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THE HIGH COURT
JUDICIAL REVIEW

[2006 1026 J.R]

BETWEEN

F. K.

APPLICANT

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Charleton J. delivered on the 20th day of February, 2008

1. The applicant is a citizen of Nigeria. She claims to currently hold two valid Nigerian passports. Prior to that, she claims to have simultaneously held two other valid Nigerian passports. When she first came to Ireland in the year 2000, she claimed to have no passport. In September 2006, on returning to the State from abroad, the applicant was refused leave to land in Ireland by an immigration official of the respondent Minister, and was detained. There are three issues in this case: firstly, whether these proceedings are a challenge under Article 40.4.2 of the Constitution to the detention of the applicant, despite the fact that she has been at liberty since a few days after her detention; secondly, whether the immigration officer was correct to refuse the applicant leave to land in Ireland; and, lastly, what is to happen now?

Facts

2. The applicant came to Ireland during September 2000 as an apparent political refugee. On the 21st September, 2000 she made an application for asylum, claiming that she was being persecuted in her home country of Nigeria. This was done in writing on a standard form issued by the respondent. On the 10th October, 2000, she gave birth to her son, who is referred to herein as A. Under Article 2 of the Constitution, as it then was, her son, who is an entirely innocent party in all that follows, became a citizen of Ireland. On the 8th November, 2000, the applicant withdrew her claim for asylum and instead applied for permission to remain in the State as the mother of an Irish citizen infant. When she applied for asylum, one of the questions asked of the applicant was as to whether she held a passport, or other official national identification and, if she did not, to explain why not. She said that she had no passport, and one wonders how she could have possibly travelled to Ireland. On the form, all of the details in relation to passport number, place of issue, date of issue, period of validity, and similar questions in relation to identity card, are crossed off. Instead, the absence of a passport was explained in the following way: "The person that I followed held documents with him and he was the one that followed the procedures". She asked on the form to stay in Ireland "'till my problem is over". She explained her problem by alleging that on Friday, September the 1st, 2000 several people burst in the door of her home in Lagos in order to kill her husband. He was there brutally questioned, while forced on to his knees, she claimed, and then taken away by armed officers. She said on the form that she hoped that the relevant people would "spare my husband's life and that of his wife", possibly referring to his second wife, but in the meantime she had fled to Ireland.

3. On applying as a foreign national to remain in the State as the mother of an Irish citizen child, the relevant forms issued by the respondent Minister require that a passport be submitted. One was submitted by the applicant, and one of the officials of the respondent noted in processing the application: "passport would appear to me to be genuine". However, doubts were also raised by other officials who thought that it looked like a forgery for particular reasons. I will call this Passport 1. I do not know if this or any subsequent passport to which I will refer is in fact a real passport. This one bears the number A0752841 and states that it was issued in Nigeria on the 8th November, 2000 and was valid until the 7th November, 2005. By letter dated the 1st August, 2001, the respondent permitted the applicant to remain in Ireland on the basis of her parentage of an Irish citizen child, for a period of twelve months initially. The relevant letter to her, dated 1st August 2001, states:

> "This permission is being granted on the basis that you are living in the same household as the Irish child and discharging the role of parent to that child. Your permission to remain will be reviewed at the end of this period in the light of all relevant circumstances and is conditional on your remaining in compliance with Irish law in every respect during that period. You are now required to register at your local registration office . . . on completion of the necessary formalities, you will be presented with a registration book which will set out in detail the conditions on which you have been granted permission to remain. This book is an important document and care should be taken to ensure that you retain it safely. You should apply for renewal of this permission thirty days before its expiry. The conditions of your permission permit you to work without the need for a work permit and to engage in business without seeking the permission of the Minister. Please note that if you are a visa required national, you will be required to obtain the appropriate visa (s) prior to travelling outside the State".

