THE COURT OF APPEAL

Birmingham P.
Mahon J.
Edwards J.

Neutral Citation Number: [2018] IECA 202

Record No: 2017/159

IN THE MATTER OF AN APPLICATION PURSUANT TO

ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

BETWEEN/

PATRICK RYAN

Appellant

V

THE GOVERNOR OF MOUNTJOY PRISON

Respondent

JUDGMENT delivered on the 21st day of June 2018 by Mr. Justice Edwards.

Introduction

1. This is an appeal against the judgment and order of the High Court (Noonan J) delivered and made on the 5th of March 2017 in respect of an inquiry under Article 40.4.2 of the Constitution of Ireland, in which that court determined the detention of the appellant to be lawful and refused to direct his release from custody.

2. The application for an inquiry under Article 40.4.2 arose out of an order of a District Court Judge sitting in the Dublin Metropolitan District in Court No 23, Áras Uí Dhálaigh, Inns Quay, Dublin 7 in the said district, on the 21st of February 2017, committing the appellant to prison for a period of seven days from that date for contempt of court contrary to s.6 of the Summary Jurisdiction (Ireland) Amendment Act 1871 ("the Act of 1871"). The initial application for an inquiry was made before Noonan J in the High Court at approximately 12.55pm on the 24th of February 2017, and on the basis of the evidence that had been placed before him at that time, the High Court judge was satisfied to open an inquiry and require the detainer (the respondent to this appeal) to produce the appellant before the High Court and to certify in writing the basis on which he was being detained. The matter was made returnable in the first instance for 3pm on the same day, whereupon the appellant was duly produced before the High Court and the respondent duly certified in writing that the appellant was being held pursuant to a warrant of committal, dated the 21st of February 2017, which he exhibited therewith.

3. The exhibited warrant was in the following form and was signed by the District Court Judge concerned:

"Form: 25.9 Warrant Of Committal (For Contempt Of Court)

No, 25.9

0.25, r.5

Warrant Of Committal

(For Contempt Of Court)

Dublin Metropolitan District

WHEREAS at a sitting of the District Court being held at Court 23 Aras Uí Dhalaigh Inns Quay Dublin 7 in said district on this day by and before me, Judge Michael Coghlan a Judge of the District Court assigned to the said district, sitting and acting in the said District Court in exercise of the Jurisdiction vested in me and in discharge of my duties as a Judge of the District Court, AT AND DURING the hearing of the cause entitled

Leixlip and District Credit Union, Creditor -v Patrick Ryan Debtor

in which the said Debtor was summonsed for his failure to comply with an Instalment Order

the said person, namely, PATRICK RYAN has in open court

wilfully insulted me + refused to engage with the court

committed a contempt of this Court

as follows:- by (1)

contrary to (3) (section 6 of the Summary Jurisdiction (Ireland) Amendment Act, 1871.)

AND WHEREAS I DO NOW, at the said sitting and acting solely in execution of my duties as such Judge, hereby adjudge that the said person for that contempt be committed to prison for the period of 7 days,

THIS IS TO COMMAND YOU to whom this warrant is addressed to lodge the said person Patrick Ryan of 39 Glendale Meadows Leixlip Co. Kildare

in the prison at Mountjoy North Circular Road Dublin 7 there to be imprisoned for such contempt by the Governor thereof for the period of 7 days from the date of this warrant, and for this the present warrant shall be a sufficient authority.

Dated this 21st day of February 2017

Signed: … Michael Coughlin …

Judge of the District Court assigned to the said district

(signature of Michael Coughlin again appears)"

4. The initial basis on which an inquiry under Article 40.4.2 was requested, and indeed granted, was an assertion on the appellant's behalf by his solicitor that the appellant had been incarcerated solely because he refused to accept the jurisdiction of the court to hear a claim in a civil matter involving an amount of €38,000 that, in his belief, exceeded the jurisdictional limit of the District Court. However, once the High Court had agreed to open an inquiry, and senior and junior counsel were retained on the appellant's behalf, the number of complaints was greatly expanded to include challenges to the validity of the warrant on the grounds that it was duplicitous, failed to particularise the offence of which the appellant had been convicted, and specified an offence unknown to the law. It was also sought to challenge the lawfulness of the detention of the appellant within the four walls of that inquiry on the grounds that he was denied fair procedures in the District Court. In the latter regard it was alleged that he was not informed of the criminal charge against him; that he was not asked how he wished to plead; that there had been no hearing of the charge; that no evidence was led; that he was not allowed to challenge the evidence relied on as supporting the charge; that he was not afforded an opportunity to lead evidence in his defence, and; that the District Court judge had acted as a judge in his own cause and had breached the maxim *Nemo iudex in causa sua*. In addition, it was alleged that the statutory provision on foot of which the appellant had been convicted, namely s.6 of the Act of 1871, was both unconstitutional and incompatible with Article 6 of the European Convention on Human Rights, various European Union Directives and the Charter of Fundamental Rights of the European Union.

5. The substantive inquiry proceeded over two days on the 3rd and the 7th of March 2017, at the end of which the High Court found the detention of the appellant to have been lawful and dismissed the appellant's claim for relief under Article 40.4.2 of the Constitution. The appellant now appeals to this Court.

The proceedings in the District Court

6. In brief outline, the procedural history of the case before the District Court was that on the 4th of January, 2013, Leixlip and District Credit Union Ltd ("the Credit Union") obtained judgment in the Circuit Court against the appellant in a sum of approximately €38,000 and costs. The appellant did not appeal and did not pay the judgment. Consequently, on the 13th of May, 2014, the Credit Union applied to the District Court for an instalment order. The total due by the appellant at that stage was €43,389.01. A summons issued by the Credit Union on the 19th of March, 2014, required the appellant to attend before the District Court for examination as to his means. The appellant did not appear in answer to the summons. Having found that the appellant failed to lodge a statement of means in accordance with the summons, that he had failed to attend for examination in accordance with the summons, that he had refused to submit himself for cross examination by or on behalf of the Credit Union and that he had failed to satisfy the court that he was not able to pay the debt in one sum or by instalments, the District Court then made an instalment order against the appellant ordering him to pay the total due in monthly instalments of €300 each. The appellant did not appeal the order of the District Court.

7. Despite an instalment order having been made against him, the appellant paid nothing on foot of that order. In those circumstances the Credit Union then applied to the District Court for a summons, as provided for in s. 6 of the Enforcement of Court Orders Act, 1940 as substituted by s.2 of the Enforcement of Court Orders (Amendment) Act, 2009, directing the appellant to appear before the District Court.

8. The summons applied for was duly issued. It came before the District Court on four occasions, the 12th of July, 2016, the 13th of September, 2016, the 24th of January, 2017, and the 21st of February, 2017, on which occasions the appellant appeared and represented himself in person. While there is no transcript of what occurred on the first date, transcripts made up from digital audio recordings of the proceedings on each of the three subsequent dates are available. The events that took place during the District Court hearings on all four dates mentioned, culminating in the order for committal for contempt of court at issue in these proceedings, are well summarised by the High Court judge in paragraphs 5 to 14 inclusive of his judgment dated the 3rd of April, 2017, and I am content to adopt that summary.

The judgment of the High Court

9. Having set out a history of the proceedings in the District Court, the High Court judge moved to consider the procedural history of the Article 40 proceedings then before him, noting the circumstances in which the initial *ex-parte* application had been made just before lunch on the 21st of February 2017, the decision to open an inquiry, and the events upon the initial return later that afternoon. He further noted that at the conclusion of the initial return he had commented on the fact that the grounding affidavit had been sworn by the appellant's solicitor, and had expressed some unhappiness about this. He had then further returned the matter to Tuesday the 28th of February 2017 for further hearing of the substantive issue. On the 28th of February 2017, the court received a number of additional affidavits and directed that certain other affidavits be sworn and filed. The matter was further adjourned to the 3rd of March on agreement between the parties.

10. When the when the hearing of the inquiry proceeded on the 3rd March, 2017, the following affidavits were before the court:

(1) Grounding affidavit of the appellant's solicitor, sworn on Friday the 24th of February, 2017;

(2) Affidavit of the appellant, sworn on Monday the 27th of February, 2017;

(3) Second affidavit of the appellant's solicitor, sworn on Tuesday the 28th of February, 2017;

(4) Third affidavit of the appellant's solicitor, sworn on Wednesday the 1st of February, 2017;

(5) Affidavit of David Ryan, the appellant's son, sworn on Wednesday the 1st of March, 2017;

(6) Affidavit sworn on behalf of the respondent by Kevin Condon, Principal Officer in the Department of Justice and

Equality, on Thursday the 2nd of March, 2017.

