THE COURT OF APPEAL

Peart J.
Hogan J.
Baker J.

Neutral Citation Number: [2018] IECA 272

Record No.: 2018/314

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

A.C. AND P.C.

APPLICANTS

- AND -

GENERAL MANAGER OF ST. FINBARR'S HOSPITAL

AND HEALTH SERVICE EXECUTIVE

RESPONDENTS

JOINT JUDGMENT of Mr. Justice Michael Peart, Mr. Justice Gerard Hogan and Ms. Justice Marie Baker delivered on the 30th day of July 2018

1. This appeal concerns an application for an inquiry pursuant to Article 40.4.2 of the Constitution. The first applicant is now a 95 year old patient who is physically enfeebled and who is suffering from dementia. She was made a ward of court in August 2016. She is currently residing at St. Finbarr's Hospital, Cork.

2. The second applicant is her son who, in truth, makes this application on behalf of his mother. In a case concerning the same applicants*, AC v. Cork University Hospital* [2018] IECA 217, this Court held in a judgment delivered on the 2nd July 2018 that the Cork University Hospital acted unlawfully when it prevented her son and daughter removing Ms. A.C. from Cork University Hospital on the 23rd June 2016 when she had signed a letter of discharge on the previous day.

3. In the wake of that decision, it appears that the Health Service Executive ("HSE") applied to the High Court for certain orders in respect of the care and welfare of Ms. A.C. Following an interim order made on 11th July 2018, a further order was made by the High Court (Kelly P.) on 16th July 2018 directing that Ms. A.C. should remain as an in-patient at St. Finbarr's Hospital, Douglas Road, Cork pending further order of that Court. Other orders were granted preventing Mr. C. and his sister making efforts to remove Ms. A.C. from St. Finbarr's. It is also appropriate to note in this context that Ms. A.C. has been visited by the medical visitor appointed by the President of the High Court and that the medical visitor has stated that he is satisfied that she has been appropriately cared for by the staff of the hospital. At the same time it is not really in dispute that this patient is, in effect, currently detained in St. Finbarr's Hospital.

4. Subsequent to the making of these orders, Mr. P.C. applied to the High Court on 16th July 2018 for an order pursuant to Article 40.4.2 of the Constitution directing an inquiry into the legality of his mother's detention. It appears that the first judge of the High Court to whom he sought to make the application for an inquiry declined to consider the application on the ground that this application ought to be made to the more senior judge who was then immediately available in the adjoining court as that judge was in charge of the listing of the day's judicial business.

5. Mr. P.C. then sought to make his application to that second judge of the High Court. Having handed the papers to the court registrar, it appears that the judge read the papers in chambers and after about fifty minutes returned to court. He apparently acknowledged that the application raised weighty and complex issues. However, rather than direct an inquiry it appears that he gave Mr P.C. leave to issue a notice of motion returnable to the non-jury list on 23rd July 2018 on notice to the HSE and the hospital.

6. There was, however, undoubtedly some doubt as to what precisely the Court had ordered. At one point, for example, the HSE thought that an inquiry under Article 40.4.2 had been directed and it had for this purpose prepared a draft certificate of detention in which the hospital exhibited the High Court order of the 16th July 2018 as the basis for the detention. We are informed by counsel that this step was taken in case such a certificate was required to be produced to the Court on the 23rd July 2018. Following further inquiries made by this Court in the course of the hearing of this appeal, it has emerged that the High Court did not in fact direct an inquiry under Article 40.4.2 on the 16th July 2018 but rather, as we have just stated, gave the applicant leave to make such an application on notice to the HSE.

7. On 23rd July 2018 the matter was listed before the third judge of the High Court who was then presiding over the non-jury list. On this occasion counsel for the Health Service Executive very properly drew his attention to an earlier order of the High Court which had been made by the President of the High Court on 9th October 2017. This order purported to prevent the plaintiff from taking any proceedings which address either the "life, *the liberty* or the welfare of his mother [A.C.] other than by application in the wardship proceedings and such application not to be brought unless two clear days notice is given to the General Solicitor for Minors and Wards of Court, the Committee of [A.C.]." [Emphasis provided]

8. Upon that order being brought to his attention, the third judge declined to hear the Article 40.4.2 application himself and transferred it to the President of the High Court. When the matter was called on before the President later that day, Mr. P.C. informed him that he intended to appeal to the Supreme Court against the order which had just been made transferring the case to him under Article 34.4.5 of the Constitution (i.e., the "leapfrog" provisions allowing for a direct appeal to the Supreme Court with leave of that Court.) (It appears that Mr. P.C. is no longer pursuing that particular appeal.) It appears that Mr. P.C. also asked the President to recuse himself on the ground that the order for the detention of his mother had been made by him, but the President declined to do so. The applicant did not proceed to move the application for an inquiry before the President.

