Neutral Citation: [2015] IEHC 168

THE HIGH COURT

[2015 No. 348 SS]

IN THE MATTER OF AN APPLICATION FOR AN ENQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND 1937

BETWEEN

DAMIEN O'NEILL

APPLICANT

AND

THE GOVERNOR OF WHEATFIELD PRISON

RESPONDENT

JUDGMENT of Kearns P. delivered on the 12th day of March, 2015

This case arises out of the jailing of the applicant, a 'water rates protester', in connection with breaches of a High Court order which prevents persons having notice thereof (a category which included the applicant) from transgressing a 20 metre exclusion zone at sites where agents of GMC/Sierra were installing water meters.

On the 2nd October, 2014, in proceedings entitled *GMC/Sierra Ltd v. McGetttrick & Others* [2014/8118P], GMC/Sierra Ltd. obtained an injunction ordering that nine named defendants and "all persons to whom knowledge of this order might come be restrained from assaulting, harassing, intimidating, endangering or otherwise unlawfully interfering with or obstructing any person working on behalf of the plaintiff and who is lawfully installing water meters in the Dublin City region".

By notice of motion returnable for the 21st October, 2014, GMC/Sierra Ltd. sought the attachment and committal of ten individuals, including the applicant, for breach of the aforementioned injunction (hereinafter referred to as the "first set of attachment and committal proceedings"). These individuals were not the original defendants to the plenary proceedings. This interlocutory matter was adjourned to the 5th November, 2014 and was subsequently adjourned on many dates thereafter. On the 16th January, 2015, this motion was adjourned generally by GMC/Sierra Ltd.

On the 5th November, 2014, Gilligan J. ordered that the defendants, the respondents to the aforementioned notice of motion, including the applicant, and all persons having knowledge of the order be restrained from approaching closer than 20 metres to the workstations where the water meters were being installed, and from obstructing the access and egress of the work vehicles of GMC/Sierra Ltd.

By notice of motion returnable for the 19th November, 2014, GMC/Sierra Ltd. sought the further attachment and committal of four individuals, including the applicant, for breach of the interlocutory order of Gilligan J. of the 5th November, 2014 (hereinafter referred to as the "second set of attachment and committal proceedings"). That matter was heard on the 24th November, 2014 and determined by the court on the 26th November, 2014.

By notice of motion returnable for the 18th December, 2014, GMC/Sierra Ltd. sought the attachment and committal of seven individuals, including the applicant, for breach of the interlocutory order of Gilligan J. of the 5th November, 2014 (hereinafter referred to as the "third set of attachment and committal proceedings"). This matter was adjourned to the 16th January, 2015 for mention.

On the 16th February, 2015, the applicant appeared before Court 21 in the Criminal Courts of Justice, Parkgate Street, Dublin 8 in respect of attachment and committal proceedings instituted by GMC/Sierra Ltd. for alleged breaches of an interlocutory order of Gilligan J. dated the 5th November, 2014. GMC/Sierra Ltd. alleged that the breaches of said order occurred on the 5th, 8th and 9th December, 2014. On the 19th February, 2015, after a hearing which all parties agree was conducted with exemplary fairness by Gilligan J., the applicant was found to have breached the order of the 5th November, 2014 on the 8th and 9th December, 2014.

The applicant and Mr. Paul Moore were sentenced to 56 days imprisonment. Ms. Bernie Hughes, Mr. Derek Byrne and Mr. Michael Batty were sentenced to 28 days imprisonment. A stay was placed on the committal order concerning Mr. Michael Batty as he was not present but had indicated, via his solicitor, that he would provide an undertaking to the court to abide by its orders.

Immediately thereafter, the applicant was arrested on foot of the committal order herein and lodged in Mountjoy Prison on the 19th February, 2015. On the 20th February, 2015, the applicant was transferred to Wheatfield Prison.

