Neutral Citation: [2017] IEHC 610

THE HIGH COURT

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION

[2017 No. 1065 SS]

BETWEEN

J.A. (CAMEROON)

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

AND

THE ATTORNEY GENERAL

NOTICE PARTY

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 20th day of October, 2017

1. This case rises a number of constitutional issues of considerable importance, the most important perhaps being whether there are circumstances in which an applicant can challenge a statute which has previously been upheld by the Supreme Court at Bill stage.

2. By agreement the hearing was spilt into two parts. Most of the relevant facts have been outlined in my judgment on the first leg of the proceedings, *J.A. v. Governor of Cloverhill Prison* (No. 1) (25th September, 2017).

3. The applicant is a national of Cameroon and a failed asylum seeker, who is the subject of a deportation order on the date of 9th December, 2010. The applicant did not leave the state as required and failed to present to the Garda National Immigration Bureau (GNIB) on 11th January, 2011. He evaded deportation until 15th April, 2014. In the meantime he applied to re-enter the protection process, which application was refused on 7th November, 2011 and subsequently he applied to revoke the deportation order under s. 3(11) of the Immigration Act 1999 on 8th September, 2014. That application was refused on 8th September, 2016. More recently he lodged a further application for permission to re-enter the protection process under s. 22 of the International Projection Act 2015 on 13th September, 2017. That application has been refused by decision dated 28th September, 2017. He has also applied to revoke the deportation order yet again on the 7th September, 2017. In the course of the earlier hearing D/Sergeant Jonathan O'Brien submitted an affidavit and gave evidence. D/ Sergeant O'Brien was responsible for the enforcement of the deportation order and stated that the applicant presented at the GNIB on 13th September, 2017 when he was informed that he was due to travel on the following day and was directed to present at Balseskin Reception Centre for the purpose of that travel. The applicant did so present himself, but when asked to produce his Cameroonian passport, failed to reply. The applicant stated he was not going to Dublin airport and that he was not getting on a plane. As I will come to later, such conduct constitutes obstruction of the process of deportation in a manner that is an offence under s. 8 of the Immigration Act 1999.

4. D/Sergeant O'Brien confirmed that on the way to the Garda vehicle the applicant spoke with his solicitor by mobile phone and then refused to get into the vehicle for the purposes of this travel to the airport. That is also an offence under s. 8. D/Sergeant Jonathan O'Brien informed the applicant that if he did not cooperate with arrangements for his deportation he would be detained on foot of the deportation order to facilitate an escorted flight to Cameroon. The applicant again stated that he would not get on a plane and once more I would comment that that again is an offence under s. 8. D/Sergeant O'Brien gave evidence that the applicant was conveyed to Cloverhill prison, where he remains detained under D/Sergeant O'Brien's warrant of dentition. He also gave evidence of a continuing intention to deport the applicant, evidence which I upheld the first leg of this application. I note that the warrant of detention is headed as such and thus corrects the difficulty to which I drew attention in *Sharma v. Member in Charge of Store Street Garda Station* [2016] IEHC 611 where the instrument ultimately produced described itself (incorrectly in my view) as a warrant for "*arrest and dentition*", and I am glad that this difficulty has been corrected.

5. I have heard helpful submissions in this second module of the hearing from Ms. Rosario Boyle S.C (with Mr. Anthony Lowry B.L.) for the applicant and from Ms. Sara Moorhead (with Ms. Sinéad McGrath B.L.) for the respondent and for the Attorney General as notice party.

Can the applicant bring a constitutional challenge to s. 5 of the Immigration Act 1999 given that it was upheld by the Supreme Court at Bill stage?

6. Article 34.3.3° of the Constitution provides that "*No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article 26.*" It is the latter clause that applies here because only ss. 5 and 10 of the Bill for the Illegal Immigrants (Trafficking) Act 2000 were referred to the Supreme Court. That Bill, when enacted, amended s. 5 of the Immigration Act 1999 among other provisions.

7. The learned authors of *J.M. Kelly: The Irish Constitution* (4th edition), comment at p. 914. that "*Another interesting question which does not yet appear to have surfaced is whether the rule contained in [Article 34.3.3°] continues to have application in the case of legislation which has been previously upheld under an Article 26 reference, but which has been more latterly amended by later legislation*". The question now falls for determination here. The learned authors go on to state that, referring to provisions repealed and substituted in legislation cleared under Article 26, "*First principles strongly suggests that these new added provisions do not enjoy the benefit of immunity from constitutional challenge*". The learned authors also comment that "*No attempt seems ever to have been made to circumvent the rule contained in th[e] subsection*" (p. 912), and to that extent the present application is a constitutional first.

