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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McLarnon, McKeown and Chakravartis' Applications [2013] NIQB 40

IN THE MATTER OF AN APPLICATION BY MICHAEL McLARNON, GERARD McKEOWN AND LEON CHAKRAVARTI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE CHIEF CONSTABLE OF THE POLICE SERVICE FOR NORTHERN IRELAND

Before: Morgan LCJ, Girvan LJ and Treacy J

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This judgment relates to three separate judicial review applications which raise a common point and one of some practical importance in relation to the proper procedures to be followed in relation to the imposition and enforcement of fines on defendants convicted of offences coming before the Magistrates' Courts. The central question relates to the lawfulness of warrants of commitment issued by the Northern Ireland Courts and Tribunals Service ("the Court Service") under the arrangements currently in place.

[2] As originally argued in the case of Michael McLarnon in the judicial review proceedings which he initiated the central issue raised was whether the execution of the warrants of commitment for non-payment of fines was lawful having regard to the passage of time between the initial issuing of the warrants and their subsequent execution. The court, having reserved judgment on the issues raised by the parties, concluded that there was a prior question which required to be addressed, namely whether the underlying warrants as issued were in fact lawful warrants. We drew the parties' attention to a number of questions which we considered fell to be fully argued and considered when determining the lawfulness of the warrants as issued.

[3] Subsequently a number of other applicants instituted judicial review proceedings raising interrelated questions. In this judgment we deal with the applications which relate to the issue of warrants of commitment in the Magistrates' Courts arising out of the non-payment of fines imposed in those courts. In a second judgment we deal with the case of those applicants who had raised issues in respect of the issue by the Crown Court of warrants in consequence of the non payment of monies payable on foot of confiscation orders imposed by the Crown Court under the Proceeds of Crime (Northern Ireland) Order 1996.

[4] In the case of Michael McLarnon the applicant originally raised three questions. Firstly, the question arose as to the period of time which constituted a reasonable time within which the PSNI should have served the warrants which were issued. The second question related to the methodology employed by the PSNI in extending time for the service of such warrants. The third issue related to the procedural steps deployed by the PSNI in seeking to keep under review warrants which had issued. Counsel contended that there is a conflict of authority between what the Court of Appeal said in Re McKenna [1998] NI 287 and the Divisional Court in Re Tierney [2009] NI 77. We shall return to these issues at a later stage in the judgment.

Factual background

Leon Chakravarti

[5] On 2 February 2012 this applicant pleaded guilty at Downpatrick Magistrates' Court to the offences of common assault and disorderly behaviour. He was fined a total of £200 and granted 15 weeks until 17 May 2012 to pay. On 17 May 2012 the full balance of the £200 fine remained outstanding. On 25 May 2012 the applicant's £200 fine was passed to the NI Court Service's Fine Recovery Team. Letters were sent to the applicant on 25 May 2012 and 1 June 2012 advising of the outstanding £200 fine. On 31 May 2012 the applicant was convicted again at Downpatrick Magistrates' Court for drugs offences and on this occasion was fined a total of £400. The applicant was granted until 20 September 2012 to pay this £400 fine. On 11 June 2012 Downpatrick Court received an application from the applicant for an extension of time to pay the £200 fine. On 21 June 2012 District Judge McCourt granted the application and extended the time to pay the £200 fine to 20 September and the £400 fine. On 9 July 2012 a warrant of commitment was issued in respect of another unrelated outstanding fine imposed by Belfast Magistrates' Court on 13 April 2012. From 16-20 July 2012 the applicant was in prison on foot of this warrant of commitment in respect of the Belfast Magistrates' Court fine. On 20 September 2012 the full balance of both the £200 fine and the £400 fine remained outstanding. On 28 September 2012 the applicant's £400 fine was passed to the NI Court Service's Fine Recovery Team. Letters were sent to the applicant on 28 September 2012 and 5 October 2012 advising of the outstanding £400 fine. Because the £200 fine had already previously been referred to the Fine Recovery Team for non-payment, on this occasion a warrant of commitment was issued for non-payment of the £200 fine.

On 11 October 2012 the applicant lodged at Downpatrick Courthouse an application for an extension of time to pay. On 25 October 2012 District Judge Bates granted an extension of time to 24 February 2013 to pay the £400 fine. On 22 October 2012 the applicant was arrested and taken into custody on foot of the warrant of commitment for the £200 fine. The applicant commenced the present judicial review proceedings on the same day and was granted interim relief leading to him being released from prison pending the hearing of the present proceedings.

Gerard McKeown

[6] On 10 November 2011 this applicant was fined £250 for the offence of disorderly behaviour at Belfast Magistrates' Court. He was granted 12 weeks to 2 February 2012 to pay the fine. The Order Book Sheet signed by the relevant District Judge purported to stipulate "Fine £250.00 … To be paid by 02-FEB-2012 … Default 14 Days in Prison". On 2 February 2012 the full balance of the £250 fine remained outstanding. On 9 February 2012 the applicant's £250 fine was passed to the Northern Ireland Courts and Tribunals Service ("the Court Service") Fine Recovery Team. Letters were sent to the applicant on 10 February 2012 and 17 February 2012 advising of the outstanding £250 fine. On 27 February 2012 a warrant of commitment was issued for non-payment of the £250 fine. The applicant attended the PSNI enquiry office on 17 April 2012 and advised the police that he required a further 5 weeks to pay the fine. On this occasion the PSNI warned him that the warrant would continue to remain active. On 23 January 2013 the applicant was arrested for unrelated alleged offences. He was further arrested and detained on foot of the warrant of commitment. The applicant commenced judicial review proceedings and was granted leave to apply for judicial review on 29 January 2013. He was released pending the determination of these proceedings

