THE HIGH COURT

[2017 No. 216 SS]

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

BETWEEN

PATRICK RYAN

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 3rd day of April, 2017

1. On the 24th February, 2017, I directed that an inquiry be held pursuant to Article 40 of the Constitution into the lawfulness of the applicant's detention at Mountjoy Prison. The inquiry subsequently proceeded over two days on the 3rd and 7th March, 2017.

Background Facts

2. On the 4th January, 2013, Leixlip and District Credit Union Ltd ("the Credit Union") obtained judgment in the Circuit Court against the applicant in a sum of approximately €38,000 and costs. The applicant did not appeal and did not pay the judgment. Consequently on the 13th May, 2014, the Credit Union applied to the District Court for an instalment order. The order of the District Court made on that day notes that there was a balance due under the Circuit Court judgment remaining outstanding in the sum of €42,399.01. A sum of €990 was awarded for the costs of the District Court application so that the total due by the applicant at the conclusion of the District Court proceedings was €43,389.01. The matter came before the District Court on foot of a summons issued by the Credit Union on the 19th March, 2014, requiring him to attend before the court for examination as to his means. The order recites that the applicant failed to lodge a statement of means in accordance with the summons, failed to attend for examination today in accordance with the summons, refused to submit himself for cross examination by or on behalf of the Credit Union and failed to satisfy the court that he was not able to pay the debt in one sum or by instalments. Having so found, the court then made an instalment order against the applicant ordering him to pay the total due in monthly instalments of €300 each. The applicant did not appeal the order of the District Court. It would appear that he has to date paid nothing on foot of the instalment order.

3. Section 6 of the Enforcement of Court Orders Act, 1940 as substituted by s. 2 of the Enforcement of Court Orders (Amendment) Act, 2009 provides for a mechanism whereby, upon a failure by a debtor to comply with an instalment order, a creditor may apply for a summons directing the debtor to appear before the District Court. On the return of such summons before the District Court, the court may make a range of orders including an order for the arrest and imprisonment of the debtor for any period not exceeding three months. Such order may however only be made by the court where it is satisfied beyond reasonable doubt that the failure to comply with the instalment order is not due to inability to pay but wilful refusal or culpable neglect and further, that the debtor has no goods against which execution could be levied. Where a debtor is imprisoned in such circumstances, he or she is entitled to be immediately released upon payment of the accrued instalments then due. S. 6A provides for the grant of legal aid to a debtor in s. 6 proceedings.

4. On the application of the Credit Union, such a summons was issued in this case. It came before the District Court on four occasions, the 12th July, 2016, the 13th September, 2016, the 24th January, 2017, and the 21st February, 2017. I had the benefit of a transcript of the digital audio recording from the court on each of the three latter dates. For the purposes of the within application, it is relevant to refer to the salient features of those transcripts.

5. On the 13th September, 2016, the Credit Union appeared by counsel and solicitor before the court. The applicant represented himself. Counsel opened the matter to the court by referring to the fact that on the previous occasion, the 12th July, the applicant had appeared and placed reliance on a promissory note that he furnished to the Credit Union. The applicant interjected by saying "objection, objection". The judge pointed out that counsel had not finished his opening remarks and asked the applicant to be polite. The applicant responded by saying that he was looking for due process here and was polite. When counsel had concluded opening the case to the court, the judge afforded the applicant an opportunity to address him. The applicant commenced by saying:

> "I am looking for due process. This is a common law jurisdiction. Is the plaintiff in court?"

6. The judge explained the procedure to the applicant who repeatedly interrupted him by making remarks such as "it is a common law jurisdiction", "is the plaintiff in court here today?" and "I object to this case going forward." Throughout the course of the hearing, the applicant persisted in repeating these and similar phrases in a mantra like form without directly responding to any of the questions asked by the judge. When it was pointed out that the plaintiff was an incorporated body who had a nominee present in court, the applicant persisted in stating that the plaintiff wasn't present in court and there couldn't be a case without a plaintiff. When addressed by the court, the applicant simply responded with the recitation "it is a common law jurisdiction" or "there is no plaintiff in court" or "I do not consent to the case going forward".

7. The judge indicated that the case was proceeding and he was going to hear the evidence. He also noted that he issued the applicant with the statutory warning on the previous occasion which could give rise to certain consequences. This is presumably a reference to the potential for imprisonment envisaged by the Act in the context of wilful refusal to pay.

8. The Credit Union witness gave evidence and was cross examined by the applicant. While the applicant was in the course of cross examining the Credit Union witness, the following exchange took place with the court:

> "Judge Coughlan: if she is the appointed credit control officer, she is the appointed credit control officer.
>
> Mr. Ryan: Do you represent the plaintiff?
>
> Judge Coughlan: I am just making a clarification for your benefit.
>
> Mr. Ryan: Are you representing the plaintiff?
>
> Judge Coughlan: I beg your pardon, sir, don't be facetious with me.

Mr. Ryan: I am not being facetious.

Judge Coughlan: You most certainly are."

9. It is evident from the response of the court that these questions were addressed to the judge not the witness. In response to further comments from the judge, the applicant said:

"Mr. Ryan: Are you representing the plaintiff. Am I getting due process here?

Judge Coughlan: You are, sir, becoming more obnoxious as time goes on.

Mr. Ryan: I am not obnoxious. I am not obnoxious."

10. At the conclusion of the evidence, further exchanges took place between the applicant and the judge in which the applicant asked the judge what his name was and then what his full name was. The applicant then reverted to his stock phrase about not consenting to the matter going forward. The judge then indicated that he was satisfied that there had been wilful contempt of the order and that he was directing a warrant for his detention issue for him to be held in contempt. To this the applicant responded with a new mantra "it is a civil matter." This was repeated and the judge again said that the applicant had wilfully refused to comply with court orders and he was issuing a warrant. Matters concluded there and it would appear for whatever reason that in fact the warrant was not executed. This seems to have been because there was no garda present in court at the relevant time. Consequently, the matter appeared again before the court on the 24th January, 2017.

