Neutral Citation Number: [2011] IEHC 395

THE HIGH COURT

2011 2112 SS

BETWEEN

DATIA TOIDZE (OTHERWISE ARABULI)

APPLICANT

AND

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 24th October, 2011

1. This is an application pursuant to Article 40 of the Constitution for the release of the applicant, Datia Toidze (otherwise David Arabuli), who is presently detained in Cloverhill Prison following his arrest pursuant to s. 5(2) of the Immigration Act 2003 ("the 2003 Act"). The applicant is a Georgian national. He was, as we shall presently see, arrested on the 3rd October, 2011, by Garda Paul Dunne, having entered the State from Northern Ireland and then subsequently having been refused leave to land. There is no doubt but that this application presents difficult issues of law against a rather unusual factual background.

2. The applicant originally entered the State in October, 2000 and unsuccessfully sought asylum. His original application for asylum was under an alias, Datia Toidze, but he also subsequently applied for asylum under this own name, David Arabuli. The Minister for Justice, Equality and Law Reform made an order in December, 2001 providing for the deportation of the applicant from the State. In the deportation order the applicant was described by both names, i.e. the real name and the alias. The applicant was required to present shortly thereafter to Letterkenny Garda Station, but when he did not do so on the appointed day, he was later classified as an evader.

3. It appears that the applicant somehow left the State and travelled to Iceland. In April, 2003 the Icelandic authorities returned him to Ireland under the provisions of the Dublin Convention. It appears that he had also made an application for asylum in Iceland, again using an entirely different alias. At all events the applicant has been physically resident in the State since his return from Iceland in April, 2003. In the meantime he has lived here with his Georgian wife – they got married here in 2009 – and they have had two children, both of whom were born in the State.

4. The circumstances giving rise to this present application under Article 40 began on the evening of the 25th September, 2011. It appears that the applicant and a friend of his, Mr. Gagloshvili, travelled from Dublin to Donegal with a view to buying a second hand motor vehicle. I should interpose here to say that Mr. Gagloshvili is another Georgian national who happens to be married to an Irish citizen and he also has permission to reside here. It would appear that both the applicant and Mr. Gagloshvili transited through Northern Ireland with a view to travelling to Donegal in order to purchase this vehicle. On the return journey, Mr. Gagloshvili, who was driving the car, re-entered Northern Ireland on his way back to Dublin.

5. While this may well have been by reason of a navigational error – as both Mr. Gagloshvili and the applicant claimed in evidence – it seems clear to me that they had no particular interest in entering Northern Ireland and that insofar as they were in Northern Ireland, it was simply for the purpose of transiting the most direct route from Donegal to Dublin. As they travelled through Northern Ireland, however, they were stopped by officers of the Police Service of Northern Ireland. An issue arose as to whether the newly purchased car had motor insurance and the PSNI also queried the immigration status of both Mr. Gagloshvili and the applicant. The process culminated in Mr. Gagloshvili appearing before a Magistrates Court in Northern Ireland where he was convicted and fined for the offence of driving without insurance. Both men were also detained in a detention centre in Larne while the authorities sought to ascertain their precise immigration status. Both Mr. Gagloshvili and the applicant indicated that they wanted to return to the State and the PSNI accordingly made arrangements for their delivery from Larne to the border on the morning of the 3rd October, 2011.

6. An application to revoke the deportation order under s. 3(11) of the Immigration Act 1999, was still outstanding at the date of his arrest. That application was refused by letter dated 18th October 2011. I propose now to consider the legal issues which arise for determination.

Whether the applicant was ordinarily resident in the State?

7. Section 3(9)(b) of the Immigration Act 1999 ("the 1999 Act") provides:-

> "A person who is ordinarily resident in the State and has been so resident for a period (whether partly before or partly after the passing of this Act or wholly after such passing) or not less than five years and is for the time being employed in the State or engaged in a business or the practice or profession in the State other than –
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> (i) a person who is served or is serving a term of imprisonment imposed on him or by court in the State, or
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> (ii) a person whose deportation order has been recommended by a court in the State before which such person was indicted for or charged with any crime or offence, shall not be deported from the State under this section unless three months' notice in writing of such deportation to be given by the Minister to such person."