4. Nigeria is a country whose nationals require a visa to visit Ireland lawfully. If the applicant had returned to Nigeria in order to obtain a passport, then she would have required a visa to return here. There is such a visa on one of the passports to which I shall refer, though I cannot see how it could have been used to travel to Nigeria in order to obtain Passport1. From these developments, involving the birth of her son A., her application to stay in Ireland to look after him, and her withdrawal of a claim of persecution in her home country, as evidenced in the relevant documents, it might reasonably be inferred that the intention of the applicant from then on was to remain here in Ireland and to take care of her child. On the evidence before me, this has not been what has happened.

Return to Ireland

5. On the 13th August, 2006, Steven Whetnall, was on duty at the port of Holyhead in Wales as an Immigration Officer. There he met the applicant who was proposing to travel to Ireland by sea. She was asked for proof of identity and produced a Garda National Immigration Bureau card, stating that she was a Nigerian. He informed the applicant that she was required to produce a passport and a visa in order to be lawfully in the United Kingdom, and she first produced a Nigerian passport number A0311807. I will call this Passport 2. This passport was supposedly valid from the 15th May, 2006 to the 14th May, 2011. Mr Whetnall examined this passport. It contained a number of visas, including one for the United Kingdom. The applicant also told him that she was in the process of applying for residency in Ireland on the basis of having an Irish child. Another passport was produced which had the number A1591868, which also contained a United Kingdom visa. This passport was apparently valid from the 5th July, 2002 to the 4th July, 2007. I will call this Passport 3, and that makes the applicant the holder of two alleged passports apparently valid for the same period of time. One of these passports contained a visa giving permission to the applicant to visit Ireland; it is described as a "Multi" type and is valid on its face from 23 May 2006 to 23 August 2008. At this stage, Mr. Whetnall suspected the applicant of having used deception in order to obtain the United Kingdom visas which were on these passports. The applicant was arrested. A search of her handbag produced another passport, one which had apparently been cancelled on expiry. I will call this Passport 4, which overlaps with Passport 1. This passport bore the number A0530190, and contained visas for the Schengen countries, together with visas for

the United Kingdom and the United States of America. This passport was apparently valid from the 27th April, 2000 to the 26th April, 2005, during the time that the applicant came to Ireland claiming that she had no passport. Some of these passports contained an inclusion for her son A. In addition, an Irish passport in respect of her Irish child A., who was not travelling with her, was produced. This was valid between the months of November, 2000 and November, 2010. It bears the number T891892. Unlike the other passports, there is no reason to question its authenticity.

6. When asked about these documents, particularly the two passports apparently valid at the time of her encounter with Mr. Whetnall, the applicant said that she had used one passport to travel to Ireland and another passport on which to travel to the United Kingdom. She was then served in Holyhead with illegal entry papers, as someone who had deceived an immigration officer. She was regarded as having obtained her multi-visit visa to the United Kingdom by deception. The applicant told Mr Whetnall that she spent only a few weeks of every year visiting Ireland, instead passing most of her time at home in Lagos, in Nigeria, where she ran a three star hotel with the help of her husband. Her son A., she said, was staying "with a friend". Later, she mentioned that she also had a daughter in Ireland, and two other grown up children who were helping her husband to run the hotel in Lagos. A Nigerian driver's licence showed this hotel as her home address. I note that as of the relevant date, the 13th August, 2006, the applicant was in possession of two apparently valid Nigerian passports, namely, Passports 2 and 3. I also note that, having come to Ireland and having sought political asylum on the basis of persecution in Nigeria, that she claimed to be in possession of no passport, but that during the November following her arrival here, she was apparently the holder of two supposedly valid Nigerian passports, which are Passports 1 and 4.

7. No question has been raised as to the authenticity of the applicant's son's passport and his birthright as an Irish citizen, under Article 2 of the Constitution, is not to be challenged.

8. By letter dated the 2nd August, 2006, the applicant had sought permission for her daughter, O. M. K., born on the 30th November, 1990 in Nigeria, to remain in the State. I am not in any way concerned with this.