Michael McLarnon

[7] On 23 February 2009 the applicant was convicted in his absence at Lisburn Magistrates' Court of the offences of driving a motor vehicle without insurance and driving a motor vehicle with no licence. He was disqualified from driving for 12 months and fined a total of £550 to be paid by 23 March 2009. The Court Order Book signed by the relevant District Judge stipulated the fines, the payment date and a default period of imprisonment. A 'Fine Notice' was sent to the applicant on 24 February 2009. On 19 March 2009 the applicant made payment in cash of £100 and lodged an application for extension of time to pay the remainder of the fine. The District Judge granted an extension of time to 31 July 2009. On 22 July 2009 the applicant made a further cash payment of £60 and a further application for extension of time. On foot of this application, the District Judge ordered the applicant should pay the remainder of the fine by instalments of £20 per week beginning on 7 August 2009. However, contrary to these terms, the applicant only made a further single payment of £60 on 14 October 2009. On 30 December 2009 the Court Service Fine Recovery Team issued a '10 day letter' to the applicant advising him that he was £40 in arrears which required payment within 10 days otherwise a warrant would issue.

A '3 day letter' was sent to the applicant on 7 January 2010. On 3rd February 2010 the applicant made a further £60 payment. However, no payments were subsequently made by the applicant and a warrant of commitment was issued on 1 July 2010 on the grounds that £270 of the fines was still outstanding. The applicant was subsequently arrested and detained on foot of the warrant.

The Court Service Practice

[8] The practice currently adopted as explained in the affidavits of Mr Coffey and Mr Luney on behalf of the Court Service follows the following pattern:

(a) When imposing a fine or other sum adjudged to be paid on conviction of a defendant the District Judge pursuant to Article 91 of the Magistrates' Courts (Northern Ireland) Order 1981 ("the 1981 Order") considers whether to order the defendant to pay the sum forthwith, allow time for payment or order payment by instalments.

(b) Generally District Judges do not make any oral declaration as to the period of imprisonment to be served in default of payment of the fine imposed. They may on occasion make reference to a period in default of payment (for example when the defendant appears in person). There may be a general reference to imprisonment as a consequence of non payment. In the vast majority of cases no reference is made in open court to the imposition of specific periods of imprisonment in default of payment.

(c) Schedule 3 of the 1981 Order specifies the maximum period of imprisonment which may be imposed for non-payment of a fine of the amount shown in the schedule. It is a maximum and thus the court will ultimately have to exercise a judicial discretion as to the actual period to be imposed. Since the introduction in or about 2006 of the Court Service's integrated computer system (known as ICOS) when the order is drawn up by the clerk the system generates the default period based on the total fines imposed. The system automatically populates the order with the maximum applicable default period. The entry can be overwritten if it requires to be changed. Even before the introduction of ICOS clerks inserted the default period themselves by reference to the maximum applicable period.

(d) The District Judge signs the Order Book. The Order Book shows the fine, the date by which it must be paid and the default period of imprisonment.

(e) The defendant is notified of the monetary penalty by a Fine Notice. This notice specifies the amount of the fine, the date by which it is to be paid and advises that if payment is not made a warrant would be issued committing him to prison. It further states that the issue of a warrant would increase the sum owed by £5 per charge and that no payment could be accepted by the court office once a warrant is issued. (At that stage payment could only be made to the PSNI or Prison Governor). It explains the various methods by which the payment could be made and advises

that the defendant may apply to the court for payment by instalments, for further time to pay or to vary any instalment order.

(f) Where no payment is made by the due date ICOS provides a 7 day opportunity for the defendant to make late payment. On the expiry of that time the involvement of the fine recovery team based in Laganside Courts is engaged. An enforcement block supressing the issue of a warrant for 10 days is applied. A 10 day letter is sent to the defendant stating that payment should be made immediately and pointing out that if the defendant is having difficulty paying the fine he may apply to the court for payment by instalments or for further time to pay. The letter strongly encourages a defendant to either make payment or immediately contact the fine recovery section to avoid any further action being taken at this stage. Seven days later a 3 day notice is given to the defendant. This is expressed to be a final opportunity to pay the fine otherwise a warrant would issue in 3 days' time.

(g) On expiry of that time a computer generated warrant created message is issued and details are forwarded by the Court Service to PSNI and the PPS. The PSNI Case Management System (NICHE) automatically creates an occurrence file which links the defendant to the warrants. The NICHE Causeway Adapter allocates the warrants to the relevant PSNI Justice Support Unit (in police terminology known as the "Owning Police Unit").

The PSNI role

[9] The PSNI NICHE automatically creates an occurrence file which links a defendant to the warrants. For example, in the case of Michael McLarnon the NICHE Causeway Adapter allocated the warrants to the PSNI Lisburn Justice Support Unit. This unit (known in police terminology as "the owning police unit") covers a number of housing estates including Twinbrook and Poleglass. In the area covered in what appears to be a very busy unit there is a substantial number of warrants outstanding. According to the affidavit of Sergeant Roberta Daniel there are 400 active warrants at any one time in the Dunmurry area. After the warrants relating to the applicant Michael McLarnon were allocated to the Lisburn unit workflow in relation to the warrants was initiated on 2 July 2010 and the warrants were assigned to officer number 15298 for execution. The warrant officer in Dunmurry opened the assigned tasks and reviewed the warrants. They were opened and reviewed periodically thereafter (on 7 July 2010 and 8 July 2010, 12 November 2010, 21 December 2010 and 24 January 2011) but apart from being opened and reviewed no active steps were taken to execute the warrants. No attempt was made to find and serve the applicant. On 19 February 2011 the applicant was arrested in relation to an unrelated matter. Whilst in custody he was arrested on foot of the two warrants.

