THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 259

Birmingham J
Sheehan J.
Edwards J.
2015/42

Anthony Murphy

Applicant/Appellant

And

Governor of Mountjoy Prison (The Training Unit)

Respondent

And

Keith Willis

Applicant/Appellant

And

Governor of Wheatfield Prison

Respondent

And

Joseph Carberry

Applicant/Appellant

And

Governor of Wheatfield Prison

Respondent

Judgment of the Court delivered on the 16th day of November 2015 by Mr. Justice Birmingham

1. These three cases have, by agreement, been heard together. Each involves an appeal by the appellants/applicants Mr. Willis, Mr. Murphy and Mr. Carberry against the judgment and order of Kearns P. of the 24th April, 2015, which declined to made orders pursuant to Article 40.4.2 of the Constitution directing their release from prison. The background to these appeals is that each applicant/appellant was convicted in the Circuit Court, on pleas of guilty, of offences contrary to s. 15A of the Misuse of Drugs Act 1977 or, in common parlance, possession of a controlled drug, the value of which exceeded €13,000.

2. The particulars of these convictions are as follows.

Keith Willis
3. Keith Willis was charged with offences contrary to s.3, s.15 and s.15A of the Misuse of Drugs Act 1977. He appeared at Sligo Circuit Court on the 1st October, 2013 and pleaded guilty to one charge on the Indictment being, at Count 3,: unlawful possession of controlled drug with an aggregate value of €13,000 or more for the purpose of sale or supply, contrary to s. 15(A)(1) of the Misuse of Drugs Act 1977, (as inserted by s. 4 of the Criminal Justice Act 1999) and s. 27 of the Misuse of Drugs Act 1977 (as inserted by s. 33 of the Criminal Justice Act 2007) and contrary to Article 4(1)(b) of the Misuse of Drugs Regulations 1988 and 1993, as made under s. 5 of the Misuse of Drugs Act 1977.

4. The particulars of the offence were that the Appellant, on the 16th April, 2013, at Sligo garda station, Pearse Road, was in possession of a controlled drug, to wit methylenedioxymethylamphetamine (MDMA), for the purpose of sale or supply and at the time when the controlled drug was in his possession, the outlet market value of the controlled drug amounted to €13,000 or more.

5. On the 10th October, 2013 the appellant was sentenced to a term of five years imprisonment, with the final two years suspended for a period of three years. In addition, provision was made for a twelve month post release probation service supervision order on his entering into a bond which was duly entered into. A warrant for the committal of Mr. Willis issued on the 10th October, 2013.

Anthony Murphy
6. Anthony Murphy was charged with offences contrary to s.3 and s.15 of the Misuse of Drugs Act 1977 on the 7th February 2011, and was subsequently charged on the 27th May, 2011 with a further offence contrary to s.15A of the Misuse of Drugs Act 1977, as amended. The Appellant pleaded guilty on the 24th June, 2013 at Dublin Circuit Criminal Court to Count 5 on the indictment, being as follows: possession of a controlled drug for the purpose of selling or otherwise supplying to another, contrary to s. 15A (as inserted by s. 4 of the Criminal Justice Act 1999) CJA and s. 27 (as amended by s. 5 of the Criminal Justice Act 1999 (of the Misuse of Drugs Act 1977 and the Misuse of Drugs Regulations 1988 and 1993, made under s. 5 of the Misuse of Drugs Act 1977). *A nolle prosequi* was entered in respect of the remaining charges.

7. The particulars of the offence were that Anthony Murphy, on the 6th of February, 2011, at Carnlough Road, Cabra, in the County of the City of Dublin, had in his possession one or more controlled drugs, namely 1-butyl-3-(1-naphthoy) indole (jwh-073) and 1-pentyll-3-(1-naphthoy) indole (jwh-018), for the purpose of selling or otherwise supplying it to another in contravention of the Misuse of Drugs Regulations, 1988 and 1993, and at the time while the drugs were in his possession, the market value of the controlled drugs amounted to €13,000 or more. The drug referred to in the particulars of offence is a synthetic cannabinoid.

