

THE HIGH COURT

Record Number: 2005 No. 1153 JR

BETWEEN

WEI SUNG JIANG

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, JUDGE JOHN COUGHLAN, THE JUDGE ASSIGNED TO THE DUBLIN METROPOLITAN DISTRICT AND FOR THE TIME BEING WITH DUBLIN AIRPORT CHARGE SHEET 410120, DETECTIVE GARDA O'SOMACHAIN
RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 16th day of November 2005

1. This application originally came before me by way of Habeas Corpus application, but simultaneously I granted leave to seek certain relief by way of judicial review and that application was made returnable for the 28th October 2005. The Habeas Corpus application had already been dealt with, and in an ex tempore judgment on that date I refused the reliefs sought in these proceedings, and indicated that as soon as may be I would hand down a written judgment.

2. The reliefs sought by the applicant include

1. an order of certiorari quashing "a demand purportedly made on or about the 22nd August 2005 by the fourth named respondent of the Applicant pursuant to Section 12(1)(a) of the Immigration Act, 2004, that the applicant produce "a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality".

2. an order of certiorari quashing an order dated the 20th October 2005 made by the second named respondent whereby he fixed the 28th October 2005 for the hearing of the Charge Sheet referred to in the title hereof.

3. In relation to 2. above, I granted interlocutory relief restraining the hearing of that Charge until after the conclusion of these proceedings, and there has been no need to make any other order in relation thereto since, the date has passed in any event and the issue is moot.

4. In addition to these two reliefs, the applicant sought a number of related declarations and ancillary orders as appear in the Statement of Grounds.

5. With commendable speed and urgency the respondent s filed and delivered a Statement of Opposition.

6. It is relevant to set out the provisions of ss. 12(1) and 12(2) of the Immigration Act, 2004 which provides:

"12—(1) Every non-national shall produce on demand, unless he or she gives a satisfactory explanation of the circumstances which prevent him from so doing –

(a) a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality, and

(b) in case he or she is registered or deemed to be registered under this Act, his or her registration certificate."

(2) A non-national who contravenes this section shall be guilty of an offence."

7. Section 5(1) of the Immigration Act, 2003 provides that the section shall apply to a non-national "whom an immigration officer or a member of the Garda Síochána, with reasonable cause, suspects has been unlawfully in the State for a continuous period of less than 3 months."

8. Section 5(2)(a) of the Act provides that a person to whom the section applies may be arrested and detained under warrant of an immigration officer or a member of An Garda Síochána, and the maximum period of such detention pending removal from the State is specified in s. 5 (3)(a) of the Act to be not more than eight weeks in aggregate.

9. Mr Brendan Kilty SC on behalf of the applicant seeks to satisfy the Court that in the circumstances of this case the immigration officer was not entitled to make a demand of the applicant to produce his passport or other equivalent document under the provisions of s. 12(1) of the 2004 Act in circumstances where the applicant had made an application for asylum shortly after his arrival in the State.

10. The submission is basically that as soon as the applicant claimed asylum no demand ought to have been made of the applicant for the documentation referred to in s. 12(1), since it is very often the case that persons who leave their country of origin and seek asylum in another country do so without passport or other forms of identification I shall return to the submissions in due course, and it is in those circumstances that the applicants seeks the order of certiorari to quash the demand that was made of the applicant. The respondents argue that the applicant has an opportunity to explain the absence of documentation under the provisions of s. 12(1) of the Act and that he never at any stage sought to explain the absence of documentation by reference to his seeking asylum or otherwise.

11. I shall set out the facts which form the background of this application. The first affidavit sworn by the applicant's solicitor, Mary Needham on the 25th October 2005 states the applicant is a Chinese national who left China on the 20th September 2004 and that having "been in Singapore, somewhere in Africa, and some other countries in Europe" came to this State on the "22nd August 2005" (the applicant in his own later affidavit corrects this date to the 20th August 2005), and that he has been detained since that date. She states that it appears that on arrival he did not have any identification papers with him and that he applied for asylum "on the ground that he would be penalised in China under the "one-child" policy". I note in passing only that on the ASY1 asylum application form completed in this case on the 22nd August 2005 the reason for seeking asylum here is stated to be simply "social problems". However, nothing turns on that for present purposes. She notes also that he had an interview appointment in connection with his asylum application which was scheduled for the 27th October 2005.

