**THE COURT OF APPEAL**

Neutral Citation Number: [2015] IECA 71

**Appeal No. 2014 No. 43 Exp**

**PeartJ.**
**Hogan J.**
**Mahon J.**

**IN THE MATTER OF AN APPLICATION**

**PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION**

**BETWEEN/**

**PATRICK JOSEPH McDONAGH**

**APPLICANT/RESPONDENT**

**AND**

**GOVERNOR OF MOUNTJOY PRISON**

**DEFENDANT/RESPONDENT**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on 20th day of March 2015**

1. The applicant in these Article 40 proceedings, Mr. McDonagh, was convicted in his absence in the District Court on 18th December 2013 of the offence of using marked motor fuel in his motor car, contrary to s. 102 of the Finance Act 1999 (as amended). While it appears that the District Court decided to impose a fine of €3,000 and, in default of payment, a sentence of 90 days' imprisonment, it is also agreed that the warrant which actually issued from that Court did not accurately reflect these details.

2. The applicant was originally imprisoned on 11th October 2014 following his failure to pay the fine, but was released on temporary release. It seems that he did not comply with the conditions attaching to that temporary release and he was re-committed to prison on 31st October 2014. Following his re-committal to prison his solicitor made an application for an inquiry under Article 40.4.2 of the Constitution into the legality of the applicant's detention on the ground that the detention warrant recorded the wrong penalty and was thereby legally infirm.

3. By order of the High Court dated 14th November 2014 (Haughton J.) the applicant was released on the ground that the detention warrant which had been sent to the applicant carried the wrong penalty (€300 instead of €3,000). Haughton J. considered that given that the default option of prison was in juxtaposition with the monetary penalty, the accuracy of the warrant was accordingly fundamental. Haughton J. accordingly directed the release of the applicant. The respondent Governor has now appealed to this Court against that decision.

4. The first question which now arises is whether these proceedings are now moot and, even if they are, whether this Court should nonetheless hear this appeal. The applicant makes the point that the 90 day sentence has now expired by effluxion of time, so that the underlying issue as to whether any defects in the warrant rendered that detention unlawful is moot. It is accordingly contended that this Court should not hear the appeal.

5. The respondent (and appellant) Governor contends that the appeal is not in fact moot. The applicant had, in fact, served but some 28 days (approximately) of the 90 day sentence as of the date of his release by order of Haughton J. It was submitted that the operation of the sentence was arrested by the making of the order of release by the High Court under Article 40.4.2. Were that order of release to be reversed on appeal, then it was said that the applicant would have to serve out the balance of the sentence (i.e., some 62 days), less any appropriate time period for remission which might have been earned by the applicant.

**Whether the sentence of imprisonment has now expired by effluxion of time?**

6. It would have to be said that question of whether the making of an order of release by the High Court under Article 40.4.2 has the effect of interrupting the underlying sentence of imprisonment or whether that sentence continues to operate in the absence of the prisoner is a question of no little difficulty on which there is, it might be thought, surprisingly little authority. While it is clear that, as Ó Briain J. said in *The State (Woods) v. Governor of Portlaoise Prison* (1973) 108 I.L.T.R. 54, 57, a sentence of penal servitude "once commenced continues to run without cessation" and that it "cannot be stopped from running by any court", this may simply reflect one of the special features of penal servitude. This principle may not necessarily apply to a sentence of imprisonment, the abolition of the distinction between penal servitude and imprisonment by virtue of s. 11 of the Criminal Law Act 1997 notwithstanding.

7. In my view, it would be undesirable to determine this novel and difficult question for the purpose of determining whether the appeal was moot unless such was strictly necessary. Since I am of the view that, for the reasons which I will proceed to set out, this Court should hear the appeal it is not necessary to express any further views on this question.

