THE HIGH COURT

[2017 No. 44SS]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40 OF THE CONSTITUTION

BETWEEN

C.A.

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGEMENT of Mr Justice David Keane delivered on the 3rd day of February 2017

Introduction
1. Pursuant to Article 40.4.2º of the Constitution of Ireland, the applicant seeks an order of release from detention. The respondent opposes that application on the basis that the applicant is being held in accordance with law.

Procedural Background
2. On Friday, the 13th January 2017, through his legal representatives, the applicant made a complaint to the High Court that he was being unlawfully detained. Inquiring forthwith, the Court ordered the production of the applicant at 2 p.m. on that day and the certification in writing of the grounds of his detention. That was duly done, and the application was then adjourned to the following Tuesday, the 17th January 2017, to afford the respondent an opportunity to justify the detention.

3. On Tuesday, the 17th January 2017, the applicant was admitted to bail on terms agreed between the parties and approved by the Court, and the application was further adjourned to the 31st January 2017, for hearing. The Court heard the application on that date. The applicant remains on bail conditional upon, amongst other things, attending Court on each date when the proceedings are before it.

The detention
4. Mr Joe Hernan, assistant governor of Cloverhill Prison, has certified that the applicant is in custody pursuant to a detention order (or warrant of detention) dated the 9th January 2017. A copy of that warrant of detention is appended to the certificate. It is addressed to the governor of that prison and recites, in material part:

> 'In exercise of the powers conferred on me by Section 5 of the Immigration Act, 1999, as amended, and by the Immigration Act, 1999 (Deportation) Regulations, 2005 (S.I. No. 55 of 2005), as amended, on Monday, the 9th January 2017, I arrested [C.A.] and I direct that pending the making of arrangements for his removal from the State that the said [C.A.] be detained in Cloverhill Prison, a prescribed place of detention for the purpose of Section 5(3) of the Immigration Act, 1999 (No. 22 of 1999) as amended.
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> The basis for such arrest and detention is that I with reasonable cause, suspect that the said person against whom a deportation order is in force…has failed to comply with [a provision of the order other than that he leave the State within the time specified in the order] or with a requirement in a notice under Section 3(3)(b)(ii).
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> In accordance with Section 5(8) of the Immigration Act 1999, as amended, [C.A.] may only be detained until such time (being as soon as practicable) as he is removed from the State but in any event he shall not be detained under this Section for a period or periods exceeding 8 weeks (excluding any period referred to in Section 5(8)(b) of the said Act) in aggregate.'

5. The detention order bears the stamp of the Garda National Immigration Bureau ('GNIB'), 13/14 Burgh Quay, Dublin 2, with a date of the 9th January 2017. The order is endorsed as executed by lodging the applicant in Cloverhill Prison on the 9th January 2017 at 10.55 a.m.

The complaint that led to the inquiry
6. The complaint that led to the present inquiry was made grounded on a short affidavit sworn on the 13th January 2013 by Lauren Martin, the solicitor acting on behalf of the applicant.

7. That affidavit exhibits the warrant of detention already described. Ms Martin then avers that, on the 23rd October 2016, the applicant applied, under Regulation 5(2) of the European Communities (Free Movement of Persons) Regulations 2015 ('the 2015 Regulations'), for a decision that he be treated as a permitted family member of a Union citizen. Ms Martin exhibits a letter dated the 25th November 2016 from the Irish Naturalisation and Immigration Service ('INIS') to the applicant, acknowledging receipt of that application, though not a copy of the application that was made. Ms Martin provides no further information concerning the basis for that application. The applicant's position, as considered further below, is that the fact of that application is sufficient to render his deportation and, hence, his detention for that purpose unlawful.

8. While strictly an argument of law, rather than an assertion of fact, Ms Martin goes on to aver that, 'in accordance with Regulation 7(3) of the [2015] Regulations, the applicant is entitled to remain in the State pending the determination of his application under the Regulations', with the consequence that the extant deportation order against him cannot be enforced and, thus, his detention, which is solely to facilitate his deportation, is unlawful. Indeed, that was the basis upon which the application for an inquiry was moved before the Court on the morning of the 13th January 2017

9. The last-mentioned averment creates considerable uncertainty about both the particular Regulations and the specific provision of those Regulations that the applicant is seeking to rely upon. Regulation 7(6) of the 2015 Regulations confers permission to remain in the State on a permitted family member who has applied for a residence card, pending a decision on that application. Regulation 32 of the 2015 Regulations revokes the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 ('the 2006 Regulations'), subject to certain transitional provisions of no relevance here. The separate initiating letters that the applicant's solicitors wrote to both the INIS and the respondent refer confusingly to the applicant's asserted entitlements under 'Regulation 7 of the European Communities [Free Movement of Persons] Regulations 2006 to 2015.' Regulation 7(3) of the 2006 Regulations operated to give permission to remain in the State to a permitted family member who had applied for a residence card under those Regulations, pending a decision on that application.

