Neutral Citation Number: [2012] IEHC 517

THE HIGH COURT

[2012 No. 2219 S.S.]

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

ROBERT ALLEN

APPLICANT

AND

THE GOVERNOR OF ST. PATRICK'S INSTITUTION

RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 5th day of December 2012

1. On 23rd November, 2012, the President, on the application of the applicant grounded on an affidavit of his mother, Katrina Allen and John Birmingham, solicitor, made an order pursuant to Article 40.4.2 that the respondent produce the applicant before the Court at 3.00pm on that day and certify in writing the grounds of his detention. As the parties were not ready to proceed at that time, the matter came before me later that day as the weekend duty judge.

2. The Assistant Governor of St. Patrick's Institution certified that the applicant was held pursuant to four warrants of execution issued in Limerick District Court on 6th November, 2012. Each warrant records that the applicant was convicted of an identified offence and ordered to be detained for a period of four months.

3. The respondent sought time to put evidence before the Court from the Garda Sergeant who had been present in Limerick District Court when the applicant was sentenced on 6th November, 2012. For practical reasons, that could not be done until the afternoon of Monday 26th November, 2012. On the evening of 23rd November, 2012, I released the applicant on bail on the same terms and conditions as had applied to the bail granted to him in the District Court prior to conviction and sentence and on his undertaking to return to the High Court at 3.00pm on Monday 26th November, 2012. The applicant returned to Court as he had undertaken.

4. The respondent filed an affidavit from Sergeant Dónal Cronin. The hearing of the inquiry was on the basis of the facts set out in the affidavits of Mrs. Allen, Mr. Birmingham and Sergeant Cronin. Whilst there were small differences in the accounts given by Mrs. Allen and Sergeant Cronin of what took place before the District judge, they were, in my judgment, differences of emphasis rather than any real dispute of fact. The facts may be summarised as follows.

5. The applicant was born on 8th November, 1994. He appeared in the Children's Court of Limerick District Court on 6th November, 2012, charged with a number of offences relating to burglary and s. 112 of the Road Traffic Acts. He was two days short of his 18th birthday. The applicant was represented by a person described as an experienced solicitor in relation to criminal matters and entered pleas of guilty in respect of all charges and evidence was heard by the District Court judge in relation to each charge.

6. A copy of a letter dated 19th February, 2010, from Dr. Eithne Foley and Dr. Naomi Kissane, consultant child and adolescent psychiatrists, was handed into the District Court judge. This stated, *inter alia*:

> "Robert has been open to the Child and Adolescent Mental Health Services (CAMHS) since May 2006. He has a diagnosis of an ***Autistic Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), very poor social and verbal skills, poor coordination, possibly sensory to processing difficulties and depressed mood.*** He is currently receiving ***Fluoxetine 40 mg daily, Abilify 10 mg daily, Concerta 72 mg daily and Strattera 40 mg daily.*** It would appear that as Robert has got older the features of his Autistic Spectrum are becoming more apparent and causing more difficulties. Robert is demonstrating significant anxiety in new situations and this is very distressing for him. He is finding it very difficult to cope with it. Robert is an extremely concrete thinker and his concrete interpretation of language is causing a lot of difficulties for him. He is very poor to read social situations and this again is causing more and more difficulties as he goes through his adolescent years as the demand for social interaction increases. Robert would appear to have sensory processing difficulties he is hyper-sensitive to any sort of touch and recently hit a young man and broke his wrist because the young man had pushed up against him."

7. Sergeant Cronin recalls that the District Court judge heard a plea of mitigation on behalf of the applicant, including that he suffered from the behavioural disorders set out in the report of Doctors Foley and Kissane; that he had a very supportive family; that the support services he had been accessing in Limerick had closed and were no longer available to him; that he was susceptible to peer influence, and that he had no previous convictions.

8. Mrs. Allen recalls that the District Court judge then "indicated that he was minded to request a report from the Probation and Welfare Service". Sergeant Cronin puts it in slightly stronger terms in that he states that the District Court judge then directed a "pre-sanction report". Nothing turns on this difference of emphasis. It is clear that the District Court judge indicated, at minimum, an intention to direct a probation report.

