Neutral Citation [2016] IEHC 710

THE HIGH COURT

[2016] No.1184 S.S.

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2º OF THE CONSTITUTION OF IRELAND

BETWEEN

LIN QING AKA QING LIN

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

NOTICE PARTY

THE HIGH COURT

JUDICIAL REVIEW

[2016] No.859 J.R.

LIN QING AKA QING LIN

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 25th day of November, 2016.

1. This is the judgment of the court on an application to extend time for proceedings challenging a deportation order and a s. 3(3)(b)(ii) Immigration Act, 1999 notification. The intended judicial review proceedings are being heard with *habeas corpus* proceedings, as explained presently.

2. The principles governing applications for extension of time in a provision such as that contained in s. 5 of Illegal Immigrants (Trafficking) Act (2000) have been authoritatively stated by Clarke J. in *Kelly v. An Bord Pleanála* [2005] 2 I.R. 404. The learned Judge said as follows, at page 411:-

> "Without being exhaustive it seems to be me that the following factors may need to be considered prior to a decision as to whether or not to exercise a discretion conferred to extend time of the type referred to above:-
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> (a) The length of time specified in the relevant statute within which the application must be made. In The Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 I.R. 360 the Supreme Court at p. 394 stated that a party who in all the circumstances of the case could be shown to have used reasonable diligence might well be in a position to persuade the court to extend the fourteen day period provided for in that legislative regime. Obviously the shorter the period of time which a person has to make application to the court, the easier it may be to show that despite reasonable diligence that person has been unable to achieve the time limit.
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> (b) The question of whether third party rights may be affected…
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> (c) …while it may well be legitimate to take into account the fact that no third party rights are involved, that should not be regarded as conferring a wide or extensive jurisdiction to extend time in cases where no such rights may be affected. The overall integrity of the processes concerned is, in itself, a factor to be taken into account.
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> (d) Blameworthiness. It is clear from all the authorities to which I have been referred in each of the areas to which stricter rules in respect of judicial review have been applied that one of the issues to which the court has to have regard is the extent to which the applicant concerned may be able to explain the delay and in particular do so in circumstances that do not reflect any blame upon the applicant. However in that context it should be noted that McGuinness J. in *C.S. v. Minister for Justice* [2004] IESC 44; [2005] 1 I.L.R.M. 81 at p.101 said:-
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> > 'There is, it seems to me, a need to take all the relevant circumstances and factors into account. The statute itself does not mention fault; it simply requires 'good and sufficient reason'. The *dicta* of this court in the reference judgment quoted earlier indicate many factors which may contribute to 'good and sufficient reason'. By no means all of these can be attributed to fault or indeed absence of fault, on the part of the applicant.'
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> While the blameworthiness (or the lack of it) on the part of the applicant is, therefore, a relevant factor it is only one such factor to be weighed in the balance.
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> (e) The nature of the issues involved. Both this court and the Supreme Court in *C.S. v. Minister for Justice* [2004] IESC 44; [2005] 1 I.L.R.M. 81 seem to have had regard to the severe consequences of deportation to a State where fundamental rights might not be vindicated. The consequences of being excluded from challenging a planning or public procurement decision, while significant, are not in the same category.
>
> (f) The merits of the case. Some considerable argument took place during the course of the hearing before me as to whether the merits of the case in the sense of whether the applicant had established an arguable case was a factor which could properly be taken into account. In favour of that proposition reliance was placed upon the judgments of the Supreme Court in *G.K. v. Minister for Justice* [2002] 2 I.R. 418 in which Hardiman J., at p. 423,

delineated the approach to applications for extension of time as follows:-

> 'On the hearing of an application such as this it is, of course, impossible to address the merits in the detail of which they would be addressed at a full hearing, if that takes place. But it is not an excessive burden to require the demonstration of an arguable case. In addition, of course, the question of the extent of the delay beyond the fourteen day period and the reasons if any for it must be addressed.'"

3. The court has been asked to determine this application to extend time at an interlocutory stage and conclusions about the facts are therefore based on untested evidence.