11. Counsel again reminded the court of the background to the matter and the judge enquired as to whether the applicant provided a statement of means, which he had not. He was asked by the judge if he had one with him to which the applicant responded by reverting to his previous mantra "is the plaintiff in court?". On being told that the applicant did not have a statement of means, notwithstanding opposition from counsel for the Credit Union to the matter being adjourned, the court gave the applicant an opportunity to produce one in the following terms:

"Now, in the circumstances having regard to the difficulties which we experienced. And insofar as I want to be 100% clear in all of this, I'm going to put the matter back for a shorter period of time, for the respondent to produce a statement of means so I can assess his capacity to pay. And I want that statement of means to be available to this court in advance of the adjournment date and to the claimant's solicitors in advance.

And I will renew my warning that if a statement of means is not provided and if there is not cooperation with the court on the next date, you are at risk, sir.

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

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

12. When counsel for the Credit Union objected to the adjournment, the judge again reiterated that he was giving the applicant an opportunity to obtain a solicitor and that he would grant legal aid to the applicant in that regard. The matter was then adjourned to the 21st February, 2017.

13. The matter came before the court for the fourth time on the 21st of February, 2017, when the Credit Union again appeared by counsel and solicitor and had a witness to update the court on the current situation. When the witness was called, the applicant interrupted to say that he had an objection and didn't consent to the matter going ahead. The judge indicated that it was proceeding whereupon the applicant reverted to his previous recitation of "is this a common law jurisdiction". When the judge told him that if he continued to interrupt he would have to take certain action the applicant challenged him in the following terms:

"Mr. Ryan: I have asked you a question, is it a common law jurisdiction? For the record?"

14. The Credit Union witness then gave evidence that no payments whatsoever had been made by the applicant on foot of the instalment order. When the applicant was asked by the judge if he had any questions for the witness, his response was:

"Mr. Ryan: I have already said three times I don't consent to anything going ahead here today?"

When the witness stepped down, the applicant for the first time introduced a new mantra, which he prefaced by saying that he didn't owe any money to the Credit Union. When the judge pointed out that there was a judgment that contradicted that assertion, the applicant responded:

"It is paid in the private."

He continued to repeat this phrase, without explanation, on some five different occasions throughout the brief hearing. When asked by the judge what he meant the applicant responded:

"You know what it means."

When asked by the judge for the third time what this phrase meant, the following exchange took place:

"Judge Coughlan: What does that mean, sir?

Mr. Ryan: It is paid in the private.

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

Are you prepared to cooperate with these proceedings sir?

Mr. Ryan: This is a common law jurisdiction.

Judge Coughlan: Are you prepared to cooperate with these proceedings sir?

Mr. Ryan: It is paid in the private.

Judge Coughlan: I asked you a simple question, sir and I accept (sic) an answer.

Mr. Ryan: I don't consent to the proceedings here today.

Judge Coughlan: Very good sir. You leave me with no alternative but to issue a warrant for your committal.

Counsel for the plaintiff: Yes judge.

Mr. Ryan: Will you be signing the order?

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

Counsel for the plaintiff: Very much obliged Judge.

Mr. Ryan: This is a civil matter; this is a civil matter.

Judge Coughlan: Sir it is a serious matter –

Mr. Ryan: It is a civil matter.

Judge Coughlan: And you have regarded it with contempt.

Mr. Ryan: It is a civil matter.

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

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

Judge Coughlan: Yes.

Counsel for the plaintiff: Thank you Judge.

Mr. Ryan: Will you be signing that order.

Judge Coughlan: I've just signed it.

Mr. Ryan: It is a civil matter, it is a civil matter, will I be able to get a copy of that original order?

Judge Coughlan: I will be delivering it now today's date is the?

Registrar: 21st of February Judge.

Judge Coughlan: 21st of February I issued a formal warning on the last occasion that you should have a solicitor in court –

Mr. Ryan: I don't owe any money.

Judge Coughlan – you failed to do that.

Mr. Ryan: It is/was paid in

Judge Coughlan: Very good. There is the orders in duplicate. If you pass one to the guard please.

Mr. Ryan: Paid them in

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

Mr. Ryan: I told you I don't owe any money.

Judge Coughlan: -- You are not helping your case. You are going to make your circumstances untenable.

Mr. Ryan: Common law jurisdiction. I don't consent to anything here today.

Judge Coughlan: That is the one, yes, keep that as a copy. That is the one. Yes I am satisfied.

Mr. Ryan: I would like for your original writing signature on that.

Judge Coughlan: The ink is dry by now sir off you go.

Mr. Ryan: Well (inaudible)."

15. A warrant of committal was executed by the District Judge entitled Warrant of Committal (for Contempt of Court). The warrant refers to the proceedings before the court and states:

> "The said person, namely, PATRICK RYAN has in open court wilfully insulted me + refused to engage with the court committed a contempt of this court as follows:- by (1) Contrary to (3) (Section 6 of the Summary Jurisdiction (Ireland) Amendment Act, 1871.
>
> AND WHEREAS I DO NOW, at the said sitting and acting solely in execution of my duties as such judge, hereby adjudge that the said person for that contempt be committed to prison for the period of seven days, "

The Article 40 Proceedings

16. For reasons which I will explain later in this judgment, it is necessary now to refer in some detail to the course that the proceedings in this court followed. The proceedings before the District Court appear to have taken place shortly after the sitting of the court at 10.30 am on Tuesday the 21st of February, 2017. The short transcript demonstrates that the matter is unlikely to have been before the court for more than a few minutes. Consequently, the applicant's detention on foot of the warrant probably commenced sometime in or around 11 am that day.