8. I would respect agree with Hogan J. and Professor Whyte in relation to their suggestion that first principles militate against a broad interpretation of the provision. The basic point is that the Constitution is a living instrument. In *A. v. Governor of Arbour Hill Prison* [2006] IESC 45, Denham J. as she then was, said that "*… a law which has been applied as a valid law for many years may be*

declared to be null and void. This power of the Superior Courts is exercised in the context that neither the law nor the Constitution is frozen in 1937. The Constitution is a living instrument. Concepts are before the courts today in forms not envisaged in 1937. Principles and rights have developed over the last seventy years, from roots in national society, the European Community, and international documents." Indeed the ECHR itself is also a living instrument (see *Tyrer v. United Kingdom* (Application No. 5856/72) 25th April 1978, Series A no. 26 and subsequent jurisprudence). Were matters otherwise the Constitution would rapidly lose touch with society and would become a transient and impermanent thing. Its status as a durable framework for national society is greatly dependent on the existence of flexible modes of interpretation and contemporary readings of the Constitution so that it always speaks in the present tense and always speaks to the present living society. No one generation, even that of 1937, has all of the answers. Even Supreme Court decisions can be viewed differently by a later Supreme Court.

9. In the U.S. context, Posner J. put it with his usual helpful directness in an interview for slate.com on 24th June, 2016: "*Eighteenth-century guys, however smart, could not foresee the culture, technology, etc., of the 21st century. Which means that the original Constitution, the Bill of Rights, and the post–Civil War amendments (including the 14th), do not speak to today … The Supreme Court treats the Constitution like it is authorizing the court to create a common law of constitutional law, based on current concerns, not what those 18th-century guys were worrying about. In short, let's not let the dead bury the living."* And in a very insightful piece on this issue published on 21st March, 2017 in the perhaps unlikely context of cosmopolitan.com, attorney Jill Filipovic commented that "*A Constitution that doesn't reflect changing norms and realities is a Constitution that would eventually prove itself ineffectual and irrelevant. Had the framers of the Constitution created a rigid, dead document, the American project may very well have failed. The judicial system is one crucial piece in our balance of powers, and if it's a neutered body only capable of addressing the country like it's still 1789 and we live in a country of farmers and slaveholders, it will simply be incapable of carrying out its role checking and balancing the modernized legislative and executive branches*."

10. Constitutional law cannot be frozen arbitrarily for all time as at the date of a particular Bill being considered under Article 26. Article 34.3.3° must be construed narrowly and on that basis does not apply where either the law in question or a relevant provision of the law has been substituted by later legislation. Section 5 in its entirely has been substituted by s. 78 of the Act of 2015 and thus s. 5 in its entirety is not immune from challenge now, even in respect of challenges that were made and failed in the Article 26 reference. That immunity does not apply in such a case as a matter of principle; but quite obviously, in respect of a challenge that has previously been rejected, an applicant faces a certain uphill struggle on the merits (if for no other reason than that the Supreme Court decision will be binding on the High Court). But I am dealing here with the threshold question of whether such a challenge can be brought at all. More broadly it seems to me that an applicant can challenge a provision that was upheld at Bill stage under Article 26 if the law in question has been amended in a relevant respect, even if it has not been replaced outright. Likewise the immunity does not apply if the Constitution has since been amended and if the argument as to unconstitutionality can be connected in some way to the amended provision. (I would add that even if the immunity does apply, that does not inhibit a later court in addressing the *interpretation* as opposed to the validity of the law – for example by reading it as impliedly applicable only on factual premises that obtained on enactment and thus as inapplicable if societal changes make its continued application incongruous or violative of contemporary understandings.) Ms. Boyle in submissions appeared to touch briefly on the broader issues including as to whether the immunity rule in Article 34.3.3° is compatible with the ECHR – in essence with the right to an effective remedy. That seems to me to be a matter for direct application to Strasbourg or for academic debate because it is evidently not something that can be entered into by an Irish Court or (as with any complaint arising from the text of the Constitution itself) for which any domestic remedy could possibly exist.

Is s. 5 unconstitutional having regard to *Damache*?

