Neutral Citation Number: [2013] IEHC 221

THE HIGH COURT

[2013 No. 746 SS]

IN THE MATTER OF AN INQUIRY UNDER ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN/

ANTHONY MITCHELL

APPLICANT

AND

MEMBER IN CHARGE, TERENURE GARDA STATION

RESPONDENT

BETWEEN/

[2013 No. 747SS]

JOHN McCANN

APPLICANT

AND

MEMBER IN CHARGE, RATHMINES GARDA STATION

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 3rd May, 2013

1. On 3rd September, 1998, the Oireachtas enacted the Offences Against the State (Amendment) Act 1998 ("the 1998 Act"). This legislation extended the scope of application of the Offences Against the State Acts 1939 – 1985 in a number of significant respects.

2. One of these significant changes was effected by s. 10 of the 1998 Act. Section 30 of the Offences against the State Act 1939 ("the 1939 Act") had previously provided for a maximum of 48 hours detention for persons arrested by members of An Garda Síochána on suspicion that they had committed a scheduled offence. Section 10 of the 1998 Act extended s. 30 of the 1939 Act by adding a new sub-section 4 to s. 30. This new sub-section allowed senior Garda officers to apply to the District Court for a warrant authorising the detention of a person so detained for "a further period not exceeding twenty four hours if he has reasonable grounds for believing that such further detention is necessary for the proper investigation of the offence concerned".

3. Some concerns had, however, been expressed regarding this extension of police powers and it was accordingly enacted that the continuing necessity for these powers should be subject to constant monitoring by both Houses of the Oireachtas. To this end, s. 18(1) of the 1998 Act provides:-

> "(1) Each of the following sections, namely sections 2 to 12 and 14 to 17 shall subject to subsection (2) cease to be in operation from 30th June, 2000, unless a resolution has been passed by each House of the Oireachtas resolving that that section should continue in operation.
>
> (2) A section referred to in subsection (1) may be continued in operation from time to time by a resolution passed by each House of the Oireachtas before its expiry for such period as may be specified in the resolutions."

4. Section 18(3) provides:-

> "(3) Before a resolution under this section in relation to a section specified in subsection (1) is passed by either House of the Oireachtas, the Minister for Justice, Equality and Law Reform shall prepare a report, and shall cause a copy of it to be laid before that House, of the operation of the section during the period beginning on the passing of this Act or, as may be appropriate, the date of the latest previous report under this subsection in relation to that section and ending not later than 21 days before the date of the moving of the resolution in that House. of the operation of the section since the making of any previous resolution."

The object of s. 18(3) is clearly to ensure that both Houses are in a position to make a considered judgment as to the necessity of the continued operation of the substantive provisions of the 1998 Act prior to making any decision as to whether to extend these powers or not.

5. That is the somewhat unusual background to the present applications under Article 40.4.2. in respect of the legality of the detention of these applicants. At the heart of their applications was the contention that the continued existence of the extended detention powers provided in s. 30(4) of the 1939 Act (and by virtue of which they were then detained) was contingent on formal proof being tendered to the District Judge who was considering the extension applications that the appropriate resolutions had been passed by both Houses of the Oireachtas. In essence, therefore, the question which now arises is as to the extent to which the District Court is entitled and, if so, in what circumstances, to take judicial notice of any resolution passed by both Houses of the Oireachtas for the purposes of s. 18 of the 1998 Act without the necessity for formal proof.

6. Following a hearing of the Article 40.4.2 applications in the evening of Tuesday, April 30th, I concluded that the applicants were in lawful custody. This judgment serves to give the detailed reasons for that conclusion.

7. The issue arises in the following way. The first applicant, Mr. Mitchell, was originally arrested under s. 30 of the 1939 Act in respect of certain firearms offences (which are scheduled offences) and the original 48 hour detention period was due to expire some time after 9pm on Monday, 29th April, 2013. His solicitor was then notified shortly before 8.00pm on the evening of 29th April that the Gardaí intended to apply to the District Court to have the applicant's period of detention extended.

8. The hearing commenced at around 8.00pm in the Criminal Courts of Justice and evidence was duly given on behalf of both the Gardaí and the applicant. At the conclusion of the Garda application, counsel for the applicant, Mr. Monahan, made a submission to the District Court to the effect that the application was defective in that a vital proof was missing, namely, evidence of the making of the appropriate resolutions under s. 18 of the 1998 Act.

9. Having heard submissions from both sides, District Judge Toale rose to consider the position. He then returned after an interval and stated in his ruling that he had consulted the Oireachtas website and seen therefrom that the appropriate resolutions had been passed by the Houses of the Oireachtas in June, 2012 to extend the operation of the 1998 Act. The judge took the view that he could accordingly take judicial notice of the making of the resolutions. Judge Toale then issued a warrant authorising the extension of the applicant's detention for 24 hours on the basis that it was necessary for the further investigation of the offence concerned and that the investigation was progressing diligently and expeditiously.

