**THE HIGH COURT**

**IN THE MATTER OF ARTICLE 40.4.2° OF THE CONSTITUTION**

**2019 No. 729 SS**

**BETWEEN**

**DAMIEN GIBNEY**

**APPLICANT**

**AND**

**THE GOVERNOR OF CORK PRISON**

**RESPONDENT**

**Note of *ex tempore* ruling given by Mr Justice Garrett Simons on 21 June 2019.**

1. This application comes before the court by way of an application for an inquiry pursuant to Article 40.4.2° of the Constitution. Applications of this type are generally referred to as an application for *habeas corpus*. The application is typically taken in two stages: an initial application which is made on an *ex parte* basis, and, if the judge is satisfied that there are any grounds for an inquiry, he or she will then direct an inquiry requiring the production of the body and the certification in writing by the detainer of the legal basis upon which the individual is detained.

2. The *ex parte* application in this case is made in respect of an individual known as Mr. David Walsh. I am told, but this is not clearly stated on affidavit, that Mr. Walsh is currently detained in Cork Prison.

3. The application is made on his behalf by a gentleman called Mr. Damian Gibney. Mr. Gibney has frankly admitted that he does not have any written consent on behalf of David Walsh to move the application.

4. See affidavit of Damian Gibney dated 20 June 2019.

> "2. I say that the honourable judge Noonan requested that I make this further affidavit in respect of my above application to clarify certain issues.
>
> 3. The court asked me to confirm that I have David Walsh's consent to bring this application which I can confirm to the court. Mr Walsh asked Mr Ben Gilroy to bring this application or if Mr Gilroy could not do it to get someone else known to David Walsh to bring this application."

5. That on its own would be sufficient to refuse the application, especially in circumstances where a similar application was moved yesterday before my colleague Mr. Justice Noonan. Mr. Justice Noonan refused the application, and it was indicated to Mr. Gibney at that stage that he was entitled to renew the application but would have to do so on proper affidavit evidence.

6. Given the importance of *habeas corpus* in the Constitutional scheme, however, I am not prepared to reach the decision solely on this procedural basis. The affidavits in this case are clearly deficient but Mr. Gibney has explained to me that Mr. Walsh is detained pursuant to an order of conviction imposed by the Circuit Court requiring that he be detained for fourteen days for contempt in the face of the court. As it happens, this precise offence and precise instance of contempt has been considered in detail by no less than three levels of the Superior Courts. A successful application for habeas corpus was made to the High Court. (*Walsh v. Minister for Justice and Equality* [2016] IEHC 323). That judgment was then appealed to the Court of Appeal (*Walsh v. Minister for Justice and Equality* [2017] IECA 106); and from the Court of Appeal, the matter was subsequently appealed to the Supreme Court. The Supreme Court gave its judgment on 25 February 2019 (*Walsh v. Minister for Justice and Equality* [2019] IESC 15).

7. In that judgment [of the Supreme Court], the order of the Circuit Court imposing the conviction for contempt was held to be valid. It seems that there was some procedural mechanism provided by the Court of Appeal whereby Mr. Walsh would have had the opportunity to purge his contempt. I have no information or evidence in relation to that.

8. It seems what happened is that Mr. Walsh had served four of the fourteen days prior to the first application for *habeas corpus* before the High Court, and that he was released on bail at that stage. There are, therefore, ten days remaining in the sentence. Following on from the Supreme Court judgment, it is clear that the order of the Circuit Court is valid and, therefore, the ten days must be served. It seems that Mr. Walsh voluntarily attended at Cork Prison on Tuesday of this week, and has now served approximately three or four of the remaining ten days.

9. An application for *habeas corpus* was made by Mr. Gibney on his behalf. When asked by the court as to the basis for the application, the only matter offered to the court was that there had been a change in the law since the judgment of the Supreme Court in February 2019.

10. Even if there had been a change in the law, that would not, on the basis of the judgment in *A. v. Governor of Arbour Hill Prison* [2006] IESC 45; [2006] 4 I.R. 88 have been sufficient to render what was otherwise a lawful detention unlawful. As it happens, however, when pressed to explain what the change in the law is, I was referred to a judgment in *Tracey v. McCarthy* [2019] IESC 14 which was given precisely the same day as the judgment of the Supreme Court in *Walsh*.

11. Thus it seems that what is offered to the court [in support of this application for *habeas corpus*] is that the Supreme Court effectively reversed itself on and within the same day. This is clearly a patent nonsense. There is no inconsistency between the two judgments on contempt delivered by the Supreme Court on 25 February 2019. In fact, the two cases were heard together by the Supreme Court, and O'Donnell J., who delivered judgments in both cases, expressly refers to them as "companion" cases.

12. It is perfectly clear that Mr. Walsh has had an opportunity at three levels of the Superior Courts to challenge the original order of the Circuit Court imposing the fourteen-day conviction. Those applications were ultimately unsuccessful, and the *habeas corpus* application was rejected by the Supreme Court in February of this year.

13. In the circumstances, on the basis of the papers before me and what was offered by way of argument, there is simply no stateable ground for saying that the detention is unlawful and, therefore, I refuse to direct an inquiry and the application is accordingly dismissed.