4. The applicant is a 29 year old man from China. He speaks very little English and is illiterate in the English language, and I infer - for reasons expressed below - that this is a fact known to the respondent. The applicant entered the State in either 2008 or 2009 and he has been working illegally for some, if not most of that time, and has been present without permission. He was arrested and imprisoned briefly in connection with immigration offences in 2009 and 2011.

5. On three occasions he gave authorities his various addresses - in Mayo, Monaghan and Kildare. These were genuine addresses.

6. He made application for asylum in April 2011 - from prison. As part of that process he was given a form which required him to indicate his address. The simple, short from was completed in English, indicating an address in Monaghan. I assume the applicant did not complete the form personally. I also assume that his written and oral application for asylum was completed with the assistance of an interpreter/translator. It is from this interaction with the State that I infer that officials know he neither writes nor speaks English.

7. A letter was sent to him on the 20th April, 2011, at his Monaghan address informing him that he had been refused asylum. The letter informed him of his right to appeal. No appeal was made. The letter was sent by registered post. It was not returned. The letter was accompanied by a form requiring him, pursuant to art. 18 of the Aliens Order 1946, to confirm his address and keep named officials informed of any change of address. The correspondence was addressed to him personally and it was not copied to any lawyer. I therefore assume that he was not professionally represented during the asylum process because asylum decisions are invariably copied to applicants' lawyers. The correspondence including the art. 18 notice in respect of changing addresses was in English. The correspondence was sent by registered post to the address he had given in Monaghan. I assume on the current state of the evidence, that he received it and he could not read any of it. He did not appeal it to the Refugee Appeals Tribunal. He did not complete the art. 18 Aliens Order Form - confirming his address. Thus the last address notified to officials was the Monaghan address which he gave in April 2011 and he must have been assisted with this.

8. In early 2016, the applicant moved to Kildare. He was working in a Chinese Restaurant. Payslips exhibited - indicating place and dates of work - support this version of events.

9. The applicant was aware of his precarious immigration status. In August 2016 his agents - BRL accountants - contacted the Department of Justice to regularise his presence in the State. They sent a letter on 29th August, 2016, to this effect, indicating his home address in County Kildare, and enclosing bank statements and payslips and a tax document for 2015, his mobile phone number, email address and passport number.

10. On the 6th of September, 2016, INIS wrote to the applicant at the Kildare home address in response to the correspondence they had received. The letter told him that he was the subject of a deportation order which had been sent on 12th February, 2016, to his old Monaghan address - the last address the applicant had notified to the officials.

11. The applicant did not understand the letter. He took photographs of it on his phone and sent it to his agents. The applicant discovered the existence of the deportation order for the first time when his agents translated the photographed letter of 6th of September, 2016. Immediately, his agents sought the revocation of the deportation order by letter of the 12th of September.

12. On the 24th September, 2016, the applicant was arrested under s. 5 of the Immigration Act 1999 at the restaurant where he worked illegally and detained in Cloverhill prison for the purposes of implementing a deportation order. (The applicant had given officials details of where he was working three weeks earlier).

13. On October 12th the applicant made contact with his solicitor from prison who in turn contacted INIS to obtain information about the applicant. This took some time. By the end of October, he had sufficient information to consider *habeas cor*pus proceedings.

14. On the 2nd November, 2016, counsel for the applicant made an application for an inquiry pursuant to Art. 40.4 of the Constitution into the legality of detention of the applicant. The applicant's solicitor, Mr. Donal Quigley, swore an affidavit on the 2nd November, 2016, setting out the basis of the *habeas corpus* application. It includes a complaint that the deportation order made on the 23rd December, 2013, was in breach of s. 3 of the Immigration Act 1999 and was without legal effect. The solicitor states that a letter inviting the applicant to make submissions on a proposal to deport him was never received by the applicant, that he was unaware at all material times of the fact that a deportation order had been made.

15. An enquiry under Art. 40.4 .2 of the Constitution having been ordered by this court, the detainer produced a "notification of arrest and detention" which constitutes the sole legal basis on which the applicant was deprived of liberty. The document asserts that:-

> "The basis for such arrest and detention is that I with reasonable cause, suspect that the said person against whom a deportation is in force:
>
> (a) Has failed to leave the State within the time specified in the order."