8. Mr. Arabuli accepted in cross examination that he was not working or was otherwise employed, so the special notice requirement of s. 3(9)(b) does not apply to him.

9. Quite independently of those considerations, however, it must be doubted whether a person in the position of the applicant could ever be said to be "ordinarily resident" in the sense envisaged by this sub-section. In *Robertson v. Governor of the Dóchas Centre*

[2011] IECH 24, I had occasion to consider the position of the South African applicant who had lived and resided in the State since August, 2004 under her own name and pursuant to permission granted by the Minister pursuant to s. 5 of the Immigration Act 2004. Critically, however, that applicant had not disclosed that she had previously arrived in the State and had applied unsuccessfully under an alias for asylum. In my judgment I ventured to suggest that:-

> "When that application [for asylum] was rejected and she was made the subject of a deportation order, she evaded deportation by not presenting as required by law at Henry Street Garda Station in Limerick in November, 2002. She then entered the State in her own name in August, 2004 without disclosing the critical fact that she was the subject of a deportation order, albeit in the name of an alias which she had deceitfully provided. Her failure to make such disclosure is tantamount to entering the State through deception and disguise, as Murnaghan J. pointed out in *[The State (Goertz) v. Minister for Justice* [1948] I.R. 45]. The concept of "ordinary residence" involves an assessment of the character of that residence. Moreover, as Black J. noted in that case, the presumption against surplusage means that the word "ordinarily" was "intended to have, and must be given, some effective meaning". To my mind, in this statutory context, the phrase "ordinary residence" connotes a residency which is lawful, regular and *bona fide*. As *Goertz* itself illustrates, mere physical residence in the State is not in itself enough, since a residence which is irregular, covert, or unlawful is not an "ordinary residence" in this sense.
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> It should also be recalled that legislation must be understood and interpreted by references to certain well understood general principles of law, one of which is that a person cannot be allowed to profit by their own wrong. If Ms. Robertson's contention were to be accepted, it could mean that this Court would have to avert its eyes to this acknowledged deception and deceit and that she would thereby be allowed to claim the benefit of a statutory entitlement to which she is not justly entitled. It follows that I am coerced to find that Ms. Robertson was not ordinarily resident for the purpose of s. 3(9)(b) of the 1999 Act in the sense I have just indicated – indeed, it could be said that her residence was anything but ordinary, since, as we have just seen, it was grounded on a fundamental deceit."

10. I accept fully that the applicant was physically resident in this State from April, 2003 onwards. But it could not be said that his presence was lawful given that he was the subject matter of a deportation order. As Murray J. pointed out in *GAG v. Minister for Justice* [2003] 3 I.R. 445, following the termination of an application for asylum, such an applicant "had no lawful entitlement to remain physically in the State". Nor can it be said that the applicant's residence was regular and *bona fide*, since to hold otherwise would require this Court to ignore the fact that the applicant had engaged in a fundamental deceit by providing an alias to the immigration authorities of this State. In this regard, I should say that I accept the evidence of Det. Garda Tom Fallon, who is a consular liaison official with various embassies on behalf of the GNIB, that the applicant had refused to give any practical assistance to the GNIB when he had met with officials from the Georgian Embassy in London who had travelled here for the purpose of ascertaining his identity. It is plain, therefore, the applicant cannot satisfy the test which I ventured to articulate in *Robertson* and that his physical presence in the State does not satisfy the requirement of "ordinary residence". It follows, therefore, that the special notice requirements contained in s. 3(9)(b) of the 1999 Act do not apply to the applicant.

The arrest of the applicant on 3rd October 2011

11. When the applicant and his travelling companion, Mr. Gagloshvili, were released from detention in Northern Ireland, they indicated that they wanted to enter this State. Following contacts between the PSNI and the Garda National Immigration Bureau, arrangement were made for the delivery of the applicant and his companion to the border, where approximately 100 metres on this side of the border they were delivered into the custody of Garda Paul Dunne at a little used car park. Garda Dunne is an immigration officer attached to Dundalk Garda Station.

