THE HIGH COURT

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 40.4.2° OF THE CONSTITUTION

[2017 No. 1071 S.S.]

BETWEEN

DEANDRA GAYLE

APPLICANT

AND

THE GOVERNOR OF THE Dóchas CENTRE

RESPONDENT

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 743 J.R.]

BETWEEN

DEANDRA GAYLE

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND, AND THE ATTORNEY GENERAL

RESPONDENT

(No. 1)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 27th day of October, 2017

1. The applicant came to the State from Jamaica on the 23rd May, 2013 on a visitor's visa, joining her family who live in Cavan. Her step-mother and three sisters are citizens of Ireland and the father has applied for citizenship. Her visitor's visa expired in July, 2013 and she has remained here without permission since as an illegal immigrant for four and a quarter years. On 4th July, 2013 she applied for leave to remain, and that was refused on 28th August, 2013. A proposal to deport was issued on 25th September, 2013 and submissions made on 18th October, 2013. A deportation order was made on 19th May, 2017 which required her to leave the State by the date specified in the notice accompanying the order. On 24th May, 2017 she was notified of a deportation order accompanied by a notice which specified that she was to leave the State by 24th June, 2017. She then consulted solicitors who considered challenging the deportation order on proportionality grounds. Advices of counsel were sought and negative advices were given. Advices of further counsel were sought and those advices were also negative. Towards the end of August and early September, 2017 she called into Cavan Garda Station on two occasions as requested. On 18th September, 2017 she was asked to attend Cavan Garda Station again which she did on 20th September, 2017 when she was arrested on the grounds that she failed to leave the State by the time specified in the deportation order.

The matters before the court

2. There are two applications before the court. Firstly an Article 40 application, in which I made an order for an inquiry on 25th September, 2017. The Governor furnished a certificate on the same date. No point is taken on behalf of the applicant by virtue of the certificate being furnished on behalf of the Governor of the Dóchas Centre rather than the Governor of Mountjoy Prison, which is the legal entity.

3. Secondly, there is a judicial review. I granted leave on the 2nd October, 2017 and allowed an amendment regarding a declaration concerning the invalidity of regulations under the Immigration Act, 1999, and on the hearing date 27th October, 2017 I granted a further amendment to permit the correct regulations to be cited. I gave leave to the applicants to deliver an amended statement of grounds and it was indicated on behalf of the respondent that no amended statement of opposition was required. The judicial review raises a challenge to the deportation order and a claim for a declaration that the ministerial regulations are invalid insofar as they provide that a person is to leave the State by a date specified in the notice accompanying a deportation order.

4. I have heard helpful submissions from Mr. Michael Forde S.C. (with Mr. Paul O'Shea B.L.) for the applicant and from Mr. Robert Barron S.C. (with Ms. Eilis Brennan B.L.) for the respondents.

The issues

5. The issues on the merits are firstly, whether the ministerial regulations are valid insofar as they allow the deportation order to refer to a date in an accompanying notice and secondly, if the regulations are valid whether the arrest was unlawful because the ground stated was that the applicant did not leave the State by the time specified in the order. There is also a third procedural issue, namely whether time should be extended for the bringing of the judicial review proceedings.

Are the regulations valid?

6. The current form of a deportation order is set out in the Immigration Act, 1999 (Deportation) Regulations 2005 (S.I. No. 55 of 2005) (as amended by the Immigration Act, 1999 (Deportation) (Amendment) Regulations 2017 (S.I. No. 74 of 2017)). The 2017 regulations are made under s. 7 of the Immigration Act, 1999 which allows the Minister to prescribe matters specified as to be prescribed or to make regulations giving full effect to the Act. Section 3(1) of the 1999 Act provides that subject to the Act the Minister may by way of a deportation order require any non-national specified in the order "*to leave the State within such period as may be specified in the order and to remain thereafter out of the State.*" Section 3(7) provides that the deportation order is to be "*in the form prescribed or in a form in the like effect*". Subject to reading a provision in context, the primary rule of interpretation must be to give effect to the purpose of the legislator or rule-maker provided of course that the purpose can be ascertained from the language used. A purposive interpretation is central to any ordered society or any ordered and effective legal system. The legal system is not a doll's house in which semantic-minded interpreters can enjoy word-games. Where a purposive interpretation is

available it should be preferred to a semantic interpretation. The qualification that such a purposive interpretation must be available is important because one must recognise that there are cases where the statutory purpose is not at all apparent from the statute and in such cases submissions on behalf of the State in particular can at times be a *post hoc* reconstruction of a purpose designed on a bespoke basis to resolve a difficultly in a particular case. In such a case the semantic interpretation is the only one properly available. In this case however s. 3 does not in fact require a date to be named expressly in the deportation order. It refers to such a period as is specified - and a period is specified, albeit one requiring one to look at a separate document. The semantic interpretation urged by Mr. Forde therefore does not succeed. That is reinforced by a purposive interpretation. The purpose of the statute is to provide for an ordered immigration system accompanied by due consideration of any submissions made by applicants and due regard to their rights. No interference with any rights of an applicant is occasioned by specifying the date in one document rather than in another. On the other hand an effective immigration system would be entirely thwarted by requiring the date to be specified in the order. The Minister cannot know when making the order precisely when it will be practicable to serve the order on an applicant.

