Neutral Citation Number: [2011] IEHC 347

THE HIGH COURT

2011 1562 SS

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND

BETWEEN:

OLAJIDE RILWAN OGUNTOL

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 4TH AUGUST 2011:

The applicant is a Nigerian national who arrived in this State on 29th October 2009. He applied for a declaration of refugee status but was refused. A Deportation Order was signed by the Minister for Justice and Equality on 25th May 2011. A copy of this Deportation Order was sent to the applicant by letter dated 1st June 2011. This letter was sent by registered post to him at the notified address, namely Hanratty Hotel, Glentworth Street, Limerick. Whether he ever in fact received this letter is unknown to me.

This letter notified the applicant that he was obliged to leave the State by 18th June 2011 and he was requested to advise the Minister's office of his travel arrangements in order to comply with the deportation order. The letter went on to inform him that if he did not leave the State by that date he was liable to be deported, and for that purpose was required to present himself at the Garda National Immigration Bureau, 13/14 Burgh Quay, Dublin 2 on 21st June 2011 at 2 pm. In fact the letter states *"21st of June 2010"* (my emphasis). However, understandably, no point appears to have been taken in relation to this clerical error.

The letter warned him that failure to leave the State by the 18th June 2011 would be a failure to comply with a provision of the deportation order, and that, as a result, an Immigration Officer or a member of An Garda Siochana may arrest and detain him without a warrant, and in accordance with section 5 (1) of the Immigration Act, 1999 (as amended), and went on to state that if the applicant failed to comply with any provisions of the deportation order, or with a requirement in that letter, an Immigration Officer or a member of An Garda Siochana may arrest and detain him without a warrant in accordance with the said section.

It would appear from a copy letter dated 18th July 2011 written by the applicant's solicitor to the Chief State Solicitor that although the applicant failed to attend at GNIB on the 21st June 2011, he called to GNIB voluntarily on the 4th July 2011 and gave an explanation for his failure to comply with the notice, and that a requirement was made to him to attend again on the following day the 5th July 2011. This letter goes on to say that he did not do so because he was ill, and there are medical certificates attached to the letter indicating that he was certified as unfit for work from 5th July 2011 to 8th July 2011 due to flu and a stomach upset.

Sgt. Doyle has stated that on the 12th July 2011, following the applicant's failure to attend on the 5th July 2011, he instructed a member of An Garda Siochana to locate him and arrest him for having failed to comply with this notice under section 3(3)(b)(ii) of the Act and on the basis of a belief that the applicant intended to avoid removal from the State.

I have heard evidence from Sgt. James Doyle of GNIB, one of whose tasks is to locate persons whom it is intended to deport of foot of a deportation Order, such as the applicant. He has stated that on the 12th July 2011 having been made aware that the applicant had failed to present himself for deportation pursuant to the said notice, and the further requirement to present himself for deportation on the 5th July 2011, he instructed a Garda officer to locate and arrest the applicant, as arrangements were in place for deportation to take place on 13th July 2011 by chartered aircraft from Dublin to Lagos. He has stated that when a Garda called to the address which the GNIB had for the applicant at 42 Leinster Street, Dublin 9 on the 12th July 2011 he was not present there, but was traced to another address at Tyrellstown, Dublin 15. When the Garda in question called to that address the applicant himself opened the door, whereupon he was taken into custody, and brought to Cloverhill Prison where he was detained by the Governor under a Notification of Detention signed by the arresting Garda officer on the 12th July 2011, which was in the form for such a Notification prescribed by the Immigration Act, 1999 (Deportation) Regulations, 2005 (S.I. 55 of 2005). That document informed the Governor that the applicant had been arrested, directed the Governor to detain the applicant *"pending the making of arrangements for his/her removal from the State*", and indicated that the basis for the arrest and detention was, firstly, that the applicant had failed to comply with a provision of the deportation order or with a requirement in the notice under section 3(3)(b)(ii) of the Act, and, secondly, because the applicant *"intends to avoid removal from the State"*.

It appears that thereafter an unsuccessful application for an injunction to restrain deportation was made to Mr Justice Cooke on the 13th July 2011.

