

THE HIGH COURT

Record No: 2016/214/SS

**IN THE MATTER OF AN APPLICATION PURSUANT TO
ARTICLE 40.4.2° OF THE CONSTITUTION OF IRELAND**

BETWEEN/

STANESCU ROSTAS

APPLICANT

– and –

THE GOVERNOR OF CLOVERHILL PRISON AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 18th February, 2016.

Part 1: Overview.

1. Though he might have relied on his right of free movement under the Treaties of the European Union to turn a fresh page on his life of repeated criminality in his home-state, and start life anew in Ireland – and the court wishes that he had taken the opportunity to do so – Mr Rostas has elected instead to pursue a life of repeated criminality in this jurisdiction. In the end, the Minister for Justice and Equality made a removal (and exclusion) order in respect of Mr Rostas because he thought it contrary to public policy for him to remain here. But back Mr Rostas has come, in breach of that order. He has been arrested by the Gardaí but he seems not to care: he joked with the arresting Gardaí that removing him from Ireland again would be a waste of time and money, presumably because he intends simply to come back if he is removed for a second time.

2. It really does Mr Rostas no credit to behave like this. His actions are certainly completely dissimilar to the actions of others of his fellow countrymen and women, and indeed many thousands of European Union nationals, who have invoked their Treaty freedoms to come and work in Ireland, and whose presence so greatly enriches our daily lives in so many ways – just as one would like to think that the national life of other European Union member states is similarly enriched materially and culturally by the presence of Irish people who have invoked their Treaty freedoms to live there.

3. Yesterday, Mr Rostas was back in court again, this time claiming that his current detention at Cloverhill Prison is unlawful. The key question arising for the court in the within application is whether Mr Rostas is correct in this.

Part 2: Mr Rostas' History of Criminality.

4. Mr Rostas appears to be something of a 'career criminal', though not a very successful one: certainly he seems regularly to get caught and imprisoned. Between 1996 and 2007, he appeared before the criminal courts of his home country on 10 occasions, for an assortment of crimes that include robbery, theft, and hitting and threatening people, attracting sentences from eight months' to seven years' imprisonment. It is not entirely clear when he came first to Ireland. But by 2011, he was here, managing in a two-month period in 2011 to be arrested on six separate occasions. In November 2011, he was convicted by the District Court of entering a building with intent to commit an offence. In January 2012, he was convicted by the Central Criminal Court of theft, entering a building with the intent to commit an offence, and damaging property belonging to another. In December 2012, he was convicted by the District Court of various offences of burglary and handling stolen property. And in July 2013, he was convicted of burglary and false imprisonment.

Part 3: Issuance of Removal Order.

5. On 20th April, 2012, Mr Rostas was made subject to a removal (and exclusion) order under reg.20(1)(a) of the European Communities (Free Movement of Persons)(No 2) Regulations 2006. The order imposed an exclusion period of five years, stating "[Y]ou shall not re-enter or seek to re-enter the State prior to a period of 5 years from the date of your removal." Mr Rostas was notified of the order and exclusion period by a letter of 24th April, 2012, in accordance with reg.20(3)(b)(ii) of the Regulations of 2006. This letter referred to the period of exclusion imposed and stated that "[A]n exclusion period preventing you from entering the State for a period of 5 years from the date of your removal has also been placed upon you." In effect, Mr Rostas was required to remain outside Ireland for a period of five years following his initial removal. The letter of 20th April, 2012, informed Mr Rostas that he was entitled to seek a review of the decision to make the aforementioned order against him, but he elected not to do so.

Part 4: Removal of Mr Rostas.

6. It does not appear that the above-mentioned removal (and exclusion) order was immediately acted upon by the State for the good reason that Mr Rostas was sentenced by the courts to a period of imprisonment here in Ireland, with a release date of 18th August, 2015. In the meantime, on 18th February, 2014, the Minister for Justice affirmed the basis for the removal order and the exclusion period of five years contained in it. Such a form of affirmation was contemplated by reg.20(1) of the then extant Regulations of 2006, which provided, *inter alia*, that:

"(1)(a) Subject to paragraph (6)[which is not relevant for present purposes], the Minister may by order require a person to whom these Regulations apply to leave the State within the time specified in the order where –

...(iv) in the opinion of the Minister, the conduct or activity of the person is such that it would be contrary to public policy or it would endanger public security or public health to permit the person to remain in the State...

(d) Without prejudice to paragraph (1)(a)(iv), the Minister shall not, except on grounds of public order, public security or public health, make a removal order in respect of a person to whom these Regulations apply solely on the basis that the person concerned has served a custodial sentence.