12. It is clear from the evidence that from that point onwards neither the applicant nor Mr.Gagloshvili were free agents. It is true that the applicant was not formally arrested at this point, but he and his companion were nonetheless effectively required by Garda Dunne to travel with him in a Garda van to Dundalk Garda Station so that the immigration formalities could be processed. It is not in dispute that they were under restraint at this point and that they were not at liberty.

13. The trip to Dundalk lasted approximately 10 minutes. At some point thereafter Garda Dunne became aware that the applicant was the subject of a deportation order, that he had left the State and that he was seeking unlawfully to re-enter the State. (Garda Dunne acknowledged in evidence that for some reason the information on the computer screen only displayed details up until 2009 and that he was not aware of the fact that the applicant had regularly and faithfully signed on at GNIB - albeit under the alias of Datia Toidze - from 2003 until September of this year). At that point the applicant was refused leave to land in the State as the person who was not the holder of a valid Irish visa and nor was in possession of a valid passport or other equivalent document establishing his identity or nationality. He was given a written notification of the refusal and was then detained pursuant to s. 5(2) of the 2003 Act pending his removal from the State.

14. The principal complaint advanced by Mr.O'Halloran on behalf of the applicant was that there was no basis for the applicant's detention upon his arrival at the border and, furthermore, that the conveyance of the applicant to Dundalk Garda Station under these circumstances was wholly unlawful and a violation of his constitutional right to liberty. It has, of course, been clear for a very long time that there is no half way house between restraint and arrest: see, e.g., *Dunne v. Clinton* [1930] I.R. 366, per Hanna J. and *The People v. O'Loughlin* [1979] I.R. 85, 91, per O'Higgins C.J. In most circumstances, therefore, the detention of the applicant and his conveyance to a Garda station would have to be regarded as a wholly unlawful act in the absence of a formal arrest which was authorised by law.

15. The situation here, however, is different and unusual, as the position of a person seeking permission for leave to land in the State is somewhat different to that of the rest of the population (whether citizens or non-citizens) residing in or otherwise visiting the State. While it is true that the border between Ireland and Northern Ireland is an international frontier, the modern reality is that, from an immigration perspective, given the operation of the common travel area it is really little more than a line in the map for the majority of those who cross it. The immigration facilities cannot, for instance, be compared to those which obtain at a major transport hub such as Dublin Airport. As Garda Dunne explained, he could not really process the leave to land application in the car park and that it would be necessary for Mr.Arabuli and Mr.Gagloshvili to travel under restraint to Dundalk Garda Station for this purpose.

16. In truth, therefore, the position here is really little different from that which obtains in the case of a non-national presenting at Dublin Airport who has been required to accompany the immigration officer to a room or office so that his identity and general credentials can be examined. In both instances, the non-nationals are under a degree of restraint while they pass through the limbo of a form of transit zone while they await a decision as to whether they will actually be allowed to enter the State.

17. This is reflected in s. 4(5)(a) of the Immigration Act 2004 ("the 2004 Act") which provides that:-

> "An immigration officer may, on behalf of the Minister, examine a non-national arriving in the State otherwise than by sea or air (referred to subsequently in this subsection as "a non-national to whom this subsection applies") for the purpose of determining whether he or she should be given a permission and the provisions of subsections (3), (4) and (6) shall apply with any necessary modifications in the case of a person so examined as they apply in the case of a person coming by sea or air from a place outside the State."

18. In my view, the word "examine" in this context should be understood as empowering the immigration officer to take such steps as are reasonable and appropriate to ensure the proper processing of an applicant seeking leave to land. In the context, it must be understood as empowering the immigration officer to detain or otherwise restrain the movements of such an applicant insofar as - *but only insofar as* - it is objectively necessary to do so to enable the proper processing of that person for immigration purposes.

19. Under ordinary circumstances, the process of examination should be measured in at most minutes. It is true that in the present case the applicant had to be physically transported to a Garda station for this purpose so that this could occur, but I consider that, having regard to the special circumstances of this case, it cannot be said that this was not part and parcel of the "examination" of the applicant. In view of the nationality of the applicant, the fact that he required to be in possession of both a passport and a visa and his general immigration history, he could not realistically have been processed and given leave to land at the actual border. It follows that the conveyance of the applicant to Dundalk Garda Station formed part of the "examination" of this applicant in the manner permitted and contemplated by s. 4(5) of the 2004 Act. The detention of the applicant at the border crossing pending the processing of the leave to land application was accordingly lawful.