8. On the 25th October, 2013, the appellant was sentenced by the Circuit Court to a term of eight years imprisonment, with the final three years suspended on certain conditions. The warrant for his committal was issued on the 25th October, 2013.

Joseph Carberry
9. Joseph Carberry was charged with offences contrary to the Misuse of Drugs Act 1977 and appeared at Dublin Circuit Court on the 6th December, 2013 where he pleaded guilty to Count 6 on the Indictment, that being: possession of a controlled drug for the purpose of selling or otherwise supplying to another, contrary to s. 15A (as inserted by s. 4 of the Criminal Justice Act 1999) and s. 27 (as amended by s. 5 of the Criminal Justice Act 1999) of the Misuse of Drugs Act 1977 and the Misuse of Drugs Regulations 1988 and 1993, made under s. 5 of the Misuse of Drugs Act 1977.

10. The particulars of the offence were that the allegation was one of possession of Pentedrone, with a value exceeding €13,000 with the intention to sell or supply on the 24th July, 2013, at properties located at the junction of Sillogue Road and Balcurris Road and on the R132, on the Swords Road.

11. On the 25th February, 2014, the applicant/appellant was sentenced to a term of eleven years imprisonment with the final twelve months suspended. The sentence was backdated to the 14th July, 2013. Pentedrone, was chemically identified as (2-methylamino) -1-phenyl-1-pentin-1. Pentedrone is a so called designer drug with stimulant effects. In the context of the sentence of eleven years imprisonment with one year suspended that was imposed on Mr. Carberry, it should be noted that he came before the court as a person with a previous conviction under s. 15A of the Misuse of Drugs Act 1977. Therefore, ten years was the actual, as distinct from presumptive, minimum that could be imposed.

Discussion
12. On the 10th March, 2015, the Court of Appeal gave judgment in the case of *Bederev v. Ireland* [2015] IECA 38. In that case, Mr. Bederev challenged the constitutionality of s. 2(2) of the Act of 1977, the section that permitted the Government, as opposed to the Oireachtas, to declare a substance to be a controlled drug for the purpose of the Misuse of Drugs legislation. Mr. Bederev was unsuccessful in the High Court, but the Court of Appeal allowed his appeal, declaring s. 2(2) of the Misuse of Drugs Act 1977, to be repugnant to the Constitution, in that it permitted the Government to have law making authority in violation of Article 15.2.1 of the Constitution. This in circumstances where the principles and policies test first enunciated in *Cityview Press Limited v. AnCO* [1980] I.R. 381, provided a basis for valid delegated legislation had not been met. Briefly put, the case for the applicants/appellants is that the substances that they were convicted of being in possession of, were not in fact controlled drugs, not controlled at the time that they were in the possession of the applicants nor at the time when the applicants were convicted or when sentenced. Accordingly, it is the case of each applicant that he is serving a term of imprisonment for something that was not in fact unlawful and therefore that he is entitled to be released forthwith.

13. It is appropriate to refer to the fact that on the 29th September, 2014, ie. some five months prior to the delivery of the decision in *Bederev*, the applicant, Mr. Carberry, personally lodged an enlargement of time application purporting to appeal both conviction and sentence. The application for an extension of time which was completed by Mr. Carberry in person states that the grounds on which he is applying for an enlargement of time are that Pentedrone is not classed as a s. 15A drug, but a mixing agent.

14. It is not disputed by the respondent that if *Bederev* was correctly decided and attention is drawn to the fact that a certificate for leave to appeal to the Supreme Court is being sought, that the statutory instruments that purported to designate the substances in question as controlled drugs were not valid. The respondents, however, argue, and argued before the High Court that, because of the decision of the Supreme Court in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88, the detention of the three appellants is lawful and that they should be refused orders directing their release. Detailed written submissions have been made by each of the appellants. The Court has also heard oral submissions on behalf of each appellant. In large measure the written submissions are directed to an argument that the case of *A. v. Governor of Arbour Hill Prison* was wrongly decided and should be overturned. However, very responsibly and realistically, counsel for each of the appellants has accepted that the argument that *A. v. Governor of Arbour Hill Prison* was wrongly decided is not one that can succeed before this Court, the Court of Appeal.

