[2019] IEHC 653

THE HIGH COURT

[2019 / 918 SS.]

BETWEEN

HH

PLAINTIFF/APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Bernard Barton delivered on the 2nd day of August, 2019.

1. This matter came before the Court by way of an *ex parte* application for an enquiry under Article 40.4 of the Constitution into the lawfulness of the Applicant's detention in Cloverhill Prison, Dublin. Having heard what was urged by Counsel and considered the grounding affidavit, I acceded to the application and made an order of Habeas Corpus. The Applicant was brought to Court the following day and a warrant for his detention, dated 27th June, 2019, produced.

Background

2. The Applicant is a citizen of Bangladesh. He arrived in the State from the United Kingdom. On the 1st February 2013, shortly after his arrival, he claimed 'International Protection'. Pursuant to the provisions of the 'Dublin Regulation' it was determined that the United Kingdom was responsible for the Applicant, accordingly, the Minister for Justice (the Minister) made an order, dated the 10th May 2013, for his transfer back to that jurisdiction. He denies any knowledge of the Order despite the Respondent's assertion that it was served personally at what was then his home address in the State.

3. As it transpired the time for execution of the order expired on the 21st September, 2014. Consequently, the application for protection fell to be determined by the State. Thereafter the Applicant applied to the Minister seeking declarations of refugee status, subsidiary protection and permission to remain; his application was processed in the ordinary way and ultimately refused. Subsequently, on the 1st February, 2019, the Minister made a deportation order, notice of the making of which was served personally on the 22nd February; a copy thereof was also served on his solicitor.

4. The notice was in the form prescribed by the International Protection Act 2015 (Deportation) Regulations 2016, S.I. 668 of 2016 (the 2016 Regulations) which contained a number of requirements one of which was that he leave the State by the 24th March 2019, failing which he was required to present himself to the office of the Garda National Immigration Bureau, Burgh Quay, Dublin, at 2pm on Wednesday 27th March, for the purpose of making arrangements for his removal from the State. The Applicant was instructed to bring with him and produce certain travel documents, namely, a passport, travel tickets or other documents that might facilitate the process of removal. It is accepted that the Minister has been in possession of the Applicant's passport for this purpose since early in the process though precisely when it was handed over was not established. It seems likely, however, to have been at the first meeting arranged for March, 27th, at which the Applicant attended.

5. The deportation notice contained a number of other requirements, which included the necessity to co-operate in any way necessary to enable a member of An Garda Síochana or an immigration officer obtain any travel document, passport, travel ticket or other documents required for the purposes of removal and to continue to reside at the address specified therein. The requirements were accompanied by a warning. Failure to leave the State by the 24th March 2019 would constitute a failure to comply with the terms of the deportation order and would render the Applicant liable to arrest and detention without warrant pursuant to section 5(1) of the Immigration Act 1999, as inserted by the International Protection Act 2015, (the Act). The notice provided for other matters referred to in s. 3(9) of the Act which are not germane to these proceedings. Finally, the Applicant was put on notice that when "satisfactory documentation has been organised" arrangements would be put into place to affect his removal from the State.

6. On 22nd March 2019, the Applicant applied to the Minister for an order revoking the deportation order. A determination on the application by the Minister has yet to be made; the application is still pending. The Applicant presented himself to the Bureau office on the 27th March 2019 as instructed; however, no arrangements had been made for his deportation nor were any such discussed. Instead he was instructed to return to the office on the 9th May 2019 for the same purpose. He complied but found the situation regarding removal arrangements as before. Once again he was instructed to return to the office, this time on the 27th June 2019.

7. When the Applicant presented himself at the Bureau office on that date he was met with the same situation as previously, no arrangements for his removal had been made nor was there any discussion regarding same. However, Garda Dillon, who was aware of the terms of the order and the date on which the Applicant should have left the State, arrested him under s. 5 (1)(a) of the Act. Following the arrest he was taken by Garda Dillon to Cloverhill Prison, a prescribed place of detention, where he has been detained ever since. The sole ground for the arrest and detention appears on the face of the warrant, namely that Garda Dillon with reasonable cause suspected the Applicant, against whom a deportation order was in force, "(a) has failed to leave the State within the time specified in the Order".

8. The Irish Naturalisation and Immigration Service (INIS) first sought removal options for the Applicant's deportation from travel agents on the 4th July, 2019; further enquiries were made on subsequent dates and culminated in a flight requisition being received on July 25th. The following day flights were booked for the purpose of executing the deportation order on August 5th. In the meantime the only indication as to the view which the Minister may take on the pending application to revoke is contained in the affidavit of Paul Maguire, an INIS higher executive officer, in which he deposes that the Minister's intention is to continue with the deportation.