11. The High Court Judge then proceeded to summarise the affidavit evidence, and also brief oral evidence received by the court from the appellant's solicitor and the appellant's son. He concluded that the instructions that the appellant's solicitor had received, indirectly from the appellant or on his behalf, concerning what had occurred in the District Court were *"entirely incorrect"*, not borne out by the DAR record, and *"significantly misrepresent*[ed] *what occurred before the District Court on the 21st of February, 2017"*. He also took issue with certain further averments in the appellant's solicitors affidavit on the basis that *"this neither represents what the warrant contains nor what in fact occurred"* While the appellant's solicitor's affidavit asserted that she had made every effort to verify the instructions she had received, the High Court Judge remarked *"[r]egrettably those efforts did not include speaking to the applicant"* (i.e.,the appellant). The High Court Judge was also highly critical of the fact that neither the appellant nor his solicitor had made any reference in their respective affidavits to the fact that the hearing on the 21st of February 2017 was the fourth occasion on which the matter had come before the District Court.

12. Among the matters deposed to in the appellant's affidavit was an averment that:

> *"8. I say that the judge then told me that he was locking me up for seven days for contempt. He didn't offer me an opportunity to consult with a solicitor. He did not offer me an opportunity to purge my contempt."*

The High Court Judge expressed the view that this was "materially misleading" for reasons expanded on by him at some length at para 25 of his judgment.

13. Following a review of the contents of the second and third affidavits sworn by the appellant's solicitor, the affidavit sworn by the appellant's son, and the oral evidence adduced before the court, the High Court Judge concluded that all of the evidence concerning what had occurred in the District Court was *"hearsay"*, and some of it *"was hearsay upon hearsay."* He commented that, in so far as the solicitor contended that she had been advised by counsel to swear the principle grounding affidavit in the case, *"If that advice was given, in my view it was incorrect."*

14. The High Court Judge went on to say:

> *"30. Of course there may be circumstances where due to the urgency of the matter, it may be appropriate for a solicitor to swear an affidavit on behalf of an applicant for an inquiry under Article 40. In the case of a solicitor who has represented the applicant in the court whose order is under challenge, that may be entirely appropriate in circumstances where first hand evidence of what transpired can be given. That does not arise here. In this case, not only was the solicitor not present in court but had never even met or spoken to the applicant prior to the court application. I asked Ms. D'Arcy why it was not possible for her to contact the applicant directly, particularly as her office is not far from Mountjoy. She said that she is not permitted to visit clients in custody without arranging a visit through the email system. She advised the court that even in urgent cases like this, it is not possible to visit clients. It was previously, but not anymore. A visit can only be arranged once an email confirmation has been received from the prison. Mr. David Ryan's evidence as I have mentioned was that his father telephoned him on the Wednesday morning. He also said that he visited his father in prison on the Thursday afternoon. I therefore find it extraordinary that it was neither possible for the applicant at any time up to 1 pm on the Friday to contact his solicitor by telephone nor was it possible for the solicitor to make contact with him either by telephone or a personal visit.*
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> ***Evidence in Article 40 Applications***
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> *31. Be that as it may, whilst as I have said there may be cases where the urgency of the matter requires a solicitor acting for an applicant to swear an affidavit when it is not possible to obtain one from the applicant him or herself, this is not such a case. It is quite clear that neither the applicant himself, nor his non-professional supporters who evidently orchestrated this application, were treating this matter as being of real urgency and certainly not the degree of urgency that would warrant the swearing of an affidavit by a solicitor which has turned out to be entirely inaccurate and misleading. It is not to my mind sufficient to put an affidavit before the court to ground such a serious application as an Article 40 inquiry on the basis that the veracity of whatever is stated in it can ultimately be determined by reference to the DAR. The applicant himself has to bear responsibility for this. Despite the evident shortcomings in his solicitor's affidavit, about which he must have known, he nonetheless purports to verify its contents in his own affidavit. Furthermore his total failure to make any reference to the highly material fact that he had appeared on three previous occasions before the same District Judge in relation to the same matter, had been repeatedly warned about his behaviour which placed him at risk of imprisonment, had actually been the subject of an unexecuted order for imprisonment, had been advised to get a solicitor in those circumstances and told that he would be provided with legal aid for that solicitor, is a serious matter."*

15. The judgment goes on to expound the limited circumstances in which the High Court Judge believed it might be permissible for a solicitor to swear an affidavit grounding an Article 40 application.

16. The High Court Judge then turned to a factual assessment of what had occurred in the District Court based on the evidence before him, and in particular the DAR transcripts of the last three occasions when the matter was before the District Court. He held that:

> *"34 …it is clear that on each of the three occasions on which the applicant appeared in the District Court, for which a transcript is available, he behaved in a contemptuous manner to the court. He deliberately sought to obstruct and frustrate the proceedings by the use of obscure phrases espoused by certain personal litigants and their support groups. He refused to answer questions properly and reasonably asked of him by the judge. He evinced a clear intention not to comply with any order of the court already made. He issued direct challenges to the authority of the court. He demanded to know from the judge if he was representing the plaintiff in an insulting and offensive manner and demanded the judge's name and then his full name.*
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> *35. He did all this despite repeated warnings about his behaviour and the fact that he was at risk of imprisonment if he continued. He spurned the court's advice to instruct a solicitor for which he was told legal aid would be provided. In my opinion, the learned District Judge acted with considerable restraint until finally left with no option by the applicant's deliberately provocative behaviour.*
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> *36. Against this background, the applicant, evidently through the medium of his supporters, and acting with no evident*

urgency half way through his sentence, moved this Court for an Article 40 enquiry on the basis that he was deprived of his liberty simply because he objected to the District Court hearing a claim involving the amount of €38,000 which exceeded its jurisdiction. Nothing could be further from the truth."

17. At this point, the High Court Judge remarked, as I have also done at paragraph 4 of this judgment, that although the initial complaint was confined to an allegation that the District Court Judge had acted without jurisdiction, *"the applicant's challenge evolved into an elaborate argument challenging the validity of the warrant on a number of grounds".*

18. The judgment goes on, in the next section thereof, to consider at great length the nature and the parameters of the procedure provided for under Article 40.4.2 of the Constitution. Having done so, the High Court judge remarks that:

> *"49 … it is clear to my mind that this application, on its true facts as they emerged, is not one that is appropriate for the Article 40 procedure. As it was initially presented by the applicant's solicitor, it was alleged that the sole reason that the applicant was imprisoned was that he refused to accept the jurisdiction of the District Court based on a claim for €38,000.00 which plainly exceeded that jurisdiction. Therefore despite the fact that the warrant under challenge was in my opinion regular on its face, the case was presented as one involving such a fundamental denial of justice as to arguably warrant the intervention of this Court pursuant to Article 40. As events transpired however, these supposed facts were quite untrue and the applicant, whatever about his solicitor, knew them to be untrue and did nothing to correct them when he had the opportunity. On the contrary, as I have previously noted, he swore an affidavit when he was at liberty and with the benefit of legal advice in which he verified that the contents of the solicitor's affidavit were true and refrained from any mention of the many highly material events that occurred at the previous hearings.*
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> *50. This gives rise to an important question. To what extent, if any, can the court refuse Article 40 relief on any basis other than that the detention is lawful? Traditionally the view has been taken that unlike judicial review, habeas corpus is not a discretionary remedy. The detention is either lawful or not. However, an analysis of cases suggests that the relief may be refused on other grounds in certain circumstances, such as where an abuse of process has occurred."*

19. Finally, commencing at paragraph 52 of the judgment, the High Court judge sets forth his conclusions. He states:

> *"52. I have little hesitation in concluding that the manner in which this matter was brought before the court by the applicant constitutes a clear abuse of process for the reasons I have already identified. It is of course well settled that any party moving the court ex parte is bound by a duty of candour and utmost good faith towards the court. I cannot see in principle why that duty ought not equally apply in Article 40 applications. Accordingly in my opinion, this application should be dismissed on this ground and further on the ground that it is not in any event appropriate for the Article 40 procedure.*
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> *53. However, even if I were to be wrong in reaching that conclusion, I am satisfied that there is no merit in the applicant's submissions. Far from being denied fair procedures, it seems to me that the District Judge went to considerable lengths to ensure that the applicant was treated fairly. He was repeatedly warned about his behaviour during successive hearings. He was fully aware that if that behaviour was persisted in, it might result in his imprisonment not only because he was explicitly told by the judge that he was at risk but he had in fact already been subject to an unexecuted order of imprisonment for contempt. He was urged to retain a solicitor and assured that legal aid would be provided to him for that purpose. He was afforded every opportunity of complying with orders of the court previously made.*
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> *54. He ignored all of these matters and instead deliberately persisted in the same obstructive and contemptuous behaviour knowing full well what the outcome was likely to be. Indeed it seems to me likely that the applicant anticipated his own imprisonment in circumstances where, irrespective of the issue of contempt in the face of the court, he repeatedly refused to comply with orders of the court requiring him to furnish a statement of means undoubtedly in the knowledge that this was likely to result in the court concluding that his failure to comply with the instalment order was not due to inability to pay but wilful refusal. It is notable that the applicant's supporters, some of whom were present during the Article 40 proceedings in court taking notes, appear to have known of the applicant's incarceration before any member of his family, perhaps because they like the applicant had anticipated it.*
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> *55. When the outcome now complained of ensued, the applicant says that he was not told of the charge against him or given any opportunity to get legal advice. The basis for this contention seems to rest on the fact that what had gone before was related to the District Court's civil jurisdiction whereas it was the exercise of its criminal jurisdiction that resulted in his imprisonment. While it may be true to an extent to say that there may have been some blurring of the lines between the civil and criminal jurisdiction being exercised by the District Judge, I am satisfied that this has resulted in no unfairness to the applicant in reality.*
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> *56. I am further of the view that the warrant in issue is not void for duplicity. What the warrant describes is a pattern of behaviour over a period of time amounting to contempt with sufficient particularity to enable the applicant to understand the nature of that offence. A literal application of the requirement to specify the words constituting the contempt would require the transcript of all three days to be recited in full in the warrant, clearly an absurd proposition and one with which it would be impossible to comply.*
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> *57. On the issue of stating a case, Article 40.4.3 makes clear that a precondition to the stating of such a case is that the High Court be satisfied that the law on foot of which the person is being detained is invalid having regard to the provisions of the Constitution. I am not so satisfied but in any event I do not see how the court could arrive at such a conclusion in the absence of argument on behalf of Ireland and the Attorney General who are not before the court.*
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> *58. Accordingly, were it necessary for me to express a view, I am satisfied that the detention of the applicant is lawful. However, for the reasons previously explained, I am dismissing this application."*

