

## THE HIGH COURT

2011 1189 SS

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

BETWEEN

LEILA DARCHIASHVILI

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY WOMEN'S PRISON

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered on the 23rd day of June, 2011

**Introduction**

The applicant was born in Georgia on 15th November, 1955. She came to Ireland in March, 2005 and has lived in Ireland since that time. She unsuccessfully sought asylum on the basis that she was a refugee. On 24th June, 2005, the applicant was notified that she was being refused refugee status and she pursued an appeal from this decision. This appeal was unsuccessful. On 29th December, 2005, the applicant was notified that the Minister for Justice, Equality and Law Reform (as the relevant Minister was then entitled) had decided to refuse to give her status as a refugee and was considering her deportation.

Subsequently, she sought leave to remain in the State under s.3 of the Immigration Act 1999, as amended (hereinafter "the Act of 1999") and to that end representations were made on her behalf by the Refugee Legal Service. However, these representations were unsuccessful and a deportation order was made in respect of the applicant on 2nd May, 2006. The applicant was then required to present herself at the offices of the Garda National Immigration Bureau, Burgh Quay, Dublin 2 on 6th July, 2006, to facilitate the making of arrangements for her removal from the state. The applicant did not present herself as required and was deemed to be an 'evader'.

The applicant then left Dublin and went to live in Cashel for some time but later returned to Dublin and took up residence at 95 Meath Street, Dublin 8. The applicant did not notify the authorities of her changes of address pursuant to her obligations.

On the 13th June, 2011, the applicant was arrested and detained and taken to 'The Dóchas Centre' (Mountjoy Women's Prison) where she continues to be detained pending the making of arrangements for her removal from the State. The Court has been given to understand by counsel for the respondent that her arrest and detention was effected by a member of An Garda Síochána attached to the Garda National Immigration Bureau. On Thursday the 23rd June, 2011, the applicant made a complaint that she was being unlawfully detained and sought an inquiry pursuant to Article 40.4.2 of the Constitution (Bunreacht na hÉireann). The Court opened an inquiry pursuant to Article 40.4.2 aforesaid and required the respondent to certify in writing the grounds of the applicant's detention and further required the respondent to produce the body of the respondent before the Court, both of which requirements were complied with.

On Friday the 24th June, 2011, this Court, following due inquiry in the course of which the respondent was given an opportunity of justifying the detention, concluded that the applicant was in unlawful detention and directed her release. The Court stated that it would give its reasons in a reserved judgment to be delivered in due course. I now give those reasons.

**Certification of grounds of detention**

Pursuant to the Order of this Court made on the 23rd June, 2011, the respondent certified in writing later on the same day that: -

"I hold the applicant in custody at Mountjoy Women's Prison pursuant to detention order dated the 13th day of June 2011."

A photostatic copy of the so called "detention order" referred to was annexed to the certificate. This purported "detention order" is in fact a document entitled "An Garda Síochána, Immigration Act, 1999 (No. 22 of 1999) Notification of Detention". It is reproduced in full in the appendix to this judgment. It is addressed to the Governor of Mountjoy Women's Prison, and is in two parts. The operative clause in the first part of the document states:-

"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) made in exercise of the powers conferred by Section 7 of the Immigration Act, 1999 (No 22 of 1999), I direct that pending the making of arrangements for his/her removal from the State, that **Leila Darchiashvili, DOB 15/11/1955** be detained in Mountjoy Women's Prison a prescribed place for the purpose of Section 5(1) of the Immigration Act, 1999 ( No 22 of 1999). The basis of such Detention is that the said name (*sic*) intends to avoid removal from the State."

The first part of the document is signed with an unintelligible signature above the words "authorised person", and is date stamped 13 June, 2011, using the stamp of the "Garda National Immigration Bureau – Detective Sergeant's Office".

The second part of the document records: -

"Executed within order by lodging the person of **Leila Darchiashvili, DOB 15/11/1955** at Mountjoy Womens Prison on,

The second part of the document is also signed with the same unintelligible signature, again above the words "authorised person", and again is date stamped 13 June, 2011, using the stamp of the "Garda National Immigration Bureau – Detective Sergeant's Office".

#### **The relevant legislation**

Section 3(1A) of the Immigration Act 1999 (as inserted by s. 10(a) of the Illegal Immigrants (Trafficking) Act 2000) provides:-

"3.— (1A) A person the subject of a deportation order under this section may be detained in accordance with the provisions of this Act for the purpose of ensuring his or her deportation from the State."

