

**Neutral citation No: [2013] NIQB 39**

*Ref:* **GIR8797**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

*Delivered:* **22/03/13**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**Maye (George) and McHughs' (Paul) Applications [2013] NIQB 39**

**IN THE MATTER OF APPLICATIONS BY GEORGE MAYE  
AND PAUL McHUGH**

**AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
OF DECISIONS MADE BY THE NORTHERN IRELAND COURTS  
AND TRIBUNALS SERVICE**

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**MORGAN LCJ, GIRVAN LJ and TREACY J**

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**GIRVAN LJ (giving the judgment of the Court)**

**Introduction**

[1] The applicants George Maye and Paul McHugh bring these judicial review applications to challenge the validity of warrants of commitment purportedly issued against them arising out of their failure to pay monies ordered to be paid on foot of Confiscation Orders made under the Proceeds of Crime (Northern Ireland) Order 1996 ("the 1996 Order").

[2] Mr O'Rourke QC, Mr O'Brien and Mr McKenna appeared on behalf of the applicants. Dr McGleenan QC and Mr McQuitty appeared on behalf of the Northern Ireland Courts and Tribunals Service ("the Court Service"). The court is indebted to counsel for their helpful and focussed written and oral submissions.

[3] While these applications raise somewhat different issues from those raised in the cases of McLarnon, Chakravarti and McKeown the judgment in relation to those applications should be read in conjunction with the judgment given in respect of the present proceedings.

## **Factual Background**

### *George Maye*

[4] On 26 March 2009 the applicant George Maye was convicted in the Crown Court in respect of offences of conspiracy to defraud contrary to common law and obtaining credit as a bankrupt and engaging in business as a bankrupt contrary to Article 331 of the Insolvency (Northern Ireland) Order 1989. Following a series of postponement orders for the applicant to serve his sentence of imprisonment on 4 March 2011 His Honour Judge McFarland made a Confiscation Order against the applicant under the 1996 Order for the sum of £62,172.50 to be paid by 4 March 2012. No default period of imprisonment was expressly stipulated by the judge. At the hearing prosecution counsel was unable to advise the judge of the relevant default period of imprisonment if the confiscation monies were not duly paid. The transcript showed the following exchange:

“Judge: Do I have to determine the length of period in custody?”

Prosecution: Yes, Your Honour does need to set a default period and I haven’t a table in front of me Your Honour but I will come back to the court almost immediately on that point.

Judge: Well I would propose to use the same table that is used for the fine default. You have up to 12 months, isn’t it?

Prosecution: Yes that would be right Your Honour.

Judge: Well I would give him the full 12 months to pay that.”

The order itself merely stated:

“A period of custody to be served in default of payment” without specifying the exact period.

[5] On 18 June 2011 the applicant made a £1,000 payment towards the Confiscation Order. On 4 March 2012 the applicant applied for an extension of time to pay the Confiscation Order. The applicant was granted an extension to 31 October 2012 on the condition that the applicant made a £2,000 payment on 30 April 2012 and a further £2,000 payment on 31 July 2012. Whilst the applicant failed to meet the first of those payments, he did make payments between 25 May 2012 and 31 August 2012 totalling £3,000.

[6] A warrant of commitment was administratively issued on 27 November 2012 stipulating that the applicant was to serve 24 months' imprisonment having defaulted on payment of the Confiscation Order. The applicant was arrested and detained on foot of the warrant on 5 December 2012. The applicant made an application to the judge for his release from custody but the judge ruled that he was *functus officio*. On 18 December 2012 the applicant commenced the present judicial review proceedings and was granted interim relief by Treacy J releasing him from prison pending the hearing of the proceedings.

*Paul McHugh*

[7] On 26 January 2012 the applicant was convicted in the Crown Court of an offence under Section 105A(1A) of the Social Security Administration (Northern Ireland) Act 1992 (relating to a failure to declare a change in circumstances). His Honour Judge Smyth QC made a Confiscation Order against the applicant for the sum of £32,546.86 under the 1996 Order. Payment was to be made by 25 July 2012. The order itself as drawn did not specify a term of imprisonment in default. When passing sentence the following exchange took place between counsel and the Judge:

“Prosecution: The clerk has the formal papers for the order Your Honour should say that in default of that there would be an 18 month period of imprisonment consecutive to any ...

