Neutral Citation: [2015] IEHC 251

THE HIGH COURT

[2015 No. 436 SS]

[2015 No. 447 SS]

[2015 No. 450 SS]

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

BETWEEN

KEITH WILLIS

FIRST APPLICANT

AND

ANTHONY MURPHY

SECOND APPLICANT

AND

JOSEPH CARBERRY

THIRD APPLICANT

AND

THE GOVERNOR OF WHEATFIELD PRISON

FIRST RESPONDENT

AND

THE GOVERNOR OF MOUNTJOY PRISON (THE TRAINING UNIT)

SECOND RESPONDENT

AND

THE GOVERNOR OF MOUNTJOY PRISON

THIRD RESPONDENT

JUDGMENT of Kearns P. delivered on the 24th day of April, 2015

Each of the above named applicants seeks release from detention pursuant to Article 40.4.2 of the Constitution having been convicted of offences in relation to the possession of certain drugs pursuant to the Misuse of Drugs Act 1977 and the classification of certain substances as controlled drugs within the meaning of the 1977 Act by the Misuse of Drugs Regulations 1988 and 1993, and by S.I. No. 551/2011 (the Misuse of Drugs Act 1977 (Controlled Drugs) (Declaration) Order 2011).

By judgment delivered by the Court of Appeal in *Bederev v. Ireland & Ors*. [2015] IECA 38 on the 10th March, 2015, s.2(2) of the Act of 1977 was declared by that court to be repugnant to the Constitution in that it permitted the Government to make law in violation of Article 15.2.1 in circumstances where the "principles and policies test" for the delegation of such authority was not met. The consequential finding of the decision was that the Regulations purportedly made under s.2(2) of the Act of 1977 were judged to be invalid.

Each of the applicants therefore claims that although they had pleaded guilty to being in possession of substances declared to be controlled drugs by regulations made under s.2(2) of the Act of 1977, the substances may no longer be seen to have been such controlled drugs, either at the time the applicants possessed them, or at the time when they were convicted in respect of them, or at the time when they were sentenced to a term of imprisonment for possession of them. They thus contend that they are entitled to be released forthwith.

In making this application, the applicants' case, reduced to its simplest version, is that as Article 40.4.1 of the Constitution provides "no citizen shall be deprived of his personal liberty save in accordance with law", and as there is no law which would warrant their continued detention, they are entitled to such release.

Article 40 of the Constitution states:-

> *"4. 1 No citizen shall be deprived of his personal liberty save in accordance with law.*
>
> *2. Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law."*

BACKGROUND
A brief description of the relevant offences may be stated. In respect of the first applicant, Keith Willis, the warrant purporting to detain him recites that he is detained and serves a sentence of imprisonment by order of the Circuit Court in respect of a single count, namely, possession of a controlled drug for the purpose of selling it or otherwise supplying it to another, contrary to s.15A (as inserted by s.4 of the Criminal Justice Act, 1999) and s.27 (as amended by s.5 of the Criminal Justice Act 1999) of the Misuse of Drugs Act 1977 and the Misuse of Drugs Regulations 1988 and 1993, made under s.5 of the Misuse of Drugs Act 1977. In his case the substance in question, stated by the warrant purporting to detain him to be a controlled drug, and the subject of the conviction is MDMA, more commonly known as ecstasy. On the 10th October, 2013 this applicant was ordered to serve a sentence of five years imprisonment, with the final two years suspended for a period of three years. As s.2 (2) of the Misuse of Drugs Act 1977 was found to be repugnant to the Constitution on the 10th March, 2015, the ministerial order enacting the Misuse of Drugs Regulations 1988 and 1993 (as made under s.5 of the Misuse of Drugs Act 1977) which proscribed ecstasy as a controlled drug, was thus invalid at the time of the passing of sentence on the applicant. In short it was the applicant's case that he was detained simply for being in possession of a substance proscribed by the Government and not the Oireachtas.

