to the applicant in respect of issues (ii), (iv), (v), (vi), (vii) and (ix) set out at para. (d) in the statement of grounds. The reliefs sought at those numbers in para. (d) of the statement of grounds were as follows:-

"(ii) A Declaration that the First Named Respondent erred in law by imposing a default period of imprisonment for non-payment of a fine imposed pursuant to section 119 of the Finance Act 2001;

(iv) A Declaration that the Second Named Respondent in arriving at its decision to issue the Committal Warrant breached the rules of natural and constitutional justice;

(v) A Declaration that the arrest and detention of the Applicant constituted an unlawful deprivation of the Applicant's liberty;

(vi) A Order admitting the Applicant to Bail pending the determination of the within proceedings;

(vii) If required an, Order extending the time prescribed for making an Application pursuant to Order 84 of the Rules of the Superior Courts;

(x) Costs"

21. On its face, the order of the High Court does not give leave to seek an order of *certiorari* nor a declaration that the actions of the second respondent in issuing the warrant were ultra vires. The Court considers that the order was in fact drafted by reference to the notice of motion rather than the statement of grounds because issues (ii) and (iv) in the notice of motion do refer to *certiorari* and a declaration of ultra vires. Both parties proceeded at the hearing on the basis that leave was given to seek *certiorari*; a declaration of *ultra vires*; a declaration of breach of natural and constitutional justice; a declaration of unlawful deprivation of liberty; an order admitting bail; and an order for costs. This only makes sense if the numbers referred to in the High Court order are in fact those contained in the notice of motion. The Court brought this issue to the attention of counsel who accepted that they were proceeding on this basis.

***Ultra Vires* actions of the second respondent**

22. The applicant submitted that the second respondent is a statutory body whose functions are prescribed by legislation and that in taking the following steps in the absence of any statutory authority, it went beyond these functions and acted *ultra vires* by making:-

(a) An inquiry as to whether a fine had been discharged;

(b) A determination that the fine had not been discharged;

(c) A determination that by not discharging the relevant fine, the applicant was in default of the order of the first respondent;

(d) A determination that the committal warrant should be issued directing the arrest and detention of the applicant at Midlands Prison; and,

(e) The issuing of a committal warrant directing the arrest and detention of the applicant at Midlands Prison.

The applicant submitted that it could only be argued by the second respondent that it was simply carrying into effect the order of the first respondent made on 19th March, 2013 in respect of (e). The applicant submitted that (a) to (d) involve the exercise of a judicial function and are *ultra vires* the second respondent. The applicant further noted that the Court had no evidence of the procedure adopted by the second respondent, in this instance or generally.

23. The applicant submitted that legislation is silent on the procedure to be adopted by the Circuit Court in the enforcement of fines imposed following a conviction on indictment. He submitted that the Rules of the Superior Courts and the Circuit Court Rules provide no material assistance.

24. Counsel for the applicant pointed out that the Fines Act 2010 and the Fines (Payment and Recovery) Act 2014 each deal with various aspects of fines recovery but none of the relevant sections have been commenced by statutory instrument or otherwise. The applicant then contrasted the position in relation to District Court fines. In the District Court, there is legislative provision for the Court to issue a warrant of committal (see s. 2 of the Courts (No. 2) Act 1986 as amended, and O. 25 of the District Court Rules). Order 25, rule 2 of the District Court Rules provides:-

"In all cases of summary jurisdiction whenever an order has been made upon the conviction of any person of an offence,

(a) For the payment of a penal sum and that sum has not been paid, the Court may issue a warrant of committal to imprisonment for the non-payment thereof […] at a time not less than six months from the expiration of the time fixed by the said order for the payment of that sum;"

25. The notice party accepted that the legislation, the Circuit Court Rules and the Rules of the Superior Courts are silent regarding the procedures to be adopted for the enforcement of fines imposed following conviction on indictment. She further accepted that the District Court Rules require that a committal warrant be signed by the District Court judge (the Court notes that the requirement of O. 25, r. 2(a) is that the warrant be issued by a District Court judge, not that it be signed by him).