By order of the High Court (Haughton J.), made on the 6th March, 2015 it was ordered that an inquiry under Article 40 of the Constitution be held into the detention of the applicant in Wheatfield Prison and that the Governor produce in this Court the body of the applicant and certify in writing the grounds of his detention.

It is appropriate at this stage to refer to the terms of the order of committal in this case:-

"Order 44 Rule 2 THE HIGH COURT

ORDER OF COMMITTAL

IN CASES OTHER THAN JUDGMENT DEBTORS

2014 No 8118 P

BETWEEN

GMC/SIERRA LIMITED

PLAINTIFF

AND

COLIN MCGETTRICK DEREK BYRNE MARK LANGELLA STEVEN STOUT AUDREY CLANCY MARK EGAN AUSTIN DWYER LISA O'LOUGHLIN LEAVEY AND MICHAEL BATTY

DEFENDANTS

To the Commissioner and members of An Garda Síochána, greeting.

> Whereas lately in the High Court it was adjudged that Damien O'Neill for default by his failure to comply with the Order of the High Court the 5th November 2014 was guilty of contempt of the High Court and do stand committed to prison for the said contempt
>
> You are hereby commanded to arrest the said Damien O'Neill and thereupon to lodge him in Mountjoy Prison there to be detained for 56 days
>
> And in what manner you have executed this order make appear to the High Court immediately after the execution hereof and have you then and there this order.
>
> BY ORDER THE HONOURABLE SUSAN DENHAM CHIEF JUSTICE OF IRELAND THE 19TH DAY OF FEBRUARY 2015
>
> (Signed by Registrar)
>
> REGISTRAR
>
> This order was issued by Eames & Co Solicitors for the Plaintiff"

PRELIMINARY POINT RE JURISDICTION OF THIS COURT

While no point was taken on behalf of the respondent on this issue, the Court would of its own volition wish to give expression to its reluctance to review the procedures adopted in another division of the High Court, particularly when, in the instant case, there has been universal acceptance that the trial judge dealt with this matter with great fairness and efficiency and where no appeal was brought from either the conviction or sentence. That reluctance derives from the comity which exists between courts exercising co-ordinate jurisdiction. However, that such a jurisdiction exists was made plain by the Supreme Court in *FX v. Clinical Director of the Central Mental Hospital* (2014) IESC 1, and is explained in passages in the judgment of Denham C.J. from paras. 52 – 70.

The Court draws some solace from the following passage in Costello (*The Law of Habeas Corpus in Ireland* (Four Courts Press 2006) at p 237:-

> *"In In re Aikin (1881) 8 LR IR 50,53, Fitzgerald J. dismissed a habeas corpus challenge made to the Queen's Bench Division against an order of attachment made by the Lord Chancellor: 'The present case comes before us as a division of the High Court of Justice, and there is a comity between the several divisions of the High Court of Justice exercising co-ordinate jurisdiction which ought to lead (the court) in the present case from questioning the procedure or practice of another Division.' It is, as we have seen earlier, arguable that an analogous prohibition against the use of Article 40.4.2 to review orders of detention made by the High Court has been perpetuated under the Constitution. But even if this is so, two exceptions to the general prohibition against habeas corpus review of High Court-directed committal may be identified. Firstly, the principle appears not to apply where the ground of challenge relates, not to the actual decision of the High Court, but to the subsequent execution of that order. A complaint which is concerned with the subsequent administration of the order does not trespass on the correctness of the decision of the committing High Court judge, and is therefore outside the rationale of the rule."*

The present case is likewise one which does not trespass on the correctness of the decision of Gilligan J. and therefore the Court is satisfied it has the appropriate jurisdiction to address the issues raised.

