Neutral Citation: [2016] IEHC 557

THE HIGH COURT

No. 2016/846/ SS]

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

BETWEEN

P. O.

and

G. E. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND P. O.)

APPLICANTS

AND

THE GOVERNOR OF THE DÓCHAS CENTRE AND THE CHILD AND FAMILY AGENCY

RESPONDENTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 10th day of August 2016

1. The inviolability of the home is an ancient precept of the common law treated with almost sacred reverence by the judges of old and summed up in the well known proverb that "*an Englishman's home is his castle*".

2. In his treatise, "*The Institutes of the Laws of England*" (1628) Sir Edward Coke, commenting on the precept stated, "*for a man's house is his castle, et domus sua cuique est tutissimum refugium*" (and each man's home is his safest refuge).

3. In 1763 the British Prime Minister, Sir William Pitt, first Earl of Chatham, better known to history as Pitt the Elder, commenting on the legal meaning of the precept stated:

> *"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter."*

4. When the people enacted our Constitution in the exercise of their sovereign power they adopted the common law as the law of the land save in so far as it was inconsistent with the Constitution. The ancient precept that the home of the subject was inviolable received Constitutional protection when it was enshrined as one of the fundamental rights of the citizen in Article 40.5.

5. Concomitant with this fundamental right and of equal if not greater antiquity in the common law is that of liberty itself. Sir William Blackstone in his Commentaries on the Common Law Vol 1, p. 127, described the Magna Carta of 1214 as the first great charter of liberties obtained, sword in hand, from King John. It was extended to Ireland in 1216. The Magna Carta did not create but rather declared the common law including the rights which the subject was entitled to enjoy. Of the right to liberty, it declared "*..no freeman shall be taken or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other way destroyed; nor will We pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land*".

6. The prerogative writ of *habeas corpus*, first recorded during the reign of Henry II in the 12th.Century, was part of an evolution in the legal process which was devised to give effect to the right that the subject could not to be deprived of liberty save in accordance with the law . Its potency arose from the subject matter with which it was concerned and by virtue of the efficacy with which it could be deployed to 'deal with all manner of unlawful confinement'. It is not surprising that the repeated suspensions of Habeas Corpus in Ireland resulting from civil and political unrest during the late Eighteenth, Nineteenth and early Twentieth centuries led to the Constitutional recognition enshrined in Article 40.4.

7. It is the alleged infringement of these rights that is at the centre of these proceedings which concern an inquiry as to the lawfulness of the detention of the Applicants consequent upon the actions of a number of members of An Garda Síochána commencing at 11.10 p.m. on the 26th of July 2016 when they entered the home of the Applicants at the Mosney Accommodation Centre, Co. Meath.

8. Thee Applicants are foreign aliens who are subject to and have been served with deportation orders dated the 28th of November, 2008 made pursuant to the provisions of the Immigration Act, 1999. It is clear from the evidence that the purpose for which the Gardaí entered their home was to give effect to the deportation orders; to that end arrangements had been made to deport and return them both to Nigeria from Dublin Airport by plane at approximately 5.55 a.m. the following morning. It was not in controversy that, although they are not Irish citizens, the Applicants are entitled to the full protection of the law.

9. The second Applicant was born on the 20th of July 2007 and has always lived in Ireland with her mother, the first Applicant. That both wish to remain in Ireland is beyond question and to this end there is little doubt but that from the date of the making of the deportation orders the first Applicant has sought to evade the deportation of herself and her daughter. During the course of the inquiry she gave evidence that in future if it came to it she would comply with any further deportation arrangements. She has twice unsuccessfully applied to have the deportation orders revoked. The Court was advised that irrespective of the outcome of these proceedings it was intended to appeal the refusal of those applications.

Factual background

10. At approximately 9.30 p.m. on 26th July, 2016 Detective Garda Deirdre Durkan accompanied by Detective Garda Michael Byrne, Detective Sergeant David Kennedy and Detective Garda Patrick Flood drove to the Mosney Accommodation Centre in Co. Meath where they arrived at approximately 10 p.m. On arrival they spoke with a security officer at the centre who advised them that the Applicants were residing at 47 Seaview, a duplex unit within the Centre to which the Applicants had recently moved from Cork.

11. In her evidence the first Applicant accepted that she had not complied with the deportation orders; she gave an explanation as to why she had not notified the Immigration service that she had left the accommodation centre in Cork and had moved to Mosney.

12. Shortly after arriving at the centre the Gardaí spoke to the security officer. He went alone to the Applicants' address to ascertain whether they were in residence. He returned and advised the Gardaí that the first Applicant was at a prayer meeting after which she

was due to return home, and that the second Applicant, together with an unnamed male individual, were in residence. At approximately 11.10 p.m. the Gardaí went to the Applicant's house with the security officer by which time the first Applicant having returned home and having locked the front door had gone up to her bedroom.

