THE SUPREME COURT

IN THE MATTER OF AN APPLICATION PURSUANT TO

ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

[Supreme Court Record No. 2018/121]

Clarke C.J.

McKechnie J.

Dunne J.

Charleton J.

Irvine J.

BETWEEN

PATRICK RYAN

APPLICANT/APPELLANT

AND

THE GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

Judgment of Ms. Justice Dunne delivered on the 19th day of March 2020

Introduction

1. The issue that arises for consideration in this case is whether it is permissible to dismiss an application for an inquiry pursuant to Article 40.4.2 of the Constitution on the grounds that the application constitutes an abuse of process or whether the Court is limited solely to the question of whether the detention of the applicant is in accordance with law. In addition, the appellant was given leave in the Determination of this Court to argue a second point, namely that the Court of Appeal erred in law in holding that, notwithstanding some blurring of the lines between the exercise of the District Court's civil and criminal jurisdictions, there was no unfairness to the appellant in the conduct of the proceedings giving rise to his detention, despite the complaints of his not being informed of the criminal charge against him, not being asked how he wished to plead, there being no hearing of the charge, there being no evidence led to support the charge, there being no opportunity to challenge the evidence relied on in support of the charge, there being no opportunity given to him to adduce evidence in his defence and the existence of a situation where the District Court Judge who convicted and sentenced him was the alleged victim of the crime the appellant had committed, in breach of the "*nemo judex in causa sua*" principle.

The Nature of the Proceedings

2. These proceedings concern an application for an inquiry pursuant to the provisions of Article 40.4.2 of the Constitution which commenced at the direction of Noonan J. on 24th February, 2017. Article 40.4.2 of the Constitution states:

> "Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law."

3. The remedy provided by Article 40.4.2 of the Constitution is the successor to the old writ of *habeas corpus* and is contained in the section of the Constitution which deals with fundamental rights. The scope of Article 40.4.2 extends beyond the situation of an individual who is detained following a decision of a court but it is not necessary to consider all of the circumstances in which an inquiry pursuant to Article 40.4.2 can be initiated for the purposes of this case. It is relevant to note the terms in which Article 40.4.2 is expressed. As can be seen, once a complaint is made in relation to a person whom it is alleged is being unlawfully detained, the High Court is obliged ("shall forthwith") to immediately embark on an inquiry into the complaint that the individual concerned is unlawfully detained. The importance of the remedy provided for in Article 40.4.2 flows from Article 40.4.1 of the Constitution which states that:

> "No citizen shall be deprived of his personal liberty save in accordance with law."

4. It can be seen therefore that Article 40.4.2 provides a speedy mechanism to ensure that if a complaint is made as to the lawfulness of an individual's detention, the matter can be inquired into and if it is found that the individual concerned is unlawfully detained then the person concerned will be released immediately.

5. Given the fact that an application for an inquiry pursuant to Article 40.4.2 is made in circumstances where it is alleged that an individual is being unlawfully detained, it is not surprising that such applications are often made as a matter of urgency and this can lead to a situation in which the commencement of such an application is not the subject of strict requirements in relation to the procedures to be followed. This was noted by Finlay C.J. in the case of *McGlinchey v. Governor of Portlaoise Prison* [1988] I.R. 671 (hereinafter "*McGlinchey*") at page 701 saying of such an application, it is:

> ". . . not subject to any special rules, and deals only with the question of the legality of the detention of the person who applies. It is given such a simple and uncomplicated procedure because it deals with an essential and vital matter, the

liberty of the individual. It is therefore important that it should not be debased by being used for purposes for which it was not intended."

Likewise, Charleton J. in *Kane v. The Governor of the Midlands Prison* [2012] IEHC 511 commented at paragraph 2:

> "…The Constitution is a law in itself as well as being the fundamental law of Ireland. The entitlement to this procedure is not to be adjusted or abridged by any form of rule which undermines the swift and direct right of anyone within the State to challenge the legality of any apparent case of wrongful imprisonment or detention. Therefore, on such an application the High Court may adopt such procedures as are suitable to a proper enquiry into the issue of lawfulness of detention. Quite often, the prison authorities will proceed to indicate why it is claimed detention is lawful and such justification may be challenged by contrary evidence, by submission or by cross-examination. If other procedures better suit the nature of the case, these may be followed."

6. Thus, the nature and importance of the remedy is such that it has been recognised that it is not subject to strict procedural rules or regulations. Nevertheless, it is important to emphasise that this valuable remedy should not be utilised when the matters at issue as to the detention of the individual are more properly decided by judicial review, appeal or where another appropriate mechanism such as an application for bail is available to the individual.

7. The fact that the procedure by which an Article 40.4.2 inquiry can be initiated is flexible and is not bound by any strict procedural rules or requirements does not mean that certain basic standards can be ignored or do not apply. As an Article 40.4.2 application is initiated by an ex parte application, the applicant has a duty of good faith to set out all relevant factual and legal matters to the Court in making the application. Thus, as Kelly J. explained in the case of *Adams v Director of Public Prosecutions* [2001] 2 ILRM 401 at p. 416:

> "On any application made *ex parte* the utmost good faith must be observed, and the Applicant is under a duty to make a full and fair disclosure of all the relevant facts of which he knows, and where the supporting evidence contains material misstatements of fact or the Applicant has failed to make sufficient or candid disclosure, the *ex parte* order may be set aside on that very ground…The obligation extends to counsel. There is an obligation on the part of counsel to draw the judge's attention to the relevant Rules, Acts or case law which might be germane to his consideration. That is particularly so where such material would suggest that an order of the type sought ought not to be made."

8. As is observed in Delaney and McGrath on Civil Procedure (4th ed.) having referred to that passage at para. 31-107:

"If an applicant fails to comply with this obligation then, as discussed further below, this may provide a basis for an application to set aside the grant of leave."

The observations of Kelly J. were made in the context of applications for leave to apply for judicial review. The fact that an application for an Article 40.4.2 inquiry is not the subject of strict rules or procedures is clear but the question that arises in this appeal is whether any consequences should follow in the case of a failure to comply with the duty of utmost good faith in the context of an application for an inquiry pursuant to Article 40.4.2 of the Constitution and if so, what those consequences should be.

Background

9. The background to this matter stems from proceedings which took place in the District Court pursuant to the provisions of s. 6 of the Enforcement of Court Orders Act 1940 ("the Act of 1940") as substituted by s. 2 of the Enforcement of Court Orders (Amendment) Act 2009 ("the Act of 2009"). Previously, in 2013, Leixlip and District Credit Union Limited (hereinafter referred to as the Credit Union) had obtained judgment in the Circuit Court against the appellant (hereinafter referred to as Mr. Ryan). Mr. Ryan failed to pay the amount of the judgment and the Credit Union sought an instalment order. Ultimately, Mr. Ryan was required to attend before the District Court for an examination as to his means but did not attend and thus failed to satisfy the court that he was not able to pay the debt due in one sum or by instalments. As a result, an instalment order was made against Mr. Ryan ordering him to pay the total sum due in monthly instalments of €300 each. He did not appeal the making of that order and did not make any payments on foot of the instalment order. As a result, the Credit Union commenced proceedings pursuant to s. 6 of the Act of 1940 referred to previously. The mechanism provided for under s. 6 of the Act of 1940 is set out in the judgment of Noonan J. in this matter but briefly it provides that where a debtor has failed to comply with an instalment order a creditor may apply for a summons directing the debtor to appear before the District Court. It then sets out a number of orders that can be made when the matter appears before the District Court including an order for the arrest and imprisonment of the debtor for any period not exceeding three months. There are limitations on the making of such an order and the Court, before doing so, must be satisfied beyond reasonable doubt that the failure to comply with the instalment order is not due to inability to pay but is the result of wilful refusal or culpable neglect and further that the debtor has no goods which could be taken in execution under any process of the court by which the judgment, order or decree for the debt was given. (See s. 6(8)). Provision is made under the Act for the grant of legal aid to a debtor in such proceedings.

10. The summons pursuant to s. 6 of the Act of 1940 came before the District Court on the 12th July, 2016 and on three subsequent occasions. Transcripts of the digital audio recording from the court were available in respect of the latter three dates. Ultimately, in the course of the hearing before the District Court on the last of those occasions, the 21st February, 2017, a warrant of committal was issued by the District Judge against Mr. Ryan for contempt of court and it was executed. It states as follows:

"The said person, namely, PATRICK RYAN has in open court wilfully insulted me + refused to engage with the court committed a contempt of this court as follows:- by (1) Contrary to (3) (section. 6 of the Summary Jurisdiction (Ireland) Amendment Act, 1871)

AND WHEREAS I do now, at the said sitting and acting solely in execution of my duties as such judge, hereby adjudge that the said person for that contempt be committed to prison for the period of seven days,"

11. It is not necessary to set out in detail the interactions between Mr. Ryan and the District Court Judge which led to the order being made committing him to prison for contempt. The exchanges between Mr. Ryan and the District Court Judge are set out in detail in the judgment of Noonan J. and I do not propose to repeat them here. Suffice it to say that on the occasions when Mr. Ryan appeared before the District Court his behaviour was uncooperative, he refused to answer questions put to him and repeated constantly a number of pointless remarks, resorting to a series of meaningless mantras. He was warned as to his behaviour on a number of occasions by the District Judge. On the 13th September, 2016 when the matter was before the District Court, an order was in fact made by the District Judge to the effect that there had been wilful contempt of the court and that a warrant for his detention was to issue for Mr. Ryan to be held in contempt. However, it would appear that that warrant was not executed. As Noonan J. observed in his judgment at para 10 "(t)his seems to have been because there was no garda present in court at the relevant time."

