Neutral Citation [2015] IEHC 768

THE HIGH COURT

[2015 No.1797 SS]

BETWEEN

ADHAMH GRANT

APPLICANT

AND

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 27th day of November, 2015

1. On 6th November, 2015, the applicant was arrested in connection with particular offences against property, which it is not necessary to set out in detail for the purposes of this judgment.

2. He came before Judge McLoughlin in the District Court sitting in Monaghan on 7th November, 2015. Ms. Irene Sands, B.L, instructed by Ms. Paula Tiernan, Solicitor, of P. Tiernan & Co. Solicitors, made an application for bail on his behalf, which was objected to by the prosecution.

3. There are three circumstances in which such an objection to bail may be made:

> (i) on the basis of s. 2 of the Bail Act 1997;
>
> (ii) that refusal of bail is necessary to ensure attendance of the accused at the trial (*The People v. O'Callaghan* [1966] IR 501); or
>
> (iii) on the basis that refusal of bail is necessary to prevent interference with witnesses, evidence or jurors (the other, less frequently encountered, ground recognised in *O'Callaghan*).

4. Given the nature of evidence at bail hearings generally, and the general non-reporting of such evidence, I canvassed with Mr. Colman Fitzgerald S.C. who appeared (with Ms. Sands) for the applicant, whether the present judgment should either be redacted or should pass over any express statement of the nature of the objection to bail. Mr. Fitzgerald has asked me not to redact it in any way and indeed to state expressly which of the three headings of objection arose in this case lest there be any speculation as to other grounds of objection. The applicant personally confirmed to his solicitor that there would be no subsequent objection from him being raised in the context of his possible forthcoming trial to my having followed his counsel's proposal. There was no objection from Mr. Kieran Kelly B.L. for the respondent. This having been clarified, I will do as requested by Mr. Fitzgerald.

5. However, it needs to be stated immediately that the applicant in this case is and at all material times was entitled to the presumption of innocence. The fact that there was a garda objection to bail or indeed that bail was refused by the District Court is not a matter that can be in any way taken into account or held against him for the purposes of his eventual trial.

6. In the present case, there was no question of s. 2 of the Bail Act 1997, coming into play, and nor was there any allegation of an intention to interfere with witnesses, evidence or jurors. The sole ground of objection to bail was that refusal of bail was necessary to ensure his attendance at the trial. Such an objection can be supported by a number of evidential matters which have been identified in caselaw, being matters which can be taken into account as relevant the overall test of whether refusal of bail is necessary to ensure attendance. For example, one of the matters relied on in the present case was the fact that the accused resides outside the State (in Northern Ireland). That a court might be satisfied as to one or more of these evidential matters does not in itself require refusal of bail, as there is an overall test in this regard that the court must consider. It is not necessary for the purposes of the present judgment to set out the specific evidential matters relied on in this case, other than to emphasise that the only possible relevance they had to the bail hearing was limited to the single question of whether refusal of bail was necessary for the purpose of ensuring the attendance of the accused at his trial.

7. A transcript of the Digital Audio Recording of the hearing has been prepared and put on affidavit in this case, so it is not necessary for me to recite the sequence of events at the hearing in full. However, I will make one immediate preliminary observation which is that it is very clear that the learned judge made every effort to be absolutely fair to the applicant. Having heard submissions he did not give an immediate decision, but adjourned a consideration of the matter for ten minutes to consider his ruling. Furthermore, after that adjournment, he asked both sides whether they had anything that they wished to add and only then did he proceed to give his decision.

8. There are two passages in the transcript that are of particular relevance. The first relates to the legal submission made by Ms. Sands on behalf of the applicant, which set out a perfectly correct statement of the presumption of innocence and the objection she had to meet, namely the suggestion by the prosecution that refusal of bail was necessary to ensure the attendance of the applicant at his trial. In the argot of criminal law this issue is often referred to as "*flight risk*".

9. This category of objection is also often referred to in shorthand as an *O'Callaghan* objection, although given that the *O'Callaghan* case also encompasses less frequently encountered objections relating to interference with the trial process, in a case where those sort of objections arose, there might need to be greater specificity of language as to which limb of *O'Callaghan* was at issue. This was not such a case, and therefore insofar as *O'Callaghan* was referred to, it was not necessary to be more specific because such references must be taken as concerning the question of securing attendance at trial.

10. Ms. Sands made an entirely correct submission to the learned judge as follows:

> *"… the court will be familiar with the case of DPP v. Mulvey of this year which indicates that the State, when they're opposing bail, need to hang their hat, if I could put it colloquially, Judge, to a particular objection. My understanding, although the Sergeant wasn't particularly clear on that, is that the flight risk is the primary concern, if I can put it that way, or certainly that's what I would deem it to be."*

11. Immediately after Ms. Sands had correctly stated the nature of the flight risk objection that she had to meet, the learned judge made a somewhat unhappy intervention as follows:-

> *"That's not my understanding Ms. Sands, I listened to all the evidence and that's not what I heard."*

12. Following the conclusion of submissions, the short adjournment and the opportunity to make further submissions which I have referred to above, the learned judge gave his ruling which it is probably best to set out in full, in the following terms:-

> *"Firstly I'll state from the outset, Ms. Sands is correct in stating that, there is a presumption of innocence in relation to the defendant regarding the charges that are before the Court, but notwithstanding that the State are still entitled to make an application to have bail refused to the Defendant.*
>
> *The application to deny bail has been made by the State pursuant to the principles governing bail that were enunciated in the case of the The People (Attorney General) v O'Callaghan. In that case, Mr. Justice Walsh stated that there was a fundamental test, and there were quite a number of matters set out in his judgment, set out at pages, between 503 and 504. He said that the test may be determined amongst others by reference to the following criteria:*
>
> *The nature of the accusation or the seriousness of the charge;*
>
> *The nature of the evidence;*
>
> *The likely sentence to be imposed upon conviction;*
>
> *And another criteria which is of importance in this instance, is the fact that the prisoner has been caught red handed.*
>
> *The O'Callaghan decision was subsequently endorsed by the Supreme Court in Ryan v. DPP.*
>
> *So in the context of this case, I've considered the submissions and the evidence heard on behalf of the State and I'm satisfied, having enunciated the criteria set out by Mr. Justice Walsh, that they have met the criteria as enunciated in what we now call the O'Callaghan rules and on that basis I'm going to refuse bail."*

13. It will be noted that having referred to a "*fundamental test*" and then to "*criteria*", that is, evidential matters that may be relevant to that test, the ruling concludes with a finding that the State "*have met the criteria*". This would again seem to be a somewhat unhappy choice of language, particularly having regard to the earlier intervention, in that the need to satisfy the overall test itself even if particular evidential matters potentially going to it have been established was not expressly adverted to by the learned judge. The reference to pp. 503-504 of *O'Callaghan* would appear to have been intended to refer to pp. 513-18 of the report.

14. Following the refusal of bail by the District Court, the applicant applied to me under Article 40.4 of the Constitution on 9th November, 2015. I granted an order for an inquiry and made the matter returnable for that afternoon. The matter was heard on 9th, 11th, 13th, 17th, 18th, 20th and 23rd November, 2015. I should perhaps make clear that for a number of reasons which included the significance, complexity and novelty of some of the legal issues involved, the quantity of legal material that was opened to me, the need to have the Digital Audio Recording made available, the need to permit the respondent to put further information before the court, and application by the respondent to be allowed to make further submissions, it was not possible in this case to complete the hearing and give a decision in a continuous manner in the hours or days immediately following the application. However the obligation in habeas corpus is not to conduct the hearing in every case in such a manner. The appropriate approach has been set out by Barrington J. in *The State (Whelan) v. Governor of Mountjoy Prison* [1983] I.L.R.M. 52: *"It appears to me also that, on an application for habeas corpus the duty of the High Court is forthwith to enquire into the legality of the detention, but that once the enquiry is entered on, and provided the urgency and importance of the proceedings are kept in mind, the Court is entitled, after hearing the views of the prosecutor, the respondent and their legal representatives to conduct the enquiry in the manner which the Court thinks best calculated to resolve the issues of law and fact raised in the proceedings and to achieve the interest of justice"* (p. 55). Also relevant is *O'D. v. Kennedy* [2007] 3 I.R. 689 per Charleton J. at pp. 690-691, where a period of 23 days between the order for an inquiry and the giving of judgment was seen as compatible with *Whelan*, given the complexity of the issues in that case. In order to mitigate any difficulty that the timetable might have caused to the applicant, I did allow short service of a notice of motion for High Court bail in the Article 40 application, returnable for 13th November, 2015, but in the event Mr. Fitzgerald decided, perfectly legitimately, to adjourn it to travel with the Article 40 application and simply to press ahead with the inquiry.

Remand orders and committal warrants

15. Following the initial order of 7th November, 2015, the applicant was twice further remanded by the District Court. There are therefore three committal warrants relating to the detention of the applicant:

> (i) the initial one dated 7th November, 2015, which is a warrant from within District Court District No. 5 to a sitting within the same District;
>
> (ii) secondly on 11th November, 2015, which is a remand from District Court District No. 5 to Cloverhill;
>
> (iii) and then again on 18th November, 2015, which is a warrant from Cloverhill to appear on the next occasion in Cloverhill by Videolink.

16. A first issue to be addressed in any Article 40 application is whether the documentation justifying the detention, in this case the committal warrants, is correct on its face. Mr. Michael O'Higgins S.C., who addressed me on this issue for the respondent, suggested that the committal warrants were of no real moment in terms of the legality of the detention and that the question of whether the applicant was lawfully detained should be determined by reference to the District Court's remand orders. I reject this argument for a number of reasons. Firstly the committal warrants are clearly a key part of the statutory scheme as will be further discussed. Secondly they are the very documents that the respondent has chosen to set out in the certificates under Article 40.4.2° justifying the detention. Thirdly, the State had only put before me the underlying orders in respect of the first two warrants and not for the current warrant, which makes the State submission on the irrelevance of the warrants all the more surprising. And finally, in *In re*

Singer (1963) 97 I.L.T.R. 130, Davitt P. at p. 131 held in respect of a return for trial that "*the applicant is not being detained under this order, but under the District's warrant of committal of the same date*". This identifies the committal warrant as the primary operative document for the purposes of an Article 40 application.

17. The parties agreed that the complaint regarding the allegedly flawed bail hearing should not be treated as moot merely because there were further remands after the bail hearing to which objection has been taken. This is a sensible approach by all concerned and is consistent with the case law on mootness in relation to "*short term orders, capable of repetition, yet evading review*": *Southern Pacific Terminal Co. v. Interstate Commerce Co.* (1911) 219 U.S. 498 at p. 501 *per* McKenna J cited in Condon v. Minister for Labour [1981] I.R. 62 at p. 72 per Kenny J. Mr. Kelly argued however that while the question of the validity of the bail hearing could still be pursued despite the further remands, the validity of any committal warrants other than the current one could not, as these were now spent.