[10] Superintendent Andrea McMullan deposes that in 2010 there were a total of 51,763 fines imposed in Northern Ireland. Two thirds of all sentences consist of fines imposed on defendants. There is no civilianised fine collection or enforcement

service in this jurisdiction unlike in the rest of the United Kingdom. Furthermore in this jurisdiction there is apparently no mechanism in place to deduct unpaid fines from state benefits paid to defendants. Such a mechanism, if it were to be introduced by legislation, would solve a number of the practical problems which arise in relation to the enforcement of unpaid fines. In 2010 the PSNI received 24,526 fine warrants to execute which equals 67 such warrants each day falling to be executed. The PSNI is clearly unhappy with the role imposed on it to pursue offenders who have the option to pay the fine rather than face imprisonment. Tracking defaulters can present practical difficulties. Offenders may actively evade police or may live in high threat areas or may be difficult to trace or when traced they may deny that they are in fact the relevant defendant. The execution of warrants requires skilled police officers to be diverted from core policing work. It is conservatively estimated that 48 police officers a year are in effect working full-time in effect on fine enforcement. Arrest on money warrants represents the ninth leading reason for effecting an arrest of individuals. On occasions detained persons require overnight stay in police custody suites. As of 14 September 2011 there are 36,878 outstanding fine warrants. While the PSNI have a statutory responsibility to execute warrants and continue to execute fine warrants as expeditiously as possible, other more pressing police activities may sometimes have to take precedence. The Policing Board do not view fine enforcement as a core policing function and have not set targets in the 2011/2014 policing plan regarding fine enforcement. PSNI strategic priorities include building relationships with presently hard to reach communities and a fine enforcement has the potential to undermine the great strides forward that have been made in work with such communities. There is no force order or other form of policy currently active with regard to the execution of warrants.

The relevant statutory provisions

[11] Article 91 of the 1981 Order provides:

> "(1) Where a person has been adjudged to pay a sum by a conviction of a magistrates' court, the court may, subject to Article 93, order that person to pay that sum forthwith, allow time for payment or order payment by instalments.
>
> (2) The court shall consider any representations made by such person as to the time to be allowed under paragraph (1) but that time shall not be less than 28 days commencing with the day in which the sum is adjudged to be paid.
>
> (3) Where the person ordered to pay the sum makes an application for permission to pay the sum by instalments the court shall allow such payment unless the

court is satisfied that it would not be reasonable in all the circumstances to do so.

(4) The court may, on the application of the person ordered to pay the sum, allow further time for payment or vary an order for payment by instalments.

(5) Subject to paragraph (7) the court may in determining an application under paragraph (4) remit the whole or any part of the sum if the court thinks it just to do so having regard to any change in the circumstances of that person since the conviction, and where the court remits part of the sum after a period of imprisonment has been imposed in default of payment, the court shall also reduce that period by an amount which bears the same proportion to that period as the amount remitted bears to that sum." ……….

[12] Article 92 provides:

"(1) Subject to this Article and Article 93, where default is made by a person in paying a sum adjudged to be paid by a conviction or any instalment or part of such sum the order of the court may be enforced by the issue of –

(a) a warrant of distress for the purpose of levying so much of the sum as remains unpaid; or

(b) a warrant committing that person to prison; or

(c) a warrant committing him to prison in default of sufficient distress.

(2) Where it appears on the return to a warrant of distress that the money and goods of the defaulter are insufficient to satisfy the sum together with the costs of levying the sum, the court may issue a warrant of commitment.

(3) Where the court has issued a warrant of commitment in the first instance in default of payment of the sum and it is found impossible to execute the warrant, a warrant of distress may be issued.

> (4) Where a court has allowed payment of the sum by instalments and default is made in the payment of any one instalment, a warrant may be issued as if the default had been made in the payment of all the instalments then unpaid.
>
> (5) The period for which a person may be committed to prison under this article in default of payment or levy of any sum or part of such sum shall not exceed the period specified in Schedule 3."

[13] Schedule 3 in paragraph 1 provides that subject to the following provisions of the schedule the period set out in the second column of the table therein shall be "the maximum periods of imprisonment which may be imposed in default of payment of a sum adjudged to be paid by conviction due at the time imprisonment is imposed." The schedule then specifies, for example, in a case where an amount not exceeding £25 by way of a fine is not paid the default period is a maximum of 7 days. Paragraph 2 provides that ,where the amount of the sum due at the time of imprisonment is imposed is such part of the sum adjudged to be paid by the conviction of the court as remains due after part payment, the maximum period applicable to the amount shall, subject to paragraph 3, be the period applicable to the whole sum reduced by such number of days as bears to the total number of days in that period the same proportion as the part paid bears to the whole sum. Paragraph 3 provides that any fraction of a day shall be left out of account.

[14] Article 91 is in line with Article 53 which provides that:

> "A magistrates' court in fixing the amount of a sum adjudged to be paid by a conviction shall, amongst other things, take into consideration the means of the offender so far as they appear or are known to the court, the expedience of allowing such amount to be paid by instalments and the amount and frequency of any such instalments."

Under Rule 14 of the Magistrates' Court Rules (Northern Ireland) 1984 a warrant or form of order issued to give effect to the order of a Magistrates' Court shall be signed by the Resident Magistrate or Justice of the Peace who made the order or by the Clerk of the Petty Sessions. Form 62 prescribes the form of commitment for a sum adjudged to be payable by conviction. It commands the police to lodge the defendant in the relevant prison there to be imprisoned for the period specified unless the sums be sooner paid. The rule provides that the warrant is to be returned within a reasonable time if it is not executed. The form of the warrant requires it to state the total of the fine, costs of the warrant, crediting any payments made and specifying the balance.

[15] Article 115 provides:

> "(1) The provisions of any enactments regulating the duties of the (PSNI) with respect to warrants and the execution of warrants shall apply in relation to warrants issued under this order to members of the (PSNI).
>
> (2) Without prejudice to paragraph 1, where for any reason the person to whom a warrant is addressed is unable to execute it within the time fixed by the warrant (or if no time has been fixed, within a reasonable time), he shall return the warrant to the resident magistrate or other justice of the peace who issued it or who made the conviction or order upon which it was issued together with a certificate in the prescribed form of the reasons why the warrant has not been executed.
>
> (3) The resident magistrate or other justice of the peace by whom a warrant has been issued or who made the conviction or order upon which it was issued may examine on oath the person to whom a warrant has been addressed concerning the reasons why it has not been executed and may re-issue the warrant or may issue any other warrant for the same purpose.
>
> (4) Without prejudice to Articles 156 and 158, where the resident magistrate or other justice of the peace who issued the warrant or made the conviction or order upon which it was issued is unable to exercise his functions under paragraph (3) by reason of his having died, ceased to hold office or become disqualified from holding office or is for any other reason unable to perform the functions of his office, his functions under this paragraph shall be exercisable by any Resident Magistrate."

