THE HIGH COURT

[2017 No. 191SS]

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

BETWEEN

YING PING HU

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGEMENT of Mr Justice David Keane delivered on the 1st day of March 2017

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

Procedural Background
2. On Wednesday, the 22nd February 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 3.30 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 Friday, the 24th February 2017, to afford the respondent an opportunity to justify the detention. The application was heard over two days on Friday, the 24th, and Monday, the 27th February.

The detention
3. Mr Tony Harris, assistant governor of Mountjoy Prison, has certified that the applicant is in custody pursuant to a detention order (or warrant of detention) dated the 21st February 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:

> 'Whereas on Friday, the 10/2/17, Garda David Hughes arrested Ying Ping Hu, D.O.B. 13-8-85, under s. 5 of the Immigration Act 1999, as amended and by the Immigration Act, 1999 (Deportation) Regulations, 2005, as amended, and the same Ying Ping Hu was detained in Cloverhill Prison, a prescribed place pending the making of arrangements for his removal from the State. And whereas the said Ying Ping Hu was removed from Cloverhill Prison for the purpose of effecting his removal from the State. And whereas the removal of Ying Ping Hu from the State could not be effected due to the actions of the said Ying Ping Hu, Ying Ping Hu has spent 12 days in detention previous to today.
>
> I now direct that pending the making of arrangments for his removal from the State that the said Ying Ping Hu be detained in Mountjoy Prison, a prescribed place of detention for the purpose of Section 5(3) of the Immigration Act, 1999 (No. 22 of 1999) as amended.
>
> 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
>
> (a) has failed to leave the State within the time specified in the order,
>
> (b) has failed to comply with any other provision of the order or with a requirement in a notice under Section 3(3)(b)(ii),
>
> …
>
> (e) intends to avoid removal from the State,
>
> In accordance with Section 5(8) of the Immigration Act 1999, as amended, Ying Ping Hu 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.'

4. The detention order bears the stamp of the Garda National Immigration Bureau ('GNIB'), 13/14 Burgh Quay, Dublin 2, with a date of the 21st February 2017. The order is endorsed as executed by lodging the applicant in Cloverhill Prison on Tuesday, the 21st February 2017.

The complaint that led to the inquiry
5. The complaint that led to the present inquiry was grounded on a short affidavit sworn on the 22nd February 2017 by Donal Quigley, the solicitor who now acts on behalf of the applicant.

6. That affidavit exhibits an almost illegible copy of an earlier warrant of detention in respect of the applicant at Cloverhill Prison. On its slightly more legible second page, that warrant bears the stamp of the Garda National Immigration Bureau ('GNIB'), with a date of the 10th February 2017. It is endorsed as executed by lodging the applicant in Cloverhill Prison on Friday, the 10th February 2017 at 5.25 p.m.

7. In the grounding affidavit, which is the only affidavit sworn on behalf of the applicant for the purpose of the present inquiry, Mr Quigley avers, in material part, as follows. According to Mr Quigley's instructions, the applicant is a citizen of China who has been residing in the State since 2009. The applicant resides with his partner and her two children. The applicant previously applied for

asylum in or about 2009 and that application was refused. The applicant has never previously made an application for subsidiary protection.

8. On the 20th February 2017, having been contacted by the applicant's uncle and informed that the applicant had then been in custody for 10 days, Mr Quigley attended on the applicant at Cloverhill Prison. Mr Quigley avers that he discussed the applicant's immigration history with him 'and, in particular, canvassed with him whether he wished to make an application for [s]ubsidiary [p]rotection.' The applicant informed Mr Quigley that he did.

9. At this juncture, it seems to me, events took a surprising turn. Although Mr Quigley was attending upon the applicant as a solicitor to advise him concerning his immigration law rights in respect of his immigration detention, at the request of the applicant's uncle, and although Mr Quigley specifically canvassed with the applicant whether he wished to make an application for subsidiary protection, Mr Quigley did not furnish the applicant with a subsidiary protection application form. Perhaps he did not envisage the issue would arise. Perhaps he forgot to bring one with him. Mr Quigley does not say.

