THE HIGH COURT

RECORD No. 2005/305 SS

IN THE MATTER OF AN APPLICATION FOR AN ENQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND, 1937
BETWEEN

SANGAR NASIRI

APPLICANT

AND
THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

Judgment of Mr. Justice John MacMenamin delivered the 14th day of April, 2005

At the conclusion of the hearing of these *habeas corpus* proceedings the court directed the release of the applicant on the grounds that his detention was unlawful. I indicated that the reasons therefor would be furnished later. I now do so.

On 25th February, 2005, the applicant in these proceedings was arrested at Dublin airport and brought by members of An Garda Síochána to Santry garda station. The applicant had been detained by An Garda Síochána pursuant to the provisions of s. 9(8) of the Refugee Act, 1996, as amended.

On 26th February, 2005, the applicant herein came before District Justice John Coughlan in the Dublin Metropolitan District Court. This was in the circumstance where Detective Garda Denise McMahon wished to apply to commit the applicant pursuant to the provisions of s. 9(10) of the Refugee Act, 1996, as amended, for a further period of detention.

The applicant was on this occasion represented by Ms. Shalom Binchy of Shalom Binchy and Company, Solicitors.

Under s. 9(8) of the Refugee Act, 1996, as amended by s. 7 of the Immigration Act, 2003, it is provided:-

> *"Where an Immigration Officer or a member of An Garda Síochána with reasonable cause, suspects that an applicant –*
>
> *(a) Poses a threat to national security or public order of the State,*
>
> *(b) Has committed a serious non-political crime outside the State,*
>
> *(c) Has not made reasonable efforts to establish his or her true identity,*
>
> *(d) Intends to avoid removal from the State in the event of his or her application for asylum being transferred to a Convention country pursuant to s. 22 or a safe third country (within the meaning of that section),*
>
> *(e) Intends to leave the State and enter another State without lawful authority,*
>
> *or*
>
> *(f) Without reasonable cause has destroyed his or her identity or travel documents or is in possession of forged identity documents,*
>
> *(g) He or she may detain the person in a prescribed place referred to subsequently in this Act as 'a place of detention'."*

Section 9(10) of the same Act provides:-

> *"(a) A person detained pursuant to subs. (8) shall, as soon as practicable be brought before a judge of the District Court assigned to the District Court district in which the person is being detained.*
>
> *(b) Where a person is brought before a judge of the District Court pursuant to subs. (a) the judge may -*
>
> *(i) Subject to para. (c) and is satisfied that one or more of the paragraphs of subs. (8) apply in relation to the person commit the person concerned to a place of detention for a period not exceeding 21 days from the date of his or her detention,*
>
> *or*
>
> *(ii) Without prejudice to para. (c) release the person…"*

Detective Garda McMahon wished to apply to the District judge for the further detention of the applicant on the grounds set out at ss. 9(8)(c) and (f) of the Refugee Act, 1996, as amended.

The court is satisfied that in the course of the District Court proceeding, Detective Garda McMahon testified that the applicant had arrived on a flight from Barcelona that he was refused leave to land, and that when he was questioned he said that he held an Iranian passport but that it was forged and that he paid $11,000.00 for it. Detective Garda McMahon also informed the District Court that the applicant had told members of An Garda Síochána that he had an identification card in Afghanistan, and concluded that the applicant had "made no reasonable efforts to produce identification". She also concluded that the applicant was in possession of forged identification.

It was accepted that the applicant had applied for asylum in this jurisdiction.

The evidence further disclosed that when the applicant arrived at Santry garda station he had made a phone call. This phone call was in his native language, which was Pushto. The contents were not understood by Detective Garda McMahon. It was apparently put to Detective Garda McMahon in the District Court that the applicant had, in this phone call, contacted his family in Afghanistan and requested that they send his identification documents to him. Detective Garda McMahon was not in a position to confirm or deny this

before the District Court.

It was contended on behalf of the applicant that no other evidence was offered by Detective Garda McMahon and no further basis provided for the application for his detention.

Ms. Binchy, Solicitor, acting on behalf of the applicant applied to the District judge to release the applicant. She submitted:-

> (i) That it was sometimes necessary for persons seeking asylum to present false documentation and that it was not unusual;
>
> (ii) That her instructions were that the applicant's life was in danger;

(iii) That the applicant had made reasonable efforts to secure and produce identification, and that as an asylum applicant, he could present himself at the office of the Refugee Application Commissioner and would be given temporary identification and accommodation.