[16] Article 23(3) provides:

> "A court of summary jurisdiction shall not in the absence of the accused sentence him to imprisonment or order his detention in a Young Offenders' Centre or make an order under Section 19 of the Treatment of Offenders Act (Northern Ireland) 1968 that a suspended sentence or order for detention shall take effect."

[17] Article 25(1) provides that:

> "(1) Without prejudice to power of a court of summary jurisdiction under Article 138 to estreat a recognisance to appear, where the accused has failed to appear at a hearing or adjourned hearing the court may, if the complaint has been substantiated on oath and the court considers it undesirable by reason of the gravity of the offence to proceed in the absence of the accused, issue a warrant for his arrest.
>
> (2) Where an accused has been convicted in his absence by a court of summary jurisdiction of an offence punishable with imprisonment and the court:
>
> (a) cannot proceed in his absence by virtue of Article 23(3); or
> (b) considers it undesirable by reason of the gravity of the offence to proceed in his absence,
>
> the court may issue a warrant for his arrest."

[18] The term "impose imprisonment" is defined in Article 2 as meaning:

> "Passing a sentence of imprisonment or fixing a term of imprisonment for failure to pay any sum of money or for want of distress to satisfy any sum of money or for failure to do or abstain from doing anything required to be done or left undone."

The statutory definition thus distinguishes between (a) a sentence of imprisonment; and (b) the fixing of a term of imprisonment for the non-payment of a fine.

The applicant's case

[19] Mr O'Donoghue QC who appeared with Ms McMahon and with Mr McKeown stood over the submissions made by Ms McMahon in relation to the issues originally raised before the court in McLarnon's case. His submissions focussed on the question of the lawfulness of the warrants. Mr O'Rourke QC who appeared with Ms Doherty on behalf of Mr Chakravarti adopted these arguments. Counsel's main contentions may be summarised thus:

(a) The decision of the district judge to fine the defendants and issue warrants of commitment constituted the imposition of a sentence of imprisonment. This mandated the presence of the defendant in court under Article 23(3) so that his specific circumstances could be properly considered.

(b) Article 5 of the Convention requires that any order imposing imprisonment has to be "in accordance with law". There had been a breach of Article 23(2) and 23(3) and hence the detention was unlawful.

(c) Article 6 and 8 of the Convention demanded a fact specific approach to the issue of commitment which necessitated the defendant having the opportunity to make representations to the court immediately prior to commitment.

(d) The uncertainty as to what constitutes a reasonable time for service of a warrant of commitment by the PSNI under Article 115 strengthened the argument that it was imperative that the court considered the circumstances of the defaulter to assess the appropriateness of the sanction of imprisonment.

(e) The issue of a warrant of commitment is a decision in pursuance of an order of the court as mandated by Article 92(1). It can only be attached to a fine as the result of a judicial decision. Articles 92(2) and (3) clearly envisage a fact specific response to an individual's circumstances. Legislative flexibility supported the contention that the statutory intention underpinning the 1981 Order was to ensure that the response to default was proportionate and justifiable. This could not be the case if a person in default is committed on foot of a warrant served many months after the sentence has been passed. It is only when the court is issuing the warrant for commitment that it is possible for the person due to pay the fine to make representations.

(f) Warrants for commitment should not be issued administratively as to do so would circumvent the requirements of Article 23(3) which applies to both the initial sentence of the fine and warrant for committal and the actioning of that warrant in cases of default. A warrant of commitment is a judicial act involving the liberty of the subject and a warrant should not be issued without giving the offender an opportunity to be heard. The current practice of issuing warrants in default of payment prevented both applicants from accessing the court to make representations before being imprisoned.

Conclusions

[20] In the Magistrates' Court a defendant facing a charge will either be summonsed under Article 20 of the 1981 Order or arrested on foot of a warrant to bring him before the court. If the accused fails to appear the court may proceed in his absence after proof of due service of the summons or after proof that he is evading service. If the court considers by reason of the gravity of the offence that it is undesirable to proceed in his absence it may issue a warrant for his arrest (see Article 25(1). If a defendant is charged with an offence punishable with imprisonment and the court cannot proceed in his absence by virtue of Article 23(3) or if it considers it undesirable by reason of the gravity of the offence to proceed in his absence it may issue a warrant bringing him before the court. Thus, if the court

is contemplating the imposition of a sentence of imprisonment it must issue a warrant for his arrest if he does not turn up, for otherwise the court would have no jurisdiction to impose a sentence of imprisonment.

[21] Where the court concludes that the proper penalty to be imposed is a fine and, as required by Article 53, after taking into account the means of the defender so far as they appear or are known to the court, the expedience of allowing such amount to be paid by instalment and the amount and frequency of any such instalments, the court will order the defendant to pay the fine fixed within the timetable laid down by the court. When fixing the fine the court is not required at that stage to specify a default period of imprisonment. It would be advisable to indicate to the defendant that he is liable to be sent to prison for up to the maximum period specified if he does not pay the fine within the timescale fixed. When he is informed of the imposition of the fine, if he is not in court in person or by his legal representative, he will have to receive notification of the imposition of the fine and he can at that time be informed in very clear terms of the power of the court to send him to prison for non-payment of the fine. The powers under Article 92(1) only arise "where default is made" that is to say after default. At that stage the order of the court may be enforced by a warrant of distress, a warrant of commitment or a warrant committing him to prison in default of sufficient distress. The period for which a person may be committed to prison under Article 92 shall not exceed the period specified in Schedule 3. The fact that the Schedule specifies maxima indicates that a judicial decision must be made as to whether the maximum in any particular case or a lesser period should be fixed as the relevant period. Under the current practice there is no exercise of a judicial judgment in determining what the appropriate period should be before the warrant issues.

