THE HIGH COURT

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

[2017 No. 1066 SS]

BETWEEN

SHANE WALSH

APPLICANT

AND

THE GOVERNOR OF WHEATFIELD PLACE OF DETENTION

RESPONDENT

[2017 No. 1079 SS]

BETWEEN

SHANE WALSH

APPLICANT

AND

THE PEOPLE AT THE SUIT OF DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of September, 2017

1. The applicant was convicted on 5th April, 2017 on two charges, count one being robbery and count two being assault causing harm. He was sentenced on 27th July, 2017 by Her Honour Judge Karen O'Connor to two and half years on count one and three and a half years on count two, with, in each case, 20 months suspended. The committal warrant was issued on 27th July, 2017 to the Governor of Mountjoy Prison. It contained a number of errors as it referred to a suspension of the sentence (singular) rather than the sentences (plural), and it also referred to an incorrect period of detention on count two. On 23rd August, 2017 there was a transfer request within the Irish Prison Service to move the applicant from Mountjoy to Wheatfield Place of Detention. On the 24th August, 2017 he was so transferred.

Procedural history

2. An order of Creedon J. ordering an inquiry under Article 40.4 of the Constitution was made on 22nd September, 2017. That was returnable for 11 a.m. on 25th September, 2017. Just before the return time, at 10 a.m. on 25th September, 2017 the D.P.P. applied to Her Honour Judge Melanie Greally in Dublin Circuit Court for an order to amend the warrant under the slip rule. However Judge Greally did not do so because of what seems to have been a perceived weakness in the rules of court. While O. 28 r. 11 of the Rules of the Superior Court refers to amendments by "*the court*", thus allowing any one judge to correct errors in orders made by any other judge, O. 65 r. 3 of the Circuit Court Rules refers to correction of errors by "*the judge or the country registrar as appropriate*". Whether this is an absolute bar to any other judge utilising the slip rule does not need to be determined now but it may be that that the possible implied inflexibility is something the Circuit Court Rules Committee might wish to consider. The upshot was that it was felt appropriate that the application to correct the warrant under the slip rule should be made to Judge O'Connor.

3. At 11 a.m. the matter came before me, and in the course of the hearing on that and subsequent occasions I have heard from Mr. David Conlan Smyth S.C. (with Mr. Karl Monahan B.L.) in an able submission for the applicant and Mr. Michael L. O'Higgins S.C., Mr. James Devlin S.C. and Ms. Grainne O'Neill B.L. (all of whom addressed the court) for the respondent.

4. There was no certificate produced to the court at 11 o'clock and it was indicated that a further application would be made in the Circuit Court. I let the matter stand and in the meantime application was made to Judge O'Connor at around 12 o'clock to amend the warrant under the slip rule. The warrant was amended and the matter was back before me after 2 o'clock where a first certificate was produced exhibiting the original warrant and the order of amendment.

5. However in the course of the hearing, it emerged that there was an error in the amending order which referred to the sentence commencing in 2006 rather than 2016. I let the matter stand again and a further application was made to Judge O'Connor at around 5.30 pm. The Article 40 application resumed before me at around 7 pm when a second certificate was produced.

6. I received in the course of the inquiry a number of affidavits from the applicant's solicitor and I also heard oral evidence from Governor Frances Daly of the Irish Prison Service (IPS). Governor Daly was fairly robustly cross-examined on a number of occasions and in my view, having seen and heard her, she stood up well to this and was an impressive witness. There were some corrections and clarifications as between her various trips to the witness box on points of technical detail but I am of the view that she gave honest evidence and that any points and issues that needed clarification arose through simple human error and misunderstanding given the somewhat technical situation that pertains in relation to the legal position in the prison campus versus the situation on the ground.

7. Governor Daly is the Deputy Campus Governor of the West Dublin Prison Campus which comprises Cloverhill Prison and Wheatfield Place of Detention. She was appointed to that position by Mr. Michael Donnellan, Director General of the Irish Prison Service on 28th September, 2016. The campus governor, Governor Martin O'Neill holds the grade of Governor I and reports to the Director General. A Deputy Campus Governor such as herself is grade Governor II.