(iv) that "possession of forged identification" or "having forged documents" *simplicter* were not grounds for the continued detention of a person under the Act. The reference at s. 9(8)(f) of the Act of 1996 to the phrase "without reasonable cause" obliges the moving party, that is the gardai, to address the issue as to whether or not there was reasonable cause for the destruction of identity or travel documents or the possession of forged documents.

In the course of her grounding affidavit in these habeas corpus proceedings Ms. Binchy states that the detective garda did not do so in this case. That being the position, it is now contended on behalf of the applicant that it was incumbent on the District Court judge to address the issue in a discernable manner in order to reach a valid decision.

It is further submitted in this court that it was not sufficient for a member of An Garda Síochána to make unsubstantiated allegations in respect of the grounds, or any matter arising under s. 9(8) of the aforesaid Act. In respect of the subsection the question of what relevant efforts had been made or might have been made by the applicant to prove his identity or to produce identification documentation was, it is now contended, never addressed in evidence either by Detective Garda McMahon or more particularly by the learned District Court judge in reaching his decision.

The applicant's case is that the District judge then refused the application on the grounds that the applicant was "a liar and a fraud" and "had forged documents". The applicant submits that at no stage during the District Court proceeding was there any evidence from Detective Garda McMahon or any other party to the effect that the applicant had lied in relation to any relevant matter upon his apprehension, arrest and detention nor had the applicant been charged with any offence of fraud under the Criminal Justice (Theft and Fraud Offences) Act, 2001, or otherwise.

Prior to dealing with the other legal submissions of the parties in more detail it is germane to point out one other and even more fundamental and unusual feature of this case.

For the purposes of making the application for *habeas corpus* Ms. Binchy applied to the District Court for the warrant under which the applicant was detained. The text of that warrant in itself will fall to be considered as being one aspect of the basis upon which the application is made. It is also highly relevant to point out, that when Ms. Binchy applied for the warrant she was told by the learned District Court judge that she could have the warrant but could not have the "information".

The fact that there was an "information" or any additional material before the learned District Court judge was not known to the applicant or his legal representative at the time of the application itself. Indeed the matter only emerged in its true light in the course of this *habeas corpus* application.

In the course of the hearing before this court Mr. O'Reilly, B.L., who appeared for the respondent, quite properly drew attention to the fact that there had indeed been additional material before the District Court judge. This consisted of what was referred to as an "information" although it was not a sworn document. This document was signed by Detective Garda McMahon. It is of some length. It contained considerable background material relating to the applicant's arrest, his statements to the gardai, information as to what transpired at Dublin airport, regarding the obtaining of an interpreter, and the fact that a *written memo* was taken of an interview between the gardai and the applicant. Not only was the existence of this information not known therefore, but also the existence of the written memo was not known to the applicant or to his legal advisors at the time of making of the application before the District Court or at any time before the preparation for, and bringing of this *habeas corpus* application. This memorandum of interview was also before the District Judge.

It may be relevant to consider the contents of both these documents in a little more detail. They contained significant material regarding the alleged circumstances surrounding the applicant's purchase of the passport, the price thereof and the applicant's alleged travels from Afghanistan to Turkey, subsequently to what was stated to be "an unknown country" and thereafter Ireland. The "information" stated that the applicant had stayed in Turkey for six months. It also stated that the applicant had come to Ireland because his two brothers were involved with the Taliban and that they were dead. It contained a statement by the applicant that he had never held a passport and did not have any identity documents in his possession now. The applicant is recorded as saying to An Garda Síochána that he did have a national identity document for Afghanistan but that it was in his own country. He stated he did not bring this document with him as he had been travelling around for approximately 15 months.

This hitherto undisclosed documentation also recorded the fact that Detective Garda McMahon did not believe that the applicant had made reasonable efforts to establish his true identity. He had she said, already given two separate identities, one using the false passport and the second using the name given during interview.

The question of the applicant's identity was not in issue in these proceedings however and is one and the same as the name given in the interview.

For completeness in the consideration of this *habeas corpus* application it is necessary also to consider the contents of the warrant on foot of which the applicant was detained in Cloverhill prison.