The Grounds of Appeal

20. The appellant has appealed against the judgment and order of the High Court judge on sixteen stated grounds, which are as follows:

1. The High Court judge erred in law and/or in fact, or on a mixed question of law and fact, in refusing the application herein.

2. The High Court judge erred in law in dismissing the application herein, having directed an enquiry into the lawfulness of the appellant's detention by the respondent pursuant to Article 40.4.2 of the Constitution of Ireland, on a basis other than of his being satisfied that the appellant was being detained in accordance with the law.

3. The High Court judge erred in law in dismissing the application herein, having directed an enquiry into the lawfulness of the appellant's detention by the respondent pursuant to Article 40.4.2 of the Constitution of Ireland, on the basis that the application constituted an abuse of process.

4. The High Court judge erred in law in dismissing the application herein, having directed an enquiry into the lawfulness of the appellant's detention by the respondent pursuant to Article 40.4.2 of the Constitution of Ireland, on the basis that the application was not appropriate for the Article 40 procedure.

5. The High Court judge erred in law and/or in fact, or on a mixed question of law and fact, in holding that the application herein constituted an abuse of process.

6. The High Court judge erred in law and/or in fact, or on a mixed question of law and fact, in holding that the detention of the appellant by the respondent herein was lawful.

7. The High Court judge erred in law and/or in fact, or on a mixed question of law and fact, in failing to order the release of the appellant from his detention by the respondent.

8. The High Court judge, having directed an enquiry into the lawfulness of the appellant's detention by the respondent pursuant to Article 40.4.2 of the Constitution of Ireland, erred in law in putting the onus on the appellant in putting an onus on him to provide explanations and/or give information and/or adduce evidence as to the circumstances in which the application was been brought.

9. The High Court judge, in an enquiry into the lawfulness of the appellant's detention by the respondent pursuant to Article 40.4.2 of the Constitution of Ireland, erred in law in holding that there were procedural requirements as to how the application must be brought, including prescribing the identity and means of knowledge of the person swearing the grounding affidavit seeking an enquiry pursuant to the said Article.

10. The High Court judge erred in law and/or in fact, or on a mixed question of law and fact, in treating the substantive issue, or the primary substantive issue, raised in the application herein as being the question of whether the appellant had been in contempt of the District Court.

11. The High Court judge erred in law and/or in fact, or on a mixed question of law and fact, in failing to hold that the procedure in the District Court whereby the appellant was sentenced to a term of imprisonment for a statutory criminal offence, were so lacking in the attributes of fair procedure required pursuant to the provisions of the Constitution of Ireland [and in particular, Articles 38.1 and 40.4.1], the European Convention on Human Rights [and in particular, Articles 5.1, 5.2, 5.3, 6.1, 6.2, 6.3.a, 6.3.b, 6.3.C and 6.3.d thereof], the Charter of Fundamental Rights of the European Union [and in particular Articles 47 and 48 thereof], and Directive 2012/13/EU [and in particular Articles 6 and 7 thereof] as to render his detention not in accordance with law.

12. Further to ground 11 the procedures in the District Court were lacking in fair procedure in that:

(a). The applicant was tried and convicted of a criminal offence, without being informed of the fact that he was charged with a criminal offence and the subject of a criminal trial; of the criminal offence with which he was charged; of his acts or omissions alleged to constitute the *actus reus* of the said criminal offence; of the state of mind alleged to constitute the mens rea of the said criminal offence; of his entitlement to be legally represented in respect of the said criminal trial; of his entitlement to apply for legal representation pursuant to the provisions of the criminal legal aid scheme; of his entitlement to give evidence and of his entitlement to make submissions, both in respect of conviction and of sentence.

(b). The appellant was tried and convicted of a criminal offence by the judge whom he was charged with having wilfully insulted. He was not tried by an independent and impartial Tribunal. His trial was in breach of the principle of *Nemo iudex in causa sua.*

(c). The manner in which the appellant was tried and convicted of a criminal offence disregarded the presumption of innocence.

(d). The applicant was tried and convicted of a criminal offence without having been provided with any, or any adequate, time and facilities for the preparation of his defence.

(e). The applicant was tried and convicted of a criminal offence without any evidence being adduced as to his guilt and without the opportunity of examining witnesses against him, or otherwise testing the facts alleged to ground his guilt, or the opportunity to obtain the attendance or examination of witnesses on his behalf.

13. The High Court judge erred in law and/or in fact, or on a mixed question of law and fact, in conflating and/or failing to adequately distinguish the proceedings before the District Court pursuant to the provisions of the Enforcement of Court Orders Acts, which were in the nature of civil contempt proceedings, and the proceedings pursuant to the provisions of section 6 of the Summary Jurisdiction (Ireland) Amendment Act, 1871 which was in the nature of a criminal contempt.

14.The High Court judge erred in law and/or in fact, or on a mixed question of law and fact, in holding that the Warrant of Committal certified by the respondent as being the grounds for the lawful detention of the appellant herein was regular on its face and a sufficient record on which to base the applicant's lawful detention.

15.The High Court judge erred in law and/or in fact, or on a mixed question of law and fact, in holding that the Warrant of Committal certified by the respondent as being the grounds for the lawful detention of the appellant herein was not void for duplicity.

16.The High Court judge erred in law and/or in fact, or on a mixed question of law and fact, in holding that section 6 of the Summary Jurisdiction (Ireland) Amendment Act, 1871 was not inconsistent with the provisions of the Constitution of Ireland and, in particular, Articles 38.1 and 40.4.1 thereof.

21. It is proposed to deal with the various complaints that have been made under the headings "Abuse of the process"; "Appropriateness of the Article 40 procedure"; "Fair procedures"; "Alleged defects in the warrant"; "Constitutional challenge", and; "The decision on the merits", though not necessarily in that order.

Abuse of Process

22. There is a long standing debate concerning whether relief under Article 40 can be refused on the grounds either that the application represents an abuse of the process in itself, alternatively in the manner in which it is presented. One school of thought, whose most high profile advocate was perhaps the late Supreme Court judge, Walsh J, as expressed in T*he State (Aherne) v Cotter* [1982] I.R. 188, maintains that the proviso to Article 40.4.2 of the Constitution ("unless satisfied that he is being detained in accordance with law") limits the jurisdiction to refuse release to one ground only: namely where the High Court is satisfied that the detention is in accordance with law. There is, however, a second school of thought which maintains that a more flexible approach may be adopted and that relief may be refused on extrinsic grounds in appropriate cases, albeit that this is a course of action to be adopted very sparingly indeed.

23. Dr Kevin Costello, in his well regarded book, entitled *"The Law of Habeas Corpus in Ireland"* (2006) (Four Courts Press: Dublin) remarks (at p.101) that there is a significant body of case law which can only be explained on the basis that release under Article 40.4.2 is not determined solely by reference to the legality of the detention, and that release may be denied on extrinsic grounds. He suggests that the overriding constitutional interest which is most usually invoked is the integrity of the administration of justice. However, for completeness, it should be noted that he also suggests that circumstances of constitutional necessity could possibly act as a justificatory defence to illegal detention, rendering the detention *"in accordance with law"* e.g., where there is an overwhelmingly superior interest to the vindication of the right to liberty, such as the need to vindicate the right to life.

