Neutral Citation [2016] IEHC 611

THE HIGH COURT

[No. 2016/1153 SS]

BETWEEN

DIBYASWOR SHARMA

APPLICANT

AND

MEMBER IN CHARGE OF STORE STREET GARDA STATION

RESPONDENT

[No. 2016/1163 SS]

BETWEEN

PRINCE IGHODARO

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

[No. 2016 1155 SS]

BETWEEN

EMIRION GJONAJ

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 7th day of November, 2016

1. In his recent judgment in *O'Farrell v. Governor of Portlaoise Prison* [2016] IESC 37 (unreported, Supreme Court, 12th July 2016), McKechnie J. referred at para. 101 to *"the rather ill-defined power to retroactively validate a defective warrant in habeas corpus proceedings".* The present application now throws up the question of whether, when and on what basis the court can properly permit rectification of such defective grounding material in the course of an Article 40 application.

2. Each of the applicants for release under Article 40.4 of the Constitution has been arrested under s. 5 of the Immigration Act 1999. In accordance with that section, they have been taken to a "prescribed place", being either a prison or a Garda station. Each applicant complains that the document under which he is detained is not in compliance with the Act.

3. It has been clear since the decision in *R. v. Davison* (1699) 1 Ld. Raym. 603 that bail may be granted in habeas corpus proceedings, with the prisoner being required to return to custody if the application fails and fully discharged if it succeeds. In accordance with this approach, I made an order permitting Mr. Sharma to be released on bail in the Article 40 proceedings, but I declined to grant bail to the other two applicants having regard to my conclusion having heard evidence in each case that there was a likelihood that they would not attend if released on bail and that that likelihood could not be attenuated by any conditions that I could impose.

4. In its original form, s. 5 of the Immigration Act 1999 provided that the arresting officer could detain the arrestee in a prescribed place, which was suggestive of what Ms. Rosario Boyle S.C. (with Mr. Anthony Lowry B.L., who also addressed the court) in a very able argument for the applicant called a "personal obligation" on the arresting officer, namely to directly cause the detainee to be placed in the prescribed place.

5. That approach is somewhat reflected in the Immigration Act 1999 (Deportation) Regulations 2005, Reg. 7 of which provides that where the immigration officer or member "*proposes to detain the person in a prescribed place*", he or she must "*inform*" the member in charge or governor of the arrest and "direct" that the person be detained.

6. As against that, Edwards J. in *Darchiashvili v. Governor of Mountjoy Womens Prison* [2011] IEHC 264 (unreported, High Court, Edwards J., 23rd June 2011) held that the scheme of the Act did allow for a certain degree of transfer of delegation of the power to detain.

7. However the permissibility of such transfer was more expressly reflected in the revised s. 5 (1) of the 1999 Act, as amended by the International Protection Act 2015 s. 78, which provides that "*a person so arrested may be …detained in the [prescribed] place*". By the use of the passive voice, it is made express that the detention is not necessarily by the arresting officer.

8. This is reflected in an amendment to reg. 7 of the 2005 Regulations effected by the Immigration Act 1999 (Deportation) Amendment Regulations 2016, effective from 10th March 2016. The new reg. 7 provides that a person arrested under s. 5 may "*be taken by an immigration officer or member of the Garda Síochána to a prescribed place*" and may *"be detained …in the prescribed place under warrant of the immigration officer or member of the Garda Síochána who arrested him or her"*.

9. Thus the amended regulations provide for a warrant of the arresting officer, rather than, as previously under the original 2005 regulations, a notification and direction. Within the system, this has been informally called a "detention order" although Edwards J. in *Darchiashvili* referred to it as a "*so called* 'detention order'", illustrating that this phrase is not to be found in statutory language. In my view the phrase "detention order" is unhelpful and confusing. What is at issue, and what is required for a lawful detention under these provisions, is a warrant.