The document is signed by Eamon Keane member of An Garda Síochána.

16. In an affidavit sworn on about the 7th November, 2016, Eamon Keane, the Garda in question averred that:-

> "… on Saturday evening, September 24, 2016, I was on duty in Monasterevin, Co. Kildare. I entered a Chinese restaurant on that date accompanied by Detective Sergeant John Stratford, Detective Garda Michael Byrne and Detective Garda Michael Neville at around 6:45pm. One of the men working in the kitchen was the Applicant in the current proceedings. As a result of enquiries conducted by Detective Sergeant Stratford I was aware that there was a valid deportation order in

existence for him.

I say that I was also aware that the deportation order required the Applicant to leave the State by 15 March, 2016. I therefore arrested him on foot of the deportation order as he had failed to leave the State by the date specified. I arrested and detained him under s. 5 of the Immigration Act 1999, as amended and I then conveyed the Applicant to Cloverhill prison so that arrangements could be made to effect his removal from the State."

I note that the arresting Garda does not appear to have seen the deportation order. He does not exhibit it. It was not part of the documentation given to the detainer.

17. By affidavit sworn on the 7th November, Mr. Tom Doyle, an assistant principal in the Department of Justice swore an affidavit and he gives evidence of the following facts:-

(1) The applicant was arrested in June 2009 working without permission in Co. Waterford. He was charged under s. 12 of the Immigration Act 2004 and remained in Cork prison. Having produced a Chinese passport he was released in July 2009 and required to report to Tramore Garda Station on the 4th August, 2009. He failed to report.

(2) The Garda located the applicant in 2011 and again he was arrested and charged with an offence under s. 14 of the Immigration Act 2004. He was detained in Cloverhill prison.

(3) He applied for asylum from prison; his claim for asylum was rejected by the Office of the Refugee Application Commissioner in April 2011.

(4) On 8th April, 2011, the applicant informed ORAC of his new address at 61 Dublin Street, Monaghan, Co. Monaghan. He informed ORAC of this change of address by completing the relevant form.

(5) The letter informing him of his unsuccessful asylum form was sent to the Monaghan address. It is dated 20th April, 2011. The applicant did not appeal the decision. A form accompanied the letter advising the applicant to update his address details and to keep an identified official informed of his address – issued pursuant to art. 18 of the Aliens Order 1946.

(6) On the 14th June, 2014, the Department of Justice issued a letter to the applicant indicating that the Minister proposed to make a deportation order in respect of him and inviting submissions in this respect and in respect of other relevant matters where appropriate within fifteen days. No submissions were received.

(7) The deportation order was duly made six months later on the 23rd December, 2013. The deportation order was served on the applicant twenty-six months later by letter dated 15th February, 2016.

(8) The letter was accompanied by another document which set out, amongst other matters, the date by which the applicant was required to leave the State, i.e. March 15th, 2016.

(9) The letter and accompanying documentation were returned marked "unknown."

(10) The applicant had indicated that his address was in Monaghan by completing a form for ORAC on the 18th April, 2011. The State authorities sent the deportation order to that address approximately five years later.

The Deportation Order
18. The deportation order was exhibited by Mr. Tom Doyle. The deportation order is in the following form:-

"IMIGRATION ACT 1999

DEPORTATION ORDER

WHEREAS it is provided by subs. (1) of s. 3 of the Immigration Act 1999 (No. 22 of 1999) that, subject to the provisions of s. 5 (Prohibition of Refoulement) of the Refugee Act 1996 (No. 17 of 1996) and the subject provisions of the said s. 3, the Minister for Justice and Equality made by order require a non-national specified in the order to leave the State within such period as maybe specified in the order and remain thereafter out of the State.