10. Instead, Mr Quigley had the applicant sign three copies of the same note; the first of which was left with the applicant to hand to the appropriate GNIB officer; the second was given to the prison staff present; and the third was e-mailed as an attachment to a letter that Mr Quigley wrote to GNIB on returning to his office that evening.

11. The note is addressed to the Governor of Cloverhill Prison and, more pertinently, to the 'International Protection Office.' It is typed (impressively, under the circumstances) and consists of the following line: 'I Ying ping Hu 13-8-85 wish to apply for Subsidiary Protection in Ireland.' It bears the applicant's signature over his printed name and, beneath that, the handwritten date '20/2/17', over Mr Quigley's office stamp.

12. On the morning of the 21st February, Mr Quigley contacted Cloverhill Prison and was informed that the applicant had been removed to the airport early that morning. Later on that date, Mr Quigley became aware that the applicant had not been deported but had been lodged in Mountjoy Prison, leading him to express the belief that officials of the GNIB were unable to remove the applicant from the State.

13. Mr Quigley then specifically avers: 'I say that I have made every effort to contact the relevant State authorities to inform them of the [a]pplicant's intention to apply for [s]ubsidiary [p]rotection.' I pause here to observe that the relevant State authority in respect of an application for subsidiary protection is neither the Governor of Cloverhill Prison nor the GNIB but, under the express terms of Schedule 1 to the European Union (Subsidiary Protection) Regulations 2013 ('the 2013 Regulations'), the Office of the Refugee Applications Commissioner (now the International Protection Office), Timberlay House, 79-83 Lower Mount Street, Dublin 2. There does not seem to be any suggestion on the evidence before me that Mr Quigley sought to contact that authority at any material time.

14. Mr Quigley's affidavit contains no explanation for the applicant's failure to make an application for subsidiary protection, or to seek or take legal advice in that regard, at any time while he has been in the State between 2009 and the 20th February 2017. Nor does it contain any explanation of the basis of the applicant's claim for subsidiary protection, that is to say, of the substantial grounds that exist for believing that the applicant if returned to China would face a real risk of suffering serious harm.

15. While strictly an argument of law, rather than an assertion of fact, Mr Quigley goes on to aver that:

> 'There can be no concluded intention to deport in circumstances where the applicant *has made known his intention to apply for Subsidiary Protection*, and is, so far as I am aware entitled to do so. Such an application is suspensive of a deportation order. Further, the [a]pplicant is entitled as a matter of law to remain in the State pending the determination of that application and therefore his detention at present, pursuant to section 5 of the Immigration Act, 1999, as amended, is unlawful as such a concluded intention cannot exist.'
>
> (emphasis added)

16. Thus, the applicant's position is that the fact that he has expressed in writing a desire to make an application for subsidiary protection, without any further explanation or elaboration, and without actually doing so, is sufficient to render his deportation and, hence, his detention for that purpose unlawful.

The State's evidence

17. Alan King, an assistant principal in the Judicial Review Unit within the Department of Justice and Equality swore a replying affidavit on behalf of the State on the 24th February 2017. From the undisputed averments in that affidavit, the following additional facts emerge.

18. The sole basis for the detention of the applicant is for the purpose of removing him from the State on foot of a deportation order that was made on the 14th June 2013. The Minister intends to deport the applicant notwithstanding the documents exhibited to Mr Quigley's affidavit and a pending application for the revocation of the deportation order against the applicant, discussed in greater detail below.

19. The applicant applied for a declaration of refugee status at Dublin Airport, having been refused leave to land, on the 19th June 2009. The applicant was represented by another firm of solicitors for the purposes of that application. The Refugee Application Commissioner recommended the refusal of a declaration of refugee status on the 28th July 2009, and that decision was communicated to the applicant and his solicitors by letter, dated the 20th August 2009. The applicant did not appeal that decision, nor did he comply with the obligation upon him, under Article 11 of the Aliens Order 1946, to notify any change of address to the Department of Justice at any time prior to his subsequent arrest on the 10th February 2017, almost seven and a half years later.