In respect of the second applicant, Anthony Murphy, the warrant purporting to detain the second applicant recites that he is detained and is serving a sentence of imprisonment by order of the Circuit Court in respect of a count of being in possession of a controlled drug for the purpose of selling it or otherwise supplying it to another, contrary to s.15A (as inserted by s.4 of the Criminal Justice Act 1999) and s.27 (as amended by s.5 of the Criminal Justice Act, 1999) of the Misuse of Drugs Act 1977 and the Misuse of Drugs Regulations 1988 and 1993, made under s.5 of the Misuse of Drugs Act 1977. Following the entry of a plea of guilty, the applicant was sentenced to a term of eight years imprisonment on the 25th October, 2013 with the final three years suspended. The substances in respect of which the applicant was charged pertain to the possession of a synthetic cannabinoid, which had previously been lawful and available to purchase in head shops and which only became a controlled drug as a consequence of a declaration to that effect made by the Minister on the 11th May, 2010 under S.I. 199/2010. This applicant also contends that the substance in question has not been validly proscribed by law and that he is thus being detained for being in possession of a substance that was not legally prohibited at the time of his arrest or sentence.

In respect of the third applicant, Joseph Carberry, he is detained and serving a sentence of imprisonment imposed by order of the Circuit Court in respect of the possession of pentedrone, a substance declared to be a controlled drug by the Minster in the Misuse of Drugs Act 1977 (Controlled Drugs) (Declaration) order 2011, S.I. No. 551/2011. On the 25th February, 2014, the applicant was sentenced to a term of eleven years imprisonment (with the final twelve months suspended), which said sentence was back-dated to the 14th July, 2013 when the applicant went into custody.

In so far as this applicant is concerned, it is contended that, notwithstanding his plea of guilty, the applicant has a live appeal in being which he himself initiated from custody. The applicant sought leave to enlarge time to appeal against both conviction and sentence on the 29th September, 2014. The grounds stated for seeking the enlargement of time and the grounds for the appeal itself were the same, namely, that pentedrone was not classed as a s.15A drug, but a mixing agent. In relation to this application to enlarge the time for an appeal, Mr. James P. Moloney, Principal Solicitor in the Chief State Solicitor's Office, has sworn an affidavit on the 8th April, 2015 in which he states that the applicant was significantly out of time within which to appeal. He says that the respondents are not aware of any excuse or explanation proffered for the delay in lodging the appeal and that no further step has been taken in pursuance of the purported appeal. Further, in so far as there is a single stated ground of appeal, no point has been raised as to the constitutionality of s.2(2) of the Misuse of Drugs Act 1977 or the constitutionality of the statutory instrument controlling the substance the subject matter of the applicant's prosecution.

At paragraph 17 of his affidavit, Mr. Moloney points out that any defects identified by the Court of Appeal in the case of *Bederev v. Ireland, the Attorney General and the Director of Public Prosecutions* [2015] IECA 38, have been rectified by the immediate introduction in the aftermath of that court ruling by the Misuse of Drugs (Amendment) Act 2015.

The respondents contend that the ruling delivered on behalf of the Court of Appeal by Hogan J. does not operate retrospectively in respect of the legality of the conviction or sentence of any of the three applicants nor does it render their detention unlawful. In resisting these applications, the respondents rely on the decision of the Supreme Court in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88.

For their part, the applicants contend that there are significant points of distinction between these cases and the judgment in *A*, the most important of which is that the *A* case related to an offence created by Statute where the conduct prohibited is *malum in se* as opposed to prohibition and possession of a substance which is *malum prohibitum* only.

Because the judgment in *Bederev* speaks to some degree to the facts of the instant cases, it is to a consideration of that case that the court must first turn.

THE *BEDEREV* CASE
The Court of Appeal gave judgment in the case of *Bederev v. Ireland* [2015] IECA 38 on the 10th March, 2015. In that case the applicant was charged with offences contrary to ss. 3 and 15 of the Misuse of Drugs Act 1977 as amended. The charges consisted of simple possession and possession with intent to sell or supply. The alleged controlled drug in question was methylethcathinone, which was declared to be a controlled drug for the purpose of the Act of 1977 by S.I. 551/2011.

Prior to his case coming on for trial, the applicant challenged the constitutionality of s.2 (2) of the Act of 1977, the section which permitted the Government, as opposed to the Oireachtas, to declare a substance to be a controlled drug for the purpose of the Principal Act. The Court of Appeal allowed an appeal from the decision of the High Court and declared that s.2(2) of the Misuse of Drugs Act, 1977 was repugnant to the Constitution in that it permitted the Government to make law in violation of Article 15.2.1 in circumstances where the principles and policies test for the delegation of any such authority was not met.