10. It is agreed by Ms. Boyle and Mr. Anthony Moore B.L. for the respondents that the following issues arise:

(i.) Whether the original certificates of detention contain errors

(ii.) If so, whether the errors are sufficiently minor as not to warrant release

(iii.) Alternatively whether the certificates can be supplemented by amended certificates and

(iv.) If so whether the amended certificates justify the detentions.

Do the original certificates contain errors?

11. In each case the certificates originally filed under Article 40.4 set forth documents which purport to be in each case a "notification" of arrest and detention. Mr. Moore has applied for liberty to file amended certificates which refer to a "warrant" of arrest and detention, without prejudice to his submission that the original certificates are not erroneous.

12. But they are erroneous. To validly justify detention under the legislation, a warrant of the arresting officer must be produced, not a document purporting to be a notification. This issue cannot be dismissed as a mere heading.

13. The heading to a document is often an integral part of it. Without knowledge of extrinsic facts, the heading may be all that distinguishes a draft document from a final document, for example a Bill from an Act. Furthermore, the heading may be all that distinguishes an original document from a copy of the document or a notification or exemplification of that original.

14. If one turns to statutory examples of the form of a warrant, it is notable that every form of warrant scheduled to the Indictable Offences Act 1848 is headed "*warrant*" of one kind or another, and includes as an operative expression language such as that "*these are therefore to command you the said constable… to take and safely convey the said A.B. to the said [house of correction] at …, in the said [county], and there to deliver him to the keeper thereof, together with this precept, and I hereby command you the said keeper to receive the said A.B. into your custody and the said house of correction, and him there safely to keep until he shall be thence delivered by due course of law"* (Schedule (H)). Similar language occurs mutatis mutandis for other types of warrant.

15. Similarly in the District Court Rules 1997, warrants are generally headed as such, e.g. form no. 34.12 "*search warrant*"; form 19.1 "*committal warrant*", and so on.

16. Even the "*European Arrest Warrant*" set out in the annex to Council Framework Decision of 13th June, 2002, 2002/584/JHA, is headed as such.

17. The only personal-liberty related warrant that came immediately to hand that did not use "warrant" in its title is in the case of administrative detention under the Offences against the State (Amendment) Act 1940. The schedule to that Act sets out the form of a warrant for such detention, and while the heading to the warrant does not include the word "warrant" (it is headed "*Offences against the State (Amendment) Act 1940 s. 4"*) the wording of the warrant uses that term in that it provides "*I…Minister for …do by this warrant order the arrest and detention of the said …under the said s. 4".*

18. By contrast, in non-liberty related matters, there is less consistency in headings. The heading "*general warrant*" is used in relation to collection rates in form 47 attached to the Public Bodies Order 1925 (S.R. & O. No. 46 of 1925). Similarly the heading "*warrant of the land commission*" certifying the debt due by a defaulter is set out in form 100 attached to the Land Purchase Acts, Rules and Orders under Section 3 of the Land Act 1933 (S.R. & O. No. 18 of 1934). For examples where the heading is not used, see form no. 2 in the schedule to the Local Government (Collection of Rates) Act 1924 s. 10 of the Civil Bill Courts Procedure Amendment Act (Ireland) 1864.

19. Overall, a review of other statutory instances of forms of warrant supports the conclusion that it is generally regarded as material insofar as personal liberty is concerned that the instrument actually describe itself as a warrant, either in the heading or the body of the document. A warrant is a distinct category from a notification (even allowing for the point that the content of the notification also includes a direction to detain).

Is the error too minor to warrant the release?

20. Mr. Moore relies on the decision in *Kristo v. Governor of Cloverhill* [2013] IEHC 218 (unreported, High Court, MacEochaidh J., 16th May 2013) (see para. 42) (followed, without any detailed discussion, in *Ganyiu v. Governor of Cloverhill* [2013] IEHC 511 (unreported, High Court, Hogan J., 12th November 2013)) in support of his submission that any error is too minor to warrant release.

