THE HIGH COURT

[2021] IEHC 396

[Record No. 2021/752 SS]

IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND

BETWEEN

DEAN DOYLE

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Stack delivered *ex tempore* on the 27th day of May, 2021.

Introduction

1. This is an application for an inquiry pursuant to Article 40.4.2° of the Constitution, seeking the release of the applicant on the basis that his detention is unlawful. The application was made to me on Tuesday, 25th May, 2021, on the usual ex parte basis, grounded on the affidavit of Ms. Eleanor Kelly, solicitor for the applicant, who deposed to the circumstances in which the applicant came to be remanded in custody by Dundalk District Court, and setting out the various dates on which the applicant had been remanded by that court. On each occasion, the respondent failed to produce the applicant as required.

2. It was acknowledged in the grounding affidavit of Ms. Kelly that the reason why the applicant was not produced in accordance with the court orders related to his isolation in Cloverhill Prison for reasons connected with the Covid-19 pandemic, but it was contended in the grounding affidavit that no proper explanation had been provided to the District Court as to why an appearance by video link was not possible, and it was further contended that there could not be a general policy of failing to produce a prisoner by video link given that any policies put in place within the prison to deal with the legitimate concerns in relation to Covid-19 could not unduly interfere with the applicant's constitutional rights, including his right of access to the courts.

3. The respondent appeared at the return to the conditional order at 2 pm on Tuesday, 25th May, 2021, and the matter was put back to 4 pm on that day. On that occasion, further time was sought by the respondent, and the inquiry was listed for hearing at 2.15 pm on Wednesday, 26th May, 2021. The respondent was given general liberty to file such affidavits as he might require to rely on, and it was directed that those would be filed in the course of the following morning.

4. The Governor also certified in writing the grounds for the detention of the applicant, as required by Article 40.4. The certificate of 25th May, 2021 relies on a Committal Warrant of the 24th May, 2021, of the District Court in Dundalk, remanding the applicant in custody to the sitting of Dundalk District Court on 26th May, 2021, at 10.30 am. The Warrant further directs the Governor as follows:

"You shall have the said accused at the said sitting to be further dealt with according to law."

5. The applicant was not produced to the District Court by video link on the morning of 26th May 2021, but was again remanded in custody. The Committal Warrant relating to that remand was produced by the respondent and time constraints dictated that the inquiry proceed before such a certificate could be prepared. However, the respondent undertook to prepare a fresh certificate reflecting the remand on 26th May 2021. The inquiry took place over several hours on the afternoon and evening of 26th May 2021 and on the morning of the 27th, prior to the expiry of the Committal Warrant, I determined that the detention was unlawful and ordered the release of the applicant. I gave the principal reasons for my decision ex tempore and indicated that I would provide my detailed reasons in a written judgment at a later date, which I am now doing.

Procedural history before the District Court and basis for seeking the Inquiry

6. The relevant procedural history before the District Court commences on Tuesday, 18th May, 2021. The applicant, having been arrested and charged with an offence of criminal damage contrary to s. 2 of the Criminal Damage Act, 1991, was refused bail. He thereupon pleaded guilty.

7. The Sergeant Court Presenter then informed the court that he did not have the DPP's directions consenting to summary disposal, and the District Judge remanded the applicant in custody overnight for the purposes of obtaining those directions - which were regarded as most likely being a formality given the nature of the case and the evidence available - for the purposes of sentencing on the following day.

8. On Wednesday, 19th May, 2021, the applicant was not produced. It was confirmed to the District Court that the applicant had been remanded in custody in Cloverhill Prison, rather than Dundalk garda station, which his solicitor had assumed would be the place of detention. It was also confirmed that the DPP was indeed directing summary disposal of the offence. According to the applicant's solicitor, the District Judge was unhappy that the applicant had not been produced and referred to the fact that she had intended only to remand him overnight in order to confirm the DPP's directions. She expressed her desire to sentence the applicant as soon as possible and made an order that the applicant would be produced via video link the following day for sentence. On the following day, the applicant was not produced, by video link or otherwise.

9. Rather than strike out the matter, the District Judge, on the basis of a "sick note" which was never furnished to the applicant's solicitor, and which appears to have been emailed directly to the court by the prison authorities in Cloverhill, remanded the applicant further to Monday, 24th May, 2021. She did this expressly on the basis that there was no sitting of the court on Friday, 21st May, 2021.

10. On 24th May, 2021, the applicant was not produced, by video link or otherwise. Again a document described as a "sick note" was produced. This time, however, it was furnished to the applicant's solicitor, and she exhibited it to her grounding affidavit for the purpose

of the ex parte application. This "sick note" is in the most generic of terms, and it is hard to disagree with the applicant's solicitor's criticisms of it, as expressed in her grounding affidavit. It states as follows:

> "The above named is medically unfit to attend court as he is currently in isolation. He is either suspected of having Covid-19 himself or of being in contact with a suspected/confirmed case of Covid-19."

There is an illegible signature, but apparently this is the signature of a doctor within the prison.

11. The fundamental basis on which the ex parte order was sought was, as stated by the applicant's solicitor at para. 17 of her grounding affidavit, that no proper explanation has been provided to the court as to why an appearance by video link was not possible. Objection was taken to a general policy within the prison to deprive the applicant of his right to be tried in accordance with law and of his right of access to the courts. It was asserted at para. 18 of the grounding affidavit that any policies put in place to address concerns relating to Covid-19 within the prison could not unduly interfere with the applicant's constitutional rights.

12. On the morning of 26th May, 2021, the applicant was not produced to Dundalk District Court. The proceedings which took place in the District Court on that morning are set out in the supplemental affidavit of Ms. Kelly, solicitor, delivered to the CSSO shortly before the commencement of the hearing of the Article 40 inquiry in the afternoon of the 26th May, 2021.