9. There is no evidence of any impediment to the Applicant's deportation; he holds a Bangladeshi passport, valid from the 21st November, 2015 to the 20th November, 2020. Nor is there any evidence of intention to evade deportation other than the failure to leave

the State by March 24th. In every other respect the Applicant's sojourn in the State has been exemplary. In February 2018, he was granted permission to access the labour market in a self-employed capacity and subsequently opened up an Indian restaurant at Ballincollig, Co. Cork, where he employed a number of staff. He also became involved in the local community and helped run a sporting association for Bangladeshi nationals. He complied in every other respect with the terms of the deportation notice. However, from and after his arrest and detention he was unable to operate the restaurant and was forced by the circumstances to close the business down.

Statutory Provisions

10. Section 5 (1) of the Act provides that where an Immigration Officer or a member of an Garda Síochana with reasonable cause suspects that a person against whom a deportation order is in force: -

    a. has failed to leave the State in the time specified in the Order;

    b. has failed to comply with any other provision of the Order or with a requirement in a notice under s. 3(3)(b)(ii);

    c. intends to leave the State and enter another State without lawful authority;

    d. has destroyed his or her identity documents or is in possession of forged identity documents or;

    e. intends to avoid removal from the State.

    The officer or member may arrest the person without warrant and a person so arrested may be taken to a place referred to in subsection (3) and detained in the place in accordance with that subsection. Subject to subsections (9) and (10) and certain specified periods which are not to be reckoned, section 5 (8)(a) provides that person shall not be detained under the section for a period or periods exceeding eight weeks.

11. It is clear on the face of the warrant as well as from the testimony of Garda Dillon, who was called to give evidence at the hearing of the inquiry, that the sole reason for the Applicant's arrest and detention was his failure to leave the State by 24th March. Although he had presented himself to the Garda Bureau office on the dates as requested it is also clear from the evidence of Garda Dillon that no arrangements for deportation had been made nor were any such discussed on any of those occasions. As mentioned earlier there was no impediment to deportation, the Minister was in possession of his passport, there had been no attempt at evasion nor any indication the Applicant would refuse to comply with deportation arrangements if and when they were made. As it happens the first enquiries in this regard were not made until the 4th July 2019, subsequent to the Applicant's arrest and detention.

The Issue

12. As with any Article 40 enquiry the Court is concerned solely with the lawfulness of the impugned detention. The Applicant contends that his arrest and continuing detention in

Cloverhill prison is unlawful; the Respondent contends otherwise. If correct in his assertion the Court is confined to ordering the Applicant's immediate release. The power to arrest and detain a person without warrant under s. 5(1)(a) of the Act in circumstances where he or she has failed to leave the State by the date specified in a deportation order is not in question nor is the validity of the deportation order or the warrant of detention in this case impugned in any way rather the question is whether in the particular circumstances of the case the arrest and detention of the Applicant was an unlawful exercise of executive power.

The Applicant's Case

13. The case made on behalf of the Applicant may be summarised in brief as follows. In circumstances where, apart from the failure to leave the State by the due date, there is no evidence of evasion or of an intention to evade deportation, where there has been diligent compliance with the requirements of the deportation notice and where no arrangements for deportation had been made or were in the process of being made at the material time, the arrest and detention of the Applicant was a grossly disproportionate, unwarranted and unnecessary exercise of executive power for the purposes of effecting the Applicant's deportation from the State the misuse of which amounts to an unlawful interference with his constitutional right to liberty.

The Respondent's Case

14. The Respondent's case in brief is that the making of arrangements for deportation is not a prerequisite to the arrest and detention under s. 5 (1)(a) of the Act of any person who has failed to comply with a deportation order nor is it a prerequisite that the arresting officer must be satisfied or have reasonable cause to believe that one or more of the eventualities specified in s. 5(1) sub paras. (b), (c), (d) or (e), supra, have occurred or are likely to occur, rather the sole and sufficient reason for arrest and detention is the failure to have left the State by the date specified in the order.

Case Authority

15. I have been greatly assisted in reaching a determination by the able submissions of counsel and the following case authorities to which the Court has been referred: In the matter of Article 26 of the Constitution and in the matter of ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill [2000] 2. I.R. 360; *Omar v. The Governor of Clover Hill Prison* [2013] IEHC 579; *P.O. v. The Governor of the Dóchas Centre and anor*. [2016] IEHC 557; *Li v. The Governor of Cloverhill Prison* [2012] IEHC 493; *Seeruttun v. The Governor of Clover Hill Prison* [2013] IEHC 217; *Saadi v. The UK* ECHR No. 13229/03; *J.A.(Cameroon) v. The Governor of Cloverhill Prison and anor*. [2017] IEHC 610; and *Trang and Vu v. The Governor of the Dóchas Centre* [2018] IEHC 211. For the purpose of executing a deportation order it is abundantly clear that a person who is in breach of a deportation order by failing to leave the State by date specified therein is liable to be arrested and detained by a member of An Garda Síochana or an Immigration Officer for the purposes of executing the deportation order.