21. However, insofar as those decisions could be taken to suggest that the Supreme Court decision in The *State (McDonagh) v. Frawley* [1978] I.R. 131 has any relevance to administrative detention, or in particular mean that an applicant must prove breach of a fundamental requirement of the law in order to succeed in an Article 40 application in relation to administrative detention such as that applying to proposed deportees, I would respectfully say, even heavily discounting for any perceived partisanship as a former professional protagonist in those cases, that such a proposition is clearly wrong and in any event is in conflict with subsequent authority.

22. Allowing for that heavy discount, one does not need to take my view for it. One need go no further than the judgment of O'Higgins C.J. in *McDonagh* itself to note that the Supreme Court was very careful to distinguish between the situation of *"a convicted person … serving* a lawful sentence which had been passed upon him by the court at which he was convicted" (at pp. 134 to 135) and on the other hand *"a person arrested and detained*" who *"was not a convicted person"* and thus whose position was *"quite different from the status and rights of such a convicted person"* (at p. 135).

23. O'Higgins C.J. went on at p. 136 to re-emphasise that *"the position of a person duly convicted and properly sentenced is quite different"*. It is absolutely clear from the decision in *the State (McDonagh) v. Frawley* that the doctrine laid down in that case (of

fundamental illegality before a release can be ordered) applies only to persons convicted of criminal offences duly serving their sentences and not to the merely administratively detained.

24. That such a conclusion is obvious from the judgment in *State (McDonagh) v. Frawley* was emphasised by Kearns P. in *Moore v. Governor of Wheatfield Prison* [2015] IEHC 147 (unreported, High Court, Kearns P., 12th March 2015), where he noted that it was "*important to distinguish*" the prisoner in that case (a contemnor) from the situation in *McDonagh ("a case heavily relied on by the respondent")* which concerned a "prisoner who had been duly convicted and sentenced" (p. 20); thus "*the situation in the present case is clearly distinguishable*".

25. Furthermore, that clear distinction was also adverted to by O'Donnell and Clarke JJ. in their joint dissenting opinion in *O'Farrell v. Governor of Portlaoise Prison* at para. 9.10: *"this statement was made in the context of prisoners challenging their detention post conviction and trial."*

26. In Kristo, the decision in *McDonagh* was represented in State submissions as relevant and applicable to non-conviction detention (a posture which clearly also proved irresistible to the State in *Moore*). But unlike its summary rejection by Kearns P. in *Moore*, that submission was accepted by the court in *Kristo*. That background emphasises yet again the extent to which courts have to rely, indeed are dependent, on the soundness and sustainability of submissions made to them. But the State's submission, as we have seen, effectively incorrectly represents *McDonagh* as standing for a proposition directly opposed to what that decision expressly states. If language means anything, prior decisions cannot be distorted in this manner: to do so would mean that "*the law has departed further from the meaning of language than is appropriate for a government that is supposed to rule (and to be restrained) through the written word"* (to use the phrase of Scalia J. (dissenting) in *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999) at 285). To his credit, Mr. Moore in the present case has not offered any rational basis for contending that *McDonagh* can be said to apply to pre-conviction or administrative detention; there is none. In the absence of the State's proposition having any inherent logical integrity, all Mr. Moore can do is to rely on *stare decisis* and *In re Worldport [*2005] IEHC 189. But it would be an odd form of *stare decisis* indeed that allows a party to procure a decision in its favour by making a submission that fails to correctly represent a previous authority, and then to prevent the error from being corrected by clinging to the decision thereby procured with a suddenly-acquired zeal for the immutably binding nature of the letter of prior judgments. *Worldport* is not an obstacle to departing from a proposition, such as that under discussion, that is clearly wrong. That is not to suggest that the error in *Kristo* was major: that is a separate question. The only issue that needs to be clarified for present purposes is that the doctrine requiring a very fundamental flaw as set out in *McDonagh* is confined to convicted prisoners.