13. At para. 3 of her affidavit, Ms. Kelly referred to the "sick note" emailed to the court that morning and which was exhibited to the replying affidavit of the Assistant Governor, Mr. Galgey. Having considered the "sick note", the District Judge, according to Ms. Kelly's affidavit, stated that she was minded to strike out the matter believing that the note did not adequately explain why the respondent was unable to have the applicant produced via video link.

14. At para. 4, Ms. Kelly states that, at second call, the District Judge made a further order for the applicant to be produced the following morning and remanded the applicant in custody to 27th May, 2021. The judge specifically stated, apparently, that if the applicant was not produced via video link the following morning, a representative of the respondent should be in attendance to explain the applicant's absence.

15. At para. 7 of her affidavit, Ms. Kelly states:

> "I say and believe that the honourable judge sitting in Dundalk District Court is correct in her assessment of the reasons offered by the respondent as to why the applicant cannot be produced via video link in that they remain wholly inadequate. It is my understanding that the facility of a prisoner entering a plea and/or

participating in a sentencing hearing via video link was one of the innovations actually introduced (sic) by way of statute in 2020 to deal with Covid-19."

16. There was some controversy at the hearing as to the precise meaning of that affidavit, and that is why I set it out in some detail. I return to this issue below.

Evidence adduced on behalf of the respondent

17. Replying affidavits were sworn on behalf of the respondent by Assistant Governor Galgey, and a prison nurse working in Cloverhill Prison. Assistant Governor Galgey gave the court considerable assistance in setting out the protocols established within the prison service, and specifically Cloverhill Prison, after the pandemic struck in March, 2020. He pointed to the undoubted difficulties in managing prison facilities, social distancing and other matters which can be accommodated in the community in general. He deposes to the fact that public health guidance was taken by the prison and considered, and arising from that advice, protocols were developed and implemented for nearly every aspect of the work of the prisons throughout the State to ensure that Covid-19 did not enter into the State's prisons. Those protocols were updated from time to time and were operated and deployed by Cloverhill Prison. The version in place on the date of the applicant's initial remand was that dated 7th April, 2021, and was version 30 of the relevant procedures.

18. Assistant Governor Galgey was cross examined by counsel for the applicant, and also answered some questions asked by the court. He was clear in his evidence that the protocols had been a success, and there is no doubt but that, speaking in general terms, the Irish Prison Service seems to have successfully contained Covid-19 and maintained a safe environment within the prisons in the State, and is undoubtedly to be commended for so doing.

19. As part of those procedures, prisoners presenting with symptoms of Covid-19 were isolated in a designated isolation cell in Block F in the prison. A prisoner moved to such a cell had the cell opened twice a day for food and medication to be provided and was also provided with a phone in the cell to communicate with his family and his solicitor, once those numbers were added to the prisoner's phone card for such calls.

20. The prison nurse confirmed that, when the applicant arrived in the prison, he stated that he had experienced loss of taste in the previous days, a symptom of Covid-19. As a result, he was transferred to Block F.

21. The significance of Block F for the purpose of these proceedings is it appears to be the only accommodation block within the prison where prisoners are not produced to court, even by video link. Other newly committed prisoners who are not presenting with and do not disclose any symptoms of Covid-19 are accommodated elsewhere and are produced to court via video link in the normal way pursuant to the 2020 Act, referred to below.

22. The standard protocol is that a prisoner is tested on Day 0 (day of arrival) or, if he arrives in the afternoon – as the applicant did –he is tested on the following day (Day 1). If that test is negative, as it was in the case of the applicant, then the prisoner is tested again on

Day 7. It is only if the second test is negative that the prisoner is released from the isolation block. If the prisoner tests positive on Day 7, he is retained in Block F and he is not produced to court even by way of video link.

23. Under cross examination, Assistant Governor Galgey relied heavily on the general procedures which had been put in place to meet the public health concerns arising from the pandemic. While a certificate of a doctor (referred to as a "sick note") is drawn up for each individual patient affected, no individual consideration beyond that is undertaken and, essentially, once a prisoner is isolated in Block F, they are not produced for court.

24. On the facts of this case, normal procedures were followed in relation to the remands on the 19th, 20th and 24th and, once it was established that a "sick note" was available for the applicant, he was not produced. Assistant Governor Galgey gave evidence that a meeting had taken place on 26th May, and it was decided that as the relevant certificate was in existence, the applicant would not be produced. He gave evidence that production by video link was discussed but it was determined that video link was the same as a normal court, it was still a court environment and a certificate that the applicant was not fit to attend court also covered production by video link.

25. It was put to Assistant Governor Galgey in cross examination that he and his colleagues should take proactive steps to impair the applicant's liberty as little as possible and he was asked why the applicant had not been provided with a phone or laptop in his cell. He confirmed that, in hindsight, it was possible that that was something that should have been looked at. He stated that using a video link phone had been looked at but it was decided that it was too much of a risk as the virus could get into the handpiece of the phone. On this point he stated in response to a specific question that a wipe down would not be enough and that the prison had employed a company to come in and clean areas used by prisoners in quarantine.

26. It appears that the prison authorities concluded that it would be safer to attempt to introduce a mobile video link unit as opposed to a video link phone. Such a unit would be wheeled to the door of the cell. The feasibility of providing such a unit in Block F was being investigated at the time of the Inquiry and it could not be said that it was possible. However, equally, it could not be said that it was not possible, and it appears that this option was only investigated in response to the grant of the conditional order.

27. As regards taking prisoners from Block F to the video link facilities elsewhere in the prison, Governor Galgey was of the view that this would not be a straightforward option as it would have involved bringing prisoners in isolation into the main prison, where they could come in contact with other prisoners as well as having contact with staff, and gave his opinion that, if it were, then we could all have put on PPE and the economy would not have had to close.