WHEREAS **Lin Qing aka Qi Qing Lin** is a person in respect of whom a deportation order may be made under subs. (2)(f) of the said s. 3;

AND WHEREAS the provision of s. 5 (Prohibition of Refoulement) of the Refugee Act 1996 and the provisions of the said s. 3 are complied with in the case of Lin Qing aka Qi Qing Lin;

NOW, I, Noel Waters, on behalf of the Minister of the Justice and Equality, in exercise of the powers conferred by subs. (1) s. 3, hereby require you the said Lin Qing aka Qi Qing Lin to leave the State within the period ending on the date specified in the notice served on or given to you under subs. (3)(b)(ii) of the said s. 3, pursuant to subs. (9)(a) of the said s. 3 and to remain thereafter out of the State.

GIVEN UNDER the official seal of the Minister for Justice and Equality this 23 day of December 2013.

Noel Waters

_____

(a person authorised by the Minister for Justice and Equality to authenticate the official seal of the Minister)."

19. The court noted during the course of the Art. 40 inquiry that the arresting Garda had stated as the sole basis for detention that the applicant "had failed to leave the State within the time specified in the order," the order in question being a deportation order. On

its face the deportation order did not indicate a date by which the applicant had to leave the State. The court was aware of the provisions of s. 3(1) of the Immigration Act 1999 which provides:-

> "Subject to the provisions of section 5 … the Minister may by order (in this Act referred to as "a deportation order") require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State."

The court was concerned about the statement of the Garda that the applicant was arrested for failing to leave the State "within the time specified in the deportation order" when the order appeared to be silent as to this matter, though s.3 (1) required the departure date to be in the order. In general, *habeas corpus* is not the appropriate procedure to challenge the validity of an administrative decision such as a deportation order (see *F.X. v. The Clinical Director of the Central Mental Hospital* [2014] IESC 01). However, it may sometimes be appropriate to combine *habeas corpus* proceedings with an application for judicial review as explained by the Chief Justice in *Re: Illegal Immigrants Trafficking Bill 1999* [2000] 2 IR 360. The Supreme Court said as follows:-

> "Article 40.4.2 of the Constitution, enshrining, as it does, the historic remedy of *habeas corpus* in constitutional form is a crucial provision ensuring that no one is deprived of his or her liberty save in accordance with law. It is not within the competence of the Oireachtas to circumscribe or abridge the right protected and guaranteed by that article. It is a necessary consequence of the presumption of constitutionality that it must be presumed that it was not the intention of the Oireachtas in enacting this provision to amend or circumscribe that right in any way.
>
> Section 5 [of the 2000 Act] deals only with the procedural remedy of judicial review as a means of challenging the validity of the administrative decisions in question. It makes no reference to proceedings challenging the legality of the detention of a person who is also the subject of a deportation order. It is in its terms solely concerned with proceedings challenging the validity *per se* of the administration decision.
>
> Nothing in the section can be interpreted as restricting the right of any person to bring proceedings pursuant to Article 40.4.2 of the Constitution. The only question is whether the validity of the deportation order can be determined by the courts in a manner consistent with that article.
>
> The validity of the deportation order may be challenged in judicial review proceedings and the issue determined before any question arising of the person concerned being detained. As already stated, the legitimate object of the provision is to ensure that challenges to the validity of the relevant decisions and other matters are brought promptly. In proceedings brought pursuant to Article 40.4.2 challenging the legality of a person's detention, that detention may be justified by reason of the existence of a deportation order. The fact that the deportation order has previously been unsuccessfully challenged in judicial review or had not been challenged at all within the time permitted by s. 5 may be sufficient to constitute the deportation order as a lawful basis for that person's detention.
>
> On the other hand, if, prior to the initiation of proceedings pursuant to Article 40.4.2 of the Constitution, the person concerned has not initiated judicial review proceedings to question the validity of the deportation order, he or she would be entitled, concurrently with the *habeas corpus* proceedings, to apply for an extension of time within which to seek leave to apply for judicial review on showing that there are good and sufficient reasons for so doing. There is no reason why this could not be done at the discretion of the court and the issue as to the validity of the deportation order heard and determined, if necessary, contemporaneously with the *habeas corpus* proceedings. As already stated, the right to apply to the court in proceedings pursuant to Article 40.4.2 is a fundamental one and the procedural powers of the courts are as ample as the defence of that right requires. Section 5 does not contain any provision inhibiting the court in exercising those powers." [emphasis added]

The Judicial Review Proceedings

20. The court granted the applicant liberty to issue judicial review proceedings to be heard with the habeas corpus proceedings in the manner contemplated by the Chief Justice as set out in para. 19 above. I directed a telescoped hearing. The first issue to be determined in the judicial review proceedings was this application to extend time.