Section 5 of the Immigration Act 1999 (as amended by s. 10(b) of the Illegal Immigrants (Trafficking) Act 2000 and Schedule 6, part 18 of the Health Act 2004) provides:-

"5.— (1) Where an immigration officer or a member of the Garda Síochána, with reasonable cause suspects that a person against whom a deportation order is in force—

- (a) has failed to comply with any provision of the order or with a requirement in a notice under section 3(3)(b)(ii),
- (b) intends to leave the State and enter another state without lawful authority,
- (c) has destroyed his or her identity documents or is in possession of forged identity documents, or
- (d) intends to avoid removal from the State,

he or she may arrest him or her without warrant and detain him or her in a prescribed place.

(2) A person arrested and detained under subsection (1) may be placed on a ship, railway train, road vehicle or aircraft about to leave the State by an immigration officer or a member of the Garda Síochána, and shall be deemed to be in lawful custody whilst so detained and until the ship, railway train, road vehicle or aircraft leaves the State.

(3) The master of any ship and the person in charge of any railway train, road vehicle or aircraft bound for any place outside the State shall, if so required by an immigration officer or a member of the Garda Síochána, receive a person against whom a deportation order has been made and his or her dependants, if any, on board such ship, railway train, road vehicle or aircraft and afford him or her and his or her dependants proper accommodation and maintenance during the journey.

(4) (a) Subsection (1) shall not apply to a person who is under the age of 18 years.

(b) If and for so long as the immigration officer or, as the case may be, the member of the Garda Síochána concerned has reasonable grounds for believing that the person is not under the age of 18 years, the provisions of subsection (1) shall apply as if he or she had attained the age of 18 years.

(c) Where an unmarried child under the age of 18 years is in the custody of any person (whether a parent or a person acting in *loco parentis* or any other person) and such person is detained pursuant to the provisions of this section, the immigration officer or the member of the Garda Síochána concerned shall, without delay, notify the Health Service Executive of the detention and of the circumstances thereof.

(5) Where a person detained under this section institutes court proceedings challenging the validity of the deportation order concerned, the court hearing those proceedings or any appeal therefrom may, on application to it, determine whether the person shall continue to be detained or shall be released, and may make any such release subject to such conditions as it considers appropriate, including, but without prejudice to the generality of the foregoing, any one or more of the following conditions:

- (a) that the person reside or remain in a particular district or place in the State,
- (b) that he or she report to a specified Garda Síochána station or immigration officer at specified intervals,
- (c) that he or she surrender any passport or travel document in his or her possession.

(6) (a) A person shall not be detained under this section for a period or periods exceeding 8 weeks in aggregate.

(b) The following periods shall be excluded in reckoning a period for the purpose of paragraph (a):

(i) any period during which the person is remanded in custody pending a criminal trial or serving a sentence of imprisonment,

(ii) any period spent by the person on board a ship, railway train, road vehicle or aircraft pursuant to this section, and

(iii) if the person has instituted court proceedings challenging the validity of the deportation order concerned, any period spent by the person in a place of detention between the date of the institution of the proceedings and the date of their final determination including, where notice of appeal is given, the period between the giving thereof and the final determination of the appeal or any further appeal therefrom or the withdrawal of the appeal or, as appropriate, the expiry of the ordinary time for instituting any such appeal."

Section 7 of the Immigration Act 1999 (as amended) provides:-

"7.—(1) The Minister may—

(a) by regulations provide, subject to the provisions of this Act, for any matter referred to in this Act as prescribed or to be prescribed, and

(b) in addition to any other power conferred on him or her to make regulations, make regulations generally for the purposes of, and for the purpose of giving full effect to, this Act including regulations requiring a non-national against whom a deportation order has been made to repay any expenditure incurred by the Minister in relation to his or her deportation having regard to the financial circumstances of the person and providing for the procedure for such repayment.

(2) Regulations under this Act may contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary or expedient for the purposes of the regulations."

Regulations 5 to 7 of the Immigration Act 1999 (Deportation) Regulations 2005 (S.I. No. 55 of 2005) (hereafter "Regulations of 2005") provide as follows:-

"5.—Each place listed in the Second Schedule to these Regulations and every Garda Síochána station is a place prescribed for the purposes of section 5(1) of the Act.

6.—Immigration officers and members of the Garda Síochána are hereby authorised to deport a person from the State under the Act.