Issues arising in the Article 40 Inquiry

28. The question arising in these proceedings is whether these protocols are in breach of the applicant's right, as a prisoner, to have access to a court, and indeed his right to liberty,

as he was at all times being remanded by the District Judge for the purpose of sentencing, which she had determined should take place as soon as possible. It was common case at the hearing that, had the applicant been sentenced, and had he entered a notice of appeal and entered into any required recognisances, then he would have been at liberty.

29. In his affidavit, Assistant Governor Galgey specifically says that the protocols are proportionate, but this is disputed in the affidavit of the applicant's solicitor. This is indeed the key question that the court has to consider, as it is well-established that any permissible restriction on a constitutional right can only be one which is proportionate. In law, proportionality is as defined many years ago by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593, at 607. In a famous dictum, Costello J. imported the principle of proportionality from the case law of the European Court of Human Rights which requires any limitation on a fundamental right which is justified in the public interest to satisfy a proportionality test. This in turn requires the public authority restricting the right to demonstrate:

(a) that the restriction is rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) that it impairs the right as little as possible, and

(c) that the effect on the right is proportional to the objective.

Counsel for the applicant, as I understand it, relied in particular on para. (b) though he also referred to para. (c). The central point was that the prison had not shown that the applicant's right to liberty and to access to the courts had been impaired as little as possible, as they had simply put in place general procedures which did not countenance, either generally, or in any particular case, that video link facilities could be provided in Block F. Counsel also relied on the fact that prisoners had access to a phone, and that it would be possible to participate in a court hearing by way of phone, but this had simply not been accommodated by the prison.

30. In his oral evidence, Assistant Governor Galgey very fairly conceded that in hindsight, it might be obvious that there should have been facilities in Block F for video link but it had not come up prior to these proceedings. (It should be noted that in his affidavit, he gave undisputed and unchallenged evidence that only 25 prisoners had been affected by this policy since the commencement of the pandemic in March, 2020). He also stated in his oral evidence that the possibility of providing video link facilities by way of a mobile video link unit was first considered on 25th May, in response to the commencement of these proceedings, and he also fairly conceded that he could not positively say that it was not possible to provide video link facilities in Block F.

Relevant statutory provisions

31. It was common case that the provisions of the Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020, applied to the sentencing of the applicant in the District Court. This

appears from s. 23 (1) and (2) (c) (ii). It was common case that sentencing would require the presence of the applicant and, given that he was in custody, his presence could be secured, in compliance with the 2020 Act, by video link. It was also not suggested by either side that the sentencing could justly proceed without the participation of the applicant nor did the applicant suggest that it was necessary to produce him in person in court.

32. I would pause here to say that it appears that the Oireachtas, in enacting the 2020 Act, appears to have balanced the exigencies of public health against prisoner's rights and to have concluded that they were resolved by video link. Arguably, the Act creates an obligation on the prison authorities to secure the production of prisoners in court by video link in all circumstances such that the proportionality test is not applicable or, perhaps, is satisfied by the statutory provisions which, in themselves, set the balance which the Oireachtas thought appropriate. The Act does not contain any provision absolving prison authorities from complying with a court order for the production of a prisoner. If that is so, then the mere fact of non-production is unlawful and it was not open to the prison authorities to conclude that they should not transfer a prisoner from Block F to the video link facilities elsewhere in the prison as this was to elevate the public health concerns about the rights of the prisoner in a manner not contemplated or permitted by the 2020 Act.

33. However, as indicated when I gave the principal reasons for my judgment, I am deciding the matter on the basis of the arguments made by the applicant at the hearing of the inquiry, namely, that the respondent had failed to discharge the onus on him of showing that the restrictions imposed on the applicant's constitutional rights were not such as to impair those rights as little as possible. It was the applicant's case that the prison authorities did not take the necessary proactive steps to impair the rights in as limited a way as possible.

34. The respondent relied heavily on s. 24 of the Criminal Procedure Act, 1967, and in particular, s. 24(5)(a), as substituted by s. 37(c) of the Criminal Procedure Acts, 2010. Subsection (5)(a) provides:

> "If the Court is satisfied that a person who has been remanded in custody is unable to be brought before the Court at the expiration of the period of remand —
>
> (i) by reason of illness or accident, or
> (ii) for any other good and sufficient reason,
>
> the Court may, in that person's absence, remand the person for such further period, which may exceed fifteen days, as the Court considers reasonable."

35. Before moving on from the text of s. 24, I wish to make comment on its purpose and interpretation. While these were not the subject of any submissions at the hearing, it seems to me that the purpose of s. 24 is to confer a power on the District Judge to remand a person despite breach of a previous order for production, but only in the

circumstances set out in the section. Although there is a general power to remand further for "good and sufficient reason", it seems to me that this must be read *ejusdem generis* with the provision to remand where non-production was due to illness or accident. The clear intention of the provision would appear to be to confer power to remand further, despite non-production, but only where that had occurred due to circumstances beyond the control of the detainer. The clear intent of the provision would appear to be to respect the constitutional right of a prisoner of access to a court and the constitutional right to liberty (remand being effected or with particular purposes, such as to ensure the person is available for trial or as, in this case, for sentencing) by only permitting further remand where non-production had been necessitated by reasons outside the control of the detainer.

36. Like all post 1937 statutory provisions, not only is it entitled to a presumption of constitutionality, but it must be given a constitutional interpretation. I accept the submission of counsel for the applicant at the hearing that the constitutional rights of the applicant can only be limited in a manner permitted by the doctrine of proportionality as explained by Costello J. in *Heaney*, and, in particular, that they must be restricted or impaired to the least extent possible. To interpret the section otherwise would potentially render the section unconstitutional as a breach of an individual's right to liberty and the right to access to a court, and it does not confer a discretion on a District Judge which can only be reviewed on *O'Keeffe* grounds. On the contrary, unless the District Judge is satisfied that the reason for non-production, in breach of a previous order of the court, was necessitated in conformity with the test in *Heaney*, then the District Judge would be operating the section in an unconstitutional fashion.