12. It appears that the matter was then adjourned to the date in January 2017. On that occasion the situation did not improve. Mr. Ryan continued to use the same mantras as had previously been used by him and the District Judge sought to obtain a statement of means from Mr. Ryan and adjourned matters for one further period of time in order to allow Mr. Ryan to comply. On that occasion when the matter was being adjourned, the District Judge stated as follows:

"Now, in the circumstances having regard to the difficulties which we experienced. And insofar as I want to be 100% clear in all of this, I'm going to put the matter back for a shorter period of time, for the respondent to produce a statement of means so I can assess his capacity to pay. And I want that statement of means to be available to this court in advance of the adjournment date and to the claimant's solicitors in advance.

And I will renew my warning that if a statement of means is not provided and if there is not cooperation with the court on the next date, you are at risk, sir.

And therefore, I offer you the opportunity again, that if you decide to come to court and continue with the kind of carry on that you did on the previous occasion you should bring a solicitor with you. And because – and that solicitor will be granted legal aid, so you have no excuse for not bringing one. But there will be consequences upon the next day. Do I make myself very clear, sir?"

Mr. Ryan responded by saying, "I don't consent to this going ahead, there is no claimant here".

13. Counsel for the Credit Union on that occasion objected to the granting of a further adjournment but the District Judge reiterated the fact that he was giving Mr. Ryan an opportunity to obtain a solicitor and that he would grant legal aid to the applicant in that regard. Hence, the matter was adjourned to the 21st February, 2017. As I have outlined, it was following the hearing on that date that an order was made committing Mr. Ryan to prison for contempt of court and pursuant to the provisions of s. 6 of the Act.

The judgments of the High Court and the Court of Appeal

14. Following the decision of the District Court, Mr. Ryan was imprisoned. The next event that occurred was an application for an inquiry pursuant to Order 40.4.2 of the Constitution of Ireland. That application was initiated at approximately 12.55 on the 24th February, 2017 and as a result of the evidence before the High Court contained in an affidavit sworn by the solicitor for Mr. Ryan, an inquiry was commenced by the High Court and it was directed that the relevant parties be notified and that the respondent (hereinafter referred to as the Governor) should certify in writing the grounds of the detention of Mr. Ryan and the matter was directed to be returnable before the Court at 3pm that afternoon. Mr. Ryan was duly produced at 3pm and the Governor certified in writing that Mr. Ryan was being held pursuant to a warrant of committal dated the 21st February, 2017 which was exhibited by him. The warrant was in the terms referred to previously.

15. The manner in which the inquiry proceeded before the High Court is summarised in the judgment of the Court of Appeal at paragraph 4 onwards as follows:

> "4. The initial basis on which an inquiry under Article 40.4.2 was requested, and indeed granted, was an assertion on the appellant's behalf by his solicitor that the appellant had been incarcerated solely because he refused to accept the jurisdiction of the court to hear a claim in a civil matter involving an amount of €38,000 that, in his belief, exceeded the jurisdictional limit of the District Court. However, once the High Court had agreed to open an inquiry, and senior and junior counsel were retained on the appellant's behalf, the number of complaints was greatly expanded to include challenges to the validity of the warrant on the grounds that it was duplicitous, failed to particularise the offence of which the appellant had been convicted, and specified an offence unknown to the law. It was also sought to challenge the lawfulness of the detention of the appellant within the four walls of that inquiry on the grounds that he was denied fair procedures in the District Court. In the latter regard it was alleged that he was not informed of the criminal charge against him; that he was not asked how he wished to plead; that there had been no hearing of the charge; that no evidence was led; that he was not allowed to challenge the evidence relied on as supporting the charge; that he was not afforded an opportunity to lead evidence in his defence, and; that the District Court judge had acted as a judge in his own cause and had breached the maxim *Nemo iudex in causa sua*. In addition, it was alleged that the statutory provision on foot of which

the appellant had been convicted, namely s.6 of the Act of 1871, was both unconstitutional and incompatible with Article 6 of the European Convention on Human Rights, various European Union Directives and the Charter of Fundamental Rights of the European Union.

5. The substantive inquiry proceeded over two days on the 3rd and the 7th of March 2017, at the end of which the High Court found the detention of the appellant to have been lawful and dismissed the appellant's claim for relief under Article 40.4.2 of the Constitution."

16. It is apparent that once the initial application for an Article 40.4.2 inquiry had commenced, the nature of the complaints made by Mr Ryan changed significantly. Further, it is abundantly clear from the judgment of the High Court that the High Court judge was unhappy with some of the averments relied on by Mr. Ryan and his representatives in order to initiate the inquiry pursuant to Article 40.4.2 of the Constitution. Reference was made in the first instance to the first affidavit sworn on behalf of Mr. Ryan by his solicitor in which the following averments appear at para 5:

> "I say that at the outset of proceedings the applicant indicated that he was taking issue with the jurisdiction of the District Court, in particular because the amount involved, that was the subject of the civil proceedings, was €38,000 and this exceeded jurisdiction of the District Court. I say that the applicant indicated to the Court that he was not consenting to the process on this basis."

This was described by the trial judge as being entirely incorrect having regard to the transcript of the hearings before the District Court. He then referred to further averments in the affidavit of the solicitor where she stated:

"6. I say that the judge then requested a statement of means from Mr. Ryan and told the applicant he would be jailed if he continued. I say the applicant asked if it was a civil or criminal court and whether the court was going to sign the committal order to which the judge replied, 'the ink was dry on it already'.

7. I say that the judge did not offer the applicant legal representation and I say the applicant was given no opportunity to purge his contempt and no hearing was conducted in relation to the issue of contempt of court."

As the trial judge observed, this description significantly misrepresents what occurred before the District Court on the 21st February, 2017.

17. The solicitor in her affidavit said that she had been contacted by Mr. Ryan's son in respect of the matter and that he informed her of the information in the affidavit. She added that the sole reason for Mr. Ryan being imprisoned for contempt was that he refused to accept the jurisdiction of the court. Subsequently, following his release on bail, Mr. Ryan swore an affidavit himself in which he averred to having read the grounding affidavit of his solicitor and that he could verify the contents thereof. Again, the trial judge was critical

of this in circumstances where Mr. Ryan was in a position to know that the facts deposed to by his solicitor were not correct. Equally, the trial judge was very critical of the fact that neither Mr. Ryan nor his solicitor referred to the fact that the proceedings had been before the District Court on four separate occasions. Likewise, he was critical of the fact that in his affidavit Mr. Ryan deposed as follows at para 8:

> "8. I say that the judge then told me that he was locking me up for seven days for contempt. He didn't offer me an opportunity to consult with a solicitor. He did not offer me an opportunity to purge my contempt."

18. As the trial judge said, this was materially misleading. More information was provided to the Court by means of a second affidavit sworn by Mr. Ryan's solicitor which was then followed by a third affidavit. From this more information emerged as to how instructions were obtained in relation to Mr. Ryan and from whom. Ultimately, oral evidence was heard from Mr. Ryan's solicitor and from Mr. Ryan's son.

19. The High Court went on to summarise the law in relation to Article 40.4.2 of the Constitution. Having done so, the trial judge concluded that the application before the Court on the "true facts as they emerged" was not appropriate for the Article 40.4.2 procedure. The Court observed at paragraph 49 of the judgment:

> "49. As it was initially presented by the applicant's solicitor, it was alleged that the sole reason that the applicant was imprisoned was that he refused to accept the jurisdiction of the District Court based on a claim for €38,000.00 which plainly exceeded that jurisdiction. Therefore despite the fact that the warrant under challenge was in my opinion regular on its face, the case was presented as one involving such a fundamental denial of justice as to arguably warrant the intervention of this Court pursuant to Article 40. As events transpired however, these supposed facts were quite untrue and the applicant, whatever about his solicitor, knew them to be untrue and did nothing to correct them when he had the opportunity. On the contrary, as I have previously noted, he swore an affidavit when he was at liberty and with the benefit of legal advice in which he verified that the contents of the solicitor's affidavit were true and refrained from any mention of the many highly material events that occurred at the previous hearings."