Judge: It is fixed by law, isn't it?

Counsel: It is Your Honour.

Judge: What is the actual period?

Counsel: 18 months, Your Honour.

Judge: 18 months sentence imprisonment if there is default in making ...

Counsel: And that payment has to be made by 25 July 2012.

Judge: Mr Fox if you could reinforce that to him.

Counsel for the defence: I will speak to him now about those details I am very much obliged, Your Honour."

[8] On 19 June 2012 the court office sent a letter to the applicant's solicitor advising that payment of the full sum remained outstanding. The applicant was advised that he could make an application to the court for an extension of time to pay and if the balance was not paid by the due date a warrant might issue committing the applicant to prison. On 25 July 2012 the full balance of £32,546.86 remained outstanding. On 6 August 2012, E Coey on behalf of the Chief Clerk issued a warrant of commitment for 18 months' imprisonment against the applicant in consequence of his default on payment.

[9] On 15 December 2012 the applicant was arrested and imprisoned in HMP Maghaberry on foot of the warrant of commitment. On 21 December 2012 the applicant avers that he made an application to the Crown Court seeking an extension of time to pay the Confiscation Order but the judge was of the view that he was functus officio as the warrant of commitment had already been executed. On the same date the applicant commenced the present judicial review proceedings and was granted interim relief by Treacy J releasing him from prison pending the hearing of the proceedings.

### **Relevant Statutory Provisions**

[10] Article 8 of the 1996 Order provides:

"(1) Where a defendant is convicted, in any proceedings before the Crown Court or a court of summary jurisdiction, of an offence to which this Order applies the court shall -

- (a) if the prosecution asks it to proceed under this article; or
- (b) if the court considers that, even though it has not been asked to do so, it is appropriate for it so to proceed,

determine whether the defendant has benefited from any relevant criminal conduct or as the case may be from drug trafficking.

(2) Subject to paragraph (4) if, in the case of an offence of a relevant description, the court determines that the defendant has benefited from any relevant criminal conduct, the court shall make an order (a Confiscation Order) ordering the defendant to pay -

- (a) the amount equal to the value of the defendant's benefit from the relevant criminal conduct; or
- (b) the amount appearing to the court to be the amount that might be realised at the time the order is made

whichever is the less."

[11] Article 13(1) provides:

"(1) Where the Crown Court orders the defendant to pay any amount under this order, section 35(1), (2) and (4) of the Criminal Justice Act (Northern Ireland) 1945 (powers of Crown Court in relation to fines) shall have effect as if the amount were a fine imposed on him by the Crown Court."

[12] Article 13(2) provides:

"Where -

- (a) a warrant of commitment is issued for a default in payment of an amount ordered to be paid under this order in respect of an offence; and
- (b) at the time the warrant is issued, the defendant is liable to serve a term of custody in respect of the offence;

the term of imprisonment ... to be served in default of payment of the amount shall not begin to run until after the term mentioned in sub-paragraph (b)."

[13] Under Article 13(4) it is provided that an amount payable under a Confiscation Order is not a fine, costs damages or compensation ... or a sum adjudged to be paid by conviction for the purposes of Article 91(5) of the Magistrates' Courts (Northern Ireland) Order 1981 (Remission of Sum).

[14] Under Article 13(5) it is provided that where a defendant serves a term of imprisonment or detention in default of paying any amount due under a Confiscation Order, his serving that time does not prevent the Confiscation Order from continuing to have effect, so far as any other method of enforcement is concerned.

[15] Section 35(1) of the Criminal Justice Act (Northern Ireland) 1945 as amended provides that:

“(1) Subject to the provisions of this section, where a fine is imposed by ... the Crown Court ... the court may by order:

(a) allow time for the payment of the amount of the fine or the amount due under the recognizance;

(b) direct such payment to be made by instalments of such amounts or on such dates respectively as may be specified in the order;

(c) fix a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered;

(d) in the case of a recognisance, discharge the recognizance or reduce the amount due thereunder;

(e) on the application of the person liable to make the payment, allow further time for payment or vary an order for payment by instalments.”

