THE HIGH COURT

2015 6 SSP

IN THE MATTER OF THE CONSTITUTION

AND IN THE MATTER OF AN APPLICATION FOR HABEAS CORPUS BY LIAM BRIEN AT PRESENT IN CUSTODY IN MIDLANDS PRISON

JUDGMENT of Mr. Justice Haughton delivered on the 8th day of August, 2015.

1. The Applicant has applied *ex parte* for an order of *habeas corpus*. He is unrepresented and it is a documentary only application. He is presently in custody in the Midlands Prison following his conviction before a jury at Galway Circuit Criminal Court on 26th February, 2013 for sexual assault for which he received a sentence of 8 years imprisonment. He appealed to the Court of Criminal Appeal and the outcome on 11th February, 2015 was that the Court of Appeal reduced the sentence to 6 years imprisonment with one year suspended.

2. In his grounding Affidavit sworn on 29th July, 2015 the applicant says he has issued a Plenary Summons and Statement of Claim dated 15th May, 2015 under Record No. 2015/3822P naming Ireland and the Attorney General as defendants challenging the validity of sections of the Juries Act, 1976 under the Constitution, "EU law and on European Convention" grounds. These proceedings were served on 18th May, 2015, and an Appearance was entered on 29th May, 2015.

3. Pending the determination of these proceedings the applicant applied by motion grounded on affidavit sent by registered post on 2nd July, 2015 to the High Court, for bail. This application was returned to him (and received by him on 9th July) on the basis that he had used the wrong procedure, and should have completed the appropriate form and sent it "….along with copies of any charge sheet you refer and committal warrant to the Bails Unit, Central Office of the High Court whereupon the office of the DPP will be notified of your application and same will be listed for hearing".

4. The applicant avers that he complied with this and the appropriate documents were sent by registered post on Monday 13th July, 2015 and received by the High Court the following day. He avers that "[t]o date this application for bail has not been listed for hearing and no reason or explanation for this not being done have been given to me."

5. The applicant submits in his affidavit that the High Court has inherent jurisdiction to grant bail "as one of its original jurisdictions acknowledged in Article 34.3.1 of the Constitution" and that there is precedent for convicted persons being granted bail pending the determination of judicial review proceedings, and he states "[t]he last of these was Mr. Ivor Callely who was granted bail pending the determination of High Court judicial review proceedings in which he challenged the wrongful exercise of discretion and not on any constitutional grounds." He argues that the refusal to list his bail application in the High Court is a denial of his constitutional right of access to the Court.

6. There is no suggestion that the order committing the applicant to prison is in any way defective on its face. No evidence or argument has been adduced to suggest reasons why sections of the Juries Act, 1976 may be unconstitutional, or be invalid under EU law or the European Convention – indeed copies of the plenary proceedings have not been put in evidence. This court must therefore assume that the applicant is being detained in accordance with law.

7. In *Ryan v. Governor of Midlands Prison* [2014] IESC 54 the Supreme Court considered an appeal of an order for habeas corpus granted by the High Court where the issue was whether the prisoner had received appropriate remission. Denham C.J. stated at p. 4:-

> "18. Thus the general principle of law is that if an order of a Court does not show an invalidity on its face, 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."

And at p. 5 Denham C.J. stated:-

> "23. The traditional remedy of Habeas Corpus, now subsumed in Article 40 of the Constitution, is the great protection of the citizens' liberty. It protects our citizens from arbitrary detention and imprisonment without legal warrant, not to mention "disappearances" which, historically and now, are all too common in dictatorial regimes. The Courts must always enquire immediately into the grounds of any person's detention, when called upon to do so.
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> But the fact that every person detained has a right to have the legality of his detention examined by the Superior Courts does not mean that such a person has a right to have every complaint he may have examined under the same extraordinary procedure."

8. The applicant's only complaint is that his bail application has not been listed. The applicant avers that there has been a refusal to list his application, but nothing in writing is exhibited and no detail is given to back up this bare assertion. It would be open to him to seek judicial review of the failure or refusal to list it after making appropriate demand. The 'extraordinary procedure' of habeas corpus is not necessary or appropriate in these circumstances where the applicant is in post conviction detention and there is no suggestion that his conviction or sentences are bad on their face. Thus while the applicant may well have a legal right to have his bail application listed before the High Court his appropriate remedy does not lie in habeas corpus.

