Neutral Citation [2016] IEHC 487

THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF THE IMMIGRATION ACT, 2004, AS AMENDED,

AND IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000, AND IN THE MATTER OF ORDER 84 OF THE RULES OF THE SUPERIOR COURTS 1986 – 2011 AND IN THE MATTER OF BUNREACHT NA hÉIREANN

[2015] No. 88 J.R.

BETWEEN

ADEBAYO DAVID AYENI AND AYOFE OLUWAFEMI ADOYEBI

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 29th day of July, 2016

1. By notice of motion of the 20th February, 2015, the applicants seek leave to apply for judicial review of decisions refusing the applicants permission to land in the State on the 3rd November, 2012. The applicants apply for an extension of time within which to apply for leave to seek judicial review. The respondents have issued a motion for security for costs.

2. The applicants were refused permission to land pursuant to s. 4(3)(k) of the Immigration Act 2004 on the 3rd November, 2012.

3. S. 5(1)(dd) of the Illegal Immigrants (Trafficking) Act, 2000 as inserted by s. 16(b) of the Immigration Act, 2004 provides that such decisions may only be challenged by judicial review commenced within fourteen days of the notification of the decisions which the applicants accept happened in the airport on the 3rd of November 2012. These proceedings should have issued on or before the 17th of November, 2012, and are out of time. An extension of time is required.

Background

4. The applicants arrived for holiday from Nigeria in Dublin airport on the 3rd November, 2012, on a flight from Frankfurt. The applicants showed their passports to a member of the Garda National Immigration Bureau. The passports contained valid Irish visas. The Garda interviewed the applicants. For reasons which will be set out later, the Garda refused permission to land pursuant to s. 4(3)(k) of the Immigration Act 2004 and notices to this effect were presented to the applicants on that date. The notices recorded that:-

> "There is a reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national."

The applicants returned to Nigeria immediately.

5. On the 15th November, 2012, Edewale Fajana and Co. ("Attorney and Solicitors") wrote to the Ambassador at the Embassy of Ireland in Abuja, Nigeria in respect of the events at Dublin airport. The letter is entitled:-

> "APPEAL TO LIFT THE DECISION OF REFUSAL OF PERMISSION TO LAND MADE AGAINST ATOYEBI AYOFE AND ADEBAYO DAVID AYENI."

In its opening passage the letter requests the Ambassador "[to]… consider this appeal by our clients and lift the unjustifiable and baseless decisions of the refusal of permission to land… on the basis of the facts and arguments canvassed below."

6. The letter is of considerable length with sections entitled "background facts", "arrival, questioning and intimidation", "detention and torture", "arbitrary deportation", "loss of funds and expenses", "mutilation of international passports" and the last section is entitled "our appeal." The letter states:-

> "We have the firm instruction of our clients to appeal to you that you will use your good office to investigate this unfortunate incident
>
> …
>
> We request that you use your good office to investigate and vitiate or lift the denial or refusal of permission to enter into the Republic of Ireland … and… that appropriate response is made to our Clients in this regard without delay.
>
> We also request that any negative report or restrictions placed on our clients in your records be immediately removed.
>
> …
>
> Please note that our Clients will pursue this redress to a meaningful conclusion and will engage the Nigerian Ministry of Foreign Affairs and the Media if need be to ensure that such inhuman treatments are not meeted to our Clients or any other Nigerian nationals amongst others.
>
> We will expect your response within 14 days..."

7. The Irish embassy in Nigeria replied on the 18th December, 2012, stating:-

> "I write to confirm receipt of your complaint dated 15th November, 2012, alleging misconduct by a member of the Garda Síochána (police) on immigration service duties at Dublin Airport. Please be advised that the Embassy has forwarded your complaint to:
>
> General Immigration Section,
>
> Irish Naturalisation and Immigration Service (INIS).
>
> …
>
> General Immigration will investigate the allegations. … They will revert to you directly on the result of his investigation.
>
> Alternatively, if you wish to pursue this issue yourself you may forward a complaint to the Garda Ombudsman …"

8. Neither the applicants, their Nigerian lawyers, nor the Irish authorities took any further steps arising from this correspondence in the fifteen months that followed.