9. The applicant was returned by ship to Ireland from Holyhead on the 13th August, 2006. The Garda National Immigration Bureau officer on duty at Dún Laoghaire was Garda Dónal O'Connor. He had been informed by telephone call from the Immigration Service in the United Kingdom that the applicant was returning to Ireland and that she was running a three star hotel in Lagos with her husband. When the Stena HSS Explorer arrived at Dún Laoghaire, he met the Master at Arms of the vessel and took possession of Passports 2, 3 and 4, together with the passport of the applicant's Irish son A. He spoke to the applicant and asked her to account for having two passports in her name. She gave no account. He asked her whether she had any business interests in Nigeria and the applicant answered that her husband was running an eleven or twelve bedroom hotel there. She said that she was still married to him. She claimed that her husband had never visited Ireland. When asked how many children she had in Ireland, she initially replied that she had two, but then altered her answer to say that she had one. Garda O'Connor examined the relevant passports of the applicant. Putting together the periods of travel stamped on these documents, they appear to disclose that the applicant was in Nigeria during the following periods:

> 29th March, 2001 to 17th June, 2001
>
> 25th June, 2001 to 19th March, 2002
>
> 3rd April, 2002 to 9th August, 2002
>
> 4th September, 2002 to 1st September, 2003
>
> 24th September, 2003 to 22nd February, 2004
>
> 29th February, 2004 to 19th February, 2005
>
> 3rd March, 2005 to 19th August, 2005
>
> 4th September, 2005 to 16th April, 2006
>
> 29th May, 2006 to 25th June, 2006

10. In addition, the relevant stamps on the several apparent passports disclose that the applicant arrived from an unknown destination at Heathrow on the 23rd October, 2003 and arrived in New York from some place on the 12th September, 2003. There are no stamps on the apparent passports showing returns from these journeys, or where the applicant travelled to, or from where or on what apparent passports. What her business was in any of these places is not before this court.

11. The applicant was refused leave to land in the State. She was served with notices under s. 4 of the Immigration Act, 2004 informing her why. These read:

> "(k) There is reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national.
>
> (h) That the non-national
>
> > (i) Intends to travel (whether immediately or not) to Great Britain or Northern Ireland, and
> >
> > (ii) would not qualify for admission to Great Britain or Northern Ireland if he or she arrived there from a place other than the State."

The applicant was then detained.

12. The applicant denies some aspects of the conversations set out in this judgment with Irish and British immigration officials. I regard the applicant as someone whose testimony should be treated with caution unless it is buttressed by corroboration as to any fact that is in issue. There is no such corroboration. Apart from that, the travel arrangements as shown on the apparent passports and visas of the applicant indicate that it is might be reasonable for any immigration officer to come to the conclusion she has not abided by the terms of her permission to remain in the State. She has provided no explanation for her possession of two passports in

August 2006, and two different passports shortly after the birth of her son in Ireland. Nor has she provided any explanation as to how she managed to obtain a passport in Nigeria after the birth of her son A. in Ireland, nor any apparently credible explanation as to why she had no passport when travelling to Ireland for the first time.

Habeas Corpus
13. On the 21st August, 2006, the issue as to the lawfulness of the applicant's detention came on for hearing before the High Court. At that stage, the affidavit evidence discloses, there was considerable, and understandable, confusion as to who the applicant might be and doubts also were expressed as to her maternity of A. The respondent no longer questions that the applicant is the mother of A. As it turned out, no *habeas corpus* enquiry took place. The respondent caused the applicant to be released from custody on terms which were announced to the High Court as follows:

> "(i) The applicant is to reside at [a particular address].
>
> (ii) The applicant is to sign on daily between 9.00am and 9.00pm at Drogheda Garda Station.
>
> (iii) The applicant undertakes to surrender all passports and travel documents to the Garda National Immigration Bureau, and not to apply for any further passports or travel documents.
>
> (iv) The applicant undertakes to attend at all hearings of these proceedings.
>
> (v) The applicant undertakes to present at the GNIB [address given] within two hours of the determination of proceedings, should she be unsuccessful."