8. It became clear in the course of the hearing that the correct name for the institution in which the applicant was detained was Wheatfield Place of Detention, not Wheatfield Prison. Consequently it appeared that the certificate at that point was incorrect on a number of points but particularly in that it referred to Wheatfield Prison. The matter then resumed on the 28th September, 2017, at which point the Governor requested permission to recall Governor Daly and also sought to put in an amended certificate which is the third certificate. Given the nature of the proceedings as an inquiry I allowed Governor Daly to be recalled. She confirmed that the

campus governor was Governor Martin O'Neill. She produced an appointment letter for him indicating he was appointed to the position of prison campus governor and that the Minister was assigning her to the West Dublin campus with governing responsibility for Cloverhill and Wheatfield Place of Detention. She confirmed that she is governor II deputy campus governor with responsibilities mirroring those of the campus governor and she says a prisoner (such as the applicant) is in the custody of the campus governor, Governor O'Neill, or in his absence herself.

9. She clarified that there was a separate governor for the somewhat vestigial institution of "*Wheatfield Prison*", Governor Healy. Wheatfield was redesignated as a place of detention in 2013 because minors were being transferred to it under S.I. No. 511 of 2013. However a small part of the prison was not so designated, namely the Gate Lodge which remains Wheatfield Prison. The underlying rationale is that a number of outstanding warrants need to be executed and therefore it was decided to leave the Gate Lodge as the place where members of the Garda Síochána could come and execute warrants addressed to the governor of Wheatfield Prison. Such prisoners are then immediately transferred to the place of detention – no-one is actually detained in the rump institution that technically is "*Wheatfield Prison*".

10. Under cross-examination Governor Daly said that her letter of offer refers to an assignment to West Dublin campus but does not mention specifically the institutions in that campus. She described Governor O'Neill as the "*governing governor*" (which seems to be an in-house IPS term) of Cloverhill Prison and Wheatfield Place of Detention and said that Governor Healy was assigned as the Governor of Wheatfield Prison. She said she had a delegation of functions from the campus governor in relation to Wheatfield Place of Detention and that her functions included management, day to day running of the prison, attending governor's parades, meeting staff and prisoners and dealing with disciplinary matters. On the transfer of the applicant to Wheatfield Place of Detention the warrant would have been checked by the assistant chief officer; she herself was not involved. There are no prisoners serving sentences in Wheatfield Prison, so therefore that institution essentially has a vestigial existence as simply a port of passage into Wheatfield Place of Detention for some prisoners.

11. Given that Governor Daly has signed the third certificate (drafted by the respondents' lawyers) in terms suggested of her having authority over Wheatfield Prison, which was not what ultimately emerged from the evidence, I asked for clarification as to which was correct and it emerged that the position was that the certificate was not correct and Governor Daly's evidence was correct. The matter was then adjourned to until the 29th September, 2017 at which point Mr. O'Higgins indicated that out of an abundance of caution he was applying to introduce a new certificate which omitted reference to Wheatfield Prison - that is the fourth certificate.

12. Governor Daly was then further cross-examined and it emerged that the fourth certificate was backdated in error. Later on 29th September, 2017, a further certificate was produced changing the signature date to the correct date and incidentally deleting incorrect reference to judicial review from the title of the proceedings. That is the fifth and operative certificate.

The bail application
13. I gave liberty to the applicant to bring a bail application in case there was any long delay in finalising the judicial review. *De bene esse* I heard evidence out of sequence from the applicant's father, Mr. Mark Burke, who is clearly a very genuine individual and I sympathise with him for the impact the detention of his son has had on him. Unfortunately this was something the applicant should have thought about before his offending behaviour. As I am deciding the application at the end of the inquiry rather than adjourning it further I do not propose to proceed further with the bail application so the appropriate step in that regard is to make no order in relation to bail.