26. The notice party referred to s. 34 of the Courts (Supplemental Provisions) Act 1961:-

> *"The jurisdiction which is by virtue of this Act vested in or exercisable by the District Court shall be exercised as regards pleading, practice and procedure generally, including liability to costs, in the manner provided by rules of court made under section 91 of the Act of 1924, as applied by section 48 of this Act."*

The notice party submitted that once O. 25 was commenced, that requirement was binding on the District Court. She accepted that were there a similar rule in the Circuit Court Rules, it would be binding on the first and second respondents. However, she contended that there is no such rule. The notice party submitted that the applicant seeks to impose the same procedural obligations as are provided for in the District Court Rules in respect of the non-payment of fines on the Circuit Court. The notice party argued that while the Rules of the Superior Courts may be imposed on a lower court, there is no provision for the rules of a lower court to be binding on a higher court, citing O. 67, r. 16 of the Circuit Court Rules:-

> *"Where there is no Rule provided by these Rules to govern practice or procedure, then the practice and procedure in the High Court may be followed."*

27. The notice party relied on O. 4 of the Circuit Court Rules as authorising the impugned warrant. That rule, unlike the District Court Rules, provides:-

> *"(1) […] It shall not be necessary that any Decree, Order, Warrant or other document shall be signed by the Judge.*
>
> *(2) Every document requiring under any provision of statute or statutory instrument, rule of law or any other Order of these Rules to be issued under Seal of the Court shall be authenticated by the Seal of the Court impressed thereon and the signature of a person mentioned in sub-rule (4).*
>
> *(3) Every document requiring authentication other than one referred to in sub-rule (2), and every Decree, Order and Warrant, shall be authenticated by the signature of a person mentioned in sub-rule (4).*
>
> *(4) The persons who may authenticate the impression of the Seal of the Court on a document mentioned in sub-rule (2) or a document mentioned in sub-rule (3) are:*
>
> > *(a) the County Registrar, or*
> >
> > *(b) such person, or one of such persons, as may, for such period as may be specified, be nominated for that purpose by the County Registrar."*

28. Counsel for the notice party submitted that in the instant case, the warrant in question is signed, and is stated as being signed, by the nominated signatory on behalf of the County Registrar. She contended therefore that the warrant is valid and authorised. The notice party submitted that the judicial order was made on 19th March, 2013 and the subsequent warrant issued by the nominated signatory merely gives effect to this order.

29. Furthermore, the notice party submitted that in relation to the inquiry as to whether or not the fine had been paid, the applicant stated before Carlow Circuit Court on 15th May, 2015 that the fine had not been paid at that point. Counsel for the notice party submitted that the warrant contained a safeguard in that it states that the applicant is to be imprisoned for one year *"unless the said sum of €39,527.32 be sooner paid".* Had the applicant paid the fine subsequent to the issue of the warrant, or indeed wished to pay the fine even at this juncture, the money would be lodged and he would be released.

***Audi Alteram Partem* and basic fairness of procedures affecting personal rights of the citizen**

30. The applicant submitted that the administrative function of issuing a committal warrant and depriving a citizen of its liberty circumvents the requirements of the constitutional guarantee of fair procedures, as outlined in *In Re Haughey* [1971] I.R. 217. The applicant further submitted that the deprivation of one's liberty can only be brought about after rigid adherence to basic and fair procedures, by judicial function.