24. Amongst the cases he cites of potential relevance to the present one *are Re Thomas McDonagh*, (Unreported, High Court, Henchy J, 24th November 1969), and Re Gallagher, (Supreme Court, *ex tempore*, see Irish Times, 26th July 1983). It had previously been thought that a rule analogous to that in Henderson v Henderson (1843) 3 Hare 100 could not apply to an Article 40.4.2 application. The Supreme Court had held in the Application of Michael Woods [1970] IR 154 that (at 162): "[t]he duty of the courts to see that no one is deprived of his personal liberty save in accordance with the law overrides considerations which are valid in litigation inter partes". In the McDonagh case, however, Henchy J, while acknowledging that he was bound by Woods, suggested that a failure to include all available grounds of complaint in the same application might constitute an abuse of process. Accordingly, while it was judicial policy that a litigant should not be "twice vexed", in the interests of fairness in litigation inter partes, that policy could not, and should not, per se prevent successive applications for relief under Article 40.4.2 of the Constitution. However, Henchy J stated:

> *"…it could not be said that he will never, during his imprisonment, be debarred from applying for habeas corpus notwithstanding how many previous applications he has already made. The result would be litigiousness and the processes of the court would be abused."*

25. The Supreme Court, of which Henchy J was by that stage a member, subsequently adopted this view in Re Gallagher. In that case the complainant, in a second challenge, attempted to overturn a conviction by the Special Criminal Court (this time on the ground that one member of the judicial panel that had convicted the complainant was not, as required by the Offences Against the State Act, 1939, a barrister of seven year's standing). The Supreme Court rejected the application on two grounds. Firstly, on the merits – they were satisfied that the impugned member of the Special Criminal Court had in fact been properly qualified; but also secondly, on the grounds that the complainant was guilty of an abuse of process in not bringing forward the insufficient qualification ground in his previous Article 40.4.2 application. Regrettably there is no written judgment. However, in a newspaper account of the Supreme Court's *ex tempore* ruling (Irish Times, 26th July 1983), quoted by Dr Costello in his book, Henchy J is recorded as stating:

> *"This was not the first application Gallagher had made to be released on habeas corpus. It was the view of the Court, annunciated in the past, that a person seeking habeas corpus should put forward all his grounds in his application and not hold them over for the purpose of making subsequent applications. On that point alone the appeal should be dismissed, but the Court was prepared to hold that the appeal was properly before it, and dismissed the appeal."*

26. Accordingly, while it remains the case that there is no limit on the number of challenges which may be brought under Article 40.4.2., the *McDonagh* and *Gallagher* cases nonetheless suggest that if successive applications are in fact made, they will be at risk of not being entertained and of instead being dismissed if it is considered that they represent an abuse of process. The significance of the *McDonagh* and *Gallagher* cases in the context of the present case is that they provide significant support for the view that relief under Article 40.4.2 may indeed be refused if the application is considered to be an abuse of process.

27. Yet further support is to be found in the principle that it is wrong to use the Article 40.4.2 procedure for a primary purpose other than to determine the legality of a person's detention, and in particular to seek to secure the overturning of a conviction order made within jurisdiction. See in Re D [1987] IR 449, and *The State (McDonagh) v Frawley* [1978] IR 131. I will be returning to this in considering the appeal under the heading "Appropriateness of the Article 40 procedure".

28. In the present case I am not concerned with *Henderson v Henderson* type issues, or with successive applications that are potentially abusive of the process. The form of the alleged abuse of process in this case that was of concern to the High Court judge was the bringing of an application on a basis that was entirely inaccurate and misleading, and known to be such by the appellant, and in circumstances where there was also a serious breach of the duty of candour expected of an appellant. I am satisfied that the view arrived at by the High Court judge in that regard was justified on the evidence.

29. In addition, although the appellant was represented by a solicitor, there had been a demonstrable failure by the solicitor concerned to take proper instructions. While the High Court judge did not go so far as to suggest that the solicitor concerned was complicit with the appellant in knowingly presenting an application for relief under Article 40.4.2 on an inaccurate and misleading basis, he was, in my view, legitimately concerned that the solicitor had failed in her duty to the court, as an officer of the court, to ensure in so far as possible by means of the taking of proper instructions that the court was not misled.

30. The Constitution contemplates that any inquiry under Article 40.4.2 shall be conducted by the High Court. Intrinsic to the relief is the notion that potential applicants for relief should have the greatest possible access to the High Court to seek to obtain that relief. Accordingly, the application does not have to be made by an applicant personally. It can be made on another's behalf, and successive applications can be made providing they are not abusive of the process. In addition, it has been held that access to the relief ought not to be fettered or limited by procedural rules that seek *"to regulate the procedure"* – see judgment of Walsh J in *The State (Aherne) v Cotter* [1982] I.R. 188. Again it is clear that this restriction on procedural rules is with a view to ensuring the greatest possible access to the High Court for the purpose of availing of the relief by legitimate applicants. However, nothing in the Constitution suggests that the High Court should be fettered or restricted in the protection of its own process from abuse.

31. The Article 40.4.2 procedure has been entrusted to the High Court by the people of Ireland, and although *sui generis* in terms of its constitutional pedigree and the imperatives created by the Constitution, that procedure is a part of the High Court's process. It seems to me that the High Court must be entitled to act protect its own process, ultimately in the interests of ensuring that it can effectively perform the tasks entrusted to it by the Constitution, including the proper conduct of an inquiry under Article 40.4.2 procedure where requested to do so. If it is to be effective it is essential that public respect for, and trust and confidence in, the High Court be maintained, so that when it acts it does so with the authority that comes with enjoyment of that respect, trust and confidence. It would be inimical to that idea of authoritative action by the High Court in vindication of the right to liberty that it should be constrained from protecting its own process. I therefore agree with the High Court judge's observation that there is no reason why the duty of candour and of *uberrima fides* that applies in other forms of litigation should not apply in relation to applications under Article 40.4.2.

32. Some flexibility in that regard, and the affording of a margin of appreciation, might be required from the High Court in circumstances where it has been necessary for genuine logistical reasons for a third party to make an application on behalf of a detained person and where the full facts may not have been ascertainable by the third party by means of reasonable enquiries in advance of the inquiry. However, that was not the situation here. Even if it was not logistically possible for the solicitor to secure a legal visit to the appellant in prison before the making of the initial application, the appellant should have been spoken to on the telephone and full details obtained concerning the history of the proceedings in the District Court. Moreover, even when the appellant regained his liberty following his admission to bail pending the outcome of the Article 40 inquiry, and had had the benefit of legal advice, he swore an affidavit verifying the affidavit previously sworn by his solicitor and in which he failed to disclose the full history of the proceedings before the District Court.

33. It was unconscionable that the High Court was not informed by the appellant, or by anybody on behalf of the appellant, that there had been multiple hearings before the District Court; that the appellant had been repeatedly warned about his behaviour; that he had been offered the opportunity to retain legal advice and told he would be granted legal aid for that purpose; that he was told he was at risk of imprisonment if he continued to behave as he was behaving; and that on a previous occasion the District Judge had been disposed to find him in contempt and that he had only avoided being incarcerated on that previous occasion due to the non-availability of a member of An Garda Síochána to take him into custody.

34. The High Court judge was entirely justified in my opinion in arriving at the conclusions specified in the passage from his judgment, as quoted at paragraph 16 above.

35. I am satisfied that the High Court judge had more than sufficient evidence to conclude, and that he was correct in his conclusion, that this application for an inquiry was brought in circumstances that were abusive of the process. He would have been entitled for the protection of the Court's process not to continue with the inquiry in those circumstances and to dismiss the application without going further. However, he did not in fact do so. Rather, having expressed the view that the application should be dismissed on the grounds that it involved an attempt to mislead the court and was therefore abusive of the court's process, he proceeded notwithstanding that that was his view to consider in any event the merits of the application in case he was "*wrong in reaching that conclusion".* His conclusion, *"were it necessary for me to express a view"*, was that the detention of the appellant was lawful.

36. In these circumstances I am not disposed to uphold grounds of appeal no's: 3, 5, 8, and 9 all of which relate, directly or indirectly, to the abuse of process finding.

Appropriateness of the Article 40 procedure

37. The High Court judge also formed the view that this was not an appropriate case in which to seek to avail of the Article 40.4.2 procedure. He arrived at this conclusion following consideration of the judgments of the Supreme Court in Child *and Family Agency v McG and JC* [2017] IESC 9. Within those judgments the Supreme Court had reviewed relevant earlier authorities on the circumstances in which it is appropriate to seek an inquiry under Article 40.4.2/habeas corpus. The earlier authorities considered included *Ryan v Governor of Midlands Prison* [2014] IESC 54; *Roche (also known as Dumbrell) v Governor of Cloverhill Prison* [2014] IESC 53; *FX v Clinical Director of the Central Mental Hospital* [2014] 1 I.R. 280; and *McDonagh v Frawley* [1978] I.R. 131.

38. It is clear from the following passage that the High Court Judge's remarks were confined to the pretext on which the *ex-parte* application for an inquiry was based:

> *"49. Applying these observations to the facts of this case, it is clear to my mind that this application, on its true facts as they emerged, is not one that is appropriate for the Article 40 procedure. As it was initially presented by the applicant's solicitor, it was alleged that the sole reason that the applicant was imprisoned was that he refused to accept the jurisdiction of the District Court based on a claim for €38,000.00 which plainly exceeded that jurisdiction. Therefore despite the fact that the warrant under challenge was in my opinion regular on its face, the case was presented as one involving such a fundamental denial of justice as to arguably warrant the intervention of this Court pursuant to Article 40. As events transpired however, these supposed facts were quite untrue and the applicant, whatever about his solicitor, knew them to be untrue and did nothing to correct them when he had the opportunity. On the contrary, as I have previously noted, he swore an affidavit when he was at liberty and with the benefit of legal advice in which he verified that the contents of the solicitor's affidavit were true and refrained from any mention of the many highly material events that occurred at the previous hearings."*

39. I am in agreement with the High Court judge that the application was put forward in the first instance on a basis that was more properly a matter for judicial review proceedings than for an inquiry under Article 40.4. 2 of the Constitution.

