NEUTRAL CITATION NUMBER [2012] IEHC 326

THE HIGH COURT

[2012, No. 1359 SS]

BETWEEN/

LOUISE JOYCE

APPLICANT

AND

GOVERNOR OF THE DÓCHAS CENTRE

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 11th July 2012

1. The applicant, Ms. Louise Joyce, applies for an order of release under Article 40.4.2 of the Constitution in circumstances that are, or, at least, have become, somewhat unusual. It is first necessary to set out the key facts which attend the merits of the application, even if these facts are rather scant.

2. The applicant was convicted of an offence in the District Court on the 4th March, 2011. She then appealed to the Circuit Court where the conviction was affirmed on 9th May, 2012. It is agreed that there is no separate conviction order, but merely a committal warrant. The applicant is currently held in detention on this warrant which contains a record number and is headed "The Circuit Court, Eastern Circuit, County of Louth".

3. The warrant states that the applicant has been committed to prison for nine months following a decision of the Circuit Court which "heard and determined" a District Court appeal. The order does not record the offence of which the accused was convicted, but simply refers to the "above mentioned Criminal case". The order is dated 9th May, 2012 and it is signed by the County Registrar.

4. I should interpose here to say that during the Article 40 hearing I was informed that the applicant was convicted of an offence under s. 4 of the Criminal Justice (Theft Offences) Act 2001, but no further particulars as to the nature of the offence or how it is said to have been committed were at hand. It appears that it was the practice in this particular rural circuit for a "short form" committal warrant to be drawn up immediately following conviction and this would be subsequently followed by the preparation of a fuller warrant containing appropriate additional details. Apparently, the office in question has closed in the interval, with the business transferred to another office and, whether by reason of oversight or otherwise, the preparation of the fuller warrant was not attended to. The essence of the applicant's case is that the warrant is fatally flawed by reason of these omissions.

5. What renders the present application unusual is that counsel for the applicant, Mr. Michael O'Higgins SC originally made an application for an inquiry under Article 40 to my colleague, Mr. Justice Hedigan, yesterday morning, 10th July, 2012. It would appear that, following a relatively short hearing, the application for an inquiry was refused. Shortly thereafter, Mr. O'Higgins SC sought to move the application afresh to me. He very properly drew my attention immediately to the fact that he had moved the application before Hedigan J. and that it had been refused.

6. Although I voiced concern lest any question of an abuse of the Article 40.4.2 procedure might arise, I ultimately agreed to hear the application for an inquiry later that afternoon in circumstances where the State authorities were put on notice of the application. At that hearing, counsel for the respondent, Mr. Kennedy, expressly accepted that Article 40.4.2 meant that, so far as the initial *ex parte* application is concerned, one has the right to make successive applications to individual members of the High Court if the initial *ex parte* application for an inquiry is refused. If, however, the applicant is adjudged to be in lawful custody following the holding of such an inquiry, then that is a decision of the High Court and the only remedy for the unsuccessful applicant is to appeal to the Supreme Court.

7. In response to a specific inquiry from me on the abuse issue, Mr. Kennedy accepted that no question of abuse arose in the present case, although his own client, the Attorney General, expressly reserved her position on this question so far as future applications of this nature were concerned. As Hedigan J. had merely refused an application for an inquiry. Mr. Kennedy submitted that the applicant was entitled to move the application by virtue of Article 40.4.2. At that point it was then agreed that the application would thereafter proceed (without prejudice to ultimate resolution of the jurisdictional issue) on the basis that an order for an inquiry had been directed by me and that this was the full hearing of that inquiry under Article 40.4.2.