13. The Gardaí did not knock to request entry; rather the security officer opened the front door with a key. Detective Garda Michael Byrne and Detective Sergeant David Kennedy accompanied Detective Garda Durkan into the hallway of the premises. Detective Garda Flood had gone around to the back door. He did not enter the premises. The first Applicant heard the door opening, came onto the landing and stood at the top of the stairs. On her evidence she was shocked by the presence of the Gardaí, however, she did not object and did not ask them to leave. I accept that evidence.

14. Detective Garda Durkan introduced herself and produced an identity card. The other Gardaí also identified themselves. The first Applicant was advised that the officers were from the Garda National Immigration Bureau and was informed as to the purpose of their presence. The Gardaí swore affidavits and gave evidence. Their evidence was that they had been welcomed into the house by the first Applicant; she disputed that she had expressly done so though accepted that she had not asked them to leave. I found her evidence to be more compelling in this regard. It is well settled law that the absence of an express refusal or of an express order to leave cannot be construed as an implied invitation to enter and remain on the premises. See *D.P.P v. Gaffney* [1987] I.R 173.

15. I am satisfied that the first Applicant was informed by and understood from Detective Garda Durcan the purpose for which the officers had entered the house and that she was being arrested pursuant to s. 5 of the Immigration Act, 1999 as substituted and amended by s. 78 of the International Protection Act, 2015, on the grounds that she had failed to leave the State within the time specified in the deportation order.

Power to arrest

16. The amendment of s. 5 was made subsequent to the decision of this Court in *Omar v. The Governor of Cloverhill Prison* [2013] I.R. 186. The amended section provides as follows:-

> *"5. (1) Where an immigration officer or a member of the Garda Síochána, with reasonable cause, suspects that a person against whom a deportation order is in force—*
>
> *(a) has failed to leave the State within the time specified in the order,*
>
> *(b) has failed to comply with any other provision of the order or with a requirement in a notice under section 3(3)(b)(ii),*
>
> *(c) intends to leave the State and enter another state without lawful authority,*
>
> *(d) has destroyed his or her identity documents or is in possession of forged identity documents, or*
>
> *(e) intends to avoid removal from the State,*
>
> *the officer or member may arrest the person without warrant, and a person so arrested may be taken to a place referred to in subsection (3) and detained in the place in accordance with that subsection.*
>
> *(2) Where a person against whom a deportation order is in force is serving a term of imprisonment in a prison or place of detention, an immigration officer or a member of the Garda Síochána may, immediately on completion by the person of the term of imprisonment, arrest the person without warrant and detain him or her in accordance with subsection (3).*
>
> *(3) A person who is arrested and detained under subsection (1) or (2) may be detained—*
>
> *(a) in a prescribed place, or*
>
> *(b) for the purpose of his or her being placed in accordance with subsection (4) and for a period or periods each not exceeding 12 hours—*
>
> *(i) in a vehicle for the purposes of bringing the person to the port from which the ship, railway train, road vehicle or aircraft concerned is due to depart, or*
>
> *(ii) within the port referred to in subparagraph (i).*
>
> *(4) A person arrested and detained under subsection (1) or (2) may be placed on a ship, railway train, road vehicle or aircraft about to leave the State by an immigration officer or a member of the Garda Síochána, and shall be deemed to be in lawful custody whilst so detained and until the ship, railway train, road vehicle or aircraft leaves the State.*
>
> *(5) The master of any ship and the person in charge of any railway train, road vehicle or aircraft bound for any place outside the State shall, if so required by an immigration officer or a member of the Garda Síochána, receive a person against whom a deportation order has been made and his or her dependants, if any, on board such ship, railway train, road vehicle or aircraft and afford him or her and his or her dependants proper accommodation and maintenance during the journey.*
>
> *(6) (a) Subsections (1) and (2) shall not apply to a person who is under the age of 18 years.*
>
> *(b) If and for so long as the immigration officer or, as the case may be, the member of the Garda Síochána concerned has reasonable grounds for believing that the person is not under the age of 18 years, the provisions of subsections (1) and (2) shall apply as if he or she had attained the age of 18 years.*
>
> *(c) Where an unmarried child under the age of 18 years is in the custody of any person (whether a parent or a person acting in loco parentis or any other person) and such person is detained pursuant to the provisions of this section, the immigration officer or the member of the Garda Síochána concerned shall, without delay, notify the Child and Family*

Agency of the detention and of the circumstances thereof."