20. By letter dated the 28th September 2009, the applicant was informed that the Minister had refused to grant him a declaration of refugee status and was proposing to make a deportation order against him.

21. That letter was returned, marked 'no forwarding address', by Cloverhill Prison, in which the applicant had been detained at the time when his application was first considered but from which he had obviously since been released. I pause at this point in the narrative to note that, in invoking the relevant 'deemed service' provisions of the relevant legislation, the respondents rely on the following passage from the decision of the Supreme Court in The Illegal Immigrants (Trafficking) Bill, 1999 Reference [2000] 2 I.R. 360 at 395-6:

> 'First, it must be observed that a person seeking asylum or refugee status is the applicant for that status. There is an administrative procedure in place to carry out and assist him or her in the processing of that application. He or she is not a passive participant in that process. It is not unreasonable for the State to require that such a person accept that an address given by him or her to the minister or furnished by him or her specifically as an address for service should be one at which service by a form of recorded delivery should be deemed as good service. In availing of such procedures and in exercising any discretion in relying on such procedures the State is bound to act with due respect to the constitutional right to access the courts and the right to fair procedures of the persons concerned.'

As already noted, the applicant has not provided the court with any information concerning his circumstances or whereabouts within the State between 2009 and the 10th February 2017, much less any explanation for his failure to provide the Department of Justice with an address after his release from Cloverhill Prison in 2009. In fairness to the applicant, no argument is advanced on his behalf that he was not on constructive, if not actual, notice of each of the relevant decisions concerning his immigration status.

22. The applicant did not make any representations in respect of the proposal to deport him. Nor did he make an application for subsidiary protection within the 15-day period then permitted.

23. On the 13th March 2013, members of the GNIB discovered the applicant in County Offaly, working illegally. He gave an address in County Kilkenny. The Minister for Justice and Equality considered the position of the applicant under s. 3 of the Immigration Act 1999 and decided to make a deportation order in respect of him. That decision was communicated to the applicant at the address he had provided by registered letter, dated the 28th June 2013, under cover of which a copy of the deportation order was enclosed, together with a copy of the Minister's reasons for making it. The applicant failed to leave the State and failed to present himself at the Offices of GNIB on the 16th July 2013, as he had been directed.

24. The applicant never subsequently contacted GNIB or the Department at any time prior to his arrest on the 10th February 2017.

25. Whether by coincidence or design, a firm of solicitors wrote to the Minister on behalf of the applicant on the 10th February 2017, the day of his arrest on foot of the deportation order against him, seeking revocation of that order on his behalf. The firm concerned is neither that which represented the applicant in connection with his refugee status application in 2009, nor that which is now representing him for the purpose of the present inquiry.

26. In that letter, those solicitors acknowledged the detention of the applicant in Cloverhill Prison and made an 'urgent application' for the revocation of the deportation order against him. They also sought the provision of an undertaking by 1 p.m. on the 13th February 2017 that the deportation order would not be enforced in the meantime, failing which an injunction would be sought. The basis for that application was the applicant's 'live-in relationship' with an Irish citizen to whose two children he was said to be 'in loco parentis.' Those solicitors had been instructed that, in the context of that relationship, the applicant had moved to another address in County Kilkenny since the deportation order was made. The letter comprises an extensive written submission, and encloses a wide range of documents, in support of that application. Amongst the enclosures is an 'authority and consent', ostensibly signed by the applicant and dated the 29th November 2016, in which he confirms that he has instructed the firm of solicitors involved 'to represent me in relation to immigration/asylum/citizenship matters.' Quite where that leaves Mr Quigley's representation of the applicant for the purposes of the present application, no one has attempted to address.

27. The Department of Justice and Equality wrote acknowledging receipt of that letter on the 15th February, stating that they were unable to provide the undertaking sought.