The consequential finding of the decision was that S.I. 551/2011, introduced under s.2(2) of the Act of 1977 was judged to be invalid. S.I. 199/2010, the order which concerns one of the applicants herein, was also made under s.2(2) of the Act of 1977 and in consequence also suffered the same fate.

Certain portions of the judgment delivered by Hogan J. have been alluded to by the applicants in these cases to make the argument that their situation is entirely different from that which affected the applicant in the A case and it is important to set those portions of the judgment out in full:-

"56. We may now turn to the central question in this appeal, namely, does the 1977 Act contain sufficient principles and policies, such that, reverting to the test of Hanna J. in Pigs Marketing Board, in making the s.2(2) order the Government is simply executing a policy standard so as to bring about, not its own views on these policy questions, but the result directed by the Oireachtas in enacting the legislation.

57. It may be accepted that there is nothing in s.2 of the 1977 Act itself which provides the necessary principles and policies. It is true that the long title does provide some greater guidance which, as we have seen, must be taken to inform the scope and breadth of the s.2(2) power. The fundamental difficulty here is that the 1977 Act determined that only 'certain' dangerous or harmful drugs would be controlled, thus leaving important policy judgments to be made by the Government rather than by the Oireachtas.

58. One may immediately ask: how is to be determined which of these dangerous or harmful drugs are to be controlled and which are not? How can it be determined which drugs are 'dangerous'? Again, one might ask: dangerous to whom? Is this standard to be measured by reference to the general public? Or would it suffice that the drug in question would be dangerous if consumed or used by certain sectors of society such as children or young adults? By what standards are the questions of whether particular drugs are 'harmful' and liable to be 'misused' to be assessed and determined?

59. Virtually every drug is potentially harmful and liable to be misused. Would it suffice for this statutory purpose if, for example, some common pharmaceutical product had been misused for time to time in the community, possibly with unfortunate and serious side-effects for those who did abuse the drug? Could the product be the subject of a s.2(2) order if it causes serious medical problems in a minority of cases, even though the product itself was regarded as beneficial and wholesome by the medical community? What levels of 'harm' and 'misuse' need to be established before an order could properly be made under s.2(2) of the 1977 Act? Could a particular drug be properly made the subject of an order under s.2(2) of the 1977 Act where there was a respectable body of scientific and medical evidence to the effect that the drug in question should not be controlled or that its beneficial properties strongly outweighed the risk of abuse by a minority of patients?

…

… by what standards, for example, could a court, faced with a challenge to the vires of any order made by the Government under s. 2(2), measure undefined and somewhat abstract concepts referred to in the long title such as 'misuse', 'harmful' and 'dangerous' in the absence of any further guidance by way of principles and policies contained in the operative part of the 1977 Act itself? All of this, perhaps, is to say that it is rather asking too much of a long title to contain the guidance needed to meet the test set out by Murphy J. in O'Neill, since, to recall again the words of Murray C.J. in BUPA Ireland, one cannot realistically expect that the long title will contain the type of specific detail which is invariably only to be found in the substantive provisions of an Act itself.

64. One might also ask whether it would be open to the Government to employ s. 2(2) of the 1977 Act to ban other types of drugs which are in everyday use and which are potentially both harmful and liable to be misused? Alcohol and tobacco are the most common cases in point. Alcohol is a major factor in range of serious anti-social activities, including road traffic fatalities and accidents, domestic violence and other serious crimes such as assault and public order offences. Alcohol is addictive and the abuse of alcohol in Irish society is regrettably so prevalent that it presents major public health challenges, of which alcoholism and cirrhosis of the liver are among only the most prominent. Tobacco consumption is highly addictive and greatly increases the risk of lung cancer, heart disease and a range of other serious illnesses. On any view, both drugs are harmful and are liable to be misused."

The applicants rely on the foregoing passage to argue that the basis upon which s.2(2) of the Misuse of Drugs Act 1977 was declared unconstitutional was that there was a lack of any clear principles and policies for the criminalisation of certain substances. This had the effect of creating a broad, sweeping and fundamental unconstitutionality at the heart of the offending regulations. Further, in *Bederev* the unconstitutionality was a fundamental failure to legislate for the effective criminalisation of a hitherto legal substance which, of itself, was not necessarily harmful or dangerous. It was not merely an adjectival or procedural deficiency.