9. On the 12th March, 2014, C.N. Doherty and Co. solicitors wrote to the Irish Naturalisation and Immigration Service. The letter is headed "Appeal to Lift the Decision of Refusal or [sic] Permission to Land made against [the applicants]." That short letter calls upon I.N.I.S. to "inform us forthwith as to when you will be making a decision in respect of this matter"

10. A reply was received by letter of the 19th March, 2014, and an official explained that the reason leave to land was refused in respect of the applicants was that a credit card had been declined in connection with the accommodation booked at a hotel and that the applicants had "no idea of Ireland or what [they] would be doing when here" and that was reason that the official at the airport decided that "there is reason to believe that the non-nationals intends to enter the State for purposes other than those expressed by the non-national." The letter states:-

> "In all the circumstances we are satisfied that the Immigration Officers acted correctly in refusing leave to land in both cases."

11. Almost four months later the applicants in the instant proceedings applied *ex parte* for leave to quash "the decision of the Respondent of the 19th day of March, 2014, to refuse to grant or overturn a 'Leave to Land' decision in respect of the applicants pursuant to s. 4 of the Immigration Act 2004." Other reliefs were also sought. An *ex parte* application for leave to seek judicial review was made in respect of these proceedings on the 7th July, 2014. The applicants were granted leave to seek judicial review by this court and the proceedings were returnable by the 20th October, 2014.

12. These earlier proceedings were grounded on affidavits of the applicants dated 6th June, 2014. No averments therein supported an application for an extension of time.

13. By notice of motion filed on 4th December, 2014, the respondents sought an order setting aside the grant of leave made *ex parte* on 7th July, 2014.

14. On 26th January, 2015, this court set aside its decision of 7th July, 2014, and the judicial review proceedings were dismissed. This court decided that the judicial review proceedings had not been instituted in accordance with s. 5 of the Illegal Immigrants (Trafficking) Act (2000) as amended The court granted the applicants liberty to issue and serve a fresh notice of motion for leave to seek judicial review and to apply for extension of time.

15. The present judicial review proceedings resulted and were commenced by issuing and serving a notice of motion on 20th February 2015. Leave to challenge the "refusal to land" decisions of 3rd November, 2012, is sought, unlike the earlier proceedings which challenged the much later decision of 19th March, 2014, affirming those earlier decisions. The applicants did not swear affidavits in this new proceeding.

16. An extension of time is now sought and it is pleaded at para. 5D of the statement required to ground judicial review that: -

> "There are good and sufficient reasons to extend time to apply for Judicial Review. By far the greater part of the delay in attributable to the Respondents failure to address the prompt representations made to them by the Applicants legal representatives in Nigeria and to further fail to accord with their undertaking given in writing to respond to those representations. The Applicants legal representatives in the state are acting for persons resident in a distant foreign jurisdiction. They have been required to communicate and to take instructions and to advise and to prepare to convey pleadings on a transcontinental basis and without the benefit of personal consultation. Further any delay is not attributable to the Applicant's fault."

Colum Doherty, Solicitor, has sworn an affidavit in the present proceedings in which he says that the applicants instructed him. He does not indicate when the instructions were given. He says that he briefed counsel on the content of the letter of 19th March, 2014, and that "counsel advised me that it was his view that there was stateable case for application to his Honourable Court" which resulted in the application for judicial review in July, 2014. Mr. Doherty then says:-

> "I say and I am further advised by Counsel that by far the greater part of delay in applying to this Honourable Court is attributable to the Respondent's failure to respond, as they undertook to do, to the prompt representations by the Applicant's solicitors in Nigeria on 15th November, 2012."