Where is the applicant detained?
14. This is not as strange a question as it sounds. The Prison Act, 2007 defines a prison as meaning: *"a place of custody administered by or on behalf of the Minister (other than a Garda Síochána station) and includes— (a) St. Patrick's Institution, (b) a place provided under section 2 of the Prisons Act 1970, (c) a place specified under section 3 of the Prisons Act 1972;".*

15. Any given prison within the Prison Service must be one or other of such a place of custody. The individual place of custody is the unit at which the Act operates. For administrative reasons the IPS has created prison campuses for prisons that are located side by side. There are three such campuses; Portlaoise Prison campus, which embraces Portlaoise Prison and the Midlands Prison, the West Dublin Prison campus, which embraces Cloverhill Prison and Wheatfield Place of Detention, and Mountjoy Prison campus which includes Mountjoy Prison, the Dóchas Centre and the Training Unit. However under the 2007 Act a prisoner is detained in a particular prison rather than a particular campus. By way of illustration the phrase "*prison*" appears 300 times in the Act, the phrase "*a prison*" appears 74 times in the Act. Campus does not appear once in the Act. Thus the correct place where the applicant is detained appears to be Wheatfield Place of Detention not the West Dublin Prison Campus and certainly not Wheatfield Prison.

Who is the correct respondent?
16. Article 40.4 refers to certification by "*the person in whose custody [the prisoner] is detained*". The affidavit grounding the *ex parte* application incorrectly names the respondent as the Governor of Mountjoy Prison. The order made by Creedon J. names the respondent in error as the Governor of Cloverhill Prison, although the respondent was at the material time recorded in the Central Office system as the Governor of Mountjoy Prison. Mr. Conlan Smyth says he is not responsible for the error in the title of the *ex parte* order.

17. In principle the respondent is the person detaining the applicant. For example, in the case of an institution, it is the body corporate managing the institution or the person managing it in the case of an entity that is not a corporation. The governor is not a corporation sole, so it is not necessary to sue "the governor of" a particular prison. One can also use the governor's name. Either option is acceptable, perhaps through practice rather than strict logic. Nonetheless, because warrants are addressed to the governor of any given prison or place of detention there must be a definite person who is the governor and who is the appropriate respondent to an Article 40 application. This is a very different situation to that of the Dóchas Centre discussed in *Rafique v. The Governor of the Dochas Centre* [2017] IEHC 80. Given the evidence recited at para. 12 and 13 of the judgment of Binchy J. it is clear that warrants for both Mountjoy and the Dóchas Centre are made out to the Governor of Mountjoy and transmitted to the same general office. While each administratively had separate governors, they were part of the one prison as a matter of law.

18. That is not the case here in respect of the institutions in the West Dublin campus. They are two separate entities. For good measure one is a prison and one is a place of detention. So it seemed to me the appropriate order was to amend the title of the proceedings to provide that the respondent would be the Governor of Wheatfield Place of Detention and I made that amendment on the 25th September, 2017. I also amended the order of Creedon J. In relation to the latter aspect given that she had directed the Governor of Cloverhill (rather than Wheatfield) to certify. Mr. Conlan Smyth at one stage suggested that the procedurally correct course was that the Governor of Cloverhill should have certified by saying that he or she did not hold the applicant. There is an impressively remorseless logic to that submission and it might be procedurally strictly correct but such a course probably would not have assisted the court or enhanced the efficiency of the inquiry.

Who is the Governor of Wheatfield Place of Detention?
19. Again that might sound like a strange question but in this case it has depended on the evidence and there has been some iteration, development and clarification of the evidence in the course of the hearing given the complexities introduced by the new campus structure put in place by the Irish Prison Service. I am satisfied on the evidence that Governor O'Neill is the campus governor and is the governor of Wheatfield Place of Detention.

Does the certificate have to be signed by the respondent?
20. While the Prison Rules, 2007 rule 2(2) provide that "*Governor*" means "*the Governor of a prison or other officer for the time being authorised to perform all or any of the functions of Governor of the prison concerned*", we are currently engaged in a process under Article 40.4 of the Constitution rather than one to which the Prison Rules apply. Mr. Devlin submitted that it would be "*a farcical situation*" if the Governor was unwell or out of the country that, as he put it, "*if you choose to strike at the right time a prisoner could be released*". It seems to me that while the certificate has to be signed by a person in the position to have knowledge of the legality of the detention it is not essential that the Governor of the prison himself or herself be the person who signs the certificate. It could be signed by a subordinate with management responsibility or indeed a superior officer with management responsibility.