SUBMISSIONS

The various submissions on behalf of the applicant may be summarised as follows:-

It is submitted that the sole instrument forming the basis for the detention is lacking in material respects required by Order 44, rule 2 of the Rules of the Superior Courts. Order 44, rule 2 requires that the order of committal shall be in the Form No. 12 in Appendix F, Part II thereof and thus requires that the contemnor "shall be lodged in prison until he purge his contempt and is discharged pursuant to further order of the [High] Court." (Emphasis added). It was submitted that the order which commits the applicant to Mountjoy Prison does so for a definite period of 56 days without any reference to the option of purging contempt and thereby fails to reflect the requirements set out within Order 44, Rule 2 of the Superior Court Rules, whereby the contemnor may purge his contempt and secure his discharge by a subsequent order of the court.

It was argued that Gilligan J. had intended that the sentence be both punitive *and* coercive. As such it was submitted that there is an error on the face of the record and, at a minimum, a fundamental non-compliance with the very rule mentioned on the face of the detaining order.

By way of confirmation of the judge's intent and order, the following facts were also relied upon. Mr. Cahir O'Higgins, solicitor, attended court on behalf of Mr. Michael Batty. He submitted a letter from Mr. Batty that indicated his willingness to provide an undertaking and/or sign a bond agreeing to abide by the order of the 5th November, 2014, thus purging his contempt. Gilligan J. adjourned Mr. Batty's case to the 9th March, 2015. It was implicit in the court's statements that Mr. Batty would almost certainly avoid a custodial sentence upon purging his contempt to the satisfaction of the court. Gilligan J. went on to state that the court had

no alternative but to impose a custodial sentence upon the applicant and the three other persons already committed in respect of the breaches of the order of the 5th November, 2014; but stated, by way of clarification of his order of the 19th February, 2015, that if the imprisoned contemnors wished to take a similar course of action to Mr. Batty, "that the door of this court is open to them". He noted the importance of advising the general community that it is open to them to apologise for their contempt and to furnish an undertaking to abide by court orders. Having regard to the aforementioned comments it was argued that the sentence imposed upon the applicant was intended to be primarily coercive. Accordingly, in failing to reflect the fact that the applicant might purge his contempt at any time within the 56 day period, thereby bringing the deprivation of his liberty to an end, it was submitted that there was a fundamental error on the face of the record.

It was then argued that it is unclear whether An Garda Síochána, to whom the detaining order is addressed, complied with the directive contained within the final paragraph of the detaining order, namely to return to court with the executed order once the prisoner had been lodged in prison. It was argued that the respondent must demonstrate that there was full compliance with this aspect of the enforcement procedure and that An Garda Síochána did indeed immediately return to the High Court with the executed order and inform the court as to the manner in which the committal order was executed. There was no such evidence before the Court.

It was contended by counsel that a document pertaining to the detention of an individual, such as in issue here, should contain clear information on its face as to the basis of its jurisdiction, the identity of the person in custody, the identity of the judge that ordered the custody and, in the case of a contempt order, proper particulars as to the finding of contempt. Clarity and precision were required in procedures that can lead to the loss of liberty of an individual and it was argued that the warrant failed to meet the test for showing jurisdiction on its face, as determined by the Supreme Court in *GE v. Governor of Cloverhill Prison* [2011] IESC 41. Instead, the committal order is said to have been carelessly drawn up and not to meet the minimum requirements of such an instrument, as elaborated in the decision of the High Court (Peart J.) in *JOG v. Governor of Cork Prison* [2007] 2 I.R. 203.

The order of committal in this instance purports on its face to have been ordered by "The Honourable Susan Denham, Chief Justice of Ireland on the 19th day of February, 2015". As a judge of the High Court had ordered the committal of the applicant, it is argued that, whatever about the inclusion of the name of the Chief Justice on the order, the omission of any reference to the sentencing court and judge is tantamount to an error on the face of the record, given that the detainer must be aware of the authority under which he is to detain the person. Moreover, the detainee ought to be entitled to inspect the document and be aware of precisely the lawful authority under which he is being held (per the dicta of Peart J. in *Macharia v. Governor of Cloverhill Prison* [2014] IEHC 387.)