Having set out the normal recitals as to the District Court area and the identity of the detained person the warrant states:-

> *"And whereas the said person has been brought before me, a judge of the District Court, on this date, in accordance*

with the provisions of s. 9, ss. (10) of the Act, and whereas I am satisfied that he/she

(a) Poses a threat to national security or public order in the State,

(b) Has committed a serious non-political crime outside the State,

~~(c)~~ Has not made reasonable efforts to establish his or her true identity,

(d) Intends to avoid removal from the State in the event of his or her application for asylum being transferred to a Convention country pursuant to s. 22,

~~(e)~~ Intends to leave the Sate and enter another State without lawful authority,

~~(f) Without reasonable cause has destroyed his or her identity or~~

is in possession of forged identity documents…"

The letter (c) in the warrant is interlineated. So too is the letter (f). The words "*without reasonable cause has destroyed his or her identity or travel documents or*" have also been interlineated.

Detective Garda McMahon states that she had prepared this warrant prior to the hearing. She retained it in her possession until the District Judge had made his decision and then submitted the warrant to him for his signature.

In order to justify the detention of the applicant Detective Garda McMahon gave oral evidence in these proceedings. She repeated that she interviewed the applicant at Dublin airport. He had given his name. He had with him an Iranian passport which was not his. The photograph contained therein was his. She again recounted the applicant stating to her that he had travelled to Turkey from Afghanistan, thereafter to an unknown country and thereafter to Ireland. She did not believe that he had made reasonable efforts to establish his identity. She deposed to the applicant's production of the false passport and his admission that his own photograph had been substituted therein. Detective Garda McMahon said the interview with the applicant was conducted through an interpreter.

The witness stated that she had forgotten to mention a number of matters to the District Court. The matters omitted included (i) that the applicant had been travelling around for 15 months (it will be recollected that this statement was contained in the information); (ii) that the application was made by Mr. Nasiri with the assistance of an interpreter and a solicitor; (iii) that a copy of the information to which reference has been made earlier was furnished to the judge.

She also stated that she was aware that the applicant was making a phone call but did not know to whom or for what purpose. The first time she was aware that the applicant had tried to telephone home was in court. The applicant had not given reasons as to why the phone call had been made to the District Court.

When asked by Mr. Feichin McDonagh, S.C., who appeared on behalf of the applicant in the *habeas corpus* proceedings what additional information was elicited on foot of cross-examination from Ms. Binchy, Detective Garda McMahon stated that the only issue was the telephone call. She accepted that her application was to have the applicant in these proceedings detained for a period of 21 days. She also accepted that the learned District Judge had said the words "fraud" and "liar". She stated that the learned District Judge had outlined in the course of his decision that he was relying on paras. (c) and (f) as set out in the warrant, and that he had stated he was granting her application on grounds (c) and the latter part of (f).

It was also put to Detective Garda McMahon that the hearing of the case in the District Court took five minutes or less. Indeed, it was suggested that on the basis of the evidence adduced by way of affidavit, and in the course of this hearing that the evidence may have been no more than 10 to 15 seconds in duration.

Detective Garda McMahon thought that Judge Coughlan may have heard two or three such applications in the course of the day in question. She denied that the hearing had been conducted on a "formalistic basis". She accepted that she had a memo of the interview and the sworn information, and that these documents were in the District Court. She also accepted that the information had been furnished to the judge but that the applicant's solicitor did not get a copy of this document or of the statement.

On the basis of the evidence adduced in this application it is difficult to see how the District Court proceedings lasted more than one or two minutes at maximum.

The law

It is clear that there are three aspects of law relevant to this application. These are -

(1) The appropriateness of *habeas corpus* proceedings,

(2) Fair procedures, and

(3) The interpretation of s. 9(8)(c) and (f) of the Act of 1996.

While these issues are to a degree interlinked I propose to deal with them sequentially.

Habeas Corpus proceedings

In the course of submissions Mr. O'Reilly, B.L., contended that the applicant should have proceeded by way of judicial review rather than *habeas corpus*. He relied on the Supreme Court authority of *McSorley v. The Governor of Mountjoy Prison* [1997] 2 I.R. 258.

In *McSorley* the applicants contended that they had not been advised by the District Judge as to their entitlement to legal representation. In the High Court in a *habeas corpus* application it was accepted on behalf of the Governor that no such advice had been given. On that basis Murphy J. directed their release.

On appeal, the Supreme Court expressed concern that neither the District Judge nor the Director of Public Prosecutions had been given an opportunity of making a case and that the procedure actually adopted involved breaches of principle *audi alteram partem.*

The same principle, it was contended, should apply in the instant case.