This, the applicants say, is in stark contrast with the position in *A* and the case of *C.C.* (*C.C. v. Ireland* [2006] 4 I.R. 1) where the impugned legislation was struck down because an act which was in and of itself abhorrent (*i.e.*, having sex with an underage girl) and the legislation could not withstand constitutional scrutiny in that it did not permit a defence of honest mistake as to age regardless of the circumstances of the case.

The applicants thus argue that one of the principal considerations which prompted the Supreme Court in the *A* case to conclude as they did, namely, the abhorrent nature of the offence in question, is singularly absent in the instant cases where possession of the substances in question only became illegal by virtue of being proscribed by a statutory instrument which is now seen to have, or never to have had, any legal effect. The applicants therefore argue that they come within one of the exceptions provided for in the new constitutional landscape laid down by the Supreme Court in the *A* case.

THE *A* CASE

The facts of the case of *A. v. The Governor of Arbour Hill Prison* [2006] 4 I.R. 88 are well known and do not require to be set out in detail. Briefly, the applicant had pleaded guilty to the offence of unlawful carnal knowledge with a female under the age of fifteen. He was sentenced to a term of imprisonment and did not appeal. Following the decision of the Supreme Court in *C.C. v. Ireland* [2006] 4 I.R. 1, which declared the offence of which *A* was convicted to be unconstitutional, *A* sought release pursuant to Article 40. The High Court granted this application and the Supreme Court reversed this decision. In his judgment in *A*, and what is the majority judgment on the question of the general principle, Murray C.J. stated (at p. 143):-

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

I do not exclude, by way of exception to the foregoing general principle, that the grounds upon which a court declares a statute to be unconstitutional, or some feature of an individual case, might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that verdicts in particular cases or a particular class of cases be not allowed to stand."

The key elements emerging from the *A* judgment, as summarised in the head note, may be stated as follows:-

> (1) There is neither an express or implied principle of retrospective application of unconstitutionality in the Constitution. It is not a principle of constitutional law that cases which have been finally decided and determined on foot of a Statute later found to be unconstitutional must invariably be set aside as null and of no effect. Once finality has been reached and the parties have in each case exhausted their actual or potential remedies, the judicial decision must be deemed valid and lawful.
>
> (2) The approach to be taken to the application of retrospectivity is to assess whether the compulsion of public order and the common good would allow the application to succeed.
>
> (3) That when an Act is declared unconstitutional, a distinction must be made between the making of such a declaration and its retrospective effect on cases which have already been determined by the courts. This distinction has even greater force where it concerns cases previously finally determined before the courts. This is necessary in the interests of legal certainty, the avoidance of injustice and the overriding interests of the common good in an ordered society.
>
> (4) It does not necessarily follow that court orders lack binding force because they were made in proceedings based on a Statute subsequently declared to be unconstitutional.
>
> (5) A declaration that a law is unconstitutional applies in the litigation to the parties in which the issue arose and prospectively. There is no general retrospective application of such an order but the possibility that an exception might arise where, in wholly exceptional circumstances, the interests of justice so require should not be excluded.
>
> (6) There are circumstances in which things that have been done under and by virtue of a Statute which has been declared inconsistent or invalid must nevertheless continue to be given force and effect and could not be described as nullities as far as their continuing force and effect are concerned.
>
> (7) The applicant by his conduct led the courts, the prosecution and the prison authorities to proceed on the footing that he accepted the validity of the charge against him. The applicant had not been able to allege any departure from natural justice in the way he had been treated, but acknowledged his guilt and that his claimed release would be a windfall.
>
> (8) The application before the court was not based on the assertion of a *jus tertii* as it was not a general assertion of unconstitutionality without regard to the applicant's circumstances or a claim based on the infringement of rights of another person or persons.

This Court is manifestly now bound by this decision of the Supreme Court with regard to the circumstances in which a post-conviction detention can be terminated following a declaration of unconsitutionality of a Statute which creates a criminal offence.