He then posed the question as to what extent, if any, could the Court refuse such relief on any basis other than that the detention is lawful. Having considered a number of views on this issue the High Court judge expressed the following view at paragraph 52 of his judgment:

> "52. I have little hesitation in concluding that the manner in which this matter was brought before the court by the applicant constitutes a clear abuse of process for the reasons I have already identified. It is of course well settled that any party moving the court ex parte is bound by a duty of candour and utmost good faith towards the court. I cannot see in principle why that duty ought not equally apply in Article 40 applications. Accordingly, in my opinion, this application should be

dismissed on this ground and further on the ground that it is not in any event appropriate for the Article 40 procedure."

The trial judge went on to consider whether if he was wrong in that conclusion it was appropriate to find that the detention of Mr. Ryan was lawful or unlawful. Having considered the issues raised in the course of the Article 40.4.2 proceedings he concluded that the detention of the applicant was lawful.

20. The Court of Appeal in its judgment at paragraph 22 stated:

"22. There is a long standing debate concerning whether relief under Article 40 can be refused on the grounds either that the application represents an abuse of the process in itself, alternatively in the manner in which it is presented."

Reference was made to the well-known book by Dr. Kevin Costello entitled "*The Law of Habeas Corpus in Ireland*" (2006) (Four Courts Press: Dublin). Reference was also made to a number of the authorities cited in Dr. Costello's book. I will refer to these later. At paragraph 33 onwards, the judgment continued as follows:

"33. It was unconscionable that the High Court was not informed by the appellant, or by anybody on behalf of the appellant, that there had been multiple hearings before the District Court; that the appellant had been repeatedly warned about his behaviour; that he had been offered the opportunity to retain legal advice and told he would be granted legal aid for that purpose; that he was told he was at risk of imprisonment if he continued to behave as he was behaving; and that on a previous occasion the District Judge had been disposed to find him in contempt and that he had only avoided being incarcerated on that previous occasion due to the non-availability of a member of An Garda Síochána to take him into custody.

34. The High Court judge was entirely justified in my opinion in arriving at the conclusions specified in the passage from his judgment, as quoted at paragraph 16 above.

35. I am satisfied that the High Court judge had more than sufficient evidence to conclude, and that he was correct in his conclusion, that this application for an inquiry was brought in circumstances that were abusive of the process. He would have been entitled for the protection of the Court's process not to continue with the inquiry in those circumstances and to dismiss the application without going further. However, he did not in fact do so. Rather, having expressed the view that the application should be dismissed on the grounds that it involved an attempt to mislead the court and was therefore abusive of the court's process, he proceeded notwithstanding that that was his view to consider in any event the merits of the application in case he was '*wrong in reaching that conclusion'*. His conclusion, '*were it necessary for me to express a view'*, was that the detention of the appellant was lawful."

21. In the circumstances, the Court of Appeal did not uphold those grounds of appeal which related directly or indirectly to the abuse of process finding.

Discussion on the abuse of process issue

22. At the outset of this discussion, I think it is important to say that the facts of this matter as disclosed in the course of the Article 40.4.2 hearing are disturbing. I appreciate the fact that in circumstances where the liberty of an individual is at stake, who it is thought has been wrongfully detained, it may be difficult to obtain clear and full instructions directly from the individual concerned. That being so it is not unusual for the initial affidavit grounding an application for an inquiry to be sworn by someone else who is in a position to say what led to the detention. Here, the initial affidavit was sworn by Mr. Ryan's solicitor who was not present in court on the occasion when he was imprisoned. As I have indicated, I understand that it may be difficult for a solicitor to get accurate and reliable information as to what occurred which has led to an individual being imprisoned when that solicitor was not present in court and has no clear instructions from anyone who was in court but great care must be taken by any solicitor who initiates such an inquiry to ensure that any affidavit sworn by them is accurate and sets out as fully and carefully as possible the background to the matter. What was presented to the High Court in this case to initiate the inquiry was far from accurate, did not set out the true position and positively misrepresented what had occurred in the District Court. This led to the finding by the High Court, upheld by the Court of Appeal, that there had been an abuse of process on the part of Mr. Ryan.

23. To paraphrase the words of Finlay C.J. in *McGlinchey* referred to at the beginning of this judgment, it is important that such an application is not debased by being used for purposes for which it was not intended. It was certainly never intended that the High Court should have been allowed to be materially misled as to what occurred in the District Court on the initial application for an inquiry pursuant to Article 40.4.2. If nothing else, these proceedings demonstrate the value of having digital audio recording (DAR) available in order to find out what in fact occurred in Court leading to the detention of the individual concerned. The transcripts of the three hearings before the District Court painted an entirely different picture to that conveyed on affidavit by and on behalf of Mr. Ryan. It must be borne in mind in this case that whatever deficiencies were exposed in the affidavits of Mr. Ryan's solicitor, those deficiencies were compounded by the failure of Mr. Ryan to present a true and accurate account of what had occurred when he had the opportunity to swear an affidavit as to the circumstances. Without the DAR, the High Court would have been left with the impression that the District Court judge in this case had behaved in a way which was in excess of his jurisdiction and a denial of Mr. Ryan's fundamental rights. In fact, the DAR demonstrates the great patience with which the District judge dealt with the matter notwithstanding the way in which Mr. Ryan behaved in court. I will return to this aspect of the matter later. However, in all the circumstances, I have no difficulty in accepting that the manner in which this application for an Article 40.4.2 inquiry was made amounted to a serious abuse of process which has resulted in a considerable amount of time being taken up by the High Court in dealing with this matter involving hearings on the 24th February, 2017, the 3rd March, 2017, the

7th March, 2017 and the 27th March, 2017 and resulting in a written judgment of the High Court delivered on the 3rd April, 2017, not to mention subsequent hearings on appeal.

24. What follows from all of this? Is it appropriate on that basis to dismiss the proceedings as an abuse of process? I have already alluded to the fact that if these were judicial review proceedings as opposed to proceedings in relation to Article 40.4.2, there is a strong possibility that an application could have been successfully made to set aside the grant of leave. (See *Adam v Director of Public Prosecutions* referred to above). Alternatively, the proceedings could have been dismissed as an abuse of process following a hearing. What then of these proceedings which are commenced pursuant to Article 40.4.2 of the Constitution? The essential point made on behalf of Mr. Ryan is that the nature of Article 40.4.2 is such that it imposes a duty on the High Court when an inquiry has been directed to proceed with that inquiry and thus precludes the possibility of the High Court dismissing the application as an abuse of process. It is contended that once an inquiry is directed the High Court is bound to address the question at the heart of the inquiry, namely whether the detention of the person concerned is lawful or not. The essential point made is that the High Court cannot refuse to release a person whose detention is unlawful by reason of the fact that that individual has abused the process of the court in obtaining an inquiry pursuant to Article 40.4.2.

25. The High Court judge considered a number of authorities as to the circumstances in which the Article 40.4.2 procedure can be invoked including *Child and Family Agency v. McG and J.C.* [2017] IESC 9, [2017] 1 I.R. 1 and further considered a number of passages from Costello, *op. cit*. at pages 100 to 104 in which some authorities were examined by the author leading to a conclusion that even though as the High Court judge put it at para 50:

> "…Traditionally the view has been taken that unlike judicial review, habeas corpus is not a discretionary remedy. The detention is either lawful or not."

The position is, as stated by Costello, not "absolute" (page 100). He said:

> "The unqualified assertion that the remedy is non-discretionary is difficult to reconcile with cases where the remedy has been withheld on the ground that the applicant has been guilty of abuse of process, or where release has been denied on the ground that the public welfare, or the welfare of the prisoner, might be compromised by discharge."

The author then cited a number of authorities to support that point of view. The Court of Appeal considered this issue at paragraph 22 to 36 and again made reference to Costello. The Court of Appeal observed:

"22. There is a long standing debate concerning whether relief under Article 40 can be refused on the grounds either that the application represents an abuse of the process in itself, alternatively in the manner in which it is presented. One school of thought, whose most high profile advocate was perhaps the late Supreme Court

judge, Walsh J, as expressed in *The State (Aherne) v Cotter* [1982] I.R. 188, maintains that the proviso to Article 40.4.2 of the Constitution ('unless satisfied that he is being detained in accordance with law') limits the jurisdiction to refuse release to one ground only: namely where the High Court is satisfied that the detention is in accordance with law. There is, however, a second school of thought which maintains that a more flexible approach may be adopted and that relief may be refused on extrinsic grounds in appropriate cases, albeit that this is a course of action to be adopted very sparingly indeed."

26. Not surprisingly, counsel on behalf of Mr. Ryan adhered to the first school of thought on this issue and contended that on an application under Article 40.4.2, the Court on an inquiry is limited to considering whether the detention of the person concerned is lawful or not and if it is unlawful, the Court must release the individual.