[22] The decision under Article 92 to issue a warrant, whether it be a warrant of distress or commitment, is a decision requiring the exercise of judicial power. This brings into play the principle clearly stated in Bonaker v Evans [1850] 16 QB 162 at 171 where Park B said:

> "No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by judicial proceedings until he has had a fair opportunity of answering the charge against him unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary.

In Re Forest and Hamilton [1981] AC 1038 the House of Lords upheld that approach. Lord Fraser stated:

> `The appellants may not be deserving of much sympathy but the question whether they were entitled to notice of the proceedings in the Magistrates' Court concerning them respectively

> raises an issue of some constitutional importance. One of the principles of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against him, so that he, or someone acting on his behalf, may make such representations if any as he sees fit. That is the rule of audi alterem partem which applies to all judicial proceedings unless its application to a particular class of proceedings has been excluded by Parliament expressly or by necessary implication'."

In Re Wilson [1985] 1 AC 750 the House of Lords stated that the principles of natural justice requiring a court to give an offender the opportunity of making representations before a judicial order was made against him extended to the judicial act of issuing a warrant of commitment. Lord Roskill stated in clear terms:

> "A warrant of commitment involves the liberty of the subject and in principle the subject must not be deprived of his liberty save after performance of a judicial act effected with judicial propriety."

[23] It is not difficult to find reasons why fairness requires a defendant to have an opportunity to make representations in a case such as this. The power to commit to prison in default of payment of a fine is hedged around with safeguards. It is the final step to be used only where every other option has been shown to be inappropriate or unsuccessful. All relevant factors must be taken into account before the court concludes that the defendant is guilty of wilful default. The court has a duty to consider other means of dealing with the defaulter (see R v Exeter City Magistrates' Court ex parte Sugar [1993] 157 JP 766). On occasions the implications of Article 8 must be considered when making a decision to commit (for example a single mother trying to balance monetary obligations on a very limited income (see R (Stokes) v Gwent Magistrates' Court [2001] 165 JP 766). Under the 1981 Order the court under Article 92 has a power to enforce a fine by a warrant of distress as an alternative to a warrant of commitment. Under Article 91(5) the court has the power to remit the whole or part of a sum if the court considers it just to do so, having regard to any change in circumstances. It may reduce the consequent period if it remits part of the sum due. Where the defendant has paid a part of the fine this will be a relevant factor for consideration by the court as to what the appropriate period for custody should be in relation to the default of the rest. The automatic issue of a warrant of commitment without any consideration of such matters means that no judicial officer has considered the relevant circumstances of the case including, in particular, matters required to be considered by the statute.

[24] Neither the 1981 Order nor the Magistrates' Court Rules deal expressly with what procedure should be followed to ensure that the defendant is given an

opportunity to make representations before a warrant of commitment is issued. The question arises as to whether, as the applicants argue, the defendant must be brought before the court, if necessary on foot of a bench warrant, if the court is minded to issue a warrant of commitment. Article 23(3) does require the presence of a defendant in court if a person is to be "sentenced" to a period of imprisonment. Normally where the defendant is not present the court, if minded to imprison the defendant, will have power to issue a bench warrant under Article 25(2). Where the court concludes that a fine is an adequate penalty, the imposition of the fine is a sentence but at the stage of the imposition of the fine the court is not sentencing the defendant to imprisonment. If the fine is paid no question of imprisonment will arise. If there is default in payment of the fine the court has a power to fix a period of imprisonment. The definition section (Article 2) distinguishes between a sentence of imprisonment and the imposition of imprisonment for breach of an order to pay a fine. While the Northern Ireland 1981 Order is not as specific as the Criminal Justice Act 1948 Section 80 in England and Wales or Section 104(1) of the Criminal Justice Act 1967 and Section 150 of the Magistrates' Courts ,which specifically provide that a sentence of imprisonment does not include a committal in default of payment of any sum of money or for want of sufficient distress, nevertheless the definition section in Article 2 of the 1981 Order is in line with the express English legislation. As a matter of construction Article 23(3) only applies to the passing of a sentence of imprisonment which, as noted, is to be distinguished from the imposition of a period of imprisonment for non-payment of a fine. We conclude that Article 23(3) does not impose a statutory duty to secure the attendance of the defendant in person in court when the court is considering the imposition of a period of imprisonment for non-payment of a fine. That, however, does not provide the whole answer to the issues raised.

[25] In Re Forest and Hamilton [1981] AC 1038, a decision which pre-dated the Human Rights Act 1998, the House of Lords dealing with the somewhat differently worded English legislation concluded that, while that legislation did not require the defendant to be present in person at proceedings at which a magistrate was issuing a warrant of commitment for default, the section did not dispense with the necessity imposed by the principles of natural justice for the court to give adequate notice to the offender before making any judicial order, so as to give him the opportunity of making representations to the court. While differently worded, the effect of the 1981 Order necessarily implies the principles of natural justice and the right to a fair hearing which impose an obligation on the court to ensure prior notification to the defendant of any proposal to issue a warrant of commitment so as to afford the defendant an opportunity if he wishes to make representations to show cause why an order of commitment should not be made in his case.

