THE HIGH COURT

[2017 No. 882 S.S.]

IN THE MATTER OF AN INQUIRY PURSUANT TO

ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND 1937

BETWEEN

MERVIN WHITE

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 6th day of November, 2017

1. In this matter, the applicant seeks an inquiry into the lawfulness of his detention at Mountjoy prison pursuant to Article 40.4.2 of the Constitution. He is on bail pending the outcome of the inquiry.

Background Facts

2. The applicant was prosecuted in the District Court for a number of road traffic offences including drunken driving which occurred on 12th October, 2012. On the 10th December, 2014, the applicant was sentenced to two months in prison in his absence. The background is summarised in the judgment of the Court of Appeal in *White v. District Judge Watkins* [2017] IECA 192:

> "[2.] Prior to the 10th December, 2014, the appellant had three times previously failed to attend for sentencing resulting in the matter being marked peremptory for the fourth occasion. The judge asked his legal representative to convey to him that the matter would proceed in his absence. On two of those occasions the appellant offered reasons, being the birth of his child and a seriously ill relative. On this fourth occasion the appellant claimed to have missed the bus and opted not to get a later bus. There were also four failures to appear prior to the plea being entered."

3. Following sentencing, the District Court issued a committal warrant on 10th December, 2014.

4. On the 19th January, 2015, the applicant applied to the High Court for leave to seek judicial review of the order of the District Court. The essential basis of this application was that the District Court had acted without jurisdiction in sentencing the applicant in his absence. In addition to granting leave to bring the judicial review, the High Court ordered "that the proceedings dated the 10th day of December, 2014 hereinbefore referred to be stayed until the determination of the application for judicial review …"

5. Following the obtaining of this order ex parte from the High Court the applicant's solicitor wrote to the Gardaí enclosing a copy of the order, drawing attention to the stay that had been granted and seeking confirmation that the Gardaí would not attempt to execute the warrant pending the determination of the judicial review.

6. On 26th May, 2016, the High Court dismissed the judicial review application. The applicant appealed to the Court of Appeal and the stay was continued pending the appeal. The applicant's solicitor again corresponded with the Gardaí informing them of this fact.

7. On 14th June, 2017, the Court of Appeal dismissed the appeal in the judgment referred to above and continued the stay on execution of the warrant until the 31st July, 2017.

8. On 5th July, 2017, the prosecuting Garda, Garda Niall O'Connor, applied to the District Court to re-issue the warrant. The application was accompanied by a certificate as to non-execution of the warrant which contained a narrative section along the lines I have indicated above and attached the original warrant, the order of the High Court granting leave on the 19th January, 2015, a copy of the judgment of the Court of Appeal and the correspondence from the applicant's solicitor to which I have referred.

9. In the affidavit sworn by Garda O'Connor opposing the within application, he avers that all of these documents were before the District Judge and when the application was called, Garda O'Connor entered the witness box and the District Judge considered the application. Having done so, he stamped and signed the warrant and the court clerk returned the documents to Garda O'Connor.

10. The re-issued warrant is exhibited in the affidavit of the applicant's solicitor grounding this application. It contains a proforma stamp which is applied over some of the printing in the form so that all of it is not entirely legible. It appears to read "I hereby re-issue this warrant … (illegible) six months from this date." It is dated the 5th July, 2017 and apparently is signed by Judge Halpin, a judge of the District Court. The illegible portion of the stamp appears to contain a number of words which could be "for a period of" but that is unclear.

11. Following expiry of the stay granted by the Court of Appeal, the re-issued warrant was executed by agreement on the 8th August, 2017, when the applicant was lodged in Mountjoy Prison.

12. On the 10th August, 2017, the applicant sought and was granted an inquiry into the lawfulness of his detention and he was granted bail pending the inquiry on the following day.

The Arguments

13. The applicant's fundamental contention is that the re-issued warrant is invalid and does not constitute a lawful basis for his continued detention essentially for three reasons.

14. First, the applicant says that the warrant fails to show jurisdiction on its face. He submits that the effect of the decision of this Court (MacMenamin J.) in *Daly v. Judge Coughlan* [2006] IEHC 126 is that the warrant is required to show on its face that the District Judge carried out the statutory inquiry necessary for its re-issue and in the absence of that, it is bad.

