Neutral Citation Number: [2005] IEHC 195

THE HIGH COURT

Record No. 732SS/2005

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

MICHAEL DERMOT MCARDLE

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON AND MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 7th day of June 2005

1. On the 27th May 2005 an order was made by the President of the High Court that a committal warrant do issue so that the applicant may be surrendered to the Kingdom of Spain. The said order was made by the learned President after he had determined that the offence specified in the European Arrest Warrant dated 19th August 2004 and on foot of which the applicant had been previously been arrested, corresponded with an offence under the law of this State, and that other necessary requirements had been met for the purpose of the application before him.

2. The Committal Warrant which duly issued on foot of the said Order directs the Governor of Cloverhill Prison to lodge the applicant in Cloverhill Prison to be detained by the Governor thereof for a period of not less than fifteen days from the date of the said order until the date of his delivery, and for any further period as may be necessary under law.

3. The applicant is currently so detained under the Committal Warrant of the High Court issued pursuant to the said order.

4. The Committal warrant states therein:

> *"IT IS ORDERED pursuant to Section 16(2) of the European Arrest Warrant Act 2003 that the said Michael Dermot McArdle be surrendered to such person as is duly authorised by the Kingdom of Spain to receive him." (my emphasis)*

5. Before me, the Deputy Governor has certified and confirmed that he holds the applicant custody at the said Prison under the said Committal Warrant, and he confirmed also that the applicant was detained under a Committal warrant issued pursuant to the provisions of s. 16(2) of the European Arrest Warrant Act, 2003, as amended.

6. The applicant now applies for an order of Habeas Corpus on the ground that his detention is unlawful. This submission is based on a number of argued grounds, but principally upon the fact that there is an error, and it is accepted by the respondent that this is so, in the Committal Warrant signed by the learned President of the High Court, namely that the said order is stated to have been made pursuant to s.16(2) of the said Act, and is therefore bad on its face "for vagueness", and/or that the said Order is bad on its face in that the provisions of s. 16(2) have no application in fact or at law to the matters in respect of which the applicant was brought before the Court, and/or that the learned President had no power or jurisdiction to make an Order under s. 16(2) of the Act, by virtue of the fact that the date for hearing of the said matter was not or, in the alternative, ought not to have been, fixed under s.14 of the said Act, but instead under the provisions of s. 13 thereof.

7. In other words, any order made by the Court ought to have been made in the present case pursuant to s.16(1) of the Act, and not s. 16(2) thereof.

8. Without prejudice to these arguments, it is also submitted that the order is bad on its face by virtue of the fact that it fails to identify properly or adequately or at all the person to whom the applicant is to be surrendered, and further, that without prejudice to either of the foregoing arguments, the said Order is bad on its face in that it fails to identify properly or at all the person to whom the applicant is to be delivered. Mr O'Hanlon has stated that these matters are perhaps matters more appropriate to an appeal from the said order, rather than to an application under Article 40.4.2 of the Constitution. I agree.

9. It is further submitted that that the order is bad in that it fails to comply with s.3 of the Act in that it fails to make an order designating the Kingdom of Spain as provided in that section, and/or in the alternative there being no evidence of any such order having been made by the second named respondent or having been brought to the attention of the learned President of the High Court. An affidavit filed on behalf of the respondent avers that in fact the Statutory Instrument (S.I. 4 of 2004) by which the Minister designated the Kingdom of Spain pursuant to s.3 of the Act was among a bundle of documents handed into Court when the matter was heard by the learned President. In the light of this averment, Mr O'Hanlon has quite rightly dropped this submission as part of the case being made.

10. It is submitted that the facts of this case do not permit of an order being made under s. 16(2) of the said Act, and that the said order ought to have been made pursuant to s.16(1) of the said Act. This is the gravamum of the present application, and in my view this question rests to be decided on the basis of whether or not the admitted error as appearing in the said order is of such a character as to render the detention of the application unlawful. An issue which arose, but which may not need to be addressed on this occasion is whether the error is one capable of being corrected pursuant to O. 28, r. 11 of the Rules of the Superior Courts ("the slip rule") or by virtue of an inherent jurisdiction in the Court to ensure that its records correctly reflect its intention.