[26] That case must now be read in the light of Article 6 of the Convention. It has been held by the ECtHR in Benham v UK (1996) 22 EHRR 293 that enforcement proceedings in respect of non-payment of a community charge which could lead to an order of imprisonment amounted to a criminal charge so that in that case the unavailability of legal aid was a breach of Article 6(3)(c). Proceedings for the

enforcement of a fine which may result in the imprisonment of a defendant in default will thus fall to be considered to be a criminal charge for the purposes of Article 6 (see *Human Rights and Criminal Justice* 3rd Edition at para 4.25). The presence of an accused person in criminal proceedings means not merely that the defendant may hear the case against him but also that he is shown to understand the proceedings and has the opportunity to make representations (per Lord Reading LCJ in R v Lee Kun [1916] KB 337 at 341). In R v Jones et al [2001] QB 862 the Court of Appeal in the context of a criminal trial on indictment emphasised that an accused person had a fundamental right to be present and represented but could waive the right by absenting himself. Thus, the right may be waived if, knowing, or having the means of knowledge, he voluntarily absents himself. In such circumstances the court has a discretion to proceed in his absence. The court has a duty to make such points on behalf of the defendant as the evidence permits. Lord Bingham, on appeal in that case, stated that the judge's overriding concern will be to ensure that the proceedings, if conducted in the absence of the accused, will be as fair as the circumstances permit and lead to a just outcome. He pointed out that it is generally desirable that a defendant be represented even if he has absconded. The presence of legal representation provides a safeguard against the possibility of error or oversight. Lord Bingham made clear that his comments applied whether the charge is trivial or serious.

[27] Thus, where a defendant has defaulted in the payment of a fine, when imprisonment is being considered as a penalty a hearing will be necessary. The defendant must be given the opportunity to attend the hearing and to make whatever representations he considers appropriate. If his means justify it a defendant will be entitled to legal aid under Article 6(3)(c). He must be given the opportunity to take legal advice and to give instructions to a legal representative to appear on his behalf. If the defendant does not appear at the hearing fixed to consider the question of enforcement, the court could only properly proceed in his absence if it is satisfied that the defendant is aware of the listing of the hearing, that he is entitled to apply for legal aid and that he has the right to make representations at the hearing in person or through a legal representative. The defendant must also be aware that the court has the power to impose a period of imprisonment up to the maximum fixed or to issue a warrant of distress. If, as will sometimes be the case, the court cannot be satisfied that a defendant in default is aware of the hearing, the defendant must be brought before the court to ensure that he is present at the hearing. By that stage in the proceedings and in a case where imprisonment is under consideration the power to issue a bench warrant arises under article 25. That provision must be interpreted in a manner which is compatible with and gives effect to the Article 6 rights of the defendant. By the time commitment for non-payment of a fine is under consideration the gravity of the original offence has reached the point that article 25(1) must be considered to be in play. If the court cannot be satisfied that the defendant is aware of the rights discussed, then it should issue a bench warrant to secure the attendance of the defendant before imprisonment is imposed to ensure that he can make his case why imprisonment should not be imposed. Before the bench warrant is executed the defendant should be written to at his last

known address to inform him that a warrant had been issued and that it will be executed unless he pays the sum due on foot of the fine. In many, and one would hope and expect in most, cases this information will impress on the defendant the gravity of the situation and should lead to either payment being made or the defendant coming before the court to explain the situation.

[28] Enforcement proceedings arising out of the non-payment of a fine cannot go on indefinitely nor can the defendant expect to be able to string out the matter by coming backwards and forward to the court with excuses for non-payment. If, as a result of the conducting of a hearing of the kind discussed above, the court concludes that the defendant should be given some further time to pay or allowed to pay the balance by instalments on fixed dates, the court should consider issuing a warrant of commitment staying the execution of the warrant pursuant to article 114(2) until the day immediately after the date by which the balance should be paid or the date on which the first instalment falls due. It should be made clear to the defendant that the warrant will then fall to be executed. If he wishes to make any further representations to the court before that date he may do so but if he does not do so then the warrant will take effect. If he does not make any such representations then he cannot complain that he has not had a fair opportunity to make a case against imprisonment. Such a procedure would be compatible with Article 6 and with common law fairness. If he does make representations he may be able to persuade the court that he should have further time but by that stage the court may be justifiably sceptical of his promises to pay.

[29] The system, as currently operated and as applied in the instant cases, breached the law in a number of respects. There has been no hearing before a judicial officer before a warrant of commitment is currently issued. The automatic computer generated issue of warrants of commitment is not subject to judicial oversight. The decision to issue a warrant of commitment requires a judicial consideration of the circumstances to ascertain what the appropriate form of enforcement should be. Commitment is not inevitably or always the most appropriate form of enforcement, particularly bearing in mind that imprisonment should be a last resort. The particular circumstances of the individual case must be properly taken into account. The statutory maximum period of imprisonment, if commitment is considered to be appropriate, is not necessarily and inevitably the period that a District Judge may decide to impose. The fixing of the period requires the exercise of a judicial assessment of the circumstances. The current system does not make provision for a hearing at which the defendant may attend and/or make written and/or oral submissions either in person or by a lawyer. The system does not give the defendant an opportunity to make representations and therefore is not compatible with the requirements of natural justice nor is the process compatible with Article 6.

[30] For these reasons we conclude that the warrants as issued were not lawful warrants of commitment.

The delay in enforcing the warrants in the case of Michael McLarnon

[31] Since the underlying warrants were invalid for the reasons given the original case put forward by the applicant Michael McLarnon arising out of the delay by the PSNI in executing the warrants becomes academic. However, in deference to counsel's argument and bearing in mind that guidance to courts, parties and the police may be helpful in this difficult area of law, we shall express conclusions reached on the questions raised.

[32] The arguments raised by the applicant McLarnon raised three issues these being, firstly, the question of the period of the time which constitutes a reasonable time within which the PSNI should have served the warrants, secondly, the methodology deployed by the PSNI in extending time for the service of the warrants and, thirdly, the procedural steps deployed by the PSNI in seeking to serve the warrants.

