Neutral Citation Number: [2011] IEHC 372

THE HIGH COURT

2011 2009 SS

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

SHU JIE LIU

APPLICANT

AND

GOVERNOR OF DÓCHAS CENTRE

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 6th day of October, 2011

1. The application under Article 40.4.2 of the Constitution arises in the following circumstances. The applicant is a Chinese national who was arrested and brought before the District Court on the 27th September, 2011. She was charged with an offence contrary to s. 12(1)(a) and s. 13 of the Immigration Act 2004 ("the 2004 Act"), as substituted by s. 24 of the Civil Law (Miscellaneous Provisions) Act 2011 ("the 2011 Act"). The particulars of the charge as recorded on the charge sheet were in the following terms:-

> "On the 27th September, 2011, on Parnell Street, Dublin 1, in the said District Court area of Dublin Metropolitan District, being a non-national did fail to produce on demand to an Immigration Officer a member of An Garda Síochána, namely Garda Michael Byrne, a valid passport or other relevant document which establish your identity and nationality and failed to give a satisfactory explanation of the circumstances which prevented you from doing so."

2. Evidence of arrest, charge and caution was given by the prosecuting garda, Garda Michael Byrne, before the District Court. Garda Byrne objected to bail on the grounds that the applicant had not provided satisfactory proof of her identity and that she was, accordingly, a flight risk. The applicant was accordingly remanded in custody to appear before the District Court No. 2 in the Criminal Courts of Justice Building on the 30th September, 2011. On that date the applicant was apparently still unable to provide any documentation regarding her identity and she was accordingly remanded in custody until the 7th October next.

3. An application for inquiry was made to me pursuant to Article 40.4.2 on October 3rd, 2011. I immediately directed an inquiry to be held on the following day. The respondent certified the grounds of the detention as consisting of a warrant of the 30th September, 2011, whereby District Judge McLoughlin remanded the applicant in custody on foot of the charge which has been proffered against the applicant.

4. At the outset it is important to state that is not disputed but that the particulars of the offence contained in the charge are defective. Indeed, counsel for the respondent, Ms. Lawlor, said that it would be necessary for the prosecution to apply to amend these particulars under O. 38, r. 1 of the District Court Rules 1997, if it were ever sought to endeavour to proceed to a valid conviction before the District Court. It is, accordingly, accepted that the charge sheet contains two separate defects.

5. In the first place, the offences are being described as being contrary to s. 12(1)(a) and (2) and s. 13 of the 2004 Act "as amended" by s. 34 of the 2011 Act. This description of the offence is, strictly speaking, not accurate inasmuch as the relevant provisions of the Immigration Act 2004 were not *amended* by s. 34 of the 2011 Act. Rather, s. 34 of the 2011 Act deleted the old s. 12 of the 2004 Act and *substituted* the relevant sections into the 2004 Act. It is, however, unnecessary for me to express any view in relation to this defect or its possible legal consequences (if any) in view of the conclusion that I am about to reach in respect of the second defect.

6. The second defect is a more serious and substantive flaw. In effect, the particulars of the charge mirror the language of the old s. 12 of the 2004 Act, which section was found to be unconstitutional by Kearns P. in *Dokie v. Director of Public Prosecutions* [2011] IEHC 110. The old s. 12 of the 2004 Act had provided:-

> "(1) Every non-national shall produce on demand unless he or she gives a satisfactory explanation of the circumstances which prevent him or her 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…
>
> (2) A non-national who contravenes the section shall be guilty of an offence."

7. It will be seen immediately that the old s. 12(1) made it impossible to segregate the *actus reus* of the offence (*i.e.* failing to produce a passport or other acceptable identity document) on the one hand with a possible defence to the charge of failing to produce the documents on the other. It was for these reasons that Kearns P. held the sub-section to be unconstitutional, inasmuch as it created a vague and uncertain offence. The sub-section thus violated the constitutional guarantee in Article 38.1 and the principles set out by the Supreme Court in *King v. Attorney General* [1981] I.R. 233 regarding the necessity for legal certainty in relation to criminal offences. As Kearns P. put it:-

> "In my view, s. 12 is not sufficiently precise to reasonable enable an individual to perceive the consequences of his or her acts or omissions or to anticipate what form of explanation might suffice to avoid prosecution. Furthermore, there is no requirement in the section to warn of the possible consequences of any failure to provide a 'satisfactory' explanation."

Applying the *Dokie* principles to the present case, it is quite impossible to separate out the *actus reus* of the offence for which the applicant has been charged from any possible defence. The applicant cannot therefore know with the degree of precision which Article 38.1 of the Constitution requires the nature of the conduct which is said to create the criminal offence. In effect, therefore, the applicant has been charged with a non-existent and patently unconstitutional offence.

8. In *Attorney General (McDonnell) v. Higgins* [1964] I.R. 374 at 385, Ó Dálaigh C.J. described a complaint as being "in its essence…a statement of fact constituting an offence". As we have just seen, in the present case the statement of facts set out in the complaint against the applicant does not disclose an offence known to the law.