10. Shortly after this Mr. McCann's case was then heard. A similar application was made by the Gardaí for an extension of time for a further twenty-four hours pursuant to s. 30(4) of the 1939 Act and the issue of the proof of the making of resolutions was again raised by the applicant's solicitor, Ms. Farrell. After the Garda evidence had closed, a copy of *Iris Oifigiúil* containing details of the making of the resolutions then came to hand and it was tendered by Detective Inspector McGeary to the judge, but the judge indicated that he did not require this. He then made a similar ruling in this case as he had in Mr. Mitchell's case and he issued a similar warrant pursuant to s. 30(4) authorising the applicant's detention for an extended period of 24 hours.

11. It was against this general background that the applications for an inquiry in both cases in accordance with Article 40.4.2 was then duly made to me on the following day.

Was it necessary that the existence of the resolution be formally proved before the District Court?
12. Counsel for the respondents, Mr. O'Higgins S.C., argued that, in view of the provisions of the Interpretation Act 2005 ("the 2005 Act"), the existence of the resolutions should be judicially noticed and that there was no need for any formal proof of their existence. Section 13 of the 2005 Act simply provides that: "An Act is a public document and shall be judicially noticed." As this will be become relevant in a context I will later mention, it may also be noted that s. 6 of the Interpretation Act 1937 ("the 1937 Act") was formerly in exactly the same terms as s. 13 of the 2005 Act which replaced it.

13. The first thing to note so far as the proof of the making of the resolutions is concerned is that the legality of the applicants' detention turned completely on the continuation in force of s. 30(4) of the 1939 Act (as inserted by s. 10 of the 1998 Act) which provided for the authorisation by the District Court of the extended detention period. If this sub-section were not in force, then the applicants' detention would have been completely unlawful.

14. Second, it is clear that the continued operation of this sub-section does not rest on statute as such, but rather on the operation of resolutions of both Houses of the Oireachtas continuing these provisions in force. It is, after all, plain from the language of s. 18(1) of the 1998 Act that these provisions would have long since expired on 30th June 2000 were it not for the passage of these resolutions. In these circumstances, I consider that s. 13 of the 2005 Act has no application, since this section relates exclusively to Acts of the Oireachtas. While every court must judicially notice legislation enacted by the Oireachtas, I agree with the submission of counsel for the applicant, Mr. Fitzgerald S.C. that this section would not have assisted the District Court in the present case since a vital piece of the legal edifice which underpinned the legality of the proposed extended detention of the applicants – namely, the various resolutions passed by the Houses of the Oireachtas - was itself extraneous to these statutory provisions.

15. Third, it is true that, as Mr. O'Higgins S.C,. noted, many of the other leading authorities dealing with the analogous issue of the proof of the making of statutory instruments were cases involving *criminal convictions* where the offence consisted (at least in part) of a breach of that very statutory instrument: see, e.g., *The State (Taylor) v. Wicklow Circuit Judge* [1951] I.R. 311*, Director of Public Prosecutions v. Collins* [1981] I.L.R.M. 447 and *The People (Director of Public Prosecutions) v. Cleary* [2005] IECCA 51, [2005] 2 I.R. 189. Yet since the legality of the applicants' detention ultimately rests on proof of the making of the resolutions by both Houses of the Oireachtas, it follows that the making of the resolutions must either be judicially noticed or formally proved.

16. Fourth, it must be accepted that the present case does not come within the scope of the Documentary Evidence Act 1925 ("the 1925 Act"), since s. 2, s. 3 and s. 4 of that Act deal with matters such as proof of Acts of the Oireachtas, Government proclamations and statutory instruments respectively. Thus, s. 4(1) of the 1925 Act provides that prima facie evidence of "any rules, orders, regulations or bye-laws" may be given in all legal proceedings by the production of the relevant copy of *Iris Oifigiúil* and even then s. 4(2) stipulates that such rules, orders, regulations and or bye-laws must have been made by the Government, Ministers or statutory bodies.

17. Proof of the making of resolutions by the Houses of the Oireachtas accordingly falls outside the scope of the 1925 Act since s. 4(1) does not apply to resolutions as such and the Oireachtas itself is not a body named for the purposes of s. 4(2).

Judicial notice and proof of public documents
18. The mere fact, however, that neither the 2005 Act nor the earlier 1925 Act provide that the making of resolutions by the Houses of the Oireachtas is to be judicially noticed does not in itself mean that such resolutions do not fall within the special category which the law of evidence has always accorded to public documents or that the doctrine of judicial notice has no possible application to the present case. As Henchy J. said in *Director of Public Prosecutions v. Collins* [1981] I.L.R.M. 447, 450:

> "…the power given by s. 4(1) of the 1925 Act to treat as prima facie evidence the mere production of the designated version of the [statutory] instrument in question is enabling only. It does not extinguish or curb the inherent power of a court in certain circumstances to treat particular matters as worthy of judicial notice, and so to be acted on as if they had been formally proved. That is the position when a course of judicial conduct is so inveterate and unquestioned and of such a nature that it necessarily postulates the existence and validity of a statutory instrument."