Counsel's submissions

[33] Counsel for the applicant contended that there was a conflict between two relevant decisions of the courts in Re McKenna's Application [1998] NI 287 and Re Liam Tierney [2008] NIQB 55. It was argued that there was a conflict in the relevant case law as to what is a reasonable time for the purpose of Article 115. The practice and current decisions of the court do not serve to assist in determining the reasonableness or otherwise of the service of warrants. The police practice is administratively driven rather than needs driven. Every time the warrants were opened on the computer and reviewed it appears that an administrative decision is taken that a reasonable period has not elapsed. This, however, was not based on any reasoning or investigation of the circumstances. The current system provides no safeguards for defendants. The system lacks any objective consideration of the reasonableness of time within which a warrant should be served. There is a complete absence of any information in the system used by the PSNI indicating the reasons relied on for opening and reviewing the warrants but not serving. The PSNI never attempted to serve the warrants on the applicant at any time. It did so only because he happened to be in custody for another unrelated matter. The applicant had not moved house and he was thus easily traceable and could have been served at any stage subject to the issue of the warrants. The applicant contended that the system and process utilised by the PSNI failed to fulfil the legislative expectation of service within a reasonably prompt period.

[34] Counsel on behalf of the respondent contended that the warrants were not time limited and remained valid until either executed or discharged. In Re McKenna [1998] the court concluded that the warrant was valid even though not executed within a reasonable time. On the other hand in Re Tierney the effluxion of time did not affect the validity of the warrant but it invalidated the execution of the warrant unless the period of time that had elapsed was not unreasonable. The

reasonableness of the respondent's action must be viewed in the specific factual context of each case. In this case the delay was just over seven months. The PSNI applied a rule of thumb that warrants should not be returned to the court for reissue under Article 115 unless they were more than 12 months old. The delay of 7 months was not unreasonable in all the circumstances.

The relevant authorities

[35] In Re McKenna [1998] NI 287 the Court of Appeal (comprising Carswell LCJ, Nicholson LJ and McCollum LJ) had to consider the consequences of the execution on 29 January 1998 of a warrant issued on 3 December 1997 for immediate execution committing the defendant to prison. Unknown to the police as of 3 December 1997 the defendant was in prison in connection with other matters. The issue for determination was whether the sentence under the warrant commenced to run from the date the sentence was pronounced (3 December 1997) or from 29 January 1998, the date when the warrant was actually executed. The court concluded that since he was already in prison at the time there was a clear implication apart from the terms of the warrant that the sentence would commence immediately. If the defendant had been at liberty the sentence would have started when the imprisonment commenced on execution of the warrant.

[36] In the course of the court's judgment Carswell LCJ scrutinised the wording of Articles 115 and 158 of the 1981 Order. In that case it was accepted by the police that service was not effected within a reasonable time from the issue of the warrant. The court concluded:

> "Although the warrant may not have been executed forthwith, which is contemplated by the terms of Article 114(1) of the 1981 Order, it was, by virtue of Article 158(1), still valid when it was eventually executed nearly two months later and it cannot, in our view, be said that it had become invalid even if not executed within a reasonable time."

The court went on to point out that:-

> "If the court issues a warrant of commitment in the appellant's absence and the appellant is not arrested within a fairly short period, the police should return the warrant to the court in compliance with Article 115 of the 1981 Order whereupon the court can decide whether to reissue it with a fresh date."

[37] The decision of the Court of Appeal is thus clear authority for the proposition that a warrant which is executed even after the expiry of a reasonable time remains a valid warrant and can be effectively executed.

[38] Subsequently in Re Tierney [2009] NI 77 a Divisional Court comprising Kerr LCJ and Campbell LJ had to consider the validity of the execution of a warrant issued in November 2004 and executed in January 2008. The applicant challenged the lawfulness of his arrest on foot of a warrant which he claimed was not executed within a reasonable time and had not been returned to the magistrate who made the order on which it was issued. He asserted that his detention was in consequence unlawful. The court held that while the effluxion of time had not affected the validity of the warrant it would invalidate the execution of the warrant unless the period had not been unreasonable. Article 115(2) provided an important protection against the tardy execution of warrants in requiring the persons to whom they were addressed to return the warrants to the magistrate who had issued them or made an order on which they had been issued. The court quashed the execution of the warrant in that case.

[39] In his judgment Kerr LCJ considered that there had been a clear procedural failure by the police to execute the warrant within a reasonable time. He considered that where there had been a delay in the execution of a warrant Article 115(2) required the police officer to whom the warrant had been issued to return it to the court which had authorised it. The decision in Re McKenna was not referred to in the judgment or anywhere discussed therein. It can only be assumed that it was not cited. The Divisional Court, accordingly, did not consider the question whether it was bound by the decision of the Court of Appeal which, if it had decided the point, was binding authority.

[40] District Judge White in Chief Constable v McDonagh [2009] NIMag 2 considered that there was a conflict between those two authorities. The case before the District Judge related to the prosecution of the defendant for assaulting police officers in the due execution of their duty contrary to section 66(1) of the Police (Northern Ireland) Act 1998. The alleged offence arose from his arrest on foot of a warrant for non-payment of a fine. The issue was whether the police were acting in the due execution of their duty. On 21 September 2005 a warrant was issued for the arrest of the defendant for non-payment of a fine imposed in August 2005. The purported execution of the warrant during which the alleged assault occurred took place on 25 May 2008. The District Judge concluded that there was no admissible evidence to explain the delay in the execution of the warrant and found that it could have been executed earlier. He concluded that the warrant had not been executed within a reasonable time and that the police were accordingly not acting in the execution of their duty. He pointed out that it was unclear from Re McKenna whether the applicant ever argued that the execution of the warrant was invalid, the real issue in McKenna being the date from which the sentence should run. Although in McKenna the court did not expressly say so it seemed implicit that the court regarded the requirement in Article 115(2) as directory rather than mandatory. The District Judge concluded that in Re Tierney the court had focused on the modern approach which seeks to establish what the legislature intended should be

the effect of a failure to comply with the procedural requirement. The District Judge decided to follow and apply the decision in Re Tierney.