18. There are three relevant statutory sources for a power to make a remand in these circumstances:

> (i) Firstly, there is a remand from within a district to a court sitting in the same district arises under s. 21 of the Criminal Procedure Act 1967. It should also be noted that under s. 27(3) of the Courts of Justice Act 1953, a transfer of business by a particular judge of the District Court would be confined to within his or her district. It seems to me that the power to remand is contained in s. 21 of the Act, and s. 22 provides for the terms of the remand but is not itself the source of the power. The marginal note to s. 21 is "power to remand" which fits its contents ("*the court may … remand the accused from time to time*"). Section 22(1) does not purport to set out a power of remand but rather a power of committal or release ("*the court may – (a) commit him to prison or other lawful custody or (b) release him…*"). Confusingly and unhelpfully, s. 22(4) states that "*[w]here a person is brought before the Court after remand under subsection (1) the Court may further remand him*". But s. 22(1) does not provide a power to "*remand under [that] subsection*". What the power to "*further remand*" under s. 22(4) means in these circumstances, or, if it means anything, what it adds to s. 21, is far from clear.
>
> (ii) Secondly, a court can remand to another court (referred to as an "alternative court") in which the place of detention is located, or a neighbouring district, under s. 5(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997 (which section, it should be noted is not an amendment of the 1967 Act but a freestanding power, having effect notwithstanding s. 27(3) of the 1953 Act). It should also be noted that there is no express power to commit a person to prison under s. 5 of the 1997 Act. The section seems to be based on the premise that the person has already been committed to a prison or place of detention.
>
> (iii) Under s. 5(2) of the 1997 Act, the alternative court may subsequently remand the accused either to itself or to another alternative court. Again no power of committal is referred to.

19. It seems to me that a remand to or by the alternative court arises under the 1997 Act exclusively rather than under that Act in combination with s. 21 of the 1967 Act, seeing as the 1997 Act contains a self-contained procedure for the alternative court remand process, and that the wide terms of s. 21 must be read as subject to the territorial limitation of the District Court and thus as not wide enough to cover a remand to or by an alternative court. Thus the jurisdictional basis of the warrants was as follows:

> (i) The first warrant arose under s. 21 of the 1967 Act.
>
> (ii) The second warrant arose under s. 5(1) of the 1997 Act.
>
> (iii) The third warrant arose under s. 5(2) of the 1997 Act.

20. Further complication is added by O. 19 of the District Court Rules 1997, as amended by the District Court (Criminal Justice) Rules 1998 (S.I. No. 41 of 1998), the District Court (Criminal Justice) Rules 2001 (S.I. No. 194 of 2001) and the District Court (Criminal Procedure Act 2010) Rules 2011 (S.I. No. 585 of 2011) . Order 19 is headed "Remands by the court". Rule 1 provides that the court "*may remand the accused from time to time as occasion requires and as provided for in section 24 of the Criminal Procedure Act 1967 … and section 5 of the Criminal Justice (Miscellaneous Provisions) Act 1997*". This provision perhaps on its face purports to create a power to remand but in reality does nothing more than repeat in a statutory instrument the statutory power itself. The propriety of repetition of a statutory power in a statutory instrument seems extremely doubtful. A power to make statutory instruments is a power to provide the machinery to give effect to primary law, not to repeat it as a separate obligation at secondary legislation level. To do so appears to be a usurpation of the function of the Oireachtas.

21. Furthermore O. 19 r. 1 suggests that the underlying power is contained in s. 24 of the 1967 Act and s. 5 of the 1997 Act. Section 5 does confer a power to remand but s. 24 does not. Rather it limits the time period for remands ordered under s. 21. The wording of this provision is unacceptably confusing and inaccurate. I note in passing that likewise, the 4th edition of Kelly's *The Irish Constitution* at p. 1581 states that "*[b]y virtue of s. 24(1) of the Criminal Procedure Act 1967 ... a District Judge is given a general power to remand in custody*". As can readily be seen from an examination of ss. 21 and 24, this statement is not correct. The "*power*" is "*given*" by s. 21, whereas s. 24 limits or defines the length of time for which that power may be exercised.

22. Order 19 r. 1 goes on to provide that "*[w]here the remand is in custody the warrant of committal shall be in accordance with Form 19.1, Schedule B.*" This seems to presuppose that any remand (including under s. 5 of the 1997 Act) would be accompanied by a warrant of committal. That conclusion is reinforced by O. 19 r. 6 (inserted by the 1998 rules) which provides that remands under s. 5 of the 1997 Act will be in the same form. Erroneously, r. 6 set out in the 1998 amending rules (sch. 2) is headed "Remands under s. 4 1997 Act" rather than s. 5, to which it in fact relates.

23. The statutory form, Form 19.1 in Schedule B to the 1997 Rules, as substituted first by the 2001 Rules referred to above and now by the 2008 Rules, is worth setting out in full:

> *No. 19.1*
>
> *SCHEDULE B*
>
> *O. 19, r.1.*
>
> *Criminal Procedure Act 1967 Criminal Justice (Miscellaneous Provisions) Act 1997*
>
> *Committal Warrant (Remand)*

District Court Area of

District No.

PROSECUTOR: The D.P.P. at the suit of .....

ACCUSED:..... D.O.B. .....

WHEREAS the above-named accused was this day before the Court charged that .....

*AND WHEREAS the hearing of the said charges has been adjourned to the sitting of the District Court at ..... on the .... day of ..... 20... at ..... am/pm *under the provisions of section 5 of the Criminal Justice (Miscellaneous Provisions) Act 1997*

*THIS IS TO COMMAND YOU to whom this warrant is addressed to lodge the accused in the *(prison) *(remand institution he being a person who is not less than sixteen nor more than twenty-one years of age) at ..... there to be detained by the Governor/the person in charge thereof until the above time of adjournment*

**(1) Being a period not exceeding eight days from the date hereof.*

**(2) Being a period not exceeding fifteen days from the date hereof and this not being the occasion of the first appearance of the accused before the court.*

**(3) Being a period exceeding 15 days but not exceeding thirty days from the date hereof, the accused and prosecutor so consenting and this not being the occasion of the first appearance of the accused before the Court,*

When he shall have him/her at the said sitting to be further dealt with according to law.

Dated this .... day of .... 20..

Signed .....

Judge of the District Court

To the Superintendent of the Garda Síochána at .....

†CONSENT AND CONDITIONS OF RELEASE

*The Court hereby consents to the above named accused being conditionally released on his/her entering into a recognisance *himself/herself in the sum of \ ..... *(of which \.....cash to be lodged)*

**and one sufficient surety in the sum of \ ..... (of which \ ..... cash to be lodged) or two sufficient sureties in the sum of \ ..... each (of which \ ..... cash to be lodged by each)*

and the accused is not to commit any offence

**and to sign on daily/weekly at ..... Garda station between .... a.m. and .... p.m. and [list any further conditions imposed by the Court]*And further consents that in lieu of such surety or sureties lodgment of the sum of \ ..... be accepted.*

Dated this .....day of ..... 20.....

Signed .....

*Judge of the District Court *Delete where inapplicable*

†Delete where inapplicable

24. Certain key elements appear from this form. It is in the form of a command under identified legislation, in the context of specific criminal proceedings relating to identified charges, from a particular judge of the District Court exercising jurisdiction in a particular area and district to the Superintendent of the Garda Siochána at a named District to lodge a named person in a named place for a specific time. In general terms those seem to be the essentials of the warrant.

25. As regards a statement of jurisdiction, Form 19.1 adopts the approach of simply referring to both Acts under which remands may be made in the heading to the warrant, rather than providing separate forms for one or the other or inviting those responsible for completion of the form to either cross out the inapplicable Act or tick the applicable one. Only the more specific reference to s. 5 of the 1997 Act in the body of the form is to be crossed out if inapplicable.

26. The approach of referring to both Acts in the heading to or body of all committal warrants is not an acceptable approach. A remand that is not made to or by an alternative court is not made under the 1997 Act. Yet the 1997 Act appears in the heading of the first warrant, and moreover in the body of the warrant it is stated that the hearing has been adjourned pursuant to s. 5 of that Act. This is significant error on the face of the record going to the jurisdiction under which it is issued.

27. Mr. Kelly relied on *The People (D.P.P.) v. Reddington* [2014] IECA 25, para. 10, to the effect that failure to comply with the forms set out in the Rules is not fatal to validity of an instrument. However what is involved here is a lot more than failure to comply with a form. Indeed the form itself is defective insofar as it requires citation of both Acts in cases where one or other of them do not apply. The requirement for a legal instrument to cite the legal authority under which it is made is not just a matter of form. Form 19.1 may be, and needs to be, departed from in any case where this is appropriate (see O. 12 r. 9(2)), and the appropriate Act, and only that Act, should be cited in any individual warrant. It is certainly unacceptable that the first warrant in this case purports to have been issued under s. 5 of the 1997 Act, which could not and did not apply.

28. Furthermore a remand that is made to or by an alternative court seems to be made under the self-contained power in s. 5 of the

1997 Act rather than the power in s. 21 of the 1967 Act which must be deemed to be subject to the usual territorial limitations applying to the District Court generally. The assumption that as s. 21 creates a power to remand from time to time, and that therefore any remand order is an order made under s. 21, is not one I can accept due to the local and limited nature of the District Court under Article 34.3.4°. A remand from one district to another requires special legislative permission, and that is provided by the 1997 Act. However, the 1967 Act also appears in the heading to the warrants. This is also an error of law on the face of the second and third warrants.

29. In addition, the second warrant contains a number of instances where the judge issuing the warrant is required to cross out alternatives that do not apply, but where these alternatives had not been crossed out. The first alternative relates to whether the remand is to a court in the District Court district where the place of detention is situated, or whether it is a court in the adjoining district. The second matter where an alternative has not been crossed out is as to whether the warrant to detain is addressed to the Governor of the place of detention or the "person in charge of that place". There is a third matter where the relevant alternative in "he/she" is not crossed out. These matters also constitute error on the face of the record.

30. The rules also provide that in general, unless the person is already in custody, the governor will provide a receipt to the person executing the warrant. Order 26 r. 9 provides:

> *"Where a warrant to commit a person to prison is issued, the officer or member of the Garda Síochána or other person whose duty it is to convey such person to prison shall deliver the said warrant and the said prisoner to the Governor of the prison named in the warrant, who shall thereupon give to such officer, member or other person a receipt for such prisoner (Form 26.3 Schedule B) but, if the said prisoner is already in the custody of the Governor, the warrant only shall be delivered, or transmitted by post."*

31. In the light of the legislation and rules of court referred to above, it can be discerned that the statutory scheme generally involves a four-step process as follows:

> (i) Firstly there must be an order of the District Court remanding the accused in custody.
>
> (ii) Secondly there must be a committal warrant, commanding the relevant Garda Superintendent or inspector to lodge the accused in a specified prison or remand institution.
>
> (iii) Thirdly the Superintendent must actually cause the person to be so lodged, by executing the warrant. In practice this includes endorsing it as so executed on the back of the document. Presumably there are clearly established protocols for this in prison reception facilities although I was provided with no real information in this regard.
>
> (iv) Finally there is normally a requirement for the member committing the prisoner to be issued with a "receipt", but this does not apply where that person is already in custody.