17. The first matter I must address is the application to extend time. It seems to me that the extension required is from 17th November, 2012, (date of decision in suit plus fourteen days) to 20th March, 2015, (date of the proceedings). Proceedings required to be commenced within fourteen days of the decision sought to be quashed are now challenged by proceedings brought some two and half years after the date of the decision in question.

18. The principles governing applications for extension of time in a provision such as that contained in s. 5 of Illegal Immigrants (Trafficking) Act (2000) have been authoritatively stated by Clarke J. in *Kelly v. An Bord Pleanála* [2005] 2 I.R. 404. The learned Judge said as follows, at p.411:-

> "Without being exhaustive it seems to be me that the following factors may need to be considered prior to a decision as

to whether or not to exercise a discretion conferred to extend time of the type referred to above:-

> a. The length of time specified in the relevant statute within which the application must be made. In The Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 I.R. 360 the Supreme Court at p. 394 stated that a party who in all the circumstances of the case could be shown to have used reasonable diligence might well be in a position to persuade the court to extend the fourteen day period provided for in that legislative regime. Obviously the shorter the period of time which a person has to make application to the court, the easier it may be to show that despite reasonable diligence that person has been unable to achieve the time limit.
>
> b. The question of whether third party rights may be affected.
>
> …
>
> c. …while it may well be legitimate to take into account the fact that no third party rights are involved, that should not be regarded as conferring a wide or extensive jurisdiction to extend time in cases where no such rights may be affected. The overall integrity of the processes concerned is, in itself, a factor to be taken into account.
>
> d. Blameworthiness. It is clear from all the authorities to which I have been referred in each of the areas to which stricter rules in respect of judicial review have been applied that one of the issues to which the court has to have regard is the extent to which the applicant concerned may be able to explain the delay and in particular do so in circumstances that do not reflect any blame upon the applicant. However in that context it should be noted that McGuinness J. in *C.S. v. Minister for Justice* [2004] IESC 44; [2005] 1 I.L.R.M. 81 at p.101 said:-
>
> > 'There is, it seems to me, a need to take all the relevant circumstances and factors into account. The statute itself does not mention fault; it simply requires 'good and sufficient reason'. The *dicta* of this court in the reference judgment quoted earlier indicate many factors which may contribute to 'good and sufficient reason'. By no means all of these can be attributed to fault or indeed absence of fault, on the part of the applicant.'
>
> While the blameworthiness (or the lack of it) on the part of the applicant is, therefore, a relevant factor it is only one such factor to be weighed in the balance.
>
> e. The nature of the issues involved. Both this court and the Supreme Court in C.S. v. Minister for Justice [2004] IESC 44; [2005] 1 I.L.R.M. 81 seem to have had regard to the severe consequences of deportation to a State where fundamental rights might not be vindicated. The consequences of being excluded from challenging a planning or public procurement decision, while significant, are not in the same category.
>
> f. The merits of the case. Some considerable argument took place during the course of the hearing before me as to whether the merits of the case in the sense of whether the applicant had established an arguable case was a factor which could properly be taken into account. In favour of that proposition reliance was placed upon the judgments of the Supreme Court in G.K. v. Minister for Justice [2002] 2 I.R. 418 in which Hardiman J., at p. 423, delineated the approach to applications for extension of time as follows:-
>
> > 'On the hearing of an application such as this it is, of course, impossible to address the merits in the detail of which they would be addressed at a full hearing, if that takes place. But it is not an excessive burden to require the demonstration of an arguable case. In addition, of course, the question of the extent of the delay beyond the fourteen day period and the reasons if any for it must be addressed.'

19. Along with the matters identified by Clarke J., it is trite to say that the court must also assess the explanation offered as to why the proceedings are issued out of time. As I understand it the overall period of delay (some twenty seven months or so) is said to comprise two distinct time frames. The first is the period from the date the Nigerian lawyers wrote to the Irish Ambassador in Nigeria (15th November, 2012) until the receipt of a substantive reply from the Irish authorities on 19th March, 2014. The second is the period from receipt of that reply to the institution of proceedings on 20th of February 2015.