9. Again, with slightly differing emphasis, both Mrs. Allen and Sergeant Cronin recall that the defence solicitor, having taken instructions from the applicant, then informed the Court that the applicant had indicated that he would not liaise with the Probation Service. Sergeant Cronin recalls that the District Court judge asked the defence solicitor to take further instructions from the applicant, which he did, and confirmed that he said he would not cooperate with the Probation Service. The defence solicitor then told the District Court judge that there would be no point in the Court directing a report. Sergeant Cronin recalls that the judge then asked the defence solicitor what he wanted the Court to do, and deposes, "the defence solicitor replied that he did not want to be back in six weeks with an unhelpful probation report".

10. The District Court judge then proceeded to sentence and imposed four months detention on four of the charges and the remaining charges were "taken into consideration".

11. Mrs. Allen explains the origin of the present application as being that on 20th November, 2012, when she was contacted by a Probation Officer from St. Patrick's Institution, who told her that she was concerned the applicant was in unlawful detention as he was sentenced to detention without a probation report having been ordered. Mrs. Allen then contacted the solicitor who had represented the applicant, but who told her he felt, in the circumstances, that he was not in a position to assist but had no difficulty if she contacted another solicitor and that he would pass the papers to that solicitor. She then contacted Mr. Birmingham of Sheehan & Partners, solicitors, who went to visit the applicant in St. Patrick's Institution on 22nd November, 2012, who confirmed that he would like to make an application under Article 40 of the Constitution and gave authority for his mother to swear an affidavit on his behalf as she was present in Court when he was sentenced.

12. The legal basis of the application is the obligation imposed on a court by s. 99 of the Children Act 2001 ("the Act of 2001"). That section provides:

> "99.—(1) Subject to subsections (2) and (3), where a court is satisfied of the guilt of a child, it—
>
> (a) may in any case, and
>
> (b) shall, where it is of opinion that the appropriate decision would be to impose a community sanction, detention (whether or not deferred under section 144) or detention and supervision,
>
> adjourn the proceedings, remand the child and request a probation and welfare officer to prepare a report in writing (a "probation officer's report") which—
>
> (i) would assist the court in determining a suitable community sanction (if any) or another way of dealing with the child, and
>
> (ii) would contain information on such matters as may be prescribed, including any information specifically requested by the court.
>
> (2) The probation officer's report shall, at the request of the court, indicate whether, and if so how, in his or her opinion any lack of care or control by the parents or guardian of the child concerned contributed to the behaviour which resulted in the child being found guilty of an offence.
>
> (3) The court may, in addition, request that a victim impact report be furnished to it in respect of any victim of the child where it considers that such a report would assist it in dealing with the case.
>
> (4) The court may decide not to request a probation officer's report where—
>
> (a) the penalty for the offence of which the child is guilty is fixed by law, or
>
> (b) (i) the child was the subject of a probation officer's report prepared not more than 2 years previously,
>
> (ii) the attitude of the child to, and the circumstances of, the offence or offences to which that report relates are similar to his or her attitude to, and the circumstances of, the offence of which the child has been found guilty, and
>
> (iii) the previous report is available to the court and the court is satisfied that the material in it is sufficient to enable it to deal with the case.
>
> (5) Where a court requests a report under this section, it may at any time summon as a witness any person whose evidence in its opinion would assist it in dealing with the case."

13. It is not in dispute that on 6th November, 2012, when the applicant appeared and pleaded guilty to the charges that he was a child for the purposes of the Act of 2001, and that none of the provisions of s. 99(4) applied.

14. It is also not in dispute that s. 99(1)(b) is mandatory in its terms and no probation officer's report was requested by the District Court judge. If the District Court judge had adjourned and requested a report, it is agreed that practice in Limerick when a child reaches 18 years is to transfer the proceedings to the District Court in Limerick to be heard by the District Court judge with seisin of the proceedings. It is agreed that the report would be available to the District Court judge.

Submissions

15. Counsel for the respondent, in her submission, accepted that s. 99 imposes an obligation on a District Court judge to get what is, I understand, often referred to as a "pre-sanction report". However, she draws attention to the purpose of the report in accordance with the statutory scheme and as described by Dunne J. in *S.T. (A Minor) v. The District Judge Anderson & Another* [2012] IEHC 287, at para. 34, as "a useful and important tool in informing a court as to the appropriate sentence to be imposed on a convicted person whether custodial or otherwise". On the facts of this application, and in particular the representation made by the solicitor for the applicant that the applicant would not co-operate with the Probation Service, she submitted that the purpose of the requirement in s. 99 of the Act of 2001, to request a report to be used as a tool by the Court was not going to be achieved and was defeated by the applicant himself. She submitted that the District Court judge acted in the best interests of the applicant, and accordingly, that his detention pursuant to the sanction imposed should not be determined to be illegal.