32. The first two warrants bear an endorsement of execution. The third does not because it was issued by a court in Dublin, and it is said that this obligation does not apply in the metropolis. I discuss further below whether the third step, that of executing the warrant, and therefore presumably the fourth, can properly be dispensed with in the Dublin Metropolitan District.

Can committal warrants in Dublin be addressed directly to the Governor?

33. Unlike the first two warrants, the third warrant is addressed not to the relevant Superintendent, for execution, but rather directly to the Prison Governor. The reason for this arises from O. 26 r. 4 of the District Court Rules 1997 which provide that in the Dublin Metropolitan District, committal warrants may be so addressed. The legal framework whereby different legal provisions apply in Dublin and in the rest of the country is deeply rooted in Irish legal history, and in turn reflects a more general and even more deeply rooted division in governance arrangements between the wider Dublin area and the much of the rest of the island. This division reflects itself most clearly for present purposes in arrangements at District Court level in criminal matters which reflect the historically separate status of the police authorities in Dublin.

34. Policing from earliest Norman times appears to have been carried out by a combination of watchmen in incorporated towns, parish constables and the military. An early statute specifically relating to the policing of Dublin was enacted in 1715 (2 Geo. 1) c.10 (Ir.) and relates to parish watches in Dublin. The watchmen evolved into a formal police system, and a Dublin Metropolitan District was subsequently established by an Act of 1786 (subsequently referred to as the Forcible Entry Act 1786 (26 Geo. 3) c. 24 (Ir.)). Policing in the capital was ultimately carried out by the Dublin Metropolitan Police, established in 1836.

35. As far as the rest of the country is concerned, a separate force of baronial police was organised under an Act on county constabulary in 1787 ((27 Geo. 3) c. 40), which evolved through various incarnations into the Royal Irish Constabulary. Dublin was not reunited with the rest of the country in policing terms until the Dublin Metropolitan Police were amalgamated into the Garda Siochána in 1925.

36. All other things being equal, there is nothing inherently wrong with there being somewhat different practices and procedures in different parts of the State. A certain variety of arrangements has existed at different times in different areas in terms of local government law. Legal provision for a directly elected mayor, for example, is confined to the greater Dublin area. Other examples of a variety of local arrangements include the 934 pre-independence private and local and personal Acts that remain in force following the Statute Law Revision Acts of 2009 and 2012, many of which provide separate and special arrangements for particular areas.

37. Only the most robotic and colourless interpretation of equality before the law would question the legitimacy of a reasonable variety of local arrangements, and certainly the sort of local arrangement contemplated by a provision such as O. 26 r. 4 is completely unobjectionable, provided of course that it is compatible with primary law.

38. The question that has arisen in this case is whether it is in fact compatible with primary law. Section 25(1) of the Petty Sessions (Ireland) Act 1851 provides that warrants of the District Court should be addressed to the relevant Superintendent. The final paragraph of the section confusingly adds that it shall "*not be necessary*" to address such warrants to the Governor, but goes on to make clear that the person to whom they are addressed shall lodge the prisoner with the Governor. The full text of the section as original enacted is –

> *"25. The persons to whom warrants shall be addressed for execution shall be as follows:*
>
> *1. All warrants in proceedings as to offences punishable either by indictment or upon summary conviction, which*

shall be issued in any petty sessions district, shall be addressed to the sub-inspector or head constable of constabulary who shall act for the place where the petty sessions for such district shall be held:

2. All warrants in other cases shall be addressed either to the sub-inspector or head constable of constabulary in manner aforesaid, or to such other person or persons (not being the complainant or a party interested) as the justices issuing the same shall see fit:

And it shall not be necessary to address any warrant of committal to the keeper of the gaol; but upon the delivery of any such warrant by the person charged with its execution to the keeper of the gaol to which the committal shall be made, such keeper shall receive and detain the person named therein, (or shall detain him if already in his custody,) for such period and in such manner as it shall appear from the warrant that the said person is to be imprisoned; and in cases of adjournments or remands such keeper shall bring the said person at the time and place fixed by the warrant for that purpose before such justices as shall be there."

39. Section 41 of the 1851 Act provides in pertinent part that "*Nothing in this Act shall extend to the Police District of Dublin Metropolis … save so far as relates to the backing or executing of any Warrants …*". The saver clause is clearly fatal to the State's contention that s. 41 displaces s. 25 insofar as addressing warrants in Dublin is concerned. The executing of warrants means their execution by the person to whom they are addressed. A saver as to executing of warrants is therefore meaningless unless it inherently saves provision as to the addressee of the warrant. Section 41 does not displace s. 25 in this respect.

40. The State argues that the section only excludes (from the exclusion) provisions on execution of warrants. It therefore does not exclude *addressing* of warrants because only *execution* is mentioned. This argument is made despite that fact that one cannot execute something which one does not have in the first place. The two are inextricably linked at any level of analysis. The State's proposition is therefore that the "*expressio unius*" principle must exclude even that which is inextricably linked with the matter expressed. I know of only one authority which might justify the suggested method of construction:

PORTIA: Tarry a little; there is something else.

This bond doth give thee here no jot of blood;

The words expressly are 'a pound of flesh:'

Take then thy bond, take thou thy pound of flesh;

But, in the cutting it, if thou dost shed

One drop of Christian blood, thy lands and goods

Are, by the laws of Venice, confiscate

Unto the state of Venice (The Merchant of Venice (Act 4, Scene 1)).

41. A final noteworthy feature of the State's submission that s. 25 does not apply to Dublin is that it contained no reference to the decision in *R. (Moore) v. Justices of County Dublin* [1910] 2 I.R. 681, in which s. 25 of the 1851 Act was applied in a Dublin context on the issue of the addressee of a warrant.

42. This is consistent with other authority supportive of the proposition that warrants generally ought to be addressed to the police authorities. *R. (Hynes) v. Clare Justices* [1912] 2 I.R. 57 was a case where a warrant for distress was quashed where addressed to a sheriff rather than the police.

43. *The State (Caddle) v. McCarthy* [1957] I.R. 359 was a case where a similar issue arose, although in that case it was in the context of a committal order relating to a convicted person, a category which has always been recognised as subject to a more exacting standard. Haugh J. said (at p. 364) that the objection that the warrant was addressed to the Governor rather than the Superintendent or Inspector was "a more important one" than other objections as to form. He was of opinion that "this objection was well founded". The 1851 Act and 1948 rules "show[ed] beyond all doubt that a warrant in a case of this nature must be addressed to a particular superintendent or inspector" (p. 365, emphasis in original). Haugh J. went on to say that "these warrants were defective, as I was satisfied they were addressed to the wrong person" but "different considerations might arise in the case of a convicted person … contrasted with a person in custody, at a time when no valid conviction is yet or at all in existence" (p. 366). A valid conviction "will save a defective commitment" (p. 366). For that reason the prosecutor was not entitled to relief by way of *habeas corpus* (p. 367).

44. The appeal to the Supreme Court was dismissed by a 3-2 majority. The *ratio* of Lavery J's judgment on this point for the majority appears to be set out at p. 376 as follows:

"Mr Justice Haugh accepted the contention that the warrant should have been addressed to a Garda officer but that nevertheless for reasons which he gave and with which I agree it was in the circumstances a valid warrant".

45. This appears to be a clear finding that Haugh J. was correct insofar as he found that, if the warrant was defective, it was nonetheless valid as it referred to a convicted person. The question of whether it was in fact defective was nonetheless commented on. In relation to the contention that s. 25 applied to Dublin, Lavery J. observed "in view of the provisions of s. 41 I cannot see how it could do so as of its date to the Dublin Metropolitan Police Courts". This seems to be simply an upholding of the stark submission made by counsel for the State in that case that "by virtue of s. 41 of this Act, the provisions of s. 25 do not apply in the Dublin District" (p. 370). Rule 91 of the 1948 rules which allowed a continuation of previous practice and procedure in Dublin "clearly justifies the direction of the warrants to the Governor in a case where the defendant is already in his custody". The decision in *R. (Moore) v. Justices of County Dublin* [1910] 2 I.R. 681 was drawn to the attention of the court (at p. 369), but the judgments contain no reference to it. The form of the report does not make clear in what context it was relied upon. The crucial context is of course that it is inconsistent with a conclusion that s. 41 of the 1851 Act excluded the application of s. 25 to Dublin. On the assumption that the case was not being overruled *sub silentio*, the absence of any reference in the judgments to the case at all or in relation to this aspect in particular may suggest an assumption that the matter was *res integra* and a lack of identification of the possible inconsistency with prior caselaw of the view being expressed in relation to s. 41. Furthermore and with the utmost respect to the court, the submission made by the State in that case and the decision upholding it contain no textual analysis of s.41 and do not

advert to, or indeed consider or examine, the question of how the execution of a warrant can be meaningfully separated from the question of its addressee. Whether or not (i) the remarks on this issue can properly be called *obiter* in the light of the finding upholding Haugh J., (ii) the absence of consideration of *Moore* in the context of whether s.25 applies to Dublin engages the doctrine of *per incuriam*, or (iii) the absence of consideration of the meaning of "execution" or how it can have exclude considerations of the addressee of a warrant engages the principle that a point not argued is a point not decided: *The State (Ryan) v. Lennon* [1965] I.R. 70 per Ó Dálaigh C.J. at p. 120, as cited in numerous cases *e.g., Ó Maicín v. Ireland* [2014] IESC 12 per Hardiman J. (dissenting) at paras. 83-84, are questions that may arise at a future point in considering the precise status of *Caddle* as a strictly binding authority on this issue.

46. It should also be mentioned that for the minority, O'Daly J. (Kingsmill Moore J. concurring) was of the view that the District Court Rules, not the 1851 Act, govern warrants in the District Court (p. 383), apparently on a more general basis rather than as to Dublin only (which is not mentioned in this context). This approach does not seem to have commended itself to the courts in any other case or the legislature. The 1851 Act has been applied to the District Court on numerous occasions and amended on countless occasions by the Oireachtas. The view that it does not apply to the District Court does not appear to take account of the Interpretation Act 1923 s. 4(6), the Interpretation Act 1937 or the Adaptation of Enactments Act 1922 s. 6.

47. Returning to the terms of s. 25, much emphasis was laid in argument on the rider to that section, the curiously-phrased paragraph that begins: *"And it shall not be necessary to address any warrant of committal to the keeper of the gaol; but upon the delivery of any such warrant by the person charged with its execution to the keeper of the gaol to which the committal shall be made…"*. The State in its written submissions has stripped the words "shall not be necessary" from their context and argued that "*it clearly implies that a warrant might properly be so addressed*". Of course, if one were to take those four words standing alone and shorn of all textual and historical context, as the State asks me to have it, that might be an arguable contention. But the sentence goes on to maintain the distinction between the "*person charged with its execution" and the "keeper of the gaol*". One has to also have regard to the words of sub-para. (1) which are clear and unambiguous.