(e) A removal order made on grounds referred to in subparagraph (d) which has not been enforced after the expiry of more than 2 years from the date it was made shall not be enforced unless the Minister is satisfied that the circumstances giving rise to the making of the order still exist."

7. Pursuant to the re-affirmed order, Mr Rostas was removed from the State on 18th August, 2015.

Part 5: Mr Rostas Returns.

8. On 10th February, 2016, Garda John Burke was on duty with his colleague, Garda Ian Gillen, in South County Dublin. They commenced duty at 07:00 and were working in a marked Garda patrol-car. At or about 12:00, they observed Mr Rostas walking among the road-traffic, carrying a large sign and begging. His actions were interfering with the normal flow of traffic, constituting a physical barrier to traffic and a distraction to road-users. Garda Burke approached Mr Rostas, arrested him for an offence contrary to s.2 of the Criminal Justice (Public Order) Act 2011, and cautioned him. Mr Rostas was then brought immediately to a Garda station and duly processed there. Mr Rostas has some knowledge of the English language and later instructed his solicitor that he understood that he was being arrested in effect for begging. Even so, the arresting Gardai thought it best to call an interpreter to the Garda station so that Mr Rostas understood fully what was happening and why.

9. At approximately 14:30, Garda Burke became aware from the Garda computer system that there was a removal order extant in respect of Mr Rostas. His colleague, Garda Gillen, then called the Garda National Immigration Bureau in respect of this. It was confirmed to Garda Gillen by a member of the Bureau that the details on the system were correct, that Mr Rostas was obliged under the order to remain outside the State for a period of five years from the date of his removal (18th August, 2015) and that, having re-entered the State in breach of the order, Mr Rostas was liable to arrest and detention under reg. 22(2)(b) of the new European Communities (Free Movement of Persons) Regulations 2015.

10. Following on this telephone call, at approximately 15:10, Mr Rostas was released from detention in respect of the alleged offence under the Act of 2011, and then arrested for the purpose of ensuring his departure from Ireland in accordance with the removal (and exclusion) order, pursuant to reg. 22(2)(b) of the Regulations of 2015. Mr Rostas later told his solicitor that he did not understand what was happening to him at this time. In this regard it was sought, on Mr Rostas' behalf, to place reliance on the renowned observations of Viscount Simon in *Christie v. Leachinsky* [1947] AC 573, 587, as repeatedly affirmed by the Irish superior courts (see, e.g., *DPP v. Walsh* [1980] I.R. 294, *DPP v. Mooney* [1992] 1 I.R. 548, and *DPP v. Mulligan* [2009] 1 I.R. 794) to the effect that a person is, *prima facie*, entitled to his personal freedom and only required to submit to restraint on same if he knows the substantive reason why it is being claimed that such restraint should be imposed.

11. The difficulty arising in this last respect, so far as the within application is concerned, is that Mr Rostas' assertion as to his lack of comprehension regarding what was happening when he was arrested under reg.22(2)(b), was and remains a lie. Garda Burke was called to the witness-box during the hearing of the within application, and he impressed the court as a competent, professional and honest Garda officer. According to Garda Burke, and the court accepts his evidence as entirely true: (i) there was an interpreter present at the time of the arrest pursuant to reg. 22(2)(b), so there could be no question of Mr Rostas being in any doubt as to what was occurring; (ii) Garda Burke detailed correctly the basis for the fresh arrest; (iii) Mr Rostas seemed a little shocked when he realised (and he did realise) that he was being arrested with a view to being removed from the jurisdiction; and (iv) Mr Rostas, as the court mentioned above, joked with Garda Burke and Garda Gillen, as they drove him to Cloverhill Prison, that his arrest and removal was and would be a complete waste of money, presumably as it is Mr Rostas' intention to seek to re-enter Ireland if and after he is removed again. The court could not but notice that Mr Rostas smiled broadly in court at the recollection of this conversation, further buttressing the court in its belief (not that any buttressing was needed) that Garda Burke was speaking nothing but the truth in the evidence that he gave.

Part 7: Some Provisions of the Regulations of 2015.

A. Introduction.

12. It will be recalled that Mr Rostas was made subject to a removal order under reg.20(1)(a) of the Regulations of 2006. Subject to certain transitional provisions, those regulations have since been replaced by the European Communities (Free Movement of Persons) Regulations 2015.

B. Some transitional provisions.

13. Regulation 31(23) of the Regulations of 2015 provides as follows:

"Where, before the date on which these Regulations come into operation, the Minister made an order under Regulation 20(1)(a) of the Regulations of 2006, that order shall be deemed to be a removal order under these Regulations and these Regulations shall apply accordingly."

