THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 101

[2015/157]

The President
Peart J.
Mahon J.

IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION

BETWEEN

PAUL O'SHEA

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT (Ex tempore) of the Court delivered by The President on the 30th day of March 2015

1. The Court is grateful for the assistance it has received in this matter in the various submissions. Because of the importance and urgency of the matter, the Court is giving an ex tempore judgment.

2. First of all, the Court is concerned with an application of habeas corpus or, as it is more properly preferred, an application under Article 40 of the Constitution. Mr. Beades is perfectly right in saying that this is an ancient remedy in the common law that is now incorporated in our Article 40 of the Constitution and which recognises the importance of the availability of a capacity to question the validity of the detention of a person. In this case, the applicant is detained in Mountjoy Prison, pursuant to orders that I will speak about, and the application is made under Article 40.

3. The Court is also concerned with another historical and important remedy which is that of contempt of Court. It is vital that courts have a power to enforce their orders and they do that by way of the contempt of Court jurisdiction. Obviously, in most circumstances, the Court makes an order and the parties may appeal it, but in the meantime, certain consequences follow because of the way that the Court has decided the issue.

4. Ultimately, it comes to a point that the Court makes an order and it is incumbent on Courts to make sure that their orders are respected and that they are enforced. Relevant to that is a distinction between two kinds of contempt. There is what is called criminal contempt and civil contempt. They may be a tiny bit misleading because they both relate to breaches of orders of the Court. It is not so much that one is particularly more reprehensible than the other, but nevertheless, that is the distinction and it arises in this way. If somebody has been but is not any longer in breach of a Court order, the question is what is the Court going to do? In those circumstances, courts have a jurisdiction to impose a penalty or punishment for a breach of the Court order. In the class of criminal contempt, in those circumstances, what the Court does is to impose either a prison sentence or a fine or some such sanction to mark disapproval of the public wrong that the person has done in disobeying in the past the order of the Court.

5. Then there is civil contempt which is the situation here. Civil contempt is where the Court is satisfied on evidence that the person is resisting the order of the Court, that the person is opposing the order of the Court, that the person is acting in breach of the order of the Court. In those circumstances, the function of the contempt jurisdiction is, as we say, coercive i.e. it is designed and intended to make the person do what the person has been ordered to do or stop a person from doing what the person has been enjoined from doing by reason of the Court order. That is the situation here. The situation that the applicant is facing is a case based on allegations that he is and was and continues to be in breach of orders made by the High Court.

6. In July 2013, Laffoy J. in the High Court made a series of orders on the basis of evidence that she was satisfied was sufficient to justify making those orders in regard to a series of injunctions applying to the applicant and restraining him from doing a number of actions. In the latter part of 2014, the plaintiff in that action, Mr. Maloney, who is a receiver appointed under powers that are not relevant to this and who had sued originally, now applied to Court to have orders of attachment and committal made against the applicant in this case. In practical terms, orders that the applicant be put in jail until such time as he agreed to abide by the orders made by Laffoy J. The case was made that the applicant was not in compliance with the orders having been made by Laffoy J. in July 2013. That was the state of affairs as of December 2014.

7. We now turn to an order by Hunt J. in the High Court on 15th January 2015. On this occasion, Hunt J. made orders for the attachment and committal i.e. the arrest and the lodging of the applicant in this case in Mountjoy Prison. In due course, in recent days, the applicant was arrested by the Gardaí and brought to Mountjoy Prison where he was lodged and where he remains. An application was first made on Wednesday 25th March 2015, and on Thursday 26th March 2015, Gilligan J. in the High Court began an enquiry under Article 40 into the detention of the applicant in Mountjoy Prison. The judge continued the matter into Friday 27th March 2015 and ultimately made an order holding that in respect of the return to the order, the Court adjudged that the return to the order was sufficient to justify the detention of the applicant and ordered accordingly. So the question was an enquiry into the lawfulness of the detention of the applicant and Gilligan J., having heard that matter, decided on Friday 27th March 2015 that it was justified

because the Court was satisfied that the applicant's detention was lawful.

8. The applicant now appeals to this Court, having applied late on Friday afternoon, and the Court agreed to hear the matter today and it has now had the benefit of submissions on behalf of the applicant from Mr. Beades, who is a friend of the applicant and from Counsel for the respondent, the Governor of Mountjoy Prison. The respondent says that this is a challenge to the lawfulness of the detention of the applicant in the prison. The Governor says that he is now certifying the basis of that detention and certifying that the reason for that is the order made by Hunt J. in the High Court on 15th January 2015, plus the committal order on 16th January on foot and following on from the same order that Hunt J. made i.e. Hunt J. found that the applicant was in contempt of Court. What was the matter that was before Gilligan J. in the High Court on Thursday and Friday? The answer is the lawfulness of detention. It is relevant to note, firstly, what was not before Gilligan J. because the same thing applies in this Court.