Successive applications for an inquiry under Article 40.4.2

8. The question of successive applications for habeas corpus forms the background to two major decisions on this topic, both of which decisions obviously influenced the drafting of the present Article 40.4.2. The first is the celebrated case from the War of Independence, *Egan v. Macready* [1921] 1 I.R. 265, where Sir Charles O'Connor M.R. (a judge of Chancery Division of the High Court) held that the Restoration of Order in Ireland Act 1920 had limited the power of the British Government to establish military tribunals and in arriving at this conclusion he had disagreed with the different views expressed by the King's Bench Division of the High Court in *R. v. Allen* [1921] 2 I.R. 244 in a judgment delivered a few months previously. When the Master of the Rolls was told by Patrick Lynch K.C., counsel for the applicants, that General Macready, the General Office Commanding of the British Forces in Ireland, did not intend to comply with the order of habeas corpus, O'Connor MR cited General Macready for contempt. The controversy was defused when the British Government agreed to release the prisoners on the following day.

9. As it happens, Egan had been captured in May 1921 just before the end of the War of Independence. While a truce was to be declared in mid-July 1921, by the time of *habeas corpus* hearing in early July he was still under sentence of death. His counsel had certainly availed of the common law right to apply to a High Court judge of one's own choice, because it is hard to see any application for habeas corpus to a judge of the Chancery Division rather than to a judge of the King's Bench Division as being other than strategic in the circumstances. In February 1921 the King's Bench Division had, after all, expressly upheld the powers of the British Forces to have drum-head military tribunals in *R. v. Allen* and the applicant in that case was later executed on 28th February 1921: see [1921] 21.R. 243, 273.

10. O'Connor M.R. had, however, concluded his judgment with the following stirring words ([1921] 11.R. 265, 279):-

> "I have not lost sight of the fact that in giving the judgment I do, I am acting at variance with the unanimous judgment of the King's Bench Division in *Allen's* case [1921] 2 I.R. 244, reaffirmed by subsequent decisions. I hope that my action will not be construed as indicating any disrespect of my colleagues or any overweening opinion of my own. I fully recognise that they have a wide knowledge and experience of criminal law and that I cannot pretend to any. My practice at the Bar and my life as a Judge of the Chancery Division have left me unqualified for criminal cases; and I say unfeignedly I cannot confidently set up my opinion against the experienced and learned Judges of the King's Bench Division. But, as has been more than once pointed out by the late Lord Chief Baron and by the most eminent English Judges, it is the right of the subject under arrest to apply to any Judge of the High Court for the writ of *habeas corpus*, and, if the writ is refused, to proceed from judge to judge; and that it is the duty of each judge to form his independent opinion and act upon it. This does not mean that he is to disregard the opinions of other judges. It is the duty of the deciding judge to take such guidance as he can from other judgments. It only means that he not absolutely bound by them as in ordinary cases, and that if he is in his own mind is unable to follow them, he is bound to dissent."

11. Over the years a certain sentimentality seems to have attached itself to that judgment, not least perhaps because Egan's counsel (Patrick Lynch, Hugh Kennedy and John A. Costello) all later assumed prominent positions in the public life of the State and the striking circumstances of the case appears to have made a dramatic impression on all of them. All three later played a role in either the drafting of and discussion on (variously) Article 6 of the 1922 Constitution, the 1937 Constitution or (as the case may be) the Second Amendment of the Constitution Act 1941 ("the Act of 1941").

12. 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. It was, after all, the reason why Allen perished and Egan lived.

13. 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).

14. But sentimentality or otherwise, Sir Charles O'Connor's analysis of the common law position regarding successive applications was seriously disputed by FitzGibbon J. in his judgment for the Supreme Court in *The State (Dowling) v. Kingston (No.2)* [1937] I.R. 699, 737-749. This very thorough analysis of the 19th century case-law and habeas corpus practice rather casts doubt on whether at common law there was ever a right to go from judge to the judge or whether the right in question was a right to go from one of the divisions of the pre Judicature Act common law courts (Queen's Bench, Common Pleas and Exchequer) to another division. If the latter, that right disappeared followed the creation of one unified High Court by the Judicature Acts in 1873 (in England) and 1877 (in Ireland). This judgment was described as "illuminating" by Lord Parker C.J. in his judgment in *Re Hastings (No.2)* [1958] 3 All E.R. 625,634 and, following an exhaustive and learned analysis of English 19th century *habeas corpus* practice, he essentially agreed with FitzGibbon J.'s treatment of this issue so far as the common law was concerned.