28. Remarkably, on the 20th February 2017, the same date upon which Mr Quigley attended at Cloverhill Prison and canvassed with the applicant whether he wished to make an application for subsidiary protection, the same firm of solicitors wrote again to the Department, enclosing further documentation in support of the the application for the revocation of the deportation order against the applicant.

29. Mr King avers to his belief, based on what he has been told by Sergeant James Doyle of GNIB, that Mr Quigley's letter of the 20th February 2017, with the applicant's note attached, was indeed e-mailed to GNIB at 9.19 p.m. on that date, and to Sergeant Doyle directly at 1.40 p.m. on the following day. However, Mr King goes on to aver as follows:

> 'I also say and believe, having been so informed by Philip Sullivan of the International Protection Office, that no application or other correspondence relating to any application for subsidiary protection, or intended application, was received by the Office of the Refugee Applications Commissioner (prior to its abolition) or the International Protection Officer (sic) prior to the institution of the within proceedings.'

30. When I pressed Counsel for the applicant, Mr Devally S.C., on this point in the course of the inquiry on the 27th February, he acknowledged that there was no evidence before the court even then that an application for subsidiary protection on behalf of the applicant has actually been made, although there was some suggestion that his instructing solicitor had taken certain steps in that regard on that date. I will return to the issue below.

Discussion

31. Mr Devally skilfully argues that the applicant's detention is unlawful on two separate grounds; although only one of those was pressed with any force.

32. The makeweight submission, if I may describe it in that way, is that the detention order is bad on its face for two reasons: first, because it wrongly recites the number of days that the applicant had already spent in detention before it was made (overestimating that period as one of 12, rather than 11, days); and second, because it sets out three separate grounds of suspicion as the basis for making it, rather than the two grounds of suspicion relied upon by the same officer as the basis for making the earlier detention order of the 10th February 2017.

33. The recording error concerning the number of days that the applicant has already been in detention is not, it seems to me, an error that goes to jurisdiction - rather it is an error of misdescription; see Costello, The Law of Habeas Corpus in Ireland (Dublin, 2006) at pp. 62-3. As such, it may be excused on the ground that the applicant has not been prejudiced by the relevant documentary imperfection (ibid, p. 66, and the cases cited there at fn 88). Indeed, in this case the error redounds to the benefit of the applicant in that it shortens by one day the period during which he may be lawfully detained.

34. The difference between the grounds of suspicion invoked as the basis for the detention order of the 10th February 2017 and the second detention order made on the 20th February 2017 does not seem to me to be an error at all. I can see no basis upon which it

can be suggested that it was not open to the officer concerned to form an additional third ground of suspicion in making the latter order.

35. For these reasons, I reject the argument that there is an error on the face of the detention order that renders the applicant's detention unlawful.

36. The second submission is of a different order. It raises the following issue. The applicant contends that his proposed application for subsidiary protection entitles him to avail of the provisions of reg. 4 of the European Union (Subsidiary Protection) Regulations 2013 ('the 2013 Regulations'), as amended by the European Union (Subsidiary Protection) (Amendment) Regulations 2015. In substance, reg. 4 provides that an applicant for subsidiary protection under the 2013 Regulations is entitled to remain in the State pending the determination of that application. The applicant submits that the effect of that entitlement is to place him in a position directly analogous to that of the applicant in *B.F.O. v Governor of the Dóchas Centre* [2005] 2 IR 1 in that it precludes the formation of a definite or concluded intention to deport, which is a condition precedent to the exercise of the power to detain under s. 5 of the Immigration Act 1999, thereby rendering his detention unlawful.

37. While that issue is undoubtedly one of substance, it seems to me there is at present no sufficient evidence before the court to permit it to be raised in this case. Regulation 4 (1) of the 2013 Regulations makes clear that the relevant right to remain in the State is that of 'an applicant.' Regulation 2 defines an 'application' to mean 'an application for a subsidiary protection declaration made in accordance with Regulation 3(1), or an application that is deemed, under paragraph (2) or (3) of Regulation 3, to be such an application, and "applicant" shall be construed accordingly.'