21. While the Constitution refers to the person (singular) in whose custody the prisoner is, that does not preclude the plural in an appropriate case. If for example an Article 40 application is brought to recover a child from putative adoptive parents, there could be a plurality of respondents; but those sort of considerations do not apply in a public service context where there is a coincidence of identity as between individuals in the management chain. It seems to me that to make Article 40 workable there must be a single person to whom one looks as the detainer even if other persons can certify on behalf of that person. In the context where a person is in X prison or Y garda station, the conventional formula is the Governor of X prison or the member in charge of Y Garda station, which seems to me to meet the requirements of practicality. Or one could as I say also use the person's actual names as they are not corporations sole. *Ward v. the Governor of Portlaoise Prison* [2006] IEHC 297 at pp. 16 to 17 confirms such an approach. Mr. Conlan Smyth made a submission that proof of Governor Daly's management position was lacking. I do not accept that submission for reasons I will discuss in more detail later. In principle someone with appropriate management position could certify. I note that the certificate Governor Daly signed says "*I hold*" rather than "*the Governor of Wheatfield Place of Detention holds*". But I see that as an issue of semantics. It is not fundamental given her position in the chain of command. If she was outside the chain of command things might be different.

Does the certificate have to exhibit any underlying order of the court?
22. In *Bolger v. The Garda Commissioner* (Unreported, Supreme Court, 2nd November, 1998), O'Flaherty J. said that he was not necessarily saying that the detainer had to exhibit any court order but it would probably be a wise move. He did not decide whether it was necessary or not. That position was cited by McMenamin J. in *Ward* at p. 17. It is clear from Dr. Costello's text book, *The Law of Habeas Corpus in Ireland* (Dublin, 2006) at p. 145 that the exhibition of the order "*became, by the nineteenth century, the conventional form of return"*. That was an improvement on the previous narrative form. However the relevance of exhibiting the actual order as part of the historical development of the history of *habeas corpus* does not seem to have been drawn to O'Flaherty J.'s attention. Overall I very respectfully do not see how an Article 40 inquiry could work if the underlying court order was not produced at some stage. If it was not produced then the order would have to be obtained as part of the inquiry and leave sought to add it to the inquiry. The inquiry could not get off the ground otherwise. So in practice I would have to take the view that notwithstanding the reservations expressed in *Bolger*, even if the court order was not produced as part of the original certificate it must be produced at some stage by the detainer in the course of an inquiry relating to a detention under an order. In essence therefore there is an obligation on the detainer to furnish any underlying court orders and that is far better done in the initial certificate rather than a later amended certificate.

Does the execution portion of the underlying warrant also need to be exhibited?
23. This in fact did not turn out to be an issue for reasons I will explain. The correctness of the execution procedure of the warrant was discussed in *Grant v. Governor of Cloverhill* [2015] IEHC 768. It is interesting to note that while an element of *Grant* was reversed by s. 25 of the Prisons Act 2015, that provision was the subject of some quite sharp criticism from Professor Robert Clark in his annotation, Prison Act 2015 (2015) *I.C.L.S.A.* 57 in which he said that the inclusion of s. 25 was "*a matter of unprincipled expediency*".

24. In fairness to the applicant it would be appropriate and I think necessary for the applicants to have access to the full court order if there was an execution part to it. Indeed the Prison Rules provide that the court order should be made available to the applicant. However Mr. O'Higgins informs me that the practice is that where a warrant is addressed to the Governor the warrant is not executed, whereas if the warrant is addressed to a superintendant it is executed. So while in my view the certificate should include any endorsement of execution there is no such endorsement in this case so the issue does not in fact arise on these facts.

