

THE HIGH COURT

Record No. 2010/815 SS

**IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE
CONSTITUTION**

Between/

ANDREA HEINULLIAN

Applicant

and

GOVERNOR OF CLOVERHILL PRISON

Respondent

Judgment of Mr Justice Hedigan delivered 20th May 2010

1. The material facts in this inquiry pursuant to Article 40.4 of the Constitution are not in dispute. The applicant was arrested and detained at Bray Garda Station in the early hours of 13th May, 2010. At approximately 8am that morning, he spoke with his solicitor, John Neville, on the telephone from the garda station and requested that he be represented at Bray District Court where he was to be taken at 10.30am having been charged with several offences. Mr Neville was unable to be present in person at Bray District Court at that time but instructed Counsel to appear and represent the applicant. When the applicant's case came before the District Judge at Bray District Court, the prosecution opposed bail and Counsel who was instructed to appear on behalf of the applicant sought to apply for bail and for a legal aid certificate. The District Judge refused to hear the applicant's Counsel because he was not attended by his instructing solicitor, and remanded the applicant in custody until 17th May, 2010. In seeking to be heard by the District Judge, Counsel made reference to Order 6 of the District Court Rules, 1997.
2. An application for an inquiry pursuant to Article 40.4 was made before this Court (Charleton J) on 14th May, and an inquiry was directed and was heard the following day on 15th May.
3. Order 6, Rule 1 of the District Court Rules provides:

The following persons shall be entitled to appear and address the Court and conduct proceedings—

- (a) any party to the proceedings; or*
- (b) a solicitor for such party; or*
- (c) a counsel instructed by the solicitor for such party; or*

- (d) *where the proceedings are in relation to the taxes and duties under the care and management of the Revenue Commissioners or in relation to any fine, penalty or forfeiture incurred in connection therewith or otherwise incurred under the Customs Acts, a duly authorised officer of the Revenue Commissioners or the Revenue solicitor; or*
- (e) *in proceedings at the suit of the Director of Public Prosecutions in respect of an offence, the said Director or any member of the Garda Síochána or other person appearing on behalf of or prosecuting in the name of the Director.*

4. Michael Collins SC, Chairman of the Bar Council, has sworn an affidavit in these proceedings, which is uncontroverted, and which states inter alia:

- 4. "... The Bar Council has considered this Rule and believes that pursuant to this Rule once counsel is instructed by a solicitor, he or she is entitled to appear in the District Court and address the Court whether or not the instructing solicitor is present.
- 5. The Code of Conduct for the Bar of Ireland is not as clear on this issue as it ought to be but the Bar Council and the Professional Practices Committee of the Bar Council are firmly of the view that there is nothing improper in counsel appearing in the District Court without being attended by the instructing solicitor. I draw attention to the following provisions of the Code of Conduct:
 - (a) Rule 4.1 provides that a barrister should act upon the instructions of a solicitor "*subject to such exceptions as may be authorised by the Bar Council.*" This appears to empower the Bar Council to authorise the lesser exception of a barrister acting on a solicitor's instructions but without the solicitor being in attendance in court (subject to any of the relevant rules of the Court).
 - (b) Rule 4.11 says that it is "*undesirable*" for a barrister to consult with a client "unless the solicitor instructing them is present or has instructed them to do so" in which case the barrister should subsequently furnish a written memorandum to the solicitor. While this does not expressly address the issue of appearing in court, it is consistent with the point that the presence of the instructing solicitor is not mandatory in every situation.
 - (c) Rule 5.15 reads: "*In general barristers shall be attended in court by their instructing solicitor or clerk or assistant but it is not necessary that they shall be so attended when moving an application for an adjournment*" (my emphasis). While this is the general rule, the Bar Council considers that the opening words make clear that attendance by the instructing solicitor is not mandatory in all cases.

6. The Bar Council is satisfied that a barrister instructed by a solicitor to appear in the District Court is not in breach of any provision of the Code of Conduct if he or she appears in the District Court whether with or without an instructing solicitor. In any event, any restriction on the entitlement to appear in Court which derives from a barrister's call to the Bar by the Chief Justice of Ireland would presumably have to be found in either legislation or the Rules of Court. As I have pointed out above, the District Court Rules contain no such restriction beyond the requirement that the barrister be instructed by a solicitor."
5. I am indebted to the Chairman of The Bar Council for the above clarification. I accept his and the Council's view in this matter as an accurate statement of the rules governing the right of audience of counsel in the District Court. Applying these rules to the present case it is clear that the applicant was detained on foot of an order of Bray District Court which is unlawful because the presiding District Judge's decision not to hear Counsel appearing on his behalf in the circumstances of this case was incorrect. The consequence was that the Applicant was allowed pursue neither a legal aid nor bail application. It is to be noted that no respondent or notice party sought to stand over the legality of the impugned decisions made in this case in Bray District Court.
6. It is clear there has been some uncertainty concerning the right of counsel to appear in the District Court where instructed but not attended by a solicitor. I am glad to have the opportunity to clarify this matter for the benefit of District Court Judges and the legal profession. Provided that Counsel is instructed by a firm of solicitors, he or she does not have to be attended in the District Court and has a right of audience in the District Court by virtue of their call to the bar by the Chief Justice of Ireland. It was due to the failure to recognize this right of audience of counsel in this case that this court was obliged to hold that the order subsequently made was unlawful and that the applicant was therefore unlawfully detained. For this reason the Court ordered his immediate release.

approved
20 May 2010
John Hedderley