14. The first issue that I have to decide is whether this case is a *habeas corpus* application as to the validity of the detention of the applicant, though she is now at liberty and has been since shortly after her detention, or whether it is a judicial review of the decision to refuse the applicant leave to land in Ireland. I have no doubt that it is a judicial review of the latter decision. The applicant clearly agreed to terms in relation to her release and then, on the 30th April, 2007, she sought, and was granted, the leave of the High Court to bring judicial review proceedings to quash the order of the respondent whereby she was refused leave to land, and was in consequence detained. This finding as to the nature of this application has the practical effect that the applicant bears the burden of proof in these proceedings and that she is bound to follow the procedure for judicial review as set out in Order 84 of the Rules of the Superior Court. In contrast, a *habeas corpus* application is flexible in procedure and the relevant State party bears the primary burden of showing that an applicant is lawfully detained.

15. Article 40.4.2 of the Constitution states:

> "4.1 No citizen shall be deprived of his personal liberty save in accordance with law.
>
> 4.2 Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law."

16. Article 40.4.2 requires a judge of the High Court to enquire into any complaint that a person is being unlawfully detained. Once that enquiry is ordered, the High Court must forthwith consider whether the detention is in accordance with law. The constitutional imperative to make that inquiry should not be diverted through the State negotiating a form of release with an applicant then presenting it as a *fait accompli* to the Court. In *Sheehan v. Reilly* [1993] 2 I.R. 81, the applicant was sentenced by the District Court, on an initial hearing, to sixteen months imprisonment; but while serving this sentence, he was convicted in the District Court of a further offence and a term of ten months imprisonment was imposed to run from the termination of the existing sixteen months sentence. This made an aggregate sentence of twenty-six months and so exceeded the jurisdiction of the District Court under s. 12 of the Criminal Justice Act, 1984, to impose aggregate sentences of up to a total of two years imprisonment. An application for an enquiry under Article 40.4.2 was commenced in the High Court. Because of an erroneous belief as to when the second sentence had been imposed, the High Court did not hold the enquiry into the legality of the applicant's detention but instead granted leave to bring judicial review proceedings. This decision as to the appropriate procedure was successfully challenged before the Supreme Court. At pages 89-90 of the report, Finlay C.J, made the following comment:

> "Although the application brought before the High Court on the 5th February, 1992, was stated, as I have indicated, in one paragraph of the affidavit of the applicant, as being "for a conditional order of *habeas corpus* to quash the Order dated the 2nd January, 1992 and for an enquiry in accordance with the Constitution of Ireland, Article 40, section 4, sub-section 2", it should, in my view, have been regarded as an application for an enquiry as to the legality of the detention of the applicant pursuant to Article 40, section 4, sub-section 2 of the Constitution. Such an application in its urgency and importance must necessarily transcend any procedural form of application, for judicial review, or otherwise. Applications which clearly, in fact, raise an issue as to the legality of the detention of a person, must be treated as an application under Article 40, no matter how they are described.
>
> Upon the making of such an application to a judge of the High Court, that judge has got a jurisdiction and a discretion, in my view, even prior to reaching a conclusion that a sufficient doubt as to the legality of the detention of the applicant has been raised, to warrant calling upon the jailer or detainer of the applicant to show cause, to make enquiries of a speedy and, if necessary, informal nature to try and ascertain the facts".

17. Ordinarily, any challenge to imprisonment by way of conviction for a criminal offence should be pursued by judicial review rather than by *habeas corpus*; *McSorley v. Governor of Mountjoy Prison* [1997] 2 I.R. 258. This principle may not apply where an error is apparent on the face of the record; though consideration as to remission of the case to the trial court for the correction of the record may be the result. On conviction by way of summary trial, an accused person has a right to appeal and a wide statutory right to bail by virtue of lodging of a notice of appeal; *Burke v. D.P.P.* [2007] I.E.H.C. 121. Where such an appeal before a judge of the Circuit Court is taken and is unsuccessful, the requirements of due process are assumed, though not conclusively, to have been complied with in any such hearing. A person convicted on an indictable offence before a jury in the Circuit Court may appeal to the Court of Criminal Appeal and may seek bail, which may be granted if a good argument is shown as to why the conviction is wrong. Forms of detention pursuant on a conviction are surrounded with safeguards centred on a review of that decision through appeal. Any