27. As was pointed out by counsel on behalf of Mr. Ryan, the Court of Appeal agreed with the approach of the High Court saying at paragraph 31 of its judgment:

"31. The Article 40.4.2 procedure has been entrusted to the High Court by the people of Ireland, and although *sui generis* in terms of its constitutional pedigree and the imperatives created by the Constitution, that procedure is a part of the High Court's process. It seems to me that the High Court must be entitled to act protect (*sic*) its own process, ultimately in the interests of ensuring that it can effectively perform the tasks entrusted to it by the Constitution, including the proper conduct of an inquiry under Article 40.4.2 procedure (*sic*) where requested to do so. If it is to be effective it is essential that public respect for, and trust and confidence in, the High Court be maintained, so that when it acts it does so with the authority that comes with enjoyment of that respect, trust and confidence. It would be inimical to that idea of authoritative action by the High Court in vindication of the right to liberty that it should be constrained from protecting its own process. I therefore agree with the High Court judge's observation that there is no reason why the duty of candour and of *uberrima fides* that applies in other forms of litigation should not apply in relation to applications under Article 40.4.2."

The Court went on to conclude at paragraph 35:

"35. . . . that the High Court judge had more than sufficient evidence to conclude, and that he was correct in his conclusion, that this application for an inquiry was brought in circumstances that were abusive of the process. He would have been entitled for the protection of the Court's process not to continue with the inquiry in those circumstances and to dismiss the application without going further. However, he did not in fact do so."

28. As the Court of Appeal noted, the High Court judge went on to consider the matter notwithstanding and reached the conclusion that the detention of the appellant was lawful. I have absolutely no difficulty with the view of the High Court and that of the Court of Appeal that the duty of candour and of *uberrimae fides* applicable in other forms

of litigation also applies to applications under Article 40.4.2. I appreciate the fact that, in circumstances such as occurred in this particular case, it may be difficult for a solicitor or anyone else making an application on behalf of an individual who has been detained to gather the information together but it is one thing to have difficulty in painting a complete picture and another thing entirely to engage in a process which results in a court being seriously misled, as happened in this case. Whatever about Mr. Ryan's solicitor who initially acted on instructions from third parties, there is absolutely no excuse whatsoever for Mr. Ryan to continue on a course of conduct which led to the swearing of an affidavit verifying incorrect information contained in the first affidavit of his solicitor. He knew that the picture presented in that affidavit was not correct, that it was misleading and a significant misrepresentation of what had occurred in the District Court but nonetheless he swore an affidavit verifying the facts set out in his solicitor's affidavit. Having said that, it is necessary to look at some of the authorities relied on by the High Court and the Court of Appeal to come to a view as to whether such an abuse of process on its own was sufficient to result in the dismissal of the application for an inquiry seeking the release of the individual concerned on foot of such inquiry.

29. A number of authorities cited in the submissions on behalf of Mr. Ryan are worth considering. Thus, in the case of *Application of Michael Woods* [1970] I.R. 154 (hereinafter referred to as "*Application of Michael Woods*"), the applicant in those proceedings had made a number of previous applications which found that he was lawfully detained. On a subsequent application the view was taken by the High Court that it no longer had jurisdiction to entertain such an application given the previous conclusion that he was lawfully detained. In his judgment in the appeal to the Supreme Court, Ó Dálaigh C.J. stated at page 162 onwards:

> "The President of the High Court has interpreted the Article as prohibiting a person who is detained from seeking habeas corpus if he has made an earlier application which has been rejected by the Supreme Court. The High Court, on receipt of a complaint under Article 40, s. 4, sub-s. 2, of the Constitution, is required to order the release of the person detained unless satisfied that he is being detained in accordance with the law. The same duty rests on the Supreme Court. This means that both courts are not confined to an examination of the illegality complained of by the applicant but are required to be alert for other grounds which could render the detention unlawful.
>
> . . . But this will not preclude an applicant from later raising a new ground even though that ground might have been, but was not, put forward on the first application.
>
> The principles which apply in litigation *inter partes* are not applicable in habeas corpus. The duty which the court has under the Constitution of ordering the release of a person, unless satisfied that he is lawfully detained, requires that the court should entertain a complaint which bears on the question of the legality of the detention - even though in earlier proceedings the applicant might have raised the

matter but did not do so. The duty of the Courts, to see that no one is deprived of his personal liberty save in accordance with law, overrides considerations which are valid in litigation *inter partes*. If, therefore, the applicant raised matters before the President on this application which had not been ruled on a previous application - and it is not clear from the documents before us whether such was the case or not - the duty of the High Court under the Constitution was to examine such grounds and say whether or not it was satisfied that the applicant was being detained in accordance with law."

30. The decision of the Supreme Court in the case of *Caffrey v. Governor of Portlaoise Prison* [2012] IESC 4, [2012] 1 I.R. 637 (hereinafter referred to as "*Caffrey*") was also referred to. The applicant had been unsuccessful in seeking an order pursuant to Article 40.4.2. The respondent cross-appealed by notice to vary on the basis that the High Court erred in incorrectly holding that the applicant was not subject to waiver/estoppel in respect of the claims he sought to advance. The appeal was refused but it was stated by Denham C.J. at paragraph 33 as follows:

> "33. As to the notice to vary, the High Court judge stated at pages 8 to 9: -
>
> '[9] What I do not believe can ever happen is that a prisoner, by his consent incidental to the process whereby he is imprisoned, or by failing to take a point as to jurisdiction at the appropriate time, or by apparently acquiescing in the form of his detention, can render what is not in law a valid form of imprisonment into a lawful detention. If a prisoner cannot be detained by a court in accordance with law, then incidental aspects of consent, acquiescence, or delay cannot make lawful what is unlawful. Nor would I believe that the Court has any discretion akin to that exercised in judicial review proceedings to refuse to make an order in *habeas corpus* proceedings. There is only one issue in this kind of enquiry: is the prisoner lawfully detained or not? That admits of only one answer where there is no legal foundation to a sentence of imprisonment.'
>
> I would affirm this approach by the High Court judge. The issue for the Court was whether the applicant was lawfully detained or not. The applicant could not be lawfully detained on the basis of his consent or acquiescence; it is a question of law. However, I also agree that the issues were more properly matters for a judicial review procedure. But, in the context of this appeal, in this Court, I would not refuse to determine the matter in the circumstances of the case."

31. Reference was also made in the written submissions to the decision in the case of *O'Farrell v. Governor of Portlaoise Prison* [2016] IESC 37, [2016] 3 I.R. 619, a Supreme Court decision, in which McKechnie J. in the course of his judgment which was one of the judgments of the majority, stated at page 688

> …Whilst I fully recognise and thoroughly agree that the underlying application in this particular case is without personal or humanitarian merit, nonetheless the rule

of law must prevail. One's consent to an illegal detention cannot change its nature: neither can one's objection to a lawful detention. Concepts such as those under discussion cannot make lawful that which is unlawful. If detention is in accordance with law, it is valid. If not, it is invalid."

32. MacMenamin J. in the same case at page 737, para 277 also observed:

> "277. The consequence of the application of this principle, as the law stands, is that a plea of waiver, consent or estoppel cannot assist the respondent."

33. It seems to me that those cases are very strong authorities for the proposition that in an application pursuant to Article 40.4.2, the role of the Court is to consider the question as to whether or not the detention of the individual concerned is lawful or not. That would appear to be so notwithstanding the actions of the individual concerned. Thus as is clear from *Caffrey* the issue of waiver/estoppel will not preclude the Court from giving a decision on whether or not someone's detention is lawful or not. Equally, it is clear from the *Application of Michael Woods* that the fact that someone has made numerous applications and has not apparently brought forward all the grounds appropriate to challenge his detention on a previous occasion does not mean that a court is not obliged to consider the legality of his detention.

34. As mentioned previously, reliance was placed by the trial judge in the course of his judgment on a quotation from Costello on the law of *habeas corpus* in Ireland at page 101 and 102 where the High Court judge quoted from Mr. Costello's book at para 50 of the judgment as follows:

> "There is also a significant body of case law which can only be explained on the basis that the release on Article 40.4.2 is not determined solely by reference to the legality of the detention, and that release may be denied on extrinsic grounds. The overriding constitutional interest which is most usually invoked is the integrity of the administration of justice. Thus, the Supreme Court has held that where a prisoner has not presented all available grounds of challenge in the one complaint, but has been guilty of unjustifiably staggering complaints over a succession of applications, an Article 40.4.2 enquiry may be dismissed. The High Court has refused relief on Article 40.4.2 where the application is of a technical nature, particularly where the circumstances, such as a long delay in raising the complaint, suggests that there is something disingenuous about the character of the complaint. The abuse of process rule was applied in *The State (Byrne) v. Frawley* a case which involved a jurisdictional complaint of a higher order of seriousness to that line of cases in which jurisdiction has conventionally been applied, and misconduct of a lower level than is usually classified as abuse of process. Two days after the complainant had been arraigned before a jury empanelled in accordance with the Jury's Act, 1927 the Supreme Court declared the 1927 Act unconstitutional. Nonetheless the trial proceeded and the accused was convicted before such an unconstitutionally empanelled jury. The Supreme Court declined to proceed with a post-conviction Article 40.4.2 enquiry on the ground that since

neither at the trial nor in his grounds of appeal to the Court of Criminal Appeal, nor in a subsequent appeal to the Supreme Court, had (presumably on the advice of his legal advisors) the question of the constitutionality of the jury been raised. The prisoner's apparent acquiescence, it was held, had compromised his complaint. The court, notwithstanding the relatively serious jurisdictional defect involved, refused redress."