Is there jurisdiction to allow amendment to the certificate and underlying documentation?
25. The State accepts the principles regarding the jurisdiction to allow the amendment of certification or underlying material as set out at para. 52 of *Sharma v. Member in Charge of Store Street Garda Station* [2016] IEHC 611 and approved by the Court of Appeal in *Gjonaj v. Governor of Cloverhill* [2016] IECA 330 I note of course that the matter is now on further appeal to the Supreme Court but Mr. O'Higgins submits that it should be "*read as good law in the interim period*". He submits that the principles regarding an amendment to a certificate also applied to an application to put forward a fresh certificate in place of a certificate which had previously been put forward but not yet accepted by the court and I agree that that must follow as a matter of logic. Mr. Conlan Smyth is not disputing that the principles in *Sharma* apply.

Should discretion be exercised in favour of admitting the amended certificate?
26. Mr. Conlan Smyth advances a number of arguments as to why the amended certificate should not be accepted. The first argument is that there was no compliance with the order of Creedon J. because the detention should have been certified by 11 a.m. on Monday 25th September, 2017 but that was not done until 2 p.m. that day without proper reason or excuse which he says is a breach of the court order. In my view the language of breach in this context is slightly over-dramatic. There was an application for a short adjournment in terms of a matter of hours in response to which I let the matter stand. Mr. Conlan Smyth accepts he would not necessarily use the language of "*breach of a court order*" if for example a party did not meet a deadline for papers being filed in a judicial review list. However he submits that because an Article 40 application affects fundamental rights and is provided for in the Constitution, strict compliance is required. But many judicial reviews also affect constitutional rights. Fair procedures must be allowed to respondents. The mere fact that a deadline is not met is not automatically fatal to a respondent's defence of a *habeas corpus* application.

27. The second objection was that it is suggested that case law has indicated that only a limited amount of indulgence should be offered to the State and it is submitted that we are well beyond that here.

28. Reliance is placed firstly on *Joyce v. The Governor of the Dóchas Centre* [2012] IEHC 326. At para. 38 Hogan J. notes that as he was about to deliver his judgment, counsel for the respondent informed him "*as a courtesy*" that further information was available but not immediately to hand in court. There was no application as such to admit further information, so the decision is not an authority for the proposition that the court should not receive further information or should be sparing in the opportunities afforded in that regard.

29. In *Miller v. Governor of the Midlands Prison* [2014] IEHC 176 the applicant applied on 25th May, 2014 by way of an *ex parte* application for an inquiry at 1 p.m. made returnable for 4 p.m. (see para. 1). Baker J. held there was a jurisdiction to allow supplementing of the material before the court. A long form warrant was handed in which met the needs of the situation and the hearing concluded at 7.30 p.m. Baker J. then proceeded to give a judgment on the following morning, 26th May, 2014 (see para. 43). The judgment was prefaced with a comment that it was based on an assumption that the Governor had or would have by the end of the hearing sufficient information to show the basis of the detention. She was later informed that the correct long form warrant was only given to the Governor at 3.40 pm on 26th March, 2017. She then gave a ruling that the premise of her earlier decision was incorrect and directed the release of the applicant, essentially because *"at the time the court had concluded its inquiry"* the Governor did not have adequate information (see para. 47). This seems to be a case where in essence the additional information did not come to light until after the court's judgment. That is completely compatible with the point made in *Sharma* that new information should be adduced before the court's position is articulated by the court. In *Miller* nobody seems to have asked the judge to hold off from giving a decision - in fact quite the reverse. So *Miller* is not an authority for the proposition that that there is an absolute limit to the amount of time to be afforded to a respondent to supply further information.

30. There are a number of matters, it seems to me, that must be borne in mind in exercising the discretion to admit further material or amended certificates.