Discussion

[41] Mr McLarnon's application proceeded on the basis that there were in existence two warrants of committal for non-payment of fines validly issued on 1 July 2010 which fell to be duly executed by the police. This court has not been provided with a copy of the actual warrant as issued complying with the requirements of Rule 14 and Form 62 of the Magistrates' Court Rules. It does not appear that the police were put into possession of any such written or signed warrant prior to execution.

[42] A warrant issued by the court is a command directed to the relevant police officer to take steps to arrest the defendant and lodge him in prison. The obligation under Article 115(2) on the addressee of the warrant is to return the warrant to the court with a certificate of the reasons if the warrant has not been executed within the time fixed or if there was no time fixed within a reasonable period. Where for any reason the addressee is "unable to execute it within the time fixed (or if no time has been fixed within a reasonable time)" the police officer shall return the warrant to the magistrate for reconsideration. Since the addressee of a warrant is under a duty imposed by the court to execute the warrant, Article 115(2) protects him from criticism or from a complaint of non-compliance with the court's command when he is actually unable to execute it. Read strictly Article 115(2) imposes the obligation on the officer to bring the warrant back before the Magistrate only where he is "unable to execute it". If he simply forebears to take steps to execute it he strictly does not come within the obligation to refer the matter back to the court when he was unable to execute it. Article 115(2) does not provide, as it could have, that where the warrant has not been executed within the time fixed or within a reasonable time the officer shall return the warrant to the court for reconsideration. It links the returning of the warrant to the court with an inability to execute it. This implies an attempt to do so.

[43] It is open to argument, however, that the officer would be unable to lawfully execute the warrant if the point has been reached where the execution of the warrant would become oppressive to the defendant. This is where the elapse of a reasonable time for execution may enter into the equation. In Re Tierney the court cited with approval Waugh v Lord Advocate [2005] SLT 451 in which the High Court of Justiciary in Scotland held that it would be oppressive to execute a warrant 15 months after it had been issued. The Lord Justice Clerk referred to a similar case of Beglan, Petr [2002] SCCR 932 in which there had been a delay of almost a year before an attempted execution. The Crown had there given no satisfactory explanation why the warrant had not been executed and it was concluded that the failure of the authorities to execute the warrant was oppressive. It was determined that a similar result in Waugh was inevitable since the essential feature in both cases

was a seemingly unreasonable and oppressive delay which the Crown could not justify.

[44] A similar approach was taken in a number of Irish authorities (R (Flynn and McCormick v Governor of Mountjoy Prison (May 1997 unreported), Dalton v Governor of the Training Unit [2000] IESC 49, K v The Governor of Cork Prison [2000] IEHC 64 and Bakoza v Dublin Metropolitan District Court (Jul 2004 unreported) in cases in which warrants were quashed for delay in service of periods significantly less than arose in the case of Tierney. In R v Flynn and McCormack Baron J stated that once a warrant had been issued it must be executed as soon as reasonably possible. In Re McKenna Carswell LCJ himself pointed out that if the defendant had not been arrested "within a fairly short period" the police should return the warrant to the court in compliance with Article 115 whereupon the court could decide whether to reissue it with a fresh date.

[45] While the reasoning in Re Tierney is attractive the ill-defined concept of a reasonable time in Article 115(2) leaves a police officer called on to execute a warrant with no clear guidance as to the point at which it becomes unlawful for him to execute the warrant. A resultant execution would result in an unlawful detention with the defendant being entitled to release forthwith and compensation for the detention. In practical terms this creates uncertainty though one which could be avoided if in the case of any doubt whatsoever the police returned the warrant to the court for reissue. Re Tierney, however, conflicts with the reasoning in the decision in Re McKenna. Faced with a conflict of authority we are bound to follow the reasoning in Re McKenna, a decision of the Court of Appeal which unless it was reached *per incuriam* is binding on this court. Re Tierney appears to have been *per incuriam* in that it appears that the court did not have the benefit of the reasoning in Re McKenna or any argument as to the effect of the Court of Appeal reasoning and its binding nature.

[46] In the result, following the reasoning in Re McKenna which must be followed unless corrected by the Supreme Court, had the underlying warrants been valid we would have been bound to conclude that, if the warrants had been lawfully issued, the execution thereof would have resulted in lawful detention.

[47] This analysis of the law demonstrates that it is not desirable for the court to leave undefined the period within which the warrants of commitment issued under the 1981 Order should be executed once they are validly issued. The fixing of a clear cut timetable within which they are to be executed enables the police to know precisely the date by which they must execute the warrants and they will thus know when they must return to the court to extend the life of the warrants if they have not been executed within the timescale fixed by the court. Where the defaulting defendant has been kept informed at every stage of his rights and has been given a fair opportunity to state his case and turn up to court in person or by legal representation to make his case, if he continues to default knowing that a warrant has been issued against him the clear inference will be that he is evading his

responsibilities. This being so there seems to be no reason in principle why the court should not specify a period of up to 12 months for execution before the police have to return to the court to renew the life of the warrant. The demands on police and court time are such that there does not seem to be any particular reason why such warrants should require frequent renewal applications. The delay will be of the defendant's own making and flow from his own evasion of responsibility. He cannot complain of oppression in delay in the execution of the warrant in these circumstances.

Disposal of the application

[48] As we have stated above the warrants in issue in these proceedings were not validly issued. We will hear counsel on the appropriate relief to be granted in consequence.

[49] Our foregoing analysis of the law underlines that the current law in respect of the enforcement of unpaid fines, many of them of small amounts, with the necessary procedural safeguards it requires to ensure due process, is cumbersome and not cost effective. It seems clear that careful thought should be given to the introduction of an effective civilianised system for the collection of fines, the timely use of attachment of earnings and statutory benefits and the establishment of a system more attuned to modern economic realities. Pending any more radical reform of the law, the Magistrates' Courts Rules Committee should urgently consider whether the rules could usefully be amended to establish the proper practice and procedure for proceedings to enforce payment of fines.