48. In making sense of this curiously-worded rider I have come to the view that considerable assistance can be derived from the forms of warrant set out in the immediately previous legislation (considered in *Singer*), the Indictable Offences (Ireland) Act 1849 (12 & 13 Vict.) c. 69. Form Q.1 in the schedule is a "Warrant remanding a Prisoner" and thus was a precedent for the type of warrant in the present case at the time the 1851 Act was enacted. It provides as follows:

> *(Q. 1.)*
>
> *Warrant remanding a Prisoner.*
>
> *To the Constables of or any of them, and to the [Keeper of the House of Correction] at in the said [County] of*
>
> *Whereas A.B. was this Day charged before the undersigned, [One] of Her Majesty's Justices of the Peace in and for the said [County] of for that [&c., as in the Warrant to apprehend]; and it appears to [me] to be necessary to remand the said A.B.: These are therefore to command you the said Constables, or any of you, in Her Majesty's Name, forthwith to convey the said A.B. to the [House of Correction] at in the said [County], and there to deliver him to the Keeper thereof, together with this Precept; and [I] hereby command you the said Keeper to receive the said A.B. into your Custody in the said House of Correction, and there safely keep him until the Day of [instant], when [I] hereby command you to have him at at o' Clock in the Forenoon of the same Day before [me], or before such other Justice or Justices of the Peace for the said [County] as may then be there, to answer further to the said Charge, and to be further dealt with according to Law, unless you shall be otherwise ordered in the meantime.*
>
> *Given under [my] Hand and Seal, this Day of in the Year of our Lord at in the [County] aforesaid. J.S. (l.s.)*

49. It will be noted immediately that the warrant remanding a prisoner is addressed to both the constables and the keeper of the house of correction. This is immediately suggestive of a natural meaning to the first part of the rider to s. 25 as meaning that it shall not be necessary to *also* address any warrant of committal to the keeper of the gaol. Read as a statement that the warrant can simply be addressed to the constables, and not *also* to the gaoler, the paragraph makes complete sense, does not conflict with s. 25(1), and its opening words would not conflict with the distinction which remains in the paragraph which continues to require the person to whom the warrant is addressed to deliver the person to the gaoler.

50. The other way to make sense of the last paragraph is to read the words "*it shall not be necessary"* in the somewhat imperious sense of "*it shall not be appropriate*". This also avoids any contradiction within the section although it seems less natural than the sense of "*it shall not be necessary to also address*". But to read "*it shall not be necessary*" as meaning "*but you can do it if you want to, and, what's more, do it to the exclusion of addressing the warrant to the constables*", as argued by the State in this case, involves an open contradiction with sub-para. (1) and creates confusion and inconsistency within the section. This is not a preferable interpretation.

51. An interesting provision of the 1851 Act which curiously is not referenced in the State's submissions quoting various other provisions of the Act, is the form of the "*Warrant to commit (or detain) for Trial, &c.*" at form E.b. in the schedule. It is addressed to "'*The sub inspector (or head constable) of constabulary' or name of person who is to execute the warrant*" and directs the person to lodge the prisoner in a named gaol "*there to be imprisoned by the keeper of said gaol*". That form does not strike the reader as altogether consistent with the idea that the intention of the 1851 Act was that the addressing of committal warrants to the police can simply be dispensed with, at least as far as Dublin is concerned. Deviation from the forms is permitted by s. 36 if the form actually used is "*otherwise sufficient in Substance and Effect*". Whatever latitude in this context this allows, it relates only to the scheduled forms and does not include deviation from the substantive provisions of the Act including s. 25. The State's submission that s. 36 can be "*employed and applied*" (submissions, para. 12) to s. 25 is simply to ignore the language of the former section, which is clearly confined to deviations from forms rather than substantive sections of the Act.

52. The power to make District Court Rules provided for in the Courts Acts must be construed as a power only to make such rules as are not in conflict with other statutory provisions. Thus it is not *intra vires* a rules committee to make a rule in conflict with any Act, whether or not that Act forms part of the Courts Acts. Mr O'Higgins submitted that it was relevant that the Petty Sessions (Ireland) Act 1851 was not the enabling Act for the 1997 rules. For the reason I have given I would completely reject that suggestion.

53. Mr. O'Higgins also submitted in essence that the practice of addressing warrants to the governor had gone on for a long time in Dublin and by virtue of inveterate practice it appeared to have acquired some validity, relying on *Singer*. That case considered r. 91(1) of the District Court Rules 1948 which provided that "*it shall be lawful for a Justice assigned to the Metropolitan District to*

continue any practice or procedure now in force in that District …". Under a rule framed in those terms, inveterate practice could of course be regarded as authorised *by the rules*. But obviously a rule of this kind could not confer an exemption from an obligation imposed by a *statutory* provision, any more than inveterate legislative practice could create an exemption from an obligation imposed by the Constitution. Inveterate practice required that there be male-only juries, and did so for the first five decades of independence, but it was not an answer to a claim of invalidity. The obligation on a judge to "*uphold the Constitution and the laws*" requires the court to uphold the higher level law against the lower level, and to give effect to the meaning of a statute in preference to what may be argued to have been intended by a statutory instrument. The meaning of a statute cannot be changed by the making of a subsequent statutory instrument.

54. The State argues that long or inveterate practice must diminish the scope to find that a practice is erroneous. I would rather incline to the opposite view. If a practice is irregular, the longer it goes on, the greater the inroad made into rule of law considerations. In *Singer*, it was argued that the forms in the rules required the warrant to be addressed to the Gardaí and not the governor. While there is general reference in the case to deviation from prescribed forms not being fatal to detention, the only specific consideration of the addressee of the warrant is by Kingsmill Moore J. who held at p. 143 that "*The direction of the warrant to the gaoler instead of the Garda authority appears to me such a defect as would be cured by rule 55*" (which rule related to non-compliance with the forms prescribed). First of all, this express finding of a defect rather undermines the central thrust of the State's submissions to me, which was that it was never an error to address a warrant to the governor rather than the Gardaí. The prescribed form 19.1, which I have quoted above, remains as it was in 1960 when *Singer* was decided in the respect that it states on its face that the warrant is to be addressed to the Superintendent. Leaving aside the effect of O. 26 r. 4, if any, for a moment, one might observe that non-compliance with a prescribed form in 1960 might be a minor matter, but one can nonetheless ask, does it remain minor for all time? Is it still minor if there is still a conflict between practice and the form 55 years later? If inveterate practice is to reduce rather than increase the significance of error, that puts a huge premium on the non-correction of mistakes. One might legitimately ask how error is ever to be rectified in a system with such perverse incentives.

55. The high point of Mr. O'Higgins' argument was that the above-quoted passage from *Singer* was "*on all fours*" with the present application. But as Mr. Fitzgerald submitted, this is simply not the case. If language means anything (a hypothesis which seems to have been called into question by some of the State submissions in this case), a case is "*on all fours*" if it is "*precisely the case that is submitted here" (Commissioner of Valuation v. Anderson* [1922] 2 I.R. 202 at p. 203 per Henry C.J.). It is the "case" that must be the same, that is, not in terms of similarity of facts but in terms of an identity as to the legal question addressed. The question presented in Singer of relevance to this issue was, given that the form set out in the District Court Rules requires a committal warrant to be directed to the Superintendent, whether a form which does not comply with the rules in this respect is invalid. That question is decided in the above-cited passage, and it is decided on the basis of a specific rule of court excusing deviations from prescribed forms. The question presented in this case is whether a specific rule allowing a committal warrant to be directed to the governor compiles with a statutory provision, s. 25 of the 1851 Act, which on its face requires such warrants to be directed to the police. *Singer* does not consider that question.

56. It was recently thought necessary to amend sub-para. (1) by s. 193 of the Criminal Justice Act 2006. The new sub-para. (1) reads:

> *"1. All warrants (except as otherwise provided by law) in proceedings in respect of offences punishable either on indictment or summarily issued by the District Court shall be addressed to the superintendent or an inspector of the Garda Síochána of the Garda Síochána district within which the place where the warrant is issued is situated or the person named in the warrant resides."*

57. Having initially forcibly argued that O. 26 r. 4 of the 1997 rules as amended was adopted after, rather than before, the 2006 amendment, a posture that was quietly retreated from with a curious lack of express acknowledgment as to its erroneous basis, Mr. O'Higgins then contended that the subsequent amendment in 2006 cured any defect in O. 26 r. 4 that might have arisen when the rule was made in 1997.

58. In considering this argument I leave aside for a moment whether the 2006 amendment was in itself sufficient to rectify any question mark over O. 26 r. 4, in view of the fact that the amendment did not affect the last paragraph of s. 25. It is well established that an invalid statutory instrument can be subsequently confirmed by an Act of the Oireachtas. For a host of reasons including basic legal certainty, the intention of the Oireachtas to confirm such instrument must be clear (*Leontjava v. D.P.P.* [2004] 6 JIC 2302). No such intention to confirm any instrument at all, let alone O.26 r. 4 of the 1997 Rules in particular, is expressed either clearly, or at all, in s. 193 of the 2006 Act. Mr. O'Higgins relied on the fact that no-one had challenged O. 26 r. 4 or obtained a declaration as to its invalidity prior to the 2006 amendment. This is completely irrelevant. It would be a startling doctrine capable of undermining legal certainty and human rights on a widespread basis if a legal instrument that was void *ab initio* could magically be deemed to spring back into life without any express advertence by the legislature to the prior invalidity simply because of a subsequent change in the law. There is no precedent for such an argument and I would reject it in terms of logic and principle. It would reduce the legal system to an arbitrary, unstable state if the question of validity of secondary legislation was determined by reference to the happenstance of whether any individual citizen had challenged it by a particular time. In this case, the correct position is the simplest one. If an instrument was *ultra vires* when made, it remains void despite any changes to the law which might have created *vires* had those changes been in place originally. For it to become valid would require an express validating provision in a subsequent Act.