31. The applicant referred to *McLarnon & Ors., Re Judicial Review* [2013] NIQB 40. In that case, the High Court of Northern Ireland considered a similar set of circumstances in which an applicant having failed to discharge a fine imposed by the Magistrates' Court, was made subject to a warrant issued by a computer (the Court notes that in that case the court had affidavit evidence from officers of the Court Service). Counsel for the applicant having noted that the procedure for imprisonment for non-payment of fines in the neighbouring jurisdiction is one prescribed by statute similar to the Courts (No. 2) Act 1986 and District Court Rules for summary proceedings in this jurisdiction, relied on a passage in *McLarnon* where Girvan LJ held at para. 22:-

> *"The decision […] to issue a warrant, whether it be a warrant of distress or commitment, is a decision requiring the exercise of judicial power. This brings into play the principle clearly stated in Bonaker v. Evans [1850] 16 QB at 171 where Park B said:*
>
> *'No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by judicial proceedings until he has had a fair opportunity of answering the charge against him unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary.'*
>
> *In Re Forest and Hamilton [1981] AC 1038 the House of Lords upheld that approach. Lord Fraser stated:*
>
> > *'The appellants may not be deserving of much sympathy but the question whether they were entitled to notice of the proceedings in the Magistrates' Court concerning them respectively raises an issue of some constitutional importance. One of the principles of natural justice is that the person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against him, so that he, or someone acting on his behalf, may make such representations if any as he sees fit. That is the rule of audi alterem partem which applies to all judicial proceedings unless its application to a particular class of proceedings has been excluded by Parliament expressly or by necessary implication.'*
>
> *In Re Wilson [1985] 1 AC 750 the House of Lords stated that the principles of natural justice requiring a court to give an offender the opportunity of making representation before a judicial order was made against him extended to the judicial act of issuing a warrant of commitment. Lord Roskill stated in clear terms:*

'A warrant of commitment involves the liberty of the subject and in principle the subject must not be deprived of his liberty save after performance of a judicial act effected with judicial propriety.'"

The applicant submitted that the procedures adopted by the second respondent did not afford any notice, nor opportunity to respond prior to the arrest and detention of the applicant.

32. The applicant pointed to the fact that while not yet enacted, the Fines (Payment and Recovery) Act 2014 provides for a number of procedures and alternatives to committal for non-payment of a fine by the specified due date, including the appointment of a receiver; payment by instalment; community service in lieu of a fine; and imprisonment in default of payment of a fine. Section 20 of the Act of 2014 amends s. 2 of the Courts (No. 2) Act 1986 in inserting a new s. 2A entitled "*Imprisonment on conviction on indictment in default of payment of fine*". It provides:-

"(i) A notice in writing to be served on the fined person informing him, inter alia, of an intended Court date;

(ii) At the sitting of the Court on the specified date if satisfied that a number of prescribed events have occurred and in taking other prescribed matters into account the Court may commit the fined person to prison for a term not exceeding 12 months."

The applicant submitted that this section sets out a clear judicial process where the court itself engages in an inquiry and must satisfy itself that sufficient evidence is before it to merit a committal; that having done so, the court retains a discretion as to whether a committal warrant should issue.

33. Finally, the applicant submitted that the warrant issued at an arbitrary time following the passing of the due date for payment of the fine; that subsequent thereto, An Garda Síochána were in possession of the warrant for an arbitrary period of time prior to its execution, all of which occurred without any prior notice to the applicant. The applicant submitted therefore that the decision to issue the warrant was *ultra vires*, in breach of the applicant's constitutional guarantee to fair procedures and that the execution thereof was an unlawful deprivation of the applicant's liberty.

34. The notice party submitted that the order made by the first respondent on 19th March, 2013 was clear, unambiguous and final; it provided that the applicant should pay a sum of money within a specified period and if he did not, he would be imprisoned for one year.

35. The notice party submitted that the applicant made full submissions at the sentence hearing and does not complain that he was prevented from making any further submissions. The notice party noted the acceptance by the applicant that he had asked the court to impose a fine which was mitigated to the maximum amount permitted by law and had specifically requested the period of twelve months to pay the fine. The notice party further noted that both requests were acceded to by the first respondent. The notice party submitted that once the order was made and not appealed within the time frame permitted by law, it became final. The notice party further submitted that unlike in the District Court where there is a power to extend time for payment of a fine under s. 2 of the Criminal Justice Administration Act 1914, no such power appears to exist for indictable matters and that therefore the appropriate time for submission was at the time sentence was being imposed. The notice party contended that as the order was final and conclusive by 18th March, 2014, the first respondent would have had no jurisdiction to vary the order and therefore any right to make further submissions prior to the issuing of a committal warrant would have been futile.