It was also argued that the applicant is not properly identified in the committal order. The applicant is not a named defendant to the proceedings as listed in the heading. The applicant is not identified by means of his address, date of birth or any other particulars. Thus it is said that the Governor of Wheatfield Prison can not be satisfied on foot of the information provided in the committal order that the applicant is adequately identified for the purpose of detaining him.

Moreover, it is claimed there is scant information provided to the Governor of Wheatfield Prison in respect of the particulars of the contempt. There is no reference to the High Court order of the 5th November, 2014. Further, the committal order is insufficient as to cause, in circumstances where the particulars of the applicant's purported failure to comply with the aforementioned order are not provided. Gilligan J. had found some allegations of contempt to have been proved but rejected others. This was not reflected in the order of committal order. The warrant did not contain such requisite information as would satisfy an examination as to jurisdiction on the face of the warrant as per Hogan J. in *Joyce v. Governor of the Dóchas Centre* [2012] 2 I.R. 666.

In certifying the grounds of detention in the context of this inquiry, the Governor referred only to the committal warrant dated the 19th February, 2015. The order of the court dated the 19th February, 2015 was not relied upon as forming part of the grounds justifying the detention.

No replying affidavit was filed on behalf of the respondent putting in issue any of the facts deposed to in the grounding affidavit sworn on behalf of the applicant.

In particular, Sean Gillane, S.C., for the respondent, accepted that the order made by Gilligan J. was "partly punitive and partly coercive". Further, he accepted that the form of committal order was not in conformity with the provisions of Order 42, rule 2 of the Rules of the Superior Courts.

Mr. Gillane contended that any omissions or errors were not of such magnitude as to invalidate the warrant and that the court should have regard to the observations of O'Higgins C.J. in *The State (McDonagh) v. Frawley* [1978] I.R. 131 and hold that, for *habeas corpus* purposes, it is insufficient for the prisoner to show that there has been a legal error or impropriety in the committal order because the applicant's detention was effectively in accordance with law.

DECISION

To begin with, it is clear that the warrant, although it purports to comply with the requirements of Order 44, rule 2, does not in fact do so. That rule provides:-

> *"An order of committal shall direct that upon his arrest the person against whom the order is directed shall be lodged in prison until he purges contempt and is discharged pursuant to further order of the court, and shall be in the Form No 12 in appendix F, Part II."*

The form in that appendix reads as follows:-

> "Order 44, rule 2 No 12
>
> **ORDER OF COMMITTAL IN CASES OTHER THAN JUDGMENT DEBTORS**
>
> *[Heading as in Form No 1]*
>
> To the Commissioner and members of the Garda Síochána, greeting.
>
> Whereas lately in the High Court it was adjudged that CD, for default *[here shortly specify*] was guilty of contempt of the High Court and do stand committed to prison for the said contempt.

> You are hereby commanded to arrest the said CD and thereupon to lodge him in _____ Prison, there to be detained until he purge his said contempt and is discharged pursuant to further order of the High Court. And in what manner you have executed this order make appear to the High Court immediately after the execution hereof and have you then and there this order.
>
> BY ORDER, &c.
>
> This order was issued, &c [*as in Form No 1*]."

It is plain from the face of the warrant that it departs from the prescribed form and was changed in format with the result that it fails to specify a method whereby contempt can be purged. The form has been altered to a form appropriate to an exclusively punitive order. While it is clear from the terms of Order 125 Rule 3 of the Rules of the Superior Courts that forms in the Appendices may be amended or modified as circumstances require, the variations and amendments were other than those which might have given effect to the intent and order of Gilligan J. This Court was not asked to express a view as to whether both a specific term *and* an opportunity for earlier release by the purging of contempt could be provided for in an amended form 12. In any event such an option was not considered in this case in which the order of Gilligan J. was treated as punitive only. In the events which transpired, that portion of the form providing for the purging of contempt was stripped out of the committal order. For reasons elaborated further on in this judgment, the Court regards this as one of the decisive points in this application because that error could be seen as having significant potential consequences for the applicant.