11. The broad argument under this heading is that the provisions of s. 5 are unconstitutional in so far as they permit administrative detention rather than detention authorised either before or shortly after the fact by an independent judicial officer, or quasi-judicial officer. However a threshold difficulty is that the Supreme Court in the *Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 case held that the provisions concerning detention of a person subject to a deportation order meet the requirements to the Constitution (at p. 408) and that "*there would appear to be adequate safeguards*" (p. 412) in relation to the period of 8 weeks' detention. It seems to me that the applicant's main compliant under this heading is at least impliedly rejected by the Supreme Court, but if I am wrong about that I will consider the merits of the point.

12. The issue is whether in failing to provide for an independent decision maker, and a juridical-type decision, and because the detaining member of the Garda Síochána does not need to go to an independent person to ascertain whether the detention would be proportionate, s. 5(1), (3), (9) and (10) of the Immigration Act 1999 is unconstitutional or alternatively that for similar reasons the Immigration Act 1999 (Deportation) Regulations 2005 are *ultra vires* s. 7 of the Act of 1999. The route to getting to the argument of unconstitutionality and *ultra vires* is the novel and inventive submission that the doctrine in *Damache v. D.P.P.* [2012] 2 I.R. 266 regarding independent oversight of a search warrant should be extended to apply to arrests.

13. The doctrine that the issue of a search warrant should be authorised by an independent person is steeped in legal history. *Damache* is the latest manifestation of that theory but it is one that goes back many centuries. For example, the Fourth Amendment to the U.S. Constitution has been held to require a judicial warrant subject, of course, to numerous exceptions such as exigent circumstances, hot pursuit, plain view, vehicle searches, border searches and searches incidental to a lawful arrest and I will come back to that. The need for a search without warrant in "*urgent situations or if immediate action is needed and as a last resort*" was acknowledged in submissions made in *Damache* noted at p. 274.

14. It has along been recognised that a search incidental to an arrest without warrant does not require a warrant, still less a judicial-type warrant. That necessarily implies an acknowledgment that an arrest can take place without a warrant and *a fortiori* without a warrant issued by an independent officeholder.

15. Ms. Boyle says that because the right to personal liberty is also a right guaranteed by the Constitution, there has to be a judicial determination of that issue as applies in relation to interference with the right to a dwelling. On that deceptively simple logic, any interference whatsoever with any right guaranteed by the Constitution would need prior judicial determination. The argument does not need any major heave to topple it; it collapses into *reductio ad absurdum* on even a preliminary examination. First of all, a search is not procedurally the same thing as arrest. A search produces fruits there and then. Arrest may be for one of a number of purposes but most of them involve bringing the person before an independent forum which can determine whether the detention continues thereafter.

16. Unbroken centuries of common law in all jurisdictions deriving from English law have allowed arrest without warrant, see for example *U.S. v. Robinson 414 US 218 (1973)* citing *Dillon v. O'Brien and Davis* (1887) 16 Cox C.C. 245.

17. Ultimately, Ms. Boyle argued that even if there did not have to be a *Damache*-style independent intervention before the arrest, the person arrested under s. 5 ought to be brought before an independent adjudicator as soon as practicable after the arrest. That

argument depended on a contention that immigration detention was a form of preventative detention.

18. Hogan J. in *Li v. Governor of Cloverhill Prison* [2012] 2 I.R. 400, held that the power to arrest and detain an asylum applicant is a form of "*preventative civil detention"* which must be viewed as an exceptional measure. That case unusually related to detention of an asylum application rather than detention for the purposes of deportation. Keane C.J. in the *Illegal Immigrants (Trafficking) Bill* case had said at p. 404 that "*the powers of detention are for the purpose of ensuring deportation*" and at p. 409 that "*detention under the Immigration Act 1999 if amended as proposed may in fact have the effect of preventing the commission of a crime but that it not its purpose, its purpose is to secure the implementation of the deportation order*". Thus the Supreme Court judgment draws a clear distinction between preventative detention and immigration detention.

