Neutral Citation [2013] IEHC 134

THE HIGH COURT

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

[2013 No. 405 SS]

BETWEEN/

CHAOXIA NI

APPLICANT

AND

GARDA COMMISSIONER

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered the 27th March, 2013

1. In these proceedings brought under Article 40.4.2 of the Constitution, the applicant, Mr. Ni, a Chinese national, seeks an inquiry into the legality of his detention. Mr. Ni originally arrived at Dublin airport on a flight from Paris around midday on 28th February 2013, having originally travelled from Shanghai. He was, however, refused leave to land by Mr. Gerry Tucker, an immigration officer, in circumstances I will presently describe.

2. In these proceedings two issues arise. First, was Mr. Ni. lawfully refused leave to land in the State? Second, was his subsequent arrest and detention lawful?

3. As Mr. Ni presented on arrival at the immigration desk on the day in question, Mr. Tucker engaged him in conversation. It was clear to Mr. Tucker that Mr. Ni failed to understand his questions. It is, however, important to state that Mr. Ni was in possession of an Irish multiple entry visa which had been issued on 6th July, 2012, and was due to expire on 8th March, 2013. This visa enabled Mr. Ni to attend here for the purposes of study. It is also common case that the student holders of such visas are allowed to work up to 20 hours per week during term time, and up to 40 per week outside of term time.

4. Mr. Tucker found the fact that Mr. Ni was unable to comprehend his questions somewhat strange given that he had been registered as having arrived in the State in 2006, and that he had been a student here for more than six years. Mr. Ni could not even identify the name of the college he was attending. Mr. Tucker made a number of calls to various language schools in Dublin but Mr. Ni ultimately then produced a business card for a particular language institution. Mr. Tucker contacted that institution and verified that the applicant was, indeed, registered as a student with that college. While Mr. Tucker gave evidence (which I accept) that Mr. Ni told him he was studying English, it appears that Mr. Ni was actually registered for an A level business studies course.

5. Following further queries during the course of the day, a senior official from the college in question telephoned Mr. Tucker and confirmed that Mr. Ni was in fact registered in the college and that his attendance record was approximately 70%. (It appears that an attendance rate of at least 70% is expected of such foreign students by the immigration authorities). While Mr. Tucker queried the applicant's poor grasp of English – especially in view of the fact that he had apparently been studying the subject or, at least, a business subject in English for at least the last six years - it cannot be said that Mr. Tucker received a completely satisfactory response to that inquiry.

6. At that point Mr. Tucker went to meet the applicant's brother in law, Mr. Xie, in the arrivals hall. Mr. Xie was unaware of the applicant's course of studies, but he did inform Mr. Tucker that Mr. Ni was working in a meat factory. Upon receipt of this information Mr. Tucker spoke with the owner of the meat factory and he was informed that the applicant was working some 30 to 40 hours per week.

7. At that point Mr. Tucker was satisfied that the applicant was in breach of the terms of his original visa and was not honouring its conditions regarding the working hours. This was conveyed to Mr. Ni through an interpreter and he did not dispute this.

8. Having consulted with his colleagues, Mr. Tucker then refused Mr. Ni leave to land pursuant to s. 4(3)(k) of the Immigration Act 2004 ("the 2004 Act"). While Mr. Ni was in possession of a valid Irish visa this, *in itself*, did not give him an automatic right to be in the State or otherwise to dispense with the leave to land formalities. The term "Irish visa" is defined by s. 1(1) of the Immigration Act 2003 ("the 2003 Act") as meaning:-

> "An endorsement made on a passport or travel document other than an Irish passport or Irish travel document for the purpose of indicating that the holder thereof is authorised to land in the State subject to any other conditions of landing being fulfilled."

9. That the holder of an Irish visa is not exempt from the other leave to land requirements is made clear from a close analysis of the provisions of s. 4 of the 2004 Act. Section 4(1) provides:-

> "Subject to the provisions of this Act, an immigration officer, may on behalf of the Minister give to a non-national, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the state (referred to in this Act as "a permission")."

10. Section 4(2) requires that a non-national arriving by air or sea "from a place outside of the State shall, on arrival in the State present himself or herself to an immigration officer and apply for permission." It will thus be seen that even the holder of a valid Irish visa must nonetheless on arrival by air or sea from a place outside the State apply to an immigration officer for a permission to land.