10. By operation of Regulation 5(1)(b) of the 2015 Regulations, that paragraph applies to, amongst others, a person who, 'is the partner with whom a Union citizen has a durable relationship, duly attested.' Under Regulation 5(2) of the 2015 Regulations, such a person may apply to the Minister for Justice and Equality ('the Minister') for a decision that he or she be treated as a permitted family member for the purposes of the Regulations. Regulation 3(6) of the 2015 Regulations provides that, for the purposes of those Regulations, a person is a permitted family member of a particular Union citizen where, as one of the necessary criteria, 'the Minister has, in accordance with Regulation 5, decided that the person should be treated as a permitted family member of the Union citizen….' Under Regulation 6(1) of the 2015 Regulations, a person within one of several defined categories (which categories include that of permitted family member) may reside in the State for up to 3 months, subject to certain specified conditions.

11. I can find nothing in Regulation 7, or in any other regulation of, the 2015 Regulations that confers any permission to reside in the State on a person who has applied, under Regulation 5(2) of those Regulations for a decision that he be treated as a permitted family member of a Union citizen, pending the making of that decision.

The evidence
12. The following undisputed facts emerge from the affidavits subsequently exchanged between the parties.

13. The applicant applied for refugee status within the State on the 17th February 2010. In doing so, he made the following claims. He is from Pakistan and is a national or citizen of that country. His date of birth is the 1st January 1961. He travelled with his wife and five children. They arrived in the State from Belfast some time that month, having flown from Pakistan to Manchester on the previous 8th January, and having spent the intervening month in that city. The person who arranged their travel ran away with the applicant's passport.

14. The Office of the Refugee Applications Commissioner ('ORAC') recommended the refusal of the applicant's claim for refugee status in May 2010. The applicant appealed to the Refugee Appeals Tribunal ('the Tribunal'). In July of that year, the Tribunal recommended that the ORAC decision be affirmed.

15. On the 22nd September 2010, Refugee Legal Services lodged an application for the applicant to be given leave to remain in the State, as well as an application on his behalf for subsidiary protection. The application for subsidiary protection was refused in August of the following year.

16. The applicant was refused leave to remain and a deportation order was signed on the 20th September 2011. The applicant was notified of that fact by letter dated three days later. Deportation orders were made in respect of the applicant's wife and five children on the same date.

17. Thereafter, the applicant and his family have remained in the state illegally.

18. The applicant applied for a decision that he be treated as a permitted family member of a Union citizen by letter to the INIS, dated the 18th October 2016. In the completed application form, which he enclosed with that letter, under the heading 'status on arrival in the state', he ticked the box marked 'visitor', ignoring the box marked 'asylum seeker.' He gave, as his date of birth, the 15th September 1960, and as the date of his arrival in the state, 'September 2009.' This information was fundamentally at variance with the information he had provided when making a claim for refugee status in 2010. In addition, in answer to the printed question 'Are you currently subject to a Deportation Order made in Ireland?', the applicant ticked the box marked 'No.' That statement was false. The applicant enclosed with his application, amongst other documents, a copy of a Pakistani passport issued to him by the embassy of Pakistan in Dublin on the 19th February 2015.

19. On the application form and in the cover letter, the applicant identified a United Kingdom passport holder in employment within the State, with whom he claimed to have been in a durable relationship 'of more than 2 years' and with whom he claimed to have been living since 2014 at two different identified addresses successively.

20. As already stated, the said application to be treated as a permitted family member of a Union citizen was acknowledged in a letter to the applicant (at the address he had provided), dated the 25th November 2016. In that letter, the applicant was requested to provide certain additional documents in support of his application within 15 working days. The applicant did not acknowledge, or respond to, that letter.

The intention to deport
21. While, again, as an argument of law rather than an averment of fact, in the replying affidavit that he swore on behalf of the respondent on the 17th January 2017, Mr Tom Doyle, an assistant principal officer in the Department of Justice deposes that, as the applicant has not been deemed a permitted family member pursuant to the terms of the 2015 Regulations, he is not entitled to any permission to reside in the State. The mere making of an application to be deemed as such to obtain a residence card does not alter the applicant's immigration status. Further, the applicant is the subject of a valid deportation order, such that the Minister is entitled to deport him and the respondent is entitled to detain him for that purpose.

