Neutral Citation Number: [2005] IEHC 483

THE HIGH COURT

[2005 No. 298 SS]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND

BETWEEN

E. A. A.

APPLICANT

and

THE GOVERNOR OF CLOVERHILL PRISON, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

Judgment of Mr. Justice John MacMenamin delivered on the 26th day of July, 2005.

1. The applicant in these proceedings is a Nigerian national. He was born on 23rd July, 1969. He first came to Ireland and claimed asylum in this jurisdiction on 29th December, 1999. His asylum claim was rejected at first instance on 18th April, 2000, and on appeal on 23rd May of that year. The applicant was notified of the failure of his appeal by letter dated 13th July, 2000. No further communication was received by the respondents from the applicant (the last communication being the letter of appeal filed by his solicitors on 26th April, 2000). A deportation order issued in respect of the applicant of 16th November, 2000, and was served on the applicant at his last known address in Tralee by registered letter dated 23rd of November of that year.

2. The applicant left Ireland at some point which he cannot precisely determine in the spring of 2000. It is probable that this was after the determination of his asylum appeal. It is accepted that he failed to notify the Irish authorities of his departure and consequently the deportation order issued against him remained in being. No step was subsequently taken by the applicant to have this order set aside.

3. Following his departure from Ireland the applicant moved to the United Kingdom. Whilst in that jurisdiction he married a Portuguese national on 15th October, 2003. The applicant and his wife now reside together in Tooting, in London. The applicant works as a security guard and his wife works as a domestic cleaner. At present there are no children of the marriage.

4. The applicant has been granted full rights of residency in the United Kingdom by virtue of his marriage to a Portuguese national. This was granted to him on the 6th November, 2003, for a period of five years, to expire in November, 2008.

5. The evidence before the court in these *habeas corpus* proceedings was that since the making of the deportation order against him in the year 2000 the applicant had not been back in Ireland. He states that he wished to pay a visit to a friend, Mr. Kunle Agboola, in Tralee, Co. Kerry. For that purpose he obtained from the Embassy of Ireland in London a valid three month visa to enter Ireland. The visa, stamped on his Nigerian passport was obtained in December, 2004. The applicant states that he was personally unaware that a deportation order had issued against him in Ireland when he applied for his visa and he answered the questions on the relevant visa application form. The applicant avers that none of these related to the possibility that the applicant for a visa may have been a former asylum seeker in Ireland. Equally the applicant did not see fit to make any such disclosure on a voluntary basis.

6. The applicant travelled by air to Farranfore Airport, Co. Kerry on the 15th February, 2005. On presenting himself at the immigration desk he was informed by Garda Michael Conway, the immigration official who dealt with him at point of entry, that there was a deportation order extant against him dating back to November, 2000. The applicant informed Garda Conway that he was unaware of the deportation order, that he was married to a Portuguese national and that he lawfully resided and worked in London as the spouse of the Portuguese national aforesaid.

7. The immigration officer on checking the computerised records available to him, discovered that the deportation order had been made in relation to the applicant on 16th November, 2000, and remained un-revoked. The applicant was also classed as an "evader", meaning that he had failed to comply with the requirement made of him under s. 3(3)(b)(ii) of the Immigration Act, 1999. The applicant was arrested and lodged in Cloverhill Prison, a prescribed place for the purposes of s. 5 of the Immigration Act, 1999, as amended. The applicant was subsequently released and rearrested on 22nd February, 2005, for reasons which are extraneous to these proceedings.

8. The applicant says he pointed out to Garda Conway that he had a current valid visa stamped on his passport for entry to Italy and was also in a position to show proof, at the point of entry, of a return flight which he had booked from Kerry, four days after the date of his arrest.

9. Garda Conway gave evidence that he accepted the explanation of the applicant but that, because of the existence of the deportation order against him he believed he had no option other than to allow the applicant to enter the country for the specific purpose of arresting him. Garda Conway stated that he had no knowledge of this, and did not believe at the time that in the circumstances he had the power to refuse the applicant entry and/or to send him back to the United Kingdom. The Garda testified that having admitted the applicant he arrested him on the grounds that he was "illegally in the country".