No real argument of substance was advanced to support the contention that the opaque words contained in form 12 in relation to some obligation of the gardaí to 'report back' to the Court in respect of the execution of the committal warrant are such as to warrant releasing the prisoner. In the Court's view, that would be an illogical and absurd outcome in circumstances where the prisoner had been duly tried, convicted, sentenced and committed on foot of an otherwise valid committal order. The Court rejects that ground of challenge. It may however suggest that the forms in the Appendices need updating and modernisation.

As regards omissions, the Court is of the view that omissions of a significant type are present in the committal order. The committal order does not state the date of the offence of contempt committed by the applicant, nor does it record the date of his conviction. No detail of the form of contempt is stated (i.e., failing to remain outside a 20 metre zone from where the plaintiff's employees were working) nor do particulars of non compliance appear in the warrant.

The warrant also fails to indicate what court and judge made the order in this case. The inclusion of the reference to the Chief Justice was not explained by reference to any particular rule of court, (a basis for such inclusion may perhaps be found in Order 84, Rule 1(1), although that reference merely states that an order of attachment shall be "witnessed" in the name of the Chief Justice). No explanation was offered as to how the naming of the Chief Justice might dispense with the necessity to name the particular court or judge who had imposed the sentence.

Reference was made by counsel for the applicant to the decision of the High Court (Peart J.) in *JOG v. Governor of Cork Prison* [2007] 2 I.R. 203, a case in which Peart J., in directing the release of the applicant, held that the warrant for arrest and committal of the applicant was "entirely unsatisfactory". It had been carelessly prepared and failed to record what was ordered and intended to be ordered by the Circuit Court Judge. A person detained was entitled to know from the document detaining him why and for how long he was being detained so that he might properly take legal advice regarding the legality of his detention.

Significantly, Peart J. stated at p. 213 of the judgment:

> *"It cannot be acceptable to say, such as in the present case, that the infelicity with which the warrant has been prepared does not matter because after all the applicant was in court and accepted that he breached the order and knew that he was being punished for that by a period of imprisonment of four weeks.*
>
> *This warrant lacks the integrity worthy of a document whose effect is to authorise the deprivation of a person's liberty. On this ground alone I am not prepared to regard this warrant as a sufficient authority for his detention."*

In *GE v. Governor of Clover Hill Prison* [2001] IESC 41 the order in issue was a detention order addressed to the Governor of Clover Hill Prison and signed by an Immigration Officer who invoked the powers conferred on him by s.5(2) of the Immigration Act 2003. Denham C.J. in the course of her judgment explained the rationale for clarity in such documents, stating at para. 31:-

> *"A document, such as in issue here, should contain clear information on its face as to the basis of its jurisdiction. This information is required so that it be available to, for example, (a) the person in custody, such as the appellant; (b) the governor of the prison, or any other, who is holding a person in custody; and (c) the court which is requested to enquire into the custody pursuant to Article 40 of the Constitution."*

In commenting upon these observations, Hogan J. stated as follows in *Joyce v. Governor of The Dóchas Centre* [2012] I.R. 678:-

> *"32. This passage shows that a warrant, whether of arrest or detention, must contain such requisite information as would satisfy an examination as to jurisdiction on the face of the warrant by, for example, a judge of this court exercising the Article 40.4.2 jurisdiction.*
>
> *33. Denham C.J. went on further to expressly approve, at p.9, of a passage from the judgment of Parke B. in the noted 19th century decision, Gosset v. Howard [1845] 10 QB 411, which stated, at p.431, that 'the cause must be contained in the warrant'. When the attention of counsel for the respondent was drawn to these passages in the judgment of Denham C.J., he accepted, without making any concession on the point, that he could not properly assist me by way of making any further submissions.*
>
> *34. For good measure I would also note that in Ex parte Terraz [1878] 4 Ex. Div. 63 at p.69, Huddleston B. said that when committal warrants are 'brought up on the habeas corpus' so that the applicant is held under a warrant of execution then:-*
>
> *'… the court can only judge by what appears on the warrant whether a crime has been committed, and whether the alleged criminal is properly held in custody.'"*