20. I am also satisfied on the evidence that the applicant was informed of the reasons for his detention. The applicant produced in evidence a copy of the refusal of leave to land document which he had been handed by Garda Dunne and I accept the evidence of Garda Dunne that the applicant was informed that he was being detained on foot of that refusal.

21. What is of concern is that as the applicant's mobile telephone was taken from him, he was afforded no effective opportunity either by the Garda authorities or the prison authorities to ensure that the applicant could contact his family and his legal advisers. It appears that this opportunity was not afforded to him until some two days into his detention. While this state of affairs cannot be regarded as satisfactory, I am satisfied that it came about either by oversight or inadvertence. At all events, there was no deliberate plan to keep the applicant incommunicado. I do suggest, however, that the prison authorities should take steps to ensure that persons detained for immigration purposes are given an effective opportunity to contact their next of kin and their legal advisers as soon as is reasonable following their reception in prison.

The outstanding s. 3(11) application

22. It is true that, at the time the applicant was arrested, there was an outstanding application pursuant to s. 3(11) of the 1999 Act whereby the applicant had sought to revoke the deportation order. This does not *in itself*, however, mean that there was not a concluded intention to deport the applicant within the requisite time period of eight weeks thereafter. The present case is thus very different from *BFO v. Governor of the Dochas Centre* [2005] 2 I.R. 1.

23. In that case the applicant's case was under consideration by the Minister following the birth of her (Irish citizen) son some three weeks earlier. It is difficult to avoid the conclusion that the applicant had been detained on a quasi-preventative basis pending the outcome of that decision by the Minister. It was for that reason (among others) that Finlay Geoghegan J. held that the continued detention was unlawful: see [2005] 2 I.R. 1 at 15-16.

24. The present case is a very different one. While a delay of some almost ten years in giving effect to a deportation order is a matter which might, in some circumstances, render it effectively unenforceable, it has to be recalled that the applicant had consistently frustrated the enforcement of that order by reason of his own deception, even if - using an alias - he did regularly attend GNIB for the purpose of signing on. Further proof of this is supplied by the fact that the applicant instituted these proceedings in that false name and gave evidence pursuant to that alias until cross-examined on this point by Ms. McGrath for the Minister, at which point he admitted his true name.

25. Unlike *BFO*, therefore, it cannot be said that there is not a concluded intention to deport the applicant. Nor can the case be compared with my decision in *Om v. Governor of Cloverhill Prison* [2011] IEHC 341, a case where I held on the facts that there was no real likelihood that the authorities would be able to deport the applicant within the remainder of the statutory period. In that case, the applicant claimed to be Liberian, but the Liberian Embassy officials who interviewed him rejected that claim. In view of that fact and the complete uncertainty as to his origins - assuming that he was not Liberian - I concluded that there was no real prospect that the applicant could be deported within the statutory time period. It was on that basis that I directed his release.

26. By contrast, the obstacle which stood in the way of the deportation of the applicant in the present case - the unwillingness of the Georgian Embassy to issue a *laissez passer* in the absence of appropriate evidence as to the applicant's identity - has now been effectively resolved. It is thus now clear, for example, that the applicant is in fact Mr. Abulia and not Mr. Toidze and that a Georgian passport actually issued to him in his real name in March, 2009. In these circumstances, there seems no reason why the Georgian authorities would not be willing to receive him.

27. For those reasons, I am of the view that there was and is a settled intention to deport the applicant and that this can be achieved within the remainder of the eight week time frame permitted by s. 5(6)(a) of the 1999 Act (as amended).

Conclusions

28. In arriving at this conclusion, it is impossible not to feel considerable personal sympathy for the applicant's wife and children who are, to a considerable extent, the innocent victims of these events. They have made their lives in Ireland on the basis that Mr. Abuli's deportation order was unlikely to be enforced. However, I cannot allow personal sympathy for their personal circumstances to cloud the fundamental question of whether the applicant is in lawful detention.

29. In these circumstances I must hold that the applicant's detention is lawful and refuse this application under Article 40.4.2 of the Constitution.