The provisions of subparagraphs 7, 8, 9 and 10 are not germane to these proceedings, however, subparagraph (11) provides:-

"For the purposes of arresting a person under subsection (1) or (2), the immigration officer or member of An Garda Síochána may enter (if necessary, by use of reasonable force) and search any premises (including a dwelling) where the person is or where the immigration officer or the member, with reasonable cause, suspects that person to be, and where the premises is a dwelling, the immigration officer or the member shall not, unless acting with the consent of an occupier of the dwelling or other person who appears to the immigration officer or the member to be in charge of the dwelling, enter that dwelling unless—

(a) the person ordinarily resides at that dwelling, or

(b) he or she believes on reasonable grounds that the person is within the dwelling.

17. I accept the evidence of Detective Garda Durkan that she had reason to believe that the first Applicant was residing in the Mosney Accommodation Centre at number 47 Seaview and that having entered and identified herself she then arrested her in accordance with the provisions of s. 5 as amended.

18. The second Applicant was not present during this conversation; she was upstairs in her bedroom. In his affidavit Detective Sergeant Kennedy averred that Detective Garda Durkan had informed the first Applicant that she would be returning to Nigeria on the morning of 27th July, 2016 and that they were going to bring herself and her daughter to Dublin Airport where she would be detained until the flight departed from the State.

19. It is common case that there was no power to arrest the second Applicant. The case made on behalf of them is that the second Applicant was detained and therefore was under *de facto* arrest. The case made on behalf of the first Respondent was that no attempt was made to arrest or detain, rather the second Applicant remained at all times in the custody of and did as her mother bade her.

20. The Gardaí asked the first Applicant whether or not there was anybody else in the house apart from herself and her daughter. She responded that there was not, however, a male was found hiding behind a partition in the kitchen. In her evidence the first Applicant accepted that she had lied to the Gardaí about that at the time and that when asked to explain his presence she had said that he was a TV repair man and had been there to fix her satellite dish. In evidence, however, she said that this individual was her boyfriend and that he had arrived that evening with the intention of seeking asylum in Ireland.

21. There was some controversy concerning whether or not the second Applicant was awake when the Gardaí arrived and whether or not she was asleep in her room. It is clear from the evidence, however, that she remained in her room. There was no attempt by the Gardaí to rouse her. That was ultimately done by her mother who packed bags for both of them. She requested an opportunity to go and pray and to make a call. In evidence she accepted that she had been afforded the opportunity to do so and that sufficient time had also been afforded thereafter to pack the bags.

22. The party left the house at approximately 12.30pm. The Applicants were driven to Dublin Airport where they arrived at approximately 1 a.m. They were taken to an airside departure room where they were made aware of toilet facilities and the availability of refreshments.

23. In evidence the first Applicant accepted that she had at all times co-operated with the Gardaí and that this remained the case until shortly before departure. Having arrived at the airport Detective Garda Durkan phoned the second Respondent in accordance with s. 5(6) (c) of the Immigration Act, 1999 as amended for the purposes of notifying the duty social worker that the second Applicant, a minor, was with her mother, that her mother was detained at Dublin Airport and that both would be returning to Nigeria via Frankfurt on foot of deportation orders on an early morning flight.

24. At the time when that call was made the evidence establishes that the Applicants intended to take the flight and that that circumstance was made known to the duty social worker; there was no evidence of any indication given by the social worker to Detective Garda Durkan of any concerns or intention to intervene on behalf of the second Respondent. Subsequent events, however, were to change that situation.

25. Shortly after 5am, the officers informed the first Applicant that she and the second Applicant were going to board a flight to Frankfurt on the first leg of their journey. There was a conflict on the evidence as to precisely what happened next. The evidence of the officers was that the first Applicant refused to get on the flight telling the officers that she would not be returning to Nigeria. According to their evidence, the second Applicant got up to go on the flight but her mother told her to sit down. The first Applicant started to scream and shout. In response to an attempt to take her to the plane, she lashed out with her hands and started kicking her feet. The first Applicant disputed that she had done this and explained that it was because her daughter was now making it clear that she did not want to go to Nigeria, a country to which she had never been, that decided issue and so she refused to cooperate further in the deportation process.

26. She accepted that she had slid off her seat onto the floor where she laid down. The evidence of the gardaí was that the daughter was becoming upset by the behaviour of her mother and that Detective Sergeant Kennedy took the second Applicant aside to try and shield her from the behaviour. As far as the mother was concerned, it was because of her daughter's upset and repeated assertions that she did not want to go back to Nigeria which had led to her behaving as she did.

27. It seems to me to be unnecessary for the purposes of these proceedings to resolve this conflict of evidence since it is clear that whatever the initiating event, it was evident that the cooperation with the deportation process which had existed up until that time was now definitively at an end.