36. The notice party submitted that as *McLarnon* arises out a different legislative regime in a foreign jurisdiction it is not binding, remarking that the Supreme Court has recently criticised the use of decisions of foreign jurisdictions in the interpretation of Irish laws on the basis that they arise from a different legislative system and jurisprudence. Quoting O'Malley, in *Sentencing Law and Practice, 2nd Ed.*, (Thomson Round Hall, 2006) that "*Under English law, imprisonment is to be treated as a last resort as a method of fine enforcement …*", the notice party states that in England if a fine is not paid, there are alternatives available to the courts for the enforcement of the fine before imprisonment is imposed, but that that is not currently the position in this jurisdiction.

37. The notice party sought to distinguish *Bonaker v. Evans* (1850) 16 QB 162 in that it related to a finding by a bishop that a vicar did not reside in the required vicarage without first allowing the vicar to address these allegations, and this had resulted in a fine and possible loss of his livelihood, whereas in the current case, the applicant had had a sentence hearing where he had availed of his right to be heard. The notice party further submitted that the non-payment of the fine does not amount to an *'offence'* and does not require any further right of reply before the issuing of a committal warrant.

38. The notice party distinguished *Re Forest and Hamilton* [1981] AC 1038 on the grounds that although the warrant in the instant case did issue without notice to the applicant, the applicant was on notice that if he did not pay the fine within the time allowed, such a warrant would issue, the sentence order being final and conclusive. The notice party submits that the judicial order was made on 19th March, 2013 and that the issuing of the warrant merely gave effect to that order.

39. The notice party submitted that the applicant has not been convicted of any offence that has resulted in a loss of liberty or other penalty; that the conviction was recorded in March, 2013 and the sentence was imposed at that time. The notice party stated that the applicant was aware from 19th March, 2013 of the consequences of non-compliance with the order of the court. He took no steps to comply with the order. Once the time for the payment had expired, the default penalty came into play as a matter of law and no further determination was required by the court.

40. The notice party argued that an inquiry into whether or not the fine remained outstanding when the warrant issued was not required; that on 15th May, 2014, the applicant had accepted before Carlow Circuit Court that he had not paid the fine; that the applicant accepts that the fine remains outstanding. The notice party referred to the fact that the applicant has not engaged with the evidence nor sworn an affidavit in these proceedings.

41. The notice party submitted that the warrant as issued provided a safeguard to the applicant against imprisonment. In the event that the fine was paid, he would not be imprisoned. Further, she submitted that the warrant effectively extended the time for payment by providing that the applicant be imprisoned for one year "*unless the said sum of €39,527.32 be sooner paid".*

42. The notice party responded to the applicant's submissions in respect of the Fines (Payment and Recovery) Act 2014 by conceding that this may be how the legislature intends to proceed with the non-payment of fines in the future but as these provisions have not yet been enacted, they do not form part of the current statutory scheme.

Error on the face of the warrant
43. Perhaps blinded temporarily by the extremely unmeritorious underlying facts in the applicant's case, the Court was initially attracted to the notice party's arguments on *ultra vires* and fair procedures. Having indicated as much to the parties, the Court asked that the parties address it on the effect of an error on the face of the warrant. The warrant describes the offence as the "*evasion of excuse duty*". Both parties produced written supplemental submissions on the issue.