Sgt. Doyle has stated that on the night of 13th July 2011 he and the applicant and other deportees boarded the flight to Lagos. Before reaching its destination, but well after it had left Irish airspace and, therefore, this State, the aircraft had to return to Dublin as the captain of the aircraft had been refused permission to enter Algerian airspace. The flight landed back in Dublin Airport at 03.10hrs on 14th July 2011.

The problem which confronted Sgt. Doyle at this point was what to do with the applicant upon his arrival back in the State.

His evidence is that he decided that since he had been arrested and taken into custody prior to the departure of the aircraft for failure to comply with the notice, and on a belief that he had intended to avoid his removal from the State, and since the Deportation Order was still in force, and as far as Sgt. Doyle was concerned nothing had changed, he arrested the applicant again for having failed to comply with the same notice under s. 3(3)(b)(ii) of the Act as previously, and on the basis of his continuing belief that the applicant intended to avoid removal from the State. A new Notification of Detention was signed by Sgt. Doyle indicating these same

reasons for his arrest and detention, and the applicant was brought back to Cloverhill Prison to await new arrangements for his removal from the State, where he has remained to date pending the making of new arrangements to deport him.

Anthony Lowry BL for the applicant has submitted that on the facts as stated in evidence, the applicant had left the State once the aircraft left Irish airspace, and that thereafter the notice under section 3(3)(b)(ii) of the Act had expired or lapsed. He points to the fact that even though the Deportation Order itself is still in force and requires that the applicant once he has left the State is required to remain outside the State, his return to this State was outside his control and that he should not be held to be in any way responsible for his return to the State. That is clearly correct.

Section 5(2) of the Immigration Act, 1999 provides:

> *"5. (2) -- a person arrested and detained under subsection (1) may be placed on a ship, railway train, road vehicle or aircraft by an immigration officer or a member of the Garda Siochana, 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."*

It seems clear also that having left Irish airspace, and therefore the State, he was no longer detained as such, and that following his involuntary return to this State for the reasons which existed there would have to be a fresh detention order made before he could again be detained lawfully.

He submits that in these circumstances it is not permissible for An Garda Siochana to arrest the applicant again as they did on the 14th July 2011 for failure to comply with the notice to leave the State, or, not having done so, to report on a given date or dates to GNIB for arrangements to be made for his removal from the State, since all that has now passed given his arrest on the 12th July 2011 and his removal from the State, and since the detention order signed on the 12th July 2011 has expired or otherwise lapsed following his removal from the State.

He has submitted also that upon arrival back in the State on the 14th July 2011 for reasons beyond his control, it was not reasonable or permissible for Sgt. Doyle to form a fresh opinion that the applicant intended to avoid his removal from the State, based solely on events that preceded his removal from the State on the 13th July 2011, and that what ought to have occurred, respecting also the principle of proportionality, was that a fresh notice ought to have been issued to the applicant requiring him to re-attend on a specified date for the purpose of new arrangements for his deportation, and that only in the event of a fresh breach of the requirements of such notice could the applicant be again arrested and detained. It is submitted that it was reasonable therefore that the applicant ought to have remained at liberty following his return until any such breach of the new notice should have occurred.

Another point is made about the contents of the second Notification of Detention dated 14th July 2011, that while it informs the Governor that the applicant has been arrested and authorises his detention, it fails to refer to the period of time that the applicant had already been in detention on foot of the earlier Notification of Detention, and it is submitted that this lack of information means that the Governor is not in a position to know from the Notification itself how much longer the applicant may be detained, given the requirement that he be detained for no longer than 8 weeks in aggregate.

In these circumstances it is submitted that the applicant's detention is not in accordance with law.

Cindy Carroll BL for the respondent has submitted in relation to this last point that in so far as the Governor may be required to ensure that the applicant is not detained for longer than 8 weeks, he may do so by checking his own records, and that it is unnecessary that the notification to the Governor contains that information, and has referred to a judgment of Herbert J. in *Okoroafor v. Governor of Cloverhill Prison and others*, unreported, High Court, 30th September 2003, where the learned judge concluded that upon a re-entry of a deported person to the State the 8 week maximum period of detention permitted revives but only as regards any subsequent period or periods of detention, and that therefore, the absence of this information in the Notification of Detention has no relevance to the lawfulness of the applicant's detention.