19. That is dealt with by Hogan J. as follows at p. 406 of *Li* "*While preventative detention is not excluded on an ex ante basis, respect for these fundamental norms means that the necessity for any such detention must be compelling. This seems necessarily implicit in the comments of Keane C.J. in the* Illegal Immigrants (Trafficking) Bill 1999 *[2000] 2 I.R. 360 at pp. 408 to 412. "*

20. With the greatest respect that seems to me to be a mischaracterisation of what the Supreme Court said in the *Illegal Immigrants (Trafficking) Bill* decision. By drawing the clear distinction it did between preventative detention and immigration detention the Supreme Court seems to me to be saying that immigration detention is not preventative detention; whereas Hogan J. is saying that the Supreme Court implied that preventative detention is allowable only on compelling grounds and that this applies to immigration detention.

21. With respect I do not believe that these two positions are compatible. The logic of the Supreme Court decision seems to me to be inconsistent with Hogan J.'s reading of it in *Li*. The clear conclusion to my mind is that as a general principle immigration detention is not preventative detention. The same point was perceptively made by Professor Walsh in *Criminal Procedure* 2nd Ed. (Dublin, 2016) at para. 505 where he says in relation to s. 5 that "*the primary purpose of this immigration-related power is not to detain the person for the purposes of criminal proceedings but to facilitate arrangements for his removal from the State in accordance with the terms of the deportation order. Accordingly, the constitutional impediment to preventative detention in the criminal law, as expounded in* People (Attorney General) v. O'Callaghan *is not directly applicable*".

22. It is notable that the European Court of Human Rights in *Saadi* at para. 72 refers to the Grand Chamber decision in *Chahal v. the United Kingdom* (Application no. 22414/93, 15th November 1996) to the effect that it is not necessary to prove that immigration detention is for the purpose of preventing offending or fleeing, as long as the action was "*being taken with a view to deportation".* So well before the decision in *Li* it was well established that lawful immigration detention was not preventative and did not require an intensive examination of the conduct of the detainee.

23. That well established case law at Strasbourg level which was decided prior to *Li* but not mentioned in it, seems to me to be incompatible with the approach taken in *Li*. A further fundamental difficulty for the applicant under this heading is that art. 5 of the ECHR does not require time limits for detention pending deportation – see *J.N. v. the United Kingdom* (Application No. 370289/12, 19th May, 2016).

24. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the return directive), while not applicable to Ireland, is also illustrative. Article 15(2) provides that detention for deportation purposes may be authorised either by administrative or judicial authorities and art. 15(3) goes on to say that only in the case of prolonged detention is there a requirement for a review subject to the supervision of a judicial authority. If the detention is ordered by administrative authorities, there is of course the right to take proceedings by which the lawfulness of his detention may be tested, and indeed the mechanism for *habeas corpus* is always available to immigration detainees.

25. It is interesting that Hogan J. in *Li* disagreed with the judgment of Charleton J. in *Yong Ding v. Governor of Cloverhill Prison* (High Court, 13th November, 2012), a judgment which was not circulated, although it is quoted from in the *Li* judgment. Admittedly the disagreement is on a collateral aspect to that to which I am drawing attention now. I might respectfully observe however that I could not accept the first of Hogan J.'s reasons for differing from Charleton J., namely that Charleton J.'s decision was delivered *ex tempore*. *Ex tempore* decisions are just as binding as reserved judgments and experience does not necessarily verify the hypothesis that they automatically make less sense. I outlined some features of the jurisprudence in relation to *ex tempore* decisions in *Walsh v. Walsh* [2017] IEHC 181, noting in para. 2 the observation in *Hadid v. Redpath* [2001] N.S.W.C.A. 416 at para. 45 *per* Heydon J.A. that it is "*a technique with which famous names can be associated*". There is no necessary connection between the depth of reasoning in a decision and whether it was delivered *ex tempore* or on a reserved basis. One can have a well-reasoned *ex tempore* that comes to a correct conclusion and a less well-reasoned reserved judgment that come to incorrect conclusions. One needs to look at substance rather than form.

26. The routine detention of asylum seekers and illegal immigrants may well be objectionable as Hogan J. commented in *Li* but that is not a reason to erect some sort of extraordinary or even unduly high barrier to the detention of such persons. If there is a continuing intention to deport and an absence of any insurmountable impediment to carrying out that removal within the period allowed by statute, that is a sufficient legal basis for the detention. Taking the return directive as a statement of European norms, it does not require the person to be taken as soon as possible to an independent authority: quite the reverse.

27. Ms. Boyle complains that her client was not informed of a right to take Article 40 proceedings but I was given the prisoners' information sheet which clearly draws attention to the right to contact a solicitor insofar as para. 2 requires that the prisoner nominate a solicitor for the purposes of his or her phone card. It is doubtful if the authorities are required to do more but in any event no harm has been done to her client as he has made such an application.