7.—Where an immigration officer or member of the Garda Síochána arrests a person pursuant to section 5(1) of the Act and where he or she proposes to detain the person in a prescribed place, he or she shall, in writing, inform the Member in Charge, in the case of a Garda Síochána station, or the Governor, in any other case, of the arrest and direct that the person be detained until further notice."

Mountjoy Prison (*inter alia*) is specified within the Second Schedule of the Regulations of 2005, as being a place prescribed for the purposes of s. 5(1) of the Act of 1999. In the course of this inquiry the Court heard oral evidence that Mountjoy Women's Prison (known informally as 'The Dóchas Centre') is not merely co-located on the same campus as Mountjoy Prison but is in fact a part of Mountjoy Prison.

#### The applicant's complaints

The applicant complained that her detention was unlawful on diverse grounds. One of the grounds relied upon was a contention that any purported authorisation of the respondent to detain the applicant in Mountjoy Women's Prison was invalid and ineffective by reason of a failure on the part of the arresting officer to comply with an essential precondition to the lawful exercise of the power conferred on him by s. 5 of the Immigration Act, 1999, which precondition was imposed by regulation 7 of the Regulations of 2005.

The precondition referred to is the requirement in regulation 7 aforesaid that "[w]here an immigration officer or member of the Garda Síochána arrests a person pursuant to section 5(1) of the Act and where he or she proposes to detain the person in a prescribed place, **he or she shall, in writing, inform the ... Governor ... of the arrest and direct that the person be detained until further notice**" [the Court's emphasis]. The applicant complains, and counsel for the respondent accepts, that the Governor was not notified in writing of the applicant's arrest. The document entitled "An Garda Síochána, Immigration Act, 1999 (No. 22 of 1999) Notification of Detention" is silent as to the fact of the applicant having been arrested pursuant to section 5(1) of the Act and merely asserts that "[i]n 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) made in exercise of the powers conferred by Section 7 of the Immigration Act, 1999 (No 22 of 1999), I direct that pending the making of arrangements for his/her removal from the State, **that Leila Darchiashvili, DOB 15/11/1955** be detained... etc."

As the Court has, for the reasons to be stated below, upheld this ground of complaint and was disposed on account thereof to order the release of the applicant from unlawful detention, it has not been necessary for the Court to consider in detail, or to rule upon, any of the other grounds advanced by the applicant for contending that her detention was unlawful. The applicant was entitled to be released if, as was the case, the Court was satisfied on any one ground that her detention was unlawful.

#### Submissions on behalf of the respondent.

It was submitted on behalf of the respondent that the statement contained in the notification of detention to the effect that "[i]n 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) made in exercise of the powers conferred by Section 7 of the Immigration Act, 1999 (No 22 of 1999), I direct that pending the making of arrangements for his/her removal from the State, **that Leila Darchiashvili, DOB 15/11/1955** be detained... etc." constitutes sufficient compliance with the statute and that in so far as the Governor was not informed in writing of the applicant's arrest such non-compliance with regulation 7 of the Regulations of 2005, constitutes a mere procedural irregularity which does not have the effect of vitiating the legality of the actual detention.

#### Decision

The provisions of what is now s. 5 of the Act of 1999 (as amended by s.10 of the Illegal Immigrants (Trafficking) Act 2000) were considered by the Supreme Court in the course of a reference by the President pursuant to Article 26 of the Constitution of Ireland of the Illegal Immigrants (Trafficking) Bill 1999— *In re Article 26 of the Constitution and in the matter of ss. 5 & 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360. Giving judgment for the Court in accordance with Article 26.2.2 of the Constitution Keane C.J said the following ( pp 403 – 404 of the report):-

"Section 10

This section of the Bill takes the form of amendments to ss. 3, 5 and 6 respectively of the Immigration Act, 1999.

The general power of detention in relation to deportation orders

Section 3 of the Act of 1999 provided for the making of deportation orders in respect of different categories of non-nationals specified in subs. (2) of the section. The first amendment proposed to be effected to s. 3 is the insertion of a new subsection (1A) which would read as follows:-

"A person the subject of a deportation order under this section may be detained in accordance with the provisions of this Act for the purpose of ensuring his or her deportation from the State."

Counsel for the Attorney General, in their written submissions in reply to the submissions by counsel assigned by the court, say:-

"The suggestion that the new s. 3(1A) of the Immigration Act, 1999, would have the effect of widening the power to detain - a suggestion which appears at p. 1 of the submission in opposition to the Bill - is misconceived. Section 3(1A) confers no new power of detention. On the contrary, it effectively limits the power of detention conferred by s. 5 of that Act by providing clearly that that power may only be exercised in respect of any person 'for the purpose of ensuring his or her deportation from the State'."

