

THE HIGH COURT

2011 2185 SS

BETWEEN/

ERVIS TROCI

APPLICANT

AND

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 2nd November, 2011

1. This is an application brought under Article 40.4.2 of the Constitution by Ernest Troci, an Albanian national, for his release from Cloverhill Prison following his arrest pursuant to s. 5(1)(d) of the Immigration Act 1999. The applicant is now aged 21 years of age. He arrived in the State just over four years ago on 1st November 2007, whereupon he sought asylum by reason of an alleged involvement in a blood feud. His claim for asylum was ultimately rejected and it culminated in the making of a deportation order by the Minister for Justice on 21st February, 2011.

2. In January, 2010 he met Sharon Healy, an Irish citizen, who works as a hotel receptionist in Killarney. Some months later they moved into an apartment together. In September, 2010 they gave notice of an intention to marry and they ultimately married on 1st March, 2011. It is clear from the affidavit sworn by Ms. Healy that their wedding plans were entirely overshadowed by the making of a deportation order which was notified to Mr. Troci by letter dated 24th February 2011. The couple were crushed and acutely disappointed by this news. The applicant was required to leave the State by 15th March 2011.

3. The applicant's erstwhile solicitor applied to the Minister to revoke the deportation order pursuant to s. 3(11) of the 1999 Act. The applicant himself attended at the offices of the Garda National Immigration Bureau in Dublin on more than 15 occasions in accordance with directions given to him to attend. While he was legally obliged to comply with these directions, it should be noted nonetheless that he was obliged to travel a considerable distance on many occasions for this purpose.

4. In the early afternoon of 25th October 2011 the applicant attended with his wife at the GNIB offices. On this occasion he was brought upstairs for an interview with two members of GNIB, Detective Garda Byrne and Detective Garda Boland. There is fundamentally little disagreement as to what happened next, as Detective Garda Byrne then made a contemporaneous note of the exchanges. Both Detective Garda Byrne and Detective Garda Boland, together with the applicant, all gave evidence before me.

5. The applicant was first asked if he were willing to travel home. He replied:-

"I am married here. I don't have the intention to go home."

6. There then followed this exchange:-

"Q. It will be our intention to deport you. Are you willing to go home?

A. No."

7. Both Detective Garda Byrne and Detective Garda Boland maintained that the applicant had raised the question of whether his passport was still in date. For his part the applicant said that he had simply stated that old Albanian passports (his passport was issued in 2006) were no longer valid by reason of some apparent change in either Albanian law or practice. At the end of the interview, however, he was informed that his application to remain on the basis of marriage to an Irish national had been refused. The Gardaí checked with the Department of Justice as to whether any High Court proceedings were outstanding as the applicant had stated, but he was then arrested pursuant to s. 5(1)(d)(as amended) of the 1999 Act once it was confirmed that there were no such proceedings.

8. The net issue before, therefore, is whether the arrest pursuant to s. 5(1)(d) was lawful. This sub-section provides as follows:-

"Where an immigration officer or a member of the Garda Síochána, with reasonable cause suspects that a person against whom a deportation order is in force-

(a) has failed to comply with any provision of the order or

with the requirement in a notice under section 3(3) (b) (ii),

(b) intends to leave the State and enter another state without
lawful authority,

(c) has destroyed his or her identity documents or is in
possession of forged identity documents, or

(d) intends to avoid removal from the State,

he or she may arrest him or her without warrant and detain him or her in a prescribed place."

9. As I ventured to suggest in my judgment in *Om v. Governor of Cloverhill Prison* [2011] IEHC 341, it is clear from the statutory language ("with reasonable cause") that the test is an objective one. Indeed, insofar as there was any doubt on this topic, it was dispelled by the judgment of the Supreme Court in *Walshe v. Fennessy* [2005] IESC 51, [2005] 3 I.R. 51. In other words, it matters not that the Gardaí acted *bona fide* or that they themselves considered that they had reasonable grounds to effect the arrest. The matter was well put by Lord Hope in *McKee v. Chief Constable of the RUC* [1996] UKHL 6, [1997] A.C. 286 when, describing the scope of statutory arrest powers where the officer in question was required to have reasonable grounds for suspicion, he said:-

"It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.