16. Allied to this submission, counsel relied upon the construction of Article 40.4.1 of the Constitution by O'Higgins C.J. in *The State (McDonagh) v. Frawley* [1978] I.R. 131, where, at p. 136, he stated:

> "The stipulation in Article 40, s. 4, subs. 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."

The State (McDonagh) v. Frawley 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 and the above statement by O'Higgins C.J. was made in a context where he was distinguishing the position of a person "duly convicted and properly sentenced".

17. Counsel for the respondent made a second and distinct submission as to why the Court should not now find that the applicant is unlawfully detained, notwithstanding the failure of the District Court judge to request a probation report prior to imposing the sentence of detention for a period of four months. She submitted that the applicant, by reason of the facts which occurred before the District Court judge, had lost his right to raise any objection to the failure to request a probation report, notwithstanding that, in the statutory scheme, he did have a right to have a report obtained prior to sentence. She did so in reliance upon principles enunciated by Henchy J. in *The State (Byrne) v. Frawley* [1978] I.R. 326, Geoghegan J. in *Brennan v. Governor of Portlaoise Prison* [2008] IESC 12, [2008] 3 I.R. 364, and the judgments of the Supreme Court in *A. v. Governor or Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88.

18. *The State (Byrne) v. Frawley* concerned an application pursuant to Article 40.4.2 brought five months after conviction and subsequent to an unsuccessful application for leave to appeal to the Court of Criminal Appeal and an unsuccessful application for a certificate pursuant to s. 29 of the Courts of Justice Act 1924, in the course of none of which had the applicant raised the point sought to be taken in the application pursuant to Article 40. The point made was that he was tried before a jury from a panel in a list prepared in accordance with the Juries Act 1927, which was declared inconsistent with provisions of the Constitution by the Supreme Court in *de Burca v. Attorney General* [1976] I.R. 38. The applicant's trial commenced on 10th December, 1975, and on the following day, adjourned to 17th December, 1975. In the meantime, the Supreme Court gave its decision in de Burca on 12th December 1975. The Senior Counsel appearing for the plaintiff in de Burca appeared for Mr. Byrne in his criminal trial. At the resumption of the trial on 17th December, 1975, no objection was taken to the jury selected under the Act of 1927, notwithstanding the decision in the *de Burca* case. In the Supreme Court, Henchy J. concluded at p. 350:

> "Because the prisoner freely and knowingly elected at his trial to accept the empanelled jury as competent to try him, I consider that he is now precluded by that election from claiming that the jury lacked constitutionality: see the decision of this court in *Corrigan v. Irish Land Commission* [1977] I.R. 317."

He later stated at p. 350:

> "The constitutional right to a jury drawn from a representative pool existed for his benefit. Having knowingly elected not to claim that right, it would be contrary to the due administration of justice under the Constitution if he were to be allowed to raise that claim in the present proceedings when, by deliberate choice, it was left unasserted at the trial and subsequently in the Court of Criminal Appeal. What has been lost in the process of events is not the right guaranteed by the Constitution but the prisoner's competence to lay claim to it in the circumstances of this case."

19. By analogy, counsel for the respondent submitted that what the applicant, on the facts of this case, has lost is not the right pursuant to s. 99 of the Act of 2001, to have the District Court judge request a probation report prior to sentence, but rather, his entitlement now to raise any objection to the legality of his detention by reason of the failure to request such a report.

20. Next in point of time is the decision of the Supreme Court in *A. v. Governor or Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88. That appeal concerned an application pursuant to Article 40 by a person who had pleaded guilty to an offence under s. 1(1) of the Criminal Law Amendment Act 1935, and received a sentence of three years imprisonment. When he had served approximately half this period, the Supreme Court, in the case of *C.C. v. Ireland* [2006] IESC 33, [2006] 4 I.R. 1, declared that the same sub-section was inconsistent with the Constitution pursuant to Article 50.1. The Applicant was successful in the High Court in his application pursuant to Article 40: *A v. Governor of Arbour Hill Prison* [2006] IEHC 169, [2006] 4 I.R. 88. The Supreme Court, on appeal, determined his continuing detention pursuant to the conviction and sentence to be lawful. The general principle applied, as explained by Murray C.J. at p. 143, para. 125, is:

> "In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is the general principle."