27. As I noted in *Grant v. Governor of Cloverhill Prison* [2015] IEHC 768 (unreported, High Court, 27th November 2015) at para. 100, the bar for release where the detention is based on a court order is high (although not as high as for post-conviction cases) and requires a flaw appearing on the face of the record, an absence of jurisdiction, a fundamental denial of justice or a fundamental flaw (see *Ryan v. Governor of Midlands Prison* [2014] IESC 54 (unreported, Supreme Court, Denham C.J., 22nd August 2014) para. 18, *F.X. v. Clinical Director of the Central Mental Hospital* [2014] 1 I.R. 280).

28. But as Donnelly J. emphasised in *Abbas v. Governor of Cloverhill Prison* [2015] IEHC 600 (unreported, High Court, 25th September 2015), "in the absence of a court order justifying detention, it is even more important that a document purporting to justify the deprivation of liberty accurately details the jurisdiction for that deprivation".

29. Thus, the level of error which may be regarded as justifying release depends on the nature of the detention:

> (i.) In the context of a convicted person, the illegality must be in relation to a particularly fundamental requirement (State *(McDonagh) v. Frawley);*
>
> (ii.) In the case of detention under any other court order, the error must appear on the face of the record or amount to an absence of jurisdiction, a fundamental denial of justice or a fundamental flaw (*Ryan v. Governor of Midlands Prison*);
>
> (iii.) In the case of administrative detention, not involving a court order, a broader range of errors may justify release particularly if they go to jurisdiction (see *G. E. v. Governor of Cloverhill Prison* [2011] IESC 41 at para. 31; *Joyce v. Governor of Dóchas Centre* [2012] 2 I.R. 666); but subject to an overall consideration of whether release is a proportionate response to the error identified (*Grant*).

30. The present application falls firmly into the third category, where the bar is, not low, but relatively lower; and in fairness to Mr. Moore he ultimately accepted that in his submission. However because of the conclusions I have reached on the question of amendment, it is not in fact necessary for me to make a final finding as to whether the error in the original certificate was of such a nature as to justify release under Article 40.4.

Should the respondents be permitted to amend their certificates?

31. The jurisdiction to allow amendment of a return to a provisional order of *habeas corpus* is a very ancient one.

32. The earliest case made available to me to this effect is noted, untitled, in Anon. (1673) 1 Mod. 102-103, where "*want of averment of the matter of fact, may be amended in a return in court … So it was mended*" (with a side-note referring to 1 Ld. Raym. 580, 603 and 1 Stra. 391). Those cases, which were decided subsequently, in 1699 and 1720 respectively (the reference being added by the reporter), do not appear to be directly in point. The latter case reported in Lord Raymond's Reports is the interesting and already-referred to decision in *R. v. Davison*, which holds that bail may be granted in *habeas corpus* proceedings, and that on the conclusion of the proceedings the prisoner (on bail) is to be either "*discharged*" or "*recommitted*".

33. An instance of amendment of a kind occurred in *R. (Emerton) v. Viner* (1674) 2 Levinz 128, where a defective return was apparently cured by oral evidence - unusually, in that case, evidence from the "prisoner", who was a thirteen year old girl ("the Damsel" in the report) who preferred to stay with the respondent, Sir Robert Viner, rather than with her guardian aunt or a Mr. Emerton (her "pretended Husband").

34. *Bacon's Abridgment* (1740 ed.), Vol. 3 contains a subheading No. 12, under the main heading of habeas corpus, titled "*Whether any defect in the return may be amended*". Under that sub-heading, it was said that a return may amended before filing, but after the return is filed it is a record of the court and cannot be amended (citing Anon. 1 Mod. 102 and *Viner's case*); although that restriction (no amendment post-filing) does not appear to have been stated in those earlier cases and in one sense is inconsistent with what happened in *Viner*.

35. Subheading No. 3 of the heading in *Bacon's Abridgement* under *habeas corpus* also notes that habeas corpus removes the person

rather than the warrant and that to do the latter requires *certiorari*. Ms. Boyle suggests that this implies an absence of power to amend a warrant in habeas corpus, but that is a misunderstanding. It is the respondent and not the court that is seeking to amend the certificate.