15. Secondly, and more fundamentally, the applicant contends that the District Court had no jurisdiction to re-issue the warrant in this case because the sole basis for re-issue is to be found in s. 33 of the Petty Sessions (Ireland) Act 1851 which provides as

follows:

> "33. Whenever the person to whom any warrant shall be so addressed, transmitted, or endorsed for execution, shall be unable to find the person against whom such warrant shall have been issued, or his goods, as the case may be, or to discover where such person or his goods are to be found, he shall return such warrant to the justices by whom the same shall have been issued within such time as shall have been fixed by such warrant, (or within a reasonable time where no time shall have been so fixed,) and together with it a certificate of the reasons why the same shall not have been executed; and it shall be lawful for such justice to examine such person on oath touching the non-execution of such warrant, and to re-issue the said warrant again, or to issue any other warrant for the same purpose, from time to time as shall seem expedient."

16. In support of this submission, the applicant relies on *Buckley v Judge Hamill* [2016] IESC 42. The applicant accordingly says that the only basis upon which the warrant could have been re-issued in this case was if his whereabouts were unknown and it is common case that they were not. As the District Court has no inherent jurisdiction being a creature of statute, it was said, there is no other basis in law for the re-issue of the warrant. This is also borne out by O. 26 of the Rules of the District Court which reflects the provisions of s. 33 of the 1851 Act and provides at r. 11:

> "11. Where a warrant, other than
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> —a warrant for the arrest of a person charged with an indictable offence,
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> —a warrant for the arrest of a person who has failed to appear in answer to a summons in respect of an offence,
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> —a bench warrant for the arrest of a person who has failed to appear in compliance with the terms of a recognisance, or
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> —a search warrant,
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> is addressed, transmitted or endorsed for execution, to any person and he or she is unable to find the person against whom the warrant has been issued or to discover where that person is or where he or she has goods, such person having the execution of the warrant shall return the warrant to the Court which issued the same (within such time as is fixed by the warrant or within a reasonable time, not exceeding six months where no time is so fixed) with a certificate (Form 26.4, Schedule B) endorsed thereon stating the reason why it has not been executed, and the Court may re-issue the said warrant, after examining any person on oath if the Court thinks fit so to do concerning the non-execution of the warrant, or may issue any other warrant for the same purpose from time to time as shall seem expedient."

17. As can be seen from the foregoing, the Rules provide for a form of certificate to be completed explaining the failure to execute the warrant on an application to re-issue same.

18. Thirdly, the applicant argues that in the present case, the statutory certificate was insufficient in that it was unsigned and did not indicate the identity of the author so as to certify the information contained therein. Allied to this point, there is no sufficient evidence that the District Judge conducted the appropriate inquiry prior to re-issuing the warrant.

19. In response to these arguments, the respondent submits that the applicant misconstrues the effect of the judgment of the Supreme Court in *Buckley* which is not authority for the proposition that the jurisdiction to re-issue a warrant is solely limited to the circumstances envisaged by s. 33. The earlier authorities such as *R (Shields) v. The Justices of Tyrone* [1914] 2 I.R. 89 and *State (McCarthy) v. Governor of Mountjoy Prison* (Supreme Court, Unreported, 20th October, 1967) support the proposition that the District Court is not confined to that sole ground in re-issuing the warrant and further that *Buckley* recognises that there may be exceptional circumstances for the valid postponement of the execution of a warrant.

20. It was said that such circumstances must be regarded as existing in the present case. Otherwise the effect of the stay granted by the High Court and the Court of Appeal would be to quash the warrant and it could never be renewed despite the fact that the applicant's judicial review application failed. It was suggested that in the unusual circumstances of this case, an O. 26 certificate could not have been completed because it is designed solely to cater for cases where the whereabouts of the person convicted are unknown.

21. It was submitted on behalf of the respondent that all the necessary ingredients were evident from the face of the warrant to show jurisdiction and that it contains the identity of the convict, details of the offence charged, the penalty imposed, the name of the court that imposed the sentence, the date of conviction and the date of the issue and re-issue of the warrant. Insofar as it could be argued that there was any want in particularity in the warrant, that could be supplied by reference to the documents that accompanied the application to re-issue to which the court was entitled to have regard. The respondent relied on *Miller v. Governor of Midlands Prison* [2014] IEHC 176 in that regard.

22. The respondent also argued that there was a want of proportionality in this Article 40 application which operated to defeat it and cited *Grant v Governor of Cloverhill Prison* [2015] IEHC 768 in support of that proposition. In the present case, there is no challenge brought by the applicant to the validity of the warrant by way of judicial review, which would be the appropriate procedure.