37. I did not understand there to be any significant dispute between the parties as to the onus on the respondent to demonstrate that non-production was necessitated by the procedures put in place to deal with the Covid-19 pandemic, rather the issue was whether it was possible to accommodate video link facilities notwithstanding the difficulties posed by the pandemic.

Scope of the Article 40 inquiry and relevant period of detention

38. The Governor, in seeking to justify the continuing detention of the applicant despite his non-production in court, relied on two arguments which were fundamental to his position, as I understand it. First, it was urged upon me very strongly that this court should not look behind the actual committal warrants issued by the District Judge. Secondly, it was equally strongly urged upon me that I could only look at the current period of detention and should not look back at the earlier periods of detention, dating back to 18th May, 2021.

(i) Whether the Court can look behind the Committal Warrants

39. I propose to deal first with the argument that I should not look behind the committal warrants issued by the District Court, and to leave aside for the moment the question of whether I should look at periods of detention commencing prior to the remand which took place last before the hearing of the inquiry, which was the remand on 26th May, 2021.

40. I think it is helpful to set out the relevant portions of the warrants issued by the District Judge on 24th and 26th May, 2021. By reason of the timing of the proceedings, as set out above, it was the committal warrant of 24th May, 2021, which was attached to the certificate of the Governor in response to the conditional order. This recited (by reference to a copy Charge Sheet) the charge with which the applicant was accused, as well as the fact that the hearing of the said charge had been adjourned to a sitting of the Dundalk District Court on 26th May, 2021, 10.30 a.m. It continued:

> "This is to command you to whom this warrant is addressed to lodge the said accused in Cloverhill Prison there to be detained by the governor thereof until the above time of adjournment… when he shall have the said accused at the said sitting to be further dealt with according to law."

The warrant is addressed to the Superintendent of An Garda Síochána, Drogheda, County Louth.

41. The Committal Warrant dated 26th May, 2021, after the proceedings had commenced, is an entirely different document, containing considerably more detail. It recites that the applicant was then in custody in Cloverhill Prison, had been remanded in custody and was on the day of the warrant due to appear before Dundalk District Court on remand charged with the charges as set out on the attached charge sheet, and it then states:

> "AND WHEREAS the Court is satisfied that the accused is by reason of illness or accident at risk for good and sufficient reason (namely Covid isolation) unable to be brought before the Court on this date.
>
> AND WHEREAS the Court, in the absence of the accused, and pursuant to Section 24 (5) of the Criminal Procedure Act, 1957 had further remanded the accused and adjourned the hearing to the sitting of the District Court at Dundalk on the 27th day of May, 2021 at 10:30 am (which the Court considers a reasonable period in the circumstances).
>
> THIS IS TO COMMAND YOU to whom this warrant is addressed to keep the accused in the prison at Cloverhill there to be detained by the Governor thereof until the above time of adjournment or he shall have him at the said sitting to be further dealt with according to the law."

This warrant is addressed to the Governor of Cloverhill Prison and, in italicised notes, states that the defendant is to be produced via video link and that if the defendant is unable to appear via video link, the District Judge has requested a member of the prison service to appear in court for explanation.

42. Counsel for the applicant took significant exception to the production of this warrant on the afternoon of the hearing, saying that the warrant made matters worse and that there was no evidence that the prosecuting sergeant gave more evidence before the court than was disclosed in his solicitor's affidavit. In particular, counsel for the applicant stated that

his instructions were very clear that neither the prosecuting sergeant nor the District Judge ever invoked the section or the relevant District Court rule. He relied on the unchallenged evidence in his solicitor's affidavit.

43. I would make the preliminary comment that the warrant appears to accept that Covid isolation does not fall within "*illness*" within the meaning of s. 24 (5) (a) but must fall within the broader category of "good and sufficient reason". As stated above, any constitutional reading of that phrase would require that it refer to a reason which unavoidably prevented the detainer from producing the prisoner to court by video link from the prison.

44. Counsel for the Governor submitted very strongly that this court could not, on an Article 40 inquiry, look behind this Warrant, and, in support of the contention I was referred primarily to three Supreme Court authorities.

45. The first of these was *F.X. v. Clinical Director, Central Mental Hospital* [2014] 1 I.R. 280 where the High Court had, on an Article 40 inquiry, found a detention by the Central Criminal Court unlawful for failure to comply with statutory provisions governing the committal of a prisoner who had been found not guilty by reason of insanity. The key issues in the case appear to have been whether the High Court had jurisdiction to review a detention by the Central Criminal Court and whether it had jurisdiction to impose a stay on the order for release. In the course of deciding those issues, the court (per Denham C.J.) stated (at paras. 64 and 65):

> "In general, if there is any order of any court, which does not show an invalidity on its face, then the correct approach is to seek the remedy of appeal and, if necessary, apply for priority. Or, if it is a court of local jurisdiction, then an application for judicial review may be the appropriate route to take. In such circumstances, where an order of the court does not show any invalidity on its face, the route of the constitutional and immediate remedy of habeas corpus is not the appropriate approach.

An order of the High Court which is good on its face should not be subject to an inquiry under Article 40.4.2 unless there has been some fundamental denial of justice. In principle the appropriate remedy is an appeal to an appellate court, with, if necessary, an application for priority. Thus, the remedy under Article 40.4.2 may arise where there is a fundamental denial of justice, or a fundamental flaw, such as arose in The State (O.) v. O'Brien [1973] I.R. 50, where a juvenile was sentenced to a term of imprisonment which was not open to the Central Criminal Court."