10. Following his arrest the applicant was regrettably detained in Cloverhill Prison for a total period of 71 days. He stated in evidence that he informed the prison Governor that he was married to a Portuguese national and that he was lawfully living and working in London.

11. Detective Inspector Philip Ryan of the Garda National Immigration Bureau gave evidence that the respondents had made enquiries of United Kingdom authorities approximately ten days before the date of hearing. These enquiries were made at or about the same time the applicant was released and rearrested on 22nd February, 2005, at Cloverhill Prison.

12. The applicant's solicitor first attended on the applicant at Cloverhill Prison on 1st March, 2005. The ex parte application for an Article 40 enquiry was moved before this Court on 3rd March, 2005. On the return date, the following day, 4th March, 2005, Detective Inspector Ryan, testified that despite the fact that enquiries had been made of the United Kingdom authorities, many days passed. It was only that same morning, just one hour before hand, that the respondents had received confirmation from the United Kingdom authorities of the applicant's immigration status in that jurisdiction. The explanation for the delay on the part of the United Kingdom authorities in responding was that the applicant's file had been temporarily mislaid.

13. The present *habeas corpus* proceedings were adjourned by order of the Court following a part hearing on Friday, 4th March, 2005. It had by then been established in evidence that the applicant was married to a Portuguese national and lawfully resided with her in

London, where they both worked. As the respondents had indicated that they had the same day finally received confirmation that the United Kingdom authorities were prepared to accept the applicant's return, the Court approved an agreement of the parties that the applicant be deported to the United Kingdom that same evening.

14. The applicant reserved his entitlement to challenge the lawfulness of this deportation, either in the context of the present proceedings, or in separate judicial review proceedings. Thereafter the applicant was permitted to make further written legal submissions on certain questions of domestic and European law.

15. Whereas the Court could no longer order that the applicant be released, this procedural course would thereby allow the Court to assess the merits of the applicant's case and to rule on the question of costs with the benefit of fuller argument. With the agreement of the respondents, the Court acceded to this course and directed that written submissions be exchanged and filed in advance of oral hearing.

The legal issues

16. The primary issue for determination is whether the applicant was lawfully detained on foot of the deportation order. Section 5 of the Immigration Act, 1999, as inserted by s. 10 of the Illegal Immigrants (Trafficking) Act, 2000, provides insofar as relevant:-

> "Where an immigration officer or a member of An Garda Síochána, with reasonable cause suspects that a person against whom a deportation order is in force-
>
> > (a) Has failed to comply with any provision of the order or with a requirement in a notice under s. 3(3)(b)(ii)…,he or she may arrest him or her without warrant and detain him or her in a prescribed place."

17. In this connection the respondent submits that the checking of the computer records was a sufficient basis for the arrest and that the arrest was thereby lawful.

18. The applicant asserts that the immigration officer had a "discretion" to refuse the applicant leave to land, which that officer ought to have exercised. From this premise the applicant argues that the applicant was not in breach of the deportation order as he could not be regarded as having returned to the State in breach of the order until he had passed through immigration control.

19. The applicant further relies on the provisions of s. 4(3)(f)(i) of the Immigration Act, 2004, which insofar as relevant provides:-

> "4(1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as 'a permission').
>
> (2) A non-national coming by air or sea from a place outside the State shall, on arrival in the State, present himself or herself to an immigration officer and apply for a permission.
>
> (3) Subject to s. 2(2), [which deals with a number of derogations to which reference will be made later] an immigration officer may, on behalf of the Minister, refuse to give a permission to a person referred to in subs. (2) if the officer is satisfied - …
>
> > (f) That the non-national is the subject of -
> >
> > (i) A deportation order (within the meaning of the Act of 1999."The applicant submits that there was available to Garda Conway an express power to refuse the applicant entry to the State and to require him to return to the United Kingdom.

20. The applicant accepts for the purposes of these proceedings that, having regard to the existence of the deportation order which remained in force as against the applicant, it was not realistically open to Garda Conway to admit him subject to any condition whereby the applicant might apply while in the State to have the deportation order revoked pursuant to s. 4(6) and s. 4(10) of the Act of 2004.

