

**THE HIGH COURT
JUDICIAL REVIEW**

2009 8 JR

**IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4.2° OF THE CONSTITUTION OF IRELAND
1937**

BETWEEN

FRANK KORANTENG

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

CONVERTED BY ORDER TO:

THE HIGH COURT

JUDICIAL REVIEW

2009 8 JR

BETWEEN

FRANK KORANTENG

APPLICANT

AND

**DISTRICT JUDGE SHERIDAN AND
THE DIRECTOR OF PUBLIC PROSECUTIONS**

RESPONDENTS

JUDGMENT of Mr. Justice John Edwards delivered the 12th day of January, 2009.

These proceedings commenced as an application for an inquiry under article 40.4.2 of the Constitution of Ireland into the lawfulness of the applicants detention at Cloverhill Prison. The Court of its own motion has decided in the exercise of its inherent jurisdiction to treat this application as an application for leave to apply for judicial review and has granted the applicant leave to apply for various reliefs by of judicial review against the respondents in the proceedings as reconstituted. The applicant is unhappy with the Court's ruling in this regard and has requested the Court to state its reasons for its ruling. I now give those reasons.

The applicant in this matter is currently on remand at Cloverhill Prison, having been remanded in custody at Cloverhill District Court on 6th January, 2009 on foot of Dublin Airport Charge Sheet No. 815537 for an offence contrary to s. 12 of the Immigration Act, 2004.

Section 12 of the Immigration Act, 2004 provides (*inter alia*):-

- (1) Every non-national shall produce on demand, unless he or she gives a satisfactory explanation of the circumstances which prevent him or her from so doing –
 - (a) A valid passport or other equivalent document, issued by or behalf of an authority recognised by the government, which establishes his or her identity and nationality, and
 - (b) In case he or she is registered or deemed to be registered under this Act, his or her registration certificate.
- (2) A non-national who contravenes this section shall be guilty of an offence.

(3) In this section "on demand" means on demand made at any time by any Immigration Officer or a member of the Garda Síochána.

Section 13 of the Immigration Act, 2004 provides that a person guilty of an offence under the Act shall be liable on summary conviction to a fine not exceeding €3,000 or to imprisonment for a term not exceeding twelve months or to both.

It appears from an affidavit placed before the court by Paul Byrne, solicitor for the applicant, sworn on the 7th January, 2009 that the applicant was charged with the said offence on 27th October, 2008 by a Detective Garda Cathal Brennan. A copy of the charge sheet was exhibited before me. Mr. Byrne further deposes that the applicant was produced in custody before District Court 44 in the Dublin Metropolitan District on the said date. An application was made by Detective Garda Brennan for a remand in custody, as the identity of the applicant had not been conclusively established. The applicant consented to the said remand. Thereafter the applicant was further remanded on consent from time to time in anticipation of his identity documents being sent from Ghana, his alleged country of origin. The applicant claims that he has never possessed a Ghanaian passport and that he entered this jurisdiction without authentic identity documents with the intention of applying for asylum here. The court has been informed that the applicant has made an application for asylum during his period of remand at Cloverhill Prison.

At para. 6 of his affidavit Mr. Byrne deposes that on the 18th November, 2008 at Cloverhill District Court counsel instructed by him attempted to give Detective Garda Brennan a document containing the applicant's previous address in Ghana and the current address of the applicant's parents; so that the prosecuting Garda might make inquiries with the Ghanaian Embassy. At para. 7 Mr. Byrne states that Detective Garda Brennan refused to accept the said document, indicating that he required proper identification papers instead. Mr. Byrne deposes that counsel then advised the applicant to contact the Ghanaian Embassy himself and that the applicant did so. At para. 8 of his affidavit, Mr. Byrne states that he was subsequently furnished with what purports to be the applicant's Ghanaian polling card by post from Ghana. He states that he attempted to furnish the said document to Detective Garda Brennan at Cloverhill District Court on 2nd December, 2008 but that the Garda refused to take it because it was not an "equivalent document" within the meaning of s. 12 of the Immigration Act. At para. 9 Mr. Byrne states that on 4th December, 2008 he also received what purports to be the applicant's baptismal certificate, church tithe card and documentary evidence corroborating the applicant's asylum claim. He stated that his instructions were that these documents (to include the polling card) were the only documents that the applicant could procure in order to verify his identity.

At para. 10 of his affidavit Mr. Byrne states that the applicant was produced before Cloverhill District Court on 23rd December, 2008. A Ms. Caroline Egan, solicitor, appeared for the applicant on that occasion, deputising for Mr. Byrne. Ms. Egan submitted to District Judge Conal Gibbons that the applicant had furnished all available identity documents to the prosecuting Garda and that in the circumstances the documents should be analysed by the Gardaí to determine whether or not they were legitimate. Mr. Byrne states that District Judge Gibbons ordered Detective Garda Brennan to take possession of the documents and to furnish them to the Garda Síochána Documents Section for examination. At para. 11 Mr. Byrne states that later on the said date Ms. Egan spoke to an official from the Ghanaian Consulate of Ireland. He states that Ms. Egan was informed that no help would be offered to the applicant from the Consulate as he was in Ireland illegally, was not entitled to apply for asylum and would ultimately be deported from this jurisdiction. According to Mr. Byrne the official refused to furnish Ms. Egan with any further information and hung up the phone on her.