20. With respect to the first period of delay, the applicants say that they were entitled to wait for a substantive reply to their letter before issuing proceedings.

21. The law requires any legal challenge to a "refusal to land" to be commenced within fourteen days of notification of that decision to its addressee. That rule is not dis-applied by writing a letter of complaint or asking in writing that the decision be reversed. A person aggrieved by a "refusal to land" decision is not entitled to write a letter of complaint and then to issue proceedings outside the fourteen day period if unhappy with the response. The applicants were not entitled to wait for the reply to the letter their Nigerian lawyer wrote before issuing proceedings.

22. The applicants are asking the court to hold that the tactic of waiting for a reply to the letter of November 15th instead of instituting proceedings was acceptable. It was not. Persons who wish to pursue complaint through correspondence about decisions listed in s. 5 of the Illegal Immigrants (Trafficking) Act 2000 cannot thereby avoid the strict time limits for commencing judicial review of those decisions. They should, at the very least, issue protective proceedings along with the letters of complaint if they wish to preserve the right to sue whilst engaging in a campaign of letter writing.

23. In addition, the court has been provided with no adequate explanation as to why the applicants did not take any step following the receipt of the letter from the Irish Embassy on 18th December 2012, until they instructed their present solicitor to write a letter on 12th March, 2014. The letter from the Irish Embassy to the applicants' lawyers in Nigeria quite plainly responded to the letter from the Nigerian lawyer as if that letter had only raised complaints about the conduct of Gardaí at the airport. No explanation has been offered as to why the applicants or their lawyer in Nigeria did not engage in correspondence with the Irish authorities to point out that their letter had sought not just an investigation into police conduct but a reversal of the refusal to land decision. No explanation has been offered as to why the letter from the Embassy did not prompt proceedings. Any such proceedings would have been late and would have required an extension of time but a much shorter extension than that now sought.

24. It is surprising that the lack of comprehensive response from the Irish authorities was so passively received in view of the fact that the original letter made such detailed complaints and demanded action and redress within fourteen days (of the letter of the 15th November, 2012). An explanation as to this passivity should have been offered in connection with this application to extend time.

25. For these reasons the court rejects the explanation offered for the first part of the delay as offering good and sufficient reason to extend time.

26. The second period of delay occurred after the reply to the letter was received, and some explanation has been provided as to why the first set of judicial review proceedings were instituted more than three months after the letter of 19th March, 2014, in as much as the pleadings assert that: -

> "The applicants legal representatives in the State are acting for persons resident in a distant foreign jurisdiction. They have been required to communicate and to take instructions and to advise and to prepare to convey pleadings on a transcontinental basis and without the benefit of personal consultation."

27. This is the sort of explanation which would normally attract the sympathy of the court. If, for example, these proceedings had issued later than fourteen days after notification of the impugned decisions, and an explanation such as that set out above was offered for the delay, the court might well adopt an understanding approach to the practical difficulties associated with managing litigation on behalf of clients based in Nigeria. But by the time this additional delay occurred, the earlier inexcusable delay had happened and could not be cured by accepting this explanation for the second period of delay.

28. Continuing with the factors identified by Clarke J. in *Kelly* (supra), I address the seriousness of the issues involved and note that in the letter of 19th March, 2014, which affirmed the refusal to land decisions, the applicants were addressed as follows:-

> "Please be advised that [the applicants] are not precluded from making a new application for a Visa to travel to Ireland or a subsequent application for permission to enter the state at any time in the future and any such application will be dealt with on the merits of the particular application."

29. The applicants have an assurance from the respondents that they will be treated in good faith should they wish to renew their applications to come to Ireland. Thus, a significant part of what these proceedings seek to achieve - reversal of the refusal to land decision - could be achieved by a new application for a visa and further application for permission to enter the State from the respondents. There is no question of physical risk to the applicants unless the impugned decision is quashed.