DISCUSSION

It must be said at the outset that this is an application brought under Article 40.4.2 of the Constitution. The applicants do not in these proceedings seek orders of *certiorari* quashing their convictions nor (with the exception of the Carberry case) do they seek to reopen the question of an appeal in respect of convictions, but instead solely challenge the legality of their continued detention having regard to the prospective effect of the decision of the Court of Appeal on the 10th March, 2015.

Leaving aside for one moment cases where a Statute has been declared unconstitutional, many applications under Article 40 to the courts often succeed on what might be characterised as narrow technical grounds. Thus in *McMahon v. Leahy* [1984] I.R. 525, McCarthy J. stated that:-

> *"Narrow though this approach may appear to be, the insistence on strict compliance with all requirements of the exercise of statutory powers is a fundamental feature of our jurisprudence; it is the duty of the Superior Courts to exercise the vigilance necessary to ensure such compliance."*

This passage was approved by Hardiman J. in the case of *Dalton v. Governor of the Training Unit, Glengarriff Parade* [2000] IESC 49 where he held that an inadvertent misrepresentation in an arrest warrant was fatal to the lawful detention of the applicant.

More recently, in *Caffrey v. The Governor of Portlaoise Prison* [2012] IESC 4, Denham C.J. at pp. 99-100, para. 33 of her judgment, approved the following passage from the decision of the High Court delivered in that case as follows:-

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

That authority was relied upon successfully in recent weeks by a number of water rates protesters who had been duly convicted of contempt for failing to comply with certain High Court orders, but secured release from coercive detention because the warrant failed to specify that they could expunge their contempt by means of a suitable application to court during the term of their detention (*Moore v. Governor of Wheatfield Prison* [2015] IEHC 147).

Nor is redress in any way confined to what is stated on the face of a warrant. It is a well established proposition of law, as acknowledged in the application of *Gallagher (No. 2)* [1996] 3 I.R. 10, that courts can look behind a warrant which is valid on its face to consider the underlying circumstances of a detention. The entire premise of the applicant's case in *Gallagher* was to impugn the decision-making process which led the Minister to refuse to release him notwithstanding the position of his detainer which was that he was not suffering from a mental illness. The application failed on its facts, but Geoghegan J. held that the case was not dependent on the validity or invalidity of the warrant, stating as follows at p.16:-

> *"It is common case also that the return and certificate are in order. Prima facie, therefore, the applicant is in lawful detention and is not entitled to an order for his release under Article 40, section 4, subs. 2 of the Constitution. However,*

> *it is well established that in appropriate cases the High Court may go behind the face of the documentation and may consider the circumstances under which the applicant is being held. If the conditions under which the applicant was being held involve serious and fundamental breaches of the applicant's constitutional rights, the detention could be so tainted as to render [it] unlawful, notwithstanding the apparent validity of his detention on the documentation produced. In such circumstances the applicant would be entitled to an order for his release and it is on this basis that he seeks such an order in these proceedings."*

In many of the cases which come before the High Court, an applicant is entitled to his release *ex debito justitiae*, regardless of any consideration of the moral turpitude of the crime of which he stands accused or convicted or any balancing test with regard to community rights or the rights of the victim of a crime, and without regard being had to issues such as acquiescence in failing to bring an earlier challenge.

There is, in addition, no suggestion that any of these applicants were aware at the time of entering their pleas that they were pleading guilty in respect of an offence which would later transpire to be inconsistent with the Constitution. It is difficult to see how a waiver of any rights might therefore be said to arise by virtue of the declaration *per se*.

Until the delivery by the Supreme Court of its written judgments in the *A* case (delivered some months after the decision to re-arrest *A*), most legal practitioners and judges alike had understood the law as regards declarations of unconstitutionality of legislation as meaning that, in the case of a pre-1937 Statute declared by the courts to be inconsistent with the Constitution, such legislation thereby ceased to have legislative existence in 1937, and that post 1937 any Statute declared to be unconstitutional was a nullity and void from the date of its enactment.

That understanding was the approach adopted by the High Court (Laffoy J.) in dealing with the *A* case, applying as she did the decision of the Supreme Court in *Murphy v. Attorney General* [1982] I.R. 241, to conclude that the offence with which *A* was charged did not exist in law when it was purported to charge him with it, nor did it exist at the date of his conviction and sentence. In the context of the Article 40 application before her, Laffoy J. felt she had no option other than to direct the release of the applicant.

