

**THE HIGH COURT**

[2021] IEHC 723

[Record No. 2021/1607 SS]

**IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE  
CONSTITUTION OF IRELAND**

**BETWEEN**

**SEAN CHRISTOPHER HENNELLY**

**APPLICANT**

**AND**

**THE GOVERNOR OF MOUNTJOY PRISON**

**RESPONDENT**

**Judgment of Mr Justice Barr delivered on the 18th day of November 2021.**

**Introduction.**

1. This is an article 40 application wherein the applicant challenges his detention in Mountjoy Prison pursuant to an order of committal dated 16th September, 2021, on foot of an order of Quinn J. dated 16th October, 2019, which found that the applicant was in contempt of court by being in breach of an order of Haughton J. that he deliver up possession of certain property in Co Galway, together with keys and alarm codes, to the liquidators of the plaintiff companies. The said order of committal was executed by a member of an Garda Síochána on 14th November, 2021.
2. The applicant challenges the lawfulness of his detention on two grounds: firstly, on the ground that the order of committal is bad because the plaintiffs in the substantive action, who had obtained an order for possession and on foot thereof had obtained a previous committal order on foot of the order made by Quinn J., had not sought a renewal of that committal order pursuant to the leave of the court, but had let it lapse and had simply applied for a new order of committal on 16th September, 2021. It was submitted that the Central Office of the High Court had no jurisdiction to issue a new order of committal under the rules of the Superior Courts.
3. Secondly, it was submitted that while the plaintiffs in the civil action had obtained an order for possession, they had not obtained an order of possession, prior to obtaining the order from Quinn J. It was submitted that this was an essential step which rendered the order of Quinn J. invalid and the ultimate detention of the applicant unlawful.
4. In response, it was submitted on behalf of the respondent, that the respondent was detaining the applicant on foot of an order of committal which was regular on its face, it correctly recorded the orders on which it was based and complied in all respects with the provisions of the rules of the Superior Courts; accordingly, it was submitted that the applicants detention was according to law and therefore the relief under article 40 should be refused.
5. In the alternative, it was submitted that if the committal order was invalid on either of the grounds submitted by the applicant, that was a matter between the applicant and the plaintiffs in the substantive proceedings and his remedy would be either to appeal the order made by Quinn J., or to seek to have that order set aside, or to have the order of committal set aside by means of judicial review.

6. Without prejudice to the arguments raised by the respondent that the detention of the applicant was in accordance with law because the order of committal was good on its face, the respondent submitted that on the basis of dicta in case law, there was nothing to prevent a judgment creditor or other person in whose favour a court order had been made, from seeking an order of committal from the Central Office of the High Court, where a previous order of committal had expired without being renewed.

**Background.**

7. The committal of the applicant to Mountjoy Prison arose in connection with his failure to comply with orders made by the High Court in the context of civil proceedings between the liquidators of two companies, as plaintiffs, and the respondent and others, as defendants.
8. Those proceedings have had a long history both before the courts in England and in this jurisdiction. It is only necessary to give a brief summary of the history of those proceedings. On 28th January, 2013 summary judgment was awarded against the applicant before the courts in England and Wales, in respect of one of the companies in the sum of £1,441,420.96, together with interest of £193,658.96 and in respect of the second company, the applicant had judgment marked against him in the sum of £389,591.18, together with interest of £52,252.56. In addition the applicant was ordered to pay costs of £123,000.
9. By order dated 7th August, 2013 the applicant's application for permission to appeal that judgment was refused. By order dated 7th December, 2015, a consent order was made whereby it was agreed between the plaintiffs and the applicant, as defendant, that he would pay the sum of £500,000 on or before 28th February, 2016 in full and final settlement of all sums due by the applicant to the plaintiffs.
10. The proceedings before the Irish Courts have also had a long history. By order dated 10th April, 2013, the Master of the High Court made an order enforcing the judgment that had been obtained before the courts in England and Wales against the applicant on 28th January, 2013. By order dated 13th July, 2015, the High Court authorised service of a special summons on the applicant by ordinary prepaid post. An order was made by the High Court on 30th May, 2016 substituting one of the plaintiffs, who were suing as liquidators of the companies that had obtained summary judgment against the applicant
11. By order dated 11th July, 2016 Messrs Coleman Sherry were given liberty to come off record as solicitors acting on behalf of the applicant. By order dated 11th July, 2016, the High Court made a well charging order, declaring that the sum of £2,199,923.66 was due on foot of a judgment mortgage which stood well charged on the applicant's interest in the lands and premises comprised in Land Registry Folio 53359 Co. Galway.
12. By order dated 11th June, 2018, the High Court made an order granting the plaintiffs possession of the lands and premises set out in the said folio and placed a stay on that order for a period of two months. The applicant was ordered that upon service of the order upon him, he was to deliver to the plaintiffs vacant possession of the said lands.