35. To deal with the case of *The State (Byrne) v. Frawley* [1978] IR 326 first, I think that the judgments of the Supreme Court delivered by O'Higgins C.J. and Henchy J., both of whom agreed that the application pursuant to Article 40.4.2 should be dismissed, contain nothing to suggest that the application in that case was an abuse of process or indeed that abuse of process played a part in the dismissal of the application. O'Higgins C.J., in his judgment, concluded as follows at page 342:

> "In this case, as already indicated, no objection was raised by the prosecutor to the composition of the jury panel or to the jury which was actually sworn to try him. At the commencement of his trial on the 10th December, 1975, the decision in the *de Burca Case* ([1976] I.R. 38.) had not been given by this Court. It could perhaps, therefore, be said on his behalf that he could not at that stage have known what the decision would be. On the continuance of his trial after the decision in the *de Burca Case*. had been announced, both he and his counsel were fully alive to the legal position; yet no objection was taken. Did the absence of such an objection at that stage cure an invalidity and make constitutional an unconstitutional jury? I think not. Neither the absence of objection nor established acquiescence could achieve so remarkable a result. In my view, failure to raise any objection on the resumption of the trial on the 17th December, 1975, is entirely irrelevant. The prosecutor's trial was already proceeding at this stage and he had been given in charge, without objection, to a jury of persons qualified under the law to try him. Whatever his attitude might have been on the concluding day of his trial, it could have no effect on the validity of that trial.
>
> I am satisfied that the prosecutor was lawfully tried by a valid jury in accordance with Article 38, s. 5, of the Constitution and, for that reason, I conclude that his application for release under Article 40, s. 4, sub-s. 2, of the Constitution fails."

At page 350, Henchy J. made the following comment:

> "Because the prisoner freely and knowingly elected at his trial to accept the empanelled jury as competent to try him, I consider that he is now precluded by that election from claiming that the jury lacked constitutionality: . . . The prisoner's approbation of the jury was affirmed by his failure to question its validity when he formulated grounds of appeal against his conviction and sentence, and when his application for leave to appeal was argued in the Court of Criminal Appeal. It was not until some five months after his trial that he first put forward the complaint that the jury had been formed unconstitutionally. Such a *volte face* is impermissible. Having by his conduct led the Courts, the prosecution (who were

acting for the public at large) and the prison authorities to proceed on the footing that he accepted without question the validity of the jury, the prisoner is not now entitled to assert the contrary. The constitutional right to a jury drawn from a representative pool existed for his benefit. Having knowingly elected not to claim that right, it would be contrary to the due administration of justice under the Constitution if he were to be allowed to raise that claim in the present proceedings when, by deliberate choice, it was left unasserted at the trial and subsequently in the Court of Criminal Appeal. What has been lost in the process of events is not the right guaranteed by the Constitution but the prisoner's competence to lay claim to it in the circumstances of this case."

36. Accordingly what appears to me to emerge from the decision in that case is that the Supreme Court refused to conclude that the detention of the prosecutor in that case was unlawful in circumstances where he never challenged the validity of his trial in the course of the trial or subsequently on appeal by reason of the grounds which led in another case to the finding that the composition of the jury was unconstitutional. That is not the same as saying that his application was refused because of an abuse of process in the application for relief pursuant to Article 40.4.2. The prosecutor in that case had an opportunity had he so wished to challenge the validity of his jury in the course of his trial or at the very latest in the course of his appeal. There was a difference between O'Higgins C.J. and Henchy J. on the issue as to whether the jury in that case was lawful or unlawful but all of the members of the court were satisfied that in circumstances where the prosecutor had made no challenge in the course of the trial to the competence of the jury, he was precluded from doing so at a later stage. The point was that when the jury was empanelled, it was apparently lawfully empanelled in accordance with the law then in force. The legislation providing for the manner in which the jury was to be empanelled was then struck down and it was open to the prosecutor to raise the issue as to the validity of the composition of the jury but he did not do so. I find it difficult to view that decision as being a decision that supports the proposition that abuse of process could preclude an application for relief pursuant to Article 40.4.2. The point was that no challenge was made to the competence of the jury and therefore the trial that followed and resulted in the conviction of the prosecutor was a lawful trial and the point subsequently raised in the Article 40.4.2 proceedings was not open to the prosecutor. It is not an authority in my view for the proposition that abuse of process precluded him from raising that point.

37. The issue of the retrospective effect of a finding of unconstitutionality arose in a later case of *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88 (hereinafter "*A*"). There, in the appeal to the Supreme Court Geoghegan J. from p. 198 of his judgment considered at length the case of *The State (Byrne) v. Frawley* saying at p. 200, para 288:

> "288. The appeal to the Supreme Court produced judgements of considerable interest. It was unanimously held that the appeal should be dismissed. The majority of the court consisting of Henchy, Griffin and Parke J.J., rejected the reasoning of the divisional Court but held against the prosecutor on a narrower ground. The

minority consisting of O'Higgins C.J. and Kenny J. more or less upheld the reasoning of the High Court.

289. The leading judgement for the majority was delivered by Henchy J. In strident terms, he rejected a view which is thought might have been implied in the judgement of the divisional Court that even if the trial judge had personal knowledge of *de Burca v. Attorney General* [1976] I.R. 38, he was not obliged to deal with the jury issue unless it was raised before him by counsel and he also strongly rejected the view that the empanelled jury could be considered a valid jury on the grounds that each of them was eligible to be a juror. Henchy J came to the conclusion, however, that he should assume that the Circuit Court Judge did not know about *de Burca v. Attorney General* or at least did not know about it in any sufficient detail. He concluded, partly on the basis that the same counsel had been for the defence in each case, that a deliberate and informed decision was made to allow the trial to proceed before a jury in circumstances where the defence knew of *de Burca v. Attorney General*. Henchy J. considered that the prosecutor was precluded by that election from claiming that the jury lacked constitutionality. In arriving at that view, his opinion was reinforced by the lack of complaint in the Court of Criminal Appeal. It was not until some five months after the trial that the prosecutor first complained that the jury had been formed unconstitutionally. This was impermissible in the view of Henchy J.…

291. In conclusion, I am of the view that concluded proceedings whether they be criminal or civil, based on an enactment subsequently found to be unconstitutional, cannot normally be reopened. As I have already indicated, I am prepared to accept that there may possibly be exceptions. But in general it cannot be done. Nor as Murray C.J. and Hardiman J. have pointed out is there any precedent for a collateral challenge of this kind. I am also firmly of the opinion that if the law were otherwise there would be a grave danger that judges considering the unconstitutionality or otherwise of enactments would be consciously or unconsciously affected by the consequences, something which in the view of Walsh J. and endorsed by O'Higgins C.J. should not happen."

38. This case does not depend on a finding of unconstitutionality of legislation and whether that finding can or should have retrospective effect. I have referred to the decision in *The State (Byrne) v. Frawley* and the subsequent decision in A at some length simply because of the suggestion that *The State (Byrne) v. Frawley* was an authority for the proposition that abuse of process could result in a refusal of relief pursuant to Article 40.4.2. As I have tried to make clear, that is not the case.

39. The other two cases referred to by Costello are decisions in a case of *Re Gallagher,* Irish Times, 26 July 1983 and *Re Thomas McDonagh*, High Court, 24 November 1969. These two cases are dealt with at pages 132 and 133 of Costello. It appears that in the *McDonagh* case, there is a suggestion that multiple applications for relief might constitute

an abuse of process and there is an apparent quotation from Henchy J. which states as follows:

> "While it is understandable because of the special nature and purpose of habeas corpus that more than one application may be made in respect of a particular detention and that failure to state a particular complaint of unlawful detention in an earlier application should not *ipso facto*, be a bar to raising it in a subsequent application, I should have thought that where a person has been convicted and sentenced to imprisonment, it could not be said that he will never, during his imprisonment, be debarred from applying for habeas corpus notwithstanding how many previous applications he has already made. The result would be litigiousness and the process of the court would be abused."

It was said that that view was adopted by the Supreme Court in the case of *In re Gallagher* which also relied on a newspaper report. In that case according to Costello:

> "The Supreme Court rejected the application on two alternative grounds: that the Special Criminal Court judge was properly qualified, and secondly, that the complainant was guilty of an abuse of process in not submitting this ground in the previous Article 40.4.2 application."