The Supreme Court then went on to refer to the various authorities, including *The State (McDonagh) v. Frawley* [1978] I.R. 131, where the Supreme Court stated that a convicted prisoner need not be released merely because some defect or illegality attached to his detention.

46. The focus in *F.X.* was to consider whether it was open to a High Court judge in an Article 40 inquiry to inquire into the lawfulness of a detention ordered by the Central Criminal Court, and at para. 69, the Supreme Court confirmed that it did, albeit subject to the limitations set out in the paragraphs that I have quoted. A reading of the relevant paragraphs of the judgment demonstrates that the Court was concerned primarily with the availability of Article 40 to convicted prisoners.

47. The passage quoted above was relied upon by the Supreme Court in the second authority which was heavily relied upon by the respondent, *Ryan v. Governor of Midlands Prison* [2014] IESC 54. In that case, the Supreme Court overturned an order for release by the High Court where the challenge to the detention of a prisoner convicted of serious firearms offences was that his application for enhanced remission of one third of his entire sentence was said to have been decided in a procedurally flawed manner by decision made 16th April, 2014. Relying on *F.X.. v. Clinical Director of the Central Mental Hospital*, Denham C.J. (*per curiam*) stated:

> "[T]he general principle of law is that if an order of a court does not show an invalidity on its face, in particular if it is an order in relation to post-conviction detention, then the route of the constitutional and immediate remedy of habeus corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In such circumstances, the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."

48. It is, first of all, important to note that in both of those cases, the court was dealing with a situation where a prisoner had had the benefit of a trial in due course of law within the meaning of Article 38.1 of the Constitution, and had either been convicted, or had been subject to the very specific provisions in the Criminal Law (Insanity) Act, 2006, where certain individuals may be found not guilty by reason of insanity.

49. However, the Supreme Court in *Ryan* did not in any way suggest that one could never look behind a court order, including an order of this Court. On the contrary, in the immediately following paragraph (para. 19), the Court distinguished judgments such as *Cirpaci v. Governor of Mountjoy Prison* [2014] IEHC 76, *State (O.) v. O'Brien* [1973] I.R. 50, and *Sweeney v. Governor of Loughan House Open Centre* [2014] IESC 42.

50. In fairness, counsel for the respondent did not submit that there is any absolute rule preventing this Court, in an Article 40 inquiry, from looking behind what appears to be a perfectly valid order. Indeed, in the third authority relied upon by him, *S.McG. v. Child and Family Agency* [2017] 1 I.R. 1, O'Donnell J., in a judgment concurring with the lead majority judgment of McMenamin J., specifically stated that the case was an appropriate one for Article 40. (The sole dissenting member of the seven person court in that case determined that the breach was not sufficiently fundamental, and was moreover of the view that remedies other than an Article 40 inquiry were available and could and should have been used.)

51. In that case, the majority were satisfied that the refusal of a District Judge to adjourn proceedings to allow the parents of a child who was the subject of an application for an interim care order to get legal advice and representation, was a fundamental departure from the requirements of a fair hearing. Much of the majority judgments are taken up with the interpretation and applicability of provisions of the Child Care Acts and with the suitability of Article 40.4 inquiry for child custody disputes, matters which are not irrelevant here.

52. However, in comments directed to Article 40 inquiries more generally, O'Donnell J. stated (at para. 9):

> "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."

53. Later in the judgment, having referred to *The State (Royle) v. Kelly* [1974] I.R. 259, O'Donnell J. continued:

> "That goes back to the fundamental nature of the remedy: its strength lies in part in its limitation. However, the Court in an exceptional case has the capacity to direct the release of the applicant notwithstanding the existence of the order, in the same way in which in an exceptional case, post-conviction, it may proceed to direct the release of an individual notwithstanding the existence of an order convicting him or her which has not been set aside on appeal in the circumstances considered by Henchy J. Any such case however is exceptional and the breach must be so fundamental that the obligation of the administration of justice and the upholding of constitutional rights requires the court to proceed in that fashion."

54. O'Donnell J. also stated that in most, if not all cases, the greater flexibility of the remedy of judicial review might be appropriate. Nevertheless, in that case, giving in the breach of fair procedures by the District Judge, O'Donnell J. was satisfied (at para. 12) that the breach was "fundamental and moreover clear-cut."

55. Before leaving *Ryan v. Governor of Midlands Prison*, it is notable that *Cirpaci*, which is implicitly approved of by the Supreme Court in *Ryan*, is a judgment of Hogan J. in which he reiterates what he had previously said in *Bailey v. Governor of Mountjoy Prison* [2012] 2 I.R. 391, an authority which I drew to the attention of the parties at the hearing. In *Bailey*, Hogan J. had concluded that there was no absolute rule which required him to automatically accept and refuse to look behind an apparently valid Order. The applicant was a convicted prisoner serving a sentence, I think that is important because there is no meaningful appeal from an order remanding an accused, whereas an appeal is always available against conviction. As part of his judgment Hogan J. stated (at para. 19) that unless the guarantees given by the State in Article 40.3.2° and 40.4.1° were to be regarded (in the words of Davitt P. in *The State (Quinn) v. Ryan* [1965] I.R.70) as "mere platitudes", it follows that Article 40.3.2° must accordingly be interpreted in a manner which makes it effective.