11. Section 4(3) then provides in relevant part:-

"…an immigration officer may on behalf of the Minister refuse to give permission to a person referred to in subs (2) if the officer is satisfied –

…

(b) that the non-national intends to take up employment in the State but is not in possession of a valid employment permit (under the meaning of the Employment Permits Act 2003)

…

(e) that the non-national, not being exempt by virtue of an order under s. 17, from the requirement to have an Irish visa, is not the holder of a valid Irish visa,

…

(k) that there is reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national."

12. Surveying the various grounds in which Mr. Ni might possibly have been refused under s. 4(3), it may be observed that neither s. 4(3)(b) nor s. 4(3)(e) apply in the present case. So far as the latter requirement is concerned the applicant did have a valid Irish visa and could not be refused on that ground. In passing, I would observe that the holder of an Irish visa is simply placed into the same general category of visitors who are visa exempt. This, however, does not mean that the holders of such visas cannot be refused leave to land on grounds *other* than s. 4(3)(e).

13. Nor could it be said that Mr. Ni intended "to take up employment in the State for which he needed a valid employment permit" for the purposes of s. 4(3)(b). This obviously did not apply because Mr. Ni was already in employment in the State and did not, in fact, require a valid employment permit in view of the conditions attaching to his multi-entry visa.

14. Mr. Ni was, however, refused leave to land on the ground that he intended to enter the State "for purposes other than those expressed by the non-national" within the meaning of s. 4(3)(k). Most visitors come here for a variety of purposes. It cannot be suggested, for example, that a person who tells an immigration officer that he or she wishes to attend a conference could be refused leave to land because it became clear that they also planned to visit a museum or engage in some shopping. The reference in s. 4(3)(k) to purposes other than those expressed must accordingly refer to purposes which, objectively speaking, would materially affect or influence the judgment of an immigration officer as to whether leave to land should be granted.

15. In the course of preparing for this Article 40 application, various inquiries have subsequently been made in relation to Mr. Ni's employment record on behalf of the immigration authorities. It would seem that from the employee records which were supplied to the Gardai that Mr. Ni was working long hours at a particular meat factory in Dublin, often commencing at 6am until 5pm or even later, more or less every weekday. In the light of this information it is very difficult to avoid forming the impression that Mr. Ni was not really attending his course – whether it was English or business studies - or to see how he could really have achieved a 70% attendance rate at that college.

16. This evidence can only be regarded as unsettling and suggests that Mr. Ni was really here for the purposes of employment rather than that of study. Even if regard, however, is had only to the information which Mr. Tucker had at the time he refused leave to land, it seems clear that everything pointed to the fact that Mr. Ni had engaged in significant and continuous breaches of the terms of his multi-entry visa regarding the circumstances in which he could take up employment.

17. In these circumstances, I am driven to the conclusion that Mr. Tucker could properly have been "satisfied" that Mr. Ni sought entry for an illicit purpose within the meaning of s. 4(3)(k). The use of the term "satisfied" by the legislative draftsman is something of a term of art in the context of a requirement that a decision maker exercising a discretionary statutory power must be "satisfied" of certain facts. It imports the triple requirement that the decision must be taken *bona fide*, that it be not unreasonable and is factually sustainable: see, *e.g., The State (Lynch) v. Cooney* [1982] I.R. 337, 380, per O'Higgins C.J., *Kiberd v. Hamilton* [1992] 2 I.R. 257, 265, per Blayney J. and *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 52, [2013] 1 I.L.R.M. 73, 76, per Fennelly J.

Conclusions regarding the leave to land decision

18. These three requirements are met in the present case. Mr. Tucker's bona fides are not in doubt and it is clear that by the early afternoon of the 28th February it was plain that Mr. Ni had been engaging in what amounted to full time employment. It cannot accordingly be doubted but that the conclusion that Mr. Ni sought to enter the State for an illicit purpose not otherwise disclosed to the immigration authorities was factually sustainable and not unreasonable. In these circumstances, the refusal of leave to land for the purposes of s. 4(3)(k) must be adjudged to be a lawful decision.

19. It does not, however, follow from this that the subsequent detention of the applicant was necessarily lawful. It is to that issue to which we may next turn.

The legality of the arrest and detention

20. Mr. Tucker informed Mr. Ni at about 2.30 pm that he was refusing him leave to land on the undisclosed purposes ground. Following this refusal of leave, Mr. Ni was arrested at about 2.45pm by Detective Garda Seán Condron of the Garda National Immigration Bureau under s. 5(2)(a) of the 2003 Act. He was originally detained in the airport environs (namely, the Terminal 2 building), since – as was made clear to Mr. Ni - it was intended to put him on another flight later that evening to Paris. As it happens, however, as Mr. Ni was being transported by members of An Garda Siochána to the airplane at about 8.30 pm that evening, he objected so strongly to his removal from the State that the captain of the airplane refused to have him on board. At that point, Mr. Ni was taken by Gardaí and detained in an approved place of detention, namely, Clontarf Garda Station.