40. Although the scope of the challenge was expanded once counsel were instructed on the appellant's behalf to include claims that the warrant was duplicitous; that it failed to particularise the offence of which the appellant had been convicted, and specified an offence unknown to the law; that the appellant had been denied fair procedures in the District Court; and that the statutory provision on foot of which the appellant had been convicted, namely s.6 of the Act of 1871, was both unconstitutional and incompatible with

Article 6 of the European Convention on Human Rights, various European Union Directives and the Charter of Fundamental Rights of the European Union, the High Court judge's ruling did not extend to these grounds, and it is clear that these were not dismissed on the basis that they were inappropriate subject matters for an inquiry under Article 40.4.2. In so far as they were dismissed, they were so dismissed either on their merits or on grounds other than that the Article 40.4.2 procedure had been inappropriately invoked.

41. In the circumstances I am not disposed to uphold ground of appeal no. 4 which relates to this issue.

Fair procedures
42. The complaints under this heading are embraced in grounds of appeal no's: 11, 12(a) to (e) inclusive and 13.

43. Let me summarise the complaints made. It is contended that the proceedings in the District Court, whereby the appellant was convicted and sentenced to seven days imprisonment for contempt, were so lacking in the attributes of fair procedures as to render the detention not in accordance with law. It is suggested that the procedure was non-compliant in various respects with Article 38 of the Constitution, with Article 6 of the ECHR and with Articles 47 & 48 of the Charter of Fundamental Rights of the European Union.

44. It was specifically complained that there was a conflation of the civil and criminal jurisdiction of the District Court; that the appellant was not informed of the criminal charge against him; that he was not asked how he wished to plead; that there had been no hearing of the charge; that no formal evidence was lead in support of the charge; that he was not allowed to challenge the evidence relied on as supporting the charge; that he was not afforded an opportunity to lead evidence in his defence, and; that the District Court judge had acted as a judge in his own cause and had breached the maxim *"Nemo iudex in causa sua".*

45. In support of the claim of lack of fair procedures, and in the absence of decided Irish cases that are directly on point, the appellant has drawn our attention to the Law Reform Commission's Issue Paper (2016) on *"Contempt of Court and other offences and torts involving the administration of justice"* (LRC IP 10-2016) ("the 2016 Issue Paper"). I vhave also had regard to the Law Reform Commission's earlier Consultation Paper on Contempt of Court (LRC CP 4 – 1991) and Report on Contempt of Court (LRC 47 – 1994).

46. In its 2016 Issue Paper the Law Reform Commission ("the LRC") identifies that criminal contempt can take a number of forms, one of which is contempt in the face of the court (contempt *in facie curiae*), which comprises conduct that deliberately disrupts or obstructs court proceedings and is prejudicial to the course of justice. In its earlier 1991 Consultation Paper the LRC characterised the insulting of the presiding judge in the course of proceedings as a contempt in the face of the court.

47. The LRC remarks at para 1.06 of the 2016 issue paper that the law in relation to both civil and criminal contempt is governed almost entirely by common law. At paragraphs 3.11 to 3.13 inclusive of their 2016 Issue Paper they elaborate:

> *"3.11 The jurisdiction of the courts in matters of contempt derives from Article 34 of the Constitution which provides that justice shall be administered by the courts. This provision has been found to authorise the courts to deal with contempt by the summary procedure of attachment. The courts' power to try summarily for contempt has also been found to derive from Article 35 of the Constitution which guarantees the independence of the judiciary. As the Supreme Court (O'Higgins CJ) noted in The State (DPP) v Walsh and Conneely [1981] IR 412, if the court did not have the power to try summarily for contempt, this would mean that every case of contempt would have to be referred to the Director of Public Prosecutions to decide whether or not a prosecution should follow. This would mean that the courts would not have authority to protect their own proceedings. In these circumstances, the Court questioned how the independence of the judiciary could be maintained.*
>
> *3.12 The Supreme Court in Walsh and Conneely concluded that, notwithstanding Article 38.5 of the Constitution (which establishes a right to a jury trial in non-minor criminal proceedings), the courts have the power to try allegations of contempt summarily and that persons charged with contempt have no right to a jury trial unless disputed issues of fact arise in a particular case. This reasoning was endorsed by the High Court in Murphy v British Broadcasting Corporation [2005] 3 IR 336 [71], where, applying Walsh and Conneely, it was held that no right to a jury trial arises in cases of contempt unless the case is non-minor and there are issues of fact to be determined.*
>
> *3.13 In its 1994 Report, the Commission concluded that contempt is an offence of a special category (sui generis) that is within the inherent jurisdiction of the courts. It noted that the courts have the function of ensuring that the administration of justice in the courts is properly protected. This function, it said, can only be exercised effectively where the courts retain their full powers to respond to and punish contempt in the face of the court. The Commission was not aware of any decision which would suggest that the Oireachtas would be able to restrict the inherent power of the courts to exercise a summary power to deal with contempt in the face of the court. The Commission concluded that legislative regulation of this area would be permissible so long as the legislation did not interfere with the power of attachment. It noted, however, that legislation could be largely academic if it could not affect the courts' inherent powers and so the majority of the Commission did not recommend any new legislation in respect of contempt in the face of the court."*

48. At para 1.08 of the 2016 issue paper the LRC states:

> *"The absence of clarity in the law of contempt in its current form may run contrary to the individual's right to a fair trial under both the Constitution of Ireland and the European Convention on Human Rights. These considerations suggest that a legislative scheme for contempt is required. A number of judges and commentators have also noted this need for legislation."*

49. Somewhat unusually, the jurisdiction exercised in the present case was not a common law one deriving from the inherent jurisdiction of the court, but rather a statutory one deriving from s.6 of the Act of 1871. The relevant section provides:

"6. If any person shall wilfully insult any justice or justices sitting in any court within the police district of Dublin Metropolis, or shall commit any other contempt of such court, it shall be lawful for such justice or justices, by any verbal order, either to direct such person to be removed from such court, or to be taken into custody, and at any time before the rising of such court by warrant to commit such person to gaol for any period not exceeding seven days, or to fine such person in any sum not exceeding forty shillings."

50. The statutory jurisdiction was applied in this case by the District Court judge in a summary way and the appellant was immediately tried for his contempt in like manner to how the common law power to commit for contempt in the face of the court arising in other circumstances has heretofore been typically applied.

51. In regard to the power to summarily and immediately try an offence of contempt the LRC has commented at paragraphs 3.05 to 3.07 of the 2016 Issue Paper:

> *"3.05 In Ireland, it has been held that a trial judge has an inherent constitutional power to summarily and immediately try an offence of contempt where this is necessary in the interests of the proper administration of justice [The State (DPP) v Walsh and Connelly [1981] IR 412.] The immediate and summary nature of proceedings serves an important purpose in that it helps to maintain the authority and legitimacy of the courts. In addition, as O'Donnell notes [in O'Donnell, "Some Reflections on the Law of Contempt" (2002) JSIJ 87 at 117], the court's power to try cases of contempt in the face of the court immediately 'encourages good behaviour by litigants and lawyers if it is known that there is some immediate sanction.'*
>
> *3.06 Where, however, it is not absolutely necessary for the proper administration of justice to try the person in contempt immediately, any conviction for contempt that is secured during the trial may be overturned upon appeal.[In re Kelly [1984] ILRM 424, also O'Donnell op cit]. In England and Wales, the courts appear to have acknowledged that a 'cooling off' period is desirable and that a decision to imprison for contempt in the face of the court should not be taken too quickly and only after the judge has had time for reflection [various authorities footnoted].The accused must also have time to prepare his or her defence and to take legal advice.*
>
> *3.07 The main problem with the power to try a person immediately for contempt in the face of the court is the fact that this may deprive the accused of his or her right to fair procedures. As Young notes, through this procedure the accused 'is dealt with immediately and thus has no time to prepare his defence; moreover he is dealt with by a judge who may find himself in the heat of the moment inclined to confuse defence of his personal dignity with the protection of orderly justice'[Young,"The Contempt of Court Act 1981" (1981) 8(2) BJLS 243, at 244] Young also questions the necessity for the immediate prosecution, asking why exclusion from the courtroom is not sufficient to maintain order. In his mind, 'if the conduct is sufficient to constitute some criminal offence it can then be dealt with later according to the ordinary criminal process.'*

52. The appellant's complaints are, in substance, that he was not dealt with later, by another judge, according to the ordinary criminal process; and that the failure to do so was procedurally unfair in the various ways that he has alleged in his grounds of appeal, and elaborated upon in his extensive written submissions.