21. Section 5(1) of the Illegal Immigrants (Trafficking Act 200 (as amended) provides that a person shall not question the validity of a deportation order or a notification under s. 3(3)(b)(ii) of the Immigration Act 1999 other than by way of an application for judicial review. Section 5(2) of the 2000 Act provides that application for leave to apply for judicial review shall be made within the period of twenty-eight days "commencing on the date on which the person was notified of the … order concerned unless the High Court considers that there is good and sufficient reason for extending the period." The same legislation changed the rules for service of deportation orders by amending s. 6 of the Immigration 1999 Act so that it now provides:-

> "6(2) Where a notice under this Act has been sent to a person in accordance with paragraph (b) of the foregoing subsection, the notice shall be deemed to have been duly served on or given to the person on the third day after the day on which it was so sent."

22. The 2000 Act made rules for deportation orders and s. 3 notices which deem them to have been "served" or "given" to the person in question three days after being sent by registered post. The Oireachtas has chosen to use a different verb in the context of calculating the 28 day period to commence judicial review proceedings. That period commences on the date on which the person "was notified" of the making of the deportation order - not when they were served or given the papers.

23. The respondent Minister's delegated official made, or as the applicant says, purported to make, a deportation order on the 23rd December, 2013, and a notice pursuant to 3(3)(b)(ii) issued on the 12th February, 2016. The respondent accepts that no attempt was made to serve the deportation notice until February 2016 when it was sent by registered post to the applicant on the 12th February, 2016. The applicant accepts that he gave the respondent or her agents an address in Monaghan in 2011 which is where he was living when he applied unsuccessfully for asylum.

24. The respondent argues that the effect of s. 6 of the Immigration Act 1999 is that the applicant is deemed to have been lawfully served with the deportation order and the s. 3 notice on the 15th February, 2006. Consequently, according to the respondent, the applicant was required to institute proceedings within twenty-eight days of the 15th February, 2016, in order to meet the statutory time limits of s. 5 of the 2000 Act. The applicant, according to the respondent, must therefore seek an extension of time from 13th March, 2016, to the 10th November, 2016 – the date upon which the judicial review proceedings issued from the Central Office.

25. The applicant avers that on or about the beginning of 2016 he moved from the Monaghan address and that he did not receive the deportation papers. The respondent has exhibited documentation showing that the registered post containing the deportation papers was returned. The respondent does not contradict the averments of the applicant that as a matter of fact he did not receive the deportation papers until they were sent to him on about the 6th September, 2016. The applicant does not expressly gainsay the respondent's proposition that non nationals are required to inform the authorities when they change address (see Aliens Order, 1946). Thus, it would appear to be the applicants own fault that he only discovered the existence of the deportation order in September 2016. I have not lost sight of the fact that the art.18 notice in relation to notifying officials of one's address/change of address was sent to a man who neither speaks nor writes English.

26. The respondent has referred to the decision of the High Court and the Supreme Court in *D.P. v. Governor of Training Unit and the Minister for Justice* [2000] IEHC 104; [2001] IESC 113 and in particular the statement by Hardiman J. as follows:-

> "In relation to the deportation order the obligation on the State is to notify the applicant of the making of the deportation order. That was done, and it is not in dispute that the notice was sent. It was sent to an address at which the applicant, as is admitted, was no longer residing when it was sent. It is not in dispute that under the relevant regulations, a person in the position of the applicant must notify the authorities of any change of address and his part and if he fails to do so, then in legal terms a failure to give him notice of the intention of the making of a deportation order is not a matter which is the legal responsibility of the Minister. It is entirely the applicant's responsibility because he has failed to comply with the relevant regulations."