As we have seen, the Supreme Court took a radically different view when, against a background of huge public alarm and disquiet at the prospect of serious sex offenders being released from custody, an appeal from this decision was speedily brought before it. The immediate re-arrest of *A* was directed with the giving of reasons being deferred for some time until full written judgments were completed.

I see no value in embarking upon an extensive recitation of the judgments because the end result of that case is what matters. That said, the Court in the course of the applicant's submissions, was furnished with an article contained in the 2005 Irish Jurist ("*Hard Case: Bad Law? The Supreme Court Decision in A v. The Governor of Arbour Hill Prison*" by barrister Rossa Fanning), which was relied upon to illustrate, amongst other things, that the question of retrospectivity need not constitute the entire argument in this case and in fact is of little or no relevance in the context of an ongoing detention under an invalid Statute. The Court found the article to be both interesting and informative.

In short, whatever criteria might be brought to bear on other Article 40 applications, the relevant legal principles in so far as the effects of declarations of unconstitutionality of legislation are concerned are now those outlined by the Supreme Court in the *A* case. On the face of it, the High Court is now required to conduct quite a different exercise when exercising its role in this context, considering matters which simply do not arise for consideration in most Article 40 applications.

Thus the relevant question in these cases now is to inquire: Is the applicant being detained "*in accordance with the law*" because he does not come within the scope of one or more of the exceptions to the new rule outlined in the *A* case? The onus of establishing that he does not come within an exception must clearly, under Article 40, rest upon the detainer.

COMING WITHIN THE EXCEPTIONS

The applicants contend that they do come within one or more of the exceptions specifically referred to in the *A* case.

In particular, all three rely on the proposition that in the *A* case the offence which had been created by the State related to conduct which was *malum in se* as opposed to prohibition and possession of a controlled substance which is *malum prohibitum*.

The applicants in this context draw from and rely upon the observations of Hogan J. in his judgment in *Bederev*, when the learned Hogan J. posed the question:-

> *"By what standards are the questions of whether particular drugs are 'harmful' and liable to be 'misused' to be assessed and determined?"*

Hogan J. pointed out in the passage already cited that every drug is potentially harmful and liable to be misused. He wondered if the product could be the subject of a s.2(2) order if it caused serious medical problems in a minority of cases, even though the product itself is regarded as beneficial and wholesome by the medical community. At paragraph 64 he posed the further question whether it would be open to the Government to employ s.2 (2) of the 1977 Act to ban other types of drugs which are in every day use and which are potentially both harmful and liable to be misused, alcohol and tobacco being mentioned as drugs which might be seen as fitting that description. While of course Hogan J. was addressing this topic in the context of the "principles and policies test", the applicants argue that they are of assistance in their cases because they confirm that, unlike the "*loathsome*" nature of the crime of having sex with an underage girl (as so described by Hardiman J. in the *A* case), no such taint or pejorative characterisation can or should be ascribed to substances which are legal one day and rendered illegal on the following day by Government order. Possession of the substances in question was not an offence on the date when the applicants possessed them, nor at the time that they were convicted, nor at the time when they were sentenced to a term of imprisonment for them.

The applicants further argue that this present application is not a collateral attack on their convictions brought by persons with no *locus standi*. A was in a completely different position from *C.C.* because he could never have availed of the defence which *C.C.* wished to raise in his forthcoming trial. On the contrary, each of the applicants, it is argued, is in exactly the same position as Mr. Bederev, albeit that Mr. Bederev raised his constitutional point in his application to ward off an impending trial.

The Court wishes to stress that no objection of any sort was raised to the procedures whereby the applicants have brought this application before the Court. There has been no alternative route or option pointed out by the respondents whereby the applicants might have sought relief.

The respondents meet the applicants' case by arguing that the applicants' guilty plea is critical. Instead of challenging the law, as occurred in *Bederev*, the applicants accepted it as valid and effective and can now no longer seek to look behind their respective pleas, nor can any of the applicants undermine same. At all relevant times the applicants were legally advised and represented. The proceedings had reached finality and there was no evidence in any of these cases to suggest that the applicants had suffered any actual injustice or oppression.