Caveat

16. I think it apposite in the context of this case to observe here that either quite different circumstances pertained and or in several instances the judgments in the authorities

relied on were handed down prior to the amendment of the Immigration Act 1999 by the 2015 International Protection Act and must therefore be considered with that caveat, the importance of which becomes particularly evident from the judgments of this Court handed down subsequently.

17. In this regard the reader's attention is drawn to the following extract from the judgment of my colleague, Humphreys J. on an Article 40 application in *J. A.* at para. 26 where he stated: -

> *"The routine detention of asylum seekers and illegal immigrants may well be objectionable as Hogan J. commented in Li but that is not a reason to erect some sort of extraordinary or even unduly high barrier to the detention of such persons. If there is a continuing intention to deport and an absence of any insurmountable impediment to carrying out that removal within the period allowed by statute, that is a sufficient legal basis for the detention."*

The learned judge reiterated and followed this statement of the law in Trang and Vu in the course of the judgement in which at para 10, commenting on the ECHR, he stated: -

> *"It seems to me that the requirements of Art. 5 of the ECHR are satisfied by Irish law, as outlined in the Trafficking Bill case, that detention must be "necessary" and that there is a reasonable prospect of carrying it out within the eight-week period or such period as is extended under the 2015 Act."*

Decision

18. There was some debate between the parties as to the meaning of what is "necessary" in this context. I accept the submissions of the Respondent in this regard, as to which there is no doubt that a continuing intention to deport the person in breach of the deportation order is a necessary requirement. The arguments which have been advanced on behalf of the parties necessarily involve a consideration of the wording and therefore an interpretation of s. 5(1)(a). Applying the well settled principles of statutory interpretation as recently expounded by the Supreme Court in *CM v. The Minister for Health* [2017] IESC 76, the wording of the provision when given its ordinary and literal meaning is, in my view, clear and unambiguous.

19. In this regard it seems to me that if the Oireachtas had intended the arrangements for deportation referred to in the deportation notice, prescribed as it is by the 2016 Regulations (S.I. 668 of 2016), to have been made or to have been in the process of being made as a condition or qualification for arrest and detention under s. 5(1) (a) it would have been necessary and a simple matter to have so provided. Undoubtedly, the purpose of the arrest and detention must be to secure the implementation of the deportation order and not for some other purpose, such as the prevention of a crime though such maybe a consequence; in short the arrest and detention must be effected for the purpose of deportation within a reasonable time. See the decision of the ECHR in *Saadi v. the UK*, *supra*.

20. The period prescribed by the Act at eight weeks or in certain circumstances an extended period was commented upon by the Supreme Court in the *Illegal Immigrants (Trafficking) Bill* case. It is crystal clear that continuing detention in circumstances where it becomes evident that deportation cannot be implemented within the eight week period or in certain circumstances the extended period would amount to an abuse of power. Even if properly exercised in the first instance the relevant executive authority must be vigilant to ensure the power of detention is brought to an end if facts or circumstances emerge which are likely to significantly impede or otherwise prevent the deportation order from being implemented.

21. Given that the purpose of the arrest and detention must be to implement the deportation order within a reasonable time, fixed at eight weeks or within such extended period as is provided for in certain circumstances by the Act, in my judgement, there would seem to be little if any sense to providing for such a period or periods of time within which to make and give effect to deportation arrangements if such had to have been made or to have been in the process of being made at the time of arrest.

22. Quite apart from the necessity to comply with the time element it is also quite clear that if there were impediments to deportation at the time of arrest or such were to emerge subsequently it could be argued, in the first instance, that the initial arrest or, in the second instance, the continuing detention was unlawful such as, for example, if it became impossible for whatever reason to make arrangements for deportation. In such circumstances continuing detention in the hope that the circumstances might alter at some unspecified time in the future would clearly be impermissible. Such circumstances do not arise here; in fact the opposite is the case. There are no impediments to deportation and there is a continuing intention to deport; arrangements have been made for the purpose of executing the order on Monday August 5th next, well within the eight week period prescribed by law.

Conclusion and Ruling

23. It follows that the exercise of the power of arrest and detention in the circumstances already outlined was neither grossly disproportionate, excessive or unnecessary and consequently was not a misuse of power such as to render its exercise an unlawful interference with the Applicant's constitutional right to liberty, on the contrary his breach of the terms of the order rendered him liable to arrest and detention for the purposes of implementing the order at any time. Accordingly, having regard to the conclusions reached for the reasons given the Court finds that the arrest and detention of the Applicant was lawful; the application will be refused and the Court will so order.