

THE HIGH COURT**IN THE MATTER OF AN ENQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND****[2016] No.1053 S.S.****BETWEEN****AMJAD PARVAIZ****APPLICANT****AND****THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND THE GARDA NATIONAL IMMIGRATION BUREAU****RESPONDENTS****JUDGMENT of Mr. Justice Mac Eochaidh delivered on the day 21st day of December, 2016.**

1. An enquiry pursuant to Article 40.4 of the Constitution was ordered in respect of the applicant who, in connection with an immigration matter, was initially arrested and then detained in a Garda station and thereafter detained in Cloverhill Prison. Pending the delivery of this judgment the applicant was released on bail on condition that he appear personally in court at hearings of this matter.

2. The Governor of the prison has certified that he holds the applicant in custody pursuant to a "Detention Order" and he has exhibited a document entitled "Notification of Arrest and Detention" addressed to the Governor of Cloverhill Prison and signed by Detective Garda Niall O Meara. In that document the Garda states :-

" ... [I] arrested [the applicant] under Section 5 of the Immigration..... I now direct that pending the making of arrangements for his removal from the state that the [applicant] be detained in Cloverhill Prison, a prescribed place of detention for the purposes of Section 5 of the Immigration Act 1999.

The basis for [the] arrest and detention is that I with reasonable cause to suspect that the said person against whom a deportation is in force:

- (a) has failed to leave the State within the period specified in the order
- (b) has failed to comply with any other provision of the order or with a requirement in a notice under s. 3(3) (b) (ii),
- (c) intends to leave the State and enter another State without lawful authority,
- (d) has destroyed his or her identity documents or is in possession of forged identities documents, or
- (e) intends to avoid removal from the State."

3. The Garda ticked (a) and (e). Two features of this document are notable. First, by ticking a box next to the text at (a) and at (e) the Garda indicated the basis for arrest and detention. I attach significance to the fact that the Garda did not place a mark beside the text at (b). This means that the applicant was not detained for failing to comply with a requirement of a notice issued under s. 3(3) (b) (ii) of the Immigration Act. Second, the powers being exercised are granted by s.5 of the Immigration Act and the Garda personally directed the detention of the applicant. The Garda has the power to detain a person, such as the applicant, who is not suspected of, charged with nor convicted of any criminal offence, for 8 weeks (see s. 5(8) (a)). This broad power of civil detention without judicial oversight must be exercised strictly in accordance with the statute.

4. Detective Garda O'Meara gave an account in an affidavit of his interaction with the applicant as follows:-

"... on 27th September, 2016 I was on duty at the offices of the GNIB on Burgh Quay. I say that the applicant was due to present at Burgh Quay on that date. Having made inquiries of the Arrangements Unit in the GNIB, I say that I that I was aware that there was a valid deportation order in respect of him and that he had been obliged to leave the State by the 8th January, 2016, as directed in a letter from the Minister for Justice on the 8th December, 2015, a copy of which I beg to refer to, when produced...

I say that the applicant duly presented at Burgh Quay on that date. I say that I introduced myself to him and explained that there was a valid deportation order in respect of him and that he had not left the State by the date specified in the letter from the Minister for Justice of the 8th December, 2015. I say that he indicated to me that he did not wish to leave the State. I say that I accordingly arrested him at approximately 12:20 that afternoon pursuant to s. 5(1) of the Immigration Act 1999, as amended."

5. Mr. Alan King, Assistant Principal Officer at the Department of Justice (INIS) swore an affidavit dated 30th September, 2016, in reply to the grounding affidavits of the applicant's solicitor in which he made the following points. The applicant has been in the State for about thirteen years. Between 2003 and 2013 he had a work permit for about two years and five months. For the rest of the time his presence in the State was unlawful. In 2013 he was detained pending deportation but made an application for asylum. The deportation order was revoked in order to allow the claim for asylum to be made. This claim was refused. The subsidiary protection application was withdrawn. The deportation order was made on the 1st December, 2015. It was sought to be implemented on the 27th September, 2016, which prompted these present proceedings. The deportation order has never been challenged by the applicant. An application for revocation pursuant to s. 3(11) of the Immigration Act 1999 was made; this was refused. Mr King says at paragraph 9:-

"... A Deportation Order was signed on December 1st 2015, ordering the Applicant to leave the State by January 8th 2016...."