However in the earlier authority of *Sheehan v. O'Reilly* [1993] 2 I.R. 81 at pg. 89 Finlay C.J. stated in relation to such applications:

> *"Such an application in its urgency and importance must necessarily transcend any procedural form of application for judicial review or otherwise. Applications which clearly, in fact, raise an issue as to the legality of the detention of a person must be treated as an application under Article 40, no matter how they are described." (pg. 89)*

In *McSorley*, O'Flaherty J. had held that the applicants ought to have challenged the legality of the convictions by means of an application for judicial review rather than by way of *habeas corpus* proceedings. If such a course of action had been adopted, he considered, both the Director of Public Prosecutions and the District Court judge would have an opportunity of making observations and the application for judicial review could have proceeded with the same degree of expedition or nearly so as an enquiry under Article 40.

I am unable to accept this submission as to the appropriateness of proceeding by way of judicial review, because I consider that I am now bound by the authority of the recent Supreme Court decision of *Martin McDonagh, Appellant/Applicant v. The Governor of Cloverhill Prison, Respondent*, a decision made on 28th January, 2005 to which I will refer below.

Fair Procedures

It is a remarkable fact that the proceedings in the District Court took place in circumstances where relevant material was made available to the District Court judge and was placed before him in circumstances which were not known to the applicant until the hearing of this enquiry under Article 40. It has been conceded on behalf of the respondent that the documentation before the District Court judge was both relevant and material to the application. I accept the submission, that such material contained evidence which might have been both detrimental and beneficial for the applicant and/or his legal advisors. Similar considerations apply to the memorandum of interview.

It is impossible on the evidence to escape the conclusion that the "information" and the memorandum of interview were likely to have formed part of the learned District Court judge's considerations. In my view the fact that they were so available would in itself render the proceeding before the District Court judge constitutionally and procedurally flawed even on the basis of justice being seen to be done.

A simple consideration of the principles enunciated so clearly in *Re: Haughey* [1971] I.R. 217 demonstrates that the material in question should have been made available to the applicant prior to the hearing so that it could have been considered by the applicant and his legal advisors. Alternatively, it should not have been before the District Judge at all.

The absence of such a procedure meant that the applicant was simply not placed on notice of the full case against him. He was not made aware that there was potential evidential material which had been placed before the District Court judge in a manner unknown and of which the applicant and his legal advisors had no notice.

The applicant was denied the opportunity to object to the presence of the documentation because he did not know of it. He was denied the opportunity of either accepting or rejecting the contents of its documentation because he did not know the contents of these documents.

He was denied the opportunity to object to the admission of such documentation on the grounds that it may have been hearsay.

In the circumstances the conclusion of this court is unavoidable. The want of fair procedures which occurred in the District Court was such as to render the proceeding "in essence unfair".

Fair Procedures and Habeas Corpus: McDonagh's case

The phrase "in essence unfair" is one which I have respectfully adopted from the decision of the Supreme Court in McDonagh's case.

That too was a *habeas corpus* application. In allowing the appeal against my judgment in the High Court, the Supreme Court concluded that the District Judge had failed properly to consider provisions of the Bail Act, 1997, or to consider what were found to be omissions in evidence, issues admitted without notice or submissions made concerning those matters. Furthermore, the court criticised a number of remarks made by the learned District Court Judge as being improper and wrong in principle.

The court (McGuinness J.) added

> *"Nevertheless it would seem to be essential as a matter of natural and constitutional justice that an accused person should be made aware that an objection to bail of so serious a nature is to be brought forward by the prosecution. In the same way it is also a matter of natural and constitutional justice that the accused person should be given a proper opportunity either by means of evidence or through submissions to challenge such objection. None of this occurred in the present case. The proceedings were in essence unfair."*

While it would appear that the earlier authority of *McSorley v. The Governor of Mountjoy Prison* [1997] 2 I.R. 258 was not referred to the Court it is quite clear that the thinking behind the judgment refers back to the earlier approach adopted by that Court in *Sheehan v. O'Reilly* [1993] 2 I.R. 81 to which reference has been made.

Having regard to such recent authority therefore, I consider I am bound by the authority of *McDonagh,* as to the appropriateness of proceeding by habeas corpus rather than judicial review.

Procedure Under S. 9(8) of the Act of 1996

So far as relates to the requirement for fairness of procedures, I do not consider that there should be any distinction made between a bail application and an application for detention of the type in suit arising under s. 9(8) of the 1996 Act.