These are the considerations which form the main basis of resistance to the present applications and, following the decision of the Supreme Court in *A.*, this Court's function in the instant case is really confined to a consideration of whether the facts of the applicants' cases are of such a nature as to warrant treating their cases as "exceptional".

First, one has to acknowledge that the application of the subjective test of what a judge considers to be a crime *malum in se* as distinct from *malum prohibitum* is a far from satisfactory one. Different judges may take different views of where the boundaries of the distinction are to be drawn. Surely relevant is the consideration that an applicant who is aware or believes at the relevant time that possession of scheduled drugs is a crime should not be entitled to some different consideration. The entry of a guilty plea by each of the applicants in these cases, is a potent marker for determining the issue as to whether or not the applicants knew they were engaging in conduct which was criminal in nature, as distinct from being unwitting innocents who, at time of sentence, could or did argue the case that they were completely unaware that possession of the scheduled substances (in some instances in large amounts), was non criminal in character. No suggestion has been made during the course of the hearing before this Court that any contentions of that nature were raised at any of the three applicants' respective sentencing hearings. None of the three applicants can be said therefore to be in the position of the hapless Dr. Manette, prisoner 105 in the Bastille, who in Dickens' *Tale of Two Cities* spent 18 years falsely imprisoned having committed no crime whatsoever.

Following as I must the decision of the Supreme Court in the *A* case, I hold that applicants Willis and Murphy, are not entitled to the relief sought, because they fail to show they come within the category of exceptions which would render their continued detention unjust.

THE CARBERRY CASE
Counsel on behalf of Mr. Carberry argues that, if unsuccessful in the main issue, he is nonetheless entitled to rely on a further discrete matter in his case. The applicant lodged a document himself seeking an enlargement of time to appeal on 29th September, 2014, over five months prior to the *Bederev* decision, and received a record number from the Court of Appeal, namely 200/14. He appealed both against conviction and sentence on the grounds, *inter alia*, that the substance he was proven to possess was not a drug but "a mixing agent".

The Supreme Court has made clear in the *A* case that, once proceedings had been concluded, the same cannot normally be reopened.

In *DPP v. Cunningham* [2012] IECCA 64, a case involving the applicant seeking to rely on the finding of unconstitutionality of s.29 of the Offences Against the State Act 1939, and in *Damache v. DPP & Others* [2012] 2 JIC 2306, Hardiman J., giving the judgment of the court, highlighted the difference between the applicant in A and that of Mr. Cunningham. He stated that:-

> *"The difference comes down to this: A never challenged the validity of the section, or the interpretation of the section during the trial process or on appeal. His case was finally completed or concluded at the time C.C. obtained the declaration of inconsistency, the time for appeal having expired. This is a major point of contrast between A's case and the present case. Mr. Cunningham's appeal is still extant and undecided. Accordingly, he says, his case has not reached finality. The significance of this appears from a consideration of what was said by Murray C.J. in the concluding section of his judgment in A., under the heading 'The General Principle' the relevant passage has been set out above. This passage plainly excludes the prospect of any challenge made after 'the case reaches finality on appeal or otherwise'. It therefore necessarily implies that the case has not reached finality when there is an outstanding appeal. That finding is fatal to the principal submission of the Director…"*

Hardiman J. went on to consider the proposition as to whether a person in Mr. Cunningham's position could subsequently "piggyback" on a helpful decision gained by a third party. He ruled that a declaration in another case could take effect in relation to a separate case, so long as it remained unconcluded. He was also of the view that Mr. Cunningham was not debarred by his own conduct from taking advantage of the finding of unconstitutionality.

This latter consideration arose in other cases where the applicants were aware of the disputed legal position but decided to press on regardless. It is argued therefore that the applicant, who has an outstanding appeal, falls within the parameters of a person who would be entitled to benefit from the decision in *Bederev*. As his application to enlarge the time to appeal was made on the 29th September, 2014, over five months before the decision in *Bederev*, it was simply not possible to argue that he was attempting to piggyback on a favourable decision as *A* had done in the aftermath of the *C.C.* decision.

In reply the respondents rely upon the matters deposed to by James Moloney, Principal Solicitor in the Chief State's Solicitor's Office, who deposes that on the 3rd October, 2014 the applicant lodged an application to enlarge the time for an appeal. His notice of appeal is dated the 29th September, 2014.