A little later, again at p.678, Hogan J. continued as follows:-

> *"36. If in GE v. The Governor of Clover Hill Prison [2011] IESC 41, the Supreme Court held that an arrest warrant did not show jurisdiction on its face by disclosing the reason for the arrest, this must be true a fortiori of a committal warrant which fails to give any details whatever of the offence of which the applicant stood convicted, not least given that this is required by the Gosset v. Howard [1845] 10 QB 411 principle which, as we have just seen, was in turn expressly approved of in GE v. The Governor Clover Hill Prison. The position might well be different if there was in existence a separate conviction order which contained those details of the offence of which the applicant was convicted and which was offered as a justification for the detention. Where, however, as here, the only document forming the basis of the detention is a committal warrant of the kind we have just described, this must be adjudged to be defective and as not forming a sound basis in law for the applicant's detention. This, after all, is also the point made by Huddleston B. in Ex parte Terraz [1878] 4 Ex. Div. 63."*

The postscript to this judgment is something I would also wish to refer to. In it, Hogan J. stated:-

> *"38. Just as I was about to deliver my judgment at 2.00pm on the 11th July, 2012, counsel for the respondent informed me as a courtesy that a full version of the committal warrant, duly signed and authenticated, had been prepared overnight, although he conceded that he did not yet have the document to hand. While I thanked him for his courtesy in this regard, it seemed to me that I was obliged to decide the application based solely on the information actually in evidence before me at the hearing. I then proceeded to give judgment in the manner just indicated."*

I make reference to this postscript to the judgment of Hogan J. merely to stress that no such initiative was forthcoming in the instant case. Nor was the instant case one which fitted within the sensible parameters of the recent decision of Baker J. delivered in *Miller v. Governor of the Midlands Prison* [2014] IEHC 176, a case in which, having alluded to a number of authorities which refer a possible joinder of a warrant with other documents in evidence, stated as follows at para. 27:-

> *"These judgments clearly point to the court having a jurisdiction to hear evidence which can explain the facts in the warrant and are authority for that proposition. The jurisdiction of the court, however, is discretionary and in McMahon v. Leahy [1984] 1 I.R. 525, McCarthy J. at p.547, was not prepared to 'over look the careless approach and lack of attention to detail' which he found on what was, in that case, an extradition warrant. The court indicated that one might overlook 'patent errors in a printed document' but that there were circumstances when this would not be exercised in favour of the respondent. I am not satisfied that there exists any unusual or special circumstances that might require me to exercise my discretion in this case not to admit the additional evidence, especially as I can do so without any oral or extrinsic evidence or any explanation which cannot be gleaned from the face of the documents offered by the respondent."*

Baker J. went on to state:-

> *"In the case of the short form warrant, I am of the view that it is possible without hearing any extrinsic evidence or making any extrapolation of fact to directly link the short form warrant, which contained express individual signifiers, to the Circuit Court orders themselves as certified by the County Registrar, and these orders contained the same record numbers as appear on the face of the short term warrant.*
>
> *In the circumstances, and having regard to clear authority on the subject that the court may seek and find clarification and assistance in the records of the court to assist in interpreting the grounds for detention, my view is that the short form warrant when taken together with and joined to the Circuit Court orders forms a sufficient basis for the detention of the applicant. I say this expressly because it is possible to join these documents without having to engage with any extrinsic evidence and because the short form warrant contains, on its face, sufficient and unique matters which enable the link to be made."*

Again, in the present case, no attempt was made on the part of the respondent to join the order made by Gilligan J. to the bare warrant certified as grounds for detaining the applicant by the respondent. Indeed it was stated that no benefit would be derived from such joinder on the facts of the instant case. The Court would regard the warrant taken alone as it must be, as so deficient by reason of omissions as to render it invalid for this reason also.