17. At approximately 12.55 pm on Friday the 24th of February, 2017, the ex parte application for an Article 40 inquiry was made by counsel before me. It was grounded upon an affidavit of the applicant's solicitor. I directed that an inquiry should be commenced, the relevant parties notified, the respondent ("the Governor") should certify in writing the grounds of the applicant's detention and the matter should be returnable before the court for 3 pm that afternoon. The matter resumed at around 3.30 pm when counsel for the Governor appeared and provided a certificate of detention executed by the Governor as directed by the court. It was further indicated to me that the Governor was consenting to the applicant being admitted to bail pending the determination of the Article 40 inquiry. At the conclusion of the brief hearing, I made a number of observations about the affidavit that had been sworn by the applicant's solicitor. The first was that the application was grounded on an affidavit of the applicant's solicitor which contained only hearsay information that had been given by the applicant's son. It contained no explanation as to why the applicant's son had not sworn the affidavit himself. I also noted that it did not identify any party by whom the applicant's solicitor had actually been instructed to make the application, despite some recent controversy in regard to grounding affidavits from solicitors in Article 40 and judicial review proceedings with which I believed counsel to have been familiar. I also observed that the affidavit was silent as to when instructions had been actually received to apply for an inquiry, which was of significance in circumstances where the applicant had received a seven day sentence and this was now day 4 of that sentence. I returned the matter to the following Tuesday the 28th February, 2017.

18. On the latter date, the parties again appeared before me and indicated that it had been agreed, subject to the court, that the full hearing of the inquiry should take place on the following Friday, the 3rd March, 2017. On the return before the court on this date, the 28th February, a verifying affidavit of the applicant sworn the previous day was before the court as well as a more detailed affidavit sworn by the applicant's solicitor that morning. I directed that an affidavit should be sworn by the applicant's son explaining why he had only instructed a solicitor to look into the lawfulness of his father's detention on Thursday the 23rd February, as now emerged from the applicant's solicitor's affidavit. I also directed that he should attend in court on the following Friday in case any issues arose from his affidavit. I further directed the applicant's solicitor to swear a further affidavit explaining precisely when she received instruction on the 23rd of February, how she received those instructions and from whom. Further, the affidavit should explain what contacts were made with Mountjoy Prison in relation to the warrant.

19. Accordingly, when the hearing of the inquiry proceeded on the 3rd March, 2017, the following affidavits were put in evidence before the court:

> (1) Grounding affidavit of Fiona D'Arcy sworn on Friday the 24th February, 2017;
>
> (2) Affidavit of the applicant sworn on Monday the 27th February, 2017;
>
> (3) Second affidavit of Fiona D'Arcy sworn on Tuesday the 28th February, 2017;
>
> (4) Third affidavit of Fiona D'Arcy sworn on Wednesday the 1st February, 2017;
>
> (5) Affidavit of David Ryan, the applicant's son, sworn on Wednesday the 1st March, 2017;
>
> (6) Affidavit sworn on behalf of the defendant by Kevin Condon Principal Officer in the Department of Justice and Equality on Thursday the 2nd March, 2017.

Summary of the Affidavit and Oral Evidence

20. In her first affidavit, the applicant's solicitor Ms D'Arcy avers that the applicant appeared before the "Four Courts" for money allegedly owed to the amount of €38,000 and that he had been summonsed for his failure to comply with an instalment order obtained by the Credit Union. At para. 5, the solicitor avers:

> "I say that at the outset of proceedings the applicant indicated that he was taking issue with the jurisdiction of the District Court, in particular because the amount involved, that was the subject of the civil proceedings, was €38,000 and this exceeded jurisdiction of the District Court. I say that the applicant indicated to the court that he was not consenting to the process on this basis."

21. It is apparent from the transcript to which I have already referred that this averment is entirely incorrect. The affidavit continues:

> "6. I say that the judge then requested a statement of means from Mr. Ryan and told the applicant he would be jailed if he continued. I say the applicant asked if it was a civil or criminal court and whether the court was going to sign the committal order to which the judge replied, 'the ink was dry on it already'.

> 7. I say that the judge did not offer the applicant legal representation and I say the applicant was given no opportunity to purge his contempt and no hearing was conducted in relation to the issue of contempt of court."

22. I am satisfied in the light of the subsequent evidence that has emerged in this case, in particular from the DAR recording, that this description significantly misrepresents what occurred before the District Court on the 21st February, 2017. The solicitor goes on to state that she was contacted by the applicant's son and he informed her of the information set out in the affidavit. She continued:

> "9. I say that it appears from the warrant that the sole reason that the applicant was imprisoned for contempt was that he refused to accept the jurisdiction of the court in respect of the matter."

23. As I have already observed during the course of the hearing before me, this neither represents what the warrant contains nor what in fact occurred. The affidavit concludes in the penultimate paragraph:

> "11. I say that I have acted on instructions in respect of this matter and that I believe these instructions to be true. I say that I have made every effort to verify these instructions however this may be a matter in which the court could benefit from listening to the DAR recording of proceedings."

Regrettably those efforts did not include speaking to the applicant. In her subsequent evidence, the applicant's solicitor averred that this affidavit was drafted by junior counsel and settled by senior counsel.