Murray C.J. recognised that there might be, by way of exception to the general principle, exceptional reasons in which verdicts in particular cases should not be allowed to stand. On the facts of that case, he did not consider that any such circumstances arose. Each of the concurring judgments of the other members of the Court, whilst emphasising different aspects of the principles, essentially agreed both with the general principle as enunciated by Murray C.J. and the absence of any exceptional circumstances applicable to the facts of the case. Several judgments refer to the principles set out by Henchy J. in *The State (Byrne) v. Frawley* [1978] I.R. 326.

21. *Brennan v. The Governor of Portlaoise Prison* [2008] IESC 12, [2008] 3 I.R. 364, also concerned an application brought pursuant to Article 40.4 of the Constitution subsequent to a conviction and sentence. In that case, the applicants were five individuals who were tried, convicted and sentenced to prison by the Special Criminal Court and whose respective applications for leave to appeal to the Court of Criminal Appeal from such convictions and sentences were refused. In the High Court, their application pursuant to Article 40 was refused, as was their appeal to the Supreme Court. The impetus for their application pursuant to Article 40 was a successful application brought by a sixth person charged with membership of the I.R.A. arising out of the same events. In the case of Mr. O'Brien, the sixth person, when he was first brought before the Special Criminal Court objection was taken that he was not lawfully before the Court, in that he was not brought "forthwith" as required by the relevant statutory provision. He brought proceedings by way of judicial review challenging the jurisdiction of the Special Criminal Court, and ultimately, was successful in the Supreme Court: *O'Brien v. Special Criminal Court* [2007] IESC 45, [2008] 4 I.R. 514. No similar objection had been made by any of the five applicants in *Brennan* throughout their period before the Special Criminal Court or in their application for leave to appeal to the Court of Criminal Appeal. Geoghegan J., delivering a judgment with which the other members of the Court agreed, concluded that the appeal must be dismissed on more than one ground "including the failure to take and pursue objection at the appropriate time" (at p.

378). At pp. 385-386, he stated:

> "There is no doubt that under long established jurisprudence of the courts a jurisdictional objection must be taken as soon as is reasonably possible. Some judges have spoken of the parties effectively conferring a jurisdiction. I would prefer a slightly different formulation. Jurisdiction is conferred by law rather than by persons and, therefore, I think that it is somewhat more accurate to say that by law a bona fide exercise of jurisdiction is deemed to be a good exercise if objection is not taken at the appropriate time. That would, of course, be very much in line with the judgments in *A. v. Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88 though that case covered a somewhat different factual situation and the principle applicable here long predated it."

22. Counsel for the applicant, in response, firstly submitted that the obligation imposed on a Court by s. 99 of the Act of 2001, must be construed in the context of its purpose, having regard to the other relevant sections, and in particular, s. 96 and s. 143(1) of the Act of 2001. He submitted that on the date the applicant was before the District Court judge, he was a child and the District Court judge was obliged to comply with the relevant statutory provisions prior to imposing a sentence that he be detained in St. Patrick's Institution. Counsel accepted the principle as set out by O'Higgins C.J. in *The State (McDonagh) v. Frawley* [1978] I.R. 131, that there must be "a default of fundamental requirements" such that the detention may be said to be wanting in due process of law. Counsel submitted that the failure by the District Court judge to request a probation report was, in the statutory scheme of the Act of 2001, and, in particular, having regard to ss. 96 and 143(1), such a default of a fundamental requirement.

23. Section 96, insofar as relevant, provides:

> "96.—(1) Any court when dealing with children charged with offences shall have regard to—
>
> (a) the principle that children have rights and freedom before the law equal to those enjoyed by adults and, in particular, a right to be heard and to participate in any proceedings of the court that can affect them, and
>
> (b) the principle that criminal proceedings shall not be used solely to provide any assistance or service needed to care for or protect a child.
>
> (2) Because it is desirable wherever possible—
>
> (a) to allow the education, training or employment of children to proceed without interruption,
>
> (b) to preserve and strengthen the relationship between children and their parents and other family members,
>
> (c) to foster the ability of families to develop their own means of dealing with offending by their children, and
>
> (d) to allow children reside in their own homes,
>
> any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed only as a measure of last resort."

Counsel drew particular attention to the requirement that "a period of detention should be imposed only as a measure of last resort". He further submitted that this requirement must also be considered in the context of the requirements of s. 143(1) which provides:

> "143.—(1) The court shall not make an order imposing a period of detention on a child unless it is satisfied that detention is the only suitable way of dealing with the child and that a place in a children detention school is available for him or her.
>
> (2) Where an order is made under subsection (1), the court making the order shall give its reasons for doing so in open court."