59. Indeed Mr. O'Higgins suggested in his submission that the very purpose of the 2006 amendment was to put the validity of r. 4 beyond doubt. Given the wording of the section, this conclusion is in my view not even stateable. Had the intention been to confirm the instrument, that could readily have been done, in line with clear precedents that are too numerous to mention. I have not had my attention drawn to any precedent for such an extraordinary sort of accidental confirmation of instruments *sub silentio*, which would create intolerable uncertainty as to the state of the statute book. If I were in any doubt about the matter, which I am not, an examination of the Explanatory Memorandum to the Bill for the Act, the Criminal Justice Bill 2004, completely contradicts the suggestion that validation of r. 4 had any role to play in the purpose of the section. Section 193 of the Act was originally s. 37 of the Bill. The Memorandum states as follows in connection with that section -

> *Section 37 (Amendment of section 25 of Petty Sessions (Ireland) Act 1851) — This section amends section 25 of the Petty Sessions (Ireland) Act 1851 to provide that all warrants (except as otherwise provided by law) in criminal proceedings issued by the District Court are to be addressed to the superintendent or an inspector of the Garda Siochána of the Garda Siochána district within which the courthouse in which the warrant is issued is situated or the person named in the warrant resides. The effect of this provision will be to speed up the execution of warrants by ensuring that it issues to the most appropriate Garda District for execution. (Emphasis added).*

60. Not only is there nothing in the section to indicate it was intended to validate O. 26 r. 4, and nothing in the Explanatory

Memorandum to suggest that the issue was even part of the legislative consideration in enacting the section, but given that the Memorandum refers to the need to "*ensur[e]*" that the warrant issues to the most appropriate Garda district, that would seem to be radically inconsistent with the idea that the purpose of the section was to remove any obligation to have warrants addressed to Garda authorities.

61. It is also notable that the Explanatory Memorandum does not in any way suggest that s. 25 does not apply to Dublin. Nor has there been material presented to me to establish that the speeding up of execution of warrants referred to in that Memorandum is either undesirable in, or not being applied in relation to, the Dublin Metropolitan District.

62. That the amendment was not addressed to the issue of validating O. 26 r. 4 (or any instrument) would also suggest that it did not displace the distinction made in the final paragraph of s. 25 between the gaoler and the person to whom the warrant is addressed, and therefore that a hypothetical new O. 26 r. 4 if re-made by the Rules Committee after 2006 would not pass muster under that unamended part of s. 25.

63. Why there should be so many separate provisions in three separate Acts affecting the power to make remand orders and issue committal warrants and as to their form and content, why some of the provisions are so unhappily drafted, and why the medley of legal provisions do not give anything like the impression of a coherent scheme, is not immediately apparent to me. This undue complexity seems to be a classic trap for the unwary and a possible source of procedural confusion and error on the face of court documents. Such error is of course exactly what has happened in this case. It does not seem to be appropriate that such scope for confusion should exist in relation to any legal instrument let alone one which deprives a person of their liberty. The omnibus tactic of referring in the heading of the warrants to all Acts that could potentially apply is not acceptable, as it confers only an illusion of legal certainty. Is it really too much to ask that the correct Act should be referred to? As the legislation currently stands, in the case of a remand to or by an alternative court, this is s. 5 of the 1997 Act. In any other case it is the 1967 Act. The fact of there being different Acts involved almost invites confusion as to which one should be cited in any given warrant. Given that procedural correctness in remands of accused persons in custody is so relevant to questions regarding the personal liberty of the individual, one could hopefully be forgiven for wondering why these provisions could not be consolidated into a single, coherent set of statutory provisions, thereby obviating the need to select between different Acts as to which is relevant. Nor is it immediately apparent to me why the forms prescribed in the Rules requires the crossing-out of inapplicable options, facilitating the sort of omission which blighted the first warrant (and the sort of failure to cross out options which seems to appear regularly in other contexts, such as drink-driving prosecutions), rather than the more user-friendly approach of selecting or ticking which option is in fact applicable (as is done in the European Arrest Warrant context or detention orders under the Immigration Act 1999), thereby, one would have thought, reducing the likelihood of errors of form in such important documents regarding personal liberty.

Does a period of invalid detention affect the legality of subsequent detention?

64. A fairly basic question in relation to the validity of detention is whether the validity of current detention is affected by an unlawful detention at some earlier point in time. The issue is whether some invalidity attaching to the earlier committal warrants or either of them could be said to invalidate that period of detention giving rise to a knock-on effect on the current detention. Mr. Kelly referred to the proposition that it does, which he rejected, as the "*domino theory*" during the hearing. I would propose to address this question before considering whether it is necessary to address the effect of the errors in the previous committal warrants.

65. In order to address this issue it is important to distinguish between two separate consequences of an invalid period of detention. The first relates to inadmissibility of evidence and the second relates to whether the court should treat the person as being in unlawful custody for any subsequent period so as to, for example, require proceedings to be dismissed, a conviction quashed on *certiorari*, or the applicant to be freed under Article 40. For the purposes of this discussion I leave aside the special case of an intention on the part of the State to infringe the Constitution, in the *People (D.P.P) v. J.C.* [2015] IESC 31 sense.

66. It is important to address the context of admissibility of evidence first, for the purposes of examining what lessons may be drawn in connection with the second context of Article 40. One might begin with statements such as that of Murray C.J. in *D.P.P. v. Finn* [2003] 1 I.R. 372 at p. 378 that *"[i]n criminal proceedings the onus is on the prosecution to establish beyond reasonable doubt that a defendant, while held in custody, has at all times been so held in accordance with law"* (emphasis added). Any such statement was probably not intended to be read without some qualification but now needs to be construed in the light of the seminal decision of a majority of a seven member court in *J.C.* In the light of that decision, there does not seem to be any onus on the prosecution to establish that a defendant has "*at all times*" been held in accordance with law, as such. Where an issue arises regarding admission of evidence which was obtained during a period of detention, the onus rests on the prosecution to show that that evidence is admissible (see *J.C.* per Clarke J. at para. 7.2(i)). There does not seem to be a basis in *J.C.* for any onus to show that there was lawful detention during any period otherwise than where this is relevant to the admission of evidence, nor is unlawful detention necessarily fatal to the admission of such evidence where the unconstitutionality was not actually intended.

67. The second issue is the impact of a prior invalid detention for the purposes of certiorari, Article 40 and similar applications. In *Keating v. Governor of Mountjoy Prison* [1991] I.R. 61 at pp. 65-66, McCarthy J. was of the view that where an issue of prior administrative detention (by Gardaí) arose before the District Court, that court should normally remand the person to allow him or her to challenge their detention under Article 40. That procedure would only make sense if the prior invalid detention was not "*cured*" by the order of remand, and this Court was entitled to release the applicant under Article 40 despite an ostensibly valid order of remand in custody by the District Court. However while apparently acting on the basis that a remand by the District Court would not cure a bad previous period of administrative detention, the court did not address whether a further remand by the District Court would cure a bad previous remand.

68. In *B.F.O. v. Governor of Dóchas Centre* [2005] 2 I.R. 1 at p.16, and my own decision referring to it, *F.I. v. Governor of Cloverhill Prison* [2015] IEHC 639, it was conceded (rather than decided) that a current valid detention did not cure a previous invalid one. However these cases were in the context of purely administrative detention (in which context I would be inclined to the view that the concession was correctly made, at least leaving aside the special case of the detention of the mentally ill) and therefore can provide no assistance to a case such as the present where the curing act is that of a court established by or under the Constitution. Such a process provides a far more definitive protection for the rights of the individual going far beyond such safeguards as apply to administrative detention, and furthermore does so in the context of an adjudication that is entirely independent of the executive power. Does such a process cure a prior illegality regarding detention?

69. *Keating*, as I have said, might suggest that the answer to this question is "*no*", at least where the prior illegality arose from administrative rather than judicial detention. In addition, *Keating* was referred to with apparent approval as recently as in the Supreme Court decision in *Killeen v. D.P.P.* [1997] 3 I.R. 218 at pp. 228-229 and relied on in some cases where the validity of subsequent warrants was upheld for purposes other than Article 40, e.g., *D.P.P. (Ivers) v. Murphy* [1999] 1 I.R. 98.

70. However, subsequent to this case, the Supreme Court decided in *Whelton v. O'Leary* [2011] 4 I.R. 544 that the jurisdiction of the District Court was not affected by a prior defect in the Garda detention of the accused. Certiorari of a conviction was therefore refused. McKechnie J. in a concurring judgment said specifically that the "*validity*" of an arrest was not a prerequisite to the court having jurisdiction.

71. So fully has this position been embraced that, in para. 66 of his judgment in *J.C.,* O'Donnell J. said:

> *"it is well established that the fact that an initial arrest was unlawful (and therefore unconstitutional) does not invalidate everything which follows even though it can properly be said that a person would not have been before a court, were it not for an initial invalid arrest which brought him or her on the first occasion before the court, from which he or she was then remanded. As long as the presence of the accused has not been obtained by deliberate and intentional breach of rights such as that which occurred in The State (Trimbole) v. The Governor of Mountjoy [1985] I.R. 550, all further steps are valid. See the concurring judgment of McKechnie J. in Whelton v. O'Leary & Anor [2011] 4 I.R. 544, where the law is helpfully analysed. It is plain therefore that the Kenny approach is not taken here".*

72. The approach that the current warrant is the relevant one appears to be consistent with a number of other authorities including *Healy v. Governor of Cork Prison* [1998] 2 I.R. 93, *Flynn v. Governor of Mountjoy* [1987] WJSC-HC 653, *Barry v. Fitzpatrick* [1996] 1 I.L.R.M. 512 [1995] WJSC – SC 3832, *Joyce v. Watkin* [2007] 3 I.R. 510, *Ward v. Governor of Portlaoise Prison* [2006] IEHC 297 at p. 14 and *Yeager v. O'Sullivan* [2012] IEHC 67.

73. The *Whelton* and *J.C.* approach clearly must take priority as a statement of the current law over the previous approach as reflected in cases such as *Finn* and *Keating*.

74. Admittedly, *Whelton* and *J.C.* were not Article 40 cases, but on the other hand it would seem illogical for judicial review and criminal appeal to adopt a stance on the legality of detention that is radically different from that to be adopted under Article 40. Mr. Fitzgerald argued to the contrary relying on certain comments in *The People (D.P.P.) v. Shaw* [1982] I.R. 1, and submitted that whatever about the standards applicable to the legality of detention in terms of judicial review and admissibility of evidence, a much stricter approach must obtain under Article 40. In *Shaw*, Walsh J. (dissenting on the grounds for admitting the evidence) took the view at p. 41 of the report that even where extraordinary excusing circumstances applied, a court would be bound to release a detainee under Article 40.4 if the detention was not strictly lawful. Griffin J. for the majority however seems to have been of the contrary view at pp. 54-55, as was KennyJ., and that view would seem to be binding on me.

75. Rejecting as I therefore must do Mr. Fitzgerald's argument in reliance on *dicta* of Walsh J. in *Shaw*, and returning therefore to the test at hand, I would hold that the existence of a prior period of unlawful detention, whether administrative or judicial, does not contaminate a subsequent lawful period of detention ordered by a court (as opposed to administratively). The review of the detention by the court provides an independent and objective safeguard for the detainee which is independent of any previous error in the process. In the context of a remand by a court, there is no "*fruit of the poisoned tree*", no domino theory.