12. Ms. Needham then refers to the charge brought against the applicant under s. 12 of the 2004 Act and which was then pending before the District Court. She states also that a colleague of hers in O'Donovan, solicitors had handed over to a member of An Garda Síochána when the matter was before the District Court "a Chinese National Identity Card believed to be in the applicant's name", and that this card was still as of the date of that affidavit with the Gardai for verification. That document, it appears, was not produced and handed over until the 27th September 2005.

13. A date was fixed for the hearing of the s.12 charge for the 28th October 2005, in spite of submissions made to the District Judge that this charge ought to be adjourned until such time as the applicant's asylum application was determined. That submission was on the basis apparently that if the fear of persecution was found to be well-founded and he was granted a declaration, this would be tantamount to saying that the demand made of the applicant for a passport or other such document was either a demand which the applicant ought not to have been required to comply with, or presumably that the immigration officer who made the demand ought to have assumed that his arrival here for asylum purposes was itself an explanation as to the absence of documents and the arrest ought not to have been made.

14. Mr Kilty submits that if a person such as the applicant arrives in this State and claims asylum he should not be subject to a demand under s. 12(1)(a) of the Act while his asylum application is pending or undecided, and that upon making an application for asylum an applicant is entitled as of right to a temporary residence certificate, and should not be arrested.

15. There is an affidavit from Mr David O'Shea, a solicitor in O'Donovans solicitors and he states, inter alia, that "on or about the 23rd September 2005 a Chinese National Identity Card arrived at O'Donovan solicitors, addressed to the Deponent. This letter was unsolicited and did not come to me by any prior arrangement. It was unaccompanied by any cover letter or other correspondence. I had it translated, and it appeared to be in the applicant's name. He goes on to state that on the 27th September 2005 at Cloverhill Courthouse he handed this document over to the fourth named respondent so that the document could be verified.

16. It appears that the applicant arrived here on the 20th August 2004 at Dublin Airport. In his own affidavit the applicant states that he left China because a social worker came to the house and told his wife to have an abortion and he would not agree. He says that the social worker returned with two policemen and that he was beaten up and injured and most of his possessions were taken. He says that his wife and children went to stay with relatives and that he himself went into hiding.

17. I notice in passing that in his own affidavit he speaks of having a wife and three children, whereas in the ASY1 Form he is noted as having only one child, namely a son born on the 1st January 1995. In his affidavit he says that two of his children are aged ten and five respectively, and the third child was not yet born when he left China.

18. At any rate he says he left China and spent some time in Singapore, Africa and some other countries in Europe. He says that he came to Ireland "with a white man" whom he understood would get him into Ireland. He says that he gave this man his Chinese National Identity Card and his other documents when he got onto the plane, and that he did this because that man spoke English. He goes on then to say that he thought that this man would stay with him through immigration at the airport, but that he did not do so and left the applicant alone at the airport. He says that a policeman saw him, and spoke to him but that the only word he understood the policeman to say was "passport". He then says: "I gestured to him that I did not understand. I was detained. I did not speak English." He then says that this policeman got an interpreter on the phone and that with the help of an interpreter I told the policeman that I wanted to claim asylum. I was not asked at this time about identity documents."

19. He says that he was later brought to a police station, but that he was not told why he was being arrested. He says that another policeman asked him through an interpreter to produce documents saying who he was and where he was from, but that he did not warn him that if he did not produce these documents, or give a sufficient explanation why he could not do so he would be committing an offence. He then says the following:

"I said that my friend was looking after this."

20. There is an affidavit also which is sworn by the fourth named respondent, Garda Brendan O'Somachain, and on which he was subjected to cross-examination before me. That affidavit gives an account of events leading up to the arrest and detention of the applicant. He states in paragraphs 3 to 7 inclusive as follows:

"3. I say and believe that on the 20th of August 2005 the applicant arrived at Dublin Airport and presented himself at Immigration/Passport Control to my colleague Detective Garda John Coakley. The applicant did not produce at that time any passport or airline tickets or identification whatsoever. The applicant did [not] speak English. It is believed he travelled from Alicante as a flight from there was in at the time.

4. Garda Coakley demanded that the applicant produce identification documents. However, the applicant indicated that he could not speak English. An interpreter was then obtained over the telephone who spoke to the applicant. The applicant spoke to the interpreter. He still failed to produce any identification documentation or indicate any reason why he could not do so. He then indicated that he wished to make an asylum application.

5. It is believed by the Gardai that the applicant was smuggled into this country by person or persons unknown. It is believed that he travelled from Spain on the 20th of August 2005. It is believed that the applicant states that in his own affidavit that he was in a number of countries between September 2004 and August 2005.