36. This jurisdiction to allow an amendment was relied on in *R. v. Mountnorris* (1795) Ir. Term. Rep. 460, in which the jurisdiction was acknowledged although the amendment in that case was not allowed. In a refreshingly modern statement of the familiar search for balance between judicial impartiality and necessarily interventionist case-management, Chamberlain J. said that "*it would be a dangerous thing to amend this return; it would make amendments endless; and it would make the court act as a counsel for the defendant in pointing out the defects in his return, and in directing how amendments should be made".*

37. Subsequent instances of discussion of this power include *In re Power and Jackson* (1826) 2 Russ. 583; *R. v. Feeny* (1842) 5 I.L.R. 437, and *Ex parte Cross* 1857 2 H. & N. 147. In *Feeny*, reliance was placed on *Bacon's Abridgement* and *Mountnorris* to resist an application to amend. Crampton J. intervened (at p. 439) to suggest that a party cannot amend after filing "*but the Court may*". Burton J referred to *In re Watson* (1839) 9 Ad. & El. 731, 112 E.R. 1389, "*where the Court, after full consideration, allowed a return to be amended after it had been filed"* (p. 438). The marginal note to the report states "*Rex v. Mountnorris*, Ir. T. R. 460, overruled".

38. Re Allen (1860) 30 L.J. Q.B. 38 is a further instance cited in Kevin Costello, *The Law of Habeas Corpus in Ireland* (Four Courts Press, 2006) at p. 73 where the defect was cured by further information rather than by a fresh warrant. Similarly, in *In Re Phipps* (1863) 11 W.R. 730, the Court of Queen's Bench (Cockburn C.J., Crompton and Blackburn JJ.) discharged a conditional order where a second, good, warrant had been obtained after the *ex parte* application. The court noted previous authority *In re Smith* (1858) 3 H. & N. 227, 6 W.R. 440, where a warrant was amended after issue of the writ but before service.

39. A further Irish example where the question of amendment arose tangentially was *R. v. Dillon* (1888) *Judgments of the Superior Courts in Ireland in cases under the Criminal Law and Procedure (Ireland) Act 1887* p. 181, a case involving a host of prominent figures in the political and legal world of the time. The prosecutor was John Dillon M.P., member of the founding committee of the Irish National Land League and later leader of the Irish Parliamentary Party. His counsel was Tim Healy M.P., later the first Governor General of the Free State. The respondent was represented by the Attorney General, Peter O'Brien Q.C., later Lord Chief Justice, and the judge was Christopher Palles, Lord Chief Baron (O'Brien's former pupil master). At p. 187, Palles C.B. states that there was no inconsistency between the order of the court below and the warrant under which the prisoner was detained in that case but "*[h]ad it been otherwise, it might have been cured by a new warrant*". It is not expressly clarified as to whether that new warrant could have been produced in the course of the habeas corpus proceedings.

40. The principle applies elsewhere in the common law world: see *Ex parte Jow* (1948) SCR 37 (Supreme Court of Canada).

41. In *In re Francis* (1963) 97 I.L.T.R. 151, O'Daly J. noted that a bad warrant can be cured by substituting a good warrant "*even after a rule nisi or conditional order*".

42. Dr. Costello's text book relies on *Mountnorris, Feeny and Dillon* as authority for the proposition that such a common law power to amend exists (p. 66). *Re Francis* is also cited in support of the view that the power continues under Art. 40. In a further discussion at pp. 72-74, reference is made to *McMahon v. Leahy* [1984] I.R. 525 in respect of which the learned author comments that "whether late correction is permitted may depend on factors such as the relative seriousness of the illegality, or the extent to which the authorities have been guilty of maladministration".

