Neutral Citation [2012] IEHC 271

THE HIGH COURT

[2012 No. 1258 SS]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN/

F.X.

APPLICANT

AND

CLINICAL DIRECTOR OF THE CENTRAL MENTAL HOSPITAL

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on the 3rd day of July, 2012

1. This applicant is currently detained in the Central Mental Hospital pursuant to an order of the Central Criminal Court made on the 26th March 2012 under s. 4(5)(c)(i) of the Criminal Law (Insanity) Act 2006 ("the Act of 2006"). He now seeks his release pursuant to Article 40.4.2 of the Constitution. This application raises very difficult questions of far reaching importance concerning the scope and reach of the Article 40.4.2 procedure and the interpretation of the Act of 2006.

2. The application itself raises from tragic circumstances. The applicant was charged with a very serious criminal offence before the Central Criminal Court and he was found unfit to plead by Carney J. This medical diagnosis is that the applicant suffers from chronic paranoid schizophrenia which is resistant to treatment. The overwhelming evidence is that the applicant is seriously disturbed and that he presents a very serious threat to himself, identifiable individuals and to the general public were he to be released from custody. It is only appropriate to record here that his mother and wider family have endeavoured to support him, while recognising his acute difficulties. It is, I think, important that her dedication to his welfare in extremely difficult circumstances should be publicly acknowledged.

3. I should further record that I made an order pursuant to s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008, prohibiting the identification of the applicant or any member of his family. In this regard I was satisfied that the identification of the applicant would seriously compromise his medical treatment and would draw unwelcome attention to his plight.

4. Before considering the questions of interpretation arising under the Act of 2006, it is necessary first to raise an important jurisdictional issue: can this Court grant an order of release under Article 40.4.2 where the order detaining the applicant has been made by the Central Criminal Court?

The jurisdiction of the High Court to make an Article 40 order in respect of another judge of the High Court

5. Section 11 (1) of the Courts (Supplemental Provisions) Act 1961 provides that when the High Court exercises the criminal jurisdiction with which it is invested by law it shall be known as the Central Criminal Court. It is true that the Central Criminal Court has attached to it an elite cadre of specialist judges, which, taken together with a distinct juristic tradition, identity, nomenclature and (since 2010) location, tends to mark it apart from the rest of the High Court. The fact remains nevertheless that the order made by Mr. Justice Carney is unquestionably an order of the High Court.

6. This raises the very difficult question of whether a person detained in custody pursuant to an order of the High Court can seek an order of release from this Court pursuant to Article 40.4.2. One would have to acknowledge that there are many powerful arguments against the existence of such a jurisdiction, as to hold otherwise would, on this view, be inconsistent with the judicial architecture established by Article 34.3.1 and Article 34.4.3 of the Constitution.

7. It is perfectly clear that, subject to one special exception, Article 34.3.1 established a unitary High Court with a full original jurisdiction with "power to determine all matters and questions whether of law or fact, civil or criminal." The special exception here is provided by Article 40.4.2 itself which carefully preserves the right of every citizen to apply to the "High Court *and any and every judge thereof"* (my emphasis). Such an applicant can accordingly apply to a judge of the High Court (and not simply the High Court as such) of his or her choice for an initial inquiry into the legality of his or her detention: see, e.g., my own judgment in *McHugh v. Minister for Justice and Equality* [2012] IEHC 110. In all other respects, however, the Constitution provides for a unitary High Court, from whose decisions the only remedy is to appeal to the Supreme Court or, as the case may be, the Court of Criminal Appeal. Thus, for example, as counsel for the applicant, Mr. Fitzgerald S.C., readily conceded, one judge of the High Court cannot quash a decision of another High Court judge in Ord. 84 judicial review proceedings. As Henchy J. observed in *The People (Director of Public Prosecutions) v. Quilligan* (No.2) [1989] I.R. 46, 57:

> "The High Court, whether sitting as the Central Criminal Court or otherwise, is not an inferior court subject to coercive orders such as mandamus."

8. If that is so, it might be thought to be anomalous if one judge of the High Court could effectively declare pursuant to Article 40.4.2 that an applicant was in unlawful custody as a result of an order made by another judge of this Court, not least where that order could not be quashed in judicial review proceedings.

9. Nor does the matter end there. If, for example, the Supreme Court were to make an order providing for the detention of an

applicant, could this Court entertain an application pursuant to Article 40.4.2, the fact that this Court is inferior in the judicial hierarchy to the Supreme Court notwithstanding? All of these consideration might be thought to suggest that this Court enjoyed no such jurisdiction under Article 40.4.2 where the practical effect of such an inquiry would be to determine the legality of an order made by another judge of the High Court or the Supreme Court.

