

Law Matters

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Debtors' law found incompatible with Constitution

McCann -v- Judges of Monaghan District Court and Ors.

High Court
Judgment was given on June 18th, 2009, by Ms Justice Mary Laffoy.

Judgment
Section 6 of the Enforcement of Court Orders Act 1940 was invalid, having regard to the provisions of the Constitution, in particular of Articles 34, 40.3 and 40.4.1.

This meant that the District Court had no jurisdiction to make the order that the plaintiff, Caroline McCann, should be imprisoned for non-payment of a debt to Monaghan Credit Union, the notice party, and accordingly the order was quashed.

Background
Ms McCann, the applicant in the case, was one of nine children. She had received five years of education, leaving school at 14 as a "bad reader". She is the single mother of two children and has had psychiatric problems and an alcohol problem, having had five admissions to a psychiatric hospital between September 2005 and January 2009. At the time the case was heard, she was living with her mother, to whom she was paying

€150 a week from her lone parent's allowance.

She ran up a debt of €18,063 with Monaghan Credit Union, which she did not pay. The credit union obtained an instalment order in court, in her absence, for €80 a week which she also did not pay, running up arrears.

In November 2005 the credit union obtained an order from Monaghan District Court for her arrest and imprisonment under the Enforcement of Court Orders Acts 1926 and 1940. She had not attended the court and was unable to understand the documentation she received and knew nothing about the order for her imprisonment until the gardai came to arrest her.

They allowed her to take advice and she contacted Mabs, the Monetary Advice and Budgeting Service, and through it, the Northside Community Law Centre. She sought an extension of time to appeal the order, which was refused.

She then instituted judicial review proceedings of the order and challenged the validity of the legislation under the Constitution and the European Convention on Human Rights.

The proceedings were consoli-

dated into a single set of proceedings and the Human Rights Commission made submissions on international human rights law.

According to Ms Justice Laffoy, an "unusual feature" of the proceedings was the stance adopted by the State parties.

The Chief State Solicitor wrote to the plaintiff's solicitor stating that he was obliged to defend the constitutional validity of the legislation, but adding that he was not seeking to stand over the 2005 order. The Chief State Solicitor also stated he had written to the credit union recommending that "in the plaintiff's unfortunate circumstances, the credit union might consider agreeing to have the order quashed".

The credit union was a notice party to these proceedings and did not deliver a defence and indicated it would not oppose the plaintiff seeking an order of *certiorari* quashing the 2005 order.

The plaintiff's solicitor rejected these proposals, stating that they denied the plaintiff the right to pursue reliefs properly raised.

The Human Rights Commission argued that adoption by the court of the State parties' stratagem of allowing the 2005 order to be struck down would not resolve the

issues raised in the proceedings, and that serious issues arise in relation to the legislation.

It referred to the right to a fair trial and to the international principle, to which Ireland had adhered, of the prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation. This is specified in the International Covenant on Civil and Political Rights, which was ratified by the State.

The State argued that, given that the credit union was prepared to accept the quashing of the 2005 order, the issue was moot.

Ms Justice Laffoy examined the process under the Act whereby a debtor became liable for imprisonment for non-payment of debt.

"Neither the summons nor the form of statement of means contains any warning as to what may happen if the debtor does not attend court or does not complete and lodge the statement of means as required," she said.

"I would observe that on the assumption that the user is a debtor, there is nothing 'user-friendly' about the procedure or about the documentation used in the procedure... in both format and in language the documentation would not be easily understood by a non-



Ms Justice Mary Laffoy outlined deficiencies in legislation

lawyer...

"I have no doubt that the plaintiff, because of her lack of literacy, her drink problem and her psychiatric problem, could not have dealt with any of the steps in the enforcement process under the Act of 1926, as amended, without advice and assistance," she said.

No procedural arrangements existed to establish the plaintiff's ability to pay before the committal order was made, her counsel said.

Decisions
Ms Justice Laffoy first dealt with the issue of mootness, pointing out that authors of *Kelly on the Constitution* had said there were definite limits to this doctrine, "where the

statute has already actually or potentially affected a plaintiff's rights or interests, even though the course of conduct in question has come to an end..." She said merely quashing the 2005 order did not address the substance of the plaintiff's complaint.

She outlined a number of deficiencies in the legislation in the light of the European Convention on Human Rights, including:

There was no positive obligation on the judge to assess the means of the debtor and ascertain whether his failure to pay was due to wilful refusal or culpable neglect; no provision was made for giving a warning to the debtor that a failure to discharge the debt may lead to imprisonment; there was no requirement for personal service of the application for a committal order; there was no prohibition on the debtor being committed in absentia; there was no requirement that the debtor has the benefit of legal representation; the burden of proof that the failure to pay was not wilful refusal or culpable neglect was effectively imposed on the debtor; there was no provision for the debtor to have recourse to the court to vary or discharge the order; imprisonment was not a "last resort" in that there

was no provision for other remedies; there was no provision for personal service of the application for the attachment order; and there was no provision for ensuring duration of the imprisonment was proportionate to the amount owing.

Fundamental constitutional safeguards that must be in place before a person was imprisoned were: that he or she was in court, unless the person deliberately absented him or herself; that the person was told of his or her right to legal representation and granted legal aid if unable to afford it; and that the court applied fair procedures and did not make an order for arrest and imprisonment unless it was satisfied that the failure to pay was due to wilful refusal or culpable neglect.

The argument that the Act was constitutional failed at the first hurdle, she said, as the Act expressly envisaged that an order could be made even if the debtor was not present in court.

It also failed at the second hurdle, in that no jurisdiction was conferred on the judge to grant legal aid, and it appeared an impecunious debtor did not come within either the criminal or the civil legal aid scheme.

The Act also violated a person's right to fair procedures in that it put the onus on the debtor to prove that the failure to pay was not wilful refusal or culpable neglect. The restriction on the right to liberty went beyond what was permitted by the Constitution and was invalid.

"I find it inexplicable that the State should countenance continuation of a scheme of enforcement of debt which, apart from being inconsistent with the Constitution... is vague and gives no guidance to either of the proponents in the enforcement process, the creditor and the debtor, or to the judge," Ms Justice Laffoy said.

Finding section 6 of the 1940 Act incompatible with the Constitution and quashing the imprisonment order, she said it was unnecessary to make a ruling on the compatibility of this section of the Act with the European Convention on Human Rights.

The full judgment is on www.courts.ie

Donal O'Donnell SC and Feargal Foley BL, instructed by the Northside Law Centre, for the applicant; Michael Cush SC and Paul Anthony McDermott BL, instructed by the Chief State Solicitor, for the State