Section 35(2) provides that the period set out in the second column of the table shall be the maximum periods of imprisonment or detention which may be fixed under sub-section (1)(c) applicable respectively to the amount set out opposite thereto. Thus, for example, in respect of an amount exceeding £20,000 but not exceeding

£50,000 the maximum period of imprisonment is 18 months. An amount exceeding £50,000 but not £100,000 carries a maximum period of 2 years.

[16] Under Section 35(4)(c) of the 1945 Act it is provided that where the order fixes a term of imprisonment in default of payment of a fine or the amount due under a recognisance, then –

“(i) on payment of the said amount to the officer responsible for the recovery thereof, or to the governor of the prison, the order shall cease to have effect, and if the person in respect of whom it was made is in prison, he shall forthwith be discharged.

(ii) on payment to the said officer or to the governor of the prison of a part of the fine or part of the amount due under the recognisance the total number of days in the term of imprisonment shall be reduced proportionately, that is to say by a number of days bearing as nearly as possible the same proportion to the total number of days in the term as the sum paid bears to the amount of the sum or the amount due under the recognisance provided that, in reckoning the number of days by which any term of imprisonment would be so reduced the first day of imprisonment shall not be taken into account and that in reckoning the sum which will secure the reduction of the term of imprisonment, fractions of a penny shall be omitted.”

### **The Applicants' Case**

[17] Mr O'Rourke QC drew attention to the fact that in England and Wales in respect of Confiscation Orders or fines the court is required to set a period of imprisonment to be served in the event of a failure to make payment whereas in Northern Ireland the fixing of a default period is discretionary. The use of the words “the maximum period” makes it plain that the court may fix the term of imprisonment below the maximum period. Counsel drew attention to R v Ellis [1996] 2 Crim App R(S) 403. A failure to impose a default period by way of commitment when the Confiscation Order was imposed precludes the court sending the defendant to prison because that would be to deal with the offender more seriously than under the original order. Counsel contended that the issue of a Warrant of Commitment is a judicial act and not merely an administrative one (Re Wilson [1985] AC 750 at 757). Before an offender is committed to prison he should have the ability to make representations (Re Forrest and Hamilton [1981]

AC 1038). A Warrant of Commitment should be a matter of last resort (per Stuart-Smith LJ in R v Harrow Justices [1991] 1 WLR 395 wherein it was stated that it was incumbent on the court to consider other methods of enforcement short of issuing a Warrant of Commitment under the Drug Trafficking Offences Act 1986.) A defendant is entitled to be heard in any proceedings in relation to crime enforcement hearings (R (Agogo) v North Somerset Magistrates' Court [2011] EWHC 518. In Bent v United Kingdom [2005] 41 EHRR the European Court of Human Rights stated clearly that where deprivation of liberty is at stake the interests of justice in principle called for legal representation.

[18] Mr O'Rourke QC argued that the warrants were unlawful in the present instance because:

- (i) there had been no default period specified in the court orders;
- (ii) the person issuing the warrants had no authority to issue them;
- (iii) the issue of the Warrants of Commitment was a judicial act which demanded proper judicial discretion being exercised; and
- (iv) the applicants were entitled to be notified and heard whether a warrant should issue. The warrants as issued were unlawful and void. R v Ellis was authority for the proposition that whilst the failure to fix a default period did not invalidate the Confiscation Order itself there was no lawful authority for enforcement of the order by way of Warrant of Commitment. The issue of the warrants and the applicants' subsequent detention breached Article 5(4) of the Convention, breached their right to natural justice and their right to a fair trial under Article 6(1) of the Convention.

### **The Court Service's Case**

[19] Dr McGleenan QC argued that in the case of Maye, Judge McFarland on 4 March 2011 effectively set the maximum default as the applicable default period. He accepted that the Confiscation Order was to be enforced in the same way as a fine under section 35 of the 1945 Act pursuant to article 13 of the 1996 Order. Since section 35(1)(c) of the 1945 Act gives power to the court to fix a default period which the person liable to make the payment "is to undergo" if any sum which he is liable to pay is not duly paid it can be seen that the default period, once set, cannot itself be varied under the 1996 Order save by operation of section 35(4) (which provides for a proportionate reduction in the event of part payment). There is an express but limited power in article 22 of the 1996 Order for the court to reduce the amount of the confiscation sum in the event of inadequacy of realisable assets.