15. 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."

16. 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.

17. 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).

18. Even if Sir Charles O'Connor's analysis in *Egan v. Macready* was wrong as a matter of legal history and even though it appears that there was no question of successive applications for the writ of *habeas corpus* actually having been made to different judges in that case (see here the comments of FitzGibbon J. in *The State (Dowling) v. Kingston* [1937] I.R. 699, 745) nevertheless, as Costello has clearly shown, the shadow of *Egan v. Macready* lay over the drafting of Article 40.4.2 (and its earlier predecessor, Article 6 of the 1922 Constitution), when this entire question of successive applications was considered in 1922, 1937 and again in 1941: see generally, Costello, *The Law of Habeas Corpus in Ireland* (Dublin, 2006) at 27-38. In view, however, of the express wording, layout and structure of Article 40.4.2 which distinguishes between the initial application to the High Court "and any and every judge thereof to whom such complaint is made" for an inquiry into the legality of the detention on the one hand and the subsequent hearing of that

inquiry by the High Court alone on the other, it seems impossible to disagree with the suggestion that there is a right (subject to important qualifications which I will presently elaborate) to make successive applications for the initial *ex parte* application for an inquiry. Thereafter, however, Article 40.4.2 makes clear that the actual decision on the legality of the detention remains that of the High Court alone. In those circumstances the only remedy is an appeal to the Supreme Court, whatever the position may have been either at common law prior to 1922 or, indeed, in the interval between 1922 and 1941.

19. If it were otherwise, then the very careful language of the first section of Article 40.4.2 dealing with the initial complaint with its references to the "High Court *or any* judge thereof' and again to the "High Court and *any and every judge* thereof' (emphasis supplied) would be rendered effectively meaningless. Once the inquiry is ordered, however, then all subsequent references in Article 40.4.2 are thereafter to "the High Court" alone (and not, as in Article 6 of the 1922 Constitution and in Article 40.4.2 as originally enacted by the People in 1937, to "such Court or Judge"). All of this is further underscored by the provisions of Article 40.4.4- a provision which, as we have just noted was an entirely new innovation introduced by the Act of 1941 and which had no counterpart in either Article 6 of the 1922 Constitution or in the Constitution as originally adopted by the People - and which gives the President of the High Court the power to determine that the High Court hearing the substantive application (*i.e.*, not merely the initial application for an inquiry) shall consist of three judges or, as the case, may be, one judge only.

20. 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*.

21. But although the right to make successive applications for an initial inquiry is not ex ante excluded by Article 40.4.2, some measure of realism must nonetheless be brought to the process. In *Dowling*, FitzGibbon J. poured scorn on the idea that at the time of the enactment of the Judicature Acts in England an applicant might have gone to as many as twenty eight different judges, "any single one of whom might, without the possibility of an appeal, overrule the considered views of the other twenty seven": [1937] I.R. 699, 746.

22. In our own case, it must be recalled that the Constitution is a living document which must be interpreted in the light of modem realities. This means that Article 40.4.2 must be construed in a realistic and sensible fashion, albeit adjusted, if necessary, to those contemporary realities. The High Court consisted of six judges in 1937 and only five judges in 1941, but today the comparable figure is 36 judges. Is to be suggested that that repeated applications to scores of different High Court judges should really be permitted if the legal system is not to fall into disorder?

23. In my view, the true meaning of Article 40.4.2 is this: while it does allow for successive applications, the object of the provision is really designed to operate as a failsafe *in favorem libertam*, in case, perchance, something was overlooked with the first application. In the nature of things, Article 40.4.2 applications are heard immediately and sometimes the very urgency of the matter hampers the ability of solicitor and counsel to have all the relevant authorities assembled for the benefit of the Court. Given further that the ordinary court business may have to be interrupted to accommodate such an application, counsel may feel under some time constraints and thus fail to advert in the process to an important point or authority.