10. These considerations notwithstanding, I nevertheless feel compelled to arrive at the opposite conclusion in view of a series of Supreme Court decisions which either tacitly or by implication acknowledge the existence of such an Article 40.4.2 jurisdiction in respect of decisions of the Central Criminal Court.

11. The first of these is *The State (O) v. O'Brien* [1973] I.R. 50. In that case the applicant had been convicted of murder while a juvenile following a jury trial in in the Central Criminal Court presided over by Teevan J. Section 103 of the Children Act 1908 had provided that a sentence of death shall not be pronounced against a young person but that in lieu thereof the court shall sentence the young person to be detained "during His Majesty's pleasure". The Supreme Court held that the trial judge had imposed an unlawful sentence, as it was not a correct interpretation of s. 103 of the Act of 1908, and, for good measure, indicated that that section had not survived the enactment of the Constitution. What is indisputable is that in the High Court O'Keeffe P. granted an order under Article 40.4.2 in respect of a sentence imposed by another judge of the High Court, Teevan J., in the Central Criminal Court and in this respect he was upheld by the Supreme Court.

12. The second example is the decision of the Supreme Court in *The State (McDonagh) v. Frawley* [1978] I.R. 131, a case where the applicant prisoner contended that he was entitled to be released under Article 40.4.2 by reason of what he said was inadequate medical treatment for backache. It is perhaps not surprising that O'Higgins C.J. rejected this argument ([1978] I.R. at 136-137) saying:-

> "The stipulation in Article 40.4.1 of the Constitution that a citizen may not be deprived of his liberty save 'in accordance with law' does not mean that the convicted person must be released on *habeas corpus* merely because some defect or illegality attaches to his detention. The phrase means that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law. For *habeas corpus* purposes, therefore, it is insufficient for the prisoner to show that there has been a legal error or impropriety or even that jurisdiction has been inadvertently exceeded. For example, if the judge at a murder trial in which the accused was convicted were to impose a sentence of imprisonment for life instead of penal servitude for life as required by the statute, the resulting detention would be imposed technically without jurisdiction. But the prisoner would not be released under Article 40.4, for it could not be said that the detention was not "in accordance with law" in the sense indicated. In such a case the court would leave the matter of sentence to be rectified by the Court of Criminal Appeal; or could remit the case to the court of trial for the imposition of the correct sentence..."

13. It is perhaps significant that the example given was in relation to the imposition of a sentence by a judge of the Central Criminal Court and there was no suggestion at all that the Article 40.4.2 jurisdiction did not apply to such an order. While, of course, some of these comments were strictly obiter, the strong implication from this passage is that if a judge of the Central Criminal Court were to take a step whether in the trial or the sentencing process such that there had in fact been default of fundamental requirements, then an order for release under Article 40.4.2 might in principle be made.

14. The third example is *O'Brien v. Governor of Limerick Prison* [1997] 2 I.L.R.M. 349 where the Supreme Court held that the applicant's detention had become unlawful after the expiry of a period of years because the sentence imposed by the trial judge in the Central Criminal Court could not be reconciled with the Prisons (Ireland) Act 1907 and the Rules for the Government of Prisons 1947. Here again the Court ordered the release of the applicant under Article 40.4.2. It is necessarily implicit in this finding that this Court has an Article 40.4.2 jurisdiction in respect of orders made by the Central Criminal Court.

15. The final example is a more recent one: *Caffery v. Governor of Portlaoise Prison* [2012] IESC 4. Here the question was whether the High Court had properly adapted an English sentence containing a tariff recommendation in respect of a murder conviction to that of life imprisonment or whether (alternatively) it provided for a form of preventative detention when that Court made an order in 2004 under the Transfer of Sentenced Persons Act 1995-1997 adapting the English sentence.

16. It is true that a majority of the Supreme Court found against the applicant, but there was no suggestion that Article 40.4.2 would not lie in respect of a High Court order of this kind. Moreover, in his dissenting judgment, Fennelly J. (with whom Murray J. agreed) agreed that Article 40.4.2 would lie if there were a "fundamental illegality in the detention" and no issue regarding the fact that the order providing for the applicant's detention was one which had been made by the High Court actually arose. It may also pertinent to observe that Article 40.4.2 is concerned only with unlawful detention. As Mr. Fitzgerald SC pointed out, Article 40.4.2 does not exclude applications for an inquiry by reason of the identity of the body or court which made the order providing for the detention.