In spite of all these difficulties, Mr. Gillane urged the court to exercise "its discretion" so as to refuse the relief sought herein, relying for that purpose on the following passage from a decision of the U.K. Court of Appeal in *Nicholls v. Nicholls* [1977] WLR 314 in which Lord Woolf, having adverted to the power under the Rules of the Superior Courts in Great Britain (which give the court the power to rectify procedural defects both in the procedure leading up to the making of a committal order and after a committal order has been made), stated as follows:-

> *"Like any other discretion, the discretion provided by the statutory provisions, must be exercised in a way which in all the circumstances best reflects the requirements of justice. In determining this the court must not only take into account the interests of the contemnor but also the interests of the other parties and the interest of upholding the reputation of civil justice in general. Today it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged contemnor. The court itself has a very substantial interest in seeing that its orders are upheld. If committal orders are to be set aside on purely technical grounds which having nothing to do with the justice of the case, then this has the effect of undermining the system of justice and the credibility of the court orders. While the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the requirements which does not prejudice the contemnor, to set aside the order purely on the grounds of technicality is contrary to the interests of justice. As long as the order made by the judge was a valid order, the approach of this court will be to uphold the order in the absence of any prejudice or injustice to the contemnor as a consequence of doing so."*

While this Court agrees with these sentiments, it must operate within the jurisprudence which has evolved in relation to applications for relief under Article 40 of our Constitution. Under that jurisprudence, an applicant under detention is usually entitled to relief *ex debito justitiae* where an error appears on the face of the record. The Court does not have any discretion. In this regard the Court would refer to recent observations made by Denham C.J. in *Caffrey v. The Governor of Portlaoise Prison* [2012] IESC 4, an application pursuant to Article 40.4 by a person serving a life sentence in Ireland pursuant to a transfer order following the imposition of a life sentence in the United Kingdom. At pp. 99-100, para 33 of her judgment, the Chief Justice approved a decision of the High Court in that case as follows:-

> *"As to the notice to vary, the learned High Court Judge stated:-*

> *'What I do not believe can ever happen is that a prisoner, by his consent incidental to the process whereby he is imprisoned, or by failing to take a point as to jurisdiction at the appropriate time, or by apparently acquiescing in the form of his detention, can render what is not in law a valid form of imprisonment into a lawful detention. If a prisoner cannot be detained by a court in accordance with law, then incidental aspects of consent, acquiescence, or delay cannot make lawful what is unlawful. Nor would I believe that the court has any discretion akin to that exercised in judicial review proceedings to refuse to make an order in habeas corpus proceedings. There is only one issue in this kind of inquiry: is the prisoner lawfully detained or not? That admits of only one answer where there is no legal foundation to a sentence of imprisonment.'"*

Similarly in *Simple Imports Ltd. v. Revenue Commissioners* [2000] 2 I.R. 243, there was a challenge to the validity of warrants issued by the District Judge on foot of which officers of the Revenue Commissioners entered and searched a number of premises and seized goods which were alleged to be prohibited and in contravention of customs and excise legislation. It was submitted that it was clear on the face of the warrant that the District Judge had not satisfied himself that there was reasonable cause or grounds for the suspicion of the officer concerned that there were uncustomed or prohibited goods relating to them in the premises, and that the warrants were thus bad on their face and should be quashed on that ground alone. Keane J. (as he then was) stated at p.255:-