9. The case of *Callelly v Minister for Justice* 2014/654 JR does not assist the applicant. Firstly, it was a challenge to a refusal of remission that was correctly brought by way of judicial review, and the bail application was made, and granted, in those proceedings. Secondly, there were unusual circumstances that were outlined by President of the High Court in his ex tempore judgment:-

> "Having regard to the fact that if the applicant is successful in his challenge in the alleged failure of the minister to consider the application for remission it would mean that he would have served out the remainder of his term of imprisonment while he was awaiting a decision on that. I am told by the respondents that no decision has been made on this notwithstanding that the relevant form was completed apparently on 17th October and forwarded apparently a

> fortnight thereafter. It is frankly acknowledged by the applicant accepts that if he is unsuccessful in this particular challenge he will have to come back and serve the remainder of his sentence. This is somewhat unusual situation in that his whole question of length and extent of remission…has been discussed in the courts in recent weeks and months. There was no suggestion in this case that the applicant has been anything other than a model prisoner…no suggestion that he is a flight risk, no suggestion of any further offending whilst granted bail…[that] it is not possible to have a hearing today of this matter as acknowledged by both sides. There are important legal issues raised here. It seems to me that the balance of justice in this situation would persuade me that…[Mr. Callely should be granted bail] pending the completion of the judicial review on the clear understanding as is acknowledged by Mr. Callely that if he is unsuccessful he would go straight back into custody to serve out…the remainder of…less than a week."

9. The case of *Arra v Governor of Cloverhill Prison and others* [2004] IEHC 393 concerned judicial review proceedings in which the applicant challenged the constitutionality of and compatibility with the European Convention on Human Rights of sections 9(8) (c) and (f) of the Refugee Act, 1996 under which he was detained. Having obtained leave *ex parte* to seek judicial review, the applicant sought bail, which was refused by the court after hearing both parties. Clarke J. accepted that the court had an inherent jurisdiction to grant what he characterised as "conditional release". He considered that the applicant, was not in the same position as a person accused of a criminal offence in respect of whom no court determination has been made and who enjoys the presumption of innocence and who should not ordinarily be deprived of liberty save in the special circumstances identified by the courts and the legislature. At p.382 he stated:-

> "In contrast, it is well established that persons convicted upon trial by indictment are not, in the ordinary way, entitled to release pending an appeal. While there are, of course, cases where persons have been admitted to bail pending appeal it would, I think, be fair to characterise same as being the exception rather than the norm.
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> ….
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> In the circumstances it seems to me that it is appropriate that I should take into account a wider range of factors in determining whether the applicant should be released pending trial…"

Having then considered firstly the test of the likelihood of the applicant attending trial, at p. 384 Clarke J. continued:

> "Those other factors are as follows:-
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> (a) A significant portion of the challenge mounted by the applicant concerns the consistency of the relevant provisions of the Act of 1996 with the Constitution. That Act enjoys a presumption of constitutionality. While there may be exceptional circumstances on which the orderly implementation of legislation might be halted on an interim basis pending the resolution of a constitutional challenge, it seems to me that a heavy weight in any consideration needs to be given in favour of giving effect to a statutory provision which has the benefit of that presumption. Similar considerations apply in respect of the contention made under the Convention on Human Rights.
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> (b) While the same considerations may not apply to those aspects of the challenge which are concerned with what actually happened in the District Court I am of the view that it is, nonetheless, necessary to give some weight to the fact that the applicant is currently in prison on foot of an order of a court of competent jurisdiction which is not manifestly ill-founded."

10. While the High Court does have inherent jurisdiction to grant conditional release where the validity of a detention is challenged in civil proceedings it is also clear that the court is not confined to considering the likelihood of the released detainee attending court or the possibility of interference with witnesses, but may also consider factors such as the strength or weakness of the case being made. Here, as in the *Arra* case, that would include regard being had to the presumption of constitutionality enjoyed by the Juries Act, 1976, and the heavy onus on the applicant to show incompatibility with the Convention. As previously noted the plenary proceedings have not even been exhibited and no argument has been addressed to suggest that arguable claims are made by the applicant. These are factors to which this court also has regard in refusing this application.

11. Having inquired into the validity of the applicant's detention and for the reasons given above I am satisfied that the applicant is lawfully detained and is not entitled to *habeas corpus*. His application is refused.