Again, he drew particular attention to the prohibition against making an order imposing a period of detention unless the Court is satisfied that "detention is the only suitable way of dealing with the child".

24. Counsel submitted that the mandatory requirement in s. 99 to request a probation report, prior to imposing a sentence of detention, must be understood as the Oireactas intending that a District Court judge have available to him a probation report to assist in determining, in accordance with the principles set out in s. 96 and s. 143, whether or not he should impose a sentence involving detention.

25. Counsel recognised that on the facts of this case, it would appear that the District Court judge intended to request a probation report pursuant to s. 99 and was dissuaded from doing so by a submission of the solicitor for the applicant, but, nevertheless, submitted that having regard to the purpose of s. 99, construed in the context of sections 96 and 143(1) in particular, that it cannot be construed as meaning that a District Court judge can lawfully be dissuaded by a child or his solicitor from requesting a report prior to making a decision on sentence. He submitted that the section is intended to protect a child, and, in particular, a vulnerable young person such as the applicant herein, having regard to the diagnosis made in the report of the child psychiatrists furnished to the Court. He submitted that a proper construction of s.99 requires a District Court judge to request a report, irrespective of the wishes of a child or his solicitor.

26. Counsel for the applicant sought to distinguish the facts of this application from the principles enunciated in the decisions to which counsel for the respondent referred and which are set out above. Firstly, he submitted that each of the cases relied upon were cases in which a person who had already been convicted and sentenced sought, as was put by Hardiman J. in *A. v. The Governor of Arbour Hill*, "to piggyback" on a challenge either to the constitutionality of a statute or the jurisdiction of the Court made by another person. In this application, the applicant challenges the legality of his detention upon the basis of an alleged fundamental defect in the mandatory statutory requirements prior to sentence which applied to him. He drew attention to the reasoning of McGuinness J. in *A. v. The Governor of Arbour Hill Prison* at p. 163, which, he submitted, was of more general application, where she stated:

> "The case was decided in accordance with the law applicable at the time and is not now open to attack. I agree with Murray C.J. in what he has stated concerning the general principle governing criminal prosecutions where the State has

relied in good faith on a statute in force at the time and concerning the application of those principles."

Counsel submitted that, by contrast, the sentence was not decided in accordance with the law applicable to the applicant on 6th November, 2012, which included s. 99 of the Act of 2001. This, he submitted, is a crucial difference.

27. Counsel also relied upon the principles in relation to jurisdiction as stated by Denham C.J. in *Caffrey v. The Governor of Portlaoise Prison* [2012] IESC 4 [2012] 2 I.L.R.M. 88. That was an application pursuant to Article 40. 4 by a person now 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 stated:

> "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 enquiry: is the prisoner lawfully detained or not? That admits of only one answer where there is no legal foundation to a sentence of imprisonment'.
>
> I would affirm this approach by the learned High Court judge. The issue for the Court was whether the appellant was lawfully detained or not. The appellant could not be lawfully detained on the basis of his consent or acquiescence; it is a question of law."

28. Counsel for the applicant submitted that this principle neatly encapsulates the question which this Court must address, namely, whether the applicant is lawfully detained pursuant to a sentence imposed by the District Court judge on 6th November, 2012. To be lawfully detained, he submitted it must be pursuant to a sentence which the District Court judge had jurisdiction to impose on 6th November, 2012. He submitted that in the absence of requesting a probation report, he had no jurisdiction to impose detention by way of sentence, and that no waiver or acquiescence of the applicant, as a vulnerable young person, and in law, a child at the relevant time, (even if he did acquiesce), could create a jurisdiction in the District Court judge to order by way of sentence that the applicant be detained.

Conclusion

29. In my judgment, the Court could not now be satisfied that the applicant is lawfully detained in St. Patrick's Institution. As is accepted by both parties, s. 99 imposes a mandatory obligation on a Court to obtain a probation report in respect of a child prior to imposing a sentence which involves, *inter alia*, a period of detention. In the absence of a probation report, a court does not have jurisdiction to impose a sentence which involves a period of detention. Whilst I recognise that on the facts of this application, the District Court judge was, as a matter of probability, led into error by the experienced solicitor appearing for the applicant, it does not appear to me, having regard to the statutory scheme, and in particular, the purpose of a report as a tool in formulating an appropriate sentence in accordance with the requirements of s. 96, that "a period of detention should be imposed only as a measure of last resort", and the prohibition in s. 143 against making an order imposing a period of detention unless it is "the only suitable way of dealing with the child", that a court may be lawfully dissuaded from requesting a probation report. Section 99, in my judgment, mandates the requesting of a report irrespective of the attitude or wishes of a child or his solicitor.