21. It was submitted on behalf of the applicant that, having regard to the information that was given to Garda Conway, he had no reasonable cause to suspect the applicant was then in breach of the provisions of the deportation order made against him. In particular, it was submitted that the applicant, although he had a visa to enter, was outside the jurisdiction and might therefore have been refused entry.

22. It will be recollected that it is common case that the applicant obtained a visa from the Irish Embassy in London. There is no evidence that he mentioned at any time in the course of this application that he had previously applied for asylum in this jurisdiction. He did not mention that he had not participated fully in the asylum seeking procedures. He had not remained in the state long enough to know of the ultimate outcome. The applicant obtained a visa which allowed him to enter the state in order to present himself to immigration and he sought leave to land. The respondent submits that this step was sufficient to breach the order, being an order to leave and thereafter remain out of the state. The respondent states that at the time of the arrest the applicant was plainly in the state when he presented himself to Garda Conway in Farrenfore, Co. Kerry.

European Community Law: Free Movement, Residence, Family Life

23. European Union Law provides for a number of "fundamental freedoms" including the freedom of establishment and the free movement of workers. The applicant's wife, as a Portuguese national working in the United Kingdom, is exercising her free movement as a citizen of the EU and as a worker in the United Kingdom. It is pointed out that this right is not being exercised in Ireland, although she may do so in the future. The respondents submit that this is significant insofar as the applicant is seeking to assert derivative rights based on his status as a "family member" of an EU national. It is submitted by Ms. Siobhan Stack, counsel for the respondent, that the critical starting point is to establish the rights on which the applicant is seeking to rely. There is no doubt but that the applicant, if he is bona fide married to a Portuguese national, has the right under Council Regulation EEC /16/2/68 and Council Directive 68/360/EEC to install himself in the United Kingdom.

24. The rights which the applicant has under Council Regulation EEC /16/2/68 are:

> (a) a right to install himself with a worker who is a national of one member state and who is employed in the territory of

another member (Article 10(1));

(b) and the right to take up any activity as an employed person throughout the territory of the state in which his wife was working, i.e. the United Kingdom.

25. On behalf of the respondent it is submitted that the applicant was not seeking to exercise either of these rights when he presented himself to the Immigration Officer at Farranfore Airport on the 15th February, 2005. It is emphasised that he was travelling alone for the stated purpose of visiting a friend in Ireland.

26. Counsel on behalf of the applicant, Paddy Dillon-Malone B.L., submitted that the nature of the freedom being exercised by an EU national such as the applicant's wife, which entitles her to lawfully reside in another member state of the European Union, whether as a worker or in the exercise of a right of establishment, is only the starting point for the real question he submits is whether the enforcement by another member state of its immigration laws against that person's spouse is compatible with European law. It is submitted on behalf of the applicants that the lawfulness of such measures of enforcement fall to be decided by reference, not just to the governing Treaty provisions, regulations and directives, but also by reference to whether such measures are compatible with an EU national's right to respect her for family life.

27. Counsel for the applicant submits that, while each State of the Union is entitled to retain full competence in the matter of immigration law, the States are required as a matter of community law to ensure that the manner in which such laws are interpreted and implemented does not interfere in a disproportionate manner with the right of residence and respect for family life of non EU nationals and their EU spouses who have exercised rights of free movement.

Consideration of Authorities of the Court of Justice

28. The respondents heavily rely on the proposition that the rights asserted by the applicant are derivative ones. They accept that there have been incidences where the European Court of Justice has employed a teleological approach to interpretation to expand somewhat the rights enjoyed under secondary European law, or where that court has found that third country nationals enjoy directly effective rights emanating from the Treaty itself by reason of the requirements of the general principle of European law, as inspired by Article 8 of the European Convention on Human Rights, that Member States should respect the right to family life. However the respondents submit that where that expansion has occurred, the purpose of such expansion has been to protect the exercise of the fundamental freedoms granted by the treaties. The purpose of the expansion has been to ensure that Member States do not dissuade EU nationals from exercising treaty rights by restricting their rights to lawfully reside with their spouses.