28. In the *Illegal Immigrants (Trafficking) Bill 1999* decision the Supreme Court cited with approval principles set out in *R. v. Durham Prison Ex p. Hardial Singh* [1984] 1 W.L.R. 704, a case which was later considered in *Lumba v. Home Secretary* [2012] 1 A.C. 245 (see para. 22 *per* Dyson J.S.C.). Those principles made clear that detention for deportation should be for the statutory purpose only and not for an unreasonable period.

29. As to the question of whether reasonable grounds exist to justify the initial arrest, that is not a live issue in the case having regard to my having accepted D/Sergeant O'Brien's evidence. Likewise on the question of whether the power to detain was exercised unnecessarily and indeed on the issue of whether deportation could be effected within a reasonable period given that I have accepted the continuing intention to deport.

30. I will deal later in this judgment with the question of the place and conditions of detention. The issue of any obstacles in the path

of the proposed deportation and the steps being taken to surmount them are not a live issue having regard to my acceptance of D/Sergeant O'Brien's evidence. The affect of the detention on the prisoner's family has to be viewed in the context of the fact that the applicant's wife and children are all in Cameroon. Whether the detention is appropriate in terms of a risk of absconding is not a live issue given that I have accepted D/Sergeant O'Brien's evidence and that the risk of non-presentation was a key factor in the decision to detain. Likewise, the question of whether there are less restrictive measures that would be appropriate.

Is there an absence of principles and policies from ss. 5 and 7 of the 1999 Act?
31. The argument is made that s. 7 fails to set out principles and policies for the making of regulations and that s. 5(9) and (10) fails to indicate to the District Court criteria for consideration of the legality of the detention. Reliance is placed on the doctrine requiring principles and policies as discussed in *Harvey v. Minister for Social Welfare* [1990] 2 I.R. 232, *Kennedy v. Law Society of Ireland (No. 3)* [2002] 2 I.R. 458, and *John Grace Fried Chicken Ltd. v. The Catering Joint Labour Committee* [2011] 3 I.R. 211.

32. As regards the argument that there are no criteria for the decision to detain in the first place it is clearly implied in the Act that this is for the purpose of detention. A complaint is made as to the passive voice in s. 5(1) that "*a person so arrested may be taken to a place referred to in subsection (3)*". The argument is that the section does not say who does the taking. It is further suggested that no principles and policies are set out regarding who does the detaining and it is suggested that this is unconstitutionally vague on a *King v. Attorney General* [1981] I.R. 233 basis.

33. This inventive argument is more or less scraping the bottom of the forensic barrel. It suggests that if the legislature ever dares to use the passive voice then uncertainty is created such that this sort of meritless argument can be launched. There is no unconstitutionality under this heading. The Oireachtas is not required to spell out everything (see e.g. *Bederev v. Ireland and the Attorney General,* [2016] IESC 34 *per* Charleton J. at para 25: "*Were the Oireachtas required to legislate for every aspect of a particular statutory scheme, it would quickly become enmired in details and in the task of precisely predicting future developments as opposed to legislating for existing trends which may change as to detail.*")

34. Clearly the person that does the conveying and detaining is a person with the expressed or implied authority of the arresting officer. Any member of An Garda Síochána can convey the arrested person to a prescribed place. Any member is deemed to be acting within the express or implied authority of any other for these purposes.

35. In any event, this argument does not arise in the facts because D/Sgt. O'Brien gave evidence that he delivered the applicant to Cloverhill Prison.

36. The further complaint is that the section allows the place to be prescribed but does not specify where any particular detention is to take place, what the conditions are to be at that place and what safeguards to be put in place for any detained person. There is no element of unconstitutional delegated legislation here. We are talking about an administrative function of designating a prescribed place. Clearly that means a place that the Minister considers suitable for the purposes of the Act having regard to all the relevant statutory provisions. There is no obligation to articulate in minute detail in primary legislation issues such as what the conditions and safeguards are to be. It would be contrary to public policy and in particular, the requirement that systems must be workable and flexible not to allow reasonable latitude for statutory instruments to be made spelling out these details or indeed for much of the details to be provided administratively, particularly given the reality that the legislative process is a lengthy and formal one and not without its inflexibilities.