17. In the light of this latter consideration and these four major Supreme Court decisions, it seems to me that I am compelled to hold that the Article 40.4.2 jurisdiction extends to orders for detention made by this Court, whether sitting as the Central Criminal Court or otherwise. There must, however, be some intrinsic limits to that jurisdiction. It could not, for example, extend to the exercise of an inherent jurisdiction of this Court by a judge of the High Court or apply in respect of the exercise of a discretionary power by this Court. Moreover, absent exceptional circumstances, persons convicted by the Central Criminal Court wishing to challenge such convictions must appeal to the Court of Criminal Appeal: see, e.g., *The State (Cannon) v. Kavanagh* [1937] I.R. 428 and *The State (McDonagh) v. Frawley* [1978] I.R.131

18. Inasmuch as this Article 40.4.2 jurisdiction exists in respect of decisions of the Central Criminal Court, it is thereby confined to ascertaining whether the strict limits of a statutorily-conferred jurisdiction have been complied with on the face of the order.

19. It may be that in this- as in other respects- the jurisdiction under Article 40.4.2 is a singular one, yet if this is so, let this be its own tribute to the Constitution's unrelenting commitment to the protection of personal liberty.

What is the legal basis for the applicant's current detention?

20. So far as the substantive issue is concerned, the first question, therefore, is the actual basis for the applicant's current detention. It is, to my mind, absolutely plain that I the legal basis for the applicant's custody remains that of the order of the Central Criminal Court of 26th March 2012. Section 4(5)(c)(i) provides that where the Central Criminal Court concludes that an accused is unfit to be tried and that accused is suffering from a mental disorder and is in need of in-patient treatment, it can commit him to the Central Mental Hospital. In those circumstances, the accused remains so committed "until an order is made under s. 13 or s. 13A."

21. Section 13A deals with the discharge of patients subject to conditions and it has no application to the present case. Section 13

deals with the review of detention by the Mental Health (Criminal Law) Review Board. In its 5th Review on 27th April 2012 the Board concluded that it was satisfied that the applicant:

> "suffers from a serious mental disorder which requires in-patient in the Central Mental Hospital and which would not be available to him in prison and that he is properly detained in the Hospital and should remain so detained pending further review."

22. There is no doubt but that the Review Board could make orders under s.13 which would have the effect of supplanting a court order for committal to the Central Mental Hospital under s. 4(5)(c). This would be especially the case where, for example, the Clinical Director of the Central Mental Hospital formed the view for the purposes of s.13(3) that the patient in question, although still unfit to plead, no longer needed in-patient care or treatment. In those circumstances, the Board would be required to inquire into the matter and, having heard evidence "relating to the medical condition of the patient given by the consultant psychiatrist responsible for his or her care or treatment", s. 13(4) provides that the Board shall then:

> "make such order as it thinks proper in relation to the patient, whether for further detention, care or treatment in a designated centre, for his or her conditional discharge under s. 113A or for his or her unconditional discharge."

23. In the event that the Review Board made an order under this sub-section for the continued detention of the patient, then this would obviously be an example of "an order [which] is made under s.13" within the meaning of s. 4(5)(c)(i). But no such order was made by the Review Board in the present case: it rather simply reviewed the case of the patient. In these circumstances, the basis for the detention of the applicant remains, as already indicated, that of the order of the Central Criminal Court.

24. In essence, I am here endorsing the views which I expressed in relation to the parallel section of the Act of 2006 dealing with the jurisdiction of the District Court, namely, s. 4(3), in *EC v. Clinical Director of the Central Mental Hospital* [2012] IEHC 214. In that judgment I found myself departing with the deepest reluctance from the judgment of Peart J. in *L. v. Clinical Director of the Central Mental Hospital* [2010] IEHC 195. In essence, the point of difference between us concerns the construction of the words "until an order is made under s. 13 or s. 13A" as they appear in both s. 4(3)(c)(i) and s. 5(2) respectively. As I read *L.*, Peart J. suggested that the mere fact that the Review Board reviewed the case of a patient is sufficient to supplant the judicial order of civil confinement. I respectfully disagree. In my judgment, it would be necessary to go further so that the Review Board actually made an *order*, such as, for example, an *order* under s.13(4) or, for that matter, s. 13(6).