28. Realising that it was not now going to be possible to affect an orderly deportation of the Applicants, Detective Garda Durcan informed the first Applicant that she would not be going on the flight and that she would be brought to Mountjoy Prison to be detained there and that as a result, her daughter would have to go into the care of Tusla, the Child and Family Agency. At this juncture, Detective Garda Byrne advised the first Respondent that as there was no one to look after her daughter he was removing her for her safety in accordance with s. 12 of the Childcare Act 1991. In these circumstances it was his opinion that there was an

immediate and serious risk to the health and welfare of the child because her mother was going to be incarcerated in Mountjoy and would not be able to look after her.

29. Section 12 of the Child Care Act 1991 as amended provides

> *"12. (1) Where a member of the Garda Síochána has reasonable grounds for believing that—*
>
> *(a) there is an immediate and serious risk to the health or welfare of a child, and*
>
> *(b) it would not be sufficient for the protection of the child from such immediate and serious risk to await the making of an application for an emergency care order by (the Child and Family Agency) under s. 13 (or an application for a warrant under s. 35),*
>
> *the member, accompanied by such other persons as may be necessary, may, without warrant, enter (if need be by force) any house or other place (including any building or part of a building, tent, caravan or other temporary or moveable structure, vehicle, vessel, aircraft or hovercraft) and remove the child to safety.*
>
> *(2) The provisions of subsection (1) are without prejudice to any other powers exercisable by a member of the Garda Síochána.*
>
> *(3) Where a child is removed by a member of the Garda Síochána in accordance with subsection (1), the child shall as soon as possible be delivered up to the custody of the (Child and Family Agency) for the area in which the child is for the time being.*
>
> *(4) Where a child is delivered up to the custody of (the Child and Family Agency) in accordance with subsection (3), the health board shall, unless it returns the child to the parent having custody of him or a person acting in loco parentis, (or an order referred to in s. 35 has been made in respect of the child) make application for an emergency care order at the next sitting of the District Court held in the same district court district or, in the event that the next such sitting is not due to be held within three days of the date on which the child is delivered up to the custody of the (Agency) at a sitting of the District Court, which has been specially arranged under section 13 (4), held within the said three days, and it shall be lawful for the (Agency) to retain custody of the child pending the hearing of that application."*

The remaining provisions of the section are not germane to these proceedings.

30. Shortly before 5:30am, Detective Garda Byrne made contact with the second Respondent's duty social worker and made arrangements to meet at Mountjoy Garda Station for the purposes of handing over the second Applicant. The party arrived at the car park of Mountjoy Garda Station shortly after 7am. At that stage the second Applicant was delivered into the custody of Tusla staff members, William O'Boyle and Patricia Canning in the presence of her mother who was then brought to Mountjoy Female Prison where she was detained.

31. Pursuant to order of the High Court dated 29th July, 2016, David Miller, Assistant Chief Officer, Dóchas Prison, certified the grounds for the detention of the first Applicant and produced the Detention Order dated 27th July, 2016, signed by Detective Garda Deirdre Durcan pursuant to s. 5 of the Immigration Act 1999, as amended. The first Applicant remains in detention for the purposes of enabling arrangements to be made for her deportation from the State.

32. During the course of this inquiry, arrangements were made to deport the Applicants from the State on 5th August, 2015. Having regard to the nature of these proceedings, those arrangements were not proceeded with.

Status of the Second Named Applicant

33. Having been delivered into the custody of Tusla, an application was made for an emergency care order pursuant to s.12 (4) and s.13 of the Child Care Act 1991 at 3:30pm on 27th July, 2016, to Judge Gibbons at Navan District Court. Section 13 provides for the making of an emergency care order. It is pertinent to refer to the provision.

> *"13(1) If a justice of the District Court is of opinion on the application of the (Child and Family Agency) that there is reasonable cause to believe that—*
>
> *(a) there is an immediate and serious risk to the health or welfare of a child which necessitates his being placed in the care of (the Child and Family Agency) or*
>
> *(b) there is likely to be such a risk if the child is removed from the place where he is for the time being,*
>
> *the justice may make an order to be known and in this Act referred to as an "emergency care order".*
>
> *(2) An emergency care order shall place the child under the care of the (child and Family Agency) for a period of eight days or such shorter period as may be specified in the order.*
>
> *(3) Where a justice makes an emergency care order, he may for the purpose of executing that order issue a warrant authorising a member of the Garda Síochána, accompanied by such other members of the Garda Síochána or such other persons as may be necessary, to enter (if need be by force) any house or other place specified in the warrant (including any building or part of a building, tent, caravan or other temporary or moveable structure, vehicle, vessel, aircraft or hovercraft) where the child is or where there are reasonable grounds for believing that he is and to deliver the child into the custody of the (Child and Family Agency).*
>
> *(4) The following provisions shall have effect in relation to the making of emergency care orders—*
>
> *(a) any such order shall, subject to paragraph (b), be made by the justice for the district in which the child resides or is for the time being;*

(b) where a justice for the district in which the child resides or is for the time being is not immediately available, an order may be made by any justice of the District Court;

(c) an application for any such order may, if the justice is satisfied that the urgency of the matter so requires, be made ex parte;

(d) an application for any such order may, if the justice is satisfied that the urgency of the matter so requires, be heard and an order made thereon elsewhere than at a public sitting of the District Court."