27. A similar situation applies in this case. The respondent sent the deportation papers by registered post to the address notified by the applicant and as a matter of law (because of s.6 (2) of the 1999 Act) the applicant was given the papers on 15th February, 2016. None of that has any bearing on whether or not the applicant is entitled to an extension of time and none of that prevents the applicant from placing facts before the court to indicate that though as a matter of law he was given the deportation papers in February 2016, as a matter of fact he did not receive them until about 6th September, 2016.

28. If the only basis for an extension of time was the fact that the deportation papers had not in fact been received because of the failure of the applicant to inform the authorities of his new address, I would almost certainly refuse the extension of time. In this case, the facts are more complex and the applicant has other strings to his bow.

29. The court has been referred to the decision of Hogan J. in Q.*W. v. The Minister for Justice, Equality and Defence* [2012] IEHC 375 of the 17th July, 2012. In this decision Hogan J. defines the issue which was required to be decided as:-

> "The critical question, however, is whether the respondent Minister lawfully served the deportation proposals to Mr. W. It is to that issue which we can now turn."

The facts of the case were that the respondent Minister had served the deportation order at the address last notified to the Minister. The applicant had sought to argue that as he had moved address, service was not in accordance with law. Hogan J. said:-

> "The real problem for the applicant is that he changed address without notifying the Minister. This in turn mean that he cannot be heard to complain if he did not otherwise receive the appropriate statutory notices, since the Minister had otherwise duly complied with the requirements of s. 6(1)(b) by sending the proposal to deport to the applicant's last registered address with the GNIB. (sic) In that regard, it is irrelevant that the applicant in fact lived elsewhere during that period or that other State agencies knew of that address, since the only issue of importance is the address actually tendered to the Minister via the address supplied to the Registration Officer.
>
> Conclusions
>
> In these circumstances I am obliged to conclude that the applicant was duly served with the requisite statutory notices regarding the proposal to deport him in accordance with s. 6(1)(b) of the Act of 1999. It follows in turn that the present application for judicial review of the deportation order itself must necessarily fail."

30. I have no hesitation in saying that I agree with the statement of the law and the approach adopted by the learned Hogan J. in that case. However the issue for decision in this case is not the same. The applicant does not argue that he was not served with the deportation order in accordance with s. 6(1)(b) of the 1999 Act. His application is for an extension of time within which to bring these judicial review proceedings. He does not argue that the service of the deportation order at an address where he no longer resided invalidates the deportation order which seems to have been the point argued in other cases where the legality of service is raised in aid of an argument as to illegality of the underlying decision.

31. The Act which deems that the applicant was given the deportation papers on 15th February, 2016 (by amending s. 6 of the 1999 Act), requires the applicant to challenge the deportation order within twenty-eight days "commencing on the date on which the person was notified of the decision." This allows a person to say that though he was given the papers as a matter of law on a certain date, he did not have actual knowledge of their existence until a later date. If the applicant were entirely blameless for the fact the papers were not received (for example if the postal service mis-delivered them) it is likely that time would begin to run on the date of actual knowledge of the deportation order, notwithstanding the legal provisions which deem when the person was given the deportation papers. It is clear that the 28 day period does not invariably commence three days after a deportation order is sent by registered post. The rules are sufficiently flexible to allow time to begin to run from the date of actual notification where the applicant is blameless in connection with non receipt of the deportation papers.

32. As a matter of law, the respondent was entitled to serve the applicant with deportation papers at the last notified address and the reason the applicant did not get the papers when they were sent there is because he had moved away and he had failed to inform officials of his new address. I note that all communications were in English, though the respondent's officials were aware that he was not an English speaker, but the applicant has demonstrated that when he receives post in English, he has a way of dealing with that. Thus, the law deems the applicant to have been served with and to have been given the deportation papers on the 15th of February 2016. The State could not have done more to notify him and he is to blame for the fact that the State did not send them to the address where he lived at the time. I therefore find that he was notified of the making of the deportation order on the date he is deemed to have been served with them, and on the date he is deemed to have been given them. In these circumstances, the applicant requires an extension of time from 15th March, 2016, until 10th November, 2016.