14. Regulation 31(27) of the Regulations of 2015 provides as follows:

"Where the Minister has notified a person in accordance with Regulation 20(3)(b)(ii) of the Regulations of 2006, the notice concerned shall be deemed to be a notification under Regulation 24(1)(b) [of the Regulations of 2015] and these Regulations shall apply accordingly."

15. The combined effect of the above-quoted provisions is that the notification letter sent to Mr Rostas in 2012, and the removal (and exclusion) order enclosed therewith, can be enforced under the Regulations of 2015, as though that notification were a notification under reg.21(4)(b) of the Regulations of 2015.

C. Arrest and detention for purposes of removal from Ireland.

16. As touched upon elsewhere above, reg.22 of the Regulations of 2015 deals with arrest and detention for the purpose of removal from Ireland. Regulation 22(1) and (2) provide:

"(1) Subject to paragraph (2), a person (other than a person who is under the age of 18 years) in respect of whom a

removal order has been made may, for the purpose of entering his or her departure from the State in accordance with the removal order and without further notice, be arrested and detained under warrant of an immigration officer or member of the Garda Síochána in any of the places listed in Schedule 11 in the custody of the officer or member of the Garda Síochána for the time being in charge of that place.

(2) An immigration officer or member of the Garda Síochána shall exercise his or her power under paragraph (1) only...

(b) where the person who is the subject of a removal order has failed to comply with a requirement in a notification under Regulation 21(4)(b) or a requirement under Regulation 21(7)..."

17. Mr Rostas was arrested and detained pursuant to reg.22(2)(b), in his case for failing to comply with a requirement in a notification under the Regulations of 2006 that is now deemed by virtue of the above-quoted transitional provisions to be a notification under reg.21(4)(b) of the Regulations of 2015. The failure to comply arose as follows. The notification letter sent to Mr Rostas in 2012, and which enclosed the removal order, referred to the period of exclusion imposed on him and stated that "[A]n exclusion period preventing you from entering the State for a period of 5 years from the date of your removal has also been placed upon you." This obliged Mr Rostas to remain outside Ireland for five years from the date of his removal. Having been removed from Ireland in August 2015, Mr Rostas was obliged to remain outside the State until August 2020. By re-entering Ireland sometime after that date but before 2020, Mr Rostas breached that requirement and became liable to arrest and detention under reg.22(2)(b) of the Regulations of 2015.

C. Lifespan of orders.

18. By virtue of reg. 20(8) of the Regulations of 2015, a removal order has a natural lifespan of two years, unless revived by the process contemplated in that regulation. In a related vein, reg.23(8) of the Regulations of 2015 makes provision whereby, if there has been a material change in the circumstances which justified the making of an exclusion order, the period prescribed in the exclusion order may be shortened by the Minister, or the order revoked, upon application by the person subject to same, either after three years have elapsed from the enforcement of the order or after such shorter post-enforcement period as the Minister considers reasonable in all the circumstances. The possibility does appear to arise from the Regulations of 2015 that the Minister could so curtail the lifespan of an enforced exclusion order as to make it shorter in duration than the lifespan of an associated and extant removal order. Whether the Minister would ever consider it reasonable that an enforced exclusion order should impose a shorter exclusion period than the lifespan of an associated and extant removal order is perhaps unlikely, though the Regulations do not appear to make proper provision for what would happen to that extant removal order in the, perhaps unlikely, event that the Minister did so curtail the effective time-span of an exclusion order.

Part 8: The Assistant Governor's Certificate

and the Text of the Detention Order

19. The court has received the usual form of certificate as to detention. Thus the Assistant Governor of Cloverhill Prison has certified that Mr Rostas is being detained pursuant to a detention order dated 10th February, 2016, a copy of which is attached to the certificate. Counsel for Mr Rostas has contended that various deficiencies present on the face of the detention order, the main text of which reads as follows:

"European Communities (Free Movement of Persons) Regulations 2015

To: The Governor of Cloverhill Prison...

In exercise of the powers conferred on me by Regulation 22(1) of the European Communities (Free Movement of Persons) Regulations 2015 on...10th...February...2015[sic] I have arrested Stanesco Rostas...in respect of whom a removal order has been made for the purpose of ensuring his...removal from the State in accordance with the removal order. I direct that this person be detained only until such time as arrangements are made for his...removal from the State and that the said Stanesco Rostas be detained in Cloverhill Prison, a prescribed place of detention for the purpose of Regulation 22(1) of the European Communities (Free Movement of Persons) Regulations 2015.

The basis of such arrest and detention is that the said person Stanesco Rostas who is the subject of the removal order...