person who is detained, on the other hand, pursuant to the decision of an administrative official, has no such comfort. The result may be that they are removed from the State whilst in such detention or that they may be required to await the next administrative step in processing them whilst in detention. Where, on the other hand, a person is serving a sentence of imprisonment, or is remanded in custody following a bail hearing, their detention arises from the operation of the courts established under the Constitution, and which are bound to apply Constitutional procedures. Judicial review of any flaw alleged to have occurred in such proceedings, and which cannot properly be cured by an appeal, is, in those circumstances, the appropriate remedy; see *Costello - The Law of Habeas Corpus in Ireland* (Dublin, 2006) pp.217-221 and the cases therein cited.

18. *Habeas corpus* is the most expeditious form of proceeding available under our law. It exists to ensure that no-one is deprived of their liberty save in accordance with the law. Originally, the consequences upon an unlawful imprisonment might have been death by execution, but though that threat has disappeared from our law the requirement for expedition remains along with the duty of the judge of the High Court to hold the *habeas corpus* hearing and to make enquiries relevant to that function in a context where the need to do justice subordinates any issue as to procedure. Some may argue that the possibility of an unlawful deportation is among the most drastic of consequences that the law of Ireland can now contemplate. It is hard to see why the procedure of *habeas corpus* could be an inappropriate remedy should a want of legality be alleged in a detention by administrative action for that purpose. The requirement of expedition that is inherent in the procedure under Article 40.4.2 and the powers conferred on the High Court thereby, underline that there is a solemn duty on any judge of the High Court who commences such an enquiry, to conclude the matter as the Constitution requires; by ordering the release of the person from "such detention unless satisfied that he had been detained in accordance with the law". In *McGlinchey v. The Governor of Portlaoise Prison* [1988] I.R. 671 at 701, Finlay C.J. stated:

> "[An] enquiry under Article 40 of the Constitution is one of the most fundamentally important procedures created by the Constitution. It is an enquiry which permits a citizen or indeed some other person on his behalf in limited circumstances to apply to a judge of the High Court and on appeal to this Court, for an enquiry as to the legality of detention. It is not subject to any special procedures; it is not subject to any special rules, and deals only with the question of the legality of the detention of the person who applies. It is given such a simple and uncomplicated procedure because it deals with an essential and vital matter, the liberty of the individual. It is therefore important that it should not be debased by being used for purposes for which it was not intended".

19. Once a judge of the High Court is satisfied that the appropriate procedure in relation to any issue arising as to whether a detention is lawful or not lawful is the writ of *habeas corpus*, there should be no attempt on the part of any respondent who detains the subject of the enquiry to dilute the procedures set out in Article 40.4.2 of the Constitution by proposing, or effecting, some form of conditional release. Either a person is in lawful detention, or they are not. The Constitution does not contemplate a situation between these two points. Once a judge of the High Court is satisfied that an enquiry under Article 40.4.2 has been correctly invoked, then it should be concluded as the Constitution requires through the judge making the enquiry and then the appropriate order. Perhaps, the enquiry having been commenced by order of a judge of the High Court, where the respondent has come to the conclusion that the detention was wrong, or the applicant has come to the conclusion that there are no valid grounds for challenging a detention, that position can be stated with reasons to the High Court on the return date and so make the necessary hearing a concise one. In those circumstances, the enquiry can be short. It can also happen in the area of law concerned with immigration, asylum and nationality that an application for *habeas corpus* may need to have tacked on to it as a matter of urgency any issue as to whether there are substantial grounds for granting leave under s. 5 of the Illegal Immigrants (Trafficking) Act 2000 to challenge by way of judicial review a decision to, for instance, order deportation. That can be necessary where the detention is in itself dependent on such a decision. If there appear to be substantial grounds, then any necessary additional evidence or further argument can be disposed of on a speedy full hearing. But, once Article 40.4.2 has been properly invoked then there has to be the enquiry before the High Court that the Constitution requires.