33. In *C.S. v. the Minister for Justice* [2005] 1 IR 343, McGuiness J. notes that s. 5 granting the court discretion to extend time "for good and sufficient reason" does not indicate the criteria which might be relied upon by a court to extend the time. Certainly, a

significant body of case law indicates that the applicant must explain why proceedings were not instituted with 28 days. Case law has examined whether applicants can establish reasonable diligence in seeking to institute proceedings challenging deportation orders and this is weighed as part of the case for extending time. Of course in a case where an applicant says that a deportation order was not challenged within 28 days because the person did not know of the existence of the deportation order until a given date, the enquiry as to reasonable diligence would only apply in respect of the period starting on the date of actual knowledge of the existence of the deportation order.

34. The following factors support the application for an extension of time:-

> (1) The applicant, as a matter of fact, did not know of the existence of the deportation order until sometime around the 6th September, 2016. The applicant could not have brought proceedings before the date of his actual knowledge of the deportation order.
>
> (2) The respondent appears to accept that the applicant did not, as a matter of fact, receive the deportation order when it was sent to him because it was the respondent who exhibited the documentation, indicating that the letter containing the deportation order had been sent back to the Department of Justice from the Monaghan address in February 2016.
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> (3) The respondent made a deportation order in December 2013 and made no attempt to send it to the applicant for twenty-four months.
>
> (4) The applicant,though living and working illegally in the State for many years has on three occasion informed the authorities of his actual address and most recently, without actual knowledge of the existence of a deportation order, and unprompted by the respondent told the respondent's officials all of his details, including his place of work on the 28th of August.

35. In accordance with the decision of the High Court in *Kelly v. Leitrim County Council* [2005] 2 IR 404, it is appropriate for the court to consider the merits of the application for judicial review in the context of an application to extend time. Broadly speaking the applicant argues that:-

> (1) The deportation order is invalid because it does not state the date by which the applicant is required to leave the State as required by s. 3 (1) of the Immigration Act, 1999
>
> (2) The notification pursuant to s. 3(b)(ii) is invalid because it contains the date by which the applicant was required to leave the State and the content of such notices is prescribed by statute and no provision is made permitting it to contain the date by which a person is required to leave the State.
>
> (3) The notice which contains the date was signed by an official whose rank or experience or training in these matters is not identified, in contrast to the position regarding the deportation order which is signed by the person who declares to be authorised so to act on behalf of the Minister.
>
> (4) The regulations setting out the form of deportation order are *ultra vires* the parent Act.

36. It seems to me that the points of challenge raised by the applicant are arguably correct. The deportation order does not, as a matter of fact, contain the date by which the applicant was required to leave the State. Section 3(1) provides that the deportation order itself must contain that date and not any other document. Section 3(b)(ii) of the Act does not make provision for inclusion in any notice served under that subsection to include the date by which the person should leave the State and s. 3(7) does not appear to permit the Minister to make regulations to do anything other than that which is contained in s. 3(1) of the Immigration Act.

37. The applicant's proceedings raise an important point concerning the validity of the Regulations and the form of deportation orders used by the State since 1999. It is possible that the issues in these proceedings – in part raised by the court - might go unscrutinised if time were not extended. Case law suggests that shortcomings in *locus standi* may be forgiven if the legal issue raised is weighty and merits inquiry (See *Harrington v. An Bord Pleanála* [2005] IEHC 244; *Lancefort v. An Bord Pleanála* [1999] 2 IR 270; *Reg. v. I.R.C.; Ex p. Fed. of Self Employed* [1982] A.C. 617). If shortcomings in standing can be overlooked to ensure that suspect laws do not escape judicial scrutiny, surely the importance of the point at issue might provide good and sufficient reason to extend time under ser s. 5 of the 2000 Act so that the point can be determined?