43. Reference is also made to *The State (Dowling) v. Brennan and Kingston* [1937] I.R. 483 where the possibility of amending the underlying document was doubted in the context of art. 6 of the Free State Constitution, although Costello doubts whether such that possibility should be excluded in the case of applications under Article 40 (as discussed with apparent approval in the opinion of O'Donnell and Clarke JJ. (dissenting) in *O'Farrell v. Governor of Portlaoise Prison* at paras. 9.1 to 9.3).

44. That jurisdiction has also been discussed in a number of recent Irish cases, including *Joyce v. Governor of the Dochas Centre, Miller v. Governor of the Midlands Prison* [2014] IEHC 176 (unreported, High Court, Baker J., 26th March 2014), *Moore v. Governor of Wheatfield Prison, McDonagh v. Governor of Mountjoy Prison* (No. 2) [2016] IECA 32 (unreported, Court of Appeal, Hogan J. (Ryan P. and Mahon J concurring), 17th February 2016), and my own decisions in *Grant v. Governor of Cloverhill* at para. 100 (v), *Donovan v. Governor of Midlands Prison* [2016] IEHC 287 (unreported, High Court, 26th May 2016), *Knowles v. Governor of Limerick Prison* [2016] IEHC 33 (unreported, High Court, 25th January 2016) at para. 45 and *P.H. v. Child and Family Agency* [2016] IEHC 106 (unreported, High Court, 25th February 2016) at paras. 36 to 41.

45. The question has come into focus recently in the Supreme Court decision in *O'Farrell v. Governor of Portlaoise Prison*, a case in which the majority of the court declined to permit a variation of the underlying documentation justifying detention.

46. At least two factors appear to have been relevant. Firstly, the statutory scheme was a self-contained code precluding such variation (see judgment of McMenamin J. at paras. 7 and 72 and Laffoy J. at paras. 1 to 4. McMenamin J.'s judgment appears to assume the existence of an inherent jurisdiction, which was in this instance ousted by the statute).

47. Secondly, there was the factor, noted in McKechnie J.'s judgment at paras. 101 and 102, that the amendment came essentially too late because it arose after the High Court had determined that the detention was not lawful. This emphasises that any amendment should arise in the course of the inquiry and not after amendment has been found to be necessary in order to save the legality of the detention.

48. While *Bacon's Abridgment* and *Mountnorris* emphasised that amendment of a return would only be permitted before the return had been filed, this approach does not appear to derive support from later authorities. One of the objectives of any form of practice or procedure to be adopted in the High Court must be the facilitation of any review of issues by any other forum should that arise. It would be counter-productive in that regard to impose an arbitrary rule about whether amendments can be made before or after filing, because it is in the interests of maintaining a complete record that all appropriate pleadings should be filed, including the certificate prepared in the course of an inquiry under Article 40.4. In my view that certificate should be filed as a matter of course to ensure a complete record, but combining that approach with a view that once filed it cannot be amended would essentially emasculate the jurisdiction to amend. In any event, the view expressed in *Bacon's Abridgment* regarding the non-amendability of records of the court appears to predate modern conceptions of amendment of pleadings and the permissibility of such amendment.

49. Ms. Boyle submits that there is "*no provision allowing documents to be reissued*", a sort of absolutist theory that presupposes that the State can do nothing without positive statutory permission. Such a theory would be ahistorical, because at one point the state had no statutory authority for anything. It would also be illogical. The concept of an organised society presupposes

fundamental enumerated and unenumerated duties and obligations (as well as their somewhat more frequently-mentioned cousins, rights); and the state can take such steps as are not positively prohibited in order to ensure that those duties are complied with. Preparation and correction of paperwork is the least of their powers in this regard.

50. I would reject the submission made by Ms. Boyle that the jurisdiction to amend only arises where the detention is under a court order. That proposition is bereft of authority and would result in the anomalous position that the court could only permit an amendment where the bar for review was set quite high in the first place and thus where amendment was less likely to arise as necessary.