76. There remains obviously a public interest in the legality of even spent periods of detention and the avoidance of error or omission, particularly blatant jurisdictional error or omission, on the face of the record. This public interest must be satisfied in some other way than by means of release under Article 40 following a subsequent remand, or the quashing of convictions on certiorari or judicial review. However the court is not without options in this regard. Those options would include declaratory relief in judicial review proceedings, an award of costs, or directions that the record be corrected if that can be done. The problem might arise most acutely a flaw in a committal warrant was drawn to the court's attention while it was still live. In that case the court would have the options of either directing release immediately, or adjourning the proceedings to allow an opportunity for the warrant to be corrected before it expired. The question of rectification, under judicial supervision, of errors in warrants is also touched on by O'Donnell J. at para. 59 of his judgment in *J.C.* I discuss these options further below.

Do parties responsible for an underlying decision need to be put on notice of an application?

77. Despite the antiquity of the remedy of *habeas corpus*, and in excess of 90 years of jurisprudence under the 1937 Constitution and Article 6 of its 1922 predecessor, it is still possible to discern in the case law different streams of thought which are not always easy to reconcile, as Hogan J. observed in *Bailey v. Governor of Mountjoy Prison* [2012] 2 I.R. 391 at p. 396). To navigate an application such as the present one, however, it is essential that some synthesis be attempted.

78. It is necessary first to address the question of the current status of the decision in *McSorley* [1997] 2 I.R. 258 which has some common ground with the present application in that both relate to an alleged failure by a judge of the District Court to respect the rights of the applicants. Prior to *McSorley*, a five-member Supreme Court had decided in *Sheehan v. District Judge Reilly* [1993] 2 I.R. 81 that Article 40 cannot be converted into any other form of procedure. In *McSorley*, a three-member Supreme Court decided that an Article 40 application in which allegations were made against a particular judge of the District Court should have proceeded by way of the court granting leave to seek judicial review so that the judge (and D.P.P.) could be put on notice in accordance with the principle of fair procedures.

79. Mr. Kelly was unable to give any example of any reported case at any level that had followed *McSorley* in the nearly two decades since it was decided. More importantly, the subsequent decision of the Supreme Court in *McDonagh v. Governor of Cloverhill Prison* [2005] 1 I.R. 394 is fundamentally at odds with the ratio of *McSorley* in the sense that the court in *McDonagh v. Governor of Cloverhill Prison* made an order for the release of an applicant under Article 40 in circumstances where complaint had been made about the conduct of the hearing by the learned judge in that case, without converting the proceedings into a judicial review.

80. It might be respectfully suggested that the decision in *McSorley* could be viewed as premised on an assumption that different organs of state are not to be expected or required to co-ordinate their efforts. Practice since the date of that judgment would seem to suggest that the concerns underlying it have not been borne out. The Chief State Solicitor will be served with notice of any Article 40 application on behalf of any prison governor. In the absence of misconduct such as to deprive a judge of immunity from suit, she also is responsible for arranging representation of judges in any case where this is necessary, by virtue of agreed protocols in this regard (which may well have been put in place at a point in time subsequent to *McSorley)*. The need to serve a judge separately from the Chief State Solicitor does not seem to arise. In addition, perhaps I could be forgiven for respectfully suggesting that it seems questionable to assume that she would fail in her management duty to co-ordinate with the Chief Prosecution Solicitor whenever appropriate. Indeed in the present case, the latter has taken carriage of the proceedings (despite never having been served with the originating application papers), illustrating perhaps that a rule that the D.P.P. needs to be put on separate notice of Article 40 applications is not in any way necessary to vindicate fair procedures. Good practice rather than dysfunction in public sector management should normally be presumed.

81. I also note in passing that academic commentary on *McSorley* has been unanimous and unforgiving. Kelly's Constitution (4th ed., at pp. 1682-1683) says of it that it is "*highly dubious … seems impossible to defend … [i]f this decision were to be acted upon, it would … emasculate Article 40.4.2".* Perhaps more significantly for present purposes, that work describes *McSorley* as inconsistent with the subsequent Supreme Court decision in *O'Connor v. Carroll* [1999] 2 I.R. 160 to the effect that a judge does not have an interest in defending his or her decision in subsequent proceedings. Mr. Micheál P. O'Higgins S.C in a *Bar Review* article which I will discuss further shortly) was also critical of the decision on the grounds that it could displace the use of Article 40.4.2°.

82. I also have regard to the fact that Hogan J. has already held in *Bailey* that the Supreme Court decision in *McSorley* was not binding upon him insofar as it restricted the scope of an Article 40 application. More relevantly for present purposes, as to whether *McSorley* remained good law on the question of whether an Article 40 application should be converted to a judicial review in order to put relevant parties on notice, MacMenamin J. decided in *Nasiri v. Governor of Cloverhill* [2005] IEHC 471that the subsequent decision in *McDonagh* was binding on him in this regard rather than that of *McSorley.* I would respectfully entirely agree with MacMenamin J. in this regard. However the fact that this matter still does not seem to be entirely free from doubt, even ten years on from *Nasiri* suggests to me that this conclusion needs to be emphasised again. It is also a matter of some surprise to me that the important decision in *Nasiri* does not seem to have been cited in any subsequent cases that I can identify.

83. In my view, the decision in *McSorley* cannot be said to have survived as a current statement of the law following the subsequent Supreme Court decisions in *McDonagh v. Governor of Cloverhill Prison* and *O'Connor v. Carroll*. Even if I am wrong about that, whatever vestigial status it might have had seems to me incompatible with the subsequent adoption of O. 84 r. 22(2A) of the Rules of the Superior Courts (inserted by the Rules of the Superior Courts (Judicial Review) 2015) which, in line with the Supreme Court decision in *O'Connor*, expressly removed the procedure whereby judges of the District or Circuit Court are named as respondents to a judicial review proceeding (except in the extremely rare case where *mala fides* is alleged) (see my judgment in *Hall v. Stepstone Mortgage Funding Ltd*. [2-15] IEHC 737). Having regard to the foregoing, and need for clarity and matters of personal liberty, I think it is preferable now expressly to acknowledge that it must be concluded that *McSorley* does not represent the current state of the law.

84. The central importance of personal liberty under the Constitution means that the detainer has to stand over in law the acts of any other persons on whose actions the validity of the detention depends, and moreover to do so in the context of the Article 40 application (if that is the procedure invoked by an applicant) and not by its conversion to any other form of procedure.

Proportionality and Article 40

85. A further general consideration is whether the provisions of Article 40 of the Constitution should be read in isolation from all other constitutional provisions. Even to phrase the question in that way almost irresistibly suggests an answer in the negative. An absolute approach to release on the basis of any irregularity in detention is not possible to reconcile with the need for an approach, which is acknowledged throughout the decision in *J.C.,* that "*properly balances the legitimate competing interests involved*" (per Clarke J. at para. 4.14).

86. There are clearly a number of situations where an order under Article 40 could have a significant effect on the legal, constitutional, EU and ECHR rights of third parties not before the court, particularly where the application related to the detention of a person either charged with or convicted of a criminal offence.

87. The informality and flexibility of *habeas corpus* has many advantages. It is essential to preserve that informality by reaffirming the doctrine that the Article 40 procedure is entirely self-contained and is beyond regulation by statute or rules of court (see *The State (Ahearne) v. Cotter* [1982] I.R. 188 per Walsh J. at p. 200). This principle is so important that even a statutory provision which purported merely to set out matters to which regard should be had by a court under Article 40 should be viewed as being inconsistent with it. The capacity of the court to react flexibly and, if necessary, immediately to a complaint is what makes the Article 40 mechanism a very real and effective vindication of the right to personal liberty. That freedom and flexibility would be diluted, however minutely, by statutory requirements to consider certain matters. Furthermore if such apparently innocuous statutory interference in the procedure were allowed it would become harder to draw the line against further interference.

88. However one disadvantage of the Article 40 procedure is that the ultimate order that can be made is limited to either the unconditional release or the non-release of an applicant (leaving aside the question of an adjournment or any interlocutory order, or costs). At one level, there is a certain crudity and disproportion in that limited suite of options.

89. Proportionality has become an increasingly central aspect of constitutional and administrative law, not simply by virtue of the influence of EU law and the ECHR, but also by reason of decisions such as *Meadows v. Minister for Justice* [2010] 2 I.R. 701 and *Mallak v. Minister for Justice* [2012] 3 I.R. 297. The potential lack of proportionality involved in release by virtue of an order under Article 40 in the criminal context has been noted academically by Mícheál P. O'Higgins, S.C., in "The King of Swaziland's Tenth Wife, Habeas Corpus and the Irish Experience" (2006) 11 *Bar Review* (issue 3) p. 75, citing similar concerns touched on by Dr. Kevin Costello in *The Law of Habeas Corpus in Ireland* (Dublin, 2006), p. 205.

90. It seems to me that the need for a degree of proportionality having regard to the rights of third parties who may be affected by release under Article 40 is perhaps a not always fully-articulated premise behind some of the restrictions on the granting of relief that have been developed in caselaw. These restrictions include reference being made to the existence of alternative remedies or to the high level of the hurdle to be overcome by an applicant in particular circumstances, such as where detention is under a court order, or to the power of the court to adjourn the hearing to allow the respondent to correct defective paperwork or to provide further documents which when joined to material already before the court may complete an otherwise incomplete picture.

91. It seems to me that another way of conceptualising these restrictions would be to say that the court should not remedy one injustice by creating another, possibly worse, injustice.

92. Whether and to what extent such considerations arise may depend on the circumstances of the particular case. For example, in the immigration context, in relation to the detention of a non-national who is unlawfully present in the State, his or her release under Article 40 may generally only engage considerations of public policy, rather than individual personal rights of third parties. However, when the detention of a person who is mentally ill, such that he or she is a danger to himself or herself or to others, is in question, or where considerations of national security or the criminal process are in issue, the rights of third parties are much more to the foreground.

Alternative remedies in the bail context

93. It would be important to emphasise that the existence of an alternative remedy is not, and could not be, an absolute bar to *habeas corpus*, as for one thing there will almost always be some other form of remedy. Article 40 is not some form of proverbial good

china, too valuable to ever be used. As Baker J. held in *McG. v. Child and Family Agency* (Unreported 17th November, 2015), "*the availability of a remedy by way of judicial review does not of itself preclude the court from engaging an inquiry under Article 40.4.2°*" (para. 49).

94. But the approach of refusing relief by way of *habeas corpus* in respect of complaints regarding bail hearings or criminal convictions by reference to the existence of alternative more appropriate remedies appears to be a particularly well-entrenched position followed in a number of other common law jurisdictions (*R. v. Richmond Justices* ex parte *Moles* [1981] Crim.L.R. 170; *Stack v. Boyle* 342 U.S. 1 (1951)). Dr. Costello's book on *The Law of Habeas Corpus in Ireland* at pp. 204-205 cites the Moles case as deciding that it would be "*unthinkable*" to allow habeas corpus relief in respect of a complaint regarding refusal of bail, quoting from the full version of the judgment (unfortunately, only a condensed version of that decision (that does not include this phrase) is reported in the 1981 *Criminal Law Review*).