21. It was then intended that Mr. Ni be removed from the State on an early flight on the following morning. In the meantime, however, an application had been made to me at my private residence later night for an inquiry into the legality of his detention under Article 40.4.2 of the Constitution. I directed such an inquiry and ordered that Mr. Ni be produced before me at 2pm on the following day. An inquiry was subsequently conducted over several days and Mr. Ni was released on bail pending the delivery of the present judgment.

22. Section 5(2)(a) of the 2003 Act provides:-

> "(2) (a) …..a person to whom this section applies may be arrested by an immigration officer or a member of the Garda Síochána and detained under warrant of that officer or member in a prescribed place and in the custody of the officer of the Minister or member of the Garda Síochána for the time being in charge of that place."

23. It will be seen that there are accordingly three aspects of the s. 5(2)(a) power, namely, arrest, detention in a "prescribed place" and the requirement that the person so detained remain in the custody of an officer of the Minister or member of An Garda Síochána in charge of that prescribed place. There is no question but that the initial arrest of Mr. Ni by Detective Sergeant Condron was lawful. It is, however, the legality of the subsequent detention that is at issue.

24. The word "prescribed" is defined by s. 1(1) of the 2003 Act as meaning "prescribed by regulations made by the Minister". The applicable regulations are the Immigration Act 2003 (Removal Places of Detention) Regulations 2003 (S.I. No. 444 of 2003)("the 2003 Regulations"). Article 2 of the 2003 Regulations prescribes "every place listed in the Schedule to these Regulations and every Garda Station is a place prescribed for the purposes of s. 5(2)(a) of the Immigration Act 2003." The places listed in the Schedule are all either detention centres or prisons.

25. While there is a Garda Station located at the airport, Inspector Murray gave evidence that it is not a fit condition to receive detained persons, since the holding cells would not satisfy appropriate minimum standards. It is accordingly accepted that for the period between 2.45pm until sometime after 9 pm when he was removed to Clontarf Garda Station that Mr. Ni was not detained in a "prescribed place" within the meaning of s. 5(2)(a) and nor was he under the custody "of the officer of the Minister or member of the Garda Síochána for the time being in charge of that place" during this period.

26. It is further clear that in the event that this detention was held to be unlawful, it would equally follow that the continuation of that detention at Clontarf Garda Station would also be rendered unlawful by reason of this initial illegality. Just as in *Oladapo v. Governor of Cloverhill Prison* [2009] IESC 42, it can be said in the present case that, in the words of Murray C.J., "that unlawful arrest and consequential unlawful detention are the dominant circumstances in this case". Everything turns, therefore, on whether the detention of the applicant at the Terminal 2 building for a period of somewhat more than five hours was lawful.

27. There is no question at all but that the detention of Mr. Ni at Terminal 2 was more convenient for all concerned. It would scarcely have made any sense for Mr. Ni to be taken to a Garda station such as Clontarf or Santry, still less to some other place of detention for such an impossibly short duration pending the departure of the next aircraft a few hours later. Counsel for Mr. Ni., Mr. Fitzgerald S.C., suggested that the immigration officers could have exercised their powers under s. 14 of the 2004 Act whereby persons who have been refused leave to land can be required to "reside or remain in a particular district or place in the State" and thereby require Mr. Ni to remain – for example – within the Terminal 2 building.

28. For my part, however, I accept the evidence of Inspector Murray that this would not have been operationally feasible in the case of Mr. Ni and that this power, when exercised, is designed principally for families with young children who have been refused leave to land. (In any event, the power of arrest under s. 5(2)(a) may not be exercised in the case of minors).

29. The issue, therefore, which remains is whether the detention of the applicant in the Terminal 2 building was lawful. In my view, it was not.

30. The approach to the construction of statutory provisions of this nature has been recently re-stated by the Supreme Court in unambiguous terms in *Kadri v. Governor of Cloverhill Prison* [2012] IESC 27, [2012] 2 I.L.R.M. 392. Here the question was whether there was any jurisdiction to extend the eight week detention period of asylum seekers pending deportation in accordance with s. 5(6) of the Immigration Act 1999. The Court held that there was not and accordingly the detention of an asylum seeker beyond that period was held to be unlawful even though the applicant had brought about this state of affairs by refusing to co-operate with his deportation and by frustrating its operation by acts of resistance.