53. In addition to the LRC's 2016 Issue Paper, our attention has also been drawn, as I understand was that of the Court below, to *Hammerton v Hammerton* [2007] EWCA Civ 248; Treacy v District Judge McCarthy [2008] IEHC 59, [2017] IESC 7; and *Kyprianou v Cyprus* [2007] EHRR 27.

54. *Hammerton v Hammerton* is a decision of the Court of Appeal in England and Wales concerning a person given a three-month sentence for civil contempt. That court held that proceedings for committal were a criminal charge for the purposes of Article 6 of the ECHR and that a defendant to such proceedings had the rights enshrined in Article 6 (3)(c) of the Convention to criminal legal aid if he did not have sufficient means to pay for legal assistance. It further held that as committal proceedings involved a criminal charge, the burden of proving guilt lay on the person seeking committal.

55. The case of *Treacy v McCarthy*, although an Irish authority, is of relatively limited assistance. It involved a judicial review in which the applicant sought certiorari of an order similar to the order in the present case on the grounds of alleged want of fair procedures, and the specific complaints in that regard were again very similar to the complaints made in the present case. The applicant was unsuccessful in the High Court where McGovern J held that he had not been denied a fair hearing. The applicant then sought to appeal to the Supreme Court, but was out of time to do so. He sought an extension of time in which to file a late appeal and in a reserved judgment dated the 10th of February 2017 delivered on behalf of the Supreme Court by Clarke J (Denham CJ and MacMenamin J concurring) he was granted late leave to appeal confined to the contention that the manner in which a finding of contempt in the face of the Court was made against him breached his rights under the Irish Constitution, under the ECHR or under EU law. The substantive appeal has yet to be heard.

56. The case of *Kyprianou v Cyprus* is certainly pertinent to the issues that have been raised. In that case the applicant was conducting a trial before a tribunal of three judges in Limassol and accused a male and female judge of interfering with his cross-examination by passing *ravasakia* between each other. In Greek Cypriot that word is capable of two meanings, either notes or love letters. The tribunal immediately indicated that what had been said was a contempt of court. The applicant was told that he should either withdraw what he had said or immediately be sentenced. When the applicant subsequently asked for details of the alleged offence, the court passed judgment describing the applicant as having, amongst other things, created a climate of terror and intimidation within the court. The applicant was sentenced to five days imprisonment.

57. The applicant brought a case to the European Court of Human Rights ("ECtHR") and a first instance Chamber upheld complaints that he had not received a hearing by an impartial tribunal contrary to Article 6.1 ECHR, that he had not been afforded the presumption of innocence contrary to Article 6.2 ECHR, and that he had not been informed in detail of the accusation against him contrary to Article 6.3 ECHR. The matter was then referred on the application of the Cypriot Government to the Grand Chamber of the ECtHR.

58. A number of common law states, including Ireland, intervened as to the current position under their domestic law concerning contempt of court. The position advocated on behalf of this state was that under our law, contempt of court was an offence *sui generis* within the inherent jurisdiction of the court and contempt *in facie curiae* came within the ambit of criminal contempt and was tried summarily by both the superior and inferior courts. Furthermore, the Irish government argued the Irish courts have consistently observed that contempt of court is not an offence against the personal dignity of judges but rather it is the name given to the kind of wrongful conduct which consists of interference with the administration of justice. The power to adjudicate and punish such conduct is considered an essential adjunct of the rule of law and an inherent aspect of the authority of judges to control the proceedings before them. It was further argued that for the purposes of safeguarding the rights of the alleged contemnor and ensuring fairness, certain procedural guarantees are afforded in the case of contempt in the face of the court, including the requirement that judges should only determine such proceedings arising out of events in their court where it is necessary to do so.

59. The Irish Government argued that the effect of the decision of the Chamber was that that an ancient and important aspect of the administration of justice as developed by the common law – the power and duty of a judge to maintain order in his or her court through the court's summary procedure jurisdiction – was contrary to the Convention. This approach disregarded the margin of appreciation enjoyed by the High Contracting Parties in making provision by their laws for the protection of order in, and the proper dignity of, court proceedings.

60. It was submitted that the dismissal of the contention that the offence was against the administration of justice rather than the individual judge was unjustified, and ignored the fact that in a range of circumstances judges were expected to and did disregard personal preference and opinion in the discharge of their functions. For this reason, it became critical for the purposes of the objective bias test to determine what the offence the judge was required to adjudicate on comprised, and who the injured party was. It was only in that context that the Convention jurisprudence as to whether there was a well-founded apprehension of bias could be properly and reasonably applied.

61. It was submitted that the Chamber's judgment disregarded the fact that referral of the alleged contempt to the prosecuting authority would reduce the authority of the court and render the proper maintenance of order dependent upon the executive. In this connection, they emphasised that a system of referral to the prosecuting authority and the appointment of a second judge to try the case would result in the adjournment of any proceedings in which there was a disturbance or interference. In more remote areas, it might be difficult to bring a prosecution before a different judge. The inevitable time lag would greatly inconvenience the proper administration of justice by the first court. Secondly, the Chamber had ignored the important implications for the authority of the court if it could not immediately deal with and punish contempts as they occurred. Thirdly, the Chamber had failed to have regard to the important procedural protections that were afforded in the case of contempt in the face of the court, including the requirement that a judge should only determine such proceedings arising out of events in his or her court where it was necessary to do so.

62. Further, the Irish Government submitted, the Chamber's judgment did not resolve the issue of how sudden interferences with the court's authority or disruptions in the course of legal proceedings could be addressed in a manner that was consistent with the rights of litigants to have their cases disposed of properly and speedily, and the dignity of the court. The Irish Government considered that there were sound practical reasons why it was appropriate for the judge before whom the contempt was committed to try the alleged contemnor for contempt. That judge was undoubtedly in the best position to deal with the issue. Only the possibility of the immediate invocation of the summary procedure for contempt constituted an effective deterrent.

63. Finally, the involvement of the Director of Public Prosecutions interfered with the separation of powers. The judge before whom the disturbance occurred would be obliged to give evidence for the State prosecutors which was an undesirable role for an independent judiciary. This would deprive the courts of their right to enforce their own orders and deny the fundamental tripartite division of powers which underlay the entire Constitution.

64. The Grand Chamber found that the confusion of roles between complainant, witness, prosecutor and judge could obviously prompt objectively justified fears as to the conformity of the proceedings with the principle that no one should be a judge in his own cause and, consequently, as to the impartiality of the bench. On that basis the applicant's fears of bias were objectively justified. As regards the subjective test of bias, the statement of the tribunal indicated a sense of indignation and shock which ran counter to the detached approach expected of judicial pronouncements. The judges had also imposed an immediate sentence of five days imprisonment, which indicated a disproportionate response to the events, and had expressed the opinion, before any trial of the issue, that they considered the applicant to be guilty of contempt. On that basis the applicant's misgivings about the impartiality of the Bench were also found to be justified under the subjective test.

65. In reply to the complaints made by the complainant in the present case, and the reliance by him on the *Kyprianou* decision in particular, it has been submitted on behalf of the respondent that the appellant did in fact have the benefit of fair procedures. Moreover, the facts of the *Kyprianou* case were completely different from those in the present case and it is readily distinguishable.

66. With respect to fair procedures, counsel for the respondent has urged upon us that while his client does not dispute that the actual offence with which the District Court was concerned was committed on the 21st of February 2017, what occurred on that date was part of a continuum and that to properly appreciate both the position of District Court judge and the position of the appellant it was important to have regard to what occurred on all four of the dates on which the proceedings in which the alleged contempt *in facie curiae* had been before the District Court.

67. It was submitted that if ever there was a case where a judge of the District Court was entitled to act as he did by invoking s.6 of the Act of 1871 and in proceeding summarily and immediately to try the appellant for contempt *in facie curiae*, it is this one. It was submitted that the evidence, and in particular the DAR transcripts, establish that the appellant was determined from the outset of the proceedings in the District Court not to co-operate with the court, but more than that to disrupt its proceedings and prevent it from performing its function. The *modus operandi* was the knowing and wilful repetition in response to questions and directions from the bench, and proper and appropriate questioning by counsel for the moving party, of several mantras and stock phrases, nonsensical in the context in which they were deployed, such as *"is the plaintiff in court?" "are you representing the plaintiff ?"* [query addressed to the Bench], *"is this a common law jurisdiction"* or *"it is a common law jurisdiction"*, and *"it is paid in the private", "it is a civil matter"*, and *"I don't consent to anything"*, to mention but some. Counsel for the respondent has described the repeated deployment of this tactic as systematic, a characterisation amply justified on the transcripts. It was submitted that the effect of what was done was to frustrate the case from going anywhere. It wasn't just a question of an appellant who was unaware of his circumstances, who didn't understand the strange legal environment in which he was present, who didn't understand the questions he was being asked. The respondent submits that the only possible construction that can be placed on the transcripts is that this was obstruction, and deliberately, calculatedly, systematic obstruction. I agree with this submission.