The remaining provisions of this section are not germane to these proceedings.

34. The District Judge refused to hear the matter as the papers had not been lodged before 2pm. He adjourned the matter to 10:30am the following morning. For reasons set out in an affidavit of Carol Boylan, and which form part of the grounds of the challenge to the lawfulness of the second Applicant's continued detention, the application for an emergency care order was not finally heard until the 29th of July by Judge Coughlan in Trim District Court. Having been satisfied that the statutory threshold criteria had been met, he made an emergency care order which was produced to this Court. On 4th August, an interim care order was sought and granted but was due to expire at 5:30am on 5th August. The expiry of that order occurred during the course of this inquiry. The expiry time coincided with the departure time of the flight which had been booked as part of the fresh arrangements which had been made for the deportation of the Applicants but which, as has already been observed, were not proceeded with having regard to the nature of these proceedings.

35. In the circumstances the first Applicant consented to the second Applicant remaining in the care of the second Respondent on the same terms as the interim care order pending the resolution of these proceedings thus obviating the necessity for a further application but notwithstanding which it has been agreed between the parties that the Court should continue to inquire in relation to the lawfulness of the detention of the second Applicant. I consider it pertinent to observe here that in her evidence Carol Boylan made it clear that the second Respondent has no concern about the welfare of the second Applicant while in the custody of her mother and that in the event that the Court should determine that the detention of the first Applicant was unlawful, the second Applicant would be returned to her mother forthwith. She remains in the care of the second Respondent pro tem.

36. The power to make an interim care order is provided for by s. 17 of the Child Care Act. The section provides:-

"17(1) Where a justice of the District Court is satisfied on the application of the (Child and Family Agency) that –

(a) an application for a care order in respect of the child has been or is about to be made (whether or not an emergency care order is in force), and

(b) there is reasonable cause to believe that any of the circumstances mentioned at paragraph (a), (b) or (c) of section 18 (1) exists or has existed with respect to the child and that it is necessary for the protection of the child's health or welfare that he be placed or maintained in the care of the (Agency) pending the determination of the application for the care order,

the justice may make an order to be known and in this Act referred to as an "interim care order".

(2) An interim care order shall require that the child named in the order be placed or maintained in the care of the (Child and Family Agency)

(a) for a period not exceeding (28 days), or

(b) where the (Child and Family Agency) and the parent having custody of the child or person acting in loco parentis consent, for a period exceeding (28 days),

and an extension or extensions of any such period may be granted (with the consent, where an extension is to exceed (29 days), of the persons specified in paragraph (b)) on the application of any of the parties if the justice is satisfied that grounds for the making of an interim care order continue to exist with respect to the child.

(3) An application for an interim care order or for an extension of such an order shall be made on notice to a parent having custody of the child or to a person acting in loco parentis except where, having regard to the interests of justice or the welfare of the child, the justice otherwise directs.

(4) Where an interim care order is made, the justice may order that any directions given under subsection (7) of section 13 may remain in force subject to such variations, if any, as he may see fit to make or the justice may give directions in relation to any of the matters mentioned in the said subsection and the provisions of that section shall apply with any necessary modifications."

Submissions

37. Written and oral submissions were made on behalf of all parties and have been read and considered by the Court; it is not proposed to recite these.

38. Suffice to say that the essence of the Applicant's case in the first instance is that the arrest of the first Applicant by Detective Garda Durkan pursuant to s. 5 of the Immigration Act 1999 as amended was tainted with illegality which arose from the unauthorised presence in the house of three other members of the Garda Síochána. It was submitted that on a literal interpretation of the provisions of s. 5 subs. 11 the power to enter the Applicant's home and to arrest the first Applicant was confined to the immigration officer or the member of an Garda Síochána entering for the purposes of affecting that arrest. The section did not authorise the entry into the premises of other immigration officers or members of an Garda Síochána, accordingly, the presence of those other officers was unlawful and violated the rights of the Applicants under Art.40. 5 of the Constitution.

39. The evidence of the other officers who entered the house was that they did so for the purposes of rendering assistance to Detective Garda Durkan in the arrest by her of the first Applicant.