Use of the Article 40 Procedure

23. In his judgment in *Grant*, Humphreys J. considered the relevant principles to be applied in Article 40 applications having distilled these from the authorities (at para. 100):

> "(i) Error on the face of the record must go to the basis of jurisdiction (G.E. para. 31). But an error or omission on the face of the record may be corrected by reference to some other document with which the instrument justifying the detention may be read (*Joyce v. Governor of Dóchas Centr*e at pp. 678-679; *Carroll v. Governor of Mountjoy Prison* [2005] 2 I.R. 296).
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> (ii) Where the detention arises under a court order, the grounds for seeking Article 40 relief are limited to a flaw appearing on the face of the record, an absence of jurisdiction (in the strong sense that the court could not in any circumstances have made the order complained of), or a fundamental denial of justice or fundamental flaw, especially having regard to the availability of alternative, more appropriate, remedies such as judicial review (*Ryan v. Governor of Midlands Prison* [2014] IESC 54 at para. 18, *FX v. Clinical Director of the Central Mental Hospital* [2014] IESC 01).

(iii) This restriction is particularly acute in the context of a convicted person, where the error or flaw must be a particularly fundamental requirement before a court can intervene under Article 40 (*The State (McDonagh) v. Frawley* [1978] I.R. 131.) …

(vi) The foregoing approach can be summarised further as an expression of the principle of proportionality, having regard to the Supreme Court decisions in *Meadows, Mallak and J.C.* A court asked to order release under Article 40.4 may ask itself in essence whether release would be a proportionate response in all the circumstances having regard to the nature of the error identified. …"

24. Some of the authorities referred to by Humphreys J. were more recently considered by the Supreme Court in the *Child and Family Agency v. McG and J.C.* [2017] IESC 9. In his judgment dealing with the availability of the Article 40 procedure, O'Donnell J. referred to some earlier authorities (at para. 9):

"The manner in which the constitutional remedy has been applied has taken account of these changes in the legal landscape. Thus, in *The State (Royle) v. Kelly* [1974] I.R. 259 Henchy J. stated at p. 269:-

'The mandatory provision in Article 40, s. 4, sub-s. 2, of the Constitution that the High Court must release a person complaining of unlawful detention unless satisfied that he is being detained 'in accordance with the law' is but a version of the rule of *habeas corpus* which is to be found in many Constitutions. The expression 'in accordance with the law' in this context has an ancestry in the common law going back through the Petition of Right to Magna Carta. The purpose of the test is to ensure that the detainee must be released if – but only if – the detention is wanting in the fundamental legal attributes which under the Constitution should attach to the detention.'

In *Ryan v. Governor of Midlands Prison* [2014] IESC 54 Denham C.J. quoted this passage and continued at para. 18:-

'18. Thus the general principle of law is that if an order of a court does not show an invalidity on its face, and in particular if it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of *habeas corpus* is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In such circumstances the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw.

[10.] The grounds for challenging the validity of orders made has expanded exponentially since the remarks in *The State (Royle) v. Kelly* [1974] I.R. 259 were made. But in most cases Article 40.4 cannot be invoked as an alternative speedier and sometimes more costly and disruptive route to a conclusion which may require the careful analysis by way of judicial review of the validity of an order. For my part I accept the observations of Henchy J. in *The State (Aherne) v. Cotter* [1982] I.R. 188 that the High Court hearing an application under Article 40.4 does not have jurisdiction to quash orders of inferior courts or administrative bodies. That goes back to the fundamental nature of the remedy: its strength lies in part in its limitation. However, the court in an exceptional case has the capacity to direct the release of the applicant notwithstanding the existence of the order, in the same way in which in an exceptional case, post-conviction, it may proceed to direct the release of an individual notwithstanding the existence of an order convicting him or her which has not been set aside on appeal in the circumstances considered by Henchy J. Any such case however is exceptional and the breach must be so fundamental that the obligation of the administration of justice and the upholding of constitutional rights requires the court to proceed in that fashion."

25. O'Donnell J. noted at para. 14:-

"Where it is contended that someone is in unlawful custody, and therefore an inquiry under Article 40.4 should be commenced, but where the contention depends on an assertion on the invalidity of the order detaining the person on judicial review grounds, then in most if not all cases I consider that the greater flexibility of remedy of judicial review, of which s. 23 is perhaps a specific statutory example make it more appropriate that the court would proceed, expeditiously by way of judicial review so that the flexibility of the remedy, and in child care cases the specific jurisdiction under s. 23 would be clearly available to it."