In their earlier written submissions, counsel for the Attorney General elaborate on this argument more fully, citing the passage already referred to in this judgment from the judgment of Keane J. in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26.

As counsel for the Attorney General point out, the inherent power to deport is now regulated by s. 3 of the Act of 1999 and the power to detain under s. 5 is consequential upon and ancillary to the power to deport. The amendment proposed to be effected to s. 3 of the Act of 1999 by the insertion of the new subs. (1A) is simply for the purpose of making express, what would at any rate have been quite clearly implied, namely that the powers of detention are for the purpose of ensuring deportation.

The court agrees with the submissions of counsel for the Attorney General in this regard. There is no question of any new or draconian power of detention being introduced by the Bill. The detention, if it is to remain lawful, must be confined to the statutory purposes in accordance with the principles enunciated by Flood J. in *Gutrani v. Governor of Wheatfield Prison* (Unreported, High Court, Flood J., 19th February, 1993)."

The document entitled "An Garda Síochána, Immigration Act, 1999 – Notification of Detention" merely records that the signatory, who is said to be an "authorised person" directs, purportedly in exercise of certain powers which are unspecified but which are said to be contained in specified legislative provisions, that pending the making of arrangements for the applicant's removal from the State the applicant be detained in "Mountjoy Women's Prison a prescribed place", and that the basis of such detention is that the applicant "intends to avoid removal from the State".

It is interesting to note that while s.5(1) of the Act of 1999, empowers an immigration officer or a member of the Garda Síochána, to arrest a person against whom a deportation order is in force, where the arresting officer with reasonable cause suspects that that person intends to avoid removal from the State, and detain him or her in a prescribed place, it does not expressly authorise the delegation of, or transfer of, the power of detention to another, e.g. the Governor of the prescribed place (in this instance the respondent, who is the Governor of Mountjoy Women's Prison). Further, though this might have been done, it does not employ the same device as is used in s. 5(4) of the Act of 1999 (to declare that detained person, the custody of whom has been delegated or transferred to a person in charge of a prescribed place, to "be deemed to be in lawful custody whilst so [further] detained.")

However, the Court regards the entitlement of an authorised person to transfer the physical custody of a detained person, and/or to delegate the further detention of the detained person, to the person in charge of a prescribed place to be implicit. Section 5 of the Act of 1999 relates to arrest and detention in the civil context. It is not a provision that relates to the imposition of a penal or other sanction and therefore is amenable to a purposive interpretation in accordance with s. 5 of the Interpretation Act 2005. It would be absurd, having regard to the scheme of the Immigration Act 1999 as a whole, if an authorised person having initially arrested and briefly detained an intended deportee under s. 5 of the Act of 1999, and who was desirous that that person should be further detained in a prescribed place, but not being himself or herself in charge of the prescribed place, could not hand over the detained person to the person who is in fact in charge of the prescribed place.

However, the implication of an entitlement on the part of an authorised person to hand over an intended deportee in custody to the person in charge of a prescribed place raises other issues. An authorised person, and it follows his or her proposed delegate, or transferee, as the case may be, can only detain the intended deportee for the purpose of ensuring his or her deportation from the State, and can only do so for the period allowed by law. The total period of detention allowed by law is limited by s.5(6) of the Act of 1999 to a period or periods not exceeding eight weeks in aggregate.

It is clear from *Attorney General v Cox* (Unreported, Court of Criminal Appeal, 9th April, 1929); *Dunne v Clinton* [1930] I.R. 366 and other cases, that there is no meaningful distinction to be drawn between "arrest" and "detention" in terms of the effect upon a person's right to liberty. Detention embraces arrest. In semantic terms the word arrest describes the point in time at which restraint of the detainee's liberty commences.

In *Attorney General v Cox* (Unreported, Court of Criminal Appeal, 9th April, 1929) the Court of Criminal Appeal rejected the suggestion that the law might recognise some form of restraint not amounting to arrest and made it clear that a detention embraces an arrest. Kennedy C.J. said:-

"According to [Cox's] counsel he was *under arrest*, according to the police, *merely detained* ... . This Court does not accept the distinction sought to be made between being 'detained', when a person is not a free agent and no longer the master of his own movements, and 'arrest' as the term is understood in law. They are in effect one and the same."