29. The case of *Carpenter v. Secretary of State for the Home Department* (case – 60/00) may represent the high water mark of the rights of third country nationals as seen by the Court of Justice.

30. This was a case of a Filipino national, married to a national of the United Kingdom who was the subject of a deportation order. As the UK national husband routinely travelled in and out of the United Kingdom to other Member States for the purposes of his business, was a clear example of an exercise with the freedom to provide services granted by Article 49 of the Treaty.

31. The question was whether Mrs. Carpenter could be the subject of a national deportation order. There was no issue as to the genuineness of the marriage. It was conceded that such rights as she might have were derivative, i.e. that they derived from her husband's right to provide services and to travel within the European Union. The Court confirmed this by stating at the outset of its judgment that:

> "the provisions of the Treaty relating to the freedom to provide services, and the rules adopted for their implementation are not applicable to situations which do not present any link to any of the situations envisaged by community law" (para. 28 of the judgment).

32. As a significant proportion of Mr. Carpenter's business consisted of providing services for remuneration to advertise, while established in other Member States, it was held that such services came within the meaning of Article 49 EC both insofar as the provider travels for that purpose to the Member State of the recipient; and also insofar as he provides cross border services without leaving the Member State in which he is established. Therefore, although resident in the United Kingdom as a citizen, Mr. Carpenter was engaged in exercising his treaty rights.

33. Due to the particular manner in which Mr. Carpenter was exercising his treaty rights, i.e. from his home in the United Kingdom, it was held that the provisions of Directive 73/148/EEC (which is the equivalent of Council Regulation 16/12/68) did not apply and that any rights that Mrs. Carpenter had must be inferred from the principles or other rules of community law (para. 36 of the judgment).

34. As the general principles of community law recognise fundamental rights, it was held that the deportation of Mrs. Carpenter would breach Mr. Carpenter's right to respect for family life.

35. Counsel for the respondents submits however, that even in inferring those rights, the Court of Justice made it clear that the recognition of rights additional to those conferred by Directive 73/148/EEC was connected to the desire of the European Court of Justice to protect the exercise of fundamental freedoms:

> "in that context it should be remembered that the community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty, as is particularly apparent from the provisions of the Council regulations and directives on the freedom of movement of employed and self employed workers within the community (see for example, Article 10 of Council Regulation (EEC) No. 16/12/68 …; Articles 1 and 4 of Council Directive 68/360/EEC …" (emphasis added) (at para. 38).

36. It is clear from the *Carpenter* judgment that the Court of Justice was willing to infer rights from the Treaty itself for the purposes of protecting the fundamental freedoms granted by that Treaty. The teleological approach adopted by the Court of Justice in these cases is linked to this purpose.

37. However where *no* Treaty right is being exercised by an EU national then the respondents state that derivative rights do not arise and have not been inferred in any case by the Court of Justice. Therefore the respondents submit neither the result nor the reasoning in Carpenter favour any alleged right to enter and/or remain in the State for a third country national travelling without his EU national spouse for the purpose of visiting a third country national friend.

38. The respondents point out that the applicants accept that the Court of Justice in Carpenter had to look to Article 49 to find the *"Community link".*

39. On the facts of this case there was no evidence adduced that the visit of the applicant to Ireland was in anyway linked to the exercise by his wife of *her* Treaty rights. Additionally no evidence was adduced that the visit was protected by any European Union principle of Human Rights, including the right to respect for family life.

40. The applicant and his wife are living in the United Kingdom, not in Ireland. They have not sought to come to live in Ireland. Even if one were to look at the much wider protection offered by Article 8 of the European Convention on Human Rights, there is no case where that Article was held to give a right to enter and/or remain in any State where the family had not at any stage lived. This is so, even having regard to the fact that the application of the Convention on Human Rights does not depend on the existence of economic activity such as occurs in the exercise of Treaty rights. Furthermore the enforcement of the Irish deportation order has not in anyway impacted upon the right of the applicant to cohabit with his wife, nor has it affected the exercise by her of any Treaty rights which she may hold.