The Deportation order is exhibited. It does not mention a departure date and so it is not immediately apparent how Mr King can say that it ordered the applicant to leave the State by a certain date. The deportation order says that the

applicant is to leave the State:-

"...within the period ending on the date specified in the notice served on or given to you under subsection 3(b) (ii) of the said section 3, pursuant to subsection 9(a) of the said section 3 and to remain thereafter out of the State."

The notice under subsection 3(b) (ii) is not exhibited by Mr King.

6. The deportation order does not express on its face the date by which the applicant has to leave the State.

7. The applicant's solicitor swore an affidavit on the 28th of September, 2016, and exhibited a letter dated the 8th December, 2015. The letter is as follows:-

"Mr. Amjad Parvaiz

8A Summerhill Village

Sligo

Co. Sligo

Registered Post

Person ID: 244922-09

Application ID: 244922-09

Legacy Ref:

Dear Mr Amjad Parvaiz

I am directed by the Minister for Justice and Equality to refer to your current position in the State and to inform you that the Minister has decided to make a deportation order in respect of you under section 3 of the Immigration Act, 1999 (as amended). A copy of the order and a copy of the Minister's considerations pursuant to section 3 of the Immigration Act, 1999 (as amended) and section 5 of the Refugee Act, 1996 (as amended) are enclosed with this letter.

In reaching this decision the Minister has satisfied herself that the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996 (as amended) are complied with in your case. The reasons for the Minister's decision are that you are a person whose application for a declaration as a refugee has been refused. Having had regard to the factors set out in section 3(6) of the Immigration Act, 1999 (as amended), including the representations received on your behalf, the Minister is satisfied that the interest of the public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this State.

The deportation order requires you to leave the State and to remain outside the State thereafter.

You are obliged to leave the State by 08 January 2016. Please advise this office of the travel arrangements that you make to comply with the deportation order.

If you do not leave the State by 08 January 2016 you are liable to be deported and the following requirements under the provisions of section 3(9)(a)(i) of the Immigration Act, 1999 (as amended) must be observed:

- You are required to present yourself to the member in charge, Booth No 1, Garda National Immigration Bureau, 13\14 Burgh Quay, Dublin 2 on Tuesday, 12 January 2016 at 2 pm to make arrangements for your removal from the State.

- You are required to produce at that appointment any travel documents, passports, travel tickets or other documentation in your possession which may facilitate your removal from the State.

- You are required to co-operate in any way necessary to enable a member of An Garda Síochána or Immigration Officer to obtain a travel document, passport, travel ticket or other document required for the purpose of such removal.

- You are required to reside at the above address pending your removal from the State.

Please also note that failure to leave the State by 08 January 2016 is a failure to comply with a provision of the deportation order. As a result, an Immigration Officer or a member of An Garda Síochána may arrest and detain you without warrant in accordance with section 5(1) of the Immigration Act, 1999 (as amended).

A member of An Garda Síochána or an Immigration Officer may require you, in writing, if he or she considers it necessary for the purpose of ensuring your deportation, to comply with any further conditions as outlined in section 3(9)(a)(i) of the Act referred to above. When satisfactory documentation has been organised, arrangements will be put in place to effect your removal from the State.

If you fail to comply with any provisions of the deportation order, or with a requirement in this notice, an Immigration Officer or a member of An Garda Síochána may arrest and detain you without warrant in accordance with section 5(1) of the Immigration Act, 1999 (as amended). It is also an offence of the Immigration Act, 1999, as amended to obstruct or hinder a person authorised by the Minister to effect your removal from the State.

The enforcement of the Minister's Deportation Order is a matter for the Garda National Immigration Bureau (GNIB) and any queries regarding its enforcement should be directed in writing to the GNIB at 13/14 Burgh Quay, Dublin 2 or to fax number (01) 666 9141.

Yours sincerely,

Louise T. Keane

Repatriation Division 08/12/2015

cc: Garda National Immigration Bureau

cc: Trayers & Company Solicitors"

8. This letter is of central importance in this case. It was exhibited by the applicant without comment in an affidavit of the 29th of September, along with a large number of other documents relating to the applicant's immigration history. The arresting Garda, in an affidavit which postdates the applicant's affidavit, says that the applicant's departure date was in a letter of the 8th of December from the Minister which he wishes to refer to "when produced" (see quoted text at para.4 above). He does not say that the letter is that which has been exhibited by the applicant and quoted above. Counsel for the respondent treated the above quoted letter as the letter the Garda was referring to. Counsel for the respondent also treated the letter as a s.3 (3) (b) (ii) statutory notice. There is no evidence that this is in fact the letter being referred to by the Garda. There is no evidence that the arresting Garda ever saw this letter. (Nor is there evidence that he ever saw the deportation order). It is likely however that the letter referred to by the Garda is indeed the letter quoted above.