22. At paragraph 19 of his affidavit, Mr Doyle avers as follows:

> 'I say that there is a concluded and continuing intention to remove the applicant from the State unless he is deemed to be a permitted family member pursuant to his application for residency.'

The arrest and detention of the applicant
23. Detective Garda Michael Neville of GNIB swore an affidavit on behalf of the respondent on the 18th January 2017. In it, he deposes to the circumstances of his arrest of the applicant on the 9th January 2017. He avers that he was aware that a deportation

order was in existence for the applicant and that the applicant had failed to comply with the provisions of that order or with a requirement in a notice under s. 3(3)(b)(ii) of the Immigration Act 1999, as amended ('the 1999 Act'). He further avers that the applicant told him that he was aware that there was a deportation order in place for him. D/Gda Neville goes on to aver that he arrested the applicant and explained to him in ordinary language the reason for his arrest. The applicant was conveyed to Cloverhill Prison where he was detained in accordance with s. 5(8)(a) of the 1999 Act. Nothing turns on those matters, as no argument has been advanced on behalf of the applicant in relation to any of them.

Extraneous evidence

24. Significant additional evidence was adduced on behalf of the respondent, which it seems to me is extraneous to the issue that I must decide. Lest it be suggested that I have improperly overlooked, rather than consciously disregarded, it, I summarise that evidence here for completeness.

25. D/Garda Neville swore a further affidavit on the 24th January 2017. In it, he deposes to the circumstances of a search that he and his colleagues carried out early in the morning of the 9th January 2015 of a certain residence in a midlands town in which the applicant, his wife and five children, together with two other persons, were then residing. The UK passport holder with whom the applicant claims to have been in a durable relationship since 2014 was also present in the house when the search was conducted. She was identified as a sister of the applicant's wife. She informed D/Garda Neville that she lived with her own family in a city in another part of the State and was visiting her sister at the time of the search. During the search, the applicant was found to be hiding in the *en suite* of an upstairs bedroom. Neither the applicant nor any member of his family was detained. On the following day, the house concerned was found to be vacant and the sister of the applicant's wife was observed returning to, and entering, the property that she had identified as her home. That property is not either of the two properties that the applicant claims to have co-habited in with his wife's sister since 2014.

26. D/Garda Neville further avers that, in September 2016, he became aware that the applicant and his family were residing in a house very close to their previous address in the same midlands town. On the morning of the 10th November 2016, D/Garda Neville observed the applicant and his wife leaving that address separately, a short time apart. On the 20th December 2016, D/Garda Neville again observed the applicant leaving that address. It is not either of the two properties in which the applicant claims to have been co-habiting with his wife's sister in a durable relationship since 2014.

27. On the morning of the 9th January 2017, D/Garda Neville observed the sister of the applicant's wife leaving the most recent address at which the applicant claims to have been cohabiting with her. That address is in the same midlands town, very close to the property that the applicant and his wife had been observed exiting at various times during the preceding two months.

28. Shortly afterwards on the same morning, D/Garda Neville arrested the applicant's wife on the public roadway nearby on foot of the deportation order against her. Very shortly after that, D/Garda Neville and his colleagues attended at the property that the applicant and his wife had been observed leaving on a previous occasion and found the applicant and four of his children present there, together with another person. D/Garda Neville arrested the applicant and two of his daughters on the foot of the deportation orders against them. The applicant's other three children were each given letters requiring them to present themselves at GNIB two days later. They each failed to appear in breach of that requirement.

29. D/Garda Neville has taken statements from a local authority official and certain private property owners and managers, which tend to contradict the applicant's assertion that he has been co-habiting in a durable relationship with his wife's sister at the two addresses he has identified in his application for permitted family member status. Indeed, those statements, if their contents were accepted in evidence, would tend to establish a dishonest scheme to create that false impression. D/Garda Neville avers that his investigations are continuing, before fairly admitting that he cannot depose to the truth of any of those statements.

30. Mr Garrett Byrne, a principal officer in the Department of Justice, swore an affidavit on behalf of the respondent on the 24th January 2017. Mr Byrne avers that the applicant's wife and two of his daughters are currently detained in the Dóchas Centre on foot of the deportation orders against each of them.