I fully accept that there is some obligation on an applicant to assist in the processing of such an application and in the procedures under s. 9 of the Act of 1996.

In *Arra (Applicant) v. The Governor of Cloverhill Prison and Others (Respondents)* (cited by the applicant) Ryan J. in his judgment delivered on 26th January, 2005 observed that an applicant under s. 9 is not "a passive participant in that process" (see Illegal Immigrants (Trafficking) Bill, 1999) 2000 2 I.R. 360 at 395. But there is a clear distinction to be drawn between the level of participation required in the process and the fundamental requirement of fairness of procedures in court applications.

I am satisfied therefore that the procedural and other deficiencies described below of the hearing before the learned District Court Judge in this case were indeed such as would invalidate essential steps in the proceedings leading ultimately to the applicant's detention. In so holding I would adopt the phraseology of Henchy J. in *The State Royle v. Kelly* [1974] I.R. 259 where he considered that the detention of the applicants *"was wanting in the fundamental legal attributes which under the constitution should attach to it".*

As will be seen from a consideration of the foregoing, the question of the appropriateness of *habeas corpus* and fair procedures are closely interlinked on the uncontested facts of this case. On the authority of *McDonagh* I cannot therefore accept the submission made that judicial review proceedings would be more appropriate. It seems to me that I was obliged to deal with the matter before this court on the basis of a *habeas corpus* application, and therefore did so.

Proceedings in the District Court

Furthermore, I do not accept that there was any sufficient evidence before the District Court to allow the learned District Court Judge to reach the conclusion that the applicant was "a liar" and "a fraud". It seems to me that in making the statement the learned District Court Judge was bearing in mind the evidence of the Garda. But how is a distinction to be drawn between the actual *oral* evidence of Detective Garda McMahon and the written material which was before the learned District Court Judge of which the applicant had no notice?

In my view it is impossible to do so, and in such circumstances it is similarly impossible to conclude that fair procedures were observed or that justice was seen to be done. There was no evidential basis for the remarks made, which were without warrant.

Further aspect of fair procedures

A further aspect of fair procedures arises on the facts of the present case. On the basis of the authority of *O'Mahony v. Ballagh* [2002] 2 I.R. Mr McDonagh S.C. submitted that the failure of the District Judge to rule on the arguments made in support of an application by the applicant fell into unconstitutionality in not indicating which of the arguments he was rejecting and which he was accepting, as it was essential for the defence to know which arguments were accepted when deciding whether or not to go into evidence.

I am far from holding that a District Court Judge, sitting in a court of summary jurisdiction is obliged to deal with each and every matter raised in submissions. A judge is entitled to disregard such matter as he or she regards as irrelevant or immaterial to the decision. However the point is of relevance in the instant case in that there is no evidence here that the learned District Court Judge actually expressed his reasons for reaching the conclusion that the applicant should be detained under subs. (c) and (f), referred to earlier. Nor did he recite the evidential basis for so concluding. In the light of the facts as now known, this is of particular relevance, specifically having regard to the fact that there was before the District Court Judge material additional to that adduced in evidence or known to the applicant and his legal advisors.

In the circumstances therefore I consider that there was an obligation upon the District Court Judge to set out the arguments he was rejecting and those he was accepting so as to ensure that constitutional justice was maintained in actuality.

This point is also of particular relevance because, as was submitted on behalf of the applicant, there was no evidence upon which this court could find that the learned District Court Judge had specifically addressed the question as to whether there was before him evidence *accepted by him* that the Gardaí had reasonable cause for their suspicion justifying the detention of the applicant under s. 9(8)(c) and (f).

I accept the submissions of Mr. McDonagh S.C. that in order to invoke the jurisdiction of the Act the District Court Judge should *himself* be satisfied by the information on oath that facts exist which constitute reasonable grounds for justifying the detention of the applicant. In *Byrne v. Gray* [1988] I.R. Hamilton P. stated at p. 40 –

> *"It is quite clear that the District Justice or Peace Commissioner issuing the warrant must himself be satisfied that there is a reasonable ground for suspicion. He is not entitled to rely on a mere averment by a member of the Garda Síochána that he, the member of the Garda Síochána has reasonable grounds for suspicion. A member of the Garda Síochána seeking the issue of a warrant pursuant to the provisions of s. 26 of the Misuse of Drugs Act, 1977 and 1984 must be in a position to so satisfy either the District Justice or the Peace Commissioner of the relevant facts so that the District Justice or Peace Commissioner can satisfy himself in accordance with the requirements of the section. He is not entitled to rely on the suspicion of the member of the Garda Síochána applying for the warrant."*

In my view similar considerations apply here and I accept the submissions made on this point.