38. Regulation 3(1) of the 2013 Regulations provides:

> 'An application for a subsidiary protection declaration-
>
> (a) may be made only by a person-
>
> (i) who is in the State, and
>
> (ii) subject to paragraph (4) to whom a notice under section 17(5) (as amended by Regulation 34) of the Act of 1996 has been sent,
>
> and
>
> (b) shall be-
>
> (i) made within the period specified in the notice referred to in sub-paragraph (a), and
>
> (ii) addressed to the Commissioner and made in writing, in the form set out in Schedule 1 or a form to the like effect.'

39. Regulation 3(4) does not arise here, as it deals with a situation where, under s. 17, sub-s. 7 of the Refugee Act 1996, as amended ('the 1996 Act'), the Minister gives consent to the making of a subsequent application for a declaration of refugee status to a person who has already been refused a declaration.

40. Section 17, sub-s. 5 of the 1996 Act , as substituted by reg. 34 (a) of the 2013 Regulations, requires that, where the Minister has decided to refuse an application for refugee status, he or she must send the applicant a notice in writing stating that:

> '(a) his or her application for a declaration has been refused,
>
> (b) he or she may make an application for a subsidiary protection declaration under the [2013 Regulations] within 15 days of the sending of the notice by completing the form for such an application and addressing it to the Commissioner, and
>
> (c) unless he or she makes an application for a subsidiary protection declaration referred to in paragraph (b), the Minister may make an order under section 3 of the Immigration Act, 1999, requiring the applicant to leave the State….'

41. It is thus apparent that the period now specified in reg. 3 (1) (b) of the 2013 Regulations is that of 15 days from the sending of the s. 17 (5) notice that a declaration of refugee status has been refused. I should add that it would appear that, on the 28th September 2009, when the Minister sent the applicant a notice in writing that his application for a declaration of refugee status had been refused, the position would have been governed by the terms of reg. 4 (1) of the European Communities (Eligibility for Protection) Regulations 2006 ('the 2006 Regulations'), whereby a notification, under s. 3, sub-s. 3 of the 1999 Act, of a proposal to deport a person who had been refused a declaration of refugee status, was required to include a statement that where the person considered that he or she was eligible for subsidiary protection, he or she may, in addition to making representations against the making of a deportation order, make an application for subsidiary protection 'within the 15 day period referred to in the notification.'

42. Under reg. 4 (3) (b), an application for subsidiary protection was to be in the form in Schedule 1 or a form to the like effect. The Schedule 1 form under the 2006 Regulations appears to me to be in all material respects identical to the Schedule 1 form under the 2013 Regulations.

43. Among the items of information required to be set out on the Schedule 1 form are the following: the basis on which 'serious harm' as defined in the Regulations is being claimed; all grounds supporting that basis for claiming a real risk of suffering such harm if returned to his country of origin; the submission of all documentary evidence available to the applicant supporting his application for subsidiary protection; the identification of any and all documentary evidence submitted with the applicant's refugee status claim that he wishes to rely upon in support of his subsidiary protection claim; and an explanation for the absence of any documentary evidence to support an application where none is provided.

44. Here, the applicant has provided none of that information, whether to this court in the context of the present inquiry or, more significantly, to the International Protection Office by way of an application made in accordance with the requirements of reg. 3(1) of

the 2013 Regulations.

45. As I observed more than once in the course of argument, in considering whether the applicant was entitled to rely on the suspensive effect of the provisions of reg. 4 of the 2013 Regulations, it was always going to be necessary to first determine whether he is, on the evidence before the court, 'an applicant' for subsidiary protection. Having considered that evidence as carefully as I can, it is clear to me that it fails to establish that the applicant has addressed an application in writing to the Commissioner (now the International Protection Office) in the form set out in Schedule 1 or a form to like effect.