68. I was asked by counsel for the respondent to note that on day 2 (i.e., the 13th of September 2016, the first date for which there is a transcript), the District Judge having exhibited great restraint and patience indicated that he was prepared to issue a warrant for the appellant to be held in contempt. However as there was no Garda present in court he did not ultimately do so, and the matter was adjourned to the 24th of January, 2017.

69. I was further asked to note that when the matter came back before the District Court on the 24th of January 2017 (the second date for which there is a transcript) the District Court enquired of the appellant as to whether he had filed a statement of means for legal aid purposes, which he had not. The enquiry was met by the appellant ignoring the question and instead directing one of his own stock questions to the judge, i.e., *"is the plaintiff in court?".* The District Judge then dealt with the matter in the following way. He said:

> *"Now, in the circumstances having regard to the difficulties which we experienced. And insofar as I want to be 100% clear in all of this, I'm going to put the matter back for a shorter period of time, for the respondent to produce a statement of means so I can assess his capacity to pay. And I want that statement of means to be available to this court in advance of the adjournment date and to the claimant's solicitors in advance.*
>
> *And I will renew my warning that if a statement of means is not provided* ***and if there is not cooperation with the court on the next date, you are at risk, sir.***

And therefore, I offer you the opportunity again, that ***if you decide to come to court and continue with the kind of carry on that you did on the previous occasion you should bring a solicitor with you.*** *And because –* ***and that solicitor will be granted legal aid****, so you have no excuse for not bringing one.* ***But there will be consequences upon the next day. Do I make myself very clear, sir?***

Mr. Ryan: I don't consent to this going ahead, there is no claimant here."

(This Court's emphasis)

70. Counsel for the respondent maintains that from this point it is clear beyond peradventure that the appellant knows that his behaviour is regarded as contemptuous, that if he repeats it he is at risk of being tried summarily on contempt, that he is entitled to retain the services of a solicitor, and that the judge is prepared to grant him legal aid. Accordingly, when the matter came on again on the 21st of February 2017, the day of the offence the subject matter of these proceedings (and the third date for which there is a transcript), it was submitted that the District Judge could be satisfied, and this Court and the court below can equally be satisfied, that the person he was dealing with, the appellant, understood that what he had been doing and saying was not acceptable; understood that his behaviour was obstructive; understood that he could seek legal advice; understood that he was at risk; and understood, because in fact he had been the subject of a decision to commit him on a previous date, that that risk could involve going to prison.

71. In all these circumstances the respondent submits there was no want of fair procedures. I agree with this submission. The appellant knew exactly what he was charged with, knew exactly the case he was required to answer, knew that he could have had the benefit of state paid legal representation, knew exactly what the consequences of persisting in his unacceptable and contemptuous behaviour would be. He was warned, clearly and unequivocally, that he should desist and that if he failed to do so there would be consequences but persisted nevertheless. He was given the opportunity even at the last minute to co-operate, giving rise to the following exchanges:

"[District judge] : Sir, I am fed up with listening to incoherent rubbish that has absolutely no basis, either in law or in practice. Now incoherent rubbish sometimes comes out of an incoherent man but I don't believe you are incoherent sir I think you are playing a game. I have already put up with insults and impertinence on your behalf on a number of occasions. I am not prepared to allow the merry go round go on any longer.

Are you prepared to cooperate with these proceedings sir?

[Appellant]: This is a common law jurisdiction.

[District judge]: Are you prepared to cooperate with these proceedings sir?

[Appellant]: It is paid in the private.

[District judge]: I asked you a simple question, sir and I accept (sic) an answer.

[Appellant]: I don't consent to the proceedings here today.

[District judge]: Very good sir. You leave me with no alternative but to issue a warrant for your committal.

Counsel for the plaintiff: Yes judge.

[Appellant]: Will you be signing the order?

[District judge]: I will be signing the order sir right now and there is a garda available to take you into custody, seven days.

Counsel for the plaintiff: Very much obliged Judge.

[Appellant]: This is a civil matter; this is a civil matter.

[District judge]: Sir it is a serious matter –

[Appellant]: It is a civil matter.

[District judge]: And you have regarded it with contempt.

[Appellant]: It is a civil matter.

[District judge]: You have failed, you have been insulting, you have failed to cooperate with the court. You have made statements that are unrelated to the issues that have been raised before you and you have sought to question the court in an irrelevant and offensive way.

Counsel for the plaintiff: And I think the basis upon which the order is made is wilful refusal to engage Judge.

[District judge]: Yes.

Counsel for the plaintiff: Thank you Judge.

[Appellant]: Will you be signing that order.

[District judge]: I've just signed it.

[Appellant]: It is a civil matter, it is a civil matter, will I be able to get a copy of that original order?

[District judge]: I will be delivering it now today's date is the?

Registrar: 21st of February Judge.

[District judge]: 21st of February I issued a formal warning on the last occasion that you should have a solicitor in court –

[Appellant]: I don't owe any money.

[District judge]: – you failed to do that.

[Appellant]: It is/was paid in

[District judge]: Very good. There's the orders in duplicate. If you pass one to the guard please.

[Appellant]: Paid them in

[District judge]: Reflect on your position over the seven days and take the offer of solicitor while you are in custody. Take the advice that you are provided with. I have told you before – that you are not –

[Appellant]: I told you I don't owe any money.

[District judge]: -- You are not helping your case. You are going to make your circumstances untenable.

[Appellant]: Common law jurisdiction. I don't consent to anything here today."

72. Counsel for the respondent maintains that this was manifestly a case that merited the summary and immediate trial of the appellant in the interests of the protection of the court's own process and the maintenance by the court of its authority. I agree with that submission and in the circumstances agree with the High Court judge's conclusion that, notwithstanding some blurring of the lines between the exercise of the District Court's civil and criminal jurisdiction there was in reality no unfairness to the appellant. He can have been under no misapprehension as to the nature of the contemptuous behaviour that was being complained about, and it is indicative of the fairness with which he was being treated that it was made plain to him, even at the 11th hour, that he could avoid sanction by co-operation with the proceedings. It was implicit that if he desisted no action would have been taken even at that stage. Moreover, the judge's solicitousness in ensuring that he understood his position, and that he could have the assistance of a lawyer if he wished to have one, is clearly indicative of the fact that the District Court judge would readily have listened to anything sensible that he might have offered in his defence. Instead he persisted with his nonsensical mantras. It is clear that he knowingly provoked and precipitated being cited for contempt and it ill behoves him in the circumstances to be contending that he was denied fair procedures.

73. In regard to the *Kyprianou* case the respondent has submitted that the facts of that case were completely different. In that case the Court acted after the alleged contemnor, a lawyer representing his client, had uttered the single word "*ravasakia*", which was said to be a disproportionate reaction and one likely to have a chilling effect on the capacity of lawyers to defend their clients. In contrast, in the present case there was a lengthy continuum of insulting, non-cooperative, disrespectful and disruptive behaviour by a lay-litigant which was only acted upon by the court after repeated warnings, and after the granting of several adjournments to allow reflection on those warnings and the provision of the opportunity to obtain state funded legal advice and/or court representation.

74. Secondly, the reaction of the judges on the Limassol tribunal, exhibiting as it did the sense of indignation and shock, suggested that they were personally affronted and motivated by that in their reaction, rather than concerned about the protection of the authority of the court. In those circumstances the maxim *nemo iudex in causa sua* was breached both in spirit and in fact. It was submitted that the same could not be said about how the District Judge in the present case dealt with the appellant's contempt. The District Judge dealt with the entire proceedings with commendable restraint and patience, and notwithstanding personal insults received was only concerned to protect and preserve the process and authority of his court.

75. While the *Kyprianou* case does not in any event represent a binding authority on this Court, although under section 3 of the European Convention on Human Rights Act 2003 this Court is obliged as an organ of the State to take account of ECtHR decisions in order to perform our function in a manner compatible with the State's obligations under the Convention, I agree with the respondent that the circumstances of the *Kyprianou* case are capable of being distinguished from those of the present case.

76. In all the circumstances of the case I am satisfied that the High Court judge was correct in finding that fair procedures were afforded to the appellant in the particular circumstances of this case. For completeness, I am also not persuaded, again in the particular circumstances of this case, that the committal of the appellant for contempt failed to respect the appellant's rights under article 6 of the ECHR, or his rights under the Charter of Fundamental Rights of the EU, or any other rights enuring to his benefit under EU law.

77. In the circumstances I am not prepared to uphold the complaints under grounds of appeal no's: 11, 12(a) to (e) inclusive and 13.

Alleged defects in the warrant

78. The appellant further complains in grounds of appeal no's: 14 and 15 that the Warrant of Committal in this case was irregular on its face and not a sufficient record on which to base the appellant's detention, and that it was void for duplicity. The basis of this complaint is the contention that s.6 of the Act of 1871 legislates for two different offences, namely (i) wilfully insulting a justice in a court, and (ii) committing a contempt of such court, and that the warrant in this case is ambiguous as to which offence the appellant has been convicted of. It was submitted that "*it is unclear whether a mens rea is required for the differing forms of contempt"*, but that it is clear from the use of the word "wilfully" in the section that it contemplates two offences with possibly differing *mens rea*. For that reason, it was submitted, the provision must be interpreted as having created two offences, rather than a single offence that may be committed in two separate ways.