26. Similar views were expressed by Charleton J. in the course of his judgment where he said (at para. 27):

"In *Ryan v. the Governor of Midlands Prison* [2014] IESC 54, the issue before this Court was the applicability of enhanced remission to a prisoner serving a sentence. The application had been preceded by correspondence. This Court found that there was no defect on the face of the order and that *habeas corpus* did not apply. Denham C.J. quoted *F.X. v. Clinical Director of the Central Mental Hospital* [2014] 1 I.R. 280:

'65. In general, if there is an order of any court, which does not show an invalidity on its face, then the correct approach is to seek the remedy of appeal and, if necessary, apply for priority. Or, if it is a court of local jurisdiction, then an application for judicial review may be the appropriate route to take. In such circumstances, where an order of the court does not show any invalidity on its face, the route of the constitutional and immediate remedy of *habeas corpus* is not the appropriate approach.' "

27. Charleton J. referred with approval to earlier comments by Denham C.J. in Ryan:

" '15. The proposition that not every defect or illegality attached to that detention will invalidate that detention has long been established.

16.This is not a novel exposition of the law. In *McDonagh v. Frawley* [1978] I.R. 131 at 136 it was stated:

'The stipulation in Article 40, s. 4, sub-s. 1, of the Constitution that a citizen may not be deprived of his liberty save 'in accordance with law' does not mean that a convicted person must be released on *habeas corpus* merely because some defect or illegality attaches to his detention. The phrase means that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law. For habeas corpus purposes, therefore, it is insufficient for the prisoner to show that there has been a legal error or impropriety, or even that jurisdiction has been inadvertently exceeded….'

> [29.] As the law stands, an applicant for *habeas corpus* who has been through a lawful process whereby there is detention in accordance with legal form, must show the following in order to obtain immediate release: that the warrant is fundamentally flawed, subject to the entitlement of the High Court conducting the enquiry to seek other documents to clarify any want of form, ambiguity or error as in *Miller v. the Governor of Midlands Prison* [2014] IEHC 176 and *M.C. v. the Director of Oberstown Detention School* [2014] IEHC 222; or that the court did not have jurisdiction to make the order impugned; or that there was such a fundamental and egregious denial of procedural rights as entirely stripped the court of its jurisdiction. The Constitution requires that the remedy in Article 40.4 is not to be used to usurp the structures which it has set up or to operate as a parallel jurisdiction out of context with the functioning of the courts in the making of orders and the appeal of those orders."

28. In *Ryan v. the Governor of Mountjoy Prison* [2017] IEHC 207, I referred to some of these authorities and noted (at para. 40):

> "All of this serves to underscore the fact that the procedure by way of Article 40 is suitable for cases where the instrument of detention is so clearly flawed on its face that it cannot amount to a justification of that detention or the procedure by which it was obtained was so fundamentally defective as to amount to a basic denial of justice."

Discussion

29. The above principles are clearly applicable to the facts in this case involving as it does post conviction detention. Leaving to one side the contention that the warrant is flawed on its face, the essential case made by the applicant here is that the District Court had no jurisdiction to re-issue the warrant in the circumstances of this case. In his submissions however, the applicant fairly concedes that "it would appear open to the District Court to simply issue a fresh committal warrant following the resolution of the judicial review proceedings, rather than re-issuing a stale one", (at para. 48).

30. The applicant contends that the effect of the decision of the Supreme Court in *Buckley* is that the District Court cannot re-issue a warrant where the whereabouts of the person concerned are known. The respondent contends that this is an erroneous interpretation of *Buckley* which again was an application for judicial review. The Supreme Court recognised that there are exceptions and there are earlier authorities the contrary. As the Supreme Court pointed out in *C.F.A. v. McG.*, even if I were to come to the conclusion that the applicant is correct on this point, I cannot quash the warrant. This is quintessentially a judicial review point on the issue of jurisdiction.

31. As such, it seems to me in the light of the authorities to which I have referred that it is not a point that could or should be considered by the court within the confines of an Article 40 application. As the Supreme Court has made clear, Article 40 is not an alternative remedy to judicial review. It is confined to much more narrow circumstances than may properly be the subject matter of a judicial review application. Nuanced arguments of the kind that are advanced here in relation to the jurisdiction of the District Court seem to me to fall well outside the ambit of what the court is required to consider in an Article 40 application.