30. Whilst I accept on the facts that the District Court judge was told by the solicitor for the applicant that the applicant would not cooperate with the Probation Service, it does not appear to me that such information excuses the District Court judge from complying with the statutory obligation to request a probation report. The District Court judge is not given a discretion by section 99. He must request the report. He may not, even where such information is furnished to him, predict or make assumptions as to what will occur if the matter is adjourned and a report requested. A child may well be persuaded to change his attitude.

31. Insofar as counsel for the respondent relied upon the principles referred to in *The State (Byrne) v. Frawley, A. v. The Governor of Arbour Hill Prison and Brennan & Others v. The Governor of Portlaoise Prison*, I accept the distinction made by counsel for the applicant that in each of those decisions, the applicant was, in effect, "piggybacking" on a successful challenge brought by another person, either to the constitutionality of statutory provision under which they were convicted, or, as in the case of Brennan, to the proper application of a statutory obligation. Nevertheless, that distinction does not appear to be a full answer to the principle, as enunciated by Henchy J. in *The State (Byrne) v. Frawley*, that where a person "freely and knowingly" elected not to make a particular objection at a trial, that he might subsequently be considered to have lost his right to make the objection. Insofar as the subsequent decisions simply refer to a failure by the applicant to make an objection to jurisdiction at an appropriate time, it must be noted that those decisions concerned adult applicants.

32. Where, as on the facts of this case, the applicant was at the relevant date a child, albeit one who had almost reached majority, and a vulnerable person by reason of the disorders diagnosed in the psychiatrists' report, it appears that before a court, in an application under Article 40, could be satisfied that he had lost his right to object to the jurisdiction of the District Court to impose a sentence of a period of detention in accordance with the principles set out in *The State (Byrne) v. Frawley* and the subsequent decisions, that there would have to be clear evidence before the court that the applicant had "freely and knowingly" elected at the trial not to object to the District Court judge proceeding to sentence to a period of detention without requesting a probation report.

33. On the evidence before me in this application, I am not so satisfied. The evidence is that the defence solicitor took instructions on the applicant's willingness to cooperate with the Probation Service if a report was requested by the District Court judge. There is no evidence before the Court as to the information given to the applicant in relation to the obligations of a District Court judge under s. 99, nor of its purpose in the context of ss. 96 and 143(1) of the Act of 2001.

34. In considering the matter in a slightly different way, it does not appear to me that the Court can form the view that the sentence was imposed by the District Court judge in accordance with law on the date of the sentence and detention, or that it was a bona fide exercise of jurisdiction as that term was used in *Brennan & Others v. The Governor of Portlaoise Prison* [2008] IESC 12, [2008] 3 I.R. 364. In stating this, I am not for one moment questioning the motives of the District Court judge who proceeded to sentence and detain without requesting a probation report. As appears from the facts, he did so effectively at the request of the solicitor for the applicant, and no doubt considered that it was in the best interests of the applicant to dispose of the matter there and then. Nevertheless, s. 99 is clear and precise in its terms. It cannot be construed other than as imposing a mandatory obligation on a District Court judge to request a report unless one of the exceptions set out in section 99(4) applies. It is not suggested that there

were any facts before the District Court judge which would have permitted him to consider that sub-section (4) applied. The purported exercise by a court of a jurisdiction in breach of a mandatory precondition imposed by statute, where there are no facts which permit of a conclusion that the mandatory precondition may not apply, does not appear to me to come within the concept of a *bona fide* exercise of jurisdiction as that term was used in *Brennan*.

35. Finally, I am satisfied that the failure to request a probation report prior to imposing a sentence of a period of detention is a default of a fundamental requirement in the statutory scheme enacted by the Oireachtas in relation to the sentencing of children as provided in sections 96, 99 and 143 of the Act of 2001, in the sense used by O'Higgins C.J. in *The State (McDonagh) v. Frawley* [1978] I.R. 131, which went to the jurisdiction of the Court to impose a sentence with a period of detention.

36. It follows that as I am not satisfied that the applicant is being detained in accordance with law, I must now, pursuant to Article 40.4.2 of the Constitution, order his release.