As far as the principal submission by the applicant is concerned, Ms. Carroll submits that Sgt. Doyle was entitled to re-arrest the applicant upon arrival back in the State for his breach of the requirements of the notice under section 3(3)(b)(ii) of the Act, in the unusual events which occurred, even though he had been previously arrested for same, and on foot of a continuing belief that the applicant intended to avoid his removal from the State. She submits that no further notice was required to be given to him before such a re-arrest could take place, and that no fresh evidence was needed to be evinced by the applicant of an intention to avoid removal from the State.

Conclusions:
Firstly, I am satisfied that the Notification of Detention dated 14th July 2011 is not defective by reason of not containing information for the Governor in relation to how long the applicant had been in detention prior to his removal from the State on the 13th July 2011. Firstly, the Governor is in a position to ascertain that information, should it be relevant, from his own custody records. But secondly, I am satisfied that the 8 week aggregate period of detention permitted excludes the earlier period in this case and would apply only to the period of detention following his return to this State.

In relation to the remainder of the submissions, I am satisfied that the section 3(3)(b)(ii) Notice dated 1st June 2011 had been acted upon. The applicant had failed to comply with its requirements, and he was arrested on foot of that failure, and was removed from the State. Its purpose had been fulfilled. In my view it is spent. It follows therefore that, even though the Deportation Order requires that the applicant remains outside this State, he was no longer in breach of that particular notice, particularly since his return to this State was an involuntary return for the reasons stated in evidence.

It follows that if the only basis on which Sgt. Doyle arrested the applicant and authorised his fresh detention on the 14th July 2011 was a breach of that notice, it would not form a lawful basis for detaining him.

However, a second reason is given for the arrest and detention and that is the opinion formed by Sgt. Doyle on the 14th July 2011 that the applicant intended to avoid his removal from the State. The question is had he any reasonable basis for forming such an opinion upon their return to this State.

In that regard, 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 Siochana, 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 then to 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."

These are alternative bases for an arrest and detention. Any one of them can be a lawful basis for arrest and detention.

Sgt. Doyle was aware that the applicant had failed to comply with the presenting requirement in the notice of the 21st June 2011. He was also aware that the applicant had called to the GNIB headquarters on the 4th July 2011 giving an explanation for his failure, and that he had been required to attend again on the following day, the 5th July 2011 and had failed to do so. I am entitled to presume that the applicant stated on the 4th July 2011 that he was residing at 42, Leinster Street, Dublin 7 since that is the address to which the Gardai first called in an effort to locate the applicant, and since that is the address for the applicant contained in the medical certificates referred to. Sgt. Doyle was aware that the applicant was found on the 12th July 2011 to be residing at a different address, which appears to be the address of a friend of his, but which had not been notified to the GNIB. These events were so close in time to the arrival back in the State on the 14th July 2011 that in my view Sgt. Doyle was entitled to regard them as still constituting reasonable cause for a belief that the applicant as of the 14th July 2011 *"intends to avoid removal from the State",* especially given the absence of any information or advice given to him by the applicant to change that view. I have no evidence which would constitute any basis for a contrary belief, or which Sgt. Doyle was required to consider and take account of before concluding that the applicant still intended to avoid removal. No explanation for the applicant moving address to that of a friend has been given to this Court, and it is safe to presume that none was given to Sgt. Doyle either. He was certainly not cross-examined in relation to any such information.

The remaining question is whether, by reason of the fact that the second arrest was on two bases, only one of which I conclude was a valid basis, the arrest and detention on foot of the Notification of Detention dated 14th July 2011 containing both reasons is lawful. In my concluded view it remains lawful provided one basis is permissible. Section 5 (1) of the Act of 1999 provides for alternative bases, any one of which may be relied upon. Sgt. Doyle would have been justified in my view in arresting and detaining the applicant simply on the reasonable cause for believing that the applicant intended to avoid removal from the State for the reasons which I have stated. The fact that he included a second reason, which was not open to him for the reasons stated, does not invalidate the detention order, provided that the other basis is a lawful one.

In these circumstances I am satisfied that the applicant's current detention is in accordance with law, and I refuse the application for his release.