The applicant was also ordered to deliver up to the plaintiff's keys and other access devices to all locks and similar devices and all security/alarm or similar codes concerning the said lands and premises.

13. By order of the High Court dated 8th April, 2019, it was ordered that service of the order for possession that had been made on 11th June, 2018 bearing a penal endorsement upon the first named defendant by email on 14th August, 2018 be deemed good and sufficient service for the purpose of Order 42, rule 7 of the rules of the Superior Courts. The plaintiffs were granted liberty to issue a motion seeking the attachment and committal of the applicant for failure to comply with the order dated 11th June, 2018. The court granted liberty to the plaintiffs to serve a notice of motion returnable for 13th May, 2019. By order of the same date the High Court directed that Dominick Dumville be appointed as a co-plaintiff to the proceedings in substitution for one of the previous liquidators.
14. By order dated 16th October, 2019, the court made an order that it was satisfied that the applicant had been guilty of contempt of the court by disobeying the order for possession dated 11th June 2018, by failing to deliver up possession of the premises and possession of the keys and other devices specified in that order. The court adjudged the applicant guilty of contempt of the court and adjudged that he be committed for such contempt to Mountjoy Prison, to be detained until he purged his contempt by complying with the order dated 11th June, 2018. The court further ordered that the plaintiffs were at liberty to issue an order of committal directed to the members of the Garda Síochána, to arrest the applicant and lodge him in Mountjoy Prison, there to be detained until he purged his contempt and be discharged pursuant to further order of the court. A stay was placed on the order for one month.
15. On 2nd December, 2019, the plaintiffs obtained an order of committal from the Central Office of the High Court directing that the applicant be arrested and detained in Mountjoy Prison pursuant to the order of the High Court dated 16th October, 2019. That order was not executed, nor was it renewed.
16. On 16th September, 2021 the plaintiffs obtained a further order of committal in the same terms as the previous order from the Central Office of the High Court. That order was executed by a member of an Garda Síochána on 14th November, 2021, when the plaintiff was arrested and detained in Mountjoy Prison.

**Submissions on Behalf of the Applicant.**

17. Order 42, rule 20 is the relevant rule for the purposes of this application. It provides as follows:

*"An execution order or an order of committal, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such order may, at any time before its expiration, by leave of the Court, be renewed by the party issuing it for one year from the date of such renewal and so on from time to time during the continuance of the renewed order,*

*either by being marked with the seal of the High Court, bearing the date of the day, month and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the like seal; and an execution order so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof."*

18. It was submitted that the rules provide that the order of committal once obtained, will only be in force for a period of one year. That period can be renewed with the leave of the court, if the application is made during the continuance of the original order, or any renewal thereof.
19. It was submitted that the plaintiffs did not do that in this case. They simply let the order of committal, which had been obtained on 2nd December, 2019, lapse and then almost 10 months later, the plaintiff simply sought a fresh order of committal based on the original order of Quinn J. dated 16th October, 2019. It was submitted that such procedure was not provided for in the rules. Accordingly, it was submitted that the order of committal, while appearing good on its face, had in fact been made without jurisdiction.
20. In this regard, counsel submitted that where there was an absence of jurisdiction to make an order underpinning a person's detention, that was a matter which could be enquired into by the court on an article 40 application. In this regard, Mr Shortall SC, referred to the decision in *Ryan v Gov of the Midlands prison* (Unreported Supreme Court, 22nd August 2014) where Denham C.J., delivering the judgment of the court stated as follows at paragraph 18:

*"Thus the general principle of law is that if an order of a court does not show an invalidity on its face, in particular if it is an order in relation to post-conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In such circumstances the remedy of article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."*
21. Counsel submitted that in this case there was a fundamental lack of jurisdiction to make the second order of committal on 16th September, 2021, as the rules did not provide for a procedure whereby a party would simply allow the first order of committal to lapse and then at a much later time, go in and obtain a second such order. Counsel submitted that what should have been done, was that the plaintiff's should have sought the renewal of the original order of committal with the leave of the court, during the continuance of that order, or during any subsequent renewal thereof.
22. A second ground on which it was alleged that the detention of the applicant was not according to law, was due to the fact that while the plaintiffs in the civil action had obtained an order *for* possession of the property from the High Court on 11th June, 2018, they had not proceeded to obtain an order *of* possession subsequently. It was submitted

that that was an essential step to take in the proceedings in order for a finding of contempt and failure to comply with the order, be made against the applicant.