38. If this were a judicial review unconnected to a *habeas corpus* application, it would, I think, be difficult for an applicant to challenge a deportation order on the basis that the departure date is not in the order but in an attached notice instead. It is hard to see what prejudice an applicant suffers from this, even if it is unlawful. On the other hand, where the point is raised in *habeas corpus* proceedings the focus is not on the standing of the applicant or how the illegality affects the applicant but rather the focus is on the conduct of the Gardaí who declare that they are detaining a person for failing to comply with a provision of a deportation order which is required to be in the deportation order, when at first glance the matter is absent and the absence is, *prima facie* a breach of a statutory requirement.

39. The respondent has offered no explanation why the deportation order was signed in December 2013 and not sent to the applicant until February 2016. No particular urgency, it would appear, attaches to the deportation process.

40. The intended judicial review proceedings are intrinsically connected with an application for *habeas corpus* where the applicant is in civil detention. The Gardaí had a statutory power to detain the applicant for failure to comply with a provision of the deportation order and on its face the provision relied on is absent in circumstances where s. 3 (1) of the Act says that the provision must be in the order and not in any extraneous document. Where a person is in civil detention, greater scrutiny of the powers of detention will occur and courts will be less forgiving of errors than in, for example, court ordered detention, (see (*State) McDonagh v Frawley* [1978] IR 131 and *Sharma v. Member in charge of Store Street Garda Station* [2016] IEHC 611; [2016] IECA 330).

41. The applicant moved with reasonable diligence to set aside the deportation order as soon as he discovered its existence. A revocation application was made within a few days of the discovery of the Deportation Order. Within twelve days of that application, the applicant was taken into custody - arising from information he had given the authorities as to where he was working. Any further delay while in custody in instituting these proceedings should not be counted against the applicant given the obvious constraints on an illiterate Chinese person in custody.

42. The respondents have referred to the case of *P. v. The Minister for Justice and Equality* [2001] IEHC 1 in support of the

proposition that no infirmity attaches to a deportation order which does not state the date by which a person must leave the country. The High Court judgment was given by Smyth J. – a single judgment in three cases. In each case a deportation order materially indistinguishable from that at issue in these proceedings was served upon the applicants. The deportation orders were accompanied by what the Judge refers to as letters of notice. One of the complaints about the deportation orders was that the deportation order failed to state the date of the effect of the deportation. Smyth J. notes that the respondents reply to this point and accepted that the deportation order complied with the form of deportation order set out in the relevant statutory instrument. The Judge granted a certificate of appeal on the point as follows:-

> "Is the combination of the deportation order and letter of notice taken together sufficient to satisfy the statutory requirements of Section 3 of the Act of 1999 aforesaid and in particular subsection 3(b)(ii), subsections (6) and (7)?"

43. In the Supreme Court, Hardiman J. whose judgment was focused on the Minister's duty to give reasons, dealt with the form of deportation order as follows:-

> "A further point taken on behalf of the applicants was that the Deportation Order itself, as opposed to the notification of the decision should contain the reasons for the Minister's decision and the date of effect of the deportation. I can see no substance in this point. The statutory obligation on the Minister is to notify the applicant in writing of his decision and of the reasons for it. He is entitled to do so by letter if he wishes and this indeed is the most obvious way to do so."

44. That passage appears to be primarily addressed to a complaint that the deportation order itself and not any other extraneous document ought to set out the reasons for the making of it. Hardiman J. clearly rejects that point. The learned Judge continued:-

> "Section 3(7) provides that:
>
> 'A Deportation Order shall be in the form prescribed or in a form to the like effect'
>
> The form actually employed in these cases is the form prescribed by the Immigration Act, 1999 (Deportation) Regulations 1999 (Statutory Instrument No. 319 of 1999). Moreover, the letter in each case refers to the order, a copy of which is enclosed with it. I can see no substance whatever in any submission that there is inadequacy, technical or otherwise, in either the letter or the order or in both of them taken together."

45. It is not possible to discern from the judgments of the High Court or the Supreme Court whether the points made in these proceedings as to the invalidity of the deportation order are the same as those which were rejected by Smyth and Hardiman JJ. The case may well be of assistance to the respondent.

46. For these reasons, I have decided to extend time for the institution of these proceedings.