9. Nowhere in that letter is there a reference to it being a notice under s.3 (3) (b) (ii) of the Act. The subsection is not mentioned in the letter. It is not described as statutory notice.

10. The court was concerned about the absence of a departure date on the face of the deportation order for two reasons. Firstly, section 3(1) of the Immigration Act provides that "...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". This suggests to me that the departure date should be on the face of the deportation order. Secondly, the arresting Garda informed the Governor that he had reasonable cause to suspect that the applicant "has failed to leave the state within the time specified in the [deportation] order". If there is no departure date mentioned in the deportation order, how could the Garda have suspected that the applicant had failed to leave the State "within the time specified in the [deportation] order"?

11. In response to my concerns counsel for the respondent made detailed and helpful submissions to the effect that a deportation order does not have to express the departure date on its face. Written submissions on this point are in the following terms:-

"..... S. 3(7) of the Act of 1999, read in conjunction with s. 7(1), empowers the Minister for Justice to prescribe by regulation the form of a deportation order. The Minister exercised that power in the Regulations of 2005, which sets out the form of a deportation order in the first schedule thereto. It is submitted that he acted *intra vires* in doing so, and that the form prescribed does not in any way contravene the parent legislation or the principles and policies contained therein.

According to the prescribed form, the period within which the subject of the order must leave the State is incorporated by reference to the period ending on the date specified in the notice sent under s. 3(3)(b)(ii).

The deportation order in this case was in accordance with that form, allowing for the deletion of the words "within the period ending on the date specified by me in the notice served on or given to you with a copy of this order", the Applicant here being a person for whom a notice under s. 3(b)(ii) was required.

The Applicant herein was therefore obliged to leave the State "*within the period ending on the date specified in the notice served on or given to you under subsection (3)(b)(ii) of the said section 3, pursuant to subsection (9)(a) of the said section 3.*" The date specified in the notice was the 8th January, 2016. It is submitted that this is compatible with s. 3(1) of the Act of 1999, which provides *inter alia* that the Minister by deportation order may require the subject of it "to leave the State within such period as may be specified in the order."

...

Proceeding on the basis that the requirements listed in s. 3(9)(a)(i)(I) to (VI) are indeed exhaustive, it is nonetheless submitted that there is nothing in s. 3(9) which prohibits the Minister for Justice from specifying in the s. 3(3)(b)(ii) notice the date which ends the period within which the subject of a deportation order must leave the State.(sic) The Minister is therefore allowed to specify the date in that manner.

Proceeding on the same basis, it is further submitted that it would be incorrect to construe the statement in the s. 3(3) (b)(ii) notice that the Applicant was "*obliged to leave the State by 08 January 2016*" as a "requirement" purportedly imposed under s. 3(9) of the Act. A careful analysis of the s. 3(3) (b) (ii) notice shows that is not the case.

Having specified the date which ended the period within which the deportation order required the Applicant to leave the State, the notice went on to state:-

"If you do not leave the State by 08 January 2016 you are liable to be deported and the following requirements under the provisions of section 3(9)(a)(i) of the Immigration Act, 1999 (as amended) must be observed:

- You are required to present yourself to the Member in Charge, Booth No. 1, Garda National Immigration Bureau, 13/14 Burgh Quay, Dublin 2 on Tuesday, 12 January 2016 at 2pm to make arrangements for your removal from the State.

- You are required to produce at that appointment any travel documents, passports, travel tickets or other documentation in your possession which may facilitate your removal from the State.

- You are required to co-operate in any way necessary to enable a member of An Garda Síochána or immigration officer to obtain a travel document, passport, travel ticket or other document required for the purpose of such removal.

- You are required to reside at the above address pending your removal from the State.

Please also note that failure to leave the State by 08 January 2016 is a failure to comply with the provision of the

deportation order ...” (emphasis added).

The penultimate paragraph of the letter stated:-

“If you fail to comply with any provisions of the deportation order, or with a requirement in this notice, an immigration officer or a member of An Garda Síochána may arrest and detain you without warrant in accordance with section 5(1) of the Immigration Act, 1999 (as amended) ...”