24. In the applicant's own affidavit subsequently sworn, he avers that he has read the grounding affidavit of his solicitor and can verify the facts contained therein. This is despite the fact that the applicant must have known that those facts were incorrect and misleading. Furthermore, neither the applicant nor his solicitor make any reference in their affidavits to the fact that this was the fourth time that this matter was before the District Court. Among the matters deposed to in the applicant's affidavit is the following:

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

25. This in my view is materially misleading. The applicant was not only repeatedly advised by the learned District Judge to retain a solicitor but told on several occasions that he would be given legal aid for the purposes of retaining such solicitor. Further, in his grounding affidavit sworn when he was at liberty and with the benefit of legal advice, the applicant fails to refer in any way to the previous three hearings before the same judge but gives the impression that this was the first occasion the matter was before the court. He makes no reference to the fact that an order for his imprisonment was made previously but not executed or to the real reasons for his imprisonment in this instance about which he can have been in no doubt. Instead he swears that he was imprisoned merely on account of the fact that he raised an objection to the jurisdiction of the court. The nature of the objection had been erroneously identified by his solicitor in her first affidavit but the applicant did nothing to correct that. On the contrary he verified it as being true. Of course the Governor can have had no knowledge of these matters and the true facts have only come to light as a result of the respondent obtaining a transcript of the DAR not only for the date referred to by the applicant but two earlier dates also.

26. In her second affidavit, the applicant's solicitor again reiterates that she received instructions from the applicant's son David Ryan who told her that his father wished to take Article 40 proceedings. In the solicitor's third affidavit, a somewhat different picture emerged. In this affidavit, she says that her office was contacted by a Mr. Gerard Horan (whose name subsequently transpired to be Gerard Honan), a friend of the applicant, at approximately 1 pm on Thursday the 23rd of February. He left a message to the effect that a man, giving the applicant's name, was incarcerated in Mountjoy and his son wanted her to look into the legality of his detention. Further information in a subsequent phone call was sought from Mr. Honan. Thereafter another friend of the applicant, Brian McCarthy, emailed the solicitor's office with further information concerning the case, stating that they would hear from the applicant's son, David Ryan. In fact, Mr. Ryan never initiated any contact with the solicitor and when he did not do so, she contacted him by phoning him twice and texting him seeking urgent contact. In response, David Ryan contacted the solicitor some time after 5.15 pm on Thursday the 23rd of February, for the first time. Ms. D'Arcy asked him to obtain further information about the case and he emailed her with that information at 10.13 pm that night.

27. In his affidavit sworn at the court's direction, David Ryan confirms these facts. He was unaware until the evening of the 21st of February, that his father had been incarcerated and this information apparently came from another friend of his father, Philip Doyle. David Ryan attempted unsuccessfully to contact his father by telephone and his request was declined. He sent an email request to the prison for a visit and this too was declined the next morning at 10.55 am. Shortly after that he received a phone call from his father who asked him to instruct a solicitor on his behalf. Because David Ryan did not know any solicitor, he contacted the applicant's cousin, Tom Ryan who in turn contacted Gerry Honan who appears to have contacted Brian McCarthy. Mr. David Ryan appeared to know very little about these people when he gave oral evidence. Despite the evident urgency of the matter, and his father's request the previous day, it would appear that Mr. David Ryan made no attempt to contact the solicitor until she contacted him. He was then asked to make further enquiries, not with the applicant, but with the applicant's friends.

28. When Mr. David Ryan gave oral evidence in court, I gained the clear impression that he was a reluctant participant in this entire matter. He told me that he was happy to leave things to the applicant's friends. He seemed to be largely unconcerned about the fact that, despite being asked by his father to get a solicitor urgently on the Wednesday morning, he heard nothing from anybody about the matter until Thursday evening. Furthermore, no affidavit was sworn by David Ryan until he was directed by the court to do so. On the first day this matter came before me, I indicated that an explanation should be furnished for why the solicitor, rather than David Ryan, swore the affidavit grounding this application.

29. With that in mind, I directed that Ms. Darcy should give oral evidence before the court. She did so on Tuesday the 7th of March, 2017. When I asked her why she had sworn the grounding affidavit in this matter rather than David Ryan, her answer was that she was advised to do so by counsel. If that advice was given, in my view it was incorrect. Of course even if David Ryan had sworn the grounding affidavit, despite his evident reluctance to become involved in the matter, that would still have been hearsay. In the event, the solicitor's affidavit was hearsay upon hearsay.

30. Of course there may be circumstances where due to the urgency of the matter, it may be appropriate for a solicitor to swear an affidavit on behalf of an applicant for an inquiry under Article 40. In the case of a solicitor who has represented the applicant in the court whose order is under challenge, that may be entirely appropriate in circumstances where first hand evidence of what transpired can be given. That does not arise here. In this case, not only was the solicitor not present in court but had never even met or spoken to the applicant prior to the court application. I asked Ms. D'Arcy why it was not possible for her to contact the applicant directly, particularly as her office is not far from Mountjoy. She said that she is not permitted to visit clients in custody without

arranging a visit through the email system. She advised the court that even in urgent cases like this, it is not possible to visit clients. It was previously, but not anymore. A visit can only be arranged once an email confirmation has been received from the prison. Mr. David Ryan's evidence as I have mentioned was that his father telephoned him on the Wednesday morning. He also said that he visited his father in prison on the Thursday afternoon. I therefore find it extraordinary that it was neither possible for the applicant at any time up to 1 pm on the Friday to contact his solicitor by telephone nor was it possible for the solicitor to make contact with him either by telephone or a personal visit.