The applicant was thus significantly out of time within which to appeal, his sentence having been imposed on the 25th February, 2013.

No issues were raised by the applicant in the course of the proceedings before Dublin Circuit Criminal Court as to the invalidity of the Misuse of Drugs Act 1977 or any order or regulations made thereunder. He had pleaded guilty. The respondents were not aware of any excuse or explanation proffered for the delay in lodging the appeal, whether on affidavit or otherwise, and it appears that no further step was taken in pursuance of the said appeal, or to bring it into being.

This Court is of the view that it cannot truly be said in Mr. Carberry's case that an appeal is in existence. It has not been brought into being by means of an application for enlargement of the time within which to appeal.

If the Court were to take the view that Mr. Carberry fell into the same category as Mr. Cunningham, it would elide the distinction between valid appeals and invalid appeals. Furthermore, there could be no question of Mr. Carberry pressing on with an appeal in the absence of an application to the Court of Appeal for leave to enlarge the time for the bringing of any appeal. This has not happened and the Court takes the view that no valid appeal is therefore in existence. It would be an invidious distinction on the flimsiest of pretexts to hold that Mr. Carberry was entitled to some treatment different from that of the two other applicants whose cases were heard by this Court at the same time as his.

CONCLUSION
In its decision in *Dublin City Council v. Fennell* [2005] 1 I.R. 604, the Supreme Court, in the judgment of the court which I wrote while then an ordinary member, declined to rule in favour of an applicant who claimed that the European Convention on Human Rights Act 2003, should be given retrospective effect. Unravelling the past, and past actions or steps taken in the *bona fide* belief that they had a sound statutory and legal footing, is fraught with difficulty, as the judgment in that case plainly demonstrates. Article 7 of the European Convention on Human Rights itself prohibits the creation of criminal offences with retrospective effect.

A graphic illustration of the difficulties arising from retrospective interpretation was cited at p. 635 of the *Fennell* case as follows:-

> *"This difficulty of identifying where the line would ever be drawn in relation to past events in the event of a retrospective interpretation was also addressed by Lord Hoffmann in In re McKerr [2004] UKHL 12, [2004] 1 W.L.R. 807, when he stated at p. 827:-*
>
> > *'Your Lordships' House has decided on a number of occasions that the Act was not retrospective. So the primary right to life conferred by Article 2 [i.e. of the Convention] can have had no application to a person who died before the Act [the Human Rights Act 1998] came into force. His killing may have been a crime, a tort, a breach of international law, but it could not have been a breach of section 6 of the Act. Why then should the ancillary right to an investigation of the death apply to a person who died before the Act came into force? In my opinion it does not. Otherwise there can in principle be no limit to the time one could have to go back into history and carry out investigations. It would in principle be necessary to investigate deaths by state action of the Princes in the Tower.'"*

It might be considered a rational and reasonable corollary to the non-retrospective nature of criminal statutes that when a statute, which enjoys a presumption of constitutionality creates a criminal offence but is later declared unconstitutional, there should be no retrospective invalidation of steps or actions taken *bona fide* thereunder. This ultimately is what the Supreme Court may be seen as having decided in the *A* case and to that extent the decision of that court in *A* may be seen as an advance, even if it means that one unsatisfactory legal approach of retrospective invalidity has been replaced with another whereby a case by case analysis involving an array of considerations, some subjective in nature, must now be brought to bear on those Article 40 applications which arise where a declaration of unconstitutionality brings an ongoing detention under an invalid statute under review. Some of the judgments in the *A* case seem to envisage a "moral turpitude" consideration or a balancing exercise between the rights of victims of crime and the wider community, considerations which are alien to other Article 40 applications where the debate is confined to the consideration as to whether a respondent can establish that a person's detention is "in accordance with law" and where the court itself has no discretion.

The law by which the three applicants are detained is not the Statute under which they were convicted, so what is the law which provides the requisite justification? It seems to be one which in this context is simply that made by judicial declaration. Apart from the specified exceptions, the *A* case seems more to create a doctrine of preclusion from obtaining relief under Article 40 than anything else. Some of the difficulties arising from what might now be seen as different regimes pertaining to Article 40 applications would benefit from further clarification, which hopefully may be forthcoming in an appellate court.