Neutral Citation [2015] IEHC 639

THE HIGH COURT

[2015 No. 1615 S.S.]

IN THE MATTER OF AN INQUIRY PUSUANT TO ARTICLE 40, SECTION 4 OF THE CONSTITUTION

BETWEEN

F. I.

PLAINTIFF

AND

RONAN MAHER ACTING AS THE GOVERNOR OF CLOVERHILL PRISON

DEFENDANT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of October, 2015

1. It is accepted by both sides that the facts are broadly as set out in the affidavit of Mary Trayers of 9th October, 2015. These have been supplemented with a number of agreed further facts. The applicant is a national of Pakistan, who arrived in the state on 15th February, 2005. He married an EU national on 6th January, 2006. Subsequently his spouse left the country following marital difficulties in or around June 2009. Ms Trayers' affidavit states that the Minister wrote to the applicant on 9th July, 2015 to inform him of a decision to make a removal order, although the text of this order has not been put in evidence.

The first Article 40 application
2. He then applied for asylum and there followed then a first Article 40 application by the applicant which seems to have been compromised in his favour. This was followed on 1st August, 2014 by a withdrawal of the asylum claim and he then applied for a visa or permission to land in Ireland.

3. The applicant was notified of the formal refusal of his asylum claim on 8th December, 2014. He was given temporary permission to remain in the state until in or around 9th September, 2015. He applied for residence under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 which was refused on 4th September, 2015 and currently does not have permission to be in the State.

4. He seems then thereafter to have gone to Northern Ireland and was apprehended on the way back from there on 25th September, 2015. He was arrested on that date by D/Garda Patrick Conroy and detained initially in Dundalk Garda Station and subsequently in Cloverhill Prison.

The second Article 40 application
5. A second Article 40 application was then moved in the High Court but was withdrawn on 2nd October, 2015 on the basis of the Minister's undertaking to carry out a consideration of whether *refoulement* would arise in the event of the applicant's removal from the State. Subsequent to that, on 6th October, 2015 the applicant submitted an application under s. 17(7) of the Refugee Act 1996 to the Minister for Justice and Equality for her consent to make a second asylum application.

The third Article 40 application
6. The applicant then applied by way of a third Article 40 application on 9th October, 2015 essentially on the basis that the application of 6th October for consent to make a second asylum application rendered his detention unlawful because it removed the necessary continuing intention to deport that was required to underlie a valid detention.

7. Mr. Anthony Moore B.L. for the respondent governor has handed in an unsigned decision dated 14th October, 2015 refusing the application under section 17(7). I have not seen the final decision and I am not in a position to afford any particular evidential status to the unsigned decision which has simply been handed in and not of course proved in evidence and as I understood matters is not admitted by the applicant. But in any event I do not believe there is anything that would turn on the matter because essentially this application revolves around the lawfulness or otherwise of the applicant's detention subsequent to the application for re-admission to the asylum process on 6th October, 2015. The resolution of the issue at a later date (by the rejection of that application, even if I had accepted that that is what occurred) would not rectify any prior infirmity in the detention of the applicant. A similar approach was taken in *B.F.O. v. Governor of Dóchas Centre* [2005] 2 I.R. 1 where it was accepted that an infirm detention could not be "cured" by some subsequent act of the executive.

8. When this matter was called on for hearing neither party applied to me for an adjournment to adduce further evidence. At the outset I asked whether there would be oral evidence and at that point it was expressly agreed between the parties that I would decide the case on the affidavit evidence.

9. I have Ms. Trayers' grounding affidavit which I have referred and I also have two affidavits from D/Garda Pat Conroy, one sworn on 13th October, 2015 and one sworn on today's date 14th October, 2015 which was entitled in the incorrect record number of the second Article 40 application. I have given Mr. Moore liberty to file that formally in the Central Office under the correct record number and indeed for completeness to file the first one as well if that has not already being filed.

10. At one stage during submissions I inquired as to whether I should be hearing from D/Garda Conroy by way of oral evidence as to his state of mind on 6th October, 2015. However, all submissions were concluded without in fact anyone seeking to call, or further adverting to any intention of calling, D/Garda Conroy. As I was about to rise to consider judgment I was informed that D/Garda Conroy was now in court if I wanted to hear from him. I think a misunderstanding may have occurred here. When for some reason the question of additional evidence arises, a party can either adopt the active stance of applying to put in that evidence before the conclusion of the hearing, which is a positive statement that the party wishes that evidence to form part of its case, or alternatively, which was the course adopted by the State in this case, a more facilitatory or passive stance that the evidence is available if the

court or another party wants it, which implies that the party is content to allow the case to be determined on the basis of the evidence as it already stands. I did not, as it were, take up the offer for two reasons, firstly because I felt that in the circumstances that the former type of positive application by one of the parties during the course of the hearing would have been more appropriate and secondly having regard to the fact that the hearing was in effect over at that point. However I appreciate that Mr Moore was simply endeavouring to do his best to facilitate the court in terms of what he understood to be what the court wanted, and I am grateful to him for that.