51. I would also reject Ms. Boyle's submission that no amendment allowed by the court can cure a defect if the original documentation was so erroneous as to justify release if left stand on its own. That is again an absolutist theory of personal rights, suggesting that a sort of cold logic of abstract principle must automatically take precedence over all other considerations of law or policy. On that theory, an amendment would never arise except where it would make no difference to the outcome of the case. That again would emasculate the jurisdiction to amend.

52. Having regard to the authorities overall, I would draw the following general conclusions in relation to the power to permit amendment:

> (i.) The court enjoys a power to permit a respondent to amend his or her certificate under Article 40.4. A certificate cannot be amended without leave.
>
> (ii.) That jurisdiction may be exceptionally ousted where the nature of the statutory scheme under which the detainee is held does not permit the variation of any underlying document.
>
> (iii.) The power to give liberty to amend a certificate is not confined to a case where the original certificate has not been filed, or to a case where the original underlying document is a court order.
>
> (iv.) Any amendment must be applied for in the course of the inquiry and that application may be made at any time up to, but not after, it has been determined that the current justification for detention is not adequate.
>
> (v.) If leave to amend is given, a respondent may rely on an amended certificate even if the court subsequently forms the view that original certificate, if left unamended, would not have justified the detention (provided that the court has not already formed and articulated that view prior to the time the amendment is made).
>
> (vi.) Subject to the foregoing, the jurisdiction is a discretionary one, and in exercising it, the court should be mindful of the need for a proportional response to any alleged infirmity in the materials before it.

53. An amended certificate is generally by way of addition to the material before the court, rather than complete substitution, in the sense that the original certificate remains as part of the record of the court, and all documents can be read together to understand the sequence of events. Both are part of the material before the court, although the amended certificate is in a sense the operative document.

54. In the present case, I conclude that I have jurisdiction to permit the amendment, and that it is appropriate to do so, because the primary consideration in terms of the rule of law is that the documentation underlying the detention of the applicants (and other similarly situated persons) should correctly reflect the statutory scheme, which the amended certificates do to a greater extent than the original (although they do not do so perfectly, an issue to which I now turn), and there is no pressing reason of public policy not to permit the respondent to do so.

Are the errors in the amended certificates such as to warrant release?

55. Nonetheless, the amended certificates are not themselves entirely free from difficulty, being headed in each case "warrant of arrest and detention", although it is only the detention that needs to be warranted and not the arrest. The arrests, carried out without warrant, had already taken place when the warrants were issued and for that reason also do not require to be warranted.

56. Furthermore, the warrants attached to the amended certificates have been essentially backdated to the original date of detention. I do not consider this to be correct. Backdating is liable to confuse or mislead and is best avoided (see *Knowles*).

57. In addition, the "amended" warrants were filled in as executed. This also appears to be an error. It was the original unamended warrants that were executed. The amended warrants correct the record but the prisoners were not actually lodged in custody on foot of those amended warrants (although they are now held on those warrants) and therefore the execution part of the amended warrants should have been left blank.

58. However, at least on the first occurrence of errors of this kind, I consider that such errors are minor in the overall context and do not warrant release in accordance with the principle of proportionality (see *Grant*). Ms Boyle submits that the relevance of proportionality is questionable because release on foot of flawed warrants is *ex debito justitiae* (*Moore, per* Kearns P. at p. 12). But proportionality is relevant to the level of error which would properly trigger release. At the same time, in so far as future warrants are concerned, the phrase "Warrant of arrest and detention" is not appropriate. The correct description of the document is a warrant of detention.

Order.

59. For the foregoing reasons I will order as follows:

> (i.) in each case that the respondent have liberty to file and rely on an amended certificate;
>
> (ii.) in each case that the application for release under Article 40 be dismissed;
>
> (iii.) in the case of Mr. Sharma, that the applicant do surrender to custody forthwith in accordance with the warrant attached to the amended certificate in his case, with liberty to apply for any further order that may be required in the event of his failing to do so;
>
> (iv.) in each case that there be a recommendation in favour of the applicant pursuant to the custody issue scheme for the payment of the applicant's costs, to include solicitors and two counsel at all stages of the proceedings.