95. Dr. Costello goes on to comment that *"The security of the pre-trial criminal process is likely to be compromised if the less flexible remedy of unconditional release on habeas corpus was to superseded the appeal (and conditional release on bail) as the proper remedy for refusal on bail"* (p. 205).

96. In *Roche (aka Dumbrell) v. The Governor of Cloverhill Prison* [2014] IESC 53, Charleton J. commented at para. 25 on the availability of relief by way of Article 40 in respect of bail hearings, saying that :

> *"An immediate right to invoke the full and original jurisdiction of the High Court was open to him should it be considered that some possible advantage would be available to him on putting his circumstances afresh before that Court. Given the wide breadth of powers in respect of bail available to any judge of the court before which an accused is to be tried, and bearing in mind the ready availability of review in respect of any such order, it is difficult to conceive of circumstances when resort to Article 40 is either appropriate or necessary."*

97. There are two features of a complaint regarding a bail hearing that make it particularly inappropriate for review by way of Article 40. First of all, there is no such thing even in principle as unconditional bail because at an absolute minimum, the accused will be required to attend his or her trial. In practice there will always be a host of further conditions if bail is granted, such as not to commit any offence, to sign on at a local Garda station and so on. Indeed such standard conditions appear on the face of the already-quoted committal warrant form 19.1 as set out in the District Court Rules. Release under Article 40, on the other hand, is unconditional. Where a bail hearing is in some way botched at the District Court level, to grant unconditional release to the accused under Article 40 is to give that applicant what Micheál O'Higgins S.C. describes in his already-cited *Bar Review* article as a "*windfall*" and a "*jackpot option*".

98. Secondly, review of bail refusal by way of the normal High Court bail list in Cloverhill is a very simple and readily available procedure. That list is normally taken twice a week during term, every Monday and Thursday. Short service of an application can always be sought in cases of urgency. The availability of Article 40 relief remains open in a case where the hearing in the District Court is so exceptionally flawed that immediate intervention of the court is required (*McDonagh v. Governor of Cloverhill*), or where the court could never properly have refused bail. Thus for example a remand in custody on a minor road traffic matter which could never properly attract a custodial sentence following conviction would warrant immediate release following the return by the governor under Article 40 (as would a custodial sentence on conviction for such an offence). But where the circumstances are such that the judge of the District Court could properly and lawfully have refused bail, any error in the process of doing so would seem to be almost always a matter for an originating bail application to the High Court rather than *habeas corpus*. Such a bail application to the High Court will therefore be the normal remedy for the vast majority of whatever complaints regarding lack of fair procedures or regarding breach of statutory or constitutional requirements as may be alleged against a judge of the District Court in the context of a bail refusal. Such an approach seems to me to follow from the judgment of Charleton J. in *Roche*.

Summary of legal principles applicable to applications under Article 40

99. In the light of the caselaw opened to the court and the analysis set out in this judgment, it seems to me that the principles applying to the procedure applying to an Article 40 application include the following:-

> (i) Subject to a determination of how fundamental the infirmity in question is, the scope of an Article 40 inquiry can investigate any infirmity that could be examined on judicial review, whether or not it appears on the face of the record (*McDonagh v. Governor of Cloverhill Prison*).
>
> (ii) Whether the detention arises under a court order or not, an Article 40 inquiry can also investigate error on the face of the record (*G.E. v. Governor of Cloverhill Prison* [2011] IESC 41; *Joyce v. Governor of Dóchas Centre* [2012] 2 I.R. 666).
>
> (iii) An otherwise valid court order remanding the applicant in custody cures any previous invalidity regarding the detention, whether arising from prior administrative detention or a flawed judicial remand (*Whelton, J.C.*).
>
> (iv) The court to which an Article 40 application is made is obliged to examine the application for an inquiry, and if an inquiry is ordered, to commence it, forthwith, but once the inquiry has commenced, the court is not obliged to hear the matter in a continuous sequence from day to day without adjournment, and may manage the proceedings in such manner as it thinks fit in the interest of justice as long as the urgency and importance of the proceedings are kept in mind (per Barrington J. in *Whelan*). As in many matters there is a balance to be achieved between speed and efficiency, on the one hand, and the quality (and therefore correctness, in so far as it can be attained) of the decision being made, on the other. In complex matters the latter will often have particular weight. Parties are entitled not just to a speedy decision but also to a correct one insofar as the court in question conceives it to be.
>
> (v) The ultimate order that a court can make on an Article 40 application is simply to grant or refuse relief and as to costs or the custody issue scheme. In addition, the court has the power to make any appropriate interlocutory order in the context of the inquiry including adjournment and an order for the release of the applicant on bail pending determination of the inquiry. The court does not have jurisdiction to issue a stay on release. However in the case of a person incapable of protecting themselves, the court may structure the final order in such a way as to control the release for that person's protection (*FX; N. v. H.S.E.* [2006] 4 I.R. 374). In a case where the High Court concludes that a post-1937 Act of the Oireachtas justifying the detention (or that limited class of statutory instruments which are the mechanism for the Act to have effect, and are not merely instruments made under the Act: *The State (Gilliland) v. Governor of Mountjoy Prison* [1987] I.R. 201 at p. 229) is contrary to the Constitution, it must adjourn the inquiry before making a final order of release or refusal, and state a case in that regard to the Court of Appeal (Art. 40.4.3°).

(vi) The person detaining the applicant is the appropriate respondent to an Article 40 application and is responsible for justifying the legality of the detention, including any steps that have occurred prior to the current detention and upon which its legality depends. It is not necessary or appropriate to put on notice any other party being an emanation of the State that made any underlying decision (see *McDonagh v. Governor of Cloverhill Prison* and other cases where this approach was taken).

(vii) An Article 40 application cannot be converted into any other form of procedure (*The State (Sheehan) v. Reilly)*. Therefore, if an applicant wishes to obtain judicial review-type relief, he or she must initiate a judicial review application either in tandem with the Article 40 or after it is concluded.

100. The crucial issue in many cases will be whether an error, once identified, is sufficiently fundamental to warrant relief. It seems to me that certain principles regarding the approach regarding that issue can be identified as follows:-

(i) Error on the face of the record must go to the basis of jurisdiction (*G.E.* para. 31). But an error or omission on the face of the record may be corrected by reference to some other document with which the instrument justifying the detention may be read (*Joyce v. Governor of Dóchas Centre* at pp. 678-679; *Carroll v. Governor of Mountjoy Prison* [2005] 2 I.R. 296).

(ii) Where the detention arises under a court order, the grounds for seeking Article 40 relief are limited to a flaw appearing on the face of the record, an absence of jurisdiction (in the strong sense that the court could not in any circumstances have made the order complained of), or a fundamental denial of justice or fundamental flaw, especially having regard to the availability of alternative, more appropriate, remedies such as judicial review (*Ryan v. Governor of Midlands Prison* [2014] IESC 54 at para. 18, *FX v. Clinical Director of the Central Mental Hospital* [2014] IESC 01)

(iii) This restriction is particularly acute in the context of a convicted person, where the error or flaw must be a particularly fundamental requirement before a court can intervene under Article 40 (*The State (McDonagh) v. Frawley* [1978] I.R. 131.) Likewise, in the context of refusal of bail, the hearing must be exceptionally flawed, or the refusal of bail must be such that a court could not properly have made that order, before relief under Article 40 can be granted, having regard to the more proper alternative remedy available (see *Roche*).

(iv) An applicant who may otherwise be entitled to relief may lose that entitlement due to acquiescence, election or even silence at a crucial point (*The State (Byrne) v. Frawley* [1978] I.R. 326 at pp. 344, 350 *per* Henchy J.), previous determination of the issues in other Article 40 proceedings (*In re Application of Woods* [1970] I.R. 154, at pp. 167-168 per Walsh J.) or similar factors.

(v) Before making the final order, the court has jurisdiction to adjourn an Article 40 hearing for a strictly limited period in the interests of justice. In the case of a flawed court order, that jurisdiction may be exercised in order to allow further information to be put before the court such as additional documents that may be joined with the order or a revised order where the court that has made the original order has been able to rectify any flaw in that order, thereby enabling rectification of the record during the course of the inquiry (*O'Farrell v. Governor of Portlaoise Prison* [2014] IEHC 416 (Hogan J.), *Moore v. Governor of Wheatfield Prison* [2015] IEHC 147 (Kearns P.), *O'Neill v. Governor of Wheatfield Prison* [2015] IEHC 168 (Kearns P.), *Miller v. Governor of Midlands Prison* [2014] IEHC 176 (Baker J.). See also *Joyce v. Governor of Dóchas Centre*).

(vi) The foregoing approach can be summarised further as an expression of the principle of proportionality, having regard to the Supreme Court decisions in *Meadows, Mallak* and *J.C.* A court asked to order release under Article 40.4 may ask itself in essence whether release would be a proportionate response in all the circumstances having regard to the nature of the error identified. Those circumstances include the already-identified questions, referred to in caselaw, of how fundamental the error is, whether there are available other, more proportionate, remedies, whether an opportunity should be afforded to the respondent to rectify any documentation which appears to be erroneous or to provide further documentation which may be read together with that originally provided, or whether the applicant has lost an entitlement to relief by reason of factors such as acquiescence. If the alleged error is of such a nature that, even if established, it would not in all the circumstances, in the view of the court asked to order an inquiry, legitimately result in an order for release under Article 40.4, the *ex parte* application for an inquiry or, *a fortiori*, the application for release, should be refused.

Application of these principles to the present case

101. The present case comes within the category of detention on foot of a judicial order, and therefore a higher hurdle applies to the nature of any flaw in such order.

102. The first possible flaw relates to the conduct of the District Court bail hearing. Despite the fact that it is entirely clear to me that the learned judge of the District Court was determined to ensure absolute fairness to the applicant, I must acknowledge, in fairness to the applicant and his legal advisers, that somehow an element of infelicity crept into the phrasing used as to the appropriate test.

103. The comment of the learned judge appearing to disagree with Ms. Sands' correct statement of the objection she had to meet is certainly unfortunate.

104. A second element which probably takes on slightly more weight when combined with the first is the possible lack of clarity in the language used in the ruling as between the ultimate test in *O'Callaghan* (which is not expressly stated in that ruling) and evidential matters to which a court can have regard in considering whether that test is satisfied. The importance of keeping this distinction firmly in mind is that a particular accused – and here I am speaking in general terms and not about the applicant in this case - might well "*tick all the boxes*" for refusal of bail by reason of, for example, having taken previous bench warrants, having been caught red-handed, having a strong case against him or her, having resisted arrest, lacking any clear community ties, and so on, but a court might be satisfied on the particular facts that refusal of bail is not necessary to ensure his or her attendance, or may be satisfied that such attendance can be ensured by means of sufficiently onerous bail conditions including lodgements of money in court or the procurement of independent sureties, or both, or other appropriate conditions. Thus it is important for a court to keep in mind a clear distinction between such evidential matters in and of themselves, and the ultimate test which remains to be satisfied even if such matters are established in evidence.