46. Nor do I consider the point to be simply one of form or a mere technicality. It seems to me that it would place the integrity of the subsidiary protection system in grave jeopardy if the apparently reasonable requirements of the application process laid down in the Regulations could be disregarded in favour of the suggestion that, in circumstances such as those of the present case, all that is required to bring a person within the scope of those regulations is the mere possession of a note expressing a wish to make such an application, which might then be waived at a prison governor or a member of An Garda Síochána in the face of a warrant of detention in respect of failure to comply with a deportation order as a real life incarnation of the 'Get Out of Jail Free' card from the board game Monopoly.

47. It is important to remember that, at the material time, the State operated two separate procedures for examining asylum applications and subsidiary protection applications. There is no question of the applicant being deprived of a genuine opportunity to submit an application for subsidiary protection in accordance with the 2013 Regulations because of a failure by the State to permit him the necessary time or assistance to do so. He has been in the State for over 7 years, since his application for refugee status was refused. During that period he has had ample time to seek and obtain any necessary legal advice; indeed, he has been represented to date by three different solicitors in the context of his immigration and asylum law rights.

48. Whatever logistical difficulties Mr Quigley may have encountered at Cloverhill Prison on the 20th February 2017 and been somehow unable to overcome in the days immediately afterwards (and, as with almost all other aspects of the applicant's position, very little information has been forthcoming in that regard), in the absence of a satisfactory explanation from the applicant concerning why he failed or was unable to obtain the necessary advice or make the appropriate application at any time over the preceding seven years, the difficulties inherent in attempting to take such steps at the eleventh hour cannot be called in aid now by the applicant, as though they were difficulties over which he had no control and could not have prevented, rendering it impossible or excessively difficult for him to avail of the protection provided by Directive 2004/83/EC.

49. Accordingly, the applicant's argument that he is entitled to rely on the suspensive effect of the provisions of reg. 4 of the 2013 Regulations fails, in limine.

Conclusion

50. For the reasons given, I am satisfied that, on the evidence before me, the applicant's detention is lawful.

51. In the circumstances, I do not propose to consider the procedural argument ventilated at some length 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 any such argument will now have to take into account the decision of the Court of Appeal, delivered yesterday, in the case of *C.A. v Governor of Cloverhill Prison* [2017] IECA 46 (at § 30-31).

52. Nor do I propose to deal with the other argument upon which the respondents sought to rely and which was debated at some length, that is, that the applicant is out of time to apply for subsidiary protection. Both sides accept that, in consequence of the decision of the Court of Appeal, delivered on the 6th February last, in *Danqua v Minister for Justice and Equality (No. 2)* [2017] IECA 2017, following that of the Court of Justice of the European Union ('CJEU') in Case C-429/15 *Danqua v Minister for Justice and Equality* EU:C:2016:789, this Court is obliged to suspend the operation of the 15 day rule already described.

53. The respondents argue that the finding of the CJEU in *Danqua* went no further than that a 15 day time limit did not ensure applicants for subsidiary protection a genuine opportunity to submit an application (at § 46), while fully acknowledging that it is for the Member States to establish such time limits (at § 44). The applicant points out, with some force, that, while it is for the Member States to establish such time limits, none has been fixed since the decision of the CJEU in Danqua, delivered on the 20th October 2016, effectively suspending the 15 day time limit that, until then, had applied.

54. Borrowing a phrase from the judgment of Hogan J. for the Court of Appeal in C.A., for my part I would be exceptionally loath to accede to any argument along the lines that it is for the Court to fix such a time limit and still more loath to accept instead that, without fixing any time limit, the Court should conclude that the applicant in this case is not entitled to apply for subsidiary protection because, even in the absence of any prescribed time limit, after more than seven years he has delayed too long. The applicant in *Danqua* had delayed for over two and half years and no such argument seems to have been raised before, much less considered by, the Court of Appeal in that case. The Court cannot, and should not, legislate. Subject to those observations, the resolution of the issue will have to await an appropriate case.

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