At para. 12 of his affidavit Mr. Byrne states that the applicant was next before Cloverhill District Court on 6th January, 2009. Mr. Byrne appeared for the applicant on that date before District Court Judge Sheridan. Mr. Byrne states that he spoke to Detective Garda Brennan before court and was advised by him that the documents had been examined but that the Gardaí were not in a position to say if they were real or forged. At para. 13 Mr. Byrne stated that when the case was called he indicated to the District Judge that every possible effort had been made to establish the applicant's identity to the satisfaction of the prosecuting guard. He further indicated that testing of the documentation had proved inconclusive and that the Ghanaian Consulate had refused to help in the identification of the applicant. At para. 14 Mr. Byrne states that he then indicated that the applicant was prepared to enter a guilty plea and have the charge finalised, rather than spend any more time on remand. He states that Detective Garda Brennan then asked the District Court Judge to remand the applicant again as he was still not satisfied about the applicant's identity and that he could be anyone. Detective Garda Brennan further added that the Ghanaian Consulate had a duty to help all citizens of their country and that they were wrong to suggest that the applicant was going to be deported.

At para. 15 Mr. Byrne states that the District Court Judge then indicated that he was minded to remand the accused again. Mr. Byrne then urged him not to do so stating that any further remand would be a waste of time as the Consulate had refused to help and they could not be compelled to do so. Mr. Byrne suggested that if the District Judge was minded to remand the applicant again he might admit the applicant to bail. The District Judge replied that he would not hear a bail application. At para. 17 Mr. Byrne states that he then submitted to the District Court Judge that the applicant had not applied for bail at any previous remand hearing and in the circumstances that he was entitled to apply. However, the District Court Judge persisted in refusing to entertain a bail application and gave as his reason that he was not satisfied about the applicant's identity. Mr. Byrne then submitted to the District Judge that while that might provide the judge with a reason for ultimately refusing bail, it was not a good reason for refusing to hear a bail application. The District Court Judge was not disposed to change his mind.

Mr Byrne deposes that in those circumstances he then asked the District Judge to finalise the matter on a guilty plea. He states that the District Court Judge also refused to accede to this application, and he then proceeded to remand the applicant in custody to 13th January, 2009 at Cloverhill District Court.

Based upon the circumstances as just outlined, the court was asked to conduct an inquiry into the lawfulness of the applicant's detention pursuant to Article 40.4.2 of the Constitution of Ireland, 1937.

After the facts of the case had been outlined to me by Senior Counsel for the Applicant I queried with him as to whether the case was an appropriate one for the conduct of an inquiry under article 40.4.2 of the Constitution of Ireland 1937 in circumstances where his client's principal complaints appeared to be that the District Judge had exceeded his jurisdiction in refusing to entertain a bail application and in refusing to allow the applicant to enter a plea of guilty so that the matter could be finalised in early course. I suggested to Senior Counsel that judicial review proceedings might be more appropriate in the circumstances of the case since the conduct complained of was not that of the detainer but rather that of a third party namely the District Judge. Counsel responded that his client could not afford to wait on remand

pending the outcome of judicial proceedings even if they were expedited, and he urged on the court that this was indeed an appropriate case in which to seek an inquiry under article 40.4.2 of the Constitution of Ireland, particularly having regard to the decision of the Supreme Court in *McSorley -v- Governor Of Mountjoy Prison* [1997] 2 I.R. 258.

I indicated that I was familiar with the decision in *McSorley* but that I did not agree that it supported his contention. I stated that the concern that he had raised about his client remaining in custody pending the outcome of any judicial review proceedings could perhaps be addressed by means of the Court entertaining an ancillary application from the applicant for bail in the context of his judicial review proceedings. Counsel for the applicant reiterated his view that in all the circumstances it was an appropriate case in which to seek an inquiry under article 40.4.2

I then decided in the exercise of my inherent jurisdiction to treat the application before me as an application for leave to apply for judicial review, as I felt that this was the more appropriate procedure in all the circumstances of the case. As I have have been requested to provide a reasoned judgment it is appropriate that I should now elaborate on my reasons for deciding that it was not appropriate to allow this case to proceed as an inquiry under article 40.4.2. Many of the relevant considerations are in fact identified in the *McSorley* decision to which Senior Counsel for the applicant referred.

First and as already indicated, the conduct complained of was not that of the detainer but rather that of a third party namely the District Judge. Secondly, there is no provision within the context of an inquiry under article 40.4.2 by means of which a party other than the detainer may be represented. Thirdly, the District Judge whose conduct of the case is being directly criticised might wish to make observations, and he is entitled in the interests of justice to be given that opportunity. Fourthly, the only remedy open to the court in the context of an inquiry under article 40.4.2 is the granting of unconditional release. An order for release in that context may not be qualified in any way, e.g. by the imposition of conditions or by an order staying the release. An unconditional release of the applicant would be disproportionate in the circumstances of the case and would tend to undermine the long established pre-trial criminal process. In contrast, a release on bail is a release subject to the security provided by the conditions attached to a grant of bail. Fifthly, there is no power of remittal in the context of an inquiry under article 40.4.2. If the District Judge has indeed made rulings in excess of his jurisdiction, and those rulings are ultimately quashed, it may be appropriate to remit those matters back to him for a proper decision in accordance with law.

Having made my ruling I indicated that I was disposed in principle to grant the applicant leave to apply for the appropriate reliefs by way of judicial review. I said that I would also be disposed to entertaining an ancillary application from him for bail in the context of his judicial review proceedings. I offered to rise for a short period to enable junior Counsel to prepare the necessary Statement of Grounds and arrange for the appropriate reconstitution of Mr Byrnes grounding affidavit for the purposes of the matter proceeding as a judicial review. When this had been done I sat again for the purposes of finalising the Order granting leave with reference to the Statement of Grounds.

The Court was also asked by Senior Counsel for the Applicant to allow short service on the State for a bail application and I acceded to this and allowed a motion to be served for 11am on the 8th of January, 2009.