

THE HIGH COURT

Record Number: 2012 No. 1577 SS

Application for an Inquiry under Article 40.4.2 of the Constitution

Between:

Joseph O'Reilly

Applicant

And

The Governor of the Midlands Prison

Respondent

Decision of Mr Justice Michael Peart delivered in open Court on the 13th August 2012:

The applicant is currently in custody in the Midlands Prison where he is serving a life sentence for murder.

According to his grounding affidavit, he has on the 12th July 2012 filed and served an application to have his murder conviction quashed pursuant to section 2 of the Criminal Procedure Act, 1993. He has been unable to engage the services of a solicitor, and for the moment at least is dealing with that application as an unrepresented litigant. He is pursuing an application to be granted legal aid.

He states in his affidavit that the within application raises a very nett issue for determination. He identifies that issue as one as to whether his detention is rendered unlawful by the fact that as an unrepresented prisoner he has a more restricted access to the courts than other citizens, and is disadvantaged in that regard by not being permitted to attend personally in court, and must do so by correspondence. He refers to certain judicial dicta to the effect that the right of access to the courts is a right available to prisoners and other citizens alike.

In my view the question raised by the applicant is not one which arguably renders his detention unlawful. He has been lawfully sentenced, and until that sentence is quashed by a Court of competent jurisdiction he must serve it. A custodial sentence by its very nature necessitates certain limitations to freedom of the prisoner, and a certain restriction of rights that would otherwise be available to the person if he or she is not serving a sentence. One of those restrictions is one of which this applicant complains, namely that unlike other persons who are not in prison he may not simply walk into court and move an application whether ex parte or otherwise, or attend personally in the Central Office for the purpose of filing papers..

But that is not to say that his access to justice is denied to him. It is not. It means that for reasons that are self-explanatory and obvious he must go about accessing justice by a different but no less onerous route. The applicant complains that he is impecunious being a prisoner, and cannot pay court fees for proceedings. That may be so, but many persons not in prison endure the same level of impecuniosity, and it cannot be said that the applicant is in some way being discriminated against in that regard. It is a matter for the legislature to legislate in relation to legal aid for persons who meet the criteria for such assistance, and I note that the applicant has made an application in that regard.

A prisoner's access to justice in the first instance is by post. As with the present application, the application will upon receipt be given to a judge for initial consideration. As with the p[resent application for release under Article 40 of the Constitution, the applicant, like any other person seeking release, being represented or not, must in the first instance satisfy the Court that the ground being put forward for release is one which is capable of argument. It must be a ground reasonably capable of success. It is not necessary that it be certain of success, but it must have some weight on a prima facie basis, and not be merely a statement of complaint which has no possibility of success. That arguability must be evident from the affidavit which is put forward to ground the application. Even when the application is processed by post, as in the present case for example, the judge reading and considering the affidavit and any exhibits provided can assess the arguability of the ground or grounds put forward. If the ground or any of the grounds appears on a prima facie basis to have some weight and is at least arguable, the Court will direct an inquiry so that the prisoner can at that stage attend court, and so that the Governor of the prison concerned can attend in order to justify the detention.

In my view such a procedure strikes an appropriate balance between the obvious implications for the prisoner of serving a sentence, and the constitutional requirement that his or her rights are restricted to the least extent consistent with his or her status as a prisoner. The right of access to the Court is not an absolute right, incapable of any interference whatsoever. Some restriction to that right is necessary for many different reasons, the status of a prisoner being just one such.

The ground put forward by this applicant for a declaration that his detention is unlawful has no possibility of success. In my view the point is unstateable and could not justify this Court directing an Inquiry into the lawfulness of detention. I refuse his application for an Inquiry in these circumstances.