15. In these circumstances, the arguments before this Court have turned on the question of whether the cases of the appellants can be distinguished from the case of *A. v. Governor of Arbour Hill Prison* or whether the appellants or any of them can bring themselves within the category of exceptional cases that was contemplated by the Supreme Court.

16. In contending that the position of the appellants is to be distinguished from that of Mr. A and that the appellants fall into the exceptional category, the appellants make a number of points. In particular, they say that the apparent offences that they were convicted of and pleaded guilty to were "*malum prohibitum"* as distinct from "*malum in se"* ie. wrong because prohibited as distinct from wrong in itself.

17. They argue that here the question of moral turpitude is absent. What was in issue in A, sexual activity with an underage minor was obviously and clearly wrong and was very widely, and indeed all but universally, recognised as such. However, they say that is not the case here, where different views in relation to the various substances might be taken by different authorities at different times.

18. It is also said that the nature of unconstitutionality has to be considered and that the nature of unconstitutionality at issue here is more fundamental than was the case in A. Here, the laws under which the appellants were purportedly convicted were made not by the Oireachtas, but by the Government which never had the power to so legislate. The result of this was that the appellants were never in possession of a "controlled" drug and it is the possession of "controlled drugs" which is criminalised.

19. In support of the argument that what is in issue is activity that is merely *malum prohibitum,* they say that the substances which were the subject of the charges were substances which were legal and which could have been possessed or traded legally up to a point shortly before the incidents leading to the charges. While these arguments were common to all appellants, and addressed to all the substances which were the subject of charges, it was pointed out by the respondents in written submissions and accepted during the course of oral argument that MDMA, more commonly known as ecstasy, the substance that Mr. Willis was in possession of, has long been regarded as illegal. Ecstasy has ostensibly been a controlled drug for almost eighteen years.

20. A further argument was advanced on behalf of Mr. Carberry based on the fact that he had taken the initiative in seeking an enlargement of time to appeal some months before the decision in *Bederev* and that therefore, it could not be said that he was "a piggy backer" or engaged in "piggy backing".

21. The appellants say that it is the combination of the matters identified that bring their situation into the exceptional category.

22. In order to address the issue raised on the appeals, it is necessary to consider in some detail the decision in *Bederev*, the case that precipitated the applications and A, the case which everyone agrees is central to determining how the appeals should be determined.

23. In *Bederev*, the Court, in a judgment delivered by Hogan J. with which Finlay Geoghegan J. and Peart J. concurred, was considering the question as to whether the Misuse of Drugs Act 1977 set out with sufficient clarity principles and policies so as to permit delegated legislation by a Minister or the Government as distinct from the Oireachtas enacting primary legislation.

24. In the course of his judgment, Hogan J. stated as follows:-

> "56. We may now turn to the central question in this appeal, namely, does the 1977 Act contain sufficient principles and policies, such that, reverting to the test of Hanna J. in *Pigs Marketing Board*, in making the s. 2(2) order the Government is simply executing a policy standard so as to bring about, not its own views on these policy questions, but the result directed by the Oireachtas in enacting the legislation.
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> 57. It may be accepted that there is nothing in s. 2 of the 1977 Act itself which provides the necessary principles and policies. It is true that the long title does provide some greater guidance which, as we have seen, must be taken to inform the scope and breadth of the s. 2(2) power. The fundamental difficulty here is that the 1977 Act determined that only 'certain' dangerous or harmful drugs would be controlled, thus leaving important policy judgments to be made by the Government rather than by the Oireachtas.
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> 58. One may immediately ask: how is to be determined which of these dangerous or harmful drugs are to be controlled and which are not? How can it be determined which drugs are 'dangerous'? Again, one might ask: dangerous to whom? Is this standard to be measured by reference to the general public? Or would it suffice that the drug in question would be dangerous if consumed or used by certain sectors of society such as children or young adults? By what standards are the questions of whether particular drugs are 'harmful' and liable to be 'misused' to be assessed and determined?
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> 59. Virtually every drug is potentially harmful and liable to be misused. Would it suffice for this statutory purpose if, for example, some common pharmaceutical product had been misused for time to time in the community, possibly with unfortunate and serious side-effects for those who did abuse the drug? Could the product be the subject of a s. 2(2) order if it caused serious medical problems in a minority of cases, even though the product itself was regarded as beneficial and wholesome by the medical community? What levels of 'harm' and 'misuse' need to be established before an order could properly be made under s. 2(2) of the 1977 Act? Could a particular drug be properly made the subject of an order under s. 2(2) of the 1977 Act where there was a respectable body of scientific and medical evidence to the effect that the drug in question should not be controlled or that its beneficial properties strongly outweighed the risk of abuse by a minority of patients?"