30. It is appropriate to have regard to the merits of these proceedings in deciding whether time should be extended. The pleadings challenge the rationality of the decision to refuse leave to land. By the time these applications were heard, Garda Richard McGeough had sworn an affidavit on 12th May 2015, explaining the basis of the decision to refuse leave to land. The Garda said as follows: -

> "The applicants answered all the questions I asked of them, [at the airport] informing me that they were here on vacation, and that they had rooms booked in the Travel Lodge Hotel at Dublin Airport for six nights.
>
> … the applicants then produced to me a receipt for their booked accommodation, as well as return tickets for Frankfurt, … I continued to ask questions of the applicants, and at this point I noticed that the first named applicant had become very nervous in his demeanour. On noticing this, I inquired with the first named applicant as to whether he was ok, to which he replied that he was. I continued with my questioning, asking in particular where the applicants intended staying after their initial six nights in the Travel Lodge Hotel in Dublin Airport, as they intended staying 15 nights in total in Ireland. I say that neither applicant was able to provide me with any further information in relation to accommodation for their intended visit.
>
> I then asked both applicants what they intended doing in Ireland during their vacation, such as any places they intended visiting, and again neither man could provide any information. Following this, I asked both gentlemen for their mobile phones. The first applicant handed over one phone, while the second applicant handed over two phones. I say that one of the second applicant's phones was a Blackberry type phone made by Nokia. I say that on opening the said home screen of the phone I observed an open email informing the applicants that their accommodation had been cancelled in the Travel Lodge Hotel at Dublin Airport due to a declined credit card.
>
> On receipt of the information about the cancelled hotel booking, I asked both applicants to take a seat in the waiting hall at Pier B of the Airport. I then rang the Travel Lodge Hotel and made enquiries as to the applicants' booking. It was confirmed to me by the said hotel that the booking had been cancelled that day by their booking website, due to a declined credit card. On ascertaining the information from the hotel, I say that I called over both applicants and asked them again where they intended staying that night. The second applicant confirmed that he intended staying at the Travel Lodge Hotel and stated that he had already presented receipts to that effect. I then pointed out to the second applicant that the booking had been cancelled, and showed him the email on his phone confirming the same.
>
> I say that the applicants were unable to explain the cancellation of their hotel booking, and I say that they were unable to reply to any more questions posed by me. In particular I noted that the first applicant did not speak at all at this stage. Following the completion of some paperwork I then informed the applicants that they were being refused permission to land in the State as I did not believe that they were genuine visitors to Ireland."

31. That affidavit is dated 12th May, 2015. No reply thereto has been made by the applicants. Garda McGeough's affidavit, and in particular the averments as to the cancelled credit card, reflect the contents of the letter of 19th March, 2014. The difference between the letter of 19th March, 2014, and the affidavit of Garda McGeough of 12th May, 2015, is that Garda McGeough says that he informed the applicants of the difficulty with the cancelled booking because of the declined credit card.

32. In an affidavit sworn in the proceedings which were dismissed, the applicants suggested that the hotel booking had been made by a Dublin resident by the name of J.T. Adekiyesi. Mr Adekiyesi swore an affidavit on 3rd October 2014, in the earlier proceedings, saying that he had made the bookings but that he had cancelled them after he discovered that the applicants had returned to Germany. This is in direct conflict with the affidavit of Garda McGeough who says he saw evidence of the cancelled bookings when interviewing the applicants in Dublin Airport - prior to their departure back to Frankfurt. This critical matter was not addressed by a replying affidavit. (Leave to cross examine the Garda was refused by the court as it was not sought in accordance with the rules and though conflict of facts should be addressed before leave is sought where the application for leave is *inter partes*, this should be done by further affidavits and not by cross examination. Cross examination may be needed to resolve factual conflict after leave is granted).