**The doctrine of mootness and Article 40 proceedings**

8. Article 34.4.1 of the Constitution provides in general terms for an unqualified right of appeal to this Court from decisions of the High Court, subject only to such exceptions and regulations as may be prescribed by law. Although no such exceptions and regulations have been prescribed by law such as might apply to the present case, it is nonetheless clear that this Court will not, generally speaking, entertain a moot: see *Malone v. Minister for Social Protection* [2014] IECA 4, *per* Irvine J.

9. The mootness doctrine is, however, but a rule of judicial practice which, as I put the matter in my judgment in the High Court in *Salaja v. Minister for Justice* [2011] IEHC 151:

"….is designed to ensure the proper and efficient administration of justice. It thus shares a close affinity with other judicially created rules of practice, such as the rules relating to *locus standi*, the rule of avoidance and the doctrine of justicability. These doctrines and rules of practice may all said to be constitutionally inspired - in particular, by the doctrine of separation of powers reflected in Articles 6, 15, 28 and 34 of the Constitution - even if they are not actually constitutionally mandated in express terms. As Article 34.1 of the Constitution provides that the administration of justice is committed to the courts, the courts must endeavour to fulfil that mandate by confining themselves to the resolution of actual legal controversies. If they were to do otherwise, then the courts would stray beyond that proper constitutional role of administering justice as between parties to a legal dispute, inasmuch as such decisions would amount to purely "advisory opinions on abstract propositions of law": see *Hall v. Beals* 396 U.S. 45 (1969)(*per curiam*). Outside of the special confines of Article 26 (which, in any event, provides for a binding decision - and not merely an advisory opinion - by the Supreme Court on the constitutionality of a Bill following a reference by the President), the provision by judges of such advisory opinions would not, at least generally speaking, serve the proper functioning of the administration of justice, since if unchecked or not kept within clearly defined limits, it would involve the judicial branch giving gratuitous advice on legal issues to the Oireachtas and the Government, a function which was never conferred on it by the Constitution."

10. The mootness doctrine accordingly serves the interests of the proper administration of justice by conserving scarce judicial resources. As Hardiman J. observed in *G. v. Collins* [2005] 1 I.L.R.M. 1, 13 "proceedings may be said to be moot where there is no longer any legal dispute between the parties."

11. It follows that the doctrine of mootness may be said to constitute a sub-set of the broader *locus standi* rules, since if a legal dispute has been resolved and the issue thereby becomes moot, the litigants no longer have any proper interest in seeking to have the issue judicially resolved, even if they had such an interest at some point in the proceedings. In such instances, the public interest generally requires that the judicial branch should refrain from deciding such questions. As Henchy J. remarked in the context of the general *locus standi* rules in *Cahill v. Sutton* [1980] I.R. 269, 283:

"To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadequately presented."

12. The critical feature, however, of the mootness doctrine is, therefore, that it is simply a rule of practice which may be relaxed as the occasion appropriately presents itself. Appeals from Article 40 applications often present special difficulties, because the detention periods in question may often be for relatively short periods, so that the period may have expired before any appeal can be heard or determined. If the applicant is released by the High Court and the period of detention subsequently expires, the proceedings will generally be regarded as moot: see, *e.g., Clarke v. Member in Charge, Terenure Garda Station* [2001] 4 I.R. 171, 177 *per* Keane C.J. and *Dunne v. Governor of Cloverhill Prison* [2009] IESC 43, *per* Denham J.

13. The decision in *Dunne* arose from an appeal from a decision of the High Court in Article 40.4.2 application which directly raised the issue of mootness. The applicant had been originally released by order of the High Court (Edwards J.) pursuant to Article 40.4.2, which decision was successfully appealed to the Supreme Court. In the meantime, the applicant had been re-arrested on foot of a different charge. Peart J. in turn ordered his release pursuant to Article 40.4.2 and the State sought to appeal that decision as well. By the time that latter appeal reached the Supreme Court, the applicant was no longer in custody on that second charge and, indeed, the charge had been dropped. In her judgment for the Supreme Court Denham J. held that the matter was moot:

"The applicant is no longer in custody on foot of the new charge. That charge is inoperative. In relation to the new charge there is no live issue remaining between the parties. In the circumstances the issue of the new charge is not justiciable and scarce judicial resources should not be used to advance an academic analysis."