56. As I stated when outlining the principal grounds for my decision in my *ex tempore* judgment of Thursday, 27th May, 2021, it seems to me that the line of authority relied upon by the respondent is primarily concerned with convicted prisoners who have had the benefit of trial in due course of law and a right of appeal. A clear example of this is *The State (Royle) v. Kelly* itself, where a person convicted in the Special Criminal Court later sought release on the basis that he had not been represented at his hearing and therefore had not been in a position to call an expert witness who he hoped would exculpate him. However, the Supreme Court was satisfied that no fundamental breach had occurred as the applicant in that case had at all times had the opportunity of having legal representation at the expense of the State, but had refused to avail of that right, insisting on being represented by the one solicitor who was not permitted to represent him. It was held, in effect, that he could have appealed to the Court of Criminal Appeal.

57. Similarly, the dissenting judgment of Charlton J. in *S.McG*. is concerned with the availability of other remedies which would have availed the applicants in that case without having to resort to the provisions of Article 40.4. The same concern is also evident in Charlton J.'s judgment in *Roche (Dumbrell) v. Governor of Cloverhill Prison* [2014] IESC 53, which concerned the revocation of bail by the Circuit Court, a matter which could have been rectified at any time by application for bail to the High Court.

58. As O'Donnell J. stated in *S.McG*., the breach must be fundamental and sufficiently clear cut. I do not think there is a difficulty in meeting the first part of this threshold in that the right of access to a court and the right to liberty are fundamental constitutional rights, and possibly the most important rights enjoyed by any prisoner. The right of access to a court, in particular, is a right which must be vindicated by the court in a real and effective way. In this case, a number of production orders made by the District Court were not complied with, a matter which must immediately arouse the concern not only of that Court, but of this Court when asked to exercise its jurisdiction under Article 40.4.

59. I pause here to deal with a submission made by the Governor in the course of the hearing, with which I disagree. It was said that the non-production was not a breach of

the warrant of 24th May, 2021, by reason of the existence of the provisions of s. 24(5) of the 1967 Act. I cannot agree. Section 24(5) deals with the power of the District Judge to remand further someone who has not been produced. As set out above, this can only occur in limited circumstances which are consistent with the fundamental and constitutional nature of the rights of the prisoner engaged by the production order in the first place, namely, the right of access to a court and the right to liberty. Section 24 does not provide, for example, that it shall be lawful for a detainer to refuse or fail to produce a prisoner notwithstanding a court order to that effect, where the reason is illness, accident or other good and sufficient reason. The order for production is breached by non-production: see, in relation to a similar breach, the finding of fact of Peart J. in *Adebayo v. Garda Commissione*r [2004] IEHC 359, para. 90. That finding of fact was specifically upheld by the Geoghegan J. when giving judgment for the majority in the Supreme Court (see para. 25, [2006] 2 I.R. 298)

60. The effect of s.24(5) is not to render non-production lawful, but to confer a power on the District Judge to remand, even when the production order included in the last remand was not complied with.

61. It seems to me clear, therefore, that the production orders of the District Court as set out by Ms. Kelly in her grounding affidavit were all breached. This was, *prima facie*, a breach of the prisoner's right of access to the court and of his right to liberty. He was to be produced to court for sentencing. It seems to me, therefore, that the rights of the prisoner thus engaged were sufficiently fundamental to meet the first part of the threshold for intervention by way of Article 40. The more difficult question is whether it is sufficiently clear cut that it can be regarded as an exception to the general situation that one cannot look behind a court order.

62. In this regard, it should be noted that Ms. Kelly's affidavits were never controverted. While at one point, the respondent appeared to take the position that he had not had sufficient opportunity to reply to the grounding affidavit, I do not accept this submission. The respondent was afforded an opportunity to respond to the grounding affidavit in any way he saw fit. The averments as to what occurred in the District Court on 24th May 2021 were brief and the nature of an Article 40 inquiry, which is not restricted to the precise basis on which the conditional order was granted, is well known. The respondent decided to adduce evidence seeking to justify the proportionality of the procedures put in place by the prison, which had the result that prisoners in Block F were not afforded access to court via video link. This was done in two affidavits, and that of the Assistant Governor was particularly detailed. The respondent was perfectly entitled to take this course, and it should be noted that, in doing so, the evidence was directed towards persuading this court that the steps taken were necessary and proportionate, as this was not evidence which was before the District Court.

63. In addition, the respondent was entitled to seek to rely on the Warrant, and to argue, as he did, that this case fell outside the exceptional circumstances in which this court could look behind the Warrant on an Article 40 inquiry. However, if there was anything

inaccurate in Ms. Kelly's account of what occurred in the District Court, in my view the respondent had ample opportunity to reply to the grounding affidavit and to take instructions and to contradict Ms. Kelly's evidence as to what occurred in Dundalk District Court on 24th May, 2021. Furthermore, Ms. Kelly was available for cross examination and indeed this option was suggested by counsel for the applicant, but it was declined.

(ii) Whether the various periods of detention should be considered separately

64. The State relied on *The People v. McGowan* (Unreported, Supreme Court, October 14, 1968) for the proposition that the lawfulness of earlier periods of detention could not be considered. Assuming that is correct, the logical consequence is that I should only consider the detention at the time of the hearing of the Article 40 inquiry on foot of the warrant of 26th May, 2021. It would therefore be necessary for me only to look at the evidence in the supplemental affidavit as to what occurred in the District Court on that date.

65. The respondent was offered an opportunity to respond to this affidavit, which of necessity only became available at the commencement of the inquiry that afternoon, but instead relied on the committal warrant of that date, as he was entitled to do. Neither was it sought to cross examine Ms. Kelly on her supplemental affidavit of 26th May, 2021.

66. Accepting, without deciding, that I should only look at the remand of the 26th May, 2021, I now turn to look at what occurred on that date and whether there are grounds for intervention on the limited basis set out in the Supreme Court authorities above.