Evidence in Article 40 Applications

31. Be that as it may, whilst as I have said there may be cases where the urgency of the matter requires a solicitor acting for an applicant to swear an affidavit when it is not possible to obtain one from the applicant him or herself, this is not such a case. It is quite clear that neither the applicant himself, nor his non-professional supporters who evidently orchestrated this application, were treating this matter as being of real urgency and certainly not the degree of urgency that would warrant the swearing of an affidavit by a solicitor which has turned out to be entirely inaccurate and misleading. It is not to my mind sufficient to put an affidavit before the court to ground such a serious application as an Article 40 inquiry on the basis that the veracity of whatever is stated in it can ultimately be determined by reference to the DAR. The applicant himself has to bear responsibility for this. Despite the evident shortcomings in his solicitor's affidavit, about which he must have known, he nonetheless purports to verify its contents in his own affidavit. Furthermore his total failure to make any reference to the highly material fact that he had appeared on three previous occasions before the same District Judge in relation to the same matter, had been repeatedly warned about his behaviour which placed him at risk of imprisonment, had actually been the subject of an unexecuted order for imprisonment, had been advised to get a solicitor in those circumstances and told that he would be provided with legal aid for that solicitor, is a serious matter.

32. In my view, it is inappropriate for an applicant's solicitor to swear an affidavit grounding an application for an inquiry pursuant to Article 40 of the Constitution unless:-

> (a) It is impossible for the applicant to swear the affidavit by virtue of the detention complained of or on account of some disability;
>
> (b) The solicitor has direct knowledge of the circumstances giving rise to the allegedly unlawful detention;
>
> (c) If reliance on hearsay is unavoidable, the solicitor has received instructions regarding the matters deposed to directly from the applicant;
>
> (d) If the instructions have not come from the applicant, the solicitor should explain what efforts have been made to verify those instructions and why it has not been possible to do so;
>
> (e) The urgency of the case means that there is no alternative;
>
> (f) A verifying affidavit is sworn by the applicant at the earliest opportunity.

The Proceedings in the District Court

33. It has been judicially noted that the arid pages of a transcript do not convey the atmosphere of the court room and the tone and manner in which things were said. This is particularly true in cases of contempt in the face of the court where a simple phrase that might appear innocuous in print assumes an entirely different characteristic when shouted in an abusive and disrespectful fashion at a judge. The contempt may not consist of words at all. It seems to me that the person by far best placed to determine whether a contempt has occurred is the judge who was present.

34. However, even allowing for these evident shortcomings in the transcript, it is clear that on each of the three occasions on which the applicant appeared in the District Court, for which a transcript is available, he behaved in a contemptuous manner to the court. He deliberately sought to obstruct and frustrate the proceedings by the use of obscure phrases espoused by certain personal litigants and their support groups. He refused to answer questions properly and reasonably asked of him by the judge. He evinced a clear intention not to comply with any order of the court already made. He issued direct challenges to the authority of the court. He demanded to know from the judge if he was representing the plaintiff in an insulting and offensive manner and demanded the judge's name and then his full name.

35. He did all this despite repeated warnings about his behaviour and the fact that he was at risk of imprisonment if he continued. He spurned the court's advice to instruct a solicitor for which he was told legal aid would be provided. In my opinion, the learned District Judge acted with considerable restraint until finally left with no option by the applicant's deliberately provocative behaviour.

36. Against this background, the applicant, evidently through the medium of his supporters, and acting with no evident urgency half way through his sentence, moved this Court for an Article 40 enquiry on the basis that he was deprived of his liberty simply because he objected to the District Court hearing a claim involving the amount of €38,000 which exceeded its jurisdiction. Nothing could be further from the truth.

37. In fact when the full hearing of the enquiry proceeded before me, this issue was hardly mentioned. Instead, the applicant's challenge evolved into an elaborate argument challenging the validity of the warrant on a number of grounds, including:

> (a) The applicant was denied fair procedures in a number of respects which included that he was not informed of the criminal charge against him, he was not asked how he pleaded, there was no hearing of the charge, no evidence was lead, he was not allowed challenge the evidence against him, he was not allowed lead evidence in his defence and so forth;
>
> (b) The warrant was bad on its face being void for duplicity in specifying two offences, failing to give particulars of the offences and specifying an offence unknown to law;
>
> (c) Section 6 of the 1871 Act is invalid having regard to the provisions of Constitution and the court should state a case to the Court of Appeal pursuant to Article 40.4.3;
>
> (d) Section 6 is incompatible with Article 6 of the European Convention on Human Rights and other EU Directives and Charters;

(e) The entire jurisprudence on contempt of court is of doubtful constitutional validity having regard to the maxims *nemo judex* in *causa sua* and *audi alterem partem*.

This is not an exhaustive list of all the applicant's points.

Procedure under Article 40

38. The procedure available under Article 40 is designed to be simple and speedy. It was recently described by O'Donnell J. in the Supreme Court as "arguably the most important and powerful order the High Court can make". It requires the High Court to deal with it as a matter of urgency ("forthwith" under the Article) and if necessary in priority to any other business than before the court. All that is required is an affidavit. Any person can make the application. There are no pleadings. More often than not, the respondent, usually the State has little or no time to prepare a response. In the present case, it had less than two hours. The urgency of the application was defused by the State's pragmatic agreement to the applicant being admitted to bail pending the determination of the inquiry. Absent that, the matter would have had to proceed there and then or at least shortly thereafter. Had that happened, the State would have been required to deal with issues of considerable legal complexity including the constitutionality of a statute. It would have been in a difficult, if not virtually impossible, situation if it was not in a position to access the DAR in a timely manner. Of course had the DAR not been available, the evidence of the applicant would have been unchallenged.

39. At the end of the inquiry, the court has to deliver its judgment with speed and urgency and thus often without the opportunity to analyse and reflect fully on all the issues in the same considered way as it might in a reserved judgment. In general, the only order that the court can make at the end of the inquiry is to direct or refuse the release of the applicant. The manner in which such release is ordered may in some cases require further consideration. Even where the court concludes that the instrument on foot of which the detention occurred is invalid, it cannot quash it. Nor can it declare the statute under which the applicant is detained to be invalid even if that is its opinion but shall refer that question to the Court of Appeal by way of case stated under Article 40.4.3.