41. The issue for determination is the entitlement of the applicant to seek admission to the State on the 15th February, 2005. There is no authority establishing a right to override national immigration laws in a case where the person has no family in the State in respect of which admission is sought. I do not think this is such a case.

42. One turns then to the question as to whether the Immigration Officer was entitled to carry out the arrest on foot of an extant deportation order.

43. In my view even if the applicant had a derivative right under European Law to enter the State and remain here for several days, on the facts herein the Immigration Officer was entitled to arrest on foot of the deportation order.

44. It is important here to have firmly in mind the following matters. The applicant did not produce any evidence to the Immigration Officer of his marriage to an EU national. He was the subject matter of an extant deportation order. European Law, while seeking to minimise requirements in order to ensure that substantive rights may be easily invoked and enjoyed, has also recognised the need for regulation of the entry of non nationals.

45. It is also relevant here to consider the provisions of Council Directive 68/360/EEC which deals with the administrative changes which were required to give effect to Council Regulation 16/2/68. It is obvious from the provisions of this Directive that the regulations were not intended to abolish all restrictions on movement and/or immigration, and that the Directive was considered necessary to indicate how those restrictions should be modified in order to give effect to substantive rights.

46. Article 3 of that Directive provides as follows:

> "1. Member States shall allow the persons referred to in Article 1 [i.e. nationals of member states and "members of their families to whom regulations (EEC) No. 16/2/68 applies"] to enter their territory simply on production of a valid identity or passport.
>
> 2. No entry visa or equivalent document may be demanded save from members of the family who are not nationals of a Member State. Member States shall accord to such persons every facility for obtaining any necessary visas". It is therefore clear from this that a third country national may be required to obtain an entry visa to gain entry to the territory of a Member State where that person's spouse is working.

47. Article 4 governs the right of residence. This is an important right for the purposes of this inquiry. This is so because s. 5 of the Immigration Act, 2004 provides that only the Minister for Justice Equality and Law Reform may grant permission to remain in the State. Not only does the applicant have no such permission, he was the subject of a deportation order.

48. Article 4 does not abolish the necessity to obtain a right of residence under national law. It merely regulates the Member States' ability to refuse such a right. Similarly, the Article does not abolish the necessity to obtain documentary proof of the right of residence, but rather confers the right to such documentary proof. The resident's permit is granted on the submission to the Member States' authority (in this case the Department of Justice Equality and Law Reform) of certain documentation being:

> "(a) the document with which he entered their territory; [i.e. the entry visa]
>
> (b) a document issued by the competent authority of the State of origin or the State whence they came, proving their relationship …"

49. I am persuaded that it is in this context that the authority of *MRAX v. Belgium* (Case C-459/99) [2002] ECR 1 – 6591 must be understood although it is relied on heavily by the applicant.

50. This was a case brought to annul a Belgian law which concerned documents which had to be produced in order to obtain a visa for the purpose of reuniting a family on the basis of the marriage contracted abroad. The national law provided that entry to Belgium could be attained on production of a valid passport of national identity card. It also imposed a requirement to obtain a visa prior to entry into Belgium.

51. In the course of that judgment the Court held that:

> "It is any event disproportionate, and therefore prohibited, to send back a third country national married to a national of a Member State where he is able to prove his identity and the conjugal ties, and there is no evidence to establish that he represents a risk to the requirement of public policy, public security, or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148" (para. 60).

52. However all the findings of the Court of Justice in that case were directed to a situation where although the third country national was not in possession of a valid passport or identity card, or had entered the Member State unlawfully, or had allowed his Visa to expire, he was nonetheless in a position to prove his identity and his conjugal ties to a Member State national. It was in those circumstances that the Court of Justice held that it would be disproportionate to impose national sanctions, such as expulsion on the third country national. The facts of that case therefore are quite distinct from those in the instant case.

53. The Court of Justice affirmed that, as a rule, a person who is not in possession of a valid identity card or passport and who cannot properly prove his identity or his family ties may be sent back to a Member States' border (paragraph 56 and 57 of the judgment). It was also affirmed that community law does not prevent the Member States from prescribing, for breaches of national provisions concerning the control of aliens, any appropriate sanctions necessary in order to ensure the efficacy of those provisions, provided that those sanctions are proportionate (paragraph 77 of the judgment). The entire judgment was concerned with the position of third country nationals who were in a position to prove their identity and their conjugal ties.