It is submitted that the s. 3(3)(b)(ii) notice therefore draws a clear distinction between the provisions of the deportation order and the requirements in the notice. Although the notice refers to the “obligation” on the Applicant to leave the State by the 8th January, 2016, it is submitted that should simply be construed as the *specification* of the date which ended the period within which he had to leave the State, as provided for in the prescribed order and, indeed, the order sent to him. It is submitted that it is important to note that the letter does not refer to leaving the State by the end of that period as a “requirement” under s. 3(9)(a)(i) of the Act of 1999. Only after that date had been specified did the notice point out that, if the Applicant failed to leave the State by that date, certain *requirements* under s. 3(9)(a)(i) of the Act would apply. It is also important to note that the notice pointed out that failure to leave the State by the 8th January, 2016 constituted a failure to comply with a *provision of the order*; it did not claim that such failure would constitute a breach of the requirement under s. 3(9)(a)(i) of the Act.

In sum, therefore, it is submitted that the form in which the deportation order was prescribed by the Minister in the Regulations of 2005 was one which was validly open to him under the Act of 1999 and that it legitimately enabled the period within which the Applicant herein had to leave the State to be incorporated by reference to the period ending on the date specified in the s. 3(3)(b)(ii) notice. That overall approach cannot be said to be contrary to s. 3(1) of the Act of 1999 or, indeed, any other provision of it.

It is submitted that the Act does not prohibit incorporation by reference. The deportation order is enclosed with the s. 3(3)(b)(ii) notice and it is appropriate that they be read together where necessary. ...

In the light of the above, it is submitted that the period by which the Applicant had to leave the State was incorporated into the deportation order by reference to the period ending on the date specified in the s. 3(3)(b)(ii) notice, and that that was a lawful approach for the Minister to have taken.

Finally, the Applicant was arrested and detained *inter alia* under s. 5(1)(a) of the Act of 1999, in that he failed to leave the State within the time specified in the deportation order. Having regard to the totality of the above submissions, it is submitted that that accurately reflects the position. There is accordingly no error on the face of the warrant of detention.”

12. As can be seen from that submission, the attention of the court was drawn to section 3(7) of the Act which provides that a deportation order “shall be in the form prescribed” and to Regulations made by the Minister (S.I. 55 of 2005) which prescribe the form of a deportation order. The deportation order in this case accords with the prescribed form and in particular with that part of the form which says the departure date is that which is “specified in the notice served on or given to you under subsection (3)(b)(ii)”. Counsel for the Minister summarised the legal position by saying that the period by which the applicant was to leave the State was incorporated into the deportation order by reference to the period ending on the date specified in the s. 3(3)(b)(ii) notice .

13. It was submitted that no illegality attached to the expression of the departure date in a s. 3(3) (b) (ii) notice and its incorporation back into the deportation order from the notice. I do not intend to rule on the merits of the respondents’ submissions on this question as this is a habeas corpus application only and it does not embrace a challenge to the validity of the deportation order (see *F.X. v Clinical Director of the Central Mental Hospital* [2014] 1 IR 269). For the purposes of this application, I assume that the Minister’s arguments are correct.

14. The critical features of this application for *habeas corpus* concern the manner in which the Detective Garda exercised the power to arrest and detain the applicant under s. 5 of the Immigration Act 1999 (as amended) which provides:-

“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 a 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.”,

the officer or member may arrest the person without warrant, and a person so arrested may be taken to a place referred to in subs. (3) and detained in the place in accordance with the subsection.”

15. In *Troci v. The Governor of Cloverhill* [2011] IEHC 405, Hogan J. confirms that the reasonable basis upon which power of arrest in s. 5 of the Act is utilised is subject to an objective test. The question is whether a reasonable man would be of the 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. Hogan J. referred to a succinct expression of the relevant legal principle as follows: -

“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.”

(The passage from *Dallison* was addressing common law power of arrest but the same approach applies to statutory power of arrest) Assuming the respondent's view of the law in relation to the content of deportation orders is correct, the question for the court is whether a reasonable person, possessing the same information as the Garda in this case, would have had the precise reasonable suspicion claimed by Detective Garda O Meara.

16. Dicta from the decision of Humphreys J. in *Sharma v. The Member in charge of Store Street Garda Station* [2016] IEHC 611 of 7th November, 2016, seem to me to be apposite in this case:-

"... as Donnelly J. emphasised in *Abbas v. Governor of Cloverhill Prison* [2015] IEHC 600 (unreported, High Court, 25th September 2015), 'in the absence of a court order justifying detention, it is even more important that a document purporting to justify the deprivation of liberty accurately details the jurisdiction for that deprivation.'"

and:

"in the case of administrative detention, not involving a court order, a broader range of errors may justify release particularly if they go to jurisdiction (see *G. E. v. Governor of Cloverhill Prison* [2011] IESC 41 at para. 31; *Joyce v. Governor of Dóchas Centre* [2012] 2 I.R. 666); but subject to an overall consideration of whether release is a proportionate response to the error identified (*Grant*)."