37. A complaint is made in relation to the power of extension under s. 5(9) and (10). This applicant is not affected by those provisions and in my view has no *locus standi* to challenge the constitutionality of provisions which do not apply to him (see *Cahill v. Sutton* [1980] I.R. 269). The challenge is speculative because those provisions may never apply. Indeed, subs. (9) and (10) are not capable of applying to this applicant unless he is first released and then further detained. If I am wrong about that, it seems to me the possibility of an extension is perfectly reasonable and the principles and policies involved are those envisaged by the Act, particularly that it be for the purpose of detention.

38. A power to extend is prefigured to some extent in the decision of Clarke J. in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 at para. 3.9 where he discusses the question of whether such a provision should be made and what detailed provisions that could involve. I would perhaps be permitted the observation that it seems somewhat odd that the power to extend only applies to a second detention requiring the person to be released in the first instance. It is hard to see any logic to that being the case, no matter how much of a flight risk a particular applicant might be. It is not the function of the legislation to give an applicant a sporting chance.

39. The discussion on this issue at the hearing raised a question of whether an applicant could be released and rearrested at the prison gate. That does not seem to be an issue under subs. (9) which appears to envisage some period of liberty and failure to leave the State between the arrests; but it could be an issue under subs. (10) where release occurs on the expiry of the eight week period. Under those conditions, the section does not seem to me to preclude an immediate re-arrest at the prison gate.

40. Ms. Boyle complains that the provisions do not spell out whether the District Court should review the original detention. On general principles, such a review does not appear to be appropriate. The District Court proceeds on the assumption that the person is lawfully detained to begin with and the allegation that he or she is not lawfully detained is a matter for the High Court in Article 40 proceedings. The main issue for the District Court is whether there is a continuing intention to deport and if it is reasonably practicable to do so within a period that appears reasonable to that court.

41. The court will consider whether detention is proportionate and whether there is any less restrictive and equally effective mode of securing the person's attendance for the purpose of deportation. (See para. 68 of *Saadi v. U.K.* (Application No. 13229/03, European Court of Human Rights, 29th January, 2008).

Is it unconstitutional for the Minister to prescribe Cloverhill Prison as a place of detention?
42. The complaint is that s. 5 sub-ss.(3) and (7) of the Act are unconstitutional because the Minister is not entitled to prescribe Cloverhill Prison, or indeed any prison. The argument is that the Oireachtas would have assumed that the power to prescribe places would be exercised in an *East Donegal* type manner (see *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317). The contention is that it is unconstitutional to detain an immigration detainee in prison alongside persons who are charged with offences because, if the right to liberty is respected, any deprivation must be proportionate.

43. Reliance is placed on a number of international materials, in particular:

> (i). a report on Ireland, entitled *Ireland Immigration Detention Profile* by the Global Detention Project which notes that the Council of European Committee for the Prevention of Torture (CPT) has repeatedly urged the State to end the

practice of confining immigration detainees in prison;

(ii). a report of an Ireland visit by the CPT (Inf (2015) 38) which states that a prison by definition is not a suitable place for such detainee;

(iii). a subsequent letter from the CPT to the Department of Justice and Equality dated 18th March, 2015, requesting action in this regard within six months;

(iv). a fact sheet dated March, 2017 entitled *Immigration Detention* CPT/Inf(2017), 3, which states that "*a prison is by definition not a suitable place in which to detain someone who is neither suspected nor convicted of a criminal offence*".;

(v). advice from the UN Human Rights Committee in 2008, requesting the State to "*take immediate and effective measures to ensure that all persons detained for immigration related reasons are held in facilities specifically designed for this purpose*".;

(vi). UN Human Rights Committee concluding observations on Ireland 2008; and

(vii). a research report by Mark Kelly in November 2005, for the Irish Refugee Council, Irish Penal Reform Trust and Immigration Council of Ireland entitled *Immigration Related Detention in Ireland*, in which the author recommends at p. 56 that "*the practice of holding immigration detainees in prisons in Ireland to be brought to an end*".

44. There does seem to be implicit acknowledgment in the international materials that, at least, some prisoners may be suitable for prisons, for example, where there are issues relating to offending behaviour or security or public order issues. Having said that it may well be desirable that if deportees generally are to be held pending deportation that this might best be done in a standalone or separate facility. In some jurisdictions this may be offshore or technically on the airside of airports and on the external side of the national frontier.

