Neutral Citation Number: [2014] IEHC 76

THE HIGH COURT

[2014 No. 187 SS]

IN THE MATTER OF AN APPLICATION

PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

GEORGHE CIRPACI

APPLICANT

AND

GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 25th February, 2014

1. In this application for an inquiry into the legality of the applicant's detention pursuant to Article 40.4.2, the court is once again called upon to examine the scope of this jurisdiction. Mr. Cirpaci was arrested on 10th December, 2013, and charged with the offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 ("the 2001 Act"). He later appeared before the District Court on that day when evidence of arrest, charge and caution was given. The court was informed that the Director of Public Prosecutions had consented to summary disposal of the case and the District Judge accepted jurisdiction on the basis that the offence in question was a minor one. The accused pleaded not guilty on 17th December, 2003.

2. The case itself was heard in the District Court on 28th January, 2014. The applicant was convicted and a sentence of six months imprisonment was imposed. It is important to stress that the applicant was legally represented at all times. Yet, critically however, it is accepted that the applicant was never informed by the District Court of his statutory right to elect for jury trial.

3. Section 53(1) of the 2001 Act provides:-

> "The District Court may try summarily a person charged with an indictable offence under this Act if –
> (a) The Court is opinion that the facts proved or alleged constitute a minor offence fit to tried summarily;
>
> (b) The accused, on being informed by the Court of his or her right to be tried by a jury does not object to being tried summarily;
>
> (c) The Director of Public Prosecutions consents to the accused being tried summarily for the offence."

4. In these circumstances, given that it was a prerequisite to the District Judge's jurisdiction to conduct a summary trial of this offence that the applicant be first informed of his right to elect for jury trial, the respondent has all but conceded that the detention is bad in law. It is indeed hard to see how the respondent could have taken any different view

5. It is further admitted that the recital in the committal warrant to the effect that the applicant was informed of his right to elect for jury trial is erroneous, but it is submitted by Ms. O'Neill, counsel for the respondent, that although this error appears on the face of the record, it does not affect the validity of the warrant.

6. In the end, the issue in the present proceedings comes down to whether the applicant should have proceeded by way of judicial review to apply to quash the conviction or whether he was entitled to apply to this Court pursuant to Article 40.4.2 for an order of release. Counsel for the applicant, Mr. O'Higgins S.C., maintained that the applicant was entitled to choose the remedy which best vindicated his rights. He pointed to the safeguards provided for in Article 40.4.2 itself, including the judicial obligation to inquire "forthwith" into the legality of the applicant's detention, the fact that the onus rests on the detainer to establish the legality of that detention, the right to apply to any judge of the High Court of one's choosing for an order to directing an inquiry and the right (in principle, at least) to go from judge to judge to seek such an inquiry. The remedy provided for under Article 40.4.2 is, of course, not a discretionary remedy. Judicial review was, by contrast, inevitably slower and was a discretionary remedy.

7. Ms. O'Neill, on the other hand, contended that in the light of the decision of the Supreme Court in *FX v. Clinical Director of the Central Mental Hospital* [2014] IESC 1 an applicant who had been convicted by a lower court could normally only proceed by way of an Article 40.4.2 applicant in cases where the warrant was not good on its face. In the light of these latter submissions, it seems necessary once again to examine the text, history and tradition of Article 40.4.2.

Text, history and tradition of Article 40.4.2

8. First, so far as the text is concerned of Article 40.4.2 is concerned it is worth observing that the text of the Constitution itself makes no distinction between warrants which are good on their face and those which are not or between persons who have been convicted and those who have not been so convicted. As I noted in *Bailey v. Governor of Mountjoy Prison* [2012] IEHC 366, [2012] 2 I.R. 391, 397:

> "If, however, the jurisdiction of this Court under Article 40.4.2° was confined to those cases where the illegal nature of the detention was obvious, why, then, it might be asked, should this Court have the role and function of conducting such an inquiry and, indeed, why should this elaborate role be spelt out by the Constitution in such meticulous detail?

> The distinction between legal errors which are patent and those which are not is not one, moreover, which is drawn by the language of Article 40.4.2 itself. Article 40.4.2 is rather solely concerned with the *legality* of the detention, irrespective of the nature of the legal error which infects the detention. Thus, the detention may be wholly illegal, even though the order grounding the detention may be perfectly valid on its face. The Supreme Court's judgment in *McDonagh v. Governor of Cloverhill Prison* [2005] IESC 4, [2005] 1 I.R. 394 itself provides a good illustration of this."