17. On this application, the court is concerned to ensure that the deprivation of the applicant's liberty was achieved strictly in accordance with law.

18. It is noteworthy that the form completed by the arresting Garda addressed to the detainer makes express provision for detention of persons for a transgression in relation to the content of a s. 3 (3) (b) (ii) notice. This was not the box ticked by the arresting Garda. No attempt was made by counsel for the respondents to suggest that the Garda had ticked the wrong box in error. As pointed out by Humphreys J. in *Sharma*, such error- had it occurred- could be corrected without invalidating the arrest and detention.

19. The arresting Garda says that he had reasonable cause to suspect that the applicant failed to leave the State within a time specified in the deportation order. As a matter of fact, the date of departure was not on the face of the deportation order. In accordance with the respondents' arguments, the date was incorporated into the deportation order because it was expressed in a s. 3(3) (b) (ii) notice which had been given to the applicant. The difficulty for the respondent is that the Garda makes no mention at all of a s. 3(3) (b) (ii) notice. In my view, a Garda could not suspect someone of failure to leave the State by a date incorporated into a deportation order from a s. 3(3) (b) (ii) notice without knowledge of this as the source of the departure date. The Garda should have explained how he had reasonable cause to suspect that the applicant had failed to leave the State within a time specified in the deportation order notwithstanding the absence of a departure date on the face of the deportation order. Assuming the Minister's explanation of the law as set out above is correct, the arresting Garda should have had an understanding that the required departure date is in the deportation order by a process of incorporation, which takes the date from a statutory notice which issued under s. 3 (3) (b) (ii) of the Act. The Garda makes no reference to this process of incorporation and does not make any mention of a s. 3 (3) (b) (ii) notice.

20. When formally stating the basis upon which the applicant is arrested and then detained by the Governor of a prison, the Garda exercising powers under s.5 of the Immigration Act is required to state accurately the basis of detention. To assert that the applicant was to be detained for failure to leave the State within the time specified in a deportation order when no time is specified therein is problematic for the respondents unless the lacuna is explained. I am not satisfied that the gap has been filled by the evidence of the arresting Garda.

21. The deportation order indicates that the departure date is in a s.3 (3) (b) (ii) notice. There is no evidence that the arresting Garda found the date in such a notice or was told that the date was in the relevant notice. He has averred that the date was in a letter. Failing to leave the State by a time specified in a letter could not be a basis to exercise a power to detain someone for up to 8 weeks under s. 5 of the Act. As indicated earlier, I regard the power given to Gardaí to detain persons for such a period, unconnected with any suggestion of criminality, to be exercisable only in strict compliance with s. 5. Before exercising the powers under s. 5 of the Act, the arresting Garda must be personally satisfied that the departure date is in either the deportation order or in a s.3 (3) (b) (ii) notice and then must demonstrate an understanding of the "incorporation by reference process" described by the respondents' lawyers. In my view, the absence of any evidence in relation to the existence or content of a s. s. 3 (3) (b) (ii) notice and the absence of evidence about the incorporation of the departure date from the notice into the deportation order is fatal to the legality of the arrest and detention. A reasonable person seeking to exercise a power of arrest and detention under s.5 (a), presumed to know that strict compliance with the section is required, presumed to know the incorporation by reference process described above, would first look for the departure date in the deportation order. Not finding it there, but directed by the text of deportation order to a s. 3 (3) (b) (ii) statutory notice, the person would then confirm the existence of the notice and could then accept that the departure date (though in the notice only) is, as a matter of law, in the deportation order. Arrest and detention under s. 5 could then follow.

22. The second reason given for the arrest and detention by the Garda was the belief of the arresting Garda that the applicant "intends to avoid removal from the State." The sole basis upon which such belief was formed that the applicant apparently "indicated [to the arresting Garda] that he did not wish to leave the State." In accordance with the decision of Hogan J. in *Troci* a statement by an applicant that he did not wish to leave the State could not reasonably form the basis of the view that the applicant intended to avoid his removal from the State.

23. In those circumstances, it seems to me that neither of the reasons given for arresting and detaining the applicant were reasonably justified (by reference to an objective standard). Therefore, I find that the applicant was unlawfully arrested and detained and, given that he is on bail, I order his unconditional release.