23. It was submitted that the absence of an order of possession was a fatal flaw in the steps that were required leading up to the order of committal, on which the applicant had been arrested and detained in Mountjoy Prison. In this regard counsel referred to the decision in *PM v EM* [2020] IEHC 700 where Jordan J. stated: "The deprivation of the liberty of the citizen is such that the procedural requirements cannot be ignored or dispensed with."
24. In relation to the distinction between an order for possession and an order of possession, counsel referred to the decision of Butler J. in *Start Mortgages DAC v Rogers* [2021] IEHC 691, where the judge stated as follows at paragraph 24:

*"An order for possession as granted in 2008 does not, of itself, permit the plaintiff to take possession of the land the subject of the order. Rather, it demands that the defendants deliver of possession of the land to the plaintiff. In the event of failure to comply with such an order, as occurred in this case, execution becomes necessary and the plaintiff must convert the order for possession into an order of possession, which can then be executed."*

25. It was submitted that on these two grounds the continued detention of the applicant in Mountjoy Prison was unlawful.

**Submissions on Behalf of the Respondent.**

26. In his opening submission, Mr McGillicuddy BL accepted that in an article 40 application, the onus rested on the person who was detaining the applicant to show that that detention was "in accordance with law".
27. Counsel submitted that what the applicant was attempting to do in the present application, was to raise matters that ought to be raised either on appeal, or in appropriate judicial review proceedings. In particular, it was submitted that the applicant was trying to persuade the court to set aside the order made by Quinn J. on 16th October, 2019, which found that the applicant had been and continued to be in contempt of the order for possession made by the High Court on 11th June, 2018. Counsel submitted that if the applicant was dissatisfied with the order made by Quinn J. in October 2019, his remedy was either to appeal that order, or to seek to set it aside by way of judicial review proceedings.
28. It was submitted that in essence the applicant was seeking to set aside the order of Quinn J. made in October 2019 and the subsequent order of committal on the basis of some procedural irregularity on the part of the plaintiffs in not obtaining an order of possession after they had obtained an order for possession of the property from the High Court in June 2018. It was submitted that that was not a basis on which to direct the applicant's release from custody on an article 40 application.
29. It was submitted that it was only necessary for the respondent to establish on an article 40 application, that he has lawful authority for detaining the person in custody. It was

submitted that in this case, the order of Quinn J. dated 16th October, 2019 was good on its face. The order of committal which had issued on 16th September, 2021 was good on its face; it complied with the rules and therefore there was no basis to suggest that the detention of the applicant was not "in accordance with law". Accordingly it was submitted that the relief sought by the applicant should be refused.

30. It was submitted that insofar as the applicant had any complaint in relation to the validity of the order made by Quinn J., which held him in contempt of the order made by Haughton J., his remedy was either to appeal that order or proceed by way of judicial review. Counsel referred to the decision in *State (Royle) v Kelly* [1974] IR 259, where Henchy J. stated at p. 269:

*"The mandatory provision in article 40 section 4, subsection 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 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 an ancestry in the common law going back through the Petition of Right to Magna Carta. The purpose of this 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."*

31. Later in the same case, Walsh J. cited an earlier decision where he had stated as follows:

*"On a habeas corpus application by a person detained by order of the court, whether under sentence following conviction or otherwise, matters dealing with the weight of the evidence or irregularities of procedure which do not go to the jurisdictional basis of the trial or other court proceedings are not relevant unless the irregularities on the procedural deficiencies complained of are shown to be such as would invalidate any essential step in the proceedings leading ultimately to his detention."*

32. Counsel submitted that the Supreme Court had disavowed the use of the article 40 procedure to argue about the merits of decisions made by inferior courts or tribunals and had also reaffirmed the general principle that it must be shown that there was a fundamental injustice involved, before the court should order that the detention of the person concerned was illegal.