54. Two further cases were relied upon by the applicant: these will be considered briefly in turn. In *R. v. Immigration Appeal Tribunal and Singh Ex p Secretary of State for the Home Department* (Case C – 370/90) [1992] ECR 1-4265 it was held that a British national was entitled to invoke community law rights against her own Member State upon returning to the United Kingdom with her spouse, an Indian national, after both had lived and worked in Germany.

55. The Court held that:

> "a national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self employed as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy the Treaty or secondary law in the territory of another Member State.
>
> Such national would not in particular be deterred from doing so if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin on conditions at least equivalent to those granted by community law in a territory of another Member State" (paras. 19 and 20).

56. In *Secretary of State for the Home Department v. Akrich* (Case C – 109/01) [2003] ECR 1-9607 a Moroccan national who had stayed beyond the term of his visa in the United Kingdom had been convicted of attempted theft in that jurisdiction, deported on two occasions in 1991 and 1992, and then, while living illegally in the United Kingdom, had married a British national in 1996. When he applied for leave to remain as the spouse of a British national he was detained under the United Kingdom Immigration legislation and sometime later deported according to his wishes to Ireland where his wife had taken up employment. Sometime later *Akrich* applied to the United Kingdom government for revocation of the deportation order so that he and his spouse could return to the United Kingdom where she had an offer of employment. This application was refused and an appeal led to a referral under Article 234.

57. The Court of Justice in that case recalled that once the EU citizen's spouse had a valid right to remain in another Member State, Article 10 of Council Regulation 16/2/68 applied, so that the EU citizen was not deterred from exercising his right of freedom of movement on returning to the Member State of which he is a national. Where the EU citizen spouse, not lawfully resident in the territory of another Member State, seeks to return with the EU citizen to that person's Member State, the Court of Justice required that regard must be had to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

58. According to the court in *Akrich*.

> "even though the Convention does not as such guarantee the right of an alien to enter or to reside in a particular country, the removal of a person from a country, where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that Article, that is unless it is in accordance with the law, motivated by one or more of the legitimate aims under that paragraph and is necessary in a democratic society that is to say justified by oppressing such need and in particular, proportionate to the legitimate aim pursued" (para. 59).

59. However it will be noted that in both *Singh* and *Akrich* the Court of Justice confirmed that:

> "the facilities created by the Treaty cannot have the effect of allowing persons who benefit from that to evade the application of national legislation and of prohibiting Member States from taking measures necessary to prevent such abuse" (Akric at para. 41; Singh at para. 24).
>
> Moreover the case of *MRAX v. Belgium* was decided entirely on the assumption that alternative means of satisfying the authorities of ones derivative rights under the EU were available and that therefore, assistance by the authorities on one particular type of proof was unlawful for being disproportionate, as the same objective by means which were less disruptive to the rights enjoyed under the Treaties and the secondary legislation".

60. This is entirely by way of contrast to the facts in the instant case. Here the applicant presented to the Immigration Officer and simply informed him that he was married and living in London. He had no proof of marriage (as is assumed in the MRAX case). He had no proof that his wife was exercising Treaty rights while a resident in London. It is submitted on behalf of the respondents, and I agree, that it would create an entirely unworkable situation if a third country national who is the subject of a deportation order might simply arrive in this jurisdiction and assert a marital relationship of which there is no proof in an effort to defeat the operation of national law.

61. Similarly the applicant herein can only have an entitlement to enter and reside in the State on the basis of his marriage to an EU national who is exercising her Treaty rights. The Minister could only examine the legal position of the applicant on being furnished by the applicant with the proof set out in Directive 68/360/EEC and on being furnished by the applicant's wife with the proof set out in the same directive.

62. Thus the respondents submit there is no entitlement either to apply for a Visa or simply arrive in the State in the absence of an EU national asserting rights of this category. I agree with this submission.

