

THE HIGH COURT
IN THE MATTER OF AN INQUIRY PURSUANT
TO ARTICLE 40.4 OF THE CONSTITUTION

[2013 No. 1965 SS]

BETWEEN

FATAI GANYIU

APPLICANT

AND

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 12th November, 2013

1. The applicant, Fatai Ganyiu, is a Nigerian national in respect of whom a deportation order has already been made by the Minister for Justice and Equality. In the last days of August 2013 Mr. Ganyiu was arrested and detained in the United Kingdom. He was then held by the UK Border Agency in various holding centres in the UK until arrangements were made for his return to Ireland under the provisions of the Dublin Regulation.

2. The applicant was accordingly flown for this purpose on a British Airways flight from Heathrow Airport to Dublin on the morning of 5th November, 2013. The aircraft arrived from London at 8.15am and parked in a holding bay at Terminal 1 at about 8.30am. As we shall presently see, the applicant was subsequently arrested and refused leave to land. He was then removed from Terminal 2 to Cloverhill Prison at approximately 1.30pm and he arrived at Cloverhill Prison at approximately 2.40pm later that afternoon. The issue which I have to consider is whether his detention in the interval between 8.30am and approximately 1.30pm was lawful.

3. The evidence given on behalf of the respondent may be summarised as follows. First, Sergeant Doyle gave evidence that he is attached to the Garda National Immigration Bureau at Dublin Airport and supervises immigration matters. He was aware that Mr. Ganyiu was scheduled to arrive in the State on the early morning British Airways flight and he instructed Det. Garda Murphy to meet that flight on its arrival in Terminal 1. Sergeant Doyle then gave evidence that Mr. Ganyiu was brought to his office in Terminal 2 where the latter's application was processed and he was formally refused leave to land at about 9.30am.

4. Sergeant Doyle had made arrangements to have Mr. Ganyiu taken from Dublin Airport to Cloverhill Prison and the appropriate Garda escort unit had been notified. Shortly after Sergeant Doyle had supervised the formal refusal of Mr. Ganyiu's leave to land, he was informed that the escort unit needed first to go back to Clontarf Garda Station in order to collect another person who was being deported and who was scheduled to leave on a 11.00am flight. It was then arranged that the unit would go first to Clontarf Garda Station and thereafter take Mr. Ganyiu to Cloverhill Prison. As it happens, however, as soon as the escort unit arrived back in Terminal 2 for this purpose at about 10.00am, it was then necessary for them to make an unexpected diversion to deal with an alleged shoplifting incident in a retail outlet at that terminal.

5. By reason, therefore, of this unexpected sequence of events, the escort unit only arrived back in Terminal 2 again at 1.20pm. The unit then immediately took Mr. Ganyiu and another individual (who had been quite separately arrived back into the State under the Dublin Regulation in the course of the morning) for Cloverhill Prison. The escort unit left at approximately 1.32pm.

6. Det. Garda Murphy gave evidence that he was also a member of the Garda National Immigration Bureau who was on duty that morning at Terminal 2. Detective Garda Murphy stated that he had been informed by Sergeant Doyle of the fact that Mr. Ganyiu was arriving in the State and he was directed to meet the British Airways aircraft as it arrived. He went up the steps to the aircraft and spoke to the British Airways flight attendants. They had directed Mr. Ganyiu not to leave the aircraft until all other passengers had alighted.

7. Det. Garda Murphy then introduced himself to Mr. Ganyiu and directed Mr. Ganyiu to accompany him. Det. Garda Murphy then drove Mr. Ganyiu in a van from Terminal 1 to Terminal 2. Upon his arrival at the immigration office in Terminal 2, Mr. Ganyiu was then processed and formally refused leave to land. Mr. Ganyiu was offered a sandwich and some water while the appropriate documentation was completed by Det. Garda Murphy. One further complicating fact was that the escort van which Det. Garda Murphy had used for the purpose of conveying Mr. Ganyiu from Terminal 1 to Terminal 2 was not sufficiently roadworthy for use on a public road for the journey from Terminal 2 to Cloverhill Prison and, accordingly, that escort van could not have been used for this purpose.