20. This case is an example of an administrative procedure which has led to detention. It is not one of a person detained for execution of sentence after conviction who must be regarded as having been through a process of law; *The State (McDonagh) v. Frawley* [1978] I.R. 131. Even were it to be the case that the applicant had been lawfully detained by administrative action when she was arrested by an immigration official in Dún Laoghaire, it is now one year and six months since that occurrence in August, 2006. If there is now to be an issue, under s.3 of the Immigration Act, 1999, as to deportation, then this must, in my view, take into account the legal principles as to how the Minister for Justice is to reach a decision to deport anyone from Ireland; see the judgment of Clarke J. in *Kouaype v. The Minister for Justice, Equality and Law Reform* [2005] I.E.H.C. 380. I am certain, having reviewed all of the facts, that it was never the intention of the respondent to suspend matters of detention for eighteen months and then to revisit a power that then existed as if eighteen months in time had not passed. Nor was it the intention of the respondent to act in any way outside the Constitution. On the contrary, humane considerations clearly led to what, in effect, is an apparent suspension of time in detention. As it turns out, the passing of time is crucial to the exercise of the statutory powers contended for in justifying the action of the respondent. I therefore turn to the power exercised at the time of the arrest of the applicant for the purpose of deciding whether that power was then exercised lawfully or unlawfully.

Permission to Land

21. I am satisfied that the statutory scheme applying to citizens of Nigeria requires them to have a visa to enter the State. Neither the existence of any visa, supposing it to be a valid one on a valid passport, the last matter being in some serious doubt in this case, or the permission granted to the applicant to stay in Ireland in order to take care of her son A., give her any automatic permission to land in the State once she has left. The statutory scheme makes this clear by referring to a permission "to be" in the State or "to land" in the State. The context makes the use of these words disjunctive. The legislation allows an immigration officer to refuse leave to land in the State where the proposed visitor does not hold a visa, but that is only one of several grounds and not one that was invoked here. Section 4 of the Immigration Act, 2004, provides, as to its relevant part:

> 4 (1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, 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").
>
> (2) A non-national coming by air or sea from a place outside the State shall, on arrival in the State, present himself or herself to an immigration officer and apply for a permission.
>
> (3) Subject to section 2 (2), an immigration officer may, on behalf of the Minister, refuse to give a permission to a person referred to in subsection (2) if the officer is satisfied -
>
> (a) that the non-national is not in a position to support himself or herself and any accompanying dependants;

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

(c) that the non-national suffers from a condition set out in the First Schedule;

(d) that the non-national has been convicted (whether in the State or elsewhere) of an offence that may be punished under the law of the place of conviction by imprisonment for a period of one year or by a more severe penalty;

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

(f) that the non-national is the subject of –

(i) a deportation order (within the meaning of the Act of 1999);

(ii) (ii) an exclusion order (within the meaning of that Act);

(iii) or a determination by the Minster that it is conducive to the public good that he or she remain outside the State;

(iv) that the non-national is not in possession of a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality;

(h) that the non-national-

(i) intends to travel (whether immediately or not) to Great Britain or Northern Ireland, and

(ii) would not qualify for admission to Great Britain or Northern Ireland if he or she arrived there from a place other the State;

(i) that the non-national, having arrived in the State in the course of employment as a seaman, has remained in the State without the leave or an immigration officer, after the departure of the ship in which he or she so arrived;

(j) that the non-national's entry into, or presence in, the State could pose a threat to national security or be contrary to public policy;

(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.