45. Much of the material cited is of a policy nature or relates to recommendations rather than being embodied in binding instruments, still less binding instruments of universal application. The closest to a binding instrument is the return directive and the corresponding provisions of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (the reception directive) neither of which applied to Ireland but in any event both of which have numerous exceptions to the general preference for separate modes of detention.

46. It seems to me having regard to the nature of the material relied on, no clear basis has been made out to import any such right into the Constitution. Whether such a right arises under the ECHR I will consider at a later stage of this judgment.

Is it unlawful by reference to the European Convention on Human Rights Act 2003 to prescribe a prison as an appropriate place of detention?

47. The argument here is that it is a violation of art. 5(1)(f) of the ECHR if detention is arbitrary. Reliance is placed on *Saadi* at para. 74 that "*the place and conditions of detention should be appropriate bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives have fled from their own country*". The submission thus is that the Minister acted *ultra vires* the 2003 Act by prescribing a prison.

48. However there could be many circumstances where placing a person in prison is necessary, for example where there is a security risk or history of offending. Thus there seems no real problem in principle with including prisons within the instrument setting out prescribed places. The real complaint is the absence of any other appropriate place.

49. It is not being suggested that there is in fact such a place and that it is not been prescribed; rather the argument is that no such place has been constructed. As regards the suitability of Cloverhill Prison, while the CPT Country report 2014 said that "*prison managers and officers in the establishments visited by the delegation all agreed that they were not appropriately equipped or trained to look after immigration detainees*", whatever effect that statement might otherwise have had, it was not accepted by Governor Conroy in evidence when it was put to him. He said that prison management was in a position to manage detainees although they would prefer if such prisoners were accommodated in a separate area.

50. He said that an area within prison that was appropriate has been identified and the prison services are currently in a tendering process in that regard. There does appear to be some backstory to the provision of a separate detention facility in that the original plan was a separate facility in Thornton Hall. There was then discussion of provision in Dublin Airport and currently the focus appears to be on a separate section in Cloverhill Prison. In the light of *Saadi*, one might well pose the question as to whether detention of a compliant non-resisting deportee in a prison would be an appropriate place for such a person. It seems to me it may well be that to detain a complaint, non-resisting and cooperating person in a prison, someone who has complied at all stages with all reporting requirements, might well raise an issue under art. 5 of the ECHR.

51. I should hasten to emphasise though that, even if a particular detention did contravene art. 5, that does not necessarily carry with it a right to immediate release. It may be that a right to damages is a more appropriate relief and that release would be disproportionate. In any event such a situation does not arise here. Section 8 of the Immigration Act 1999 provides that a person against whom a deportation order has been made is prohibited from obstructing or hindering a person authorised by the Minister to deport such person from the State and is also positively required to cooperate in way necessary to facilitate his or her deportation. Section 8(2) provides that a person who contravenes the section shall be guilty of an offence. This applicant falls into that category. By informing the Gardaí that he would not cooperate with the planned removal he has put himself in the category of a person who is engaged in actions that amount to obstruction which also constitutes criminal offending, albeit that there is presumably no point in prosecuting a person under the circumstances such as these.

52. That obstructing and offending behaviour makes it, in my view, appropriate for art. 5 purposes that he should be detained in a prison. Thus no breach of art. 5 arises on the facts of this case. Even if counterfactually there was such a breach, it seems to me that damages would be the appropriate remedy and that immediate release from prison would be a disproportionate response.

Is s. 5 of the 1999 Act incompatible with the ECHR?

53. The fall-back suggestion was that s. 5 was incompatible with Convention provisions for the purposes of 2003 Act. However ECHR incompatibility is not illegality and so does not render the detention unlawful. The 2003 Act provides for a declaration of incompatibility in those circumstances rather than binding relief. That is not remedy that can be sought in Article 40 proceedings because the sole relief that can be granted in such proceedings is an order for the release of an applicant. Thus the applicant must

be left to any declaratory remedies by way of separate proceedings under the 2003 Act.

Is s. 5 unconstitutional because of a lack of safeguards?
54. Ms. Boyle submits that there should be various safeguards in the section as regards the basis on which the person should be detained, the factors to be taken into account, who should make the decisions and a requirement for an independent element. These submissions are basically a re-run of the points I have rejected above. They do not improve by being rebranded as questions of safeguards.