33. Bearing all of these averments in mind, my view is that the respondents have a reasonable likelihood of succeeding in an action which claims that they acted irrationally in refusing leave to land. The applicants do not deny that the hotel lodgings were cancelled.

They do not assert that they offered an explanation to the Gardaí as to why the credit card had been declined or the hotel bookings had been cancelled. No explanations had been offered as to why they seemed to know so little about Ireland and as to why they had no further hotel accommodation booked. I am not, of course, suggesting that tourists coming to Ireland must have pre-booked accommodation or even basic information about the country in order to be allowed in.

34. The Gardaí perceived the applicants to be behaving suspiciously and the decision making process which followed that would only be set aside if it offended fundamental reason and common sense. On balance, I do not regard this aspect of the applicants' case as being sufficiently strong to aid the submission they make in support of an extension of time.

Are the other reliefs/ grounds arguable?
35. In addition to orders of *certiorari* the applicants seek a declaration that s. 5(1)(dd) of the Illegal Immigrant (Trafficking) Act, 2000 as inserted by s. 16(b) of the Immigration Act 2004 is unconstitutional and a "declaration of incompatibility under s. 5 of the European Convention on Human Rights Act 2003, having regard to Article 5 of the Convention, in respect of s. 4(3)(k) of the Immigration Act 2004."

36. With respect to the claim that the Irish legislation is unconstitutional, the pleaded ground for unconstitutionality is as follows:-

> "The circumstances of a decision, such as the instant ones, to refuse permission to land in the state, requiring the persons concerned to then return to a foreign jurisdiction, are such that the said provisions effectively act to cause unjust denial of access to the Court and to an effective remedy."

37. The constitutionality of the very short period within which judicial review proceedings must be instituted was upheld by the Supreme Court when the legislation was referred thereto by the President. See *Re The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360. The Supreme Court was of the view that the facility granted to applicants to apply for judicial review outside the period of fourteen days was broad enough to permit persons to institute judicial review proceedings outside that period provided there was a good explanation for their inability to do it within fourteen days. (The inclusion of "refusal of leave to land" decisions in s. 5 post-dated the decision of the Supreme Court on the constitutionality of the Act. Nonetheless, the reasoning of the Supreme Court applies with equal force to the restrictions on challenging such decisions).

38. No elaboration is made on this ground in the written submissions. Thus, it would appear that the only basis upon which it is alleged that the legislation is unconstitutional is because a denial of access to justice would occur by virtue of the short time period and by virtue of the fact that the application would, in a case such as this, have to be pursued from outside the jurisdiction. As indicated above, in an appropriate case court would grant every latitude to a person seeking to institute proceedings from outside the jurisdiction. In this case, the applicants have instituted three sets of proceedings, including the present proceedings, from outside the jurisdiction. Insofar as the distance between their location and the location of their lawyers in Ireland has caused a difficulty, the court might have been willing to accept that as an explanation for why the proceedings which were struck out on the 26th January, 2016, took more than three months to be commenced from the date of the decision which was sought to be impugned.

39. Reviewing the alleged basis for the unconstitutionality and the particular facts of this case, I am not of the view that the legislation is arguably unconstitutional in a manner which would persuade me to extend time to permit the applicants' argument to be advanced.

40. A declaration is also sought that s. 4(3)(k) of the Immigration Act of 2004 is incompatible with the European Convention on Human Rights is sought apparently on the following basis:-

> "The ground stated on the refusal notice given to the Applicants attributes an 'intent to deceive' to the Applicants, and as such, as a ground for detention is vague and imprecise. This together with the failure to give notice of legal means of redress is contrary to Article 5 of the European Convention on Human Rights and constitutes grounds sufficient for a Declaration of Incompatibility under section 5 of the European Convention on Human Rights Act 2003, in respect of s. 4(3)k of the Immigration Act 2004."