63. Finally, the applicant relies on the case of *Kweder v. Minister for Justice* [1996] 1 I.R. 381. In that case the High Court rejected an attempt by the Irish authorities to refuse entry to a Syrian national married to a British national on the ground only that he had being previously deported from the United Kingdom. Geoghegan J. held that a person could not be deprived of his European Union rights by reason merely of an earlier deportation order:-

> "As the right to reside with one's spouse working in a Member State is clearly a fundamental right under European

Community law a public policy defeating it cannot be lightly invoked."

64. It is essential however to recollect the facts of *Kweder*. In that case the applicant was deported from the United Kingdom, having breached the conditions of his student visa by taking up part time employment. His wife, a British national, left the United Kingdom, moved to this State and took up employment. His wife being established in the State, the applicant therefore applied for an Irish entry Visa which was refused. The applicant sought to quash that refusal. The respondent sought to invoke two grounds to justify the refusal to grant a Visa to the applicant; firstly that it would be contrary to public policy to allow a person to enter the State against whom there was in existence a deportation order by another Member State of the European Union; and secondly that such policy requires that the common travel area between the State and the United Kingdom should not be put in jeopardy.

65. It will be seen then, by examination of the facts, that the applicant in *Kweder* quite clearly did have rights based on his spouse's establishment in this State and her employment therein. It will also be seen that the respondents in that case were seeking to derogate from the provisions of the directive on public policy grounds. This is not the case here.

66. Moreover the applicant in the instant case has no such right, as arose in *Kweder*, based on his spouse's establishment or working in this jurisdiction. Consequently it seems to me that the facts of that case are entirely distinguishable from those in *Kweder*.

67. There is moreover one further issue which seems fatal to the applicant's case.

68. The applicant heavily relies on the fact that what occurred in this case was disproportionate on the facts. It is contended that the applicant could have been refused entry. But this is surely not the issue. The true question is whether there is any issue of disproportionality on the actions of Detective Garda Conway at the time he took them, with the information which was presented to him by the applicant. The paucity of information presented by the Garda was entirely the fault of the applicant. The absence of any proof of identity lies at his door also. He had taken no step to revoke the deportation order. This order prohibited his entry into the State. I do not accept the proposition that an allegation of disproportionality can be made on an *ex post facto* basis having regard to facts which were not made known to the immigration officer at the time and where the fault for the absence of any such information lies at the door of the applicant. Moreover, on the particular facts of this case, it will be seen that the information which was highly relevant took some ten days to arrive by reason of the fact that the applicant's file had apparently been mislaid in the United Kingdom. I reject the contention that the immigration officer's action on those facts could be seen as a disproportionate one when he was presented with a situation where the applicant was apparently seeking entry into this jurisdiction while a deportation order was extant against him.

69*. Prima facie* the applicant in this case had no right to be in the State whatever. It is, to my mind entirely unreal to expect an immigration officer to juggle a series of options in his mind and thereafter to seek to subject them to analysis on the basis of facts which were not known to him at the time. Moreover it will be noted that the applicant's Nigerian passport contained no information whatever to disclose his position vis-à-vis the United Kingdom.

70. It is very difficult to avoid the conclusion that this case arose by reason of a series of events. First, the applicant sought asylum in this jurisdiction and thereafter withdrew his application. Second, he was the subject matter of a deportation order of which he must be deemed to have notice. Third, he took no steps to have the deportation order revoked. Fourth, he arrived in this jurisdiction with no documentation to demonstrate his changed position in the United Kingdom. Fifth, he had no documentation which showed his marriage to an EU national or that she was working in the United Kingdom. Sixth, the time elapse which occurred was due to the loss of his file in the United Kingdom. Any delay that occurred at that point was entirely outside the control of the Irish authorities.

71. Having regard to all of these facts it is difficult to avoid the conclusion that the facts of this case which was regrettably a cause of trouble to the applicant himself, and which has given rise to a consideration of a number of authorities was very largely attributable to the applicant's own actions and failure to take elementary and sensible steps to prevent a foreseeable situation.

72. Having regard to the foregoing I do not consider that the applicant is entitled to any of the reliefs which are claimed. I will hear counsel as to the form of the order.