31. First of all this is an inquiry not a normal *inter partes* hearing.

32. Secondly, the constitutional requirement is to commence the inquiry speedily and thereafter to bear expedition in mind, not to conduct all aspects immediately or at breakneck speed. I discuss this in *Grant v. Cloverhill Prison* [2015] IEHC 768 at para. 14: "*The appropriate approach has been set out by Barrington J. in* The State (Whelan) v. Governor of Mountjoy Prison *[1983] I.L.R.M. 52* :" It appears to me also that, on an application for *habeas corpus* the duty of the High Court is forthwith to enquire into the legality of the detention, but that once the enquiry is entered on, and provided the urgency and importance of the proceedings are kept in mind, the Court is entitled, after hearing the views of the prosecutor, the respondent and their legal representatives to conduct the enquiry in the manner which the Court thinks best calculated to resolve the issues of law and fact raised in the proceedings and to achieve the interest of justice "(p. 55*). Also relevant is* O'D. v. Kennedy *[2007] 3 I.R. 689* per *Charleton J. at pp. 690-691, where a period of 23 days between the order for an inquiry and the giving of judgment was seen as compatible with Whelan, given the complexity of the issues in that case."*

33. The overriding consideration is in the interests of justice. Fair procedures must be afforded to a respondent just as much as an applicant. There is no doctrine that latitude to a respondent must be exceptionally limited or that only one or two bites of the cherry must be allowed. Here there was a fair bit of latitude in the sense that there were three trips to the Circuit Court (albeit one of which was before the return time of 11 o'clock), and five separate certificates, so there were a number of iterations of the certificate albeit first of all in a relatively short period of seven days and secondly in the sense that the later two iterations were not necessarily fundamental matters. Seven days is not a long period in forensic terms. So overall I do not consider that this amounts to excessive indulgence of the respondent.

34. Mr. Conlan Smyth's third point was that the fifth certificate should not be accepted because it contains an irregularity. The irregularity is that the cover page from the C.S.S.O. is incorrectly dated the 28th rather than the 29th September, 2017 and was changed by Governor Daly not by representative of the C.S.S.O. That is not a major issue by any means. Probably error correction fatigue had set in on the State's side. Given that the certificate was handed up into court by a representative of the C.S.S.O. it follows they were adopting the amendment made by Governor Daly so there is no real irregularity here. It probably would have been better if the date on the cover page was corrected by the C.S.S.O. rather than the IPS given that the cover page is signed by the C.S.S.O., but I am not seeking to apply a counsel of perfection.

35. The fourth objection was the allegation that it has not been proved that Governor Daly has the appropriate authority to sign the certificate. I am satisfied having seen and heard her give evidence that Governor Daly has the appropriate authority and holds office as deputy campus governor of the West Dublin Prison Campus with governing responsibility for Cloverhill Prison and Wheatfield Place of Detention, and I accept her evidence in that regard. The suggestion is that it has not been proved that Governor O'Neill was unavailable such that her functions as Deputy Governor would kick in; but her functions as Deputy Governor do not depend on there being an absence of the Governor. Her functions as Deputy Governor are general management functions which apply even if the Governor is available. Mr. Conlan Smyth says I should have been furnished with her warrant of appointment for Wheatfield Place of Detention. However that is dealt with in her oral evidence, but for good measure I was furnished with her offer of promotion to Governor grade II which clearly indicates an assignment to West Dublin Campus and the evidence is that includes Wheatfield Place of Detention.

36. The overall criterion however in terms of whether to accept an amended certificate is the interest of justice, bearing in mind as I said in *Grant* and *Sharma* the proportionality of release in the context of whatever the issue with the certification might be. In my view it is not in the interests of justice to release a convicted person because of essentially typographical errors without allowing a reasonable opportunity to correct those errors (see *Gjonaj* at para. 23).

Is the applicant properly detained in Wheatfield Place of Detention given that the warrant is addressed to the Governor of Mountjoy Prison?

37. Section 17(2) of the Criminal Justice Administration Act, 1914 provides that "*A prisoner sentenced to imprisonment or committed to prison on remand, or pending trial, or otherwise, may be lawfully confined in any prison to which the Prison Acts, 1865 to 1902, apply*". Thus committal to one prison is committal to any provided that the Prison Acts apply. Section 1(3) of the Prison Act, 2007 includes that Act as part of the Prison Acts. The 2007 Act defines place of detention as meaning "*a place provided under s. 2 of the Act of 1970*" which therefore includes a place of detention in the definition of prison which I have already referred to. I note in *Ward* that MacMenamin J. was concerned about the prisoner being detained in a prison other than that named in the warrant. It would appear that counsel in that case failed to draw attention to the 1914 Act. Had such attention been drawn it would have been clear that this is not a problem. So this matter having been canvassed during the hearing Mr. Conlan Smyth accepts it is not an issue at this stage.