40. All of this serves to underscore the fact that the procedure by way of Article 40 is suitable for cases where the instrument of detention is so clearly flawed on its face that it cannot amount to a justification of that detention or the procedure by which it was obtained was so fundamentally defective as to amount to a basic denial of justice.

41. In *Child and Family Agency v. McG and JC* [2017] IESC 9, the Supreme Court had to consider the suitability and appropriateness of Article 40 in the context of childcare proceedings. The case concerned an application to place children in interim care before the District Court. The mother obtained legal aid but had no opportunity to give her solicitor instructions until about thirty minutes before the case commenced. The father was functionally illiterate and had no legal aid. When the case was called, he sought an adjournment. Both the solicitor for the mother and the solicitor for the CFA consented, both agreeing that the matter should appropriately be adjourned for one week. It was felt that the father's illiteracy made it unlikely that he could properly represent himself. He had applied for legal aid and told the judge that he was informed that his application would get priority.

42. The judge however refused the application for an adjournment and the case proceeded. A detailed written report from a social worker was before the court which the father could not read. It recommended that the children be placed in care. At the conclusion of the case, the judge made an interim care order placing the children in the custody of the CFA. The mother of the children applied to the High Court for an inquiry pursuant to Article 40.4.2. One of the principal issues that arose before the High Court, and again on appeal to the Supreme Court, was the suitability of the Article 40 procedure for a case involving a childcare application. Baker J. held in the particular circumstances of the case that it was appropriate and her decision was affirmed by the Supreme Court.

43. Several of the judgments delivered deal with the circumstances in which it is appropriate to engage the Article 40 procedure. In the course of his judgment, O'Donnell J. said the following:-

> "[8.] The remedy of an inquiry under Article 40 is the great constitutional remedy of the right to liberty. It carries with it its history in the common law as the vindication of the rule of law against arbitrary exercises of power. It is and remains the classic remedy when a person's liberty is detained without any legal justification, or where the justification offered, is plainly lacking. However the right it protects is a right not to be deprived of liberty save in accordance with law. More difficult issues arise when it is sought to justify detention by the production of a valid order which is regular on its face, but which it is asserted is liable to be quashed because of some defect in procedure. The High Court on an Article 40.4 inquiry does not have jurisdiction to make any order other than release or to refuse release. It cannot for example quash an order or direct the performance of a legal duty. Given the importance of the remedy, and its power, I do not doubt that it is possible in a fundamental case, for the High Court to as it were, 'look through' an otherwise validly issued order, or at least an order which has not yet been quashed by a court with jurisdiction to do so, and direct the release of the applicant ….
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> [9.] When habeas corpus was established as the essential bulwark of personal liberty, the grounds for asserting the invalidity of an order whether of detention or otherwise, were limited and rarely invoked. Similarly there was no provision for a right of appeal against conviction in criminal cases, something itself a relative novelty in 1937 when the Constitution was adopted. The writ of habeas corpus was an important method of ensuring legality of detention, in the absence of any other mechanism being provided by law.
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> The manner in which the Constitutional remedy has been applied has taken account of these changes in the legal landscape. Thus, in *State (Royle) v. Kelly* [1974] I.R. 259 Henchy J. stated at p. 269:-
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> > 'The mandatory provision in Article 40 section 4, subsection 2, of the Constitution that the High Court must release a person complaining of unlawful detention unless satisfied that he is being detained 'in accordance with the law' is but a version of the rule of habeas corpus which is to be found in many Constitutions. The expression 'in accordance with the law' in this context has an ancestry in the common law going back through the Petition of Right to Magna Carta. The purpose of the test is to ensure that the detainee must be released if - but only if - the detention is wanting in the fundamental legal attributes which under the Constitution should attach to the detention.
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> In *Ryan v. Governor of Midlands Prison* [2014] IESC 54 Denham C.J. quoted this passage and continued at para. 18:-
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> > 'Thus the general principle of law is that if an order of a court does not show an invalidity on its face, and in particular if it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to

seek judicial review. In such circumstances the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw.'

[10.] The grounds for challenging the validity of orders made has expanded exponentially since the remarks in *State (Royle) v. Kelly* were made. But in most cases Article 40.4 cannot be invoked as an alternative speedier and sometimes more costly and disruptive route to a conclusion which may require the careful analysis by way of judicial review of the validity of an order. For my part I accept the observations of Henchy J. in *State (Ahearne) v. Cotter* [1982] I.R. 188, that the High Court hearing an application under Article 40.4 does not have jurisdiction to quash orders of inferior courts or administrative bodies. That goes back to the fundamental nature of the remedy: its strength lies in part in its limitation. However, the Court in an exceptional case has the capacity to direct the release of the applicant notwithstanding the existence of the order, in the same way in which an exceptional case, post-conviction, it may proceed to direct the release of an individual notwithstanding the existence of an order convicting him or her which has not been set aside on appeal in the circumstances considered by Henchy J. Any such case however is exceptional and the breach must be so fundamental that the obligation of the administration of justice and the upholding of constitutional rights requires the court to proceed in that fashion."

44. O'Donnell J. continued at para. 14:-

"Where it is contended that someone is in unlawful custody, and therefore an inquiry under Article 40.4 should be commenced, but where the contention depends on an assertion on the invalidity of the order detaining the person on judicial review grounds, then in most if not all cases I consider that the greater flexibility of remedy of judicial review, of which s. 23 is perhaps a specific statutory example make it more appropriate that the court would proceed, expeditiously by way of judicial review so that the flexibility of the remedy, and in child care cases the specific jurisdiction under s. 23 would be clearly available to it."