The appeal to this Court

9. Mr. P.C. then sought to appeal to this Court against these various orders. In some respects it is not clear that there is any decision to appeal against, because no decision has been made either granting or refusing the application for an inquiry, still less was there any substantive adjudication on the legality of the detention of Ms. A.C. We are, however, of view that, in the events that transpired, the judges of the High Court to whom the application was presented each fell into error by failing to hear and determine the application for an inquiry under Article 40.4.2 of the Constitution once Mr P.C sought to move it.

The Article 40.4.2 procedure

10. It is, perhaps, easy to overlook the fact the procedure prescribed by Article 40.4.2 is two stage in nature. The first stage involves an application for an inquiry into the legality of the detention of any person which can be made to the High Court "or any judge thereof." The High Court and "any and every judge thereof to whom such complaint is made" must then "forthwith" enquire into the said complaint. This constitutional duty falls upon each judge of the High Court to whom a complaint is made and any applicant has perforce the constitutional right to apply to any and every judge of the High Court, regardless of seniority or the administrative allocation of judges to particular judicial duties on the day in question.

11. Once called upon to inquire into the legality of the detention of any person, the High Court judge in question must, generally speaking, perform that duty and forthwith inquire into the complaint. Of course, Article 40.4.2 must be interpreted with some degree of realism, so that there are obviously circumstances where it would be unrealistic to expect that particular judge to perform that duty on that particular day: the judge may, for example, have to attend to an urgent medical appointment or he or she might have suffered a bereavement. Quite apart from those circumstances personal to the judge, there may be other circumstances where it would be unreasonable to expect the judge to divert his or her attention from other immediate judicial tasks: the judge who is about to charge a jury in the Central Criminal Court at the conclusion of a criminal trial could not, we think, be expected to break off these particular judicial duties to entertain the application for an inquiry at such a critical juncture in the criminal trial.

12. Absent, however, special and particular circumstances of this kind, it is the duty of each judge to entertain the application for an inquiry and to rule on whether or not to direct an inquiry. In general, the judge of the High Court should direct an inquiry under Article 40.4.2 where at least an arguable case has been presented that the detained person is in unlawful custody or where there is some doubt as to the legality of that detention. If the judge is not satisfied that such an arguable case is presented, or that he or she has insufficient information for this purpose, the application for an inquiry may be refused. The refusal to direct an inquiry at the *ex parte* stage does not create a *res judicata*, for independently of the question of any appeal against that refusal, the applicant remains free *in principle* to apply for an inquiry to another judge of the High Court (subject, of course, to issues of possible abuse of process): see *Joyce v. Governor of the Dóchas Centre* [2012] IEHC 326, [2012] 2 I.R. 666.

13. As Hogan J. observed in *Joyce*, the language and structure of Article 40.4.2 carefully distinguishes between the initial *ex parte* application for an inquiry (which, as we have just noted, can be made to the High Court and any and every judge thereof) on the one hand and the subsequent substantive decision on the legality of the detention on the other. As the words of Article 40.4.2 make clear, that latter decision is taken by the High Court alone.

14. If the judge then directs an inquiry, then the second stage is put in train. The judge who has directed an inquiry *may* at that point (*i.e.,* at the end of the first stage process) order the detainer to produce the body of the person so detained and *must* also direct the respondent to certify in writing the grounds of the detention. As Henchy J. made clear in *The State (Rogers) v. Galvin* [1983] I.R. 249, 253, while the power to direct the production of the body is permissive, the jurisdiction to direct the respondent to certify the grounds of the detention is mandatory:

> "This opportunity of justifying the detention is always treated as including an opportunity of justifying the detention by means of a certificate in writing. It cannot be treated as a mere enabling or dispensable preliminary. It is mandatory. It lies at the heart of the jurisdiction to grant a release by habeas corpus."