If the certificate is admitted is the applicant in lawful custody?

38. Mr. Conlan Smyth says that if I admit the final certificate he has no what he calls "*post-admission arguments*" and in my view the fifth certificate does satisfy me that the applicant is in lawful custody.

If the amended certificate is not admissible should the applicant be released?
39. The next question which only arises if I am wrong about admitting the amended certificate is if the certificate is not admissible should the applicant be released. Mr. Conlan Smyth says that is automatic. However Mr. O'Higgins refers to a fallback argument which essentially is that it is common case that the applicant has been lawfully convicted and sentenced. In *The State (McDonagh) v. Frawley* [1978] I.R. 131 at p. 136 O'Higgins C.J. said that a person "*duly convicted and properly sentenced*" is *prima facie* detained in accordance with law and it therefore requires the most exceptional circumstances to proceed by way of Article 40. Even if "*some defect or illegality attaches to his detention*" or "*even that jurisdiction has been inadvertently exceeded*" that is insufficient to justify release. In a similar vein Henchy J. in *The State (Ahern) v. Cotter* [1982] I.R. 188 at 203 emphasises that a post-conviction release under Article 40 can only apply if there is a breach of "*fundamental rules of natural justice*" O'Higgins C.J. in *McDonagh v. Frawley* referred a situation where a person is incorrectly given a sentence of penal servitude versus imprisonment. So even if one can extrapolate from that that even if the court did not have jurisdiction to grant the sentence specifically mentioned in the order but had jurisdiction to grant another appropriate sentence that the appropriate course as indicated by O'Higgins C.J. was to remit the matter to the sentencing court or allow the matter to proceed through the criminal process so that the sentence could be corrected.

40. I should perhaps mention, as noted in *Sharma*, that the doctrine in *McDonagh v. Frawley* should not be pushed too far, and as I discussed in that case, MacEochaidh J. in *Kristo v. Governor of Cloverhill Prison* [2013] IEHC 218 in my respectful view incorrectly applied *McDonagh v. Frawley* to administrative detention, a decision which I was not in a position to follow for the reasons set out in *Sharma*. (See also the decision of Hogan J. in *Ganyiu v. Governor of Cloverhill Prison* [2013] IEHC 511 which followed what I respectfully regarded as the erroneous approach in *Kristo*.) It is clear that *McDonagh v. Frawley* is a doctrine related to post-conviction detention, not administrative detention such as was in issue in *Kristo* and *Ganyiu*.

41. O'Higgins C.J. said in *McDonagh v. Frawley* that a misstatement in the sentence should not give rise to release under Article 40 in the case of a convicted person: instead that matter should be remitted to the court of trial (at pp. 136 to 137). That seems to be binding on me unless and until qualified by the Supreme Court. As it happens that doctrine is very much in line with the historical position as set out in *R. v. Mount* (1875) L.R. 6 P.C. 283 which is a decision of the Privy Council to the effect that a jurisdictional post-conviction error should be corrected in the criminal process rather than resulting in release under *habeas corpus*. Reversing the Supreme Court of the Colony of Victoria which had granted *habeas corpus* to a prisoner in that situation, the Privy Council said "*if the Judges of the Supreme Court were right in holding that an order of the Secretary of State was necessary, their Lordships think they erred in setting the prisoners at large. In any event, some time must have elapsed after the sentence had been passed before such an order could be obtained, during which the prisoners must have been necessarily detained by the Inspector-General, as the statutory sheriff; and in any view of the case, the Court should, in their opinion, have remanded the prisoners to his custody, to give the opportunity for an application to the Secretary of State for the order the Court thought necessary. The prisoners who had been convicted of felony, ought not to have been set at large during the term of their sentence, until it was clear that no lawful means of executing it could be found* : *Ex parte* Krans (1823) 1 B. & C. 258.; Parker's Case (1839) 5 M. & W. 32 [151 ER 15 (Exch)]" *per* Sir Montague E. Smith at p. 305.