9. Rather, the only question which the High Court is required to determine is whether the applicant for Article 40.4.2 relief "is being detained in accordance with law."

10. Second, the language of Article 40.4.3 provides further clear textual evidence that the jurisdiction of the High Court could not be – and is not - confined in the manner urged by Ms. O'Neill. Article 40.4.3 expressly provides for those cases where this Court concludes that the detention of the applicant is in accordance with law save that the law under which the applicant is being detained is itself unconstitutional. Article 40.4.3 provides for a special case-stated of that issue to the Supreme Court, while the applicant may be admitted otherwise to bail "until the Supreme Court has determined the question so referred to it." But of course in those particular circumstances the warrant detaining the applicant would *ex hypothesi* be good on its face, as the Court would have upheld the legality of the applicant's detention save for the unconstitutionality of the impugned law. As the law itself would enjoy a presumption of constitutionality and (adapting here the famous words of Lord Radcliffe in *Smith v. East Elloe RDC* [1956] A.C. 736, 769) as it would bear "no brand of invalidity upon its forehead", it could therefore never be said that the committal warrant (or other detaining order) was anything other than perfectly regular on its face. The unconstitutionality of the statute in question could therefore only be established by the applicant going behind the warrant in order to establish that latent unconstitutionality.

11. Third, the fact that the drafters of the Constitution took great care to ensure that Article 40.4.2 embodied the traditional common law remedies of *habeas corpus* is itself a striking fact which must inform any interpretation of its terms. Of course, at the date of the enactment of the Constitution common law courts had been looking behind warrants by way of *habeas corpus* for well over well 200 years. Moreover, as I ventured to point out in *Joyce v. Governor of the Dóchas Centre* [2012] IEHC 326, [2012] 2 I.R. 666, the experience of *habeas corpus* during the War of Independence and the Civil War was fresh in the minds of many associated with the actual drafting of the Constitution in 1937 and the debates in the Oireachtas in both 1937 and later in 1941 in the lead-up to the enactment of the Second Amendment of the Constitution Act 1941. As I pointed out in *Joyce* ([2012] 2 I.R. 666, 671-673):

> "It is, perhaps, little wonder, therefore, that to these men and others who endured the bitterness and the hardships of the struggle for independence, traditional rights associated with *habeas corpus*- namely, the right to apply to 'any' judge and to move successive applications for *ex parte* orders - should be cherished and protected. …..Article 6 of the 1922 Constitution set out the applicable *habeas corpus* procedure and this was reproduced more or less verbatim in Article 40.4.2 of the Constitution as originally enacted by the People in 1937. The most significant changes were, however, effected by the Act of 1941, which was inserted in the Constitution by legislation enacted by the Oireachtas in 1941. (Article 51.1 of the Constitution allowed for the amendment of the Constitution by means of ordinary legislation enacted by the Oireachtas for a transitional three year period from the date on which the first President of Ireland took office, save where, in accordance with Article 51.2, the President took the view that the proposed amendment was "of such a character and importance that that the will of the People thereon ought to be ascertained by Referendum before its enactment into law." As President Hyde took office on 25 June 1938, the transitory period ended some three years later and the Constitution can now only be amended following a referendum. No referendum was held in respect of the Act of 1941)."

12. I then went on to discuss the issue of the traditional right to move from judge to judge in pursuit of an application for an inquiry. Having discussed the Supreme Court's decision in *The State (Dowling) v. Kingston (No.2)* [1937] I.R. 699, I then continued ([2012] 2 I.R. 666, 672-673):