The newspaper report records Henchy J. as stating:

> "This was not the first application Gallagher had made to be released on habeas corpus. It was the view of the Court, enunciated in the past that a person seeking habeas corpus should put forward all his grounds in his application and not hold them over for the purpose of making subsequent applications. On that point alone, the appeal should be dismissed. But the Court was prepared to hold that the appeal was properly before it, and dismissed the appeal."

Costello went on to observe:

> "Gallagher strongly suggested that the duty to submit all current available grounds in the same application now applies to habeas corpus (though the status of the ruling may have been undermined by a series of subsequent assertions in both the High and Supreme Courts repeating the doctrine that there is no limit on the number of challenges which may be brought on Article 40.4.2)."

40. I would hesitate to place undue reliance on the quotations in relation to the *McDonagh/Gallagher* line of argument that abuse of process of itself could lead to an application pursuant to Article 40.4.2 being refused, given that all that is available are quotations from newspaper reports. Both cases appear to have arisen following a trial and conviction. In those circumstances, an application under Article 40.4.2 would have had to show some fundamental unfairness in the trial process as otherwise it would be difficult to imagine any problem with the lawfulness of the detention. Further, as Costello

himself acknowledged, the status of the *Gallagher* ruling is contradicted by subsequent decisions.

41. In my view, the line of argument to the effect that abuse of process *per se* precludes someone from obtaining their release from what would otherwise be unlawful detention simply cannot stand. I do not think the line of authority based on the cases cited by Costello supports that conclusion. Fundamentally, it seems to me to be as simple as this: if an inquiry is initiated pursuant to Article 40.4.2 of the Constitution then the High Court is under an obligation to proceed with the inquiry. If in the course of the inquiry it transpires that the detention of the prosecutor is unlawful then the prosecutor must be released. For the sake of argument, assume a situation in which the most egregious untruths are told in the affidavit of a prosecutor seeking his release from detention pursuant to Article 40.4.2. In the course of the inquiry, having clarified the facts of the matter leading to the conclusion that the prosecutor has told a number of lies, without which the inquiry would not have been initiated, but it transpires that the detention of the prosecutor is in fact unlawful, could it be permissible to continue to hold that person in what has been determined to be unlawful detention? Article 40.4.2 expressly states that the Court shall "…after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law". Thus, unless someone is detained in accordance with the law he must be released.

42. There was some consideration in the course of the judgment of the High Court in this case and indeed in the judgment of the Court of Appeal of the decision of this Court in the case of *Child and Family Agency v McG and JC* [2017] IESC 9, [2017] 1 I.R. 1.That was a case which arose in the context of the Child Care Act 1991 and in which the question of whether or not Article 40.4.2 was the appropriate remedy to invoke in circumstances where there was an allegation of a breach of fair procedures in the context of childcare proceedings which resulted in the children of the prosecutors being removed from the custody of their parents by means of interim care orders. The Supreme Court in that case was very much focused on the appropriateness of the procedure in that context. At paragraph 8 of his judgment (with which I agreed) O'Donnell J. said as follows:

> "8. The remedy of an inquiry under Article 40 is the great constitutional remedy of the right to liberty. It carries with it its history in the common law as the vindication of the rule of law against arbitrary exercises of power. It is and remains the classic remedy when a person's liberty is detained without any legal justification, or where the justification offered, is plainly lacking. However the right it protects is a right not to be deprived of liberty save in accordance with law. More difficult issues arise when it is sought to justify detention by the production of a valid order which is regular on its face, but which it is asserted is liable to be quashed because of some defect in procedure. The High Court on an Article 40.4 inquiry does not have jurisdiction to make any order other than release or to refuse release. It cannot for example quash an order or direct the performance of a legal duty. Given the importance of the remedy, and its power, I do not doubt that it is possible in a

fundamental case, for the High Court to as it were, 'look through' an otherwise validly issued order, or at least an order which has not yet been quashed by a court with jurisdiction to do so, and direct the release of the applicant."

He went on to comment at paragraph 9:

"9. The writ of habeas corpus was an important method of ensuring legality of detention, in the absence any other mechanism being provided by law."

43. It follows therefore, it seems to me, that in circumstances where the Court is satisfied that an individual is unlawfully detained then that individual should be released from detention. That is so notwithstanding any issue that may arise as to the conduct of the individual by which the inquiry was initiated or in the course of the inquiry. It does not seem to me that it is permissible to refuse to order the release of an individual in unlawful detention solely by reference to an abuse of the process of the courts engaged in by that individual. Finally, none of this analysis precludes the possibility of a High Court judge refusing an application for an inquiry where the application itself amounts to an abuse of process. See *AC and Ors. v Cork University Hospital and Ors*. 2019 IESC 73 at para.400 where O'Malley J. observed, "However, it should be borne in mind that the judge who receives a complaint is not bound to proceed to direct an inquiry if the complaint is manifestly baseless." However, once the inquiry is initiated, the lawfulness of the detention must be considered and if unlawful, the prisoner must be released.

The second issue

44. The second issue concerns what has been described as the blurring of the lines between the exercise of the District Court's civil and criminal jurisdiction. Essentially the point made on behalf of Mr. Ryan is that once the District judge decided that there was an issue to be determined as to whether or not Mr. Ryan was in contempt of court, it was necessary to inform him of the criminal charge against him, to hear the evidence against him, for him to have an opportunity to challenge that evidence and for him to have the opportunity to have legal representation. Insofar as the District judge had advised Mr. Ryan to obtain legal representation and that legal aid would be available for that purpose it was contended that this was not in the context of the contempt procedure but was in fact for the purpose of the enforcement procedures.

45. It is further contended that the law on contempt as provided for in s. 6 of the Summary Jurisdiction (Ireland) Amendment Act 1871 is imprecise and uncertain. Section 6 of that Act provides as follows:

"6. If any person shall wilfully insult any justice or justices sitting in any court within the police district of Dublin Metropolis, or shall commit any other contempt of such court, it shall be lawful for such justice or justices, by any verbal order, either to direct such person to be removed from such court, or to be taken into custody, and at any time before the rising of such court by warrant to commit such person to gaol for any period not exceeding seven days, or to fine such person in any sum not exceeding forty shillings."

46. In essence it is contended on behalf of Mr. Ryan that there are conflicting responsibilities for a judge in cases of contempt in the face of the court and that these conflicts are in breach of basic principles of constitutional natural justice. The complaint made is that there was a want of fair procedures afforded to Mr. Ryan once the decision had been taken by the District judge to deal with the matter as a contempt in the face of the court. Reference was made in the course of the submissions to two recent decisions of this Court both delivered by O'Donnell J. on 25th February 2019, namely *Tracey v. District Judge McCarthy* [2019] IESC 14 and *Walsh v. The Minister for Justice and Equality* [2019] IESC 15, (hereinafter referred to as "*Tracey*" and "*Walsh*"). I will refer to those decisions again in due course. I think however it would be useful in the first instance to refer to the observations of the trial judge in relation to these issues. At paragraph 53 of his judgment, Noonan J. stated as follows:

> "53. However, even if I were to be wrong in reaching that conclusion, I am satisfied that there is no merit in the applicant's submissions. Far from being denied fair procedures, it seems to me that the District Judge went to considerable lengths to ensure that the applicant was treated fairly. He was repeatedly warned about his behaviour during successive hearings. He was fully aware that if that behaviour was persisted in, it might result in his imprisonment not only because he was explicitly told by the judge that he was at risk but he had in fact already been subject to an unexecuted order of imprisonment for contempt. He was urged to retain a solicitor and assured that legal aid would be provided to him for that purpose. He was afforded every opportunity of complying with orders of the court previously made.
>
> 54. He ignored all of these matters and instead deliberately persisted in the same obstructive and contemptuous behaviour knowing full well what the outcome was likely to be. Indeed it seems to me likely that the applicant anticipated his own imprisonment in circumstances where, irrespective of the issue of contempt in the face of the court, he repeatedly refused to comply with orders of the court requiring him to furnish a statement of means undoubtedly in the knowledge that this was likely to result in the court concluding that his failure to comply with the instalment order was not due to inability to pay but wilful refusal. It is notable that the applicant's supporters, some of whom were present during the Article 40 proceedings in court taking notes, appear to have known of the applicant's incarceration before any member of his family, perhaps because they like the applicant had anticipated it.
>
> 55. When the outcome now complained of ensued, the applicant says that he was not told of the charge against him or given any opportunity to get legal advice. The basis for this contention seems to rest on the fact that what had gone before was related to the District Court's civil jurisdiction whereas it was the exercise of its criminal jurisdiction that resulted in his imprisonment. While it may be true to an extent to say that there may have been some blurring of the lines between the civil and criminal jurisdiction being exercised by the District Judge, I am satisfied that this has resulted in no unfairness to the applicant in reality."