7. In that regard I place reliance on the affidavit of Tom Doyle, an Assistant Principal Officer of the Department of Justice and Equality. At para. 4 he avers that at the time a deportation order is signed it is not certain on what date it will issue and that matter will be dependent on whether an address is available for the person to whom it relates at the relevant time. The specification of the date is also dependent on allowing 28 days for a challenge, a point made in para. 5 of his affidavit. This is clearly related to the foregoing point and reinforces the conclusion that it is not practicable to require that date to be specified in the order itself. At the level of even broader principle it seems to me there is no logical objection to specifying something by reference to something else as long as the something else is specific. If for example I were to say in a judgment that I reject or accept a point for similar reasons to the way the point was dealt with in another case, that constitutes a sufficient specification of reasons. I could not credibly impose a more rigorous duty on the Minister or any administrative decision-maker than I would be prepared to accept for myself.

8. The 10th edition of the Concise Oxford English dictionary defines "*specify*" as "*identify clearly and definitively.*" The definitive 6th edition of 1976 defines its primary meaning as "*Name expressly, mention definitively*". That does not necessarily connote that specification must done in a single document - a reference to another document can be a clear and definitive identification and an express and definitive mention and naming. There is no magic formula that must be used in legislation as to the form of a document. The fact that a different wording is used in the European Arrest Warrant Act, 2003 does not assist the applicant.

9. I turn now to the question of authority on the subject. While it is true that the 2005 regulations as substituted by the 2017 regulations have not been specifically challenged in other proceedings, it seems to me that the principle underlying the argument has already been determined by the Supreme Court. In *F.P. v. Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164 at 175, Hardiman J. held that the argument that the "*date of effect of the deportation"* should be in the deportation was a point of "*no substance*". That decision is clearly binding and determinative against the applicant. The decision was followed by O'Regan J. in *M.A.K. v. Minister for Justice, Equality and Law Reform* [2017] IEHC 168 in refusing leave on this point. The same conclusion was ultimately arrived at by Faherty J. in *Kumar v. Minister for Justice, Equality and Law Reform* [2016] IEHC 677 at para. 70-72, although the authorities do not seem to have been opened to her.

10. It was loosely suggested that there could be divergence of authority but that point has not been made out. In *Parvaiz v. Commissioner of An Garda Síochána* [2016] IEHC 772 at para. 13, the point was left open by Mac Eochaidh J., as it was in *Lin Qing v. Governor of Cloverhill Prison* [2016] IEHC 710 at para. 45 where he said that it was not possible to discern whether the point had been determined in the *F.P.* case, although he conceded that "*the case may well be of assistance to the respondent*".

11. It seems to me that the point has indeed been determined in *F.P.* and that definitive interpretation by the Supreme Court is not something that can be cast into doubt by reason of subsequent decisions of the High Court of the type referred to. Reference is also made to *S.A.A.E. v. Minister for Justice, Equality and Law Reform* [2016] IEHC 573, but since that decision is under appeal (see *S.A.A.E. v. Minister for Justice, Equality and Law Reform* [2017] IESCDET 62), it does not appear productive to discuss it further.

Was there an error of fact in the terms of the arrest?
12. It follows from the foregoing that when the arresting member took the view that the applicant had failed to leave the State within the time specified on the order, that in law was a valid reason because the date specified in the order were indirectly specified by reference to the notification.

Should the extension of time at the leave stage be set aside?
13. The argument was made by the applicant that an extension of time was not necessary for the challenge to the regulation. It seems to me that the decision in *Nawaz v. Minister for Justice, Equality and Law Reform* [2013] 1 I.R. 142 applies, in which the Supreme Court held that a constitutional challenge which had as its natural and intended the consequence the rendering invalid of a measure set out in s. 5 of the Act of 2000 was caught by that section so could not validly be brought by plenary summons. The logic of that decision must also apply to a *vires* challenge to regulations. If I am wrong about that, however, it seems to me that if the deportation order became unchallengeable because the challenge was out of time the applicant would not have standing to challenge the validity of the regulations. In circumstances such as these where s. 5 of the 2000 Act applies the applicant cannot launch an abstract challenge to legislation unless she also has a valid challenge pending to a particular decision caught by s. 5 of the Act. I turned then to whether time should be extended on the facts, or perhaps more precisely whether the order extending time at the leave stage should be set aside. The explanation essentially is that her solicitors and two separate counsel did not advert to the point and only when the present counsel were briefed after the applicant's arrest was the point taken up.