6. I was then contacted by my colleague at Dublin Airport and I attempted to speak with the applicant. I was informed that the demand to produce had been made of him but that he had failed to comply with same and had offered no explanation. I arrested the applicant and conveyed him to Santry Garda Station.

7. At Santry Garda Station I made a further demand for identification of the applicant with the assistance of an interpreter. He did not have any documentation but said that 'his friend was looking after it'. He was later charged with an offence contrary to Section 12(1)(a) of the Immigration Act 2004."

21. In a later paragraph this deponent states that on the 27th September 2005 on one of the remand dates at Cloverhill Court a document produced to the Court by the applicant which was claimed to be a Chinese National Identity Card, but he did not explain to the Court or to the deponent from where this document had been obtained. Garda O'Somachain goes on to say that the Gardai have no way of ascertaining if this is a genuine document or not.

22. When cross-examined by Mr Kilty, Garda O'Somachain stated that at the time that he made the demand for documents of the

applicant at Santry Garda Station, he was already aware that such a demand had already been made of the applicant at the airport, and that he had been arrested at the airport. But he had not been present when that demand was made. Garda O'Somachain accepted that he knew at that time at Santry Garda Station that the applicant had no documents, but stated also that the applicant might have given an explanation as to why he had no documents. In that regard he states that what the applicant stated to him was that a friend of his was looking after the matter of documents. He also believes that the applicant was aware at the time of his arrest why he was being arrested.

23. The main ground on which relief is sought for an order quashing the demand made under s. 12 is that because the applicant made an application for asylum at the airport prior to the demand being made at Santry Garda Station, there is something improper in that demand and that it ought not to have been made. I cannot find any basis for that submission, given the way in which the legislation is drafted. I have already set out the relevant legislative provisions, and nowhere is it apparent that there was any intention on the part of the legislature to provide that in circumstances where a non-national arrives at the frontiers of this State and claims asylum, that thence forth such a person may not be required to produce identification documents or explain why he/she is not in a position to do so. I am also satisfied that the applicant, who had available to him the services of an interpreter, albeit by telephone, never at any time gave any indication that the explanation for his lack of documentation was linked to his reason for claiming asylum or the manner and circumstances in which he left his country. He had an opportunity to offer an explanation as to why he had no documents, and he appears simply to have stated that a friend was looking after that matter. As we know, some weeks later in unexplained circumstances, a document said to be a Chinese National Identity Card was received anonymously by the applicant's solicitor, but there has been no verification of same.

24. As already set forth, Section 5(1) of the Immigration Act, 2003 provides that the section shall apply to a non-national "*whom an immigration officer or a member of the Garda Siochana, with reasonable cause, suspects has been unlawfully in the State for a continuous period of less than 3 months.*"(my emphasis)

25. In my view the facts in this case at least clearly gave rise to a "reasonable cause" for suspicion on the part of An Garda Siochana that the applicant was here unlawfully. I am also of the view that the fact that the applicant immediately claimed asylum does not in any way exclude him from the class of persons to whom the section applies. It is nowhere stated in the Act. It follows that Garda O'Somachain was entitled to arrest and detain the applicant – a matter relevant to the Habeas Corpus application.

26. But specifically in relation to the "demand" which it is sought to quash, I am satisfied that the applicant is someone of whom it was lawful to demand production of the documentation pursuant to s.12(1) of the 2004 Act, and that having had that demand made of him, the onus was upon him to give a satisfactory explanation of the circumstances which prevented him from so producing them. I am satisfied that he made no reasonable attempt to explain their absence, and that accordingly the Garda was entitled to charge him with an offence under the section. There is no exception provided for in the legislation in relation to an asylum seeker.

27. I am also satisfied that the production of the purported Chinese National Identity Card on the 27th September 2005 does not in any way affect the entitlement to make the demand on the 22nd August 2005.

28. In any event, Ms. Sunniva McDonagh BL for the respondents has submitted that the "demand" which the applicant seeks to quash is not such a decision which is amenable to judicial review. She submits that a decision to make a demand is not a decision affecting the rights and liabilities of a person, and submits that in reality what the applicant is asking the Court to do in these proceedings is to make a finding that the applicant ought not to be prosecuted for an offence under s. 12, and that such a decision is solely within the power of the DPP, and that the Court could not interfere with that decision.

29. I am satisfied that no grounds have been made out which would entitle this Court to grant the orders of certiorari sought, and I am satisfied also that the declaratory reliefs sought should not be granted as no case has been made out that it would be appropriate to do so for the reasons appearing above.

30. I refuse the application.