79. Counsel for the respondent maintains that s.6 of the Act of 1871 concerns the single offence of contempt, which may be committed in different ways including by wilfully insulting the court which is the only example cited. The respondent maintains that it is clear that this is the correct interpretation because of the clause which says *"or shall commit any **other** contempt of court"* (This Court's emphasis), which necessarily implies that the wilful proffering of an insult is also a contempt of court and not a discrete crime in its own right.

80. I agree with the interpretation advocated by counsel for the respondent and consider that the High Court judge was correct in expressing the view that the warrant is not void for duplicity.

81. In so far as it was also complained that the conduct said to comprise the contempt was insufficiently specific in the warrant I reject that, and agree entirely with the conclusions of the High Court judge in that regard. The warrant makes plain when and where the offence was committed, it identifies the court and judge concerned, it identifies the proceedings or cause in the course of which the contempt was committed, it identifies the nature of the contempt namely that the complainant had behaved contemptuously in that he *"wilfully insulted me + refused to engage with the court"*, it identifies the statutory provision relied upon, namely s.6 of the Act of 1871, and it specifies the precise sentence, namely that the contemnor *"be committed to prison for the period of 7 days*" . Finally, it is addressed to the respondent. There was manifest sufficient information contained within it for the appellant to know for what it was, and on what basis, he was being committed.

82. In the circumstances, I am not prepared to uphold grounds of appeal no's 14 and 15.

The decision on the merits
83. The grounds of appeal to be dealt with under this heading are grounds no's: 1, 2, & 7. These are generic in the manner in which they are pleaded, and in substance take issue with the High Court judge's conclusion that, quite apart from issues involving abuse of process; the appropriateness of using the Article 40.4.2 procedure; and other issues pleaded with specificity, it was not appropriate on the merits of the application to direct the appellant's release under Article 40.4.2.

84. I am not prepared to uphold these grounds of appeal. The evidence before the High Court judge indicated the proper exercise within jurisdiction of a discretionary statutory power to commit a contemnor *in facie curiae*, in circumstances where there was a sound evidential basis capable of justifying the exercise of the power in question. I consider that the judge's conclusion *that "were it necessary for me to express a view, I am satisfied that the detention of the appellant was lawful"* was a conclusion that was legitimately open to him to express in the circumstances of the case.

Constitutional Challenge
85. Save with one exception, the only orders that can be made in the context of an inquiry into the lawfulness of a detention under Article 40.4.2 of the Constitution are that the detained person should either be released on the basis that s/he is unlawfully detained; alternatively, not released on the basis that s/he is lawfully detained. The exception to which I have alluded arises under Article 40.4.3 of the Constitution which provides:

> *"3° Where the body of a person alleged to be unlawfully detained is produced before the High Court in pursuance of an order in that behalf made under this section and that Court is satisfied that such person is being detained in accordance with a law but that such law is invalid having regard to the provisions of this Constitution, the High Court shall refer the question of the validity of such law to the Court of Appeal by way of case stated and may, at the time of such reference or at any time thereafter, allow the said person to be at liberty on such bail and subject to such conditions as the High Court shall fix until the Court of Appeal has determined the question so referred to it."*

86. Although ground of appeal no 16 asserts that the High Court Judge held that *"section 6 of the Summary Jurisdiction (Ireland) Amendment Act, 1871 was not inconsistent with the provisions of the Constitution of Ireland"*, the High Court judge did not in fact say that. What he said was that he was not satisfied that the law in question *"is invalid having regard to the provisions of the Constitution".* This was in the context of responding to a request for him to state a case for the opinion of the Court of Appeal under Article 40.4.3 of the Constitution, and where Article 40.4.3 itself refers to invalidity.

87. In that regard, the High Court judge stated in his judgment, at para 57 thereof :

> *"**On the issue of stating a case, Article 40.4.3 makes clear** that a precondition to the stating of such a case is that the High Court be satisfied that the law on foot of which the person is being detained is invalid having regard to the provisions of the Constitution. I am not so satisfied…". (this Court's emphasis)*

Moreover, he added:

> *"but in any event I do not see how the court could arrive at such a conclusion in the absence of argument on behalf of Ireland and the Attorney General who are not before the court."*

88. There is a distinction in Irish Constitutional legal jurisprudence between *"invalidity"* having regard to the terms of the Constitution on the one hand, and "*inconsistency"* with the Constitution on the other hand. *Invalidity* has been held by the Supreme Court in *The State (Sheerin) v Kennedy* [1966] IR 379 to be a legal term of art which is potentially applicable only to post 1937 legislation. All post 1937 legislation is presumed in the first instance to be constitutional, although that presumption may be rebutted and such legislation may be declared "invalid" having regard to the provisions of the Constitution by a court competent to do so. As s. 6 of the Act of 1871 is a pre-1937 legislative provision it could never be regarded as "invalid" having regard to the provisions of the Constitution. Rather, if it was "inconsistent" with the Constitution it would not have been continued in force upon the coming into operation of the Constitution in 1937. It would never have been law in the post 1937 era and therefore there would be nothing to declare invalid. The conclusion expressed in the judgment that s. 6 of the Act of 1871 is not invalid having regard to the provisions of the Constitution is therefore technically correct in that it could never be otherwise.

89. However, it appears to be the case that neither counsel, nor the High Court judge, were alive to the import of *The State (Sheerin) v Kennedy*, and that although the High Court judge referred to s. 6 of the Act of 1871 as not being "invalid" having regard to the terms of the Constitution, he may have meant that in his view that it was not "inconsistent" with the terms of the Constitution. Be that as it may, it is clear that, although he was expressing a provisional view he did not regard himself as being required to decide and rule upon the issue definitively. Rather, he made it absolutely clear that he could not do so in the absence of the Attorney General having been put on notice.

90. Clearly, the issue of the constitutionality of s.6 of the Act of 1871 is not before us as a case stated. The Article 40.4.3 procedure special case stated procedure is only available in respect of post 1937 legislation. I therefore cannot consider the constitutionality of it on that basis. Moreover, *The State (Sheerin) v Kennedy* makes clear that any question of the constitutionality of a pre-1937 law is one to be determined by reference to Article 50 of the Constitution.

91. Had such an issue been properly raised, the High Court Judge would have been required to determine within the four walls of the proceedings then before him whether or not, applying the test provided for in Article 50, the terms of s. 6 of the Act of 1871 were

inconsistent with the provisions of the Constitution. If he so concluded, it would clearly influence in one direction how he should decide the case. If his conclusion was otherwise, it would not have that influence. However, as the High Court judge rightly pointed out, there is a mandatory requirement whenever it is proposed to challenge the constitutionality of a law, either in terms of its constitutional validity or consistency with the Constitution, to put the Attorney General on notice and to join him as a Notice Party so that he might have the opportunity of making submissions on behalf of the State in support of the constitutionality of the provision. That was not done in this case and, absent it being done, any issue as to the consistency of s. 6 of the Act of 1871 with the provisions of the Constitution was not properly before the court below and was not justiciable. If an application for an adjournment had been made to enable the appellant to put the Attorney General on notice it might well have been acceded to. However, there was no such application in this case.

92. This requirement to put the Attorney General on notice arises under Order 60 of the Rules of the Superior Courts. The mandatory nature of it was emphasised by Carroll J in the High Court in *The State (D) v Groarke* [1988] IR 187. Here the applicants who had sought to litigate the constitutionality of the Children Act 1908, in the context of an inquiry under Article 40.4, had claimed that they were not required to serve an Order 60 notice on the Attorney General. Carroll J rejected this argument, stating (at 190) that the purpose of Order 60:

> *"…is to enable the Attorney General to argue for the constitutionality not only of post-constitution statutes but also of pre-Constitution ones as well. A large body of our statute law dates from before the Constitution. I cannot accept that O. 60 should be interpreted so that it would be possible for a pre-Constitution statute to be declared unconstitutional in an action between two private individuals without the knowledge of the Attorney General."*

93. This view received endorsement by the Supreme Court in *Re Ellis' Application* [1990] 2 IR 291. In the High Court O'Hanlon J upheld the constitutionality of s.2 of the Trial of Lunatics Act 1883 in proceedings where the Attorney General had not been put on notice. However, in the Supreme Court, which allowed the appeal and set aside the order of the High Court, Finlay CJ observed (at p.303) that the failure to serve such a notice "*must raise significant doubts and queries as to the validity of the procedures leading to the making of [the] order."*

94. Accordingly, in so far as it might have been argued that s.6 of the Act of 1871 was inconsistent with the provisions of the Constitution and did not therefore survive the coming into force of that instrument, such an issue was not properly before the court below, was not justiciable and, in those circumstances, did not give rise to any finding capable of being appealed against.

95. I am not therefore disposed to uphold ground of appeal no 16.

Conclusion

96. In circumstances where I have not been prepared to uphold any of the grounds of appeal advanced, I therefore dismiss the appeal.