THE HIGH COURT

[RECORD NO. 2018 6 SSP]

IN THE MATTER OF THE CONSTITUTION

AND

IN THE MATTER OF AN APPLICATION FOR HABEAS CORPUS AND/OR IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2° OF THE CONSTITUTION

BY

PREMIER SIPHO MTHETHWA

AT PRESENT IN CUSTODY IN LIMERICK PRISON

JUDGMENT of Mr. Justice Barniville delivered on the 22nd day of May, 2018

1. The applicant is at present in custody in Limerick Prison having apparently been arrested on foot of a deportation order made by the Minister for Justice, Equality and Law Reform (the "Minister").

2. The applicant wishes to apply for an enquiry into the legality of his detention in Limerick Prison pursuant to Article 40.4.2° of the Constitution and/or for an order of habeas corpus. He is not legally represented.

3. The applicant relies in support of his application on a signed but unsworn form of affidavit which is undated (the "statement"). The applicant's statement was forwarded by the General Office of Limerick Prison on 2 May 2018 and was received by the Registrar of the High Court on 11 May 2018.

4. In the statement, the applicant states that he was arrested at his home in Tralee, Co. Kerry on 30 April 2018 and was brought to Limerick Prison "*for deportation back to South Africa*". He states that his wife and four children (two of whom are Irish citizens) are living in Ireland.

5. In his statement, the applicant puts forward a number of reasons as to why he says that his detention is unlawful as a result of which he should be entitled to an order of habeas corpus or an enquiry pursuant to Article 40.4 of the Constitution. He makes the following points:

> • He states that he came to Ireland as an asylum seeker in 1999 and that his wife joined him in Ireland in 2000. His stepdaughter and son came to Ireland to join the applicant and his wife in 2003. They are aged 26 and 25 respectively.
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> • The applicant's eldest daughter was born in Ireland in 2000. Another daughter was born in Ireland in 2005. Both are Irish citizens.
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> • The applicant and his wife have been working in Ireland since 2001 when the applicant and his wife obtained permanent residence permits from the Garda National Immigration Bureau (GNIB). The applicant worked as a kitchen maintenance worker in a hotel in Killarney from 2002 until 2010. The applicant's wife qualified as a healthcare assistant and has been working in that capacity since then. She works in a care home in Listowel, Co. Kerry.
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> • The applicant was convicted in 2010 of an offence or offences arising from the possession of cannabis resin. The applicant received a prison sentence of seven years. He states that due to his good behaviour while in prison, he was released after four and a half years in custody.
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> • The applicant states that while he was in prison his residence permit expired. Following his release from prison (the date of which is not stated but appears to have been some time in 2015) the Minister made a deportation order in respect of the applicant. The applicant does not specify the date of the deportation order but I infer that it was some time in 2015. The applicant states that the deportation order was made while the applicant was undertaking community service following his early release from prison. The applicant states that the same Minister who made the deportation order had granted him early release from prison to undertake community work.
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> • The applicant states that his eldest daughter is seventeen years of age and has just been admitted to the first year of "*Cork School of Commerce*". The applicant's youngest daughter is in her first year of secondary school in Tralee.
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> • The applicant asserts that removing or deporting him from Ireland back to South Africa "*would be a very big problem not just for [him] alone but for [his] whole family*" and in particular for his daughter who he states is "pursuing a career in nursing" and that it "will be difficult for [his] wife alone" to support his daughter in college without his assistance.
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> • The applicant appeals to the court to intervene "*to stop and revoke this deportation order*". He states that as a human being he deserves a "*second chance in life*" and that he will "*never disappoint*" the court if his application is granted.

6. As the applicant is a detained person he is entitled to apply for an enquiry under Article 40.4 of the Constitution. However, he is not entitled to launch a collateral attack on the deportation order by means of the Article 40 procedure. See, for example, *M.A. (Pakistan) v. The Governor of Cloverhill Prison* [2018] IEHC 95 (Humphreys J.).

7. The applicant has not provided a copy of the deportation order with his application. Nor has he specified the date on which it was made. However, as noted above, I infer from what the applicant states that it was probably made some time in 2015. It appears that the detention order has not been successfully challenged by way of an application for judicial review. There is nothing in the applicant's statement to indicate any legal ground on which it could be said that the detention order and/or the applicant's arrest and

detention on foot of it, are unlawful. Nor is there anything in the statement provided by the applicant to indicate that there has been any fundamental denial of justice in relation to the applicant's detention (see: the decisions of the Supreme Court in *F.X. v. Clinical Director of the Central Mental Hospital* [2014] IESC 1 and *Ryan v. Governor of Midlands Prison* [2014] IESC 54.)

8. While it is not clear from the applicant's statement, I infer that the deportation order was made by the Minister pursuant to s. 3 of the Immigration Act, 1999 (as amended) (the "1999 Act"). One of the grounds on which a deportation order may be made in respect of a non-national (such as the applicant) is where the person in question has served, or is serving, a term of imprisonment imposed on him by a court in this State (s. 3(2)(a) of the 1999 Act). Certain statutory procedures must be complied with in respect of the making of a deportation order. There is no suggestion in the statement provided by the applicant that those procedures were not complied with.