25. Naturally, I would only depart from an earlier judgment of a colleague for strong reasons, in line with the judgment of Clarke 1. in *Kadri v. Governor of Cloverhill Prison* [2012] IESC 27. The issue, here, however, is fundamental and in these circumstances I do not think I would be justified in departing from my own judgment in EC. It may also be noted that these latter views also correspond with the (admittedly obiter) analysis of this issue which is contained in the judgment of Hanna J. in *B. v. Mental Health (Criminal Law) Review Board* [2008] IEHC 303.

The interpretation of section 4(5) of the Act of 2006

26. Turning next to issue of interpretation of s. 4(5) of the Act of 2006 (as amended by the Criminal Law (Insanity)(Amendment) Act 2010)("the Act of 2010"), it is necessary first to set out the relevant provisions of the 2006 Act as so amended. Section 4(5)(a) first provides:

> "Where an accused person is before a court other than the [District] Court charged with an offence and the question arises as to whether that person is fit to be tried the provisions of this subsection shall apply."

27. Section 4(5)(b) then provides that the question of fitness for trial shall be determined by the judge concerned "sitting alone."

28. Section 4(5)(bb)(as inserted by s. 4(d) of the Act of2010)) clearly gives the trial judge discretionary powers to hear the evidence from an approved medical officer for the purposes of adjourning the proceedings to facilitate the care and treatment of the accused person or for the purpose of making a determination as to whether the accused is fit to be tried or in order to commit the accused to the Central Mental Hospital for a fourteen day period for the purposes of assessment and treatment. But these powers all relate to the powers of the court *prior* to the making of the determination of whether the accused is fit to be tried. This sub-section accordingly has no application to the present case, where the accused *has already been found unfit to be tried*.

29. The present case is accordingly governed by s. 4(5)(c) of the Act of2006 (as amended). Once Carney J. had determined that the applicant was unfit to be charged, he was obliged by virtue of this sub-section to adjourn the proceedings. The trial judge also had the option of either committing the applicant to either in-patient or out-patient care.

30. Where, as here, the applicant was committed to a course of in-patient treatment in the Central Mental Hospital, the trial judge is then required to consider "the evidence of an approved medical officer adduced pursuant to subsection 6(b)." Section 4(6)(b) requires the approved medical officer to prepare a report within a time period stipulated by the court on the question of whether the applicant is suffering from a medical disorder and is need of in-patient care or treatment.

31. One might pause here to observe that the legislative history of this provision is not without interest. As originally enacted, s. 4(5)(c) provided that the trial judge was required to consider the "evidence of an approved medical officer adduced pursuant to subsection 6". In effect, the trial judge was required first to make an order under s. 4(6)(a) providing for the accused either to be detained for a 14 day period or, alternatively, that he or she attend the Central Mental Hospital as an out-patient within that 14 day period. The trial judge who availed of either option was required to direct that the accused be examined at the Central Mental Hospital by an approved medical officer: s. 4(6)(a)(ii). It was only then that sub-section (b) came into operation, and the approved medical officer prepared his or her report for the trial judge on the issues of mental capacity and the necessity for in-patient treatment.

32. Section 4(5)(c)(i) of the Act of 2006 was amended by s. 4(e) of the Act of2010 so that the reference in the former sub-section is now to s. 4(6)(b). What was the effect of this change and what was its purpose? It is not clear that this change has had any particularly significant effects. After all, the fact that s. 4(5)(c)(i) refers now to s. 4(6)(b) (as opposed to s. 4(6) *simpliciter*) cannot really be regarded as having effected any really significant change, not least given that s. 4(6)(b) refers back to s. 4(6)(a)("...the approved medical officer who examined the accused person pursuant to [s. 4(6)(a)(ii)]"), so that it would seem that s. 4(6)(b) cannot be operated if the court does not make an order under s. 4(6)(a) for either in-patient detention and subsequent assessment or for out-patient assessment.

33. If that is so, then this suggests that the object of the legislative change was largely for reasons of presentational clarity and

accuracy. No evidence is capable of being adduced pursuant to s. 4(6)(a)- as distinct from s. 4(6)(b)- and by making a change which makes this clearer, the Oireachtas must therefore be understood as wishing to be more precise and accurate regarding the scope of the legislative references to the adducing of evidence in these circumstances.