9. At this point, however, it may be apposite to recall that the task of this Court in adjudicating in respect of this Article 40 application is to examine whether the applicant is *presently* detained in accordance with law. In that respect, therefore, it is irrelevant *for the purposes of this present Article 40 application* to examine whether the prosecution could at any later stage apply to the District Court to amend the complaint under O. 38 of the District Court Rules. Were such an application to be made at some point hereafter, the District Court would, of course, be bound to follow the principles set out by MacMenamin J. in *Director of Public Prosecutions (King) v. Tallon* [2006] IEHC 232, [2007] 2 I.R. 230, in assessing whether the court should accede to such an amendment. I should stress that I express no view whatever as to whether such an application could properly be made in respect of the present charge under O. 38 or, assuming that it could, whether the *Tallon* principles would mean that the District Court judge would be bound to accede to such an application. That particular issue does not arise before me in the course of this Article 40 application and the determination of that issue, were it to arise, would be a matter which is quintessentially committed to the jurisdiction of the District Court.

10. There is, moreover, one critical difference between the present case and authorities such as *Tallon. Tallon* did not concern the situation of an applicant in custody who maintained in Article 40 proceedings that their detention was unlawful. That case rather concerned the principles which should guide the District Court in determining whether or not to accede to an application to amend under O. 38. As things stand, therefore, no application to amend under O. 38 has been made to the District Court. We are thus left with the situation whereby the applicant currently stands detained on foot of a charge which, as formulated through the particulars of that charge, is manifestly unconstitutional and, accordingly, is one which is not known to the law. Viewed thus, it is plain that there is currently no lawful basis for the current detention of the applicant.

11. The respondent, however, has argued forcefully that the applicant should be deemed to have acquiesced in her current detention in that no objection was raised by her to the manifest inadequacy of the particulars before the District Court prior to the making of the remand order. This is, perhaps, not the occasion for an elaborate discourse on the vexed question of acquiescence in the sphere of criminal proceedings. It can nevertheless be said immediately, however, that this case is very different from the leading authorities such as *The State (Byrne) v. Frawley* [1978] I.R. 326 and *A. v. Governor of Arbour Hill Prison* [2006] IESC 44, [2006] 4 I.R. 88. In those cases both applicants had elected to proceed with the criminal proceedings either by continuing with an ongoing trial before an unconstitutionally empanelled jury (as in the case of *Byrne*) or by pleading guilty to an offence (as in the case of *A.*) and thereby obtaining the benefit of a reduced sentence. The common thread which emerges from the Supreme Court decisions in both cases is that an applicant who has freely elected to proceed with the criminal proceedings to the point of finality will thereby be generally estopped by their own conduct from later asserting the invalidity of their conviction.

12. The present case is a very different one. There is no question that the applicant engaged in some tactical manoeuvre whereby she deliberately elected to refrain from raising an issue regarding the particulars of the complaint before the District Court in the hope of later obtaining some advantage, as in the manner of the appellant in *Corrigan v. Irish Land Commission* [1977] I.R. 317. Indeed, as counsel for the applicant, Mr. O'Higgins S.C., made clear in the course of argument, this issue of the defective nature of the charge only came to attention some days after it was initially proffered following receipt of counsel's advices.

13. In *Corrigan*, the appellant was aware of a possible ground of objection to a particular administrative adjudicator on the ground of prior involvement with the case, but he elected not to raise it at the Land Commission hearing. When the Tribunal ruled adversely to the appellant, he then later sought to raise this ground of objection on appeal. A majority of the Supreme Court held, however, that he was estopped by his own conduct from doing so. As Henchy J. put it ([1977] I.R. 297 at 325-326):-

> "However, this point was knowingly waived by counsel when they elected to accept the tribunal as they found it composed on the day of the hearing.
>
> The rule that a litigant will be held estopped from raising a complaint as to bias when, with knowledge of all the relevant circumstances, he expressly or impliedly abandoned it at the hearing is founded, I believe, on public policy. It would be obviously inconsistent with the due administration of justice if a litigant were to be allowed to conceal a complaint of this nature in the hope that the tribunal will decide in his favour, while reserving to himself the right, if the tribunal gives an adverse decision, to raise the complaint of disqualification. That is something the law will not and should not allow. The complainant cannot blow hot and blow cold: he cannot approbate and reprobate: he cannot have it both ways."

14. Nothing of the kind arises here. Indeed, as counsel for the applicant, Mr. O'Higgins S.C., made clear in the course of argument, the issue of the defective nature of the particulars of the charge only came to attention following receipt of counsel's advices a few days after she was first charged. Nor can it realistically be said that the applicant enjoyed some form of tactical advantage by failing to take the point immediately before the District Court in view of the fact she was remanded in custody. Besides, unlike cases such as *The State (Byrne) v. Frawley* and *A.*, the applicant has not allowed the charge to proceed to the stage of finality prior to raising this point of objection. For all of these reasons, it cannot be said that the applicant has acquiesced in the matter.

Conclusions

15. For the reasons stated, therefore, I am of the view that the applicant's custody is predicated on the existence of a charge which, as matters presently stand having regard to the particulars of the complaint set out in the charge sheet, does not disclose an offence known to the law. In these circumstances, I must hold that her detention is not in accordance with law and I will accordingly direct her release pursuant to Article 40.4.2 of the Constitution.