9. Habeas Corpus is a valuable and important remedy, but certainly in the case of a High Court order, which is the basis of the detention of the person in question, the Court has a relatively limited function. The Court is not concerned in this case with whether the order made by Hunt J. was based on evidence that was correct or not correct. I will come to what can be done about that if the applicant wishes to challenge it: I want to deal with the options that are open to him. But it was not a matter for Gilligan J. to say: let us start back at the beginning with the situation before Laffoy J. came to her decision. He is not reviewing the decision of Laffoy J. as to whether she was right to give an injunction or whether she should not have given an injunction or whether she should have given one in that particular form. That was not before the High Court. Neither was it before the High Court to say: let us look at the evidence that was before Hunt J. and see if he got it right or perhaps he was making a mistake. Again, there are issues and options there but one of them was not in the High Court to challenge that on Thursday and Friday last. The question was – was the detention valid?

10. Counsel for the respondent is correct in saying that when the Gardaí arrived at the door of the prison with the applicant with them under arrest, the Governor was not free to say, hold on, I am going to check if Hunt J. was correct back in November to see whether he made a mistake or whether the Gardaí drove a bit too fast or whether they arrested the applicant in the correct way or not. That was not open to the Governor of the prison; the Governor of the prison was obliged to receive the applicant into the prison. The Court has a number of questions. Some of them are technical. But what is clear is this. The Assistant Governor's Certificate was first produced on Thursday and then on Friday the Governor's Certificate on which was endorsed the relevant and necessary Garda endorsement that the applicant had been lodged in the prison following an arrest and pursuant to the order.

11. So what are the applicant's options? The applicant says he was not in breach of the order made by Laffoy J. and should not be in jail and has done nothing wrong. However, there is a Court order to say that applicant has done something wrong i.e. the order says that he has been in contempt of Court and is in contempt of Court. The applicant can return to the High Court and say he is willing to obey the order of the Court. If the applicant is correct in saying that he is not and has not ever been in contempt of Court, this should present no difficulty for him. He can return to the High Court and agree to abide by the orders made by Laffoy J. This is one option. The second option is that the applicant can, in addition to or in the alternative to returning to the High Court; he can seek to appeal the High Court order. The applicant can contend that Hunt J. was wrong and should not have sent him to jail for contempt of Court. If his appeal is late, then the applicant can apply to this Court to extend the time to appeal his case; he can request that he be admitted to bail or released from incarceration pending the hearing of his appeal against Hunt J's order. There is nothing to stop the applicant from doing this. The applicant would have to do this on notice to the receiver. The receiver might not agree that the applicant is wrongly incarcerated and that he is in contempt of Court. The Court would then have to determine this dispute. Fairness dictates that each side be heard – the receiver would have to be brought into those proceedings. The receiver is not a party in the High Court or in this appeal on the Article 40. The applicant may wish to appeal Laffoy J's order of July 2013. He may require an extension also in this case.

12. Those options arise for the applicant in the present situation. This Court cannot decide that the applicant ought to be freed from his incarceration because of a decision made without hearing the receiver or without hearing the allegations involving the Gardaí and what they did wrong and the Court is not saying in any way whether they are correct or not correct, the Court simply does not know the situation there.

13. The issue here is whether the return to the order i.e. the challenge to justifying the lawfulness of the custody of the applicant in Mountjoy Prison is correct or wrong? More particularly, was Gilligan J. correct in his decision or has it been shown that he made a mistake? This Court is satisfied that on that limited investigation as to whether there was an error in the decision of the High Court in this specific point i.e. is the applicant lawfully in custody on the ground of contempt of Court, yes, the documentation, the Court is satisfied is in order, the documentation is correct. The Governor of the prison has no choice but to accommodate the applicant. The purpose is to get him to abide by the order as made by Laffoy J. and Hunt J. has decided that the applicant was in contempt of Court and the proposition is that he continues to be in contempt of Court. The remedy is now in the applicant's hands to go back to Court. Equally, I want to emphasise that he is not without remedies in challenging or seeking to challenge any hearing or any application he made to extend the time, if he has not already appealed, or to be freed in the meantime because the Court has to hear the other side in any of these applications.

14. In the circumstances, therefore, the Court cannot allow and must dismiss the appeal against the order of Gilligan J., having regard to the particular function that the Court has, and emphasising the function of the High Court in regard to another High Court order in respect of what Gilligan J. was doing.

15. The Court wants to make reference to a procedural matter, that is, in the circumstances of this case, it was perfectly understandable for Mr. Beades to apply to the High Court on the basis of one citizen looking after the interests of another, and the Court was happy to hear from Mr. Beades and benefited from his assistance in his submissions but the Court wants to put a reservation that it is not to be taken as making a general rule, this is a more complicated issue than might appear to be the case and the Court does not want to set a precedent or make a general rule, much as it appreciates the assistance that it was afforded by Mr. Beades in the particular circumstances, which is not to say make any rule absolute one way or the other.

16. Lastly, if it truly be the case that the applicant was taken by surprise by the transfer of the matter from Noonan J. to Hunt J. in the CCJ, there is provision under the Rules for making an application to set aside an order of the High Court, as opposed to an appeal of an order of the High Court where a litigant has been taken by surprise or there is some element of mistake. In that regard, the same time limit for appealing would not apply to the order to set aside because time would start to run from the time the applicant first became aware of the order of Hunt J.

17. There has to be an order for costs so whoever wins gets the costs in the almost absolute rule of the courts, same to be taxed in default.