41. In written submissions it was argued that the applicants had no opportunity to dispute the lawfulness or the proportionality of the respondent's decision and that consequently s. 4 of the 2004 Act is an unlawful interference with Art. 5 of the Convention and incompatible therewith. This is difficult to comprehend. I would have thought the argument about absence of opportunity to appeal or review the decision prior to departure from the State might have been advanced in support of the contention that domestic legislation is unconstitutional. Instead, the argument is advanced in connection with incompatibility between the domestic legislation and Art. 5 E.C.H.R..

42. Article 5 of the European Convention on Human Rights – not quoted in the pleadings or in the written submissions – provides as follows:-

Article 5 - Right to liberty and security
(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision ….;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases ...;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he/she understands, of the reasons for his/her arrest and of any charge against him/her.

(3) Everyone arrested or detained in accordance with the provisions of para. 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

43. Bearing in mind the text of Article 5 E.C.H.R., it is difficult, based on the pleadings and the written submissions, to appreciate the case being made as to the alleged incompatibility between s. 4 of the Immigration Act and Art. 5 of the European Convention on Human Rights. I cannot detect an arguable basis expressed in this case upon which s. 4 is incompatible with Art. 5 of the Convention. There is a suggestion that the applicants were detained, and there is an averment by the Garda that the applicants were indeed kept in a secure part of the airport pending their return to Frankfurt and onwards to Nigeria, but no legal complaint connected with this detention is pleaded. In order for there to be an arguable case as to incompatibility between Art. 5 E.C.H.R. and s. 4 of the Act, significantly greater detail by way of pleading, written, and oral submission would have been required. I am not persuaded that the court should extend time to permit so imprecise and vague an argument as to incompatibly/illegality to proceed.

Mistakes by lawyers

44. In *C.S & ors v. Minister for Justice, Equality and Law Reform* [2004] IESC 44; [2005] 1 I.R. 343, the Supreme Court extended time for judicial review proceedings challenging the decision of the Minister to which s. 5 of the Illegal Immigrants (Trafficking) Act 2000, was applicable. McGuinness J. addressed the approach required where an assessment of the blameworthiness of the applicant's lawyers in connection with the failure to institute proceedings within the statutory time limit. In that case, the deportation orders in question were notified by letter of 25th September, 2003, and the application for leave and the application to extend time were moved on 28th October, 2003, - a much shorter delay than the period under examination here. Affidavit evidence and oral evidence was available in the High Court in connection with the application to extend time.

45. It is clear from the case law surveyed by McGuinness J. that there are circumstances when an applicant will be vicariously liable for the deficiencies of his or her lawyers and there are other circumstances where the absence of blameworthiness on the part of the applicant will justify an extension of time, though the cause of delay is attributable to lawyers. However, McGuinness J. did refer to the decision of the Supreme Court in *S. v. Minister for Justice* [2002] 2 I.R. 163, where at para. 11 of her judgment, Denham J. pointed out that the delay at issue in that case was essentially the delay by legal advisers. Denham J. said at p. 167:-

> "The delay in issue is essentially delay by legal advisers. Legal advisers have a duty to act with expedition in these cases. In general, delay by legal advisers will not *prima facie* be a good and sufficient reason to extend time. Circumstances must exist to excuse such a delay and to enable the matter to be considered further."

46. In the result, McGuinness J. held, at para. 59:-

> "Nor, despite my considerable reservations arising from the various deficiencies of her present solicitors, do I consider that she should be held vicariously liable for their actions. In so holding I would bear in mind the observations of Finnegan J. in *G.K. v. Minister for Justice* [2002] 1 I.L.R.M. 81 where he held at p. 87 that:-
>
> 'in determining the extent to which an applicant should be held vicariously liable for the default of his solicitor it is important to bear in mind the serious consequences which could result from an application failing because of the delay… where however an applicant is deported the consequences for him may be very serious indeed in that he may be deported to a State in which his fundamental human rights would not be vindicated.'"