9. The matters to which the Minister is obliged to have regard in determining whether to make a deportation order in relation to a person under s. 3(6) of the 1999 Act are: -

> "(a) the age of the person;
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> (b) the duration of residence in the State of the person;
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> (c) the family and domestic circumstances of the person;
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> (d) the nature of the person's connection with the State, if any;
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> (e) the employment (including self-employment) record of the person;
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> (f) the employment (including self-employment) prospects of the person;
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> (g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
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> (h) humanitarian considerations;
>
> (i) any representations duly made by or on behalf of the person;
>
> (j) the common good;
>
> and
>
> (k) considerations of national security and public policy so far as they appear or are known to the Minister"

10. The Minister would, therefore, have been obliged to have regard to the applicant's family and domestic circumstances as well as his employment and the fact of his criminal conviction and prison sentence in determining whether to make the deportation order. There is no suggestion in the statement provided by the applicant that the Minister did not have regard to these matters prior to making the order. Nor, as noted earlier, does it appear that the applicant has ever challenged, or in any event, successfully challenged, the deportation order.

11. A deportation order cannot be questioned otherwise than by way of an application for judicial review under O. 84 of the Rules of the Superior Courts having regard to the provisions of s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 (as amended) (the "2000 Act"). Such a challenge must be made within the period of 28 days under s. 5 of the 2000 Act. Assuming the order to have been made some time in 2015, that time has long since passed. Further, the Supreme Court held in *Rachki v. Governor of Cloverhill Prison* (Unreported, Supreme Court, *Ex Tempore*, 5 December 2011) that it was not open to an applicant to challenge a refusal to give a residence card in an indirect fashion using Article 40.4.2° of the Constitution. The application in that case was dismissed on that basis. (See also: *Igunma v. Governor of Wheatfield Prison & Ors* [2014] IEHC 218 (Hogan J.) and *K.P. v. Minister for Justice and Equality* [2017] IEHC 95 (Humphreys J.)).

12. In my view, the applicant is not entitled to challenge the deportation order indirectly by using the Article 40.4 procedure or by way of an application for habeas corpus. Once the deportation order is valid (and not successfully challenged by means of an application for judicial review brought within the statutory time period), the person against whom a deportation order has been made may be arrested without warrant and detained in a "*prescribed place*" in the circumstances provided for in s. 5 of the 1999 Act. Such a person may be arrested by an immigration officer or a member of An Garda Siochána without warrant and be detained where the officer or member:

> "with reasonable cause, suspects that a person against whom a deportation order is in force –
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> (a) has failed to leave the State within the time specified in the order
>
> (b) has failed to comply with any other provision of the order …"
>
> (s. 5(1) of the 1999 Act).

13. A person so arrested may be taken to and detained, pursuant to s. 5(3) of the 1999 Act in a "*prescribed place*" (s. 5(3)(a) of the 1999 Act). Limerick Prison is such a "*prescribed place*" for the purposes of s. 5 of the 1999 Act, pursuant to Regulation 5 of the Immigration Act, 1999 (Deportation) Regulations, 2005 (S.I. no 55 of 2005) as amended by the Immigration Act, 1999 (Deportation) Regulations 2016 (S.I. no 134 of 2016).

14. The statement provided by the applicant does not put forward any basis on which the legality of his arrest and detention in Limerick Prison can be called into question.

15. Insofar as the applicant seeks to advance the argument that the fact that he was released early from prison and required to undertake community work is inconsistent with a decision by the Minister to make a deportation order, there is no legal basis for that argument. The mere fact that the applicant was released early from prison in no way precludes the Minister from exercising the statutory powers contained in the 1999 Act. Indeed, one of the matters to which the Minister would be required to have regard in

deciding whether to make a deportation order was the fact of the applicant's criminal conviction (s.3(6)(g) of the 1999 Act).

16. Nor do the applicant's personal and family circumstances provide any basis for challenging the legality of his detention in Limerick Prison. The applicant's family and domestic circumstances as well as his employment and other matters concerning his character and conduct within the State (such as his conviction) would already have had to have been taken into account by the Minister in considering whether to make the deportation order (s.3(6)(c), (d), (e), (f) and (g) of the 1999 Act.) There is no suggestion in the material furnished by the applicant that they were not.

17. In all these circumstances, I am not satisfied that there is any basis on which to direct an enquiry pursuant to Article 40.4 of the Constitution or to make a conditional order of *habeas corpus* pursuant to O. 84 of the Rules of the Superior Courts.

18. It would be open to me to consider the applicant's application as an application for leave to seek judicial review or at least to invite the applicant to consider whether he wished to convert his application for an enquiry pursuant to Article 40.4 of the Constitution into an application for leave to seek judicial review. However, I am not prepared to treat the applicant's application as an application for leave to seek judicial review or to invite the applicant to convert his application into an application for leave to seek judicial review as I am not satisfied that the applicant has advanced any basis for challenging either the validity of the detention order on foot of which he was arrested and is detained or the legality of his detention consequent upon the making of that deportation order.

19. For these reasons, I refuse the applicant's application.