45. O'Donnell J. concluded (at para. 15):-

"Accordingly I do not consider that the route adopted here could necessarily be replicated in other fields. In my view the essential clarity of the remedy requires that it be applied only in those cases where there is a fundamental defect which can and must be remedied by an order for release forthwith."

46. Similar sentiments were expressed by McMenamin J. who said (at para. 17):-

"[17.] Extensive reliance was placed upon the recent judgments of this Court in *Ryan v. The Governor of Midlands Prison* [2014] IESC 54 (Supreme Court, Judgment of the Court (ex tempore) delivered on the 22nd day of August, 2014, Denham C.J.), and *Roche (also known as Dumbrell) v. Governor of Cloverhill Prison* [2014] IESC 53 (Supreme Court, Charleton J., delivered on the 31st day of July). It is right to say that both judgments deprecate the use of the Article 40 procedure in circumstances other than when there is a defect on the face of the order which goes to jurisdiction. But there is an exception to this rule, that is, where there has been some fundamental 'denial of justice', (as Denham C.J. points out in *Ryan* [2014] IESC 14 at para 13). Charleton J.'s judgment in this Court in *Roche* is to the same effect. I would hold that what occurred in the District Court was a fundamental denial of justice, and of the constitutionally implied right to fair procedures."

47. McMenamin J. continued at para. 19:-

"The facts of this case establish there was a fundamental breach of the right of fair procedures. In *McDonagh*, O'Higgins C.J. specifically pointed out that an Article 40 procedure was appropriate in the event there was such a default in the fundamental requirements of justice that the detention might be said to be '*wanting in due process of law*'. (p. 136 of the Report). In my view, this was precisely the situation here. This was decidedly not a situation where there had been a mere legal error, or slight procedural impropriety, or where the jurisdiction of the court had been inadvertently exceeded. Had this been so, then applying Higgins C.J.'s dicta, different considerations would arise."

48. In his judgment, Charleton J. further analysed the circumstances in which the Article 40 procedure could be said to be appropriate. He said (at para. 27):-

"In *Ryan v. Governor of Midlands Prison* [2014] IESC 54, the issue before this Court was the applicability of enhanced remission to a prisoner serving a sentence. The application had been preceded by correspondence. This Court found that there was no defect on the face of the order and that habeas corpus did not apply. Denham CJ quoted *FX v. Clinical Director of the Central Mental Hospital* [2014] 1 I.R. 280:

65. In general, if there is an order of any court, which does not show an invalidity on its face, then the correct approach is to seek the remedy of appeal and, if necessary, apply for priority. Or, if it is a court of local jurisdiction, then an application for judicial review may be the appropriate route to take. In such circumstances, where an order of the court does not show any invalidity on its face, the route of the constitutional and immediate remedy of habeas corpus is not the appropriate approach.

66. An order of the High Court which is good on its face should not be subject to an inquiry under Article 40.4.2 unless there has been some fundamental denial of justice. In principle the appropriate remedy is an appeal to an appellate court, with, if necessary, an application for priority. Thus, the remedy under Article 40.4.2 may arise where there is a fundamental denial of justice, or a fundamental flaw, such as arose in *The State (O.) v. O'Brien* [1973] 1 I.R. 50, where a juvenile was sentenced to a term of imprisonment which was not open to the Central Criminal Court.

[28.] Denham CJ endorsed the line of authority that affirms that the lawful application of the jurisdiction created under the Constitution does not turn an error within jurisdiction into the destruction of that jurisdiction. She stated at paragraphs 14-18:

14. Most recently, in *Roche (also known as Dumbrell) v. Governor of Cloverhill Prison* [2014] IESC 53, Charleton J. pointed out, and this Court would endorse:-

> '21. There are many instances where, within jurisdiction, a court may fall into an error of interpretation or base its decision on a mistaken view of the law. This does not in consequence remove jurisdiction. There are legal structures in place to deal with such commonplace situations and these fall outside the obligation of the High Court to enquire into and to declare that a detained person is either lawfully detained or not'.

15. The proposition that not every defect or illegality attached to detention will invalidate that detention has long been established.

16. This is not a novel exposition of the law. In *McDonagh v. Frawley* [1978] I.R. 131 at 136 it was stated:

> 'The stipulation in Article 40, s. 4, sub-s. 1, of the Constitution that a citizen may not be deprived of his liberty save 'in accordance with law' does not mean that a 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'….

[29.] As the law stands, an applicant for *habeas corpus* who has been through a lawful process whereby there is detention in accordance with legal form, must show the following in order to obtain immediate release: that the warrant is fundamentally flawed, subject to the entitlement of the High Court conducting the enquiry to seek other documents to clarify any want of form, ambiguity or error as in *Miller v. Governor of the Midlands Prison* [2014] IEHC 176 and *MC v. Director of Oberstown Detention School* [2014] IEHC 222; or that the court did not have jurisdiction to make the order impugned; or that there was such a fundamental and egregious denial of procedural rights as entirely stripped the court of its jurisdiction. The Constitution requires that the remedy in Article 40.4 is not to be used to usurp the structures which it has set up or to operate as a parallel jurisdiction out of context with the functioning of the courts in the making of orders and the appeal of those orders."