44. In considering the submissions on the effect of the misstatement of the offence on the face of the warrant, the Court found itself forced back to consideration of the issue of *ultra vires* and jurisdiction. The Court was particularly struck by the passage in *G.E. v Governor of Cloverhill Prison* [2011] IESC 41 in which Denham C.J. cited Sullivan P. in *The State (Hughes) v. Lennon* [1935] I.R. 128 at p. 142 where he held:-

> *"I did not think there could be any doubt upon that matter. 'And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged: Peacock v. Bell (1 Saund. R.74d.)' 'In the case of special authorities given by statutes to Justices or others acting out of the ordinary course of the Common Law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions, or inquisitions, ought, according to the course of decisions, to show their authority on the face of them by direct averment or reasonable intendment. Not so the process of Superior Courts acting by the authority of the Common Law', per Parke B: Gosset v. Howard (10 Q.B. 411, at pp 452, 453). This principle was recognised and reaffirmed by Palles C.B. in the course of his judgment in R. (Boylan) v. Londonderry JJ., ([1912]] 2 I.R. 374) in which he refers (at p. 381) to 'the more general rule that not only an order to imprison, but any order made by any authority, no matter how high, not known to the Common Law or although known to it, not acting in pursuance of it, must upon the face of it show the facts which give the jurisdiction to make it'."*

Denham C.J. went on to hold at para. 27:-

> *"Thus such a person must show on the face of the document which he/she creates the facts upon which jurisdiction rests. This general principle applies to the detention order at issue in this case."*

Applying these principles to the facts of this case, the Court looked afresh at the impugned warrant. The document is simply headed "*Warrant*". It does not describe its nature. Is it a warrant of execution or a warrant of commitment or some other type of warrant? More fundamental is the fact that on its face it does not show the power pursuant to which it is issued. That in the Court's view is a fatal flaw in the *'warrant'*. The simple explanation for the failure to show jurisdiction on the face of the warrant is that there is in fact no statutory power authorising a civil servant in the employ of the Courts Service to issue a warrant for the applicant's arrest.

45. The notice party's reliance on O. 4 of the Circuit Court Rules as authorising the issuing of a warrant by an official in the Circuit Court office is misconceived. That order merely provides that a warrant, order or decree **issued by a judge** does not have to be signed by the judge but may be **authenticated** by a County Registrar or his or her nominee [emphasis added]. That order cannot be construed as conferring on a County Registrar or his nominee a jurisdiction to issue a warrant not otherwise conferred by statute.

Supplemental submissions on *ultra vires* issue
46. Having in effect changed its mind on the centrality of the issue of jurisdiction to its decision, the Court considered that fairness required that the parties be notified of that fact and be given an opportunity should they wish, to address it further on the issue. Both parties submitted supplemental written submissions on the issue.

47. The notice party identified the issues raised by the Court as the following:-

1. That the warrant does not identify if it is a committal warrant or a warrant of execution;

2. that the warrant does not refer to the statutory power under which it is issued; and

3. that the warrant was issued by a civil servant who has no power to direct imprisonment.

48. The notice party submits that it is clear from the wording on the face of the warrant that it is a warrant and that it authorises the imprisonment of the applicant. The notice party submits that the function of a warrant is to enable a prisoner, the governor and the courts to ascertain the basis of the detention, the length of the detention and the start/end date of the detention, all of which is available on this warrant. The notice party quotes Humphreys J. in *Walsh v. Governor of Cork Prison & Ors.* [2016] IEHC 323:-

> *"As a matter of first principles, an order is addressed to the parties or their solicitors. It exists in 'original' form only electronically, and the copies of the perfected order taken up by both sides are equally authentic. By contrast a warrant for the detention of a prisoner exists ordinarily in a single original, which is issued on foot of an order of the court and is addressed to the relevant Superintendent of the Garda Síochána … or, in Dublin, to the Governor of the Prison. That original is then endorsed on behalf of the Superintendent upon lodging the prisoner in a specific gaol."*

The notice party argued that the warrant in the instant case complies with this requirement; that it is clear that it is a warrant authorising the detention of the applicant due to the non-payment of a fine. The notice party stated that warrants issued by the Circuit Court headed "*Warrant*" are not expressed to be committal warrants and that that is clear from the fact that the period of detention on foot of a conviction order has been set out.