14. It seems to me that the present case is precisely the sort of challenge that s. 5 of the 2000 Act was enacted to prevent. Applicants and their advisors are required to apply their minds to whether they want to challenge a decision to which s. 5 applies within 28 days. Otherwise the legislation, upheld by the Supreme Court, would be set at nought. The grounds essentially are failure by the applicant's lawyers to think of the point. If that is a valid excuse then the fact that three months have expired is irrelevant - the same excuse would be equally good after three years, or any amount of time. The orderly operation of the immigration system would be impossible if that were a ground for extension of time. In that regard I see a significant difference between extension of time to get the proceedings going in the first place and allowing an amendment at a later stage of the proceedings. If proceedings were issued within time on any ground, the public policy of providing certainty in a timely manner as to whether the decision is being challenged or not is satisfied even if the grounds are subsequently extended or amended. Thus the Supreme Court has been able to take a more generous approach to amendments in judicial review even long after the limitation period (see *Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570, [2012] IESC 29 and comments *in O'Neill v. Appelbe* [2014] IESC 31 and my own comments in cases including *B.W. (No. 2) v. Refugee Appeals Tribunal* [2015] IEHC 759 (under appeal)). It seems to me that much of the pre-*Keegan* case law, at least insofar as it applies to amendment, is no longer a definitive statement of the position. While reliance was placed on *Muresan v. Minister for Justice, Equality and Law Reform* [2004] 2 I.L.R.M. 364 [2004] IEHC 348 the law has evolved because the Supreme Court in *Keegan* has said essentially that inadvertence by lawyers is not necessarily a bar to permitting an amendment, even at a late stage. This however is a case where no proceedings whatsoever were issued within the 28 days. Given

the clear statutory policy it would require substantial reasons to permit an extension in that time even independently of the requirement set out in O. 84 r. 21 (3) as amended by the Rules of the Superior Courts (Judicial Review) 2011.

15. That provision requires firstly that there be good and sufficient reason for the extension, and secondly that the circumstances that resulted in the failure to make the application within the required period were either outside the control of or could not reasonably have been anticipated by the applicant. In my view none of these criteria are met here. If one takes, first of all, a case where there was failure to seek legal advice, that would not be a good and sufficient reason, nor would it be outside the control of an applicant, nor would it be something that could not have reasonably been anticipated. One then moves to a case such as this where there was an attempt to seek legal advice but a failure by the lawyers to take proceedings. That likewise could not be a good and sufficient reason, nor is it outside the control of an applicant in the sense firstly, that an applicant for these purposes must be identified with their legal advisers, but secondly that an applicant can always get a second or even a third opinion if necessary, nor could the possibility that later counsel might take a different view be regarded as something that could not reasonably be anticipated. Mr. Forde relies on the dictum in *Bonalumi v. Secretary of State for the Home Department* [1985] 2 W.L.R. 722 [1984] EWCA Civ J1122-1 [1985] 1 All ER 797 to the effect that many points have been raised that previous excellent counsel overlooked. That, it seems to me, is all the more reason why the possibility that new counsel could think of new points is something that one might very well anticipate and is therefore not something that could not reasonably have been anticipated originally. Failure to take the proceedings after obtaining negative legal advice could not be said to constitute a situation where reasonable diligence has been put forward on behalf of an applicant as adverted to in In *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, [2000] 2 I.R. 360 at 393 and *C.S. v. Minister for Justice Equality and Law Reform* [2005] 1 I.R. 343, [2004] IESC 44 at para. 62.

16. The key authority here is the Supreme Court decision in *L.C. v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 133 [2006] IESC 44. One cannot come back at the Article 40 stage and make a point that one could have made at the time the deportation order was made. Section 5 of the 2000 Act is an exclusive mechanism. The validity of a deportation order cannot be reopened because a person is subsequently arrested on foot of it and brings an Article 40 application. The clear inference I would have drawn from the timing, in any event, was that what stimulated the belated challenge to the deportation order was the applicant's arrest for the purposes of deportation. To permit a belated challenge under those circumstances would clearly undermine any orderly immigration process. That inference is reinforced by Mr. Moroney's affidavit where he avers that only after the applicant's arrest were the present advices sought and obtained. In addition, the affidavit makes clear, inferentially at any rate, that there was a positive decision made on behalf of the applicant not to seek judicial review of the deportation order within the limitation period.

17. Irrespective of whether or not one has sympathy for the applicant it seems to me that Kant's categorical imperative applies here. To reframe the grant of an extension of time in this case in terms of a universal law would necessitate a nullification in a huge swathe of cases of the time limit set out in s. 5 and upheld by the Supreme Court. However, given that the application fails on the merits in any event, it is not in fact necessary to set aside the extension of time granted at the leave stage so in strict technicality the foregoing discussion on time must be regarded as *obiter*.

Order

18. The order I will make is:

(i). that the relief sought in the judicial review be refused on the merits; and

(ii). Secondly, as I am satisfied that the applicant is in lawful custody, that the Article 40 proceedings be dismissed.