24. It is in those type of circumstances (or something like it) in which the application can properly be renewed before a second judge without the second application being regarded as abusive. Naturally, the second judge hearing the application for an inquiry must pay close attention to the reasons given by the first judge for refusing it, even if he or she is not strictly bound by that refusal. One would normally expect that the fresh application would turn on some new authority or perhaps even new facts corning to light. Of course, the strategic withholding of arguments which are to be kept in reserve if necessary for a second renewed application may be regarded as per se abusive: see, *e.g., Re McDonagh*, High Court, 24 November 1969 *per* Henchy J. and *The State (Gallagher) v. Governor of Portlaoise Prison*, Supreme Court, 25 July 1983, per Henchy J. For all of these reasons, it goes without saying that all legal representatives are under an obligation to disclose the existence of any prior application under Article 40.4.2 to the judge to whom the complaint is made, although as I have noted already, this was an obligation which was immediately (and properly) discharged by counsel in the present case.

25. While Article 40.4.2 does not strictly exclude third and successive applications, so far as the law, learning and practice of habeas corpus over the last two hundred years or so is concerned, multiple applications of that kind are all but unheard of. While there are (rare) instances of where a renewed application was successfully made after 1941 (see, *e.g., The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82, 84 where Barrington J. made an order for an inquiry under Article 40.4.2 "after considerable argument" where the initial application had been refused by Keane J.), I can find no reported case of where a third renewed application of this kind was made, much less successfully entertained. Absent quite exceptional circumstances which would have to be fully explained, third and successive applications of this kind must therefore be regarded in principle as being *per se* abusive. Given that the Constitution must be interpreted holistically, Article 40.4.2 must, after all, be interpreted in light of the Article 34.1 which presupposes that the judicial branch will discharge its constitutional mandate of administering justice in a reasonable, efficient and prompt fashion.

26. In the present case, I gave anxious consideration to whether the renewed application before me was actually or potentially abusive. In the end I have concluded that it was not and for the following reasons. First, counsel for the respondents, Mr. Kennedy, submitted, having taken instructions from the Attorney General on the matter, that this particular renewed application should not be regarded as abusive and that it should be heard on its merits, although it is important also to record that the Attorney reserved her position with regard to future renewed applications of this kind. It is only appropriate that I should record my complete appreciation of the eminently restrained and wholly fair minded manner in which this application was met by the respondents, because the Attorney's views on this question- as submitted through her counsel - have weighed heavily with me.

27. Second, Mr. O'Higgins SC has fairly conceded that the application before Hedigan J. was not, perhaps, as fully opened as it might have been. Specifically, the important judgment of the Supreme Court in *GE v. Governor of Cloverhill Prison* [2001] IESC 41 was opened in some detail before me, but it is accepted that this case was only mentioned in passing to Hedigan J. and that the case was not formally opened in its own right. As we shall presently see, there are key passages in that judgment which, in my view, are dispositive of the case at hand.

28. It is against that background that I have concluded with some diffidence and considerable personal reluctance that I have a jurisdiction to hear this renewed application and that I am free to form my own view, while, of course, fully taking into account the views of Hedigan J.

The merits of the application
29. So far as the merits of the application is concerned, it is accepted that there is only one warrant committing the applicant to prison. This warrant states that the applicant has been committed to prison for nine months following a decision of the Circuit Court which "heard and determined" a District Court appeal. The warrant does not record the offence of which the accused was convicted, but simply refers "to the above mentioned Criminal case". The order is dated 9th May, 2012.There is no separate conviction order from the Circuit Court.

30. In the course of argument Mr. Kennedy did not demur from the suggestion that if the warrant were challenged in Ord. 84 proceedings, it was "likely" to be quashed with remittal back to the Circuit Court. Critically, as we have already noted, the decision of the Supreme Court in *GE v. Governor of Cloverhill Prison* [2001] IESC 41 was opened in some detail before me and I have had the benefit- which my colleague, Mr. Justice Hedigan did not - of considering this important decision in some depth.