49. The notice party submitted that the statutory power relied upon in authorising the detention is the conviction and sentence imposed in respect of the offence. Section 119(3) of the Finance Act 2001 permits the court to impose a fine, and provides the method by which that fine is to be calculated. The notice party noted that the acceptance by the applicant that the fine imposed had been calculated in accordance with that provision and had been mitigated to the maximum amount permitted by law. The notice party argued that it is not necessary to set out the statutory authority as to the default period of detention as it is common case that the period of detention was made within jurisdiction. The notice party stated that what is required in a warrant is that the applicant and the detainer know the length of the period imposed, and that is set out clearly on the face of the warrant. The notice party argued that if it were the applicant's case that the court did not have jurisdiction to impose the period in default as it did, he should have either appealed the sentence or sought to quash the sentence order as having been made without or in excess of jurisdiction. He did neither, and once the period for appeal had passed, the sentence imposed was final. The notice party noted that while the applicant originally sought a declaration that the imposition of the default period was an error of law, this relief was abandoned before the substantive hearing when s. 195 of the Criminal Justice Act 2006 was brought to his attention. Section 195 of

the Criminal Justice Act provides:-

> *"(1) Where on conviction on indictment a fine is imposed a court may order that, in default of due payment of the fine, the person liable to pay the fine shall be imprisoned for a term not exceeding 12 months.*
>
> *(2) Where on conviction on indictment a fine is imposed on a body corporate, the fine may, in default of due payment, be levied by distress and sale of the goods of the body corporate.*
>
> *(3) In this section 'fine' includes any compensation, costs or expenses in addition to a fine ordered to be paid."*

The notice party argued that the applicant has not challenged the constitutionality of the provisions permitting the imposition and in those circumstances they enjoy the presumption of constitutionality. The fact that more recent legislation has now been commenced does not affect the lawfulness of the acts undertaken prior to that date which were in accordance with the law as it then stood.

50. The notice party submitted that the warrant merely records and reflects the order of the court made on 19th March, 2013 and in that respect, she referred to its earlier submissions. The notice party referred again to O. 4 of the Circuit Court:-

> *"Every document required under any provision of statute or statutory instrument, rule of law or any other Order of these Rules to be issued under Seal of the Court shall be authenticated by the Seal of the Court impressed thereon and the signature of a person mentioned in sub-rule(4)."*

The notice party states that it is common case that the warrant was signed by a person listed in sub-rule (4). The notice party argues that the order of the court was that the applicant should serve a sentence of twelve months if he did not pay the fine within the time specified, and that effectively the order placed a stay on the issuing of the warrant until the time to pay had elapsed. If paid, the warrant would not issue at all. The notice party argued that the actual order of the court is recited fully on the warrant and that the warrant records the name and address of the convicted person; the nature of the offence; the fact of conviction on 19th March, 2013; the order to pay the fine; the amount of the fine; the time for payment of the fine; the default period of imprisonment and the fact of non-payment of the fine. The notice party submitted that prior to the commencement of the Fines (Payment and Recovery) Act 2014 on 11th January, 2016 there was no requirement for a person who had not paid a fine to be brought back before the court which had sentenced him. The notice party argued that the person signing the warrant did not issue it in any legal sense, but that she merely recorded the order of the court as is permitted (the Court wonders as to the effect of a warrant which is not issued in any legal sense). The notice party stated that as with any warrant that issues following the non-payment of a fine, an applicant can at any time, even after the warrant has been executed, pay the fine and be released forthwith.