31. Mr Byrne exhibits a letter dated the 24th January 2017 from INIS to the applicant, which recapitulates much of what has already been set out above, before recording that the Minister proposes to decide not to treat the applicant as a permitted family member of a Union citizen. The reasons given are, first, that the Minister considers that the applicant has at all material times resided with his wife and five children as a family unit and that the durable partnership that the applicant claims to be in with his wife's sister is not genuine and was brought about with the intention of obtaining permission to reside in the State. Second, having considered the applicant's actions, it is the Minister's opinion that the documentation submitted by the applicant in seeking permitted family member status is false; misleading as to a material fact; and submitted with the intention of creating the false impression that the applicant is in a durable partnership with a Union citizen, namely his wife's sister. The letter concludes by stating that, if that is found to be case, the Minister will refuse to grant the applicant permitted family member status, before inviting the applicant to make any detailed written submissions he may wish to INIS within 7 days. It was suggested in argument, without demur, that the period concerned has since been extended to one of 21 days.

32. Mr Byrne goes on to depose at some length to the Department's concerns in relation to the abuse or misuse of EU treaty rights concerning the free movement of persons.

33. It seems to me that it would be inappropriate to have regard to any of the foregoing averments in considering the present application for several reasons. First, the material concerning the merits (or demerits) of the applicant's claim to permitted family member status appears to me to be irrelevant to the quite separate question of whether he is lawfully entitled to remain in the State while that application is pending.

34. Second, it seems to me that there would be significant potential unfairness to the applicant if I were to take into consideration allegations of fact to which he has not yet had an appropriate opportunity to respond.

35. Third, the Minister's proposed decision on the applicant's claim to permitted family member status postdates his detention. As the respondent conceded in *B.F.O. v Governor of Dóchas Centre* [2005] 2 I.R. 1 (at 16), the legality of a given detention must be decided on the facts as they existed at the commencement of that detention and, if illegal on that date, cannot be cured by a subsequent decision of the Minister.

36. And fourth, guided by the comments of MacMenamin J. in *Kadri v Governor of Wheatfield Prison* [2012] IESC 27 (at §§ 6-7), I cannot conceive how the undesirable public policy consequences (specifically in this instance, the potential abuse of EU free movements rights) that might flow from a certain construction of a legislative provision can influence the proper interpretation of that

provision where the fundamental issue of the right to liberty is in the balance on the other side of the scales.

Discussion
37. The applicant principally relies on two decisions of the High Court in support of his argument that his detention is unlawful. The first is B.F.O., already cited, and the second is *F.I. v Governor of Cloverhill* [2015] IEHC 639.

38. In B.F.O., Finlay Geoghegan J. found that the power of detention under s. 5(1) of the Immigration Act 1999, as amended ('the 1999 Act'), is exercisable only to ensure deportation and a precondition to the valid exercise of the power requires the existence of a definite and concluded intention to deport the person concerned. That proposition is not in dispute here.

39. The applicant submits that his situation is on all fours with that of the applicant in *B.F.O.* in that the fact of his application for a decision treating him as the permitted family member of a Union citizen precludes the formation of a definite and concluded intention to deport him prior to the making of that decision.

40. But the position of the applicant in *B.F.O.* was different in a fundamental respect. In that case, the judgment records (at 10) the respondent's concession that the applicant could not be deported from the State until the Minister had made a decision on her application for residency as the mother of an Irish born son. Finlay Geoghegan J. explained the position as follows (at 15):

> 'In most instances, the making of a deportation order will be evidence of a final or concluded intention to deport the person in question. The facts of this case are unusual. The deportation order was made in August, 2002. At that stage there was a final and concluded intention to deport the applicant. The birth of her son in the State changed in a significant way the family circumstances. Counsel for the respondents submitted that the making of the application for residency based upon the birth of her Irish born son and the acknowledgment received did not alter the legal status of the applicant in Ireland. This is correct in the sense that the applicant remains a person who has no right to be in Ireland. However, as stated by the Supreme Court in the Article 26 reference this does not mean that she is a person without rights. In addition, there now exists her son, an Irish citizen with rights.
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> As already stated, it was accepted on behalf of the respondents that subsequent to the 3rd January, 2003, the applicant could not be deported without a decision made by the Minister on her application for residency. Hence, I have concluded that there was not, at any time subsequent to the application for residency based upon the birth of her Irish born son, which was acknowledged on the 3rd January, 2003, a final or concluded intention to deport the applicant. Hence, a necessary precondition to the exercise of the power of detention under s. 5(1) of the Act of 1999 did not exist on the 27th January 2005.'

41. In this case, I have already observed that I can find nothing in Regulation 7, or in any other regulation, of the 2015 Regulations that confers any permission to reside in the State on a person who has applied, under Regulation 5(2) of those Regulations, for a decision that he be treated as a permitted family member of a Union citizen, pending the making of that decision.