Further, in *Dunne v Clinton* [1930] I.R. 366, Hanna J giving judgment in the High Court stated at p. 372:-

"In law there can be no half-way house between the liberty of the subject, unfettered by restraint, and an arrest. If a person under suspicion voluntarily agrees to go to a police station to be questioned, his liberty is not interfered with, as he can change his mind at any time. If, having been examined, he is asked, and voluntarily agrees, to remain in the barracks until some investigation is made, he is still a free subject, and can leave at any time. But a practice has grown up of "detention," as distinct from arrest. It is, in effect, keeping a suspect in custody, perhaps under as comfortable circumstances as the barracks will permit, without making any definite charge against him, and with the intimation in some form of words or gesture that he is under restraint, and will not be allowed to leave. As, in my opinion, there could be no such thing as notional liberty, this so-called detention amounts to arrest, and the suspect has in law been arrested and in custody during the period of his detention. The expression "detention" has no justification in law in this connection, and the use of it has in a sense helped. to nurture the idea that it is something different from arrest, and that it relieves the guards from the obligation to have the question of the

liberty of the suspected person determined by a Peace Commissioner or the Court. If the word "detention" were deleted from the police vocabulary and the word "arrest" substituted there would be a clearer understanding as to the obligations upon the guards. If it is necessary or advisable for the investigation of crime that there should be some intermediate period conforming to the present practice, it must be authorised by the Legislature. It is a deprivation of the liberty of the subject, and it is fundamental that that cannot occur in cases such as this, save by the order of a Peace Commissioner or a Court."

Because there is no meaningful distinction to be drawn between "arrest" and "detention" in terms of the effect upon a person's right to liberty, and because the total period or periods during which a person may be detained under s. 5 of the Act of 1999 is subject to a specific limit *i.e.*, it is limited to a period or periods not exceeding eight weeks in aggregate, the person in charge of a prescribed place, and to whom custody of the intended deportee is to be delegated or transferred, needs to know (a) if the person that he or she is being asked to take custody of has already spent some time in detention and (b) if so, how long that person has spent in custody up to that point. For practical purposes, that means that the person in charge of a prescribed place needs to be told, or be able to ascertain, whether the intended deportee was arrested before being presented to him or her for detention. If the person in charge of a prescribed place is duly informed of the fact of an earlier arrest he or she will, by virtue of being so informed, be prompted to ascertain from the arresting officer both the time of arrest (or arrests as the case may be), and the duration of the previous detention or detentions, and can thereby satisfy himself or herself as what portion, if any, of the theoretical maximum of eight weeks deprivation of liberty in aggregate remains during which the intended deportee might be lawfully detained. (It is important to state here that it was acknowledged in the judgment *In re Article 26 of the Constitution and in the matter of ss. 5 & 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2. I.R. 360, at p. 411, that "[e]ven though the Irish legislation contains an express time limit of eight weeks in the aggregate subject to certain extensions where proceedings are brought etc., it would still be the case that it would be an abuse of the power to detain if it was quite clear that deportation could not be carried out within the eight weeks.")

The need for a person in charge of a prescribed place to know about an earlier arrest or arrests is afforded express recognition in regulation 7 of the Regulations of 2005 which requires that "[w]here an immigration officer or member of the Garda Síochána arrests a person pursuant to section 5(1) of the Act and where he or she proposes to detain the person in a prescribed place, **he or she shall, in writing, inform the .... Governor .... of the arrest and direct that the person be detained until further notice.**" The Court is satisfied that this is not merely a procedural requirement. Rather it is properly to be characterised, in this Court's view, as a provision necessary for the purpose of giving full effect to the power of arrest and detention contained in s. 5 of the Act of 1999. It is not merely an incidental, supplementary and consequential provision, rather the regulation creates a necessary precondition to the lawful delegation of the power of detention, and/or the transfer of custody, of an intended deportee who has been arrested and initially detained by an authorised person in reliance on s. 5 of the Act of 1999, to the person in charge of the prescribed place at which it is proposed to further detain, or more correctly, continue the detention of the detained person.

### Conclusion

As it is conceded by counsel for the respondent that, contrary to an express requirement contained in regulation 7 of the Regulations of 2005, the respondent was not informed in writing of the arrest of the applicant by the person who carried out that arrest and the initial detention of the applicant in purported pursuance of s. 5(1) of the Act of 1999, the Court considers that the purported delegation of the power of detention, and/or the transfer of custody, of the applicant from the arresting officer to the respondent was not lawful. In the circumstances the applicant was entitled to be released.