22. Section 4 (4) requires the immigration officer who refuses to give to a person seeking to come into the State leave to land, to furnish them with a written notice indicating the grounds for refusal. The applicant was in possession of a conditional permission to be in the State, in order to stay and care for her Irish child in Ireland which permission was extended, I am told and her G.N.I.B. card confirms, up to the 23rd August, 2008. Once the applicant chose to leave the State and go to the United Kingdom and to return to the State, she had to apply for permission to land. In the circumstances of this case, the issue before me is whether it could appear to a reasonable immigration officer that on August 13th, 2006, the applicant was a non-national who should be refused permission to land in the State under s. 4 (3) of the Immigration Act, 2004 on the grounds set out in the statutory notice quoted above. Where leave to land in the State has been refused, the provisions of s. 5 of the Immigration Act, 2003, as inserted, in part, by s. 16 (8) of the Immigration Act, 2004, apply and might be invoked by a reasonable immigration officer. The relevant portion of the legislation reads:

"5. (1) Subject to sub-section 5 of the Refugee Act, 1996, and section 4 of the Criminal Justice (United Nations Convention Against Torture) Act, 2000, this section applies to -

(a) a non- national to whom leave to land has been refused under Article 5 (2) of the Aliens Order, 1946 (SI 1946 No. 395) ("the Order"),

(b) a non-national who has failed to comply with Article 5 (1) of the Order,

(c) a non-national who has entered the State in contravention of Article 6 of the Order,

(d) a non-national deemed to be a person to whom leave to land has been refused under the Order,

(e) a non-national who has failed to comply with section 4 (2) of the Immigration Act, 2004,

(f) a non-national who has been refused permission under section 4 (3) of that Act,

(g) a non-national who is in the State in contravention of section 5 (1) of that Act,

(h) a non-national who has landed in the State in contravention of section 6 (1) of that Act,

whom an immigration officer, or member of the Garda Síochána, with reasonable cause, suspects has been unlawfully in the State for a continuous period of less than three months.

(2)(a) Subject to paragraph (b), 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 or the Minister, or member of the Garda Síochána for the time being in charge of that place.

(b) Paragraph (a) shall not apply to a person who is under the age of 18 years.

(c) If, and for so long as the immigration officer or, as the case may be, the member of the Garda Síochána concerned has reasonable grounds for believing that the person is not under the age of eighteen years, the provisions of sub-section (1) shall apply if he or she or she had attained the age of 18 years".

(3) (a) A person arrested and detained under this section may, subject to subsection (4), be detained only until such time (being as soon as practicable) as he or she is removed from the State in accordance with this section but, in any event, may not be detained for a period exceeding 8 weeks in aggregate.

(b) The following periods shall be excluded in reckoning a period for the purpose of paragraph (a);

(i) any period during which the person is remanded in custody pending a criminal trial or serving a sentence of imprisonment,

(ii) any period spent by the person on board a ship, railway train, road vehicle or aircraft pursuant to this section, and

(iii) if the person has instituted court proceedings challenging the validity of his or her proposed removal from the State, any period spent by the person in a place of detention between the date of the institution of the proceedings and the date of their final determination including, where notice of appeal is given, the period between the giving therof and the final determination of the appeal or, as appropriate, the expiry of the ordinary time for instituting any such appeal.

23. Under s. 5(1) of the Immigration Act, 2004, no non-national is entitled to be in the State other than in accordance with the terms of a permission given to him or her, and if they are, then they are deemed to be unlawfully in the State. As an exception to this, a person applying for asylum under the Refugee Act, 1996, a refugee who is the holder of a declaration from the Refugee Appeals Commissioner, or on appeal from the Refugee Appeals Tribunal, that they are a refugee, a family member of a refugee, or a programme refugee under s. 24 of the Refugee Act, 1996, can be lawfully in the State. The applicant has been refused leave to land in the State. Once that is done lawfully, then there is no entitlement for the applicant to be in the State as she is not a citizen of Ireland. It follows therefore that she is subject to s.4 of the Immigration Act 2004. Once that decision to refuse her leave to land is valid, the applicant is unlawfully in the State under s.5 of that Act. That does not necessarily mean that she may now be returned to custody and, without more, removed from the State. The applicant is a person who by virtue of the terms of the release before this court from detention by the respondent, quoted above, has been in the State for a continuous period of eighteen months. Therefore, s. 5(1) of the Immigration Act, 2003, no longer applies to her because arrest under that section is dependant on an immigration officer or Garda suspecting that the person who has been refused leave to land "has been unlawfully in the State for a continuous period of less than three months." That section allows for the arrest, and then for the detention and removal from the State, of persons who are unlawfully in the State. As to detention for the purpose of removal from the State, the section places a limit of 8 weeks in custody as the maximum period that a person may be held. Some time periods may be excluded from reckoning those 8 weeks in detention under S. 5(3) of the Act: these are quoted above. However, this is not one of the exceptions.