40. The first named Respondent submitted that Detective Garda Durkan entered the premises under statutory authority, namely, for the purposes of affecting an arrest under s. 5 of the Act and that the officers who attended with her were entitled to be present in the course of their duty to render assistance, if necessary, for that purpose, accordingly, there was no basis in law for the suggestion that their attendance constituted a violation of the Applicants' Constitutional rights under Art. 40.5 of the Constitution.

41. In passing it should be noted that no challenge was made by the Applicants to the legality or enforceability of the deportation orders.

Decision on the legality of the entry and arrest in the home
42. Whilst no authority was opened to the Court to support the proposition, it was submitted on behalf of the first Respondent that once a member of an Garda Síochána was executing a duty authorised in accordance with the law that that officer was entitled to the assistance, if required, of other officers in the performance of that duty.

43. The powers of the gardaí are conferred on them by common law and by statute. They are required to keep the peace, detect and prevent crime and uphold the public law. In the absence of any authority to the contrary being opened to the Court it would, in my judgment, be wholly wrong to hold in the circumstances of this case that the officers who were assisting Detective Garda Durkan in the discharge of a duty authorised by statute was unlawful thus rendering the arrest of the first Applicant invalid, accordingly, the Court finds that the arrest of the first named Applicant by Detective Garda Durkan was lawful. The absence of an express statutory provision in S. 5 permitting the arresting officer to be accompanied by other officers on entering the house does not, in my judgment, vitiate the duty to render assistance when requested or directed nor does it render their presence in the house for that express purpose, as was the case here, unlawful.

44. In passing I pause to observe that in Tort law the failure by a police officer to render assistance to another officer in the performance of an authorised policing duty which causes that officer injury and loss may constitute negligence on the part of the other rendering both the officer and, on the grounds of vicarious responsibility, the police authority liable in damages. See: *Costello v. Chief Constable of Northumbria Police [1999] 1 All ER 550*.

45. I ought also to observe here that none of the unfortunate factual circumstances which formed the background to the decision of this Court in *Omar v. The Governor of Cloverhill Prison* [2013] IEHC 579 were present in this case. The officers involved in this case behaved appropriately and were at all times courteous and sensitive to the feelings of the Applicants. There was no evidence of coercion or invasion of the child's bedroom and none such was suggested by the first Applicant.

46. On her own evidence all requests as to what was required were made to the first Applicant alone. She accepted that she cooperated with the Gardaí at all times up until she was asked to board the plane. I am satisfied on the evidence and in all the circumstances pertaining to the presence of the officers in their home that there was no violation of the Applicant's rights guaranteed by Article 40. 5 of the Constitution.

Decision on the arrest of the 2nd Applicant
47. As to the legal status otherwise of the second Applicant throughout these events, it is clear having regard to the provisions of s. 5 subs. 6(c) that there was no power to arrest her. That was not in controversy between the parties. It was argued, however, that whether or not her mother was under lawful arrest the second Applicant was no longer at liberty; consequently, the second Applicant was also detained and this was more particularly so because on the evidence of the officers the purpose of their presence on the premises was to bring both to the airport for the purposes of giving effect to the deportation orders. While it was not contended that the second Applicant had been arrested it was submitted that her *de facto* detention had the same effect in law; in this regard the Applicants relied on the decisions of *Dunne and Clinton* [1930] I.R. 366; *The People v. Walsh* [1980] 1 I.R. 294, and *Toidze v. the Governor of Cloverhill Prison* [2011] IEHC 395.

48. Particular emphasis was placed by the Applicants on the decision of this Court in *Omar v. The Governor of Cloverhill Prison*. while accepting that that decision was handed down prior to the amendment of s. 5, it was submitted that the second Applicant was in precisely the same situation as the child of the Omar's, namely, that the officers had entered their home with a view to deporting her along with her mother from the State. In the circumstances she was under *de facto* arrest. If that submission is correct then her detention would be unlawful.

49. Apart altogether from the fact that Omar was decided prior to the passing of the International Protection Act 2015 it is necessary to distinguish the circumstances pertaining to that case from those here. It is apparent from the judgment of Hogan J., that there had been egregious and repeated violations of the Constitutional rights of the Omar family. Significantly and although the officers had been initially invited into the house by Mr. Omar, the material circumstances in that case were altogether different. The Gardaí had entered the house without a search warrant for the purposes of making a *de facto* arrest in order to give effect to the deportation order, moreover, there was no power, as now exists, to enter the house and arrest Mr. Omar. Because of the unlawful actions in the house which constituted a breach of Art. 40.5 of the Constitution, it followed that Mr. Omar was already in unlawful custody at the point when he was arrested in Dublin Airport.