47. At para. 53, McGuinness J. concluded as follows:-

> "In considering the circumstances of the delay the court is handicapped by the state of the evidence. One must accept that in all these asylum judicial review applications the applicants and their legal advisers are acting under pressure of time. The solicitors acting for the applicants in this case, however, are experienced in the field of asylum and immigrant law. Even if they were not there can be no excuse for relying on affidavits containing hearsay by the solicitor in regard to what is known to his client and, even more extraordinarily, hearsay by the client in regard to matters known only to her solicitor. This court has previously stressed that in this type of case the applicant should personally set out on affidavit the circumstances which gave rise to any delay by the applicant himself or herself while the solicitor should set out any circumstances of delay which arose in the legal process itself. Given that in practice affidavits are drafted by legal advisers rather than by their clients, a great deal of the blame for the state of the evidence in this case must fall on the applicants' legal advisers.
>
> In addition, as has already been pointed out, there are remarkable *lacunae* in the evidence some of which, for example the date of the first applicant's receipt of the notification of the deportation order, are even now totally unexplained."

48. The judgment of the Supreme Court in C.S. indicates that the explanation for the delay and the proffering of good and sufficient reason in respect of the extension of time must be on affidavit. A similar position was adopted in *G.K. v. M.J.E.* [2002] 2 I.R. 418, where, in refusing an extension of time because of a lack of merits in the underlying case, Hardiman J. held that:-

> "I would remark in passing, that it is preferable that explanations of this kind should be put before the court on an affidavit of the applicants or one of them rather than by their solicitor on a hearsay basis."

49. I note that Order 84 Rule 21(5) R.S.C. requires that an application for an extension of time be grounded on an affidavit sworn by or on behalf of the applicant which sets out the reasons for the applicant's failure to make the application within the period prescribed and verifies any facts relied on in support of those reasons.

50. Even if I were to read the dicta of McGuinness J. as referring only to challenges in the asylum area, it seems to me, at the very least, that a full explanation of delay is required before the court can extend time.

51. My view is that the court could only extend time in this case if there were an explanation from the applicants and/or their lawyers on affidavit as to matters such as:-

> (i) why they took no action in the long period during which no reply was received from the Irish authorities following their complaint of 15th November, 2012;
>
> (ii) the circumstances in which the applicants came to obtain legal advice in Ireland and the date on which this happened;
>
> (iii) a detailed explanation why it took in excess of three months to institute proceedings arising from the letter of 19th March, 2015; and
>
> (iv) an express explanation as to why the present proceedings are instituted ten months after the letter of 19th March, 2015.

52. The court is aware, because of its past involvement in the case, of the reasons the first proceedings were dismissed. If part of the reason for the delay in instituting these proceedings relates to a mistake as to whether s. 5 applied to the decision in suit, an averment to that effect ought to have been clearly made, and then the principles governing vicarious liability of an applicant for mistakes of lawyers could have been assessed. None of this happened in this case. In passing, I would say that had this been part of the explanation offered, the court might have had some sympathy for the failure to notice that s.5 of the 2000 Act had been amended by section 16(6) of the Immigration Act 2004 to create a new s.5 (1) (dd) of the 2000 Act to catch refusals under s. 4 of the Immigration Act 2004. It might well be unfair to hold the applicants vicariously liable for such error. But even if this court could excuse the applicants issuing the wrong proceedings initially and thus delaying these proceedings, that would not overcome the failure to issue any sort of proceedings before 17th November, 2012. That error is not attributable to the applicants' current lawyers.

53. A combination of the an unacceptable explanation for the initial delay, absence of relevant averments by or on behalf of the applicants relating to all of the circumstances contributing to delay, the apparent frailty of the substantive case sought to be made, the possibility of a simple method of reversing the impugned decision by re applying for a visa/permission to land, all cause me to conclude that no good and sufficient reason exists to grant the extension of time. The proceedings are consequently dismissed because they are out of time. No decision is therefore necessary on the application for security for costs.