24. There is nothing in this case that would allow the respondent to validly invoke one of the exceptions which allow for that 8 week maximum limit of detention to be extended. Also, by no stretch of the imagination has the applicant been in detention under that section since she was arrested on coming into the country 18 months ago in August 2006. In fact, she has been at liberty. She has been unlawfully in the State under terms agreed between the parties. I am not entitled to somehow stretch a time limit of three months set out in a statute into eighteen months and any agreement as to release between the applicant and the respondent does not allow reality to be suspended so that I now treat her as having been in custody during that time. I note that within two hours of this judgment, the terms of the release from the administrative detention effected by the respondent requires the applicant to present herself to the Garda immigration section. That possibly suggests that the respondent may take the view that detention for the purposes of refusal of leave to land may be somehow suspended and that the time limit for acting by deportation on such a refusal may be of no effect. I do not know if the respondent takes that view, but such a view would be incorrect. If the respondents are contemplating deporting the applicant then they will only seek to do so, I am satisfied, in accordance with law. The deportation procedure set out in s.3 of the Immigration Act, 1999, would now seem to be the relevant procedure. There is no power vested in this Court to authorise anyone to ignore the statutory requirement in relation to time that I have set out. The respondent has not argued to be allowed to do so and, I am sure, would not knowingly do so. My remark is cautionary based on the terms of the release of the applicant.

25. This case illustrates why *habeas corpus* applications should not be diverted through a conditional release by those who detain persons and why all parties should seek, instead, to comply with the requirements of Article 40.4.2 of the Constitution. Fundamentally, once an enquiry has been ordered into the legality of a person's detention, then it should proceed to declare that such detention is lawful or unlawful. It is understandable that the respondent should rely on a practice that has grown up on a humane basis: in saying that the Constitution makes no provision for it, no criticism is directed by the court towards the parties or their legal advisors.

Reasonable Grounds

26. The power to refuse permission to land contained in s. 4. of the Immigration Act, 2004, may only be exercised if the immigration officer is satisfied that one of the grounds set out in s. 4 (3) apply. Here, the grounds set out in writing, pursuant to s. 4 (4) of the Act, specify the intention of the applicant to travel to Great Britain or Northern Ireland when she would not qualify for entry and, further, that she intended to enter the State for purposes other than those expressed by the non-national. Being satisfied as to such matters, the test set out in the relevant legislation, requires that the officer should act reasonably. The officer was entitled to rely on information provided to him by immigration officials in the United Kingdom provided, as he did, he made independent enquiries with a view to ascertaining whether he could also be reasonably satisfied that a relevant ground of refusing permission to land should be applied. Having regard to the applicant's travel history, what she had told immigration officials in Ireland and in the neighbouring kingdom, her dubious passports and even without considering her dealings with the Irish authorities in relation to her status, there were grounds for the immigration officer in this case to act as he did. As of the present time, however, the applicant has been in Ireland for more then three months and s.5(1) of the Immigration Act, 2003 does not allow her to be removed from the State without a formal deportation procedure under s.3 of the Immigration Act, 1999, if that is a course which the respondent wishes to consider.

Result

27. In the result, there are no valid grounds for making any order in the judicial review taken by the applicant.