25. Later, at para. 63 of the judgment, Hogan J. commented:-

> ". . . by what standards, for example, could a court, faced with a challenge to the *vires* of any order made by the Government under s. 2(2), measure undefined and somewhat abstract concepts referred to in the long title such as 'misuse', 'harmful' and 'dangerous' in the absence of any further guidance by way of principles and policies contained in the operative part of the 1977 Act itself? All of this, perhaps, is to say that it is rather asking too much of a long title to contain the guidance needed to meet the test set out by Murphy J. in O'Neill, since, to recall again the words of Murray C.J. in *BUPA Ireland,* one cannot realistically expect that the long title will contain the type of specific detail which is invariably only to be found in the substantive provisions of an Act itself.
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> 64. One might also ask whether it would be open to the Government to employ s. 2(2) of the 1977 Act to ban other types of drugs which are in everyday use and which are potentially both harmful and liable to be misused? Alcohol and tobacco are the most common cases in point. Alcohol is a major factor in range of serious anti-social activities, including road traffic fatalities and accidents, domestic violence and other serious crimes such as assault and public order offences. Alcohol is addictive and the abuse of alcohol in Irish society is regrettably so prevalent that it presents major public health challenges, of which alcoholism and cirrhosis of the liver are among only the most prominent. Tobacco consumption is highly addictive and greatly increases the risk of lung cancer, heart disease and a range of other serious illnesses. On any view, both drugs are harmful and are liable to be misused."

26. A reading of the *Bederev* case shows that the appellants are correct in their contention that the Court of Appeal was very clear in its view that the Misuse of Drugs Act failed the principles and policies test, with the result that the substances in question were being deemed to be controlled, and by extension to be unlawful, by an entity without lawmaking powers. However, the judgment does not offer support for the proposition that the substances possessed were not inherently harmful. Insofar as the appellants seek to draw a distinction between what is *malum prohibitum* and *malum in se* they do not find support in this judgment. Moreover, the response of the Oireachtas to the judgment of the Court of Appeal which was to immediately introduce amending legislation designed to restore the *status quo ante* is suggestive of the fact that the Oireachtas viewed possession of all these substances as injurious to the public good. The legislative response to the judgment of the Court of Appeal would suggest that, contrary to what was submitted by the appellants, the legislature was of the view that possession of the substances in question involved a high degree of moral turpitude.

27. Turning then to the case of *A. v. Governor of Arbour Hill Prison*. The facts of this case are so well known that they do not require to be rehearsed at any great length. Suffice to say that in the case of *C. C. v. Ireland* [2006] 4 I.R. 1, the Supreme Court had declared s. 1(1) of the Criminal Law Amendment Act 1935, to be inconsistent with the Constitution. Mr. A, who had been convicted some two years earlier, following a plea of guilty of an offence of unlawful carnal knowledge contrary to s. 1(1) of the Criminal Law Amendment Act, sought to be released from custody. His point was a simple one. He argued that the offence in respect of which he was convicted was not on the statute books at the time of the conviction, not having been carried forward in 1937. This argument found favour in the High Court, but the Supreme Court unanimously allowed the respondent's appeal. The judgments of the court established that it is necessary to draw a distinction between the fact of the invalidity of an enactment and the effect of a declaration of invalidity on decided matters. Murray C.J. dealt with the issue in these terms:-

> "87. In my view when an Act is declared unconstitutional a distinction must be made between the making of such a declaration and its retrospective effects on cases which have already been determined by the courts. This is necessary in the interests of legal certainty, the avoidance of injustice and the overriding interests of the common good in an ordered society. Such a distinction is consistent in my view with the basic norms of constitutional adjudication and is supported

by judgments and judicial dicta in the case law of this court."