51. The notice party included in its later submissions an argument that the application was out of time by reason of delay on the part of the applicant. While delay was pleaded in the statement of opposition, it had not been relied on at the hearing of the application, nor had the Court invited any such submission. The Court therefore does not consider it appropriate to entertain such a ground of opposition at this stage of the proceedings. However, lest there be any doubt about the matter, the Court expresses the view that in the circumstances of this case there was no delay, culpable or otherwise, by the applicant. On the facts of this case it is clear that the warrant for the applicant's imprisonment was issued on 8th September, 2014 without any input from him or notice to him of the event. The Court has no evidence as to how or when the warrant was transmitted to An Garda Síochána. What is clear on the evidence is that the first notice which the applicant had of the existence of the warrant was at the time of the warrant's execution on 5th March, 2015. An unsuccessful attempt to re-enter the matter was made within days to the Circuit Criminal Court and thereafter these proceedings commenced as an application pursuant to Article 40.4 of the Constitution on 19th March, 2015. In the Court's view, time could not begin to run against the applicant until he had notice of the existence of the warrant. Even if the Court is wrong in that view, in the circumstances of this case the Court would have no hesitation in exercising its discretion to extend the time for the bringing of the application.

52. The applicant noted that the warrant fails to refer to s. 195 of the Criminal Justice Act 2006, the statutory provision which enables the Circuit Criminal Court to make an order of imprisonment where there is default in payment of a fine. The applicant argued that this failure, coupled with the fact that the warrant then refers to an offence unknown to law, gives rise to a manifest error on the face of the warrant rendering it incomprehensible to a reader to discern the reason or statutory basis for the applicant's imprisonment, as dealt with in earlier submissions.

53. Counsel for the applicant noted that from the outset, the crux of the applicant's case has been that the issuing of the warrant inexorably involved the performance of a judicial function due to the penalty of imprisonment and associated loss of liberty. The applicant notes that here, the warrant has been issued by a civil servant, and submits that the judicial function of determining that a fine had not been discharged due to default on the part of the applicant was performed by an administrative agent and as such was *ultra vires*. The applicant asserts that there is nothing new raised by the notice party's most recent submissions on the issue.

Discussion

54. Having correctly identified the issues of concern to the Court, the supplemental submissions of the notice party fail to address any of them convincingly. Counsel for the notice party suggests that that the fact that the impugned warrant states that it is a warrant is sufficient. This is in keeping with her earlier submission that since the issuing of warrants by the Circuit Court office is not prohibited, it is *ipso facto* permitted. This is a remarkable submission which if correct would allow the issuing of warrants of imprisonment by a member of the executive unless specifically prohibited from doing so by statute. That is not the law. The Court is quite confident and holds that the law is precisely the opposite. The law is that a member of the executive cannot issue a warrant of imprisonment unless authorised to do so by statute. In support of her position the notice party, in the Court's view, mischaracterises the effect of a statement of Humphreys J. in *Walsh v. Governor of Cork Prison & Ors.* [2016] IEHC 323. In the excerpt quoted above at para. 48 Humphreys J. appears to be contrasting civil orders with detention orders. In relation to the latter he states:-

> *"By contrast a warrant for the detention of a prisoner exists ordinarily in a single original,* ***which is issued on foot of an order of the court*** *and is addressed to the relevant Superintendent of the Garda Síochána [emphasis added]"*

The notice party seems to be contending that this quote establishes that the fact that the court had ordered the imprisonment of the applicant in default of payment of the fine meant that the warrant issued by the court official is a warrant "*which is issued on foot of an order of the court*". To accept such an interpretation would do violence to both the law and the English language.

55. The warrant in this case was not issued on foot of an order of the court. The court never issued a warrant for the imprisonment of the applicant. The notice party's submission throughout the application was that the *'warrant'* was *'giving effect'* to a court order in respect of which the applicant was in default and in respect of which the court had fixed a term of twelve months imprisonment in

the event of default. Where a party fails to comply with a court order whether civil or criminal, it is for the court and not the executive to determine what should follow from the event of default. On the civil side that is achieved by issuing a motion for attachment and committal. On the criminal side (absent as in this case any statutory provisions) that is achieved by seeking from the court a warrant for the defaulter's arrest so that he may be brought before the court to answer for his default.