Discussion

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

50. This gives rise to an important question. To what extent, if any, can the court refuse Article 40 relief on any basis other than that the detention is lawful? Traditionally the view has been taken that unlike judicial review, habeas corpus is not a discretionary remedy. The detention is either lawful or not. However, an analysis of cases suggests that the relief may be refused on other grounds in certain circumstances, such as where an abuse of process has occurred. A helpful discussion of this issue is to be found in Kevin Costello, *The Law of Habeas Corpus in Ireland* (Four Courts Press, 2006). At pages 100 to 104, the author examines some authorities suggesting that a literal interpretation of Article 40.4.2 forbids the court from taking into account any matter other than the legality of the detention in deciding whether to grant or refuse an order. Mr. Costello goes on to say (at p. 101):

> "There is also a significant body of case law which can only be explained on the basis that the release on Article 40.4.2 is not determined solely by reference to the legality of the detention, and that release may be denied on extrinsic grounds. The overriding constitutional interest which is most usually invoked is the integrity of the administration of justice. Thus, the Supreme Court has held that where a prisoner has not presented all available grounds of challenge in the one complaint, but has been guilty of unjustifiably staggering complaints over a succession of applications, an Article 40.4.2 enquiry may be dismissed [*re Gallagher* Irish Times 26th July, 1983; *re Thomas McDonagh* High Court 24th November, 1969 ccp131-4]. The High Court has refused relief on Article 40.4.2 where the application is of a technical nature, particularly where the circumstances, such as a long delay in raising the complaint, suggests that there is something disingenuous about the character of the complaint. [In *re MacCurtain* [1941] I.R. 83, 87; *The State (Bond) v. Governor of Mountjoy Gaol* (1964) 102 ILTR 93, 99 where the High Court held that it would be "utterly absurd" that an accused person who had pleaded guilty to an offence could be released on *habeas corpus* on the ground of a pure irregularity in the proceedings taken against him.]
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> The abuse of process rule was applied in *The State (Byrne) v. Frawley* [1978] I.R. 326 a case which involved a jurisdictional complaint of a higher order of seriousness to that line of cases in which jurisdiction has conventionally been applied, and misconduct of a lower level than is usually classified as abuse of process. Two days after the complainant had been arraigned before a jury empanelled in accordance with the Jury's Act, 1927 the Supreme Court declared the 1927 Act unconstitutional. None the less the trial proceeded and the accused was convicted before such an unconstitutionally empanelled jury. The Supreme Court declined to proceed with a post-conviction Article 40.4.2 enquiry on the ground that since neither at the trial nor in his grounds of appeal to the Court of Criminal Appeal, nor in a subsequent appeal to the Supreme Court, had (presumably on the advice of his legal advisors) the question of the constitutionality of the jury been raised. The prisoner's apparent acquiescence, it was held, had compromised his complaint. The court, notwithstanding the relatively serious jurisdictional defect involved, refused redress."

51. It seems to me that these views are consistent with the judgments of the Supreme Court in *Child and Family Agency v. McG and J.C. (supra).* There, the issue considered by the Court was whether the matter could proceed by way of an Article 40 enquiry at all, implicitly accepting that the court was free to come to the conclusion that the application might be dismissed on grounds other than a pure consideration of the lawfulness of the detention in issue.

Conclusions

52. I have little hesitation in concluding that the manner in which this matter was brought before the court by the applicant constitutes a clear abuse of process for the reasons I have already identified. It is of course well settled that any party moving the court ex parte is bound by a duty of candour and utmost good faith towards the court. I cannot see in principle why that duty ought not equally apply in Article 40 applications. Accordingly in my opinion, this application should be dismissed on this ground and further on the ground that it is not in any event appropriate for the Article 40 procedure.

53. However, even if I were to be wrong in reaching that conclusion, I am satisfied that there is no merit in the applicant's submissions. Far from being denied fair procedures, it seems to me that the District Judge went to considerable lengths to ensure that the applicant was treated fairly. He was repeatedly warned about his behaviour during successive hearings. He was fully aware that if that behaviour was persisted in, it might result in his imprisonment not only because he was explicitly told by the judge that he was at risk but he had in fact already been subject to an unexecuted order of imprisonment for contempt. He was urged to retain a solicitor and assured that legal aid would be provided to him for that purpose. He was afforded every opportunity of complying with orders of the court previously made.

54. He ignored all of these matters and instead deliberately persisted in the same obstructive and contemptuous behaviour knowing full well what the outcome was likely to be. Indeed it seems to me likely that the applicant anticipated his own imprisonment in circumstances where, irrespective of the issue of contempt in the face of the court, he repeatedly refused to comply with orders of the court requiring him to furnish a statement of means undoubtedly in the knowledge that this was likely to result in the court concluding that his failure to comply with the instalment order was not due to inability to pay but wilful refusal. It is notable that the applicant's supporters, some of whom were present during the Article 40 proceedings in court taking notes, appear to have known of the applicant's incarceration before any member of his family, perhaps because they like the applicant had anticipated it.

55. When the outcome now complained of ensued, the applicant says that he was not told of the charge against him or given any opportunity to get legal advice. The basis for this contention seems to rest on the fact that what had gone before was related to the District Court's civil jurisdiction whereas it was the exercise of its criminal jurisdiction that resulted in his imprisonment. While it may be true to an extent to say that there may have been some blurring of the lines between the civil and criminal jurisdiction being exercised by the District Judge, I am satisfied that this has resulted in no unfairness to the applicant in reality.

56. I am further of the view that the warrant in issue is not void for duplicity. What the warrant describes is a pattern of behaviour over a period of time amounting to contempt with sufficient particularity to enable the applicant to understand the nature of that offence. A literal application of the requirement to specify the words constituting the contempt would require the transcript of all three days to be recited in full in the warrant, clearly an absurd proposition and one with which it would be impossible to comply.

57. On the issue of stating a case, Article 40.4.3 makes clear that a precondition to the stating of such a case is that the High Court be satisfied that the law on foot of which the person is being detained is invalid having regard to the provisions of the Constitution. I am not so satisfied but in any event I do not see how the court could arrive at such a conclusion in the absence of argument on behalf of Ireland and the Attorney General who are not before the court.

58. Accordingly, were it necessary for me to express a view, I am satisfied that the detention of the applicant is lawful. However, for the reasons previously explained, I am dismissing this application.