> "Yet in his concurring judgment in *Dowling* Murnaghan J. also took the opportunity to observe in the context of Article 6 of the 1922 Constitution (which was, as we have noted, in similar but far from identical terms to the present Article 40.4.2) that there was in fact the right to go from judge to judge, but *only* in respect of the initial *ex parte* application for an inquiry ([1937] I.R. 699, 751-752):-
>
> > 'In my opinion there is no right to apply to a Judge after the High Court has pronounced the detention to be legal. It is quite a different matter (which, however, does not arise for discussion in this appeal) to say that the refusal of a Judge to grant the first *ex parte* application prevents an application to another Judge. In such a case the detention has not been declared to be in accordance with law- it is only a view that there is no case to inquire into at all. In my opinion the right to make an *ex parte* application after refusal by another Judge has been confused with a hearing by the Court or Judge at which the detention has been declared to be legal.'
>
> A not dissimilar controversy arose in November and December, 1939 in *The State (Burke) v. Lennon*. In that case the applicant originally declined to move an application before a Divisional Court consisting of Maguire P., O'Byrne and Gavan Duffy JJ. (*The Irish Times*, 25 November 1939) on the basis - counsel submitted- that it would interference with the constitutional right of the applicant to choose a judge of his choice for the full hearing of the Article 40.4.2 application. The applicant then subsequently moved an application for an inquiry before Gavan Duffy J. alone. That judge then conducted the full hearing where he found Part VI of the Offences against the State Act 1939 (by virtue of which the applicant had been detained and interned) to be unconstitutional: *The State (Burke) v. Lennon* [1940] I.R. 136. The Supreme Court subsequently held that no appeal lay from that decision: see [1940] I.R. 136, 161.
>
> The procedure whereby the applicant was effectively allowed to select his own judge, not only in respect of the *ex parte* application, but also the full hearing following an *ex parte* order for an inquiry, in a case of huge importance and sensitivity evidently caused considerable concern in official circles and clearly influenced the drafting of the present version of Article 40.4.2, Article 40.4.3 and Article 40.4.4 (the latter two sub-Articles being entirely new with no earlier counterparts either in Article 6 of the 1922 Constitution or in Article 40.4.2 as originally enacted)…
>
> As a matter of constitutional history, therefore, it seems indisputable that in 1941 the drafters intended to preserve the right of the applicant to apply for the initial *ex parte* application to any judge and to make successive *ex parte* applications for such an inquiry (hence the reference in Article 40.4.2 to "any and every judge" of the High Court), while providing thereafter the subsequent decision on the actual legality of the detention should be that of the High Court itself. This latter change - which was effected through the altered and more extended version of Article 40.4.2 along with (the entirely new) Article 40.4.4 - was in order to guard against a possible repetition of the

precise sequence of events in *The State (Burke) v. Lennon."*

13. Against that historical background, it is impossible to accept that the drafters ever intended that by providing for Article 40.4.2 they were implicitly limiting the traditional scope of *habeas corpus* by removing perhaps the most central feature of that remedy at common law, namely, the right to go behind the warrant and to examine the underlying legality of the detention and thereby, at one stroke, to remove two hundred years of legal history.

14. This is especially so given that the common law in relation to successive applications for an inquiry was re-stated in codified - if, perhaps, nonetheless slightly modified - form in Article 40.4.2. The drafters were accordingly well capable of modifying aspects of the common law of *habeas corpus*, but there is but nothing in either the text of the Constitution or the complicated drafting history of these provisions between 1937 to 1941 which suggests that the power to go behind a warrant which was good on its face was to be curtailed in some implied fashion.

15. Some further textual evidence is supplied by Article 40.4.4 which expressly empowers the President of the High Court to direct that the High Court which is hearing the Article 40.4.2 application shall consist of three judges. As I pointed out in *Bailey*, why, it might be asked, should the Constitution trouble itself with such details if the High Court is confined to the relatively straightforward task of ascertaining whether the order forming the basis for the detention is good on its face or (as was argued in *Bailey*) that the illegality of the detention is obvious?

The decisions in FX and O'Connor

16. In support of their argument that Article 40.4.2 is confined to those cases where the invalidity is patent on the face of the record, considerable reliance was placed by the respondents on the decision of the Supreme Court in *F.X. v. Clinical Director of the Central Mental Hospital* [2014] IESC 1 and, to some degree, on my own judgment in *O'Connor v. Governor of the Midlands Prison* [2014] IEHC 46.

17. It is important to recall that the facts of *FX* were quite singular. In that case the Central Criminal Court had made an order committing the applicant to the Central Mental Hospital on the ground of unfitness to plead without complying with the two-stage procedure specified in the Criminal Law (Insanity) Act 2006. Although that error was manifest on the face of the order of committal, it also raised the difficult and troubling question as to whether the High Court could grant an order under Article 40.4.2 in respect of an order of the Central Criminal Court, which, of course, is the statutory name for the High Court exercising its criminal jurisdiction.

18. The Supreme Court held that the High Court could grant an order under Article 40.4.2 in respect of a decision of a co-ordinate court, albeit that this jurisdiction was confined to those cases where the order of the Central Criminal Court was either bad on its face or had violated fundamental constitutional principles. Denham C.J. stressed that whereas at common law *habeas corpus* did not, save possibly in exceptional circumstances, extend to review a decision of a court of co-ordinate jurisdiction, the jurisdiction conferred by Article 40.4.2 was broader:

> "However, at issue is the constitutional right to *habeas corpus* governed by Article 40.4.2 of the Constitution of Ireland. The wording of Article 40.4.2 of the Constitution is clear and unambiguous and grants to the High Court a broad jurisdiction."