(b) has failed to comply with a requirement in a notification under Regulation 21(4)(b) or a requirement under Regulation 21(7)....

In accordance with Regulation 22(9)(a) of the European Communities (Free Movement of Persons) Regulations 2015, Stanesco Rostas shall not be detained under this Regulation for a period or periods exceeding 28 days in aggregate.

...Stanesco Rostas has spent 1 days in detention previous to today."

20. The signing details then follow. No objection has been taken to the fact that the warrant contains a mistaken reference to '10th February 2015'.

21. The court must admit to some surprise that it could be suggested – as it was at the hearing of the within application – that the authorities at Cloverhill Prison would not know from the above-quoted text why Mr Rostas was and is being detained. The detention order states that: (i) a removal order has been made in respect of Mr Rostas (it has and it remains extant); (ii) he is being detained pending his removal (he is); (iii) the specific basis for his detention is that he has not complied with certain requirements made of him in a notification that issued to him under reg. 21(4)(b) or a requirement under reg.21(7) (this is true); and (iv) he is not to be detained for longer than 28 days in aggregate (again this is so).

22. Counsel for Mr Rostas referred the court to the judgment of Denham C.J. for the Supreme Court in *Ejerenwa v. The Governor of Cloverhill Prison* [2011] IESC 41, at para. 26, following a consideration of *The State (Hughes) v. Lennon and Others* [1935] I.R. 128 that an order depriving a person of his liberty must show on the face of the document the facts upon which jurisdiction rests. What more, one might ask, is the State required to detail that has not been detailed on the above-quoted detention order? Counsel for Mr Rostas suggested that a fuller narrative or more ample reasons could have been provided. Perhaps they could, but this does not have the necessary result that the detention order that issued is invalid. Life is lived in the real, not the ideal. Much in life can be done better but just because this is so does not yield the consequence that the particular manner in which something is done – even

something as serious as detaining someone – must be found to be inadequate or contrary to law, merely because it might have been approached or done better – and, for the avoidance of doubt, the court does not see that the manner in which Mr Rostas has been arrested and detained requires or required to be done better. Just as there is no doubt that Mr Rostas knew why he was arrested and why he was being detained, there cannot be, and there cannot at any point have been, any ambivalence or doubt on the part of the prison authorities as to the basis for, and the essential background to, Mr Rostas’ arrest, having regard to the above-quoted text. Specifically, the court does not accept the contention made by counsel for Mr Rostas that the prison authorities would not know, having regard to the above-quoted text, why it is that Mr Rostas is being detained.

23. Counsel made the following specific objections to the face of the warrant:

(i) **There is no reference on the document to the fact that Mr Rostas having re-entered the State.** To this the court’s answer is that there is no need for this to be mentioned. There would be no harm done if it was mentioned (though the court does not mean to intimate or suggest in this that there is a need for it to be mentioned). The essence of Mr Rostas’ tale is on the face of the warrant: (i) he is the subject of an extant removal order; (ii) the State is desirous of removing him from the jurisdiction; (iii) the specific wrong alleged of Mr Rostas is that he has failed to comply with a requirement that has issued in a notification under reg.21(4)(b) or a requirement under reg.21(7) of the Regulations of 2015. There is no need for the prison authorities to know more.

(ii) **There is no reference to Mr Rostas having previously been removed from the State.** To this the court would reiterate its answer to (i).

(iii) **There is no reference to the fact of the exclusion order or the duration of same.** To this the court would reiterate its answer to (i).

(iv) **There is no reference to the date of the removal order.** To this the court would reiterate its answer to (i).

(v) **There is no reference to the fact that the removal order includes an exclusion order.** To this the court would reiterate its answer to (i).

(vi) **There is no reference to the belief formed by the arresting officer when he arrested Mr Rostas.** To this the court would reiterate its answer to (i).

(vii) **The detention order is insufficiently precise as to the nature of Mr Rostas’ failure to comply.** The specific wrong alleged of Mr Rostas is that he has failed to comply with a requirement that has issued in a notification under reg.21(4)(b) or a requirement under reg.21(7) of the Regulations of 2015. There is no need for the prison authorities to know more.

Part 9: Non-Treaty Rights and Recycling Orders.

A. Averment Made.

24. The grounding affidavit to the within application, as sworn by a solicitor for Mr Rostas, avers as follows:

"It is my understanding that the Applicant [Mr Rostas], being a person in respect of whom an exclusion order from the State is currently in force, has now re-entered the State outside of any treaty rights, having already been removed and had his treaty rights in relation to free movement temporarily suspended for the period in the exclusion order. I say, therefore, that in effect, the Applicant is being held in an attempt to recycle the old removal order from 2012 for the purposes of effecting his removal again. I say that this does not appear to be contemplated by the 2015 Regulation and the Applicant is therefor in unlawful custody."