The learned District Court Judge had a discretion under s. 10(b)(2) to either detain the applicant in custody, or to release him subject to conditions, or if satisfied that one or more of the paras. of subs. 8 applied, commit the applicant to a place of detention for a period not exceeding twenty one days. A necessary pre-condition to detention is that the learned District Court Judge was *himself satisfied* that one or more of the paras. of subs. 8 applied to the applicant. It is only in such circumstances that he might then direct the detention of such applicant. This rendered it more important on the facts of this case that there should be a clear indication of the precise finding made by the District Court Judge and the basis upon which he proceeded to direct the applicant's detention.

The Interpretation of s. 9(8)(f) of the Refugee Act 1996

The third aspect of the applicant's submission presents more difficulty. It relates to the proper interpretation of s. 9(8)(f) of the Refugee Act, 1996 as amended by s. 7 of the Immigration Act, 2003.

It will be recollected that one of the bases for detention identified by the statute is if the District Court Judge is satisfied that the person:

> *"(f) without reasonable cause has destroyed his or her identity or travel documents or is in possession of forged*

identity documents…"

In essence it is contended on behalf of the applicant that the phrase *"without reasonable cause"* refers not only to the question of destruction of identity or travel documents but also the issue of possession of forged identity documents. Counsel for the applicant particularly relies on the absence of a comma after the word *"documents".* He submits that it follows from this that there may be circumstances in which a person seeking entry to the jurisdiction may be in possession of forged identity documents with reasonable cause. It is submitted that the interlineation which is set out at sub para. (f) in the warrant of the words

"without reasonable cause has destroyed his or her identity or travel documents"

is fatal not only to that portion of the warrant but also to sub para. (c) viz whether the applicant "has not made reasonable efforts to establish his or her true identity".

Counsel relies on Bennion, Statutory Interpretation Fourth Edition, at Section 273 (p. 714) where the learned author says: *"one aspect of the principle against doubtful penalisation is that in the exercise of state power, the physical liberty of the person should not be curtailed or interfered with except under clear authority of law";* and further; *"the presumption against the impairment of liberty of a person without clear authorisation is an aspect of the general principle of common law against doubtful penalisation".*

Mr. McDonagh further relies on Hogan and Morgan on Administrative Law (1998 edition at p. 415) where the learned authors say under the heading "Strict Construction of Penal Statutes"-

> *"At common law there is a particularly strong presumption in favour of a statutory construction which protects individual liberty. This common law presumption must now of course be read in the light of constitutional provisions protecting such fundamental rights in which will elevate the status of such rights to a somewhat higher legal plain."*

(The authors thereafter refer to the judgment of Henchy J. in *D.P.P. v. Gaffney* [1988] ILRM 39 to the effect that insofar as a statutory provision constitutes an incursion into individual liberty such statute should not be interpreted as making such incursion further than the extent specifically expressed in the statute.)

However the court in these proceedings is bound by the doctrine of judicial restraint. Reasons have earlier been already outlined as to the unlawfulness of the applicant's detention under two general headings. Therefore here, the court will adopt a narrow basis for its finding. This refers back to the issue raised earlier in the judgment regarding the obligations of the District Court Judge to clearly set out a decision and also the evidential basis therefor (see *O'Mahony v. Ballagh* [2002] 2 I.R.).

On the facts outlined I consider that there was insufficient evidence adduced on the part of the respondent to demonstrate to the requisite degree of proof that the learned District Court Judge had directed his mind to the issue as to the *evidential* basis for the applicant's custody under s. 9(8). In the absence of that evidence the learned District Court Judge erred in failing to establish jurisdiction for the making of a detention order.

Having regard to this finding it is unnecessary to make any finding regarding the interpretation of s. 9(8)(c) and (f). It is sufficient to say that on the evidence adduced in this case the respondent has failed to establish that the learned District Court Judge acted within jurisdiction and the applicant is therefore entitled to the order under that general heading also, but confined to the basis which has been outlined earlier, that is to say the absence of proved *evidential* material upon which the learned District Court Judge proceeded so as to establish his jurisdiction.

For these reasons the court grants the relief claimed by the applicant.