[20] Counsel rejected the applicant's argument that there was no power to issue a Warrant of Commitment in the 1945 Act. By necessary implication section 35(1)(c) of the 1945 Act empowers the Crown Court to not only fix a default period but also to issue a Warrant of Commitment if any sum which he is liable to pay is not duly paid. Article 13(2) of the 1996 Order assumes such a power (Article 13(2)(a) provides that where a Warrant of Commitment is issued for default the term of imprisonment is to be consecutive to any term of custody which the defendant is liable to serve in respect of the offence). An express statutory power carries implied ancillary rights (Great Eastern Railway Co [1885] AC 473). Dr McGleenan rejected as misconceived the applicant's reliance on section 47(4) of the Judicature (Northern Ireland) Act 1978 which was not relevant. There is no lacuna in the law that requires the case to fall back on section 47(4). The respondent submitted that a Crown Court having made a Confiscation Order under article 8 of the 1996 Order and having fixed a default period in accordance with section 35 is empowered to enforce that order in default without further notice. The Fines Act (Ireland) 1851 has no relevance. The issue of Warrants of Commitment in the present cases was an administrative act carried out by the Clerk of the Court in order to give effect to the earlier judicial act. The sentence of imprisonment was in effect imposed on him by the Confiscation Order. When default occurred the administrative act of issuing a Warrant of Commitment operated to simply give effect to that earlier judicial order. Counsel described the issue of the warrants as a hybrid judicial-administrative act. Counsel accepted that a Warrant of Commitment which deprives the subject of his liberty should only be issued after the performance of a judicial act effected with judicial propriety. He contended that the relevant judicial act effected with judicial propriety took place at the earlier stage in the proceedings when the Crown Court imposed the Confiscation Order wherein default periods of imprisonment were fixed and which took effect immediately on default. That earlier proper judicial act is, thus, given effect by the subsequent administrative act by which the Clerk of the Court issued the Warrant of Commitment. Being an administrative act there was no legal prohibition on the same being carried out by the Clerk of the Court. The applicants were able to participate in the hearings in respect of the Confiscation Orders. There were safeguards after the Confiscation Order had been made (an extension of time to pay could be made under section 35(1)(e).) Article 22 permitted applicants to make application to the court to reduce the amount of the Confiscation Order (and with it the term of default imprisonment) and section 35(4)(c)(ii) whereby the period of imprisonment was reduced proportionately to reflect any payments made. These provisions were adequate to protect the liberty of the individual and to ensure that the period of imprisonment was proportionate. The applicants had had a fair hearing satisfying Article 6 of the Convention. Mr Maye ignored correspondence and did not seek to extend time under section 35 nor had he argued for a certificate under article 22 as judicial review proceedings themselves provided a safeguard. No proper challenge to the lawfulness of the orders of imprisonment had been established. Relying on Perks v UK [2000] 30 EHRR 37 counsel argued that article

5(1)(b) of the Convention permitted the lawful arrest and detention of a person for non-compliance with the lawful order of the court though Dr McGleenan had to concede that the European Court had found in that case a violation of Article 6 in respect of the absence of legal aid.

## **Conclusions**

### ***Maye's Application***

[21] The Warrant of Commitment issued against the applicant cannot stand for the reason that the court in that case had not in fact fixed a default period of imprisonment. The judge did not pronounce such a period when he made the Confiscation Order. The order as drawn appears to have merely stated that a period of custody would be served in default of payment. It is the sentence pronounced by the judge in court rather than the order as drawn which constitutes the relevant sentence (R v Kent [1983] 77 Crim App R 120 at 125).