15. If, having given the respondent the opportunity of justifying the detention, the High Court is satisfied that the detention is in accordance with law, then the application for release of the detained person will obviously be refused. The only remedy in such circumstances is to appeal against the decision in question and – unlike in the situation in the case of the original *ex parte* application for an inquiry – since the enactment of the Second Amendment of the Constitution Act 1941 (which amended Article 40.4.2 in certain important respects), there is now no question of possibly going from judge to judge to seek an order for release, whatever may possibly have been the position either at common law or in the period between 1922 and 1941.

16. The historical background to this was explained by Hogan J. in *Joyce*, including the amendments to the Article 40.4.2 procedure which were introduced by the Second Amendment of the Constitution Act 1941 in the aftermath of what had occurred in *The State (Burke) v. Lennon* in 1939 ([2012] 2 I.R. 666, 673-674):

> "A not dissimilar controversy arose in November and December 1939 in *The State (Burke) v. Lennon*. In that case the applicant originally declined to move an application before a Divisional Court consisting of Maguire P., O'Byrne and Gavan Duffy JJ. (*The Irish Times*, 25 November 1939) on the basis - counsel submitted - that it would interference with the constitutional right of the applicant to choose a judge of his choice for the full hearing of the Article 40.4.2 application. The applicant then subsequently moved an application for an inquiry before Gavan Duffy J. alone. That judge then conducted the full hearing where he found Part VI of the Offences against the State Act 1939 (by virtue of which the applicant had been detained and interned) to be unconstitutional: *The State (Burke) v. Lennon.* [1940] I.R. 136. The Supreme Court subsequently held that no appeal lay from that decision: see [1940] I.R. 136, 161.
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> The procedure whereby the applicant was effectively allowed to select his own judge, not only in respect of the *ex parte* application, but also the full hearing following an ex parte order for an inquiry, in a case of huge importance and sensitivity evidently caused considerable concern in official circles and clearly influenced the drafting of the present version of Article 40.4.2, Article 40.4.3 and Article 40.4.4 (the latter two sub-Articles being entirely new with no earlier counterparts either in Article 6 of the 1922 Constitution or in Article 40.4.2 as originally enacted). ….In view, however, of the express

wording, layout and structure of Article 40.4.2 which distinguishes between the initial application to the High Court "and any and every judge thereof to whom such complaint is made" for an inquiry into the legality of the detention on the one hand and the subsequent hearing of that inquiry by the High Court alone on the other, it seems impossible to disagree with the suggestion that there is a right (subject to important qualifications which I will presently elaborate) to make successive applications for the initial *ex parte* application for an inquiry. Thereafter, however, Article 40.4.2 makes clear that the actual decision on the legality of the detention remains that of the High Court alone. In those circumstances the only remedy is an appeal to the Supreme Court, whatever the position may have been either at common law prior to 1922 or, indeed, in the interval between 1922 and 1941.

If it were otherwise, then the very careful language of the first section of Article 40.4.2 dealing with the initial complaint with its references to the "High Court *or any* judge thereof' and again to the "High Court and *any and every judge* thereof' (emphasis supplied) would be rendered effectively meaningless. Once the inquiry is ordered, however, then all subsequent references in Article 40.4.2 are thereafter to "the High Court" alone (and not, as in Article 6 of the 1922 Constitution and in Article 40.4.2 as originally enacted by the People in 1937, to "such Court or Judge"). All of this is further underscored by the provisions of Article 40.4.4- a provision which, as we have just noted was an entirely new innovation introduced by the Act of 1941 and which had no counterpart in either Article 6 of the 1922 Constitution or in the Constitution as originally adopted by the People - and which gives the President of the High Court the power to determine that the High Court hearing the substantive application (*i.e.*, not merely the initial application for an inquiry) shall consist of three judges or, as the case, may be, one judge only.

As a matter of constitutional history, therefore, it seems indisputable that in 1941 the drafters intended to preserve the right of the applicant to apply for the initial *ex parte* application to *any* judge and to make successive *ex parte* applications for such an inquiry (hence the reference in Article 40.4.2 to "any and every judge" of the High Court), while providing thereafter the subsequent decision on the actual legality of the detention should be that of the High Court itself. This latter change - which was effected through the altered and more extended version of Article 40.4.2 along with (the entirely new) Article 40.4.4 - was in order to guard against a possible repetition of the precise sequence of events in *The State (Burke) v. Lennon*."