19. Denham C.J. then continued by noting that there, had been, exceptionally, isolated cases where orders had been made by this Court (or the Supreme Court) pursuant to Article 40.4.2 in respect of orders of detention made by this Court. Those decisions had, in general, emphasised that the institutional supremacy of the Court of Criminal Appeal in respect of entertaining appeals from convictions on indictment. But even in those conviction cases where an appeal had been already unsuccessfully taken to the Court of Criminal Appeal the Supreme Court had always stressed that an application under Article 40.4.2 was open in exceptional cases presenting "some fundamental jurisdictional defect is established in an Article 40 application which through nobody's fault had not been raised or considered in the appeal processes": see *Brennan v. Governor of Portlaoise Prison* [2008] 3 I.R. 364, 384, per Geoghegan J.

20. Having quoted with approval from *Brennan* the Chief Justice then continued:

> "65. In general, if there is an order of any court, which does not show an invalidity on its face, then the correct approach is to seek the remedy of appeal and, if necessary, apply for priority. Or, if it is a court of local jurisdiction, then an application for judicial review may be the appropriate route to take. In such circumstances, where an order of the court does not show any invalidity on its face, the route of the constitutional and immediate remedy of *habeas corpus* is not the appropriate approach.
>
> 66. An order of the High Court which is good on its face should not be subject to an inquiry under Article 40.4.2 unless there has been some fundamental denial of justice. In principle the appropriate remedy is an appeal to an appellate court, with, if necessary, an application for priority. Thus, the remedy under Article 40.4.2 may arise where there is a fundamental denial of justice, or a fundamental flaw, such as arose in *The State (O.) v. O'Brien* [1973] I.R. 50, where a juvenile was sentenced to a term of imprisonment which was not open to the Central Criminal Court."

21. Considerable reliance was placed by the respondents in this application on the wording of para. 65 of the judgment in support of the argument that Article 40.4.2 should be invoked only where the warrant or other order was bad on its face. I cannot help thinking but that this, with respect, represents an over-interpretation of this paragraph, especially when the judgment is read as a whole. It is true that the Chief Justice expressly envisages that relief may be granted under Article 40.4.2 where the error is on the face of the record, but it is also clear that what she also described elsewhere in the judgment as a "broad jurisdiction" conferred by Article 40.4.2 is also available in those cases involving a fundamental defect or fundamental error. If, moreover, the Article 40.4.2 jurisdiction was to be confined to errors on the face of the record, the Chief Justice would not have approved of the passage which she did from the judgment of Geoghegan J. in *Brennan*.

22. Accordingly, the test remains that articulated by Henchy J. in *The State (Royle) v. Kelly* [1974] I.R. 259, 269:

> "The mandatory provision in Article 40, s.4, sub-s.2, of the Constitution that the High Court must release a person complaining of unlawful detention unless satisfied that he is being detained 'in accordance with the law' is but a version of the rule of *habeas corpus* which is to be found in many Constitutions. The expression 'in accordance with the law' in this context has ancestry in the common law going back through the Petition of Right to Magna Carta. The purpose of the test is to ensure that the detainee must be released if-but only if- the detention is wanting in

the fundamental legal attributes which under the Constitution should attach to the detention."

23. This passage was not only quoted with approval by Denham C.J. in *FX*, but it is the test which is consistent with the text, history and tradition of Article 40.4.2 itself.

24. In *O'Connor* the applicant contended that evidence had been admitted at his trial in July 2011 pursuant to a search of his dwelling which had been conducted pursuant to s. 29 of the Offences against the State Act 1939. Section 29 was, however, held to be unconstitutional by the Supreme Court in *Damache v. Director of Public Prosecutions* [2012] IESC 11, [2012] 2 I.R. 266 in a judgment delivered in February 2012. The applicant had, however, never objected to the admissibility of that evidence at his trial and, indeed, through his counsel, had made something of a virtue of the fact that no such objection was being raised. On appeal following his conviction the Court of Criminal Appeal later determined that in those circumstances he could not raise the *Damache* point and, indeed, in a reserved judgment, later refused the applicant leave to appeal to the Supreme Court.