Application of the principle summarised in Ryan to this case

67. When one looks at the evidence in Ms. Kelly's affidavit of 26th May 2021, the only positive finding of the District Judge was that she was not satisfied that good and sufficient reason had been given for the failure to produce the applicant. It is true that she put the matter to second call, but I do not believe that para. 4 of her affidavit, as set out above, can be interpreted (as counsel for the respondent sought to do in his submission) as saying that the District Judge effectively changed her mind at second call and must have been satisfied as to a reason within the meaning of s.24(5). There is no statement in Ms. Kelly's affidavit that the District Judge, having pronounced herself dissatisfied, then went on to change her mind and pronounce herself satisfied. Presumably if the District Judge were going to change her mind, she would have said so and, presumably, if she had said so, Ms. Kelly, as a solicitor and officer of the court, would have referred to that in her affidavit. Para. 7 of the affidavit in fact suggests a clear understanding by Ms. Kelly, who was present in the District Court and heard what the judge said, that the judge had not changed her mind.

68. Moreover, Ms. Kelly was tendered for cross examination in the course of the hearing, and counsel for the respondent indicated that he did not wish to cross examine her. If it was sought to be asserted that she omitted something from her affidavit and that the decision of the District Judge was other than as set out at para. 3 of her affidavit, then that could easily have been put to her in cross examination and no doubt she would have given a truthful reply. As matters stand, I am left with the affidavit evidence, and I do not think it

can be inferred from para. 4 that the District Judge pronounced herself positively satisfied, as s. 24 (5) required her to be, that there was a good and sufficient reason. We cannot know the internal thoughts of the District Judge if they are not outwardly expressed, but it seems to be that, having thought about the matter for a while, and having already pronounced herself dissatisfied with the reason given, she nevertheless remanded the applicant pursuant to s. 24(5) on the basis that she would give the Governor one last chance and, if this were not taken, she would at least demand an explanation.

69. In my view, the District Judge if she was not satisfied as to the reason, did not have the power to remand the applicant further, and the result was not only a breach of s.24(5), but a denial of the applicant's fundamental right of access to a court and a breach of his fundamental right to liberty.

70. Insofar as it was suggested to me at hearing that the *dictum* of Denham C.J. in *Ryan v Governor of Midlands Prison* should be interpreted in a manner akin to a statute as to refer three separate and distinct bases on which this court could "*look through*" an apparently valid court order, I do not accept that submission. The judgment in *Ryan* does not appear to me to seek to depart from or expand the general position as set out by Henchy J. in *The State (Royle) v. Kelly* many years ago. In that case, Henchy J. stated at p. 269), in respect of a convicted prisoner, that in order to succeed in an Article 40, it should be shown that "the detention is wanting in the fundamental legal attributes which under the Constitution should attach to [it]."

71. I do not think that Denham C.J. was seeking to break that down into three distinct categories but was rather giving three expansionary and overlapping reiterations of it. In this case, one could say the District Judge acted without jurisdiction in purporting to remand the applicant when in fact she herself was of the view that the test in s. 24(5) for remanding the applicant further had not been met. In another sense one could say that this was a fundamental flaw surrounding the making of the remand order. Indeed, one could also say that there was a fundamental denial of justice attached to the fact that the prisoner, despite repeated orders requiring his production in court, was not in fact given access to a court.

72. In considering whether this is one of the exceptional circumstances in which a court can look behind an apparently valid court order, the facts of cases such as *Royle* and *The State (McDonagh) v. Frawley* are so far removed from the case made here that they are not of great assistance to me in considering whether those circumstances exist in this case. In *Royle*, the prosecutor had rejected the opportunity to be represented at his trial in the Special Criminal Court, in *McDonagh*, the prosecutor was claiming (without medical evidence) that the treatment afforded by the prison doctor for his back was not adequate, and in *Ryan* itself, the complaint related to a discretionary power to grant enhanced remission of a sentence which could never of itself lead a court to question the underlying conviction.

73. I am, however, able to draw guidance from the decision of the Court of Appeal in *Connors v. Governor of Limerick Prison* [2017] IECA 218, as the facts are much closer to the situation in this case. In that case, the applicant was on trial with two co-accused for charges contrary to s. 18 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, when a recent decision of the Court of Appeal on common design was drawn to the attention of the District Judge. The applicant had had his bail revoked, and was in custody, whereupon he pleaded guilty. However, the District Judge appeared to think he had a prospect of acquittal, and therefore refused to accept the guilty plea. He then remanded the applicant in custody on the basis that the trial would continue. The following day, an application was made pursuant to Article 40.4 to inquire into the lawfulness of his detention on the basis that the District Judge had been wrong in law to refuse to accept the applicant's offer to plead guilty. The respondent, in certifying the basis of the applicant's detention, relied upon the remand order of the District Judge. It was argued that not every defect or illegality attaching to a detention would invalidate that detention and that any error was made within jurisdiction. The High Court (White J.) released the applicant on 18th January, 2016, and that order was appealed to the Court of Appeal, which unanimously refused the appeal.

74. The right to plead guilty is an aspect of the right to trial in due course of law which an accused enjoys pursuant to Article 38.1 of the Constitution, and the Court of Appeal was satisfied that, while there were limited circumstances in which a guilty plea could be refused, this was not one of them.

75. In what appears to be a clear reference to the dictum of Denham C.J. in *Ryan v Governor of Midlands Prison*, the Court of Appeal unanimously found that the High Court judge was right in his determination that the necessary exceptional circumstances permitting a District Judge to refuse a guilty plea did not exist in that case and the District Judge, notwithstanding his well-intentioned motivation, was wrong to not accept the applicant's change of plea when it was offered on 14th January, 2016. The Court of Appeal held (at para. 56):

> "There was, from that point on, a serious flaw in the proceedings that required to be corrected. …[T]he trial judge's decision to remand him in continuing custody from the 14th to the 19th of January 2016, in circumstances where he had offered to plead guilty, and that plea should have been accepted, is problematic."

