

THE HIGH COURT

[2017 No. 3 S.S.P.]

IN THE MATTER OF ARTICLE 4.4.2 OF THE CONSTITUTION OF IRELAND

BETWEEN

JOHN O'BRIEN

APPLICANT

AND

THE GOVERNOR OF CORK PRISON

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 8th day of February, 2017

1. An application was made by way of correspondence by John O'Brien for an enquiry in accordance with Article 42 of the Constitution. The matter came before this Court on the 6th of January, 2017 and this Court made an order directing the governor of Cork Prison to produce John O'Brien and certify in writing the grounds of his detention.
2. Mr. O'Brien was serving a sentence in Cork Prison of three weeks which was imposed by a District Judge on 26th January, 2017.
3. The applicant had previously been ordered to pay to F.O.R the weekly sum of €300 for the support of two dependent children by the District Court judge on 3rd September, 2013.
4. The District Court judge on the 26th January, 2017, was satisfied on the evidence adduced that of the said weekly payments, which had become due and payable in the sum of €10,525, had not been duly paid. Further, the District Court judge certified that the maintenance debtor had been provided with the explanations referred to in s.9 (8) of the Family Law (Maintenance of Spouse and Children) Act 1976 as inserted by the Civil Law (Miscellaneous Provisions) Act 2011. John O'Brien had been given an opportunity to apply for legal advice and legal aid. Evidence was adduced by F.O.R and John O'Brien as to the payment concerned having not been made. This was not due to the inability of John O'Brien to make the payment concerned by reason of a change in his financial circumstances which occurred since the order was made. The District Court judge treated the failure by Mr. O'Brien to make the payment concerned as constituting contempt of court and dealt with the matter accordingly by ordering the imprisonment of John O'Brien for a period of three weeks, a period of 21 days on this same date, 26th January, 2017.
5. Mr. O'Brien submitted that when the application for the maintenance order was first made in April, 2011 he was in hospital having an operation. The case was adjourned to the 3rd of September, 2011 and he stated that his consultant had indicated that the surgery would have taken a physical and psychological toll on his health, and that he would need at least six months to recover.
6. In any event, the matter proceeded on the 3rd of September, 2011 and Mr. O'Brien attended the hearing. The maintenance order was made by the District Judge on that date, and as stated above, it appears from the order of the District Judge on the 26th of January 2017 that no payments had been made by Mr. O'Brien.
7. Mr. O'Brien indicated that he had appealed the decision regarding the maintenance order to the Circuit Court. The Circuit Court judge hearing the appeal had not amended the order in any way.
8. Mr. O'Brien cited article 40 of the Constitution in making his application, and he also referred to the European Convention on Human Rights Act 2003. He stated that he had been providing maintenance up to the time of his operation.
9. Counsel on behalf of the governor indicated that this was an inappropriate application as his relief should have been to judicially review the decision of the District Judge made on the 3rd of September, 2011 but that there was no issue with regard to the legality of his detention pursuant to the order of the District Court judge made on 26th January, 2017.
10. She cited the decision of the Supreme Court in *FX v. The Clinical Director of the Central Mental Hospital* [2014] IESC 01, in which Denham C.J. stated:

"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."
11. The order of the District Judge made on 26th January, 2017 on its face showed no invalidity, and in those circumstances I decline to release Mr. O'Brien pursuant to Article 44.2 of the Constitution of Ireland.