31. All three members of the Court were unanimous on the approach to be adopted to issues of statutory interpretation in cases of this kind. Fennelly J. observed ([2012] 2 I.L.R.M. 392, 400):

> "However, there is nothing in subsection 6 to permit a Court to extend or prolong the eight week period on the grounds of new acts of resistance. The eight-week aggregate limit is expressed in unqualified terms. *The Court cannot adopt a flexible or purposive interpretation of a provision designed to protect personal liberty, all the more so when such an interpretation would do violence to the clear language of the Oireachtas*. I agree with the judgment about to be delivered by Clarke J insofar as it discusses s. 5 of the Interpretation Act, 2005. It is clear that the appellant was not lawfully detained on 11th April 2012, which was more than eight weeks from 8th February 2012. The Court therefore directed his release." (emphasis added)

32. The underlined words clearly point the way in a case of this kind. In other circumstances not concerning powers of arrest or personal liberty it might be possible to construe s. 5(2)(a) in such a manner as would allow the Court to hold that the requirement that the applicant be detained at a Garda station or other prescribed place of detention was a "pointless absurdity" (to use the words of Henchy J. in *Nestor v. Murphy* [1979] I.R. 326, 329) so far at least as the particular circumstances of Mr. Ni's detention was concerned. In the light, however, of the comments of Fennelly J. in Kadri, such an approach is, however, excluded in cases of this kind involving powers of arrest and detention, not least where, as here, the words used in the statute are clear and unambiguous.

33. In his concurring judgment, MacMenamin J. said that ([2012] 2 I.L.R.M. 392, 405) "whatever the applicant's merits, he is entitled to rely on a literal interpretation of the statute."

34. Clarke J. agreed that s. 5(1) of the Interpretation Act 2005 did not come into play, mainly because the construction offered by the applicant was neither ambiguous or absurd or otherwise fail to reflect the plain intention of the Oireachtas. Clarke J. then observed ([2012] 2 I.L.R.M. 392, 402-403):

> "It is important to note that the construction which that section requires is one that "reflects the plain intention of (the legislature) where that intention can be ascertained from the Act as a whole". It is clear, therefore, that it not only is necessary that it be obvious that there was a mistake in the sense that a literal reading of the legislation would give rise to an absurdity or would be contrary to the obvious intention of the legislation in question, but also that the true legislative intention can be ascertained. There may well be cases where it may be obvious enough that the legislature has made a mistake but it may not be at all so easy to ascertain what the legislature might have done in the event that the mistake had not occurred."

35. It cannot necessarily be said that the approach taken by the Oireachtas in the present case could be categorised as absurd. At worst, the Oireachtas has failed to cater for a contingency which, upon reflection, it might with advantage have addressed in the wording of the sub-section. Moreover, echoing the comments of Clarke J., I cannot usefully say what the Oireachtas would necessarily have done had it so addressed its mind to the problem.

36. How long, for example, might such a visitor refused leave to land be permitted to be detained in the airport precincts? Should this depend on whether there is a functioning Garda station in the immediate vicinity? Would the same rules apply to both airports and harbours? Who should take charge of the person so detained while that person is held in the precincts of either an airport or a seaport? At what point would the person so detained have to be brought from the airport or seaport to a prescribed place of detention such as a Garda station or a prison?

37. The fact that the Oireachtas might have catered for some or all of these questions and that there is a range of possible solutions to each of these queries provides clear evidence of the fact that the resolution of the conundrum thrown up by this case has to be legislative in nature and that such lies beyond the capacity of the judicial branch to supply.

Conclusions on the arrest and detention issue

38. In the end, one cannot really escape the confines of language used in clear and unambiguous terms by the Oireachtas in s. 5(2)(a) of the 2003 Act. The Oireachtas envisaged that the person refused leave to land could only be detained following arrest in a place prescribed by the Minister for Justice by regulations and in the custody of either a ministerial official or a member of the Gardaí who was in charge of that place. Terminal 2 in Dublin Airport has not been so prescribed by the Minister. Adapting the language of MacMenamin J. in *Kadri*, Mr. Ni is entitled to rely on the literal words of the sub-section, irrespective of his own personal merits.

39. It follows, therefore, that the detention of the applicant from 2.45pm onwards on that day must be adjudged to be unlawful. Since it is the validity of that custody which it at issue before the Court, it follows, therefore, that I must direct the release of the applicant in accordance with Article 40.4.2 of the Constitution.