47. The Court of Appeal in its judgment dealt with this issue from paragraph 42 onwards. Reference was made to the Law Reform Commission's Consultation Report and Report on Contempt of Court and to its later Issue Paper (2016) on *Contempt of Court and other offences and torts involving the administration of justice* (LRC IP 10 – 2016). It was noted at paragraph 50 of the judgment having recited a number of passages from the 2016 Issue Paper that what was at issue here was the statutory jurisdiction deriving from s. 6 of the Act of 1871 and it was stated in paragraph 50 as follows:

> "50. The statutory jurisdiction was applied in this case by the District Court judge in a summary way and the appellant was immediately tried for his contempt in like manner to how the common law power to commit for contempt in the face of the court arising in other circumstances has heretofore been typically applied."

The Court went on to review a number of authorities including *Hammerton v Hammerton* [2007] EWCA Civ 465; and the High Court decision in the case of Tracey v District Judge McCarthy [2008] IEHC 59 together with *Kyprianou v Cyprus* [2007] EHRR 27. At the point in time when the matter was being considered by the Court of Appeal, the Supreme Court had not given its decision on the substantive appeal in *Tracey*. The Governor before the Court of Appeal had submitted that there was no want of fair procedures in the course of the proceedings in this case. At paragraph 71 of its judgment it was stated as follows:

> "71. In all these circumstances the respondent submits there was no want of fair procedures. I agree with this submission. The appellant knew exactly what he was charged with, knew exactly the case he was required to answer, knew that he could have had the benefit of state paid legal representation, knew exactly what the consequences of persisting in his unacceptable and contemptuous behaviour would be. He was warned, clearly and unequivocally, that he should desist and that if he failed to do so there would be consequences but persisted nevertheless. He was given the opportunity even at the last minute to co-operate, giving rise to the following exchanges: . . ."

The Court then set out a portion of the transcript dealing with the final opportunity given to the appellant by the District judge to co-operate with the process before the Court. The Court continued at paragraph 72 onwards as follows:

> "72. Counsel for the respondent maintains that this was manifestly a case that merited the summary and immediate trial of the appellant in the interests of the protection of the court's own process and the maintenance by the court of its authority. I agree with that submission and in the circumstances agree with the High Court judge's conclusion that, notwithstanding some blurring of the lines between the exercise of the District Court's civil and criminal jurisdiction there was in reality no unfairness to the appellant. He can have been under no misapprehension as to the nature of the contemptuous behaviour that was being complained about, and it is indicative of the fairness with which he was being treated that it was made plain to him, even at the 11th hour, that he could avoid sanction by co-operation with the

proceedings. It was implicit that if he desisted no action would have been taken even at that stage. Moreover, the judge's solicitousness in ensuring that he understood his position, and that he could have the assistance of a lawyer if he wished to have one, is clearly indicative of the fact that the District Court judge would readily have listened to anything sensible that he might have offered in his defence. Instead he persisted with his nonsensical mantras. It is clear that he knowingly provoked and precipitated being cited for contempt and it ill behoves him in the circumstances to be contending that he was denied fair procedures. . . .

76. In all the circumstances of the case I am satisfied that the High Court judge was correct in finding that fair procedures were afforded to the appellant in the particular circumstances of this case. For completeness, I am also not persuaded, again in the particular circumstances of this case, that the committal of the appellant for contempt failed to respect the appellant's rights under article 6 of the ECHR, or his rights under the Charter of Fundamental Rights of the EU, or any other rights enuring to his benefit under EU law."

48. The issue of contempt in the face of the court has, as has been previously mentioned, been considered recently in two cases. The first of those was the case of *Tracey* referred to above and the second was the case of *Walsh.* I propose to refer to a lengthy passage from the judgment in the *Tracey* case because I think it is of great assistance in clarifying the law in relation to contempt in the face of the court. It is not unfair to say that the law in this respect has been somewhat uncertain and confusing. However, the decisions in the last cited two cases have clarified the position in relation to the law of contempt in the face of the court to a great extent. At paragraph 14, O'Donnell J. stated as follows:

"14. This court directed that the sole issue to be considered on appeal was whether 'the manner in which a finding of contempt in the face of the Court was made against [Mr. Tracey] breached his rights under the Irish Constitution, under the European Convention on Human Rights or under European Union law'. On this appeal, Mr. Tracey represented himself. I mean no discourtesy to him, but it is necessary to record that both the submissions and papers submitted were somewhat diffuse. However, the Irish Human Rights and Equality Commission was added to the proceedings as a notice party, and made helpful submissions, which were broadly supportive of the position of Mr. Tracey in the appeal. Those submissions were also considered in the companion case of *Walsh v. Minister for Justice and Equality*, Supreme Court Record No. 68/2017, which was heard at the same time, and in which judgment is delivered today. In that judgment, I suggested that, in the light of developments in constitutional law, and the jurisprudence of the European Court of Human Rights, it was important to distinguish between the different procedures necessary for the maintenance of order in a courtroom, and that, in particular, it was helpful, and indeed necessary, to distinguish between the procedures required when an order of a disciplinary nature was made (such as removal from the court in order to allow proceedings to be conducted in an orderly fashion), and, on the other hand, the procedures which would be necessary before a conviction could be

entered and a punishment imposed in the form of imprisonment or a fine. It is possible to summarise the steps open to a court in the following way: -

(a) Where a person is behaving in a disruptive manner, a judge should warn him or her that the court has power to remove him or her from the courtroom;
(b) If the conduct persists, the judge should explain to the person what it is that he or she has done that is considered disruptive, and give the person the opportunity of saying anything they wish to by way of explanation, excuse, and apology, and, if so, an undertaking not to repeat the behaviour in question;
(c) Where an apology and undertaking (and, where appropriate, a satisfactory explanation) is forthcoming, it will normally be appropriate to take no further steps;
(d) If no apology and undertaking, or satisfactory explanation, as the case may be, is forthcoming, a judge may order the person to leave the courtroom and, if necessary, direct the removal of him or her from the courtroom. It may be necessary to arrange for the attendance of the gardaí for this purpose;
(e) Where there is more general disturbance, a judge may order that the court is cleared. While any court will be reluctant to take this course, it may nevertheless be necessary. In such cases, members of the public may still be entitled to enter the courtroom, if they agree to sit quietly during proceedings. *Bona fide* members of the media and members of the legal profession should be permitted to remain on the same basis.
(f) Where the person engaging in disruptive behaviour is a party to the proceedings, a court should be correspondingly slow to take the step of removing them from the courtroom, particularly when they are dealing with the substance of the dispute, rather than procedural issues such as those involved in the present case. Some issues may require the presence of the party, and in other cases it may be preferable to adjourn the proceedings. Nevertheless, the judge may still order the removal of a persistently disruptive party. In such circumstances, the party should be informed that arrangements will be made to make available a copy of the relevant extract from the digital audio recording ('D.A.R.'), if that is possible. If facilities are at hand to allow the person to continue to observe and participate remotely through videolink, these may also be availed of.

I should emphasise at this point that this is not a checklist to be followed slavishly, departure from which will lead inevitably to judicial review. In the first place, the law is concerned with the minimum required rather than the maximum desired, and in many cases it will be a counsel of prudence not to respond immediately to every comment, and to take steps such as warnings, short adjournments of the sitting, and more patient explanations before intervening even to this limited extent. On the other hand, the summary nature of the proceedings is designed to allow the court to proceed with the hearing of matter (*sic*) before it in the atmosphere to which all litigants and participants are entitled as part of the constitutional

guarantee of the administration of justice. It should not be therefore assumed that orders made in this respect can routinely be challenged, but if such an order were to become the subject of judicial review by a superior court, the test to be applied should consider the overall proceedings, the background facts, and the atmosphere of the hearing, and in those circumstances consider whether fundamental fairness was complied with. Up to this point, it should be said that the court is not exercising a contempt jurisdiction, and the making of an order for removal does not involve a finding of contempt, or require the procedural safeguards necessary before the trial and conviction of a criminal offence. However, a court may consider the particular conduct so serious as to merit proceedings for contempt which may result in a punishment whether by way of fine or imprisonment."