105. It is also notable that Ms. Sands and Ms. Tiernan, who both briefly addressed me on this subject, and were present in court on the day, were of the view that the learned judge was referring to evidential matters when he disagreed with Ms. Sands' correct statement of the test to be met.

106. At the same time, everyone is vulnerable to an accusation of infelicitous or insufficiently precise use of language on occasion.

107. Mr. Kelly submitted that it would be lawful for a judge simply to say "*I refuse bail*". I entirely reject that proposition, which is inconsistent with the law as set out in the Supreme Court decision in *Meadows* and *Mallak*. A judge must give reasons for either granting or refusing bail. The reasons do not, however, need to be very elaborate, but at a minimum, they need to state what the ground of refusal is. Thus, for example, in a case where the prosecution is objecting under both s. 2 of the Bail Act 1997 and the "*flight risk*" heading of *O'Callaghan*, the court must specify whether it is upholding either or both of those grounds of objection and why, even in the most summary manner, such as that it is accepting the garda evidence in support of that objection. The reasons for the grant or refusal of bail can be extremely Spartan, but there must nonetheless be reasons.

108. While accepting that the intervention of the learned judge and the terms of his ruling were not altogether felicitous and indeed left the applicant's legal advisers with the not altogether unjustified impression that confusion could have occurred as to the correct expression of the yardstick to be applied in refusing bail, the principles I have set out above require me to ask whether, if there was a legal error, the order was one that the court had no jurisdiction to make or the error constituted such a fundamental defect, as to warrant release, especially having regard to the alternative remedy of an originating application for bail to the High Court.

109. As regards jurisdiction, reference to a body acting "*outside its jurisdiction*", can be ambiguous because the notion of exceeding jurisdiction has two distinct senses. The weaker sense is by making an error which is reviewable, at least on judicial review by the High Court. However, a body can exceed its jurisdiction in the much stronger sense that it can make a decision which it could not, under any conceivable circumstances, have authority to make. The present decision complained of is *within* the jurisdiction of the District Court in that stronger sense, which is the sense relevant to release under Article 40 in respect of a bail refusal. The District Court clearly had jurisdiction to make the order that it did.

110. The other element is that of a fundamental defect. Even if one were to characterise the learned judge's choice of wording as an error, such error is, in my view, not at the sort of fundamental level that would lead the court to conclude that this applicant is not being detained in accordance with law for the purposes of release under Article 40. It is not possible to say precisely why the learned judge phrased the matter in the way he did and I would not infer that it was due to a misunderstanding or incorrect conceptualisation on his part of the appropriate test. But it should be acknowledged that there is a need, not simply to correctly conceptualise a decision, but to express that decision in a way that would ensure that justice was seen to be done, so that an applicant had no legitimate lingering concern that the matter had not been dealt with by reference to the correct application of the appropriate legal considerations. The applicant's concern in that regard is not wholly unreasonable. However the authorities I have referred to would indicate that a bail application to the High Court, or possibly judicial review, is the appropriate channel to vindicate his rights in that respect.

111. I now turn to the issue of error on the face of the record. As regards the errors on the face of the first two committal warrants, these are not matters that can be relied upon to justify the release of the applicant under Article 40 having regard to their replacement by the third committal warrant. Nonetheless, this pattern of error, including serious error, in the format of important committal warrants dealing with the liberty of the citizen is a significant matter that needs to be marked in an appropriate way by the court. In the *J.C.* case, Clarke J. said that *"there is also a significant constitutional value to be attached to the need to ensure that investigative and enforcement agencies (including An Garda Síochána) operate properly within the law"* (para. 4.11). There must for similar reasons be a significant constitutional value to be attached to the need for the High Court to ensure that instruments which purport to deprive individuals of their liberty are prepared properly within the law. Of course, that value does not have to be achieved by release of an applicant in every case where error is identified, any more than the value to which Clarke J. referred has to be achieved in every case by rejection of evidence where error is found.

112. As the first two committal warrants are spent, I am precluded by the legal principles I have identified above from considering that the applicant's current detention is affected by any flaws in these warrants. However it must be noted that the error in the first warrant is particularly significant in that it purports to be issued under an incorrect and inapplicable Act. It seems to me that this serious departure from proper standards should be marked in some way. Marking this matter by ordering release under Article 40 is not available on this ground for the reason I have mentioned. Nor can I grant judicial review-type reliefs in an Article 40 application where the applicant has not instituted parallel judicial review proceedings. An alternative approach might be that the record could potentially be corrected simply for the purpose of marking the error and deterring repetition. D/Sgt O'Donoghue in the present case applied to the learned judge to correct these warrants under the slip rule, which the latter declined to do. That D/Sgt O'Donoghue made the application (without prejudice to the respondent's legal position in the proceedings of course) is consistent with a recognition on the part of the State of the undesirability of such an error and a wish to see it rectified, and he is to be commended for having done so. Indeed the citation of jurisdiction under the wrong Act in the first warrant is the one serious error that the State was prepared to acknowledge in this case, and Mr. Kelly is to also to be commended for facing up to this. His main answer was the correct one that the warrant is now spent. But it seems to me that correction of a judicial act or order under the slip rule is in principle possible even after the order is spent, given that such correction is not altogether without purpose having regard to the objectives I have referred to. After all, *certiorari* of an order, even one that has been executed, can be granted in appropriate circumstances to remove the record for the purpose of being quashed. However because this is not a judicial review action, I cannot consider whether I can or should compel rectification of the record in these proceedings. Finally, apart from having regard to the matter in terms of costs, the only other way Mr. Kelly suggested to me that the matter could be marked would be by way of making comment on it in this judgment.

113. The third and current warrant contains a reference to the 1967 Act as a basis of jurisdiction, which I have held does not apply to remands to or by an alternative court.

114. In addition it is addressed to the governor directly which is correct in terms of O. 26 r. 4 of the District Court Rules, but there are serious grounds for doubting whether r. 4 is *intra vires* having regard to the terms of s. 25 of the Petty Sessions (Ireland) Act 1851 as of the date the rule was made. A subsequent amendment of that section does not magically revive an *ultra vires* order. However I consider in line with general principles of public law adjudication that I should not formally decide that r. 4 is *ultra vires* unless it would be decisive in terms of any order I might make. I have come to the view that while the nature of the addressee of a warrant is at one level a technical matter, what makes it more significant is that the same issue affects all committal warrants in the Dublin Metropolitan District from now until the clarification of the issue, if ever that is to occur. Such clarification can only be achieved either by court decision or legislative and regulatory intervention.

115. It seems to me, bearing in mind the overarching need for proportionality, that I should for the purposes of the present application regard the issue as minor and thus as not affecting the validity of the detention. It is therefore not necessary to formally decide wither r. 4 is *ultra vires*. However, an issue arising from a statutory instrument that could be said to rest on shaky foundations and which affects a whole category of future cases is more than a one-off technical question. For that reason, if the matter is not clarified in some other way within the reasonably near future, I think it might be proper for a court to re-examine its approach at such a future date.

116. In that context I have regard to para. 53 of the judgment of O'Donnell J. in *J.C.* to the effect that insofar as "*encourage[ing] precision in the drafting and issuance of warrants*" is a worthwhile objective, State authorities do not need to be deterred from failing to engage in *"a form of inspired legal clairvoyance in predicting decisions in future cases on points not yet raised, argued or decided, at the time the warrant is obtained"*. This approach seems to militate in favour of a more tolerant approach to errors which have not yet been the subject of decided cases than to those which have been judicially considered, and thereby brought to the attention of the State but which following such consideration remain uncorrected in future cases notwithstanding that fact (see also by analogy comments on Hamilton C.J. in *Croke v. Smith (No. 2)* [1998] 1 I.R. 101 at p. 131 to the effect that that which is upheld in one case could be revisited at a later date if it were shown that there were systemic failures in practice attending to that procedure). A similar approach was taken by Hogan J. in the Article 40 context in *Kinsella v. Governor of Mountjoy Prison* [2012] 1 I.R. 467.

Conclusions

117. The inquiry which has been undertaken pursuant to Article 40 of the Constitution has identified a number of issues as follows:

> (i) The learned judge of the District Court engaged in an infelicitous choice of words which left the applicant's legal advisers with a lingering and not altogether unreasonable concern that the applicable legal principles had not been articulated in a strictly correct manner in the course of the bail refusal;
>
> (ii) The first committal warrant purports to be issued under the wrong Act, which is on any view a significant error in any legal instrument.
>
> (iii) The second committal warrant has other errors on its face.
>
> (iv) The reference in the heading of the third committal warrant to the 1967 Act is also an error on its face as I have found it was made under a self-contained procedure in the 1997 Act.
>
> (v) Furthermore the third committal warrant depends for part of its form on O. 26 r. 4 of the District Court Rules 1997. There are serious grounds for doubting whether r. 4 was *intra vires* when made, having regard to s. 25 of the Petty Sessions (Ireland) Act 1851. If *ultra vires*, it was not validated by the Criminal Justice Act 2006.

118. The legal principles applying to Article 40 applications which I have attempted to identify above lead me to the following conclusions in respect of these matters:

> (i) The appropriate remedy for the difficulty that arose in the bail hearing is an originating application for bail to the High Court, not relief under Article 40. Alternatively the applicant could have sought judicial review and the court in that context might have been justified in directing that the matter be re-heard in the District Court, although without prejudice to the lawfulness of the remand in custody.
>
> (ii) Any error in the first warrant does not affect the current detention of the applicant. If the issue had been brought to my attention when the first warrant was live, I would have been minded to allow a short opportunity to the respondent to seek to have the warrant corrected under the slip rule before deciding what order was appropriate in the light of the error (if uncorrected).
>
> (iii) Likewise, errors in the second warrant do not affect the validity of the current detention.
>
> (iv) Form 19.1 in the District Court Rules does not compel the citation of both the 1967 and 1997 Acts in every case. Rather, the appropriate Act should be referred to (see O. 12 r. 9(2) which allows modification of forms as may be suitable). In the circumstances I would regard the citation of the 1967 Act in respect of the third warrant as an error, but one not being sufficiently major to warrant relief under Article 40 in this case.
>
> (v) The serious grounds for doubting whether O. 26 r. 4 is valid are capable of elevating what might seem the minor point as to the identity of the person to whom the warrant is addressed into a more major one as such grounds have potentially systemic consequences and the matter is not akin to a one-off administrative slip. Approaching the matter, as I consider I am required to do, with the principle of proportionality to the forefront, I will regard this as a minor matter for the purposes of the present application, and therefore will refrain from deciding whether r. 4 is *ultra vires* as such clarification is not necessary for my decision under Article 40 in this case.

119. Having regard to the foregoing, I am satisfied by reference to the principles which I have endeavoured to set out in this judgment, as applied to the facts of this case, that the applicant is being detained in accordance with law in the sense in which that expression is used in Article 40.4.2° of the Constitution. I therefore must decline to order the release of the applicant.