31. This is of some importance because in the course ofher judgment for the Supreme Court, Denham C.J. expressly stated that a warrant (in that case, an arrest warrant under the Immigration Act 2004) must "contain clear information on its face as to the basis of its jurisdiction". Here the Supreme Court held that the arrest warrant was invalid as it did not disclose jurisdiction on its face, but there are two particular passages from the judgment of the Chief Justice which might, with advantage, have been opened to Hedigan J.:

> "The appellant has invoked his right under the Constitution to habeas corpus. In enquiring under the Constitution as to his custody the Court must examine the validity of the document of the 2nd August 2011.
>
> A document, such as in issue here, should contain clear information on its face as to the basis of its jurisdiction. This information is required so that it be available to, for example, (a) the person in custody, such as the appellant; (b) the Governor of the Prison or any other [person] who is holding a person in custody and (c) the Court which is requested to inquire into the custody pursuant to Article 40 of the Constitution.
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> In this case the document of 2nd of August refers only to s. 5(2)(a) of the Immigration Act 2003....That is insufficient to show jurisdiction. The document is defective because it does not state on its face the reason for the arrest and detention of the appellant."

32. This passage shows that a warrant, whether of arrest or detention, must contain such requisite information as would satisfy an examination as to jurisdiction on the face of the warrant by, for example, a judge of this Court exercising the Article 40.4.2 jurisdiction.

33. The Chief Justice went on further to expressly approved of a passage from the judgment of Parke B. in the noted 19th century decision, *Gosset v. Howard* (1845) 10 QB 411 which stated that 'the cause must be contained in the warrant'. When Mr.Kennedy's attention was drawn to these passages in the judgment of the Chief Justice, he accepted, without making any concession on the point, that he could not properly assist me by way of making any further submissions.

34. For good measure I would also note that in *Ex parte Terraz* (1878) 4 Ex. Div. 638, Huddleston B. said that when committal warrants are "brought up on habeas corpus" so that the applicant is held under a warrant of execution then:

> "the Court can only judge by what appears in the warrant whether a crime has been committed and whether the alleged criminal is properly held in custody."

35. Here again I have had the benefit of another authority on point being opened to me and which was not brought to Mr. Justice Hedigan's attention.

36. If in *GE* the Supreme Court held that an arrest warrant did not show jurisdiction on its face by disclosing the reason for the arrest, this must be true *a fortiori* of a committal warrant which fails to give any details whatever of the offence of which the applicant stood convicted, not least given that this is required by the *Gosset v. Howard* principle which, as we have just seen, was in turn expressly approved of in *GE*. The position might well be different if there was in existence a separate conviction order which contained those details of the offence of which the applicant was convicted and which was offered as a justification for the detention. Where, however, as here, the only document forming the basis of the detention is a committal warrant of the kind we have just described, this must be adjudged to be defective and not forming a sound basis in law for the applicant's detention. This, after all, is also the point made by Huddleston B. in *Terraz*

Conclusions
37. In these circumstances it seems to me that I am obliged to conclude that the warrant by reference to which the applicant is currently detained is bad on its face in that it does not disclose the offence of which she was convicted. In the light of the Supreme Court's decision in *GE*, I must therefore direct the applicant's release pursuant to Article 40.4.2 as I am not satisfied that she is detained in accordance with law.

Postscript
38. Just as I was about to deliver my judgment at 2pm on 11th July 2012, Mr. Kennedy informed me as a courtesy that a full version of the committal warrant, duly signed and authenticated, had been prepared overnight, although he conceded that he did not yet have the document to hand. While I thanked him for his courtesy in this regard, it seemed to me that I was obliged to decide the application based solely on the information actually in evidence before me at the hearing. I then proceeded to give judgment in the manner just indicated.