8. The first objection raised by counsel for Mr. Ganyiu, Mr. Humphreys S.C., is to the detention of the applicant for the period when he disembarked off the airplane until he was formally refused leave to land. The evidence established that the airplane parked at the stand at about 8.30 am and that Mr. Ganyiu was the last to leave the aircraft. One may assume, therefore, that the applicant was under effective restraint from the point where Detective Garda Murphy required him to accompany him, which was probably about 8.40am or thereabouts, since, as we have already noted, Mr. Ganyiu was the last to leave the aircraft.

9. In essence, therefore, the applicant says that there are two separate reasons why he was in illegal custody. First, it is said that there was no legal basis for his detention for the period from the point he was taken off the aircraft until he was formally refused leave to land. Second, it is contended that his detention at Terminal 2 was illegal in the period between 9.30am and 1.32am when he was transported to Cloverhill Prison. We may now consider each of these arguments in turn.

The first period of detention: the period of restraint prior to the refusal of leave to land

10. As we have just noted, Mr. Ganyiu was then driven by van from Terminal 1 to Terminal 2, where he was then processed for immigration purposes. He was then formally refused leave to land at about 9.30am. The power to restrain a non-national seeking leave to land is contained 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."

11. In my view, the word "examine" here is apt to cover the period where a non-national physically presents himself to immigration officers to the point when a decision on leave to land is taken. Normally this will take, at most, only a matter of minutes, but sometimes it may take longer in cases with unusual or special facts.

12. This point was considered by me in *Toidze v. Governor of Cloverhill Prison* [2011] IEHC 395. In that case the applicant, a Georgian national, had been arrested by the Police Service of Northern Ireland when he had strayed into Northern Ireland when the car in which he had been a passenger had lost its way. Mr. Toidze then expressed the desire to be returned to this State and the PSNI made arrangements with their counterparts in GNIB to have Mr. Toidze deposited directly at the Louth/Armagh border. Mr. Toidze was then conveyed by a member of the GNIB in a police van some 10 kilometres to Dundalk Garda Station where he was then processed for immigration purposes and then refused leave to land.

13. I rejected the argument that the applicant was then in irregular or illegal custody:

"The principal complaint advanced ...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.

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

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.

In my view, the word "examine" in [s.4(5) of the 2004 Act] 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.

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."

14. For my part, I consider that the situation of Mr. Ganyiu is no different in principle from that of the applicant in *Toidze*. The applicant's position upon arrival in the State could not, in any event, be realistically compared with that of other travellers, as he was a person who had already been the subject of a deportation order and who had been transferred here under the provisions of the Dublin Regulation. It was accordingly appropriate in that case to make special arrangements for him as he was transferred from the aircraft following its arrival in Terminal 1 to Terminal 2, in much the same way as the applicant in *Toidze* had been conveyed from the actual border with Northern Ireland to Dundalk Garda Station.

15. In that sense Mr. Ganyiu's transfer from Terminal 1 to Terminal 2 and the actions of the GNIB in placing him under restraint were part and parcel of the "examination" of this applicant for the purposes of s. 4(5) of the 2004 Act. It is for this reason, therefore, that I consider that the present case is in this respect indistinguishable from *Toidze* and I would accordingly reject the argument that the applicant was in unlawful custody for this period.

The second period of detention: from 9.30am until 1.30 pm

16. There is no doubt but that the applicant was detained in Terminal 2 from about 9.30 am until 1.30 pm. It is equally clear that Dublin Airport has not been designated as a place of detention for the purposes of s. 5(2)(a) of the Immigration Act 2003 ("the 2003 Act").

17. It is against this background that the applicant relies in my own decision in *Ni v. Garda Commissioner* [2013] IEHC 134, a case

where I held that the detention of a person who had been refused leave for a period of five hours in Terminal 2 was unlawful. It is true that the present applicant was detained for a period of four hours in Terminal 2, but there the comparisons end for reasons I will presently outline.

18. Section 5(2)(a) of the 2003 Act provides:-

".....a person to whom this section applies may be arrested by an immigration officer or a member of the Garda Síochána and detained under warrant of that officer or member in a prescribed place and in the custody of the officer of the Minister or member of the Garda Síochána for the time being in charge of that place."

19. Critically, however, no attempt was made in *Ni* to secure the applicant's detention in any place other than Terminal 2. What had happened in that case was that, having refused the applicant leave to land, it was decided - for perfectly understandable reasons of administrative convenience - to detain the applicant at Terminal 2 pending the making of arrangements for his return to Paris from whence he had arrived. I held, however, that the decision to detain the applicant at Terminal 2 was unlawful because it had never been designated as a place of detention.