O'Donnell J. then proceeded to set out a number of steps that should be taken if the conduct was such as to merit proceedings for contempt which could result in imprisonment or a fine. In those circumstances he stated as follows at page 6 of the judgment:

"6. If so, the following steps could be taken:

(g) Where it is considered that the conduct at issue is serious enough, whether in itself, because of the persistence of the behaviour, or because of the involvement of others in a concerted way, then a court may consider that it is appropriate to proceed with a separate hearing of a charge of contempt, which, if established, may lead to the imposition of a punishment, whether by way of a fine or a period of imprisonment;

(h) Where a court considers it necessary to invoke the contempt jurisdiction, the person concerned should be warned, told in simple terms of the conduct considered capable of constituting contempt, and given the option of obtaining legal representation (including legal aid if their means are insufficient);

(i) Although the hearing can proceed immediately where lawyers are available (or, if having been offered the opportunity of representation, the individual refuses it) in some cases it may be necessary for the hearing to be postponed for short period to allow for the arrangement of legal representation. The adjournment may also allow a time for reflection. In any event, the person should be informed clearly of the time and date fixed for the contempt hearing, and the hearing should proceed within a short period of the original incident;

(j) During the period of adjournment or deferral, the immediate disruption of the business of the court can be addressed, if necessary, by the removal of the person from the court. Furthermore, the court has the power ancillary to the contempt jurisdiction to detain the person temporarily pending the hearing. However, this power should be exercised with restraint, and the period of detention should not extend to more than a day, normally during the day on which the incident occurred;

(k) The hearing can be straightforward, but the accused person must be given a fair opportunity of defending himself or herself. Since this is in its nature a criminal offence, even if a unique one, the criminal standard of proof beyond reasonable doubt must be applied. Furthermore, there is the same right of appeal as lies from any other decision of the court. However, given the availability of the D.A.R., there should be little room for dispute as to what was said, and it will be unlikely, therefore, that there could be any need to seek to have the judge (or indeed any other court officer) called as a necessary witness and in most, if not all, cases, it will be inappropriate to seek to do so. Production of the extract from the D.A.R., if required, by the clerk or registrar is all that would be necessary to establish the basic facts in most cases. It would then be a matter for the accused person to offer representations in their defence, whether by way of submissions as to whether the conduct amounts to contempt, or, if so, by offering an explanation or apology, or raising other matters which might be considered in mitigation. This may, if necessary, include the giving of evidence.

(l) When the alleged contempt consists of allegations against a judge personally in some respect, so that there could be a well-founded apprehension of the appearance of unfairness if the judge proceeded to deal with the contempt issue, it will be necessary to have the issue heard and determined by another judge, possibly via a referral to the Attorney General, who may bring the matter before the High Court. Once again, the availability of the D.A.R. should mean that this issue should not involve a dispute as to what was said in court. The judge should not be a necessary or, indeed, an appropriate witness in most, if not all, cases.

(m) The criminal standard of proof must apply, and the decision should be capable of appeal, where appeal lies from the decision of the court. Where the contempt is alleged to occur before a court of final appeal, or in respect of which appeal is limited, the court may proceed, however it retains the option of directing that the matter be heard in the High Court, which has full and original jurisdiction in this regard."

49. O'Donnell J. went on to explain the basis of the statutory regime to be found in s. 6 of the 1871 Act but it is not necessary to deal with that in detail save to acknowledge that O'Donnell J. noted at paragraph 16 of his judgment that:

> "16. . . . where a District Court acts to have someone removed for the purpose of maintaining order in court at a particular hearing, the 1871 Act or the 1851 Act, as appropriate, provides sufficient jurisdiction and authority, but where it is considered necessary to proceed to a full hearing on another day in circumstances where, if established, a court may consider imposing a punishment, including a fine or committal to prison, it is appropriate to proceed under the common law jurisdiction."

As noted in the submissions of the respondent this was not a case in which it was necessary to adjourn the matter to a full hearing on another day and therefore there was jurisdiction to deal with the matter under the provisions of s. 6 of the Act of 1871.

50. This Court has in the course of the judgments of O'Donnell J. in the cases of *Tracey* and *Walsh* outlined the steps that could be taken when difficult situations arise in court which may amount to contempt of court. They also outline the steps that can be taken when contempt of court has occurred. This case concerns a summary trial of Mr. Ryan in relation to contempt of court. The circumstances to be borne in mind cover not just the date on which the matter reached its conclusion but also the events that occurred at previous hearings. It is manifestly clear that the Court dealt with Mr. Ryan with great patience and forbearance throughout the course of the proceedings which first commenced before him in 2016. It is also very clear that the District Court judge warned Mr. Ryan as to his behaviour and his lack of co-operation on a number of occasions culminating on the 24th January, 2017 when the judge stated:

> "And I will renew my warning that if a statement of means is not provided and if there is not cooperation with the court on the next date, you are at risk, sir.
>
> And therefore, I offer you the opportunity again, that if you decide to come to court and continue with the kind of carry on that you did on the previous occasion you should bring a solicitor with you. And because – and that solicitor will be granted legal aid, so you have no excuse for not bringing one. But there will be consequences upon the next day. Do I make myself very clear, sir?"

51. It was suggested on behalf of Mr. Ryan that the prior suggestions by the Court to the applicant to obtain the services of a lawyer were made in the context of the civil proceedings but I think it is absolutely clear from that passage that the Court was not confining itself solely to the civil proceedings but was also advising him to obtain a solicitor having regard to his behaviour in the court. Indeed, I agree with the conclusions of the Court of Appeal set out in paragraph 72 of its judgment and which I have previously referred to. This was a case in which Mr. Ryan could have been under no misapprehension as to the circumstances in which he found himself. He previously had been the subject of a finding of contempt of court albeit that the order made on that occasion was not executed. He was advised repeatedly as to his behaviour by the District Court judge and further he was advised to obtain the assistance of a lawyer and that legal aid would be provided for such a lawyer should that be required. There is no doubt that he was well able to deal with any issue that could have arisen in his defence had he wished to do so. He could have been under no misapprehension as to the nature of the proceedings before the court and he was given every opportunity to deal with the matter. As it was pointed out in the Court of Appeal at para 72:

> "72. . . . it is indicative of the fairness with which he was being treated that it was made plain to him, even at the 11th hour, that he could avoid sanction by co-operation with the proceedings."

52. The key consideration in this this case was whether or not Mr. Ryan was in fact afforded fair procedures in the course of the proceedings leading to his committal for contempt of court. The analysis of what occurred in the District Court would have been more straightforward had the District Court had the benefit of the guidelines enunciated by O'Donnell J. but of course, this case took place prior to the delivery of the judgments in *Tracey* and *Walsh*. I am satisfied that in all the circumstances of the case and over the course of the proceedings as a whole Mr. Ryan was afforded fair procedures throughout the various hearings before the Court as described in the previous paragraph. However, it is important to emphasise the significant assistance that has been provided to judges in the form of the guidelines referred to above and it behoves all judges to have regard to those guidelines and to operate the guidelines when faced with situations that could lead to someone being committed to prison for contempt. A failure to follow the guidelines will almost inevitably lead to a successful application for relief pursuant to Article 40.4.2.

Conclusion

53. Two issues arose in this case, the first related to the question of whether or not it would be appropriate to deny a party relief pursuant to Article 40.4.2 in circumstances where there was an abuse of the process of the court in the manner in which the inquiry was sought and/or pursued. In this case, having regard to the matters described previously in the course of this judgment there is no doubt whatsoever that the way in which these proceedings were initiated and the sequence of swearing of affidavits which were not factually correct constituted an abuse of process. Indeed, the most disturbing aspect of the matter is the fact that having been released from custody, Mr. Ryan swore an affidavit verifying the matters set out in the affidavit of his solicitor which he, of all people, knew not to be correct. Having said that, that does not mean that once initiated the Court should not proceed with the inquiry and should not consider the question of whether or not the individual's detention was lawful. Once the inquiry is initiated the Court must carry out such an inquiry. It could not be the case that a person who is found to be in unlawful detention can continue to be held in unlawful detention simply by reason of their abuse of the process leading to that conclusion. If the party is in unlawful detention they must be released. That does not mean that an abuse of process of this kind can be left without sanction. There may be issues in regard to the costs of proceedings where a party has initiated such proceedings in circumstances which amount to an abuse of process but it is not appropriate or permissible to continue the unlawful detention of the individual as a form of sanction to deal with abuse of the process concerned.

54. There has been some confusion in relation to the procedure that ought to be followed by a court when confronted by contempt in the face of the court. The law in this regard has benefitted significantly from the judgments of this Court delivered by O'Donnell J. in the cases of *Tracey* and *Walsh* referred to above. Those decisions set out a number of steps that may be followed in such cases in order to deal with difficult situations that can occur which can ultimately lead to an individual or individuals being imprisoned for contempt of court. It is clear from those decisions that courts should take every opportunity possible to defuse situations that may give rise to contempt of court but of course in some cases, no matter what steps are taken by a court to deal with behaviour in the court which

amounts to contempt of court it may be necessary in some cases to invoke the ultimate sanction of imprisonment for contempt of court. What the court must always do is to ensure that fair procedures are provided to the individual or individuals concerned. In this case, it is manifestly clear that the Court bent over backwards to be patient and attempted to encourage and persuade Mr. Ryan to co-operate with the Court in the context of the civil proceedings before the Court and also warned him as to the manner in which he was conducting himself before the Court and the consequences that could flow from his behaviour. Mr. Ryan was offered every opportunity to deal with the matter appropriately and did not do so. He was offered the opportunity to obtain legal advice if necessary with the benefit of legal aid. He did not take that opportunity. The case was adjourned on at least one occasion in order to facilitate him in co-operating with the court. He did not do so. There was no denial of fair procedures to Mr. Ryan.

55. In all the circumstances of the case I would dismiss the appeal.