55. It is also submitted that s. 5(3) and (7) does not specify appropriate places or would require persons to be informed of their rights and specify that they have a right to legal advice, to contact the outside world and other protections. The fallacy of this argument is that any given statute does not have to spell out all possible safeguards. The right to legal advice for example arises under the Constitution; it does not need to be spelled out in any given Act permitting detention.

56. Complaint is made that the applicant does not have access to his mobile phone. It is of course a criminal offence to be in unauthorised possession of a mobile phone in prison (s. 36 of the Prisons Act 2007). The complaint seems to me to be an unstateable argument in the absence of a constitutional challenge to that provision. It would bring the administration of justice into disrepute if a prisoner were to be released on the grounds that he did not have access to a mobile phone.

Is the detention unlawful because the applicant's right to liberty has been infringed upon excessively?
57. The argument is that the right to liberty has been infringed upon to a greater extent than necessary. Reliance is placed on *The State (McDonagh) v. Frawley* [1978] I.R. 131 which refers to the principle that convicted prisoners are in a different position than persons who are not convicted.

58. That is certainly true but it does not mean that a person is in unlawful detention if they are not convicted and are nonetheless subject to a regime of custody in prison. Essentially this is a policy argument. It may well be desirable that immigration detainees be held in separate facilities, but failure to put such a policy in place does not render the detention unlawful. The evolving opinions of international committees have not yet attained the status of internationally-recognised binding principles reaching the level where there could be said to be a breach of some essential aspect of the right to personal liberty, still less to the level that would render the detention unlawful.

59. The argument is made that there was a lack of proportionality in detaining the applicant in prison, reliance being placed on *Holland v. Governor of Portlaoise Prison* [2004] 2 I.R. 573. *Holland* was a judicial review not a *habeas corpus* application, and there was no question that the disproportionate restriction in that case rendered the detention unlawful. It maybe that if particular elements of a particular detention regime in relation to a particular applicant are disproportionate there could be a remedy in judicial review but it does not follow that the detention itself is unlawful for the purposes of Article 40 any more than it could be said that the Prison Service restricting Mr. Holland's correspondence would have had the effect of making his detention unlawful. This argument does not arise here because the applicant's non-cooperation renders his detention in a prison proportionate.

Do the conditions in Cloverhill render the detention unlawful?
60. An affidavit was introduced by the applicant complaining of conditions currently provided in Cloverhill. I received a replying affidavit from Governor David Conroy and heard evidence from him. He is a Governor III in charge of Cloverhill, and having seeing him and heard him in the witness box I accept his evidence. He states that at present there are ten to twelve persons in Cloverhill Prison for immigration purposes and that this is a normal enough level.

61. The applicant averred in his second affidavit at para. 4 that he was not allowed to wear his own clothes. However the Governor stated in evidence that while the applicant was issued with prison clothes; he can wear his own clothes if he produces three sets to allow for changes. There is no difficulty if someone wants to bring in additional clothes. The applicant does have persons in the jurisdiction on his contact list – a partner, cousin and friend. It does not appear to me that there is any reason why this could not be done or indeed why he could not have brought clothes given that he was given prior notice of the requirement to present.

62. It was put to Governor Conroy that clothes could only be brought in after a four week period. That was not accepted and the applicant did not give evidence to substantiate that.

63. The applicant averred that he was allowed three phone calls a day and only one to his solicitor and averred that if the line was engaged he was unable to make a further call. Governor Conroy gave evidence that the system allows a connection and that if voicemail is reached the call can be terminated within 15 seconds and a replacement call can be made later in the day, so it would appear that the applicant's averments on that point are incorrect. Governor Conroy also said that if a person made a request for a second phone call to a solicitor the prison would certainly facilitate that. He gave evidence that it would be impractical and not workable to allow solicitors to phone in but that messages could be passed on and the applicant could telephone back. As regards a time limit on phone calls with solicitors it was said that there was limit due to the (presumably limited) amount of phones involved.

64. The applicant averred that he had to share a cell with a heavy smoker. The Governor said that he was not aware of any complaint made regarding sharing a cell but that when the option to move was put to the applicant he requested to remain in his existing cell. Many of the applicant's complaints thus fell away given Governor Conroy's evidence which I am accepting but in any event on the basis that the detention of this applicant in prison is in principle constitutional and lawful, the particular practical features or elements of his detention that he complains about are not such as to render the detention itself unlawful.

Order
65. As I am satisfied that the applicant is in lawful detention I will dismiss the proceedings.