11. Before making the order for the surrender of the applicant, and signing the order for the committal of the applicant pursuant to s. 16(4) of the Act, the learned President had delivered a written judgment in which he fully set forth the provisions of s.16(1) of the Act, and immediately thereafter stated:

> *"On the evidence before me, I am satisfied on the matters mentioned in paragraph 16(1)(a),(b),(c) [of the European Arrest Warrant Act, 2003]……"*

12. The President then addressed the issues raised by the applicant, namely abuse of process; delay; breach of constitutional and Convention rights; whether it would be oppressive or invidious to surrender the applicant; and the finally the point relating to the applicant's contention that the object of the European Arrest Warrant was to procure the return of the applicant for the purpose of carrying out a form of preliminary enquiry or investigation.

13. These issues were raised on behalf of the applicant in his Points of Objection filed and delivered prior to the hearing. Having considered and made findings in relation to these issues, the learned President concluded his judgment stating:

"In the light of the foregoing findings I propose making an order that the respondent be surrendered."

14. In my view, there can be no doubt whatsoever from the terms of this judgment that the President had decided, having heard the issues raised, to grant an order under s.16(1) of the Act. Subsection (2) of that section is never mentioned in the judgment, and it is reasonable to assume that it was never mentioned even in argument before the President, given that ss(2) does not apply to the case before the Court, since its application is confined to a case where the date fixed for the hearing under s. 14 of the Act - a section which provides for the arrest without warrant of a person in respect of which a 'Schengen alert' has issued, and where a member of An Garda Siochana believes that the person is likely to leave the State before the European Arrest Warrant to which the Schengen alert refers is received in the State. Clearly the circumstances of s.14 did not arise in the present case. The present case was dealt with and could only have been dealt with on the basis of an arrest under s.13 of the Act, and he was processed thereafter pursuant to the provisions of s. 13. The date fixed for the hearing was fixed under s.13, and the only application before the Court when the matter was heard by the President was an application for an order under s.16(1) of the Act.

15. Roderick O'Hanlon SC for the applicant has informed the Court that following the delivery of his judgment, the learned President took considerable trouble to ensure that the terms of the Committal Warrant were correct. It would appear that the form of Committal Warrant prepared for his signature initially was not in the correct form and some time was taken to correct that matter. Eventually the Warrant pursuant to which the applicant is detained was signed. In these circumstances, Mr O'Hanlon submits that clearly the learned President must be taken to have intended that the Committal Warrant should issue pursuant to an order made under the section and subsection referred to specifically therein. He also submits that as with the interpretation of any penal statute by the Court, there must be a strict interpretation. He submits that in the present case the applicant is detained under a statutory provision, namely s. 16(4) of the 2003 Act, which provides:

"16 -- (4) When making an order under this section the High Court shall also make an order committing the person to a prison ……."

16. and that since the order made under s.16(2) is bad for the reason that there was no jurisdiction to make it, then the detention order made following it is bad, and the applicant's detention cannot therefore be found to be valid upon enquiry into its validity under the provisions of Article 40.4.2 of the Constitution.

17. Mr O'Hanlon has also submitted that the Court cannot simply apply the 'slip rule' so as to cure the defect in the order, since for the reason which I have already stated, the learned President took considerable time and care to ensure that the terms of the Committal Order were correct, and must be taken to have intended the order which he signed. He also submits that even if the error was found to be capable of amendment under the rule, the amendment cannot render his present detention lawful, and that therefore the conditional order of habeas Corpus should be made absolute by this Court.

18. In response, Patrick McCarthy SC has referred the Court to the fact that in the hearing of the application before the President due process was observed and there is no criticism of the hearing on that basis by the applicant. Mr McCarthy has also referred the Court to the judgment of O'Higgins CJ. in *The State (McDonagh) v. Frawley* [1978] I.R.131 wherein it was held that for the successful invokation of relief by way of Habeas Corpus there must be shown to have been a breach of a fundamental requirement of law. In that case the applicant had complained that he was not being provided with appropriate medical treatment for a pain in his back, and that accordingly there was a breach of his constitutionally protected right to bodily integrity. The Court expressed the view that as a convicted prisoner the applicant became subject to the Prison Rules and that many of his normal constitutional rights are abrogated or suspended during the period of his incarceration, and that while he was entitled to receive such medical acre as the prison medical officer thought appropriate, he was not entitled to demand whatever treatment he thought he should get.