34. This change nevertheless provides further evidence that the Oireachtas considered that this obligation was of some importance. If this were not so, one might ask why the Oireachtas went to the trouble which it did in order to put this matter beyond doubt. While one may readily accept that the Act of2006 should be given a paternalistic interpretation (see, e.g., by analogy the comments of McGuinness J. in *Gooden v. St. Otteran's Hospital* [2005] 3 I.R. 617 and those of Kearns J. in *EH v. Clinical Director of St. Vincent's Hospital* [2009] IESC 46, [2009] 1 I.R. 774, albeit that these comments were made in respect of the Mental Health Act 2001 and its predecessor), one cannot effectively re-write key procedural safeguards prescribed by the Oireachtas under the guise of paternalism.

35. If we now return to the facts of the case, it is clear that Carney J. made an order on 26th March 2012 committing the applicant to the Central Mental Hospital pursuant to s. 4(5)(c)(i). To this end, Carney J. heard the evidence of an approved Medical Officer, Dr. Brenda Wright, prior to the making of the order. Dr. Wright confirmed in her evidence that the applicant was seriously disturbed and required treatment at the Central Mental Hospital. As I have already indicated, these findings are not in doubt and there is, one imagines, very little prospect that the applicant will quickly recover from such a grievous illness.

36. The fact remains, however, that Carney J. did not consider the evidence of an approved medical officer *adduced pursuant to s. 4(6)(b),* since this would have required the court to make an order providing for the detention of the applicant at the Central Mental Hospital for an initial period of 14 days (s. 4(6)(a)(i)), his examination there by Dr. Wright (s. 4(6)(a)(ii)) and the subsequent presentation of a report for the benefit of the Central Criminal Court (s. 4(6)(b)). In other words, what the Oireachtas had prescribed as a two stage process seems to have been compressed through inadvertence into a single stage.

37. Following the delivery of my own judgment in *EC v. Clinical Director of the Central Mental Hospital* on 5th April 2012, the Director of Public Prosecutions had the matter listed before Carney J. in the Central Criminal Court who declined to make any further order. On that date, the applicant indicated that it was proposed to make an application to this Court under Article 40.4.2.

Compliance with a mandatory statutory provision

38. As thus stated, the case presents in acute form the age old problem of how the court should approach failure to comply with a mandatory statutory provision, not least where, as here, there is virtually no prospect that the result would have been any different if the evidence had actually been adduced pursuant to s. 4(6)(b) in the manner envisaged by s.4(5)(c)(i).

39. The locus classicus on this issue is, of course, *Monaghan UDC v Alf-a- Bet Promotions Ltd* [1980] I.L.R.M. 64. Here Henchy J., dealing with the issue of sufficient compliance with the terms of the planning regulations, stated ([1980] I.L.R.M. 64, 69):-

> "In such circumstances, what the Legislature has, either immediately in the Act or mediately in the regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the *de minimis* rule. In other words, what the Legislature has prescribed, or allowed to be prescribed, in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with."

40. Viewed from that perspective, I find it hard to characterize that which has been prescribed by the Oireachtas - and, as we have noted, recently re-affirmed in 201 0 - as trivial or peripheral or insubstantial. The Oireachtas clearly sought to add a further layer of protection for the benefit of an accused person found unfit to plead and to adapt my own language in *EC v. Clinical Director of the Central Mental Hospital* [2012] IEHC 214, these statutory requirements cannot be regarded as mere surplusage. Rather, they have been deemed by the Oireachtas to represent core protections for vulnerable persons. If the scope of these protections is thought to be otiose, burdensome or unnecessary, I fear that the respondents have addressed their arguments to the wrong forum.

41. Of course, I completely agree that *on the facts of this particular case* compliance with these requirements is most unlikely to have altered the actual result. But this does not mean that compliance with the requirements of the statute is not important or that in the context of an Article 40.4.2 application this Court can gloss over such noncompliance on discretionary grounds. Unlike the established discretion of the High Court and Supreme Court to withhold relief in judicial review proceedings in appropriate circumstances on established grounds- such that the granting of relief would serve no useful purpose- Article 40.4.2 is not a discretionary remedy, since as the language of Article 40.4.2 itself makes clear, the Court must order the release of the applicant unless it is established that he or she is in lawful custody.