28. Later in this judgment Murray C.J. elaborated upon the general principles that apply in such cases:-

> "125. In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is the general principle.
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> 126. I do not exclude, by way of exception to the foregoing general principle, that the grounds upon which a court declares a statute to be unconstitutional, or some extreme feature of an individual case, might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that verdicts in particular cases or a particular class of case be not allowed to stand."

29. The other members of the court also addressed the identification of the general principles and the question of the extent to which there were exceptions thereto. Denham J., (as she then was), did so in these terms:

> "179. In conclusion, the general principle is that a declaration of invalidity of a law applies to the parties in the litigation or related litigation in which the declaration is made, and prospectively, but that it does not apply retrospectively, unless there are wholly exceptional circumstances. The applicant in this case was not a party in C.C. v. Ireland [2006] IESC 33, [2006] 4 I.R. 1, nor had he commenced related litigation, or any form of group action, nor are there any wholly exceptional circumstances. Consequently, the applicant is not entitled to the retrospective application of the declaration of unconstitutionality."

30. McGuinness J. dealt with the issue in these terms:-

> "A consideration of the case law as a whole demonstrates that, while the principle that the impugned statute or section is void *ab initio* is generally if not invariably set out, the actual outcomes of the cases show that what might be described as blanket retrospectivity has not in fact been applied. The facts of the cases differ and the reasoning for the conclusions may vary but it is impossible to establish either an express or an implied principle of unqualified retrospectivity. In common with Geoghegan J., I agree with the statement of Denham J. that a court is required to differentiate between the declaration of unconstitutionality and retrospective application of such a decision and that as a consequence it is a matter of construing the Constitution to determine how such a decision should be applied in a manner consistent with the principles of the Constitution. I also agree that when a law has been treated as a valid law for decades it is impossible, unjust, and contrary to the common good, to reverse the many situations which have been affected over the decades. I concur with the view of Geoghegan J. that concluded proceedings based on an enactment subsequently found to be unconstitutional cannot normally be reopened. This approach is in accordance with common law principles of finality in legal proceedings.
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> I would not exclude exceptions to this normal rule but any such exception should be based on the clear demands of justice in the particular case."

31. Hardiman J. in a powerful judgment where he chose not to consider foreign law or judgments of the courts of any foreign state or entity concluded the judgment by saying:-

> "I have read what the learned Chief Justice has said with regard to the general principles mentioned above, and with regard to the nature of any exceptions to it. I very respectfully agree with him and, like him and for the reasons given above, do not consider that the present case could possibly qualify as an exception. On the contrary, the requirements of justice strongly demand that force and effect be given to the sentence justly imposed on the applicant here. The 'compulsion of public order and the common good' (*Murphy*, p. 314) require no less."

32. Geoghegan J. in his opening paragraph commented:-

> "In short, I believe that on any reasonable interpretation of Bunreacht na hÉireann, convictions and sentences pursuant to enactments not declared unconstitutional, are at the very least deemed to be lawful at the time of the relevant court orders and must be treated as remaining lawful following on a declaration of unconstitutionality."