19. Mr McCarthy submits that in the present case there is no breach of any fundamental right, since the learned President heard a matter which was correctly before him under s. 13 of the 2003 Act, and in his judgment he indicated that he had considered the matters arising under s. 16(1) of that Act and had decided to make an order. Mr McCarthy has pointed to the fact therefore that all that has occurred is that the incorrect subsection was inserted in the Committal Warrant, and that this has occurred simply through human error, and that the error does not go so far as to result in the detention of the applicant being unlawful.

20. Mr McCarthy has also submitted that it is incumbent on the Court to ensure that its orders are implemented and given effect to, and to ensure that they are not frustrated by an error appearing therein. He characterises the error as a technical defect only, and therefore one coming within the principles of The State (McDonagh) v. Frawley, especially since in his submission there can be no question but that the applicant had a hearing of the application for his surrender in accordance with law. Mr McCarthy has referred to a passage from the judgment of Fitzgerald J. in *Application of McLouglin* [1970] I.R. 197 as follows:

"Before considering the submissions in any detail I think it well to point out the apparent futility of these proceedings. While I quite appreciate the necessity for having the orders of the Courts carried out strictly in accordance with statutory requirements and rules applicable to the particular circumstances, I am also conscious of the necessity of seeing that orders of the Courts are implemented and that the orders should not be frustrated by an error in administration subsequent to the order."

21. In response to this submission made by Mr McCarthy on the basis of *The State (McDonagh) v. Frawley*, Mr O'Hanlon has referred to the fact that case, the detention under scrutiny was that of a convicted person, and he refers to the undoubted fact that the applicant in the present case enjoys the presumption of innocence in respect of the matter for which his surrender is sought. In this regard he seeks to distinguish that case from the present case and refers in particular to an extract from the judgment appearing at p.135 as follows:

"Quite different from the status and rights of such a convicted person are those of a person arrested and detained under the Emergency Powers Act, 1976. That Act under s. 2 (which, having operated for a period of 12 months has now expired) gave a power of arrest and detention for a specified period or periods and for reasons which are also specified. A person so arrested was not a convicted person and, of course, had the right to be either released or charged. The power of arrest and detention was given by that Act under the special provisions of Article 28, s. 3, sub-s.3 of the Constitution. As the Act of 1976 suspended some constitutional rights, the exercise of the powers conferred required to be watched with zealous care and particular concern by the Courts. If it appeared that those powers were used for a purpose which was not permitted, or in defiance of rights which were not suspended or ought not to be affected, then the Courts would interfere and say that the detention was not in accordance with the Act."

22. The distinction between the applicant in the present case and that of the convicted prisoner in the case referred to is an important one and one on which Mr O'Hanlon places much emphasis. Again, Mr O'Hanlon points to the fact that in the present case

the point is that the Court had no jurisdiction to make the order that appears to have been made on the face of the order itself.

23. Mr O'Hanlon, referring to Mr McCarthy's submission that in the present case the applicant has enjoyed due process, says that this is not so, in the sense that he is convicted of nothing, and that his position is akin to a person detained under the provisions of the Emergency Powers legislation referred to in The State (McDonagh) v. Frawley, and that different considerations apply, such that the error in the text of the order, showing that it is an order made without jurisdiction is an error which is to be regarded as serious enough to render the detention unlawful, and cannot simply be corrected under any 'slip rule'.

Conclusions
24. I should perhaps preface my concluding remarks by referring to the fact that at the time that this application came before me both in respect of the application for a conditional order of Habeas Corpus and the hearing to make same absolute last Friday, the learned President of the High Court was out of the jurisdiction and therefore not available to deal with a matter arising out of an order made by him. It is clearly competent for any other judge of the High Court to hear this application for Habeas Corpus.

25. Equally, I believe that in such a circumstances it is open to any judge of the High Court to amend, where necessary and appropriate, the order of another judge, where there can be, and is, no dispute about the intention of that other judge. Different considerations might apply where there might be some doubt or debate about what the judge making the impugned may have intended. But in the present case, I am satisfied that there is no doubt, and no room for the slightest doubt, as to what was intended by the learned President in this case, namely that he intended to make the only order which could be made in respect of the application before him and in accordance with his written judgment, namely an order under s.16(1) of the 2003 Act. However, I am leaving over for the moment the question of whether any amendment should be made now to the Committal Warrant in the present case.