32. The same considerations necessarily apply to the applicant's argument that there is insufficient evidence before this Court to establish that the District Court was correct in deciding to re-issue the warrant.

33. It appears to me therefore that the only remaining issue with which I am concerned is whether the re-issued warrant is on its face invalid, such that it cannot amount to a justification of the detention under challenge here. In this respect, the applicant relies on the decision in *Daly* which he says is on all fours with this case. The first point to note about *Daly* is that it too was an application for judicial review and not an Article 40 application.

34. The applicant was convicted of certain offences in the District Court on 19th June, 2001, and was sentenced to six months imprisonment. He appealed to the Circuit Court and on 19th November, 2003, his appeal was struck out. On 17th December, 2003, the warrant was re-issued by the District Court but not executed. A further application to re-issue the warrant was granted on 18th May, 2005, and the respondent purported to re-issue the warrant for a period stated on the face of the warrant to be "within six months" of the date of issuing.

35. As noted by MacMenamin J., this was plainly an error as the warrant was in fact re-issued seventeen months after the previous re-issue. It could not therefore have been issued "within six months". The court observed that in the affidavit sworn on behalf of the respondent opposing the application, no detail was provided as to what transpired at the renewal hearing. In fact as noted by MacMenamin J. (at para. 18), the evidence was confined to a single sentence in the replying affidavit of the Garda Sergeant which simply said that he made an application and the respondent re-issued the warrants.

36. Here of course the situation is quite different with detailed evidence as to what precisely was put before the District Court when the warrant was re-issued. The court referred to the earlier case of *Brennan v. Windle* [2003] 3 I.R. 494 where there was a failure to give evidence of the contents of the certificate that led to the re-issue. MacMenamin J. said (at para. 16):

> "The District Court Rules and s. 33 of the Act of 1851 place an obligation on applicants for the re-issuing of a warrant to do so with a certificate and/*or* evidence on oath".

37. The court went on to note (at para. 21):

> "[21.] But no evidence is adduced as to what precisely was stated to the District Court judge. This is of particular importance in the absence of a certificate. Nor is there any evidence of the reasoning of the District Court judge of the basis of the evidence adduced before him. And this absence of evidence arises in the context of an order which is *prima facie* bad on its face in that it recites that it was renewed within six months when it plainly was not."

38. All of this is quite different from what occurred in the present case where detailed evidence has been put before the court of what was available to the District Court when this warrant was re-issued. Unlike in *Daly*, the warrant in the present case is not *prima facie* bad on its face but on the contrary, is apparently valid. Although it is correct to say that the court considered that as a general principle the warrant should exhibit on its face the requisite inquiry into the application for re-issue that had been carried out, even if it could be said in the present case that there is a failure on the part of the warrant to set those matters out, which I do not necessarily accept, I am satisfied, as the authorities demonstrate, that I am entitled in an Article 40 application to have regard to the totality of the documents that where available to the District Court Judge which are to be read in conjunction with the warrant itself.

39. Those documents to my mind demonstrate the nature of the evidence available to the District Court and the inquiry carried out.

As I have said, in addition to these matters the court in *Daly* was clearly influenced to a significant degree by the fact that the warrant was manifestly bad on its face in asserting the existence of a state of affairs which clearly could not have existed.

40. I am therefore of the opinion that the warrant in this case does not contain an error on its face of such a fundamental nature that could warrant the court in reaching the conclusion that the applicant's detention is unlawful. Even if I were to regard the warrant as containing any error because the wording of the re-issuing stamp is not entirely clear, it does not appear to me to be such a default of fundamental requirements that the detention may be said to be wanting in due process of law, as explained by the judgment of the Supreme Court in *McDonagh v. Frawley*.

Conclusion

41. For the reasons I have explained, I am satisfied that the applicant has not demonstrated any fundamental error in the warrant of the nature and type that could warrant the intervention of this Court under Article 40. The general issue of jurisdiction raised by the applicant is I believe not one he is entitled to raise by way of Article 40 application. That appears to me to be the clear import of the authorities to which I have referred. The appropriate means of ventilating that issue is by way of an application for judicial review.

42. Accordingly, I am satisfied that the detention of the applicant is in accordance with law and I refuse this application.