42. It is true of course that in general a warrant should set out precise details of the length of detention. That was the basis for decision of Peart J. in *J.O'G. v. Governor of Cork Prison* [2007] 2 I.R. 203. However *J .O'G*. relates to a contempt of court matter, not conviction and sentence in the ordinary course of the criminal process. Furthermore it does not refer to *McDonagh v. Frawley* or *State (Ahern) v. Cotter*, nor indeed could a High Court decision have been intended to adopt a different position to that set out by the Supreme Court. Of some importance is that not only has *McDonagh v. Frawley* been not qualified by the Supreme Court in this respect but there have been a number of post-conviction Article 40s in recent years which have been refused by the Supreme Court, particularly *Caffrey v. Governor of Portlaoise Prison* [2012] IESC 4, *C.D. v. Clinical Director of the Central Mental Hospital* [2013] IESC 5 and most pertinently *Ryan v. Governor of Midlands Prison* [2014] IESC 54 where at paras. 19 to 20 Denham C.J. distinguished cases of error from an absence of jurisdiction. She classified the cases of *Cirpaci v. Governor of Mountjoy Prison* [2014] IEHC 76, *The State (O) v. O'Brien* [1973] 1 I.R. 50 and *Sweeney v. Governor of Loughan House Open Centre* [2014] IESC 42 as absence of jurisdiction cases.

43. There are a number of decisions of other courts where a post-conviction Article 40 has been refused, many of which rely on *McDonagh v. Frawley* such as Eagar J.'s decision in *Kennedy v. Governor of Portlaoise Prison* [2017] IEHC 402. Very few cases of successful post-conviction habeas corpus come to mind. Reference was made in the hearing to the decisions of Barrett J. in *Ryan* (reversed by the Supreme Court) and that of Hogan J. in Farrell which followed what was found by the Supreme Court to be the incorrect approach of Barrett J. in *Ryan*. Mr. O'Higgins referred to what he called some "*low-lying cases of summary jurisdiction*" where a sentence might have been outside of jurisdiction by being for example in excess of a statutory maximum. Some of these cases may not have been in fact contested but broadly it seems to me that the *McDonagh v. Frawley* principle, reflecting the historic principle in *Mount* and discussed in Mr. Sharpe's text book *The Law of Habeas Corpus* (Oxford, 1989), at p. 148, is very much still the law. Indeed Mr. Sharpe's comment is that "*it is clear from the Mount case that the courts will do everything they can to prevent a convicted person from being freed because of some procedural defect in the manner of execution of his sentence*".

44. There is no question but the applicant was properly sentenced by the Dublin Circuit Court. Even in the absence of the certificate this appears from the grounding affidavit in the *ex parte* application. Thus the doctrine in *McDonagh v. Frawley* applies and the applicant should not be released even if the court order as it originally stood did not reflect the duration of the sentence as set out in the spoken order of the learned Circuit Court judge. In my view that applies even if there is an absence of certification given that there is enough information about the underlying conviction and sentence from the information supplied by the applicant including that in the *ex parte* application where full disclosure applies.

Order
45. The order I will make is therefore:

(i). that the fifth certificate be accepted and liberty given to file it;

(ii). in order to ensure that the court record is complete that the respondent in addition to filing the fifth certificate be directed to file an affidavit exhibiting copies of the previous four certificates;

(iii). that the release of the applicant under Article 40.4 be refused;

(iv). that there be no order on the bail motion;

(v). that the applicant recover costs under the Legal Aid Custody Issues Scheme on the basis that it was appropriate to have solicitors and two counsel at all stages; and that in order to give effect to the principle of parity where the respondent had two Senior Counsel, the brief fee for the applicant's Senior Counsel be the higher (if there is a difference) of those paid to the two Senior Counsel for the respondent; that the refresher for the applicant's Senior Counsel for the 29th September, 2017 be the sum of the refreshers paid to Senior Counsel for the respondent on that date and that the refresher for the applicant's Senior Counsel on 28th September, 2017 be in the same amount as his refresher for 29th September, 2017.