33. Later in his judgment Geoghegan J. commented as follows:-

> "It cannot have been the intention of the draftsmen of the Constitution and more properly of the Oireachtas and perhaps more properly still of the people that if a statutory provision creating an offence was found to be unconstitutional, every past conviction and sentence, perhaps going back a large number of years *were ipso facto* nullities. In interpreting any particular provision of the Constitution it is always necessary to have regard to the general intent of the Constitution as a whole. If such was the devastating effect of a declaration of unconstitutionality in all cases, it would fly in the face of common sense, would be manifestly unjust and would be contrary to any good order in a civilised society. As suggested by O'Flaherty J. in *McDonnell v. Ireland* [1998] 1 I.R. 134, the Constitution must be interpreted as deeming orders in completed proceedings prior to a declaration of unconstitutionality to be lawful. A provision that must be deemed lawful is by definition unlawful. It remains the position, therefore, that s. 1(1) of the Criminal Law (Amendment) Act 1935, was notionally never in force from and after the coming into being of the present Constitution but orders made in proceedings completed under it must as a matter of reasonable and orderly interpretation of the Constitution be deemed lawful.
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> In dealing with consequences from declarations of unconstitutionality of statutory provisions there cannot be absolute rules. What I have expressed as my view of the law may not itself be absolute any more than the obiter dicta of Henchy J. [in *Murphy v. Attorney General*]. Individual cases throw up particular and unanticipated facts which in justice may lead to a different kind of solution. It is impossible for me to speculate now but I do not rule out the possibility that there might be circumstances where it would be manifestly unjust or oppressive to uphold a completed proceeding having regard to a declaration of unconstitutionality. In that situation, if it ever arose, an Article 40 order might be appropriate. Such a circumstance would be exceptional."

34. The *A* case was received with surprise in some quarters and indeed was the subject of some vigorous criticism. (See, in that

regard, Fanning, "*Hard Case; Bad Law?"* the Supreme Court Decision in *A. v The Governor of Arbour Hill Prison*, 40 Irish Jurist (2005) 188, an article referred to by the President of the High Court in his judgment.) On the other hand it has been quoted with approval in other jurisdictions. (See, by way of example, the judgment of the UK Supreme Court in *Cadder v. Her Majesty's Advocate* [2010] UKSC 43.) In general, those who have criticised the approach in A have not quarrelled with the rejection by the Supreme Court of the notion of blanket retrospectivity which would have permitted anyone convicted of the offence since 1935 to reopen the matter and perhaps, to bring an action claiming damages for false imprisonment, but they say that retrospectivity is not what is in issue when someone is actually detained on an ongoing basis at the time of the application and where it is intended to continue to detain that individual into the future. This they say is inconsistent with the emphatic direction in the Constitution that no person shall be deprived of liberty save in accordance with law and is in contravention of the age old maxim *nulla poena sine lege*. However, be that as it may, it undoubtedly represents an authoritative statement of Irish law, which is binding on this Court unless, for some reason, the present applicants' situation is to be distinguished.

35. Possible areas for distinguishing are that *A* concerned a pre 1937 statute, whilst *Bederev* was dealing with a post 1937 statute. However, there is nothing in the judgments to suggest that this is a point of significance. Rather, it is a distinction without a difference. Another possible basis for distinguishing the present case is by reference to the fact that all three appellants now before the Court could have launched a challenge on the same basis that Mr. Bederev did, while Mr. A, as a 38 year old, having sexual intercourse with the twelve year old friend of his daughter would never have been in a position to make the arguments that were advanced successfully by *C.C*. However, a careful reading of the five judgments in the *A* case does not indicate that this provides a basis for distinguishing the present case from *A*. Neither, as I have already indicated, do I believe that the distinction between *malum prohibitum* and *malum in se* has any relevance in the present case.

36. On the other side of the coin, the similarities between the situation of the three applicants and Mr. A are striking indeed. All four had entered pleas of guilty when arraigned. In all cases the criminal proceedings had reached finality and the Article 40 inquiries launched amounted to a collateral attack on the outcome of the proceedings.

37. It is true that in the case of Mr. Carberry he lodged a notice of appeal out of time which was addressed to a quite separate issue to the point that succeeded in *Bederev*. Like the President of the High Court, this Court is of the view that it cannot truly be said in the Carberry case that there was an appeal in existence at the time of the first application. An appeal is not brought by means of an application for an extension of time within which to appeal. Like the President, I am of the view that to conclude otherwise would be to eliminate the distinction between valid appeals and invalid appeals.

38. In conclusion, I am of the view that the situation of all three applicants cannot be distinguished from A and that this Court is bound by the decision in *A. v. the Governor of Arbour Hill Prison* and that no basis from departing from it has been established. Accordingly, I would dismiss the three appeals and refuse to make an order directing the release of the three applicants.