14. The fact, however, that a particular appeal is moot is not necessarily the end of the matter. The rule in relation to mootness is, as we have already noted, simply a rule of practice designed to conserve the exercise of the judicial power to its proper sphere of application. In recent years the Supreme Court has stressed that this general rule must yield on occasion to the greater imperative of resolving issues which, while moot, are apt to recur or where there are other compelling reasons why such an appeal should be entertained.

15. These contemporary developments are well illustrated by the Supreme Court's decision in *Farrell v. Governor of St. Patrick's Institution* [2014] IESC 30, [2014] 2 I.L.R.M. 341. In that case the applicant sought and obtained an order *ex parte* from the High Court (Birmingham J.) granting leave to apply for judicial review in respect of a pending trial. A stay was also granted restraining any further prosecution of that offence in the District Court. The District Judge nonetheless subsequently remanded the applicant in custody for a short period of a few days.

16. An application was then made to me as a judge of the High Court under Article 40.4.2. By the time the application was ultimately heard the stay had long since expired. I took the view that although the matter was now moot, given the shortness of the time period in question, the legality of that detention might otherwise escape effective judicial oversight and review, it was appropriate that the merits of the case should be addressed. I then held that the remand in custody which had been made by the District Court judge was inconsistent with the earlier stay which had been granted by Birmingham J. and made a declaration to that effect.

17. A majority of the Supreme Court held that the respondent's appeal from my decision was now moot by reason of the effluxion of time, but the Court unanimously took the view that even if this were so, it should nonetheless proceed to hear the appeal. The Court then proceeded to hold that I had been incorrect in granting the declaration which I had.

18. So far as the mootness issue was concerned, Denham C.J. pointed out ([2014] 2 I.L.R.M. 341, 348-349) :

"The reasons why I would hear this moot appeal include the following:-

(i) the decision to grant a stay was made on an *ex parte* application, and the appellant had no opportunity to address the issue, or terms, of a stay;

(ii) the decision has an effect on criminal proceedings which are of real and reasonable concern to the appellant;

(iii) such an issue arises in circumstances which would escape review if the Court did not exercise a discretion to hear the appeal;

(iv) the decision potentially affects many criminal cases in the District Court;

(v) the decision has a systemic relevance to cases before the courts, where an application for judicial review has been granted."

19. It may be accepted that not all of these reasons apply directly or immediately to the present case. Yet it is nonetheless impossible to overlook the fact that this question arises in circumstances which might well escape review if this Court were not to exercise a discretion to hear the appeal, not least given the relatively short duration of the custodial sentence at issue. The decision also potentially affects many criminal cases in the District Court, since the questions of the extent to which the warrant was defective and, if so, whether this affects the validity of the detention are important ones which frequently arise in practice. Indeed, given the relative frequency of such questions in relation to defective warrants, it can reasonably be said that this question has a "systemic relevance" to the operation of the criminal justice system in the District Court.

20. For the reasons, therefore, I consider that it is appropriate that this Court should exercise its discretion to hear the appeal, even if the appeal were otherwise moot.

**Conclusions**

21. In summary, therefore, I believe that this Court should entertain this appeal against the decision of the High Court. For the reasons I have already stated, it is unnecessary to decide whether the appeal is actually moot, because even if it is, I consider that, by analogy with the reasons given by Denham C.J. in *Farrell*, it would nonetheless be appropriate that this Court should hear the appeal.

22. In these circumstances I believe that the Court should now proceed to hear the merits of the appeal.

Peart J. I agree with the judgment of Hogan J.

Mahon J.: I also agree with that judgment.