B. Interaction Between Reg.20(1) and Reg.3(1) of the Regulations of 2015.

25. Counsel for Mr Rostas observed in argument that reg.20(1) empowers the Minister to make a removal order in respect of a person to whom Regulation 3(1) applies. He then noted that reg.3(1), so far as relevant to the within application, applies to "[European] Union citizens entering or remaining in the State in accordance with these Regulations". As Mr Rostas entered Ireland when there was a removal (and exclusion) order in place in respect of him, his counsel contends that he could never have been a person "entering or remaining in the State in accordance with these Regulations" and thus no removal order can now be made in respect of him. However, the removal (and exclusion) order in issue in the within application is an extant order that existed under the Regulations of 2006 and which has been continued in existence by the Regulations of 2015. So there is no question of the Minister making a removal order at this time. That order already exists and survives; so this line of argument must fail – though it might perhaps have succeeded in a case involving an order initially made under the Regulations of 2015, given the absence of such words as "at any time was not, or" sitting after the words "the person" and before the words "is not" in reg.20(1)(a).

C. Recycling a Spent Order.

26. Counsel for Mr Rostas contended that when Mr Rostas was removed from Ireland on 18th August last, the order in respect of him was spent. However, there is no basis for this contention in the Regulations. Indeed, as outlined previously above, the removal (and exclusion) order to Mr Rostas under the Regulations of 2006 remain live under the Regulations of 2015. So there is no recycling. Instead what confronts the court is a case that seems almost on 'all fours' with that in *Okoroafor v. Governor of Cloverhill Prison* [2003] IEHC 62. There an Article 40 inquiry was conducted by the High Court into the legality of the detention of a non-national who re-entered Ireland in breach of a deportation order. The validity of Mr Okoroafor's detention was upheld by Herbert J. and, on appeal, by the Supreme Court (Unreported, Supreme Court, 10th October 2003), McGuinness J. noting, in an *ex tempore* judgment that:

"[Mr Okoroafor] has newly breached the deportation order by returning to this country during a period when, as everybody accepts, the deportation order is still in force so this is a new breach would give rise to a new arrest under section 5(1) and therefore a new detention."

27. The universal acceptance among the parties in *Okoroafor* that the deportation order remained extant does not present here as regards the removal (and exclusion) order. However, for the reasons stated above, the court is satisfied that the removal (and

exclusion) order does remain extant. This being so, *Okoroafor* is clear authority for the proposition that Mr Rostas can lawfully be arrested and detained on foot of same.

Part 10: Failure to Afford Due Process.

28. The grounding affidavit to the within application, as sworn by a solicitor for Mr Rostas, avers as follows:

"I say that there is a defined procedure for the treatment of persons who have entered the State who are not permitted to enter, and in the Applicant's case, he has not been afforded such due process, but rather detained for the purported execution of a removal order which has already been executed and as such it appears to me that his current detention is in effect an attempt to 'recycle' it. I therefore say and believe that the 2015 Regulation not being applicable for the purposes of the removal of the Applicant from his current stay in the State, the warrant now holding him shows no jurisdiction on its face and therefore it appears to me that the Applicant is being unlawfully detained."

29. In light of the court's conclusions in Part 9, it seems to it that this further ground of objection does not provide a basis for impugning the legality of Mr Rostas' detention.

Part 11: Need for Review.

30. The grounding affidavit to the within application, as sworn by a solicitor for Mr Rostas, avers that if the removal order is to be treated as valid:

"...it would appear to me...that before same is capable of now being executed, the Second Named Respondent is obligated pursuant to Regulation 20(8) to perform a review of the Applicant's circumstances – it now having been over two years since the removal order has been made..."

31. It was further contended for Mr Rostas that where a removal order was made in August 2012 and Mr Rostas was removed more than two years later, in August 2015, the Minister was prohibited from removing him at that time under reg.20(1)(e) of the Regulations.

32. It does not appear that either of these grounds are now being relied upon. As became apparent during the hearing of the application, the Minister, consistent with reg.20(1)(e) of the Regulations of 2006, affirmed on 18th February, 2014, that she remained satisfied that the circumstances of public policy giving rise to the making of the order still existed. So, prior to 18th February, 2016, there was no need for a further reconsideration of matters following the unlawful entry by Mr Rostas into Ireland.

Part 12: Conclusion.

33. For the reasons outlined above the court must and does conclude that at this time Mr Rostas' continuing detention pursuant to the detention order of 10th February is lawful.