20. The present case, is, however, very different. Unlike *Ni*, the GNIB never sought to detain Mr. Ganyiu at Terminal 2 for any appreciable period beyond the time he was refused leave to land at 9.30am. Indeed, but for a series of unforeseen contingencies he would have been removed to Cloverhill Prison within minutes of leave to land having been refused. As both Detective Garda Murphy and Sergeant Doyle explained, given that the other escort van was in need of repair and could not properly have been used on a public road, they were dependent for this purpose on the other available Garda escort unit. That particular unit was scheduled to collect Mr. Ganyiu sometime after 10.30am, but due to the exigencies of service that unit found itself diverted, not once, but twice during the course of the morning.

21. In effect, therefore, Mr. Ganyiu would have been transported much sooner to Cloverhill Prison but for events amounting to *force majeure* which prevented the escort unit arriving sooner. While there is no doubt but that the authorities have no jurisdiction to use Dublin Airport for the purposes of the detention of persons refused leave to land, that it not really what happened here. It is rather a case of where events beyond the direct and immediate control of GNIB conspired to prevent the removal of the applicant to Cloverhill Prison some several hours later than had been originally planned and arranged. It is by reason of these special facts that I find myself distinguishing my own decision in *Ni*.

22. In truth, the present case is much closer to the facts of *Kristo v. Governor of Cloverhill Prison* [2013] IEHC 218 than those of *Ni*. In *Kristo* the applicant was an Albanian national who arrived in Dublin on a flight from Maastricht without a passport. The applicant was refused leave to land by reason of the fact that he lacked the appropriate documentation. He was then detained in Terminal 2 for a period of several hours while the authorities sought to assist the applicant in making arrangements to obtain his passport by contacting his son who was living in Greece before any final decision was made to have him detained in prison. In those circumstances MacEochaidh J. held that that case was very different to *Ni*:

"The significant point of contrast between the facts in *Ni* and the facts in this case are that between arrest and detention at 2.45 p.m. and the disturbance at 8.30 p.m., Mr. Ni was detained in Dublin Airport for the sole purpose of affecting his removal. There was no intention at any point until the disturbance occurred to remove him from the airport and to bring him to a prescribed place under warrant of detention. That only happened after 8.30 p.m. when it became impossible to remove him on the evening flight to Paris. In this case, contrastingly, the purpose of the applicant's presence in Dublin Airport following his arrest was related exclusively to assisting the applicant with making arrangements to obtain his passport. It was for a considerably shorter period of time than that endured by Mr. Ni - two hours and 15 minutes as against approximately six hours in Mr. Ni's case. I note in this regard that certain provisions of the Immigration Act 2003 also place an onus on the applicant to co-operate with the relevant authorities engaged in his removal from the State. Section 5(8)(b) of the 2003 Act states that a person in the circumstances of the applicant "shall, for the purpose of facilitating his or her removal from the State, co operate in any way necessary to enable an immigration officer or a member of the Garda Síochána engaged in the removal of the person to obtain a travel document, ticket or other document required for the purpose of such removal". As such, it would appear that the legislation envisages some degree of an exchange between the relevant immigration authorities and the person proposed to be removed from the State such as that which occurred between Mr. Kristo and Det. Garda Coakley in Dublin Airport."

23. For my part I respectfully agree with the views of MacEochaidh J. and I consider that both *Kristo* and the present case are distinguishable from *Ni* for the very reason that in neither of these two cases was there an intention to use Dublin Airport as a place of detention *in itself*. Inasmuch as both applicants were detained at the Airport it was by reason of incidental and extraneous factors, namely, assisting the securing of a passport (as in *Kristo*) or unforeseen delays in the arrival of the escort unit (as in the present case).

24. For completeness I should note that reliance was also placed on the fact that the formal notice detaining the applicant referred to the "Minister for Justice" rather than to "Minister for Justice and Equality" and it was said that this amounted to an error on the face of the record. For all the reasons set out by MacEochaidh J. in *Kristo*, I consider that this was at most a harmless error which could not affect the validity of the applicant's detention.

Conclusions

25. For all the reasons, therefore, which I have ventured to set out, I must reject the argument that the applicant's detention was unlawful. In these circumstances, accordingly, I must refuse to order his release from detention for the purposes of Article 40.4.2.