26. I am satisfied that no fundamental right of the applicant has been breached or even threatened in the present case by the error appearing. The application was properly and fully heard by the learned President, conclusions were arrived as appear in his written judgment, and all that remained was for the necessary order to be made for the surrender of the applicant, and for the Court to also make an order under s.16(4) of the Act committing the applicant to a prison pending his surrender to the Spanish authorities. It is a fact that s. 16(4) provides that such a committal order shall be made by the Court "*when making an order under this section*", i.e whether under s.16(1) or s.16(2).

27. This Court is conscious, as submitted by Mr McCarthy, of the importance of ensuring as far as is consistent with justice, that orders of the Court are implemented and not unnecessarily frustrated in that regard. I recognise the distinction made by Mr O'Hanlon with regard to the applicant not being a convicted person and therefore not strictly within *The State (McDonagh) v. Frawley*, but nevertheless that distinction does not dilute or disturb the relevance of what is stated by O'Higgins CJ. At p. 136 of his judgment as follows:

> *"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. For example if the judge at a murder trial in which the accused was convicted were to impose a sentence of imprisonment for life, instead of penal servitude for life as required by statute, the resulting detention would be imposed technically without jurisdiction. But the prisoner would not be released under Article 40, s.4 for it could not be said that the detention was not 'in accordance with the law' in the sense indicated. In such a case the court would leave the matter of sentence to be rectified by the Court of Criminal Appeal; or it could remit the case to the court of trial for the imposition of the correct sentence: see the unanimous opinion expressed in the House of Lords in Athanassiadis v. Government of Greece at p. 289 of the report which shows that a mere technical defect is not a good ground for release on habeas corpus."*

28. I am satisfied that what has occurred in the present case is such as to come within this principle, and that it has not resulted in the applicant's detention being unlawful. A slip has occurred in the text of the order made for the applicant's surrender. This is particularly so where the power to order the detention of the applicant exists whenever an order is made under section 16 of the Act. It is not dependent on whether the order for surrender is made under s. 16(1) or under s. 16(2). It applies equally in both instances. But even if the provisions of s. 16(4) were confined to the context of an order made under s. 16(1), I would be of the view that, since the intention of the learned President was to make an order under s. 16(1), since that is the subsection under which the matter was before him, and to which he specifically and fully refers in his written judgment, the error would not be such as to render the detention unlawful.

29. It is worth drawing attention to another aspect of the matter. When a date has been fixed for the purpose of the hearing of an application for an order for the surrender of a person to the requesting country, the Court hears that application under s.16 of the 2003 Act. In some circumstances, the date for hearing is fixed, as we have seen, pursuant to s. 13 of the Act, and in other instances pursuant to s. 14 of the Act. Either way, any order to be made on foot of the application is made, either under s.16(1) or s.16(2) as may be appropriate. That is the order for surrender itself. However, upon the making of an order under either of these subsections, the Court shall go on and make a second order, namely for the detention of the person pending his/her surrender. It is this second order under s.16(4) - an order which "shall" be made when an order is made under s.16 and on foot of which the applicant in the present case is detained in Cloverhill Prison.

30. It seems clear that if one asks the rhetorical question "under which section is the detention order made?" the answer is clearly going to be "under s.16(4)". If one then asks the question "in what circumstances must such an order be made?", the inevitable answer is going to be "when making an order under s. 16 of the Act". The final question is then "was an order made in this case under s.16 of the Act?", to which the answer inexorably be "yes". The fact that the Committal Order made under s. 16(4) recites within it, arguably unnecessarily, that an order for surrender has been made under the incorrect subsection of s. 16 of the Act, does not touch on the legality of the detention order. It may speak to the correctness of the surrender order, and no doubt that may be examined on another occasion, but it is not such as to give rise to unlawful detention.

31. The only application before this Court is one by the applicant for an order of Habeas Corpus. I am of the view that the applicant has not satisfied me that his detention is unlawful, and I refuse his application. There is no application before the Court to make any amendment to the order of the learned President of the High Court. While I would be clearly of the view that the error which has occurred is such as to be capable of amendment under either the 'slip rule' or by virtue of the inherent jurisdiction of court to have control over its records so as to ensure that the court's clear intention set forth in its orders, this is a matter which might more

appropriately be brought before the learned President who made the order, since his absence is only temporary.