50. In this case the first Applicant had been lawfully arrested pursuant to s. 5 by Detective Garda Durkan. I accept the submissions of the Respondents that though she was under arrest her daughter at all times remained in her custody and the first Applicant continued to exercise control over her. The argument that her rights in this regard were necessarily fettered by the fact that she had been arrested does not, in my judgment, stand up to scrutiny. The first Applicant could have refused to cooperate with the requests made of her, particularly in relation to what instructions she decided she would give to her child whom it appears from the evidence would almost certainly have obeyed her mother. The entire process could have been frustrated at any time as it was subsequently.

51. The rights, duties and responsibilities of a mother towards and in respect of her child are well settled in National and European law. See *G v. An Bord Uchtala* [1980] 1 I.R. 32 and Article 42.A of the Constitution. Although she was under arrest, I am satisfied that the first Applicant remained competent and capable of making decisions for her daughter and that she exercised those rights by waking her daughter, packing her bags and directing that she cooperate and come with her to the airport; it is hardly a surprise that an 8 year old girl did as she was asked by her mother.

52. It is of some import, as was observed by Hogan J. in Omar, that there was no evidence of any arrangements having been made in that case for the welfare of either Ms. Omar or their child. That evidential lacuna is not present here. I am quite satisfied that Detective Garda Durkan was conscious of the requirements of s. 5 subs. 6(c) and that on arrival at the airport she notified the

second Respondent's duty social worker that the first Applicant had been arrested and advised the relevant circumstances pertaining to that arrest.

Conclusion on whether the 2nd Applicant was arrested.
53. The first Applicant was quite within her rights as an undoubtedly good and caring mother to make decisions for her daughter including a decision that they would pack and travel to the airport for the purposes of deportation from the State. It must be remembered that at all times immediately prior to the time of departure no indication had been given to the officers that she intended to do anything other than comply with the deportation orders. In these circumstances I reject the submission that the second Applicant had been detained and was *de facto* under arrest, rather, she remained at all material times in the custody and under the control of her mother and that that remained so until her daughter was taken into care.

Findings in relation to subsequent events
54. What happened at the airport has already been recited earlier and need not be repeated here. Suffice it to say that the Applicants were brought to Mountjoy Garda Station where the second Applicant was delivered into the custody of Tusla staff members in the presence of her mother who was then taken and detained in Mountjoy Female Prison. I am satisfied that the first Applicant was aware of the reasons why it was considered necessary in these circumstances to make arrangements for the care of her daughter.

55. The Court finds that these sequence of events commenced with and arose as a result of a decision by the first Applicant on behalf of herself and her daughter to cease cooperation with the process of deportation and with the decision that they were not going to travel to Nigeria; it was the behaviour of the first Applicant which frustrated the lawful deportation of them both from the State.

Position of the 2nd Applicant.
56. The second Applicant remains under the care of the second Respondent. With regard to that matter it was submitted that the emergency and interim care orders were unlawful and that the second Applicant should be released into the custody of her mother.

57. It was quite clear to the officers that the effect of the detention of the first Applicant in the women's prison at Mountjoy necessarily involved a separation of mother and daughter and that as there was nobody who could act in *loco parentis* to look after her welfare in such circumstances, it was necessary for Detective Garda Michael Byrne to make the arrangements with the second Respondent to take the second Applicant into care.

58. In passing it is necessary to observe in relation to the lawfulness of the second Applicant's placement in care that the Respondents had initially submitted that the appropriate procedure by which the orders in question should be challenged was by way of judicial review. Additionally the second Respondent had initially submitted that the Art. 40 procedure was inappropriate. Neither of these grounds were advanced at the hearing and the second Respondent conceded that for the purposes of this case the Art. 40 procedure was appropriate.

Excessive use of executive power
59. It was also submitted on behalf of the Applicants that the power of detention was not exercised in accordance with the principles set out by the Supreme Court in *East Donegal Cooperative Livestock Mart Limited v. The Attorney General* [1970] I.R. 317 and in this regard reliance was placed on the decision of the Supreme Court in *BFO v. The Governor of Dochas Centre* [2005] 2 I.R. 1 where it was held that the power of arrest and detention may only be used where it is determined that it is necessary to do so in order to ensure the orderly deportation from the State of the person concerned.

60. In this case the arrest and detention of the first Applicant had the effect of separating a mother from her daughter. The first Applicant's rights as a mother have constitutional protection and recognition by reason of Art. 40.3 of the Constitution, accordingly, the exercise of the power of arrest and detention was subject to the rules of constitutional justice and in this regard reliance was placed on the decision of *G. v. An Bord Uchtala* infra.