Can a settled intention to deport be inferred?

11. Turning then to the legal position, s. 5(5) of the Immigration Act 2003 makes clear that detention under that section can only be for the purposes of deportation. There must therefore be a settled intention to deport in order to ground a valid detention and that is clear from cases such as *Gutrani v. Governor of Wheatfield Prison and Minister for Justice* (unreported;, Flood J., 19th February 1993), *In re the Illegal Immigrants Trafficking Bill 1999* [2000] IESC 19 [2000] 2 I.R. 360 and *B.F.O. v. Governor of Dóchas Centre* [2005] 2 I.R. 1. The onus therefore is on the State to demonstrate that settled intention to deport.

12. At the level of generality it can be said that, normally and at least in the absence of either an application for re-admission to the asylum process, a change in circumstances sufficient to disturb the inference that a decision to remove will be carried out, or an administrative or other practical blockage to the implementation of the removal (such as unavailability of a travel document), the continued existence of a settled intention to deport can be inferred from the mere existence of a deportation order or a removal order. Indeed even without the production of such an order, I will assume that that intention may be proved in some other manner. The state's argument in this case was not that the existence of the removal order (which was not produced to me) in itself was a sufficient answer to the application. The real issue in the case is whether even if a settled intention to deport is formed, that such intention must be deemed to continue, even in the absence of any evidence to that effect, despite the making of an application for re-admission to the asylum process.

13. The argument made on behalf of the applicant, distilled perhaps to the point of over-simplification, is that while under the Refugee Act 1996, the making of such an application for re-admission does not have suspensory effect on the power to deport, it does have that effect (or at least, the first such application does) by virtue of Article 7 of the Procedures Directive (Council Directive 2005/85/EC). This is said to undermine the capacity of the State immediately to deport the applicant and therefore to vitiate the continuing intention to deport necessary to justify detention.

14. For the purposes of this argument it is perhaps relevant to note that Article 41 of the Recast Procedures Directive (Directive 2013/32/EU) (to which the State is not a party but which in the absence of any argument or material to the contrary, might conceivably be of assistance in interpreting the intention, spirit and purpose of the original Directive) would appear to envisage suspensory effect arising only from the first re-application (unless it was abusive), subject to *refoulement* not arising on any subsequent re-applications.

15. Even if a settled intention to deport is legally capable of being formed despite the fact that an application (particularly the first application) for re-admission to the asylum process has been made (a proposition which was disputed by Ms Rosario Boyle S.C. on behalf of the applicant and which I am not deciding), a justification of the detention would still depend on the existence of that settled intention being established at times material to the legality of the detention being considered by the court asked to consider the matter under Article 40.4. Given that the making of an application for consent to reapply for asylum clearly had the affect of complicating the process of the removal of the applicant from the State (by reason of the possible impact of article 7 of the Procedures Directive), I would not be prepared to infer from the evidence as it stands and the facts and circumstances that I have set out in this judgment that a settled intention to deport existed immediately following that application.

16. The complication of the need to consider any potential suspensive effect of a re-application arising from the Directive is a crucial element which was missing in the authorities cited by the State and which therefore distinguishes this case from those authorities, particularly *Toidze v. Governor of Cloverhill Prison* [2011] IEHC 395 (the need to consider a section 3(11) application to revoke a deportation order did not in that case not impair an intent to deport), *Okoroafor v. Governor of Cloverhill Prison* [2003] IEHC 62 (which was a similar case to the present in certain respects as it also revolved around a s.17(7) application for re-admission to the asylum process, which was held not to impair the entitlement to deport, but was decided pre-Directive and therefore could not have addressed the present issue), and *Ejerenwa v. Governor of Cloverhill Prison* [2011] IEHC 351 (the need to consider *refoulement* under s. 5 of the Refugee Act 1996 did not in that case not impair an intent to deport).

17. Given the matters I have referred to, the existence of such a settled intention to deport in the present case would require positive evidence in that regard as to the state of mind of whoever it would be that would be carrying out the removal and I do not find such evidence in either of the affidavits delivered on behalf of the State. Even if such evidence had been produced I would have had to go on to consider a number of other issues including whether the directive did indeed confer suspensive effect on the s. 17(7) application, and if so whether this rendered legally ineffective any subjectively held intention to deport if such had been established in evidence. These questions must await resolution in some future case, in which it may also be necessary to consider issues such as how soon following a change in circumstances will the detainer be required to reassess the necessity for detention, the extent to which detention in a particular case is a proportionate response and the extent to which, or frequency with which, the necessity for it is kept under review. In the present case, in the absence of sufficient evidence of a subsisting and continuing settled intention to deport, the respondent governor has not satisfied me that the applicant is being detained in accordance with law. I therefore am obliged under Article 40.4 to direct his release and that is the order I made on 14th October 2015. On that date I informed the parties that I would be delivering a written judgment at a later stage setting out more detailed reasons for the decision, and this is that judgment.