42. Nor can the present case be compared with *EH v. Clinical Director of St. Vincent's Hospital* [2009] IESC 46, [2009] 3 I.R. 774. In that case the issue was whether the patient was a "voluntary patient" for the purposes of ss. 23 and 24 of the Mental Health Act 2001, such that the medical staff could seek to restrain her leaving the hospital under these provisions if they were of the view that she was suffering from a mental disorder. The Supreme Court rejected the argument that the applicant was not a voluntary patient in this sense. Kearns J. moreover noted that any illegality which might otherwise hitherto have attached to that detention had been superseded by subsequent orders which were perfectly lawful, so that ([2009] 3 I.R. 774, 792-793) it was only "in cases where there had been a gross abuse of power or default of fundamental requirements *would a defect in the earlier period of detention justify release from a later one*." Of course, for the reasons already given above, the present case does not involve an example of where an earlier defective order has been supplanted by a later valid order.

43. In summary, therefore, I am left with the inescapable conclusion that the applicant's detention became unlawful after the initial fourteen day period of detention, inasmuch as the section precludes the making of an order for indefinite detention in the Central Mental Hospital (subject to the making of an order by the Review Board under s.l3 or s. 13A)) under s. 4(5)(c)(i) without the court first having heard the evidence of the approved medical officer *adduced pursuant to s. 4(6)(b*). This failure is apparent on the face of the order of the Central Criminal Court.

The right of appeal to the Court of Criminal Appeal

44. Section 9(1) of the Act of 2006 provides that an appeal lies to the Court of Criminal Appeal against the making of an order of committal under s. 4(5)(c). While this is principally a merits based appeal against the making of the order, s.9(4) also provides that the Court of Criminal Appeal shall also have the power "to make any such order as may be necessary for the purpose of doing justice in accordance with the provisions of this Act." This latter section is, in my view, broad enough to enable the Court of Criminal Appeal to set aside the order of committal under s. 4(5)(c)(i) on the grounds of non compliance with the requisite statutory requirements.

45. While "the institutional precedence of the Court of Criminal Appeal over habeas corpus is long established" (Costello, *The Law of Habeas Corpus in Ireland* (Dublin, 2006) at 207), it is critical to note that these comments were made in the context of convictions. Absent quite exceptional circumstances, it is clear that Article 40.4.2 will not lie in respect of convicted persons for all the reasons set out by O'Higgins C.J. in *The State (McDonagh) v. Frawley*. But where, as here, the applicant has not been convicted, the mere fact that a right of appeal exists cannot take from the right of an applicant to come to this Court under Article 40.4.2.

The retrospective effect of EC

46. It remains to consider the retrospective effect of my judgment in EC. Under the declaratory theory of the common law, in my judgment in EC I did no more than declare the law as it was understood to be from its enactment and entry into force. In reality, life is not as straight forward as this and it may well be that many parties (not least those charged with the operation of the Central Mental Hospital) have altered their position in the belief that the law was otherwise than I found it to be in *EC*. In practice, therefore, that decision might have practical consequences of such magnitude for those charged with the welfare of persons such as the applicant that they are akin to a finding of unconstitutionality.

47. In cases of this kind, for all the reasons enumerated by Denham C.J. in *The People (Director of Public Prosecutions) v. Kavanagh* [2012] IECCA 65 the courts would enjoy a exceptional jurisdiction to limit the retrospective effects of such a finding. Given that the Preamble to the Constitution envisages the attainment of a "true social order", it cannot be the case that the courts should look on helplessly were administrative chaos otherwise to ensure as a result of a judicial decision or that they are powerless to staunch the adverse consequences of such a state of affairs. While the first duty of the courts is, as Henchy J. emphasised in *Murphy v. Attorney General* [1982] IR 241, to secure the protection of individual rights, there are also circumstances where, as he himself pointed out in *Murphy* (which views were echoed and endorsed by Denham C.J. in *Kavanagh*) this may not prove feasible or practicable.

48. I should have thought, however, that if the respondents wished to advance arguments of this nature, it would be necessary for the foundation to be established by appropriate evidence, rather than merely by submission. In this regard, it would be at least desirable (and perhaps necessary) to advance evidence as to the number of persons affected and the implications for the administrative system of the ruling.

49. Nevertheless, it may well be that future applicants seeking to rely on the decision in EC might find that the any want of statutory vires was held to be cured by the application of the principles enunciated by Henchy J. in *Murphy* and by Denham C.J. in *Kavanagh*. This, however, is an argument which must await decision in another, more suitable case.

Conclusions

50. For the reasons just stated, I must hold that the applicant's detention is not in accordance with law and I must further direct his release in accordance with Article 40.4.2 of the Constitution. I will, however, adjourn the making of any order (whether of release or otherwise) pending further argument as to the remedy which is most appropriate in this case, not least having regard to the applicant's own welfare and the implications which this decision might have for other persons.