42. Nor is there any concession in this case, equivalent to that of the respondents in *B.F.O.* that the applicant cannot be deported pending a decision by the Minister on his application for permitted family member status. Here, the respondent contends that the deliberate effect of the 2015 Regulations is to confer no permission to reside in the State upon a person based solely upon the making of an application to be treated as a permitted family member.

43. The second principal authority upon which the applicant relies is the decision of Humphreys J. in *F.I.*, already cited. There, after the applicant's residence permission had expired and his asylum claim had failed, he was detained under s. 5(1) of the 1999 Act. While in detention awaiting deportation, the applicant sought the Minister's consent, under s. 17(7) of the Refugee Act 1996 ('the 1996 Act'), to make a second asylum application. The applicant then sought an order directing his release from custody on the basis that his application for consent to make a second asylum claim rendered his detention unlawful because it removed the definite and concluded intention to deport him that is a necessary condition of the validity of the detention power. The basis for that claim was that, while the making of an application under the 1996 Act for re-admission to the asylum process does not have suspensory effect on the power to deport, a first such application may have that effect under Article 7 of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status ('the Procedures Directive').

44. Article 7 of the Procedures Directive confers an express entitlement on asylum applicants to remain in the Member State concerned for the sole purpose of the asylum procedure until the determining authority has made a first instance decision. Humphreys J. noted that Article 41 of Directive 2013/32/EU (to which the State is not a party but which, he felt, might conceivably assist in interpreting the intention, spirit and purpose of the Procedures Directive) appears to envisage suspensory effect arising from, at least, a first re-application for asylum.

45. Based on the existence of that legal issue (if, not necessarily, the existence of any legal right) and what Humphreys J. found to be an evidential deficiency in relation to the existence of a continuing intention to deport the applicant arising from the existence of that issue, Humphreys J. concluded that he could not be satisfied of the lawfulness of the detention. Humphreys J. identified the existence of that legal issue as the crucial element missing from several authorities relied upon by the State in that case (at §15): 'particularly *Toidze v Governor of Cloverhill Prison* [2011] IEHC 395 (the need to consider a section 3(11) application to revoke a deportation order did not in that case impair an intent to deport), *Okoroafor v Governor of Cloverhill Prison* [2003] IEHC 62 (which was a similar case to [*F.I.*] in certain respects as it also revolved around a s. 17(7) application for re-admission to the asylum process, which was held not to impair the entitlement to deport, but was decided pre-Directive and therefore could not have addressed [the issue in *F.I.*]), and *Ejerenwa v Governor of Cloverhill Prison* [2011] IEHC 351 (the need to consider refoulement under s. 5 of the Refugee Act 1996 did not in that case impair an intent to deport).

46. I cannot identify the existence of any comparable legal issue in this case to that which arose in *F.I.* In particular, while passing reference has been made on behalf of the applicant to Directive 2004/38/EC ('the Citizens' Rights Directive), which underpins the 2015 Regulations, no attempt was made to identify any provision in that Directive comparable to Article 7 of the Procedures Directive and I have been unable to find one. Article 3 of the Citizens' Rights Directive deals with the obligation of a host Member State to facilitate entry and residence to persons in the category of 'permitted family members' (although that term is not used in the Directive) 'in accordance with its national legislation.'

47. It follows that I can identify no evidential deficit in relation to the existence of a continuing intention to deport the applicant. On behalf of the applicant, some play was made of Mr Doyle's averment that 'there is a concluded and continuing intention to remove the applicant from the State unless he is deemed to be a permitted family member pursuant to his application for residency.' I am quite satisfied that this averment does not connote some doubt about whether the applicant is entitled to remain in the State pending a

decision on whether he is to be so deemed, much less does it entail the concession of that entitlement. Rather, it acknowledges the obvious position that, should the applicant succeed in establishing any lawful basis for continuing to remain in the State during the course of his detention prior to his deportation from the State, the legal basis for his detention pending deportation will then, and only then, immediately fall away.

Conclusion
48. For the reasons given, I am satisfied that there is a settled intention to deport the applicant. I find that the applicant's detention is lawful.

49. In the circumstances, I do not propose to consider the procedural argument advanced on behalf of the respondents, in reliance upon the decision of the Supreme Court in *Ryan v Governor of Midlands Prison* [2014] IESC 54, that, since the detention order shows no invalidity on its face, the return made by the respondent in certifying the applicant's detention on foot of that order is sufficient to establish the lawfulness of the detention, and habeas corpus is not an appropriate remedy to seek in relation to it. The resolution of that argument must await a suitable case.

50. The application for an order pursuant to Article 40.4.2□ of the Constitution releasing the applicant from detention is refused.