17. It follows, therefore, that Article 40.4.2 provides that the applicant for an inquiry can apply *ex parte* to any judge of the High Court to direct such an inquiry. One other feature of the procedure prescribed by Article 40.4.2 should be noted at this point. Article 40.4.4 provides that, where an inquiry has been ordered, the President of the High Court may direct that the substantive hearing be heard by a High Court consisting of three judges and, in the absence of any such direction, it shall otherwise consist of one judge. It is necessarily implicit in this constitutional provision that, once an inquiry has been directed, the President of the High Court can also assign the substantive Article 40.4.2 application in any particular case to a named judge or judges of the High Court. This is a power which the President of the High Court can, in any event, exercise by statute, since this is part of the function of arranging the "distribution and allocation of the business of the High Court" which is vested in the President by s. 10(3) of the Courts (Supplemental Provisions) Act 1961.

The various applications to judges of the High Court in the present case

18. Following this re-statement of constitutional principles, we can now consider the manner in which Mr. P.C.'s application for an inquiry was dealt with by the High Court.

19. We have been informed that the first judge to whom the complaint was made declined to consider the application on the ground that a more senior judge was immediately available in the adjoining courtroom and that judge was in charge of the listing of the day's business. If this is correct and if this was the sole reason why the application was not entertained, then the judge in question fell into error. She was under an independent duty to entertain the application and to rule on it, regardless of whether a more senior judge was immediately available. Nor could this be affected by any administrative listing arrangements, because Mr. P.C. had the right pursuant to Article 40.4.2 to move his *ex parte* application for an inquiry before "any" judge of the High Court.

20. Mr. C. then attempted to move his application before the second judge. He read the papers and recognised the complex and difficult issues which this case raised, but instead of determining the application for an inquiry, he granted Mr. C. leave to issue his notice of motion seeking an Article 40 inquiry on notice to the HSE. This motion was made returnable to the judge having seisin of the non-jury list on the following Monday, *i.e.*, a week later. We consider that in these respects the second judge also fell into error.

21. In the first place, the judge should have ruled – albeit perhaps not necessarily immediately – on whether to direct an inquiry. What he could not do was not rule on the application at all, but rather adjourn the *ex parte* application and direct that it be moved on notice to the HSE. Unlike the position which obtains in the case of applications for judicial review where the judge can adjourn the application for leave and direct that it be moved on notice to the respondent (Ord. 84, r. 24(1)), this option is not provided for by Article 40.4.2. To repeat, therefore, the judge before whom the *ex parte* application for an inquiry is made must rule on that application by deciding whether to direct an inquiry or not. That judge can, of course, make inquiries of his or her own or seek to have certain matters clarified before ruling on *the ex parte* application for an inquiry: see, *e.g.*, the comments of Finlay C.J. in *Sheehan v. Reilly* [1993] 2 I.R. 81, 90. But, in the end, the judge to whom the application is made must ultimately come to a decision one way or another on the *ex parte* application for an inquiry.

22. When the matter came before the judge having seisin of the non-jury list on Monday, 23rd July 2018, counsel for the HSE very properly drew his attention to the order which the President had previously made regarding applications concerning the liberty of Ms. A.C. The judge then transferred the matter to the President's list rather than ruling on the *ex parte* application for an inquiry. While the judge's approach was very understandable in the light of the order which had just been brought to his attention, we nonetheless consider that he fell into error in so doing. To repeat once again, every applicant for an inquiry has the right to apply *ex parte* to any and every judge of the High Court for an inquiry into the legality of the detention of a named person. As this Court pointed out in *AC*, the procedure prescribed by Article 40.4.2 is constitutionally inviolate and cannot be circumscribed by legislation, rules of court, administrative practice or convenience in relation to listing arrangements, or, for that matter, by court order.

Conclusions

23. In conclusion, therefore, we are of the view that the various High Court judges fell into error in the manner which we have described in failing to rule on Mr. P.C.'s *ex parte* application for an inquiry. The end result is that there has been no decision on whether to direct an inquiry.

24. In these circumstances, Mr. P.C. remains free, should he wish to do so, to make an application *ex parte* pursuant to the provisions of Article 40.4.2 to any judge of the High Court for an inquiry into legality of his mother's detention at St. Finbarr's Hospital.