This means that the point does not depend on whether the arresting officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told. His reasonable suspicion may be based on information which has been given to him anonymously or it may be based on information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances."

10. It may also be noted that in *Dallison v. Caffery* [1965] 1 Q.B. 348, 371 Diplock L.J. had described the common law power of arrest in the following terms:-

"The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely, whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause."

11. There is no question here but that the Gardaí acted *bona fide* and that they themselves subjectively believed that there were such reasonable grounds. What next has to be asked is whether a reasonable person, armed with the appropriate information and looking at the matter with objective detachment, might reasonably *suspect* that the applicant would evade deportation.

12. I have to confess that this is not altogether an easy question to answer. As I suggested in *Om*, some allowance must be made for the almost impossible task facing members of the GNIB who must daily make these assessments in the context of foreign nationals from completely different backgrounds. Moreover, as Ms. Stack, counsel for the Minister, correctly observed, it is merely a *suspicion* (*i.e.*, something less than formal proof) that is required.

13. If, moreover, one turns to apply these principles in an immigration context, it might be said at one level that a reasonable person might suspect that every person who is the subject of a deportation order would be tempted to evade deportation. Human nature being what it is, few who have known the reality of life in Ireland - despite our present difficulties - would prefer to give up that life in favour of their home country from whence they have sought refuge. This, however, cannot be the standard of suspicion, since this would mean that the State would in practice have to detain all asylum seekers pending deportation for the full statutory period.

14. Proceeding from that premise, therefore, one is therefore driven to conclude that the suspicion in question must refer either to some overt act or deed (including statements) on the part of the arrested person or some external piece of intelligence which suggests that there is a risk that such person will seek to evade the deportation process. Presenting with an apparently false identity (essentially the situation in *Om*) is one such example and failing to present to a Garda station or immigration office at a nominated time and place is quite obviously another. Reliable intelligence that the applicant plans to escape is yet another such example.

15. What, then, is the situation here? The only material advanced to justify the arrest are the exchanges as recorded by Detective Garda Byrne. So far as the first question is concerned, it appeared to be common case that this in itself could not justify the arrest. By that question the applicant was essentially asked whether he wanted to go home. Not surprisingly, he answered that he had no intention of going home given that he was married here. This answer really amounts to little more than Mr. Troci saying that he preferred to stay here.

16. The second question was really little more than a variant of the first. Detective Garda Byrne referred to the deportation order and asked Mr. Troci whether he was willing to go home. Again, Mr. Troci answered in the negative. Viewed objectively, it amounts to saying that he would not voluntarily travel home. But this answer cannot *in itself* mean that Mr. Troci would take active steps to avoid deportation once he was legally obliged to attend at GNIB for this purpose. There is often a wide gulf between the voluntary act and the legal obligation. Few but the noble, altruistic and patriotic would volunteer to pay tax if, for example, income tax was purely voluntary. The fact, for example, that most citizens might not elect to pay tax if it were purely a matter of personal choice does not mean that they would not otherwise comply with their legal obligation to do so once it was (as it is) a matter of legal compulsion.

17. Thus analysed, it will be seen that the responses to the question proved altogether too slender a basis to justify the arrest. On reflection, the reasonable person would have cross-examined Mr. Troci further regarding his intentions to evade the deportation order and to comply with the legal obligation to attend for this purpose before deeming the suspicion to have been arrived at with reasonable cause. In these circumstances, I am coerced to the conclusion that the arrest was unlawful.

Conclusions

18. In the present case, the legality of the detention turns entirely on whether the arrest was a lawful one. Since I have concluded that it was not, it follows that I must direct the release of the applicant pursuant to Article 40.4.2 of the Constitution.