19. The decision of the Supreme Court in *Minster for Defence v. Buckley* [1978] I.R. 314 is perhaps one of the few cases where the

evidential status of matters associated with an Act of the Oireachtas – although extrinsic to the Act itself – has had to be judicially considered. In this case the defendants had been prosecuted for grazing sheep on certain lands (known as the "Blue Lands") on the Curragh in Co. Kildare. An evidential issue arose as to the scope of those lands and the Supreme Court held that a duly certified copy of a deposited map supplied by the Director of Ordnance Survey pursuant to s. 6 of the Curragh of Kildare Act 1961 ("the 1961 Act") was a public document so that it was prima facie evidence of the accuracy of every particular stated therein. That section allowed for the deposit of such a map by the Minister for Defence in the Central Office of the High Court and the Circuit Court Office for Co. Kildare and the map in question was defined by s. 1 of the 1961 Act as a particular map which had been lodged on 7th July 1961 by the Minister in the Ordnance Survey Office.

20. What may be of interest is that the Supreme Court did not consider that the map formed part of the Act of the Oireachtas or that it should be judicially noticed by reason of s. 6 of the 1937 Act (i.e., the earlier version of what has now become s. 13 of the 2005 Act). In other words, the Court at least tacitly rejected the argument that the statutory obligation to take judicial notice of Acts of the Oireachtas extended to matters extraneous to the Act itself, even if associated therewith. The analogy here with resolutions passed by both Houses of the Oireachtas is, it might be thought, an obvious one.

21. Henchy J. nevertheless stated ([1978] I.R. 314, 321):

> "There is no doubt, therefore, that the original deposited map, which was prepared for and deposited by the Minister, and adopted by parliament as a vital part of the Act of 1961, is a public document…Furthermore, it is a public document which was prepared and deposited specifically for the purposes of the Act. The admissibility of a certified copy of it in evidence is provided for by s. 6(5) of the Act of 1961, but the evidential effect of its reception in evidence is governed by common law, that is to say, as a public document it is *prima facie* evidence of every particular stated on it and which was within the purposes for which it was prepared."

22. In the present case, Judge Toale consulted the website of the Houses of the Oireachtas and saw that the requisite resolutions for the purposes of s. 18(1) of the 1998 Act had been passed. This was a public document in the sense enunciated by Henchy J. in *Buckley*. The material on the website is published in the public interest under the superintendence of the Houses of the Oireachtas and this material is intrinsically authentic and accurate.

23. It follows, therefore, that when the judge consulted the website for this purpose, it was the same as if he had inspected a public document. He could accordingly be satisfied that this constituted *prima facie* evidence that the resolutions had been passed in much the same manner as if he had read a parliamentary notice to this effect in *Iris Oifigiúil* or an official from the Oireachtas had been summoned to give evidence for this purpose. It was at that point that Judge Toale was, to adapt the language of Davitt J. in *The State (Taylor) v. Wicklow Circuit Judge* [1951] I.R. 311, 321, "perfectly well aware" that the resolutions had been passed and he could take judicial notice of this fact.

24. In *Taylor* this Court upheld a conviction for drunk driving, with Davitt J. rejecting the argument that formal proof of the making of a statutory instrument bringing the Road Traffic Act 1933, into force was necessary. The Court found instead that the Circuit Court judge was entitled to make use of his general knowledge acquired as a judge who had administered the Act that the legislation was in force and take judicial notice of this fact. Likewise, in *Collins* Henchy J. held that the courts were entitled to take judicial notice of the making of regulations where such was widely known and well established.

25. It is true, of course, when the issue was first raised Judge Toale either did not know of these matters or was uncertain of the precise status and duration of any such resolutions that had been passed. But, having consulted the Oireachtas website, all of this changed, for he was then aware of these facts having consulted the public document in question. It follows, therefore, that he was entitled at that point to take judicial notice of these facts. Moreover, while it does not strictly arise in the present case, it would also have been open to the Court in view of the comments of Henchy J. in *Collins* to hold that by reason of the inveterate conduct of both bench and bar and the comparative frequency by reference to which such applications for extension orders under s. 30(4) of the 1939 Act are made to the District Court, it could then take judicial notice of the making of the requisite resolutions.

Conclusions

26. In conclusion, therefore, I would hold that:

> A. Since the legality of the applicants' detention ultimately rested on proof that the necessary resolutions had been made by the House of the Oireachtas for the purposes of s. 18(1) of the 1998 Act, it was necessary for this fact either to be formally proved or to be judicially noticed.
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> B. Since the resolutions in question were extraneous to any Act of the Oireachtas as such, it follows that they were not required to be judicially noticed for the purposes of s. 13 of the 2005 Act.
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> C. The judge was, however, entitled to consult the Houses of the Oireachtas website to establish that the appropriate resolutions were passed. This website constituted a public document in the sense described by Henchy J. in Buckley and its contents were accordingly *prima facie* proof of what was stated therein.
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> D. Having thus consulted the Oireachtas website, the judge was then thereafter entitled to take judicial notice of the making of the resolutions and no further formal proof in that regard was then required.

27. In these circumstances, I found myself compelled to hold that the applicants were in lawful custody and that the present Article 40.4.2 applications must accordingly stand refused.