> *"Here, the recital was to the effect that it appeared to the District Judge, or he was satisfied, that the officer had 'cause' or a 'ground' – not 'good reason' – to suspect that there were uncustomed goods on the premises.*
>
> *I am satisfied that the submission on behalf of the respondents that, in a case where the warrant itself states that it is being issued by the District Judge on a basis which is not justified by the statute creating the power, the invalidity of the warrant can be cured by evidence that there was in fact before the District Judge evidence which entitled him to issue the warrant within the terms of the statute is not well founded. That proposition seems to me contrary to principle and unsupported by authority. Given the necessarily draconian nature of the powers conferred by the statute, a warrant cannot be regarded as valid which carries on its face a statement that it has been issued on the basis which is not authorised by the statute. It follows that the warrants were invalid and must be quashed."*

It is important to distinguish the situation arising in this case from that which obtained in *The State (McDonagh) v. Frawley* [1978] I.R. 131, a case heavily relied upon by the respondent, in which O'Higgins C.J. observed that when a person is detained for execution of sentence after a conviction on indictment he is *prima facie* detained in accordance with law:-

> *"The stipulation in Article 40, 5.4 sub-5.1, 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 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 person to show that there has been a legal error or impropriety, or even that jurisdiction has been inadvertently exceeded."*

That case concerned a prisoner, who had been duly convicted and sentenced. He complained in his Article 40 application that his detention was unlawful because he was not receiving proper medical treatment in prison. There was no challenge to his conviction and sentence but the statement by O'Higgins C.J. was made in a context where the prisoner had been found by the court to be detained on a valid warrant.

However, the situation in the present case is clearly distinguishable, notwithstanding the similarities of a fair hearing, proper conviction and imposition of sentence. A committal to prison for contempt imposed as a coercive measure contains within it an option whereby the prisoner can procure his early release by purging his contempt. No such option of securing early release arises where, as in *State (McDonagh) v. Frawley*, a sentence had been imposed for a criminal offence. That distinction is critical in the instant case, as it is conceded on behalf of the respondent that Judge Gilligan's order was partly coercive in nature. Unfortunately, the warrant did not provide any indication that contempt could be purged by means of the procedures contained in Order 44, rule 5.

In light of the foregoing the order of committal is deemed to be invalid and the Court directs the immediate release of the applicants.

Post script

As already indicated in this judgment, this Court is most unhappy at the idea of a procedural technicality trumping substantive justice. The notion of justice being frustrated on a technicality is damaging to the concept of justice itself and gives rise to public unease and disquiet. That is particularly the case when all parties in this case, including the water rates protesters themselves, agree that the trial judge conducted the hearing with exemplary fairness and no appeal has been brought against any pat of his order.

Obviously – and as described by Denham C.J. in *FX v. Clinical Director of the Central Mental Hospital* [2014] IESC 01 (at para. 53), - the right to apply to court for release from detention under Article 40 may be seen as "the great remedy" which has "deep roots in the common law". It has a special place in our Constitution and is a right jealously – some might say zealously - fostered and protected in this jurisdiction.

That should not however lead to a situation where technical errors on the face of the record, even errors of more than a trivial kind, can be relied upon in every instance to set aside committal orders in the absence of any prejudice or injustice being demonstrated by an applicant in circumstances where he has been properly tried, convicted and sentenced. That was the view expressed by O'Higgins C.J. in *(McDonagh) v. Frawley* [1978] I.R. 131, a view with which this Court strongly concurs. Ideally, hearings of inquiries under Article 40 should permit rectification of the record during the course of that inquiry, such as, for example, by permitting the filing during the hearing of a long form warrant with all appropriate information. It is clear from the decisions of Hogan J. in *Joyce v. Governor of the Dóchas Centre* [2012] 2 I.R. 666 and, more particularly, of Baker J. in *Miller v. Governor of the Midlands Prison* [2014] IEHC 176 that considerations of this sort featured in those cases. This Court would venture to suggest that the status of Article 40 is enhanced by such an approach.