33. Without prejudice to the submission that the matters raised by the applicant were not such as to render the detention unlawful and therefore fell outside an article 40 application, counsel submitted that there was no basis for suggesting that the order of committal dated 16th September, 2021 was bad on its face or in any way wanting in jurisdiction. It was a new order of committal based on the order of Quinn J., which had found that the applicant was in contempt of the earlier order made by Haughton J. It was submitted that it was perfectly acceptable within the rules for a judgment creditor, or any other party in whose favour an execution order or committal order had been made, to

seek a further order of committal from the Central Office of the High Court. In in this regard, counsel referred to the decisions in *Wymes v Tehan* [1988] IR 717, where this use of procedure had been recognised and condoned by the court. In particular counsel referred to the following passage from the judgment:

*"It is difficult to see why it should not be permissible to issue a new writ even if partial execution has already taken place on foot of the original writ. The judgment creditor applying for a new writ instead of seeking renewal of the original writ will thereby lose the priority he gained in the dating of the original writ."*

34. Counsel submitted that that statement of the law had been adopted and applied by Dunne J. in *Carlisle Mortgages Ltd v Canty* [2013] 3 IR 406, where the learned judge stated as follows:

*"However there is absolutely nothing to prevent the plaintiff from seeking to have another execution order in the form of an order of possession issued in the usual way in the central office. It should be remembered that the only reason why the order of possession in this case was not executed during its continuance was because of the conduct of the defendant. The only penalty, if that is the appropriate word to use, for the plaintiff is that it does not have priority in respect of its execution order over any other execution order that might be in existence in respect of the same property."*

35. In relation to the order for possession/order of possession point, the respondent submitted that that was an irrelevant argument. He submitted that the High Court order of 16th October, 2019 set out a clear decision that the applicant was guilty of contempt and set out that he was to be held in Mountjoy prison and detained there until he purged his contempt. The committal warrant before the court on which the governor detains the applicant is to the same effect. It was submitted that any attempt to re-argue the order for possession/order of possession issue in an article 40 application was inappropriate, having regard to the clear terms of the case law from the Supreme Court. In this regard counsel referred to the decisions in *Roche (aka Dumbrell) v The Governor of Cloverhill Prison* [2014] IESC 53; *FX v Clinical Director of the Central Mental Hospital* [2014] IESC 1 and *SMcG v Child and Family Agency* [2017] IESC 9.
36. Finally, in response to the argument that had been raised by the respondent on the issue of a fresh order of committal issuing in this case, counsel for the applicant submitted that the decisions in the *Wymes* and *Carlisle* cases, and the statements referred to by the respondent, were obiter and were made in cases that referred to execution orders. It was submitted that they had no relevance to an order of committal, which was totally different in character, involving the deprivation of a person's liberty.

### **Conclusions.**

37. This application was heard by the court on the 17th November, 2021. The court was greatly assisted by the helpful oral and written submissions that have been submitted on behalf of the parties.

38. There is considerable substance to the argument put forward by counsel on behalf of the respondent, that relief on an article 40 application must be refused if the respondent can establish that the detention of the applicant is in accordance with law. There is also force in his argument that if the applicant has any cause for complaint in relation to the order made by Quinn J. on 16th October, 2019, or the order of committal dated 16th September, 2021, his primary avenue of relief was to either appeal the relevant order, or seek a judicial review thereof.
39. However, where a person's liberty is at stake and has been removed, it is incumbent on the court to deal with the matter in the most expeditious way possible. Having considered the arguments of counsel and the cases cited by them both in their oral argument and in the written submissions, the court is of the view that the respondent has established that the detention of the applicant in Mountjoy Prison is in accordance with law.
40. The committal order on which the applicant has been detained was based on the order of Quinn J. made on 16th October, 2019, in which he found that the applicant was in contempt of the order for possession that had been made by Haughton J. on 11th June, 2018 and in those circumstances, the judge directed that the applicant be detained in Mountjoy Prison until he purged his contempt by complying with the order for possession.
41. The applicant was present in court when the order was made by Quinn J. on 16th October, 2019. He did not take any steps to appeal that order, or to set it aside by way of an application for relief by way of judicial review.
42. The committal order which issued from the central office of the High Court on 16th September, 2021 is good on its face. It recites the previous orders that had been made by the High Court on 16th October, 2019 and 11th June, 2018; it specified in what way the applicant had been found in contempt of the order for possession and specified how he could go about purging his contempt if he chose to do so. There were no lacunae or errors on the face of that order.
43. It is the order of committal dated 16th September, 2021, which was based on the order of Quinn J. dated 16th October 2019, which formed the legal basis for the applicant's detention in Mountjoy Prison. The applicant has not established that there is any fundamental irregularity, or unfairness in the making of either of those orders. Having regard to the statements of law in the cases cited by counsel for the respondent, as outlined earlier in this judgment, the court is of the view that insofar as the applicant may have an argument to make that the order of committal dated 16th September, 2021 is invalid, his remedy is to seek to overturn that order by way of an application for judicial review.
44. The court is of the view that the applicant has an arguable case that the Central Office of the High Court did not have jurisdiction to issue a fresh committal order. However the court has to recognise that there are statements in other cases, notably in the *Wymes* and *Carlisle* cases, to the effect that in relation to execution orders, a party is always entitled to seek a fresh execution order, rather than a renewal of a previous order, even



though seeking the fresh order will cause it to lose priority in terms of the assets in respect of which execution is sought.

