Neutral Citation Number: [2011] IEHC 110

THE HIGH COURT

JUDICIAL REVIEW

2008 792 JR

BETWEEN

EBERE DOKIE

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AT THE SUIT OF GARDA THOMAS MORLEY

RESPONDENT

AND

THE HUMAN RIGHTS COMMISSION, IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Kearns P. delivered the 25th day of March, 2011

By order of the High Court (Peart J.) dated 7th July, 2008, the applicant was granted leave to apply for judicial review. The reliefs sought by the applicant include the following:-

1. A permanent injunction by way of an application for judicial review restraining the respondent from taking any further steps in the prosecution entitled *Director of Public Prosecutions at the suit of Garda Thomas Morley v. Ebere Dokie* (Bridewell Charge Sheet No. 761009) at present pending before the Dublin Metropolitan District Court;

2. A declaration by way of an application for judicial review that s. 12 of the Immigration Act 2004 is inconsistent with the provisions of Bunreacht na hÉireann and in particular Articles 38.1, 40.1, 40.3.1, 40.3.2, and/or 40.4.1 thereof; and/or

3. If necessary, a declaration by way of an application for judicial review that s. 12 of the Immigration Act 2004 is incompatible with the State's obligations under the Convention and in particular Articles 5, 6, 7 and/or 14 thereof.

4. Damages by way of an application for judicial review as against the respondent for false imprisonment.

5. Damages and/or compensation pursuant to s.3 of the European Convention on Human Rights Act 2003 for unlawful detention of the applicant contrary to Article 5 of the Convention.

6. An order providing for such further or other relief, including ad interim or interlocutory relief as to this Honourable Court shall seem meet.

7. An order providing for an award of the costs of these proceedings to the applicant.

FACTUAL BACKGROUND

The applicant in these proceedings is a non-national who is believed to be a national of Liberia. She entered the State on 3rd April, 2008 via Dublin Airport. The applicant had traveled to Ireland from Nigeria transiting through a European airport with her daughter who is a national of Nigeria. It is stated that she paid an agent $5,000 to arrange her travel into this State and to secure passports for the applicant and her daughter. The applicant believed these passports to be false. It was claimed that she met a man and his two children, two young boys aged four and seven years old, at Lagos Airport who were also traveling with the same agent. As the group was preparing to leave Lagos, the father of the children said that he could not travel and asked the applicant to take the two young boys with her to Ireland. After initially refusing to bring the boys the applicant then later agreed. Upon her arrival at Dublin Airport with the three children, her daughter and the two young boys, the applicant was arrested and charged with an offence that she being a non-national failed to produce on demand to an Immigration Officer/member of An Garda Síochána at Dublin Airport a valid passport or other equivalent document which established her identity and nationality and failed to give a satisfactory explanation of the circumstances which prevented her from doing so contrary to ss. 12(1)(a) and (2) and s. 13 of the Immigration Act 2004.

The applicant appeared before the District Court on this charge on 4th April 2008 when she was remanded in custody. The applicant applied for asylum on 9th April 2008 and was issued, pursuant to s. 9(3) of the Refugee Act 1996, with a Temporary Residence Certificate (hereinafter referred to as 'the TRC') from the Office of the Refugee Applications Commissioner (hereinafter referred to as 'ORAC', on 28th May, 2008. However on 28th May, 2008, the District Court stated that it was not going to deal further with the case against the applicant on foot of the Dublin Airport charge sheet and made "*no order*" in respect of that case. It was the view of the District Court Judge that the initial charge arising from 3rd April, 2008 was null and void. The applicant was released from custody but was, however, re-arrested and charged pursuant to ss. 12(1) (a) and (2) and s. 13 of the Immigration Act 2004 with failing to produce the same documentation on the 29th May, 2008 at Chancery Street, Dublin. The applicant was granted bail on 23rd June, 2008, but was unable to meet the terms of bail until the terms of bail were adjusted on 15th July, 2008. The applicant has been at liberty in this country since July 2008 and has yet to furnish either a passport or proof of identity or nationality to the authorities. The State simply does not know for sure who the applicant is or even what country she comes from. It appears in this case that no effort has been made by or on behalf of the applicant to make good this information deficit since her arrival in this country.

The facts of this case illustrate all too clearly the serious problems faced by immigration authorities in endeavoring to control and deal with undocumented persons entering this jurisdiction. The applicant currently resides in a reception centre in the State with her

daughter and presumably is supported from State resources. Leave was granted in relation to these proceedings on 7th July, 2010.

RELEVANT LAW
Section 1(1) of the Immigration Act 2004 provides that the term "*non-national*" has the meaning assigned to it by the Act of 1999. The Immigration Act 1999 defines a "non-national" as "an alien within the meaning of the Act of 1935 other than an alien to whom, by virtue of an order under section 10 of that Act, none of the provisions of that Act applies."

Section 11 of the Immigration Act 2004, the validity of which is not challenged in these proceedings, provides:

> "(1) Every person (other than a person under the age of 16 years) landing in the State shall be in possession of 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 to the satisfaction of an immigration officer.
>
> (2) Every person landing in or embarking from the State shall furnish to an immigration officer such information in such manner as the immigration officer may reasonably require for the purposes of the performance of his or her functions.
>
> (