61. These principles do not fall to be considered *in vacuo* but rather upon the particular facts and circumstances in any given case. It is a legitimate aim of the State to maintain its own borders and operate a regular system of immigration control. The processing and monitoring of non-national persons in the State is devised in the furtherance of that objective and in this regard the Applicants accepted that the decisions in *A.O. & D.L. v. the Minister for Justice* [2003] 1 I.R. 1 and *Oguekwe v. The Minister for Justice* [2008] 3 I.R. 795 were applicable. It was submitted, however, that this aim and the procedures adopted to achieve it had to comply with the principle of proportionality and in that regard had to:-

> (a) be rationally connected to the object and not be arbitrary, unfair or based on irrational considerations,
>
> (b) be such as to impair the right as little as possible and
>
> *(c)* be such that the affects on rights were proportional to the objective. See *Gallagher v. the Director of the Central Mental Health Hospital (No. 2)* [1996] 3 IR 1 at p. 63.

62. In the present case it was submitted that no consideration appeared to have been given to permitting the Applicants to return to the accommodation centre at Mosney until such time as arrangements were made in order to deport them. Moreover, given that the Applicants resided in State accommodation, it was difficult to draw the conclusion that the detention of the first Applicant in Mountjoy and the placing of her daughter in care was necessary in order to give effect to deportation. Accordingly, the detention was not in accordance with national law and in any event was not proportionate to the pursued objectives and was therefore in breach of constitutional justice constituting as it did a disproportionate interference with the Applicants' rights under the Constitution and the European Convention on Human Rights.

Conclusion on excessive use of executive power
63. Having regard to the circumstances and facts of this case and in particular the admitted efforts to avoid the deportation orders from the time they were made until the events giving rise to these proceedings, the decision to detain the first Applicant and to place the second Applicant in care was both proportionate, justifiable and lawful. The arrest and detention of the first Applicant in the women's prison at Mountjoy was warranted in the circumstances in order to ensure her orderly deportation from the State. See *BFO v. the Governor of Dochas Centre (supra)*.

Misuse of Childcare Acts and validity of care orders.
64. It was also submitted on behalf of the Applicants that the principle and object of the application for the emergency and interim

care orders were not made *bona fide* and within the powers provided for by the Child Care Acts, rather, the provisions had been invoked not with the object of securing the health and welfare of the first Applicant's daughter but rather as a device to secure the deportation of the second Applicant from the State.

Findings
65. I accept the second named Respondent's submissions in relation to the procedural infirmities of the District Court process contended for by the Applicants. In particular I accept the second named Respondent's explanation for the separate notices which had been issued in respect of the different sittings of the District Court and that in substance there was no decision to refuse the application at the earlier sittings rather, for all practical purposes, the original application was adjourned and was ultimately determined by District Judge Coughlan within jurisdiction on 29th July. The interim care order was made on foot of a separate application, I am satisfied that this too was made within jurisdiction.

66. In relation to the circumstances giving rise to the initiation of the s. 12 process at the airport it would, in my judgment, require a strained construction of the provision if the officer concerned was required to leave the precincts of the airport and then re enter in order to comply with the provisions of the section. The officer was already present in the place when the circumstances contemplated by the section arose resulting in the initiation of the process provided for.

Conclusion
67. I accept the evidence of Carol Boylan concerning the procedure and the evidence given to the District Judge on the hearing of the application for the interim care order. The making of the emergency and interim care orders required the respective district judges to be satisfied on the evidence before them that the threshold criteria set out in statute had been met. The orders themselves are sufficient evidence beyond which the Court is not required to go in order to be satisfied as to the lawfulness of those orders and the validity of the detention made on foot of them. See *Ryan v. The Governor of The Midlands Prison* [2010] IEHC 337 and *McKevitt v. The Governor of Portlaoise Prison* [2014] IEHC 442. The production of a valid warrant of detention is sufficient to establish the lawfulness of the detention.

Decision on the Application
68. On the findings made and for the reasons given in respect of this enquiry it is the judgment of the Court that the arrest and subsequent detention of the first Applicant in the women's prison at Mountjoy was and is in accordance with law.

69. During the enquiry the first Applicant quite properly consented to the continuing placement in care of her daughter in like terms to the care orders while she was detained in the women's prison at Mountjoy. Having regard to the lawfulness of those orders the Court finds, insofar as the placement in care of the 2nd Applicant on foot of them can be construed at law as a detention, that such was lawful.

70. On a human level I am conscious that the separation of mother and daughter must be the cause of unhappiness and not a little distress for both but particularly for a young girl. Nevertheless, and having regard to the best interests of the second Applicant in these unfortunate circumstances, the result has a practical benefit in the sense that she is and will continue to be well cared for pro tem. Had her placement in care been found to be unlawful it would not have been possible to unite her with her mother, who remains in lawful detention, with the result that her health, care and welfare would, once again, become an issue that would necessarily require intervention by the second Respondent. In the event that does not now arise.

Ruling
71. Consequent upon the findings made and the conclusions reached the Court will make an order dismissing the Application.