25. I held that I was bound by the decision of the Court of Criminal Appeal which had fully considered these issues. It followed that I was then compelled to hold that the applicant was in lawful custody. I then continued:

> "In the light of *FX* it is clear that the Article 40.4.2 jurisdiction could be invoked in such circumstances only where the order displayed a jurisdictional error or it was clear that there was some fundamental denial of the applicant's constitutional rights, whether by reason either of the circumstances of the conviction itself or perhaps, as in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235, [2012] 1 I.R. 457, the circumstances of detention. Here the only issue is the extent to which the applicant can retrospectively invoke the decision in *Damache.* It is clear from a long series of decisions (including all the recent decisions of the Court of Criminal Appeal dealing with post-*Damache* issues) that such declarations of unconstitutionality cannot generally be invoked to upset earlier convictions, save where the issue itself has been raised at the court of trial. .....
>
> In these circumstances since it is manifest that the applicant is being detained in accordance with law, I cannot see that there is any further matter which requires an inquiry by this Court."

26. It follows, therefore, from a consideration of this case-law that the Article 40.4.2 jurisdiction remains a broad and flexible one. It is, however, not as confined as the respondents suggest. It is rather the case that Article 40.4.2 shines as a beacon of liberty which will never deny refuge to an applicant who can show a fundamental breach of constitutional rights or the existence of some other significant defect attaching to the warrant or order providing for his or her detention. It is for these reasons that I accordingly reject the interpretation of *FX* which Ms. O'Neill has so ably urged on this Court.

The conviction in the present case

27. The defect which attaches to the conviction in the present one is fundamental to the legality of the applicant's detention. Here it is necessary to look no further than *The State (Vozza) v. O'Floinn* [1957] I.R. 227, a case where the Supreme Court quashed a conviction in more or less identical circumstances and the earlier judgment of Davitt P. in *The State (Hastings) v. Reddin* [1953] I.R. 134 in the context of the virtually identical provisions of the Criminal Justice Act 1951 ("the 1951 Act").

28. In *Hastings* the applicant had been convicted by the District Court of the offence of occasioning actual bodily harm. This, however, was a scheduled offence for the purpose of the 1951 Act and the District Judge was empowered to try the offence in a summary fashion only where the Court had informed the applicant of his entitlement to jury trial and he or she elected not to avail of that right. As Davitt P. observed ([1953] I.R. 134, 138):

> "Both the conveying of the information to the accused by the Court of his right to a jury and the absence of objection on his part to being tried summarily appear to me to be statutory conditions precedent to the exercise by the District Court of the jurisdiction conferred by statute.
>
> The District Court has no jurisdiction to try a scheduled offence apart from the statute. Its gets the jurisdiction subject to the conditions imposed by the statute. If it does not comply with the conditions it has not got the jurisdiction."

29. Davitt P. went on to stress the absolute nature of the obligation imposed personally by statute on the District Judge ([1953] I.R. 134, 141):

> "I do not think it matters whether the accused is aware of his right or not, or whether, if he is represented by counsel or solicitor, he is presumed to be aware of it. The duty imposed by statute on the Court is not to assume, or presume, or be satisfied – it is to make certain, by itself imparting the necessary knowledge to the accused… [The Oireachtas] fastened upon the matter that was really essential and ensured that the accused shall be informed in the most authoritative way possible, namely, by the Court itself, of his constitutional right to be tried with a jury."

30. The decisions in both *Hastings* and *Vozza* accordingly stress the mandatory nature of the obligation which is imposed on the District Judge with regard to informing the accused of his or her right to elect for jury trial before any summary disposal can take place. Since this did not occur in the present case, it is obvious that the District Court lacked any jurisdiction to hear and determine the charge in the manner in which it did.

31. It is agreed that this particular defect could not be cured by availing of the right of appeal since this would not afford the applicant his right to elect for jury trial.

32. It is clear from the terms of s. 53 of the 2001 Act that the District Court only had jurisdiction to try the case once the applicant had been informed of his right to jury trial and he had elected nonetheless for summary disposal. Since it is agreed that he was never afforded that right, a finding that the ensuing conviction was entirely without jurisdiction merely amounts to a statement of the obvious. To require in those circumstances that the applicant proceed by way of judicial review rather than to avail of the remedy which the Constitution expressly provides for unlawful detention would amount to a repudiation of the text, tradition and history on which Article 40.4.2 rests. It would, moreover, further circumvent the particular safeguards which Article 40.4.2 so carefully protects. These, after all, were the safeguards to which the drafters gave the most careful attention in both 1937 itself and perhaps especially again in 1941.

Conclusions

33. It is for these reasons that I must hold that the applicant is entitled to proceed by way of Article 40.4.2 to challenge the legality of that detention. Since there can be no argument but that the applicant's underlying conviction was entirely without jurisdiction, it follows that his continued detention is equally unlawful.

34. I, therefore, propose to direct the release of the applicant in the manner required by Article 40.4.2 since his continued detention is not in accordance with law.