[22] Unlike the position under the English legislation in the Powers of Criminal Courts Act 1972, which requires the court when imposing a fine to make an order fixing a term of imprisonment if any sum is not paid as ordered, the 1996 Order did not require the court to fix a default period of imprisonment. Section 35 does not in terms require the fixing of a default period of imprisonment at the same time as the imposition of the Confiscation Order and since a statutory power may be exercised from time to time as circumstances require there appears to be no reason in principle why the court could not impose a default period of imprisonment at any point in time when the confiscation sum remains unpaid. Thus in the case of Maye there seems to be no reason why the court, subject to ensuring that there is a fair hearing (see below) could not impose a default period of imprisonment on the applicant if he continues to default in the payment of the monies due on foot of the Confiscation Order.

### ***McHugh's Application***

[23] Judge Smyth QC in his oral judgment imposed a default period of imprisonment of 18 months. While the order did not specify the term of imprisonment to be served the oral judgment of the court constituted the sentence (R v Kent see above). Strictly the judge was in error in concluding that 18 months was a fixed period. The statutory period was a maximum term and the sentencing judge was bound to consider whether that period or a lesser period should be fixed as the appropriate period. No appeal, however, was brought against the default period as fixed by the Judge.

[24] In our judgment in the case of McLarnon, McKeown and Chakravarti we set out the reasons why, in the context of proceedings to enforce a fine in the Magistrates' Court, common law fairness and the requirements of article 6 imposed an obligation on the court to ensure that before a Warrant of Commitment was issued a hearing took place at which the defendant could make representations to show cause why imprisonment should not be ordered. We conclude that although the legislative context is somewhat different similar principles come into play when the Crown Court is considering whether to put into effect a default order for imprisonment when a defendant has failed to pay monies due under a Confiscation Order.

[25] The proceedings in question were governed by the 1996 Order. The later Proceeds of Crime Act 2002 in section 186 empowered the Director of Public Prosecutions to apply to the court to issue a summons ordering the defendant to appear before the court for a hearing at which the court was empowered to issue a Warrant of Commitment. If the defendant did not appear the Crown Court could issue a warrant for his arrest. That procedure thus clearly envisaged and provided for an opportunity for securing the attendance of the defendant at a hearing before an order of imprisonment was made. Such a procedure complies with the requirements of fairness and with Article 6. Although the 1996 Order does not contain the statutory procedure in section 186 of the 2002 Act, the requirements of Article 6 and common law fairness call for a similar procedure. Thus the Crown Court would be bound to conduct a hearing that would be bound to give the defendant an opportunity to attend and make representations (if necessary, depending on the defendant's means, with the benefit of legal aid). Unless such a hearing is, in fact, conducted the court cannot know of the circumstances which may call for the extending of time for payment or whether an instalment order should be imposed or, if already imposed, should be varied. Furthermore, the defendant may have a basis for applying to the High Court under Article 22 for a certificate that the realisable property is inadequate for the payment of the amount remaining to be recovered and for arguing that the Crown Court should not make an order for imprisonment immediately until the applicant has had an opportunity to make an application to the High Court. Furthermore, the defendant may be able to produce evidence of some special circumstances (such as those arising under Article 8) which would help to inform the court on whether the issue of an immediate Warrant of Commitment would be proportionate. A hearing must accordingly take place at which the defendant has an opportunity to make relevant submissions.

[26] The case of McHugh is an example of the kind of problem which may arise if there is in fact no hearing at which the circumstances can be properly investigated. The judge in McHugh's case concluded that he was functus officio once the Warrant of Commitment was issued and executed notwithstanding that the applicant was seeking an extension of time to pay the Confiscation Order. Whether he had any

basis for such an application remains to be seen. The timing of an application to seek further time to pay confiscation monies against the background of existing delay and the absence of any previous such application would be relevant matters for the court to consider when deciding whether an immediate Warrant of Commitment should be issued. Against a background of a specified default period of imprisonment and in the absence of any application for an extension of time to pay, the lack of any real explanation justifying that delay will usually lead the court to conclude that the default period of imprisonment as specified should be served. Fairness, however, does require that a judicial consideration is carried out of the circumstances before a defendant serves a potentially lengthy period of imprisonment.

[27] Accordingly we conclude that the Warrants of Commitment in both cases were not validly issued. We shall hear counsel on the appropriate relief.