56. The statutory power relied on by the notice party as authorising the issuing of the warrant by a court official is s. 119(3) of the Finance Act 2001. From even a cursory glance at that section (which is set out in full at para. 7 of this judgment) it is clear that that it contains no power to imprison anyone for non-payment of a fine, let alone does it confer a power on a court official to issue a warrant in the event of non-payment of that fine. Section 119(3) simply sets out the penalty for evasion of excise duty and the manner in which the mandatory fine is to be calculated.

57. Counsel for the applicant submitted that in fact the power to imprison in default of payment of a fine derives not from the Finance Act 2001 but from s. 195 of the Criminal Justice Act 2006. That point is well made. Section 195 is not referred to in the *'warrant'*. Even were the Court persuaded that the relevant court official had power to issue the warrant (which the Court is not) then the Court might well be persuaded that the warrant is invalid in that it discloses no legal basis for the detention of the applicant. The Governor of the Midlands Prison on reading the *'warrant'* and the sections of the Finance Act 2001 specified therein would be unable to discern any basis on which he could lawfully detain the applicant.

Decision

58. The warrant of arrest and detention at the core of this application was issued without lawful authority by a civil servant. Civil servants cannot order that a person be arrested and/or imprisoned unless specifically authorised by statute to do so. It is accepted in this case that at the time the warrant was issued on 8th September, 2014, there were no legislative provisions in force providing for a process of execution in the event of default of payment of a fine imposed in indictable matters. The situation is now governed by the Fines (Payment and Recovery) Act 2014.

59. Where the law is silent on a particular issue then one must look to general principles to guide one as to the appropriate procedure. There is no more fundamental principle in a society which espouses the rule of law than that a person can not be deprived of liberty save in accordance with law. As held by Girvan LJ in *McLarnon* referred to at para. 31 above:-

> *"The decision […] to issue a warrant, whether it be a warrant of distress or commitment, is a decision requiring the exercise of judicial power."*

On 19th March, 2013, the Circuit Criminal Court as part of its sentence ordered:-

> *"That the [Applicant] pay for fine the sum of €39,527.32 on Count No 2 such fine to be paid within 12 months from this date. In default of such payment to be imprisoned in Midlands Prison for a period of 1 year.*

This is a conditional order. By its terms the applicant is ordered to pay a fine. He is given a certain amount of time to do so. If he fails to pay within the allotted time he faces twelve months in prison. In the event of default the applicant must be brought back before the court. This would normally be done by seeking a warrant for his arrest so that he can be brought before the court to answer for his default. At the hearing, before the court the default must be established by appropriate evidence and thereafter the court may issue a warrant. I say *'may'* because in my view while the court in this case cannot reduce the amount of the statutorily mandated fine, the court retains a discretion at the time of hearing, to extend the period for payment of that fine. While the facts of this applicant's case are certainly unmeritorious, one can easily envisage circumstances in which the subject of a fine, through some unforeseen event such as accident or serious illness, may have been rendered incapable of discharging the fine within the allotted time. It is for the court to weigh the circumstances when deciding whether or not to issue a warrant of committal.

60. It seems to the Court that the necessity for a further hearing in the event of default in payment of the fine, was at least implicitly acknowledged by the prosecution at the sentencing hearing when counsel for the Director at the end of the hearing sought liberty to apply.

61. In this case, for reasons not disclosed in evidence to the Court, officials of the second respondent decided that it was unnecessary to bring the applicant back before the court for the purpose of seeking a warrant of committal. A nominee of the County Registrar determined that there had been a default and further presumably determined that there was no good reason for the default. Having done so she issued a warrant for the imprisonment of the applicant. She had no power to do so. The warrant was accordingly issued without jurisdiction and in the Court's view must be quashed.