45. The court recognises that there is merit in the counter argument put forward by the applicant, to the effect that those dicta are not of relevance to this case, due to the fact that in this case one is dealing with an order of committal, which involves a deprivation of a person's liberty, and is therefore of a wholly different character to the types of execution orders that were being considered in the *Wymes* and *Carlisle* cases. Nevertheless, where there are dicta of a High Court judge which suggest that the procedure used in this case is permissible under the rules of court, this court would be slow to depart from such ruling, unless it was clear that those dicta did not apply to the case before the court.
46. All of that goes to show that while there may be an argument to be made by the applicant, it cannot be said that there was a fundamental lack of jurisdiction to make the order of committal in this case. The court is satisfied that the order of Quinn J. is valid on its face, as is the order of committal. That being the case, the court is satisfied that as far as an article 40 application is concerned there is a lawful basis for the detention of the applicant. If the applicant wishes to set aside the committal order of 16th September, 2021, the court is satisfied that he must seek to do so by means of an application for judicial review.
47. A further reason why the court believes that that is the appropriate avenue of redress, is the fact that if this court were to determine the issue on this application, and if it were to determine that application in favour of the applicant, that would effectively deprive the plaintiffs in the substantive action of a means of enforcing the order made by Quinn J. on 16th October, 2019. Furthermore, that would effectively mean that the plaintiffs would be deprived of any means of enforcing that order, because they could not seek a renewal of the original order of committal dated 2nd December 2019, because such a renewal application must be made during the continuance of the original order for committal, or renewed order, as the case may be.
48. While the plaintiffs in the substantive action were notice parties to the article 40 application, they did not have locus standi to make submissions before the court. The court is satisfied that it would be most unjust to make a finding on this article 40 application which could have such far-reaching effect on the rights of the plaintiffs in the substantive action, without giving them an opportunity to be heard on that aspect. For that reason it is preferable that the application to set aside the order of committal should be brought by way of judicial review in the original proceedings, thereby giving the plaintiffs who had obtained that order an opportunity to argue in favour of its validity.
49. Turning to the ancillary argument put forward by the applicant concerning the order for possession/order of possession point, that is alleged to have been a procedural irregularity that occurred after the order was made by Haughton J. on 11th June, 2018 and before the finding of contempt was made by Quinn J. on 16th October, 2019. The court is not satisfied that there is substance in this argument.

50. It is unrealistic to expect a person who is detaining the applicant on foot of a committal order issued on 16th September, 2021, which is regular on its face, to be able to address alleged infirmities in the procedure in civil litigation between separate private parties many years prior to the order on which the lawfulness of the detention is said to rest.
51. It is unreasonable to expect the present respondent to be able to answer any allegations of procedural irregularity, which were alleged to be the fault of unconnected third parties many years previously. The court accepts the submission made by the respondent that that issue falls to be addressed in separate judicial review proceedings, if at all, rather than in the present article 40 application.
52. In that regard it must be noted that the applicant is long out of time to appeal the order of Quinn J., or to challenge it by way of judicial review. The court is satisfied that the argument put forward by the applicant in this regard is not sufficient to warrant the making of an order pursuant to article 40 of the constitution. Any such irregularity must be established by means of a judicial review application.
53. In summary therefore, the court is satisfied that the order of committal dated 16th September, 2021 on foot of which the applicant is detained in Mountjoy Prison, is regular on its face and complies in all respects with the provisions of the rules of the Superior Courts. It was based on a valid order of Quinn J. of 16th October, 2019. That order was not appealed, or challenged by the applicant. In these circumstances, the court is satisfied that the detention of the applicant in Mountjoy Prison is in accordance with law. Accordingly, the court refuses to grant the relief sought by the applicant herein.
54. Insofar as the applicant may feel aggrieved by the order of committal made on 16th September, 2021, his remedy in that regard is to bring an application to have it set aside by way of judicial review.