76. At para. 57, the Court of Appeal examined what would have occurred if a plea of guilty had been accepted, as it ought in law to have been, and noted that the applicant could either have been sentenced immediately or, if the judge was not disposed to do so, might have obtained bail in the new circumstances that then obtained, as a guilty plea was one of the matters which would be taken into account in any such application. They stated:

> "On the contrary, he was remanded in custody in the flawed circumstance of being treated as continuing to be contesting his guilt, which did not represent the reality, and on the basis that his trial would in fact continue on an uncertain date in the future once written submissions had been exchanged."

77. That is similar to this case as it was common case at the hearing before me that, had the applicant been sentenced on 19th May, 2021, as originally intended by the District Judge, he could at that stage have entered a notice of appeal and would have been entitled to a stay on his conviction. On the entry into recognisances, he would then have been at liberty. Instead, the applicant remained in custody for over a week notwithstanding several court orders for his production which were not complied with, and notwithstanding the fact that compliance could have been achieved by way of video link pursuant to the 2020 Act enacted to deal with the special exigencies of the Covid-19 pandemic. There was, therefore, every likelihood that the applicant would have been at liberty at the time the application for a conditional order was made.

78. In effect, what occurred here, is that by reason of the general Covid-19 procedures within the prison, the applicant was deprived of his right of access to the court, was deprived of the benefit of the decision by the District Judge that he be sentenced as soon as possible, and was deprived of the benefit of potentially being at liberty on the basis that he could appeal any sentence imposed and be at liberty pending his appeal to the Circuit Court.

79. That appears to me to be a fundamental flaw. I do not have to enter into a discussion as to whether Article 40 should proceed even though there is an alternative remedy of judicial review, because I do not believe that any such remedy in reality existed in this case. The State argued trenchantly that Article 40 was not appropriate, but also that each single period of detention should be looked at and that I should not look at the earlier periods of detention from the 18th May to the 24th May. Once the detention was on foot of the committal warrant of the 26th May, 2021, the logic of the State's argument was that I should not look at the committal warrant of the 24th May, 2021.

80. The remand of 26th May, 2021, was for 24 hours. There is absolutely no prospect of any judicial review proceedings concluding within that time and, indeed, notwithstanding the speed of the Article 40 inquiry, it concluded only just before the period of remand itself expired. To accept the dual legal argument of the State that I should only look at the period of detention that was actually current at the time of the hearing of the Article 40 inquiry, but that I should find that the applicant should apply by way of judicial review if he was dissatisfied with the District Judge's decision to remand him further, or that I should not look behind the Committal Warrant notwithstanding the evidence as to what occurred in the District Court and also the additional evidence tendered by the respondent to this court as to the reasons for non-production would, on the facts of this case, result in the denial to the applicant of any remedy effective to review the lawfulness of his detention and, indeed, would result in the denial to the applicant of his constitutional right to an Article 40 inquiry in the first place. In the words of O'Donnell J. *S.McG.*, at para. 11, once I became satisfied, as I was, that the fundamental constitutional rights of the applicant had been breached by his continuing remand by the District Judge notwithstanding the failure of the prison to give a reason within the meaning of s. 24 (5), the upholding of his constitutional rights required me to proceed to release him on foot of the Article 40 inquiry.

81. For the avoidance of doubt, had I considered it necessary to consider the lawfulness of the remand on 24th May, 2021, I would have also found that that remand was not lawful. In relation to that remand, Ms. Kelly clearly stated on affidavit that the District Judge was of the view that she could not look behind the "sick note" provided by the prison. However, there is no question but that the District Judge was entitled to look behind it. It was submitted to me that to interpret Ms. Kelly's affidavit as relating a statement by the District Judge that she felt she would not have jurisdiction to come to her own view on the matter was to parse the affidavit. I do not accept that this is so. The plain meaning of the words used by Ms. Kelly in her affidavit - and I reiterate that she was not cross examined on it - was to the effect that the District Judge expressed the view that she was somehow bound by this document. That is not correct, and s. 24 (5) requires the District Judge himself or herself to be satisfied that the reason for non-production in breach of a previous court order was for one of the limited reasons set out in s. 24 (5), in the absence of being so satisfied, they should not further remand a prisoner.

Conclusion

82. The evidence in this case was to the effect that the prison authorities were of the view that the public health emergency occasioned by the Covid-19 pandemic was sufficient to justify non-production of prisoners in the isolation unit in Block F, despite statutory provision being made for the production of prisoners by video link as part of the State's response to the pandemic. Arguably, the Act created an obligation to produce by video link in all cases but, it is not necessary to find this as I have considered the matter from the point of view of the contention of the applicant that the respondent had not discharged the onus of proof of showing that the failure to provide for any video link facilities to prisoners in quarantine in Block F. The evidence was to the effect that it could not be said that it was not possible to provide for video link facilities in Block F itself and in particular, the possibility of using a mobile video link unit was not considered until the conditional order was granted on 25th May, 2021. At the time of the Inquiry, it could not be said whether that would be possible or not, but the onus was on the respondent, who had not complied with the orders to produce the applicant to court, to demonstrate that it was not possible. In those circumstances, the detention was unlawful.

83. I also disagree with the respondent's contention that this court should not look behind the committal warrant of the 26th May, 2021 in this case. The uncontroverted evidence was, in essence, that the District Judge pronounced herself dissatisfied with the reasons given for non-production by video link on that date but nevertheless purported to remand the applicant. In my view, this was a breach of the applicant's constitutional rights to liberty and to access to the court and this is an appropriate case, by reference to the test enunciated in *Ryan v. Governor of Midlands Prison*, for intervention by way of Article 40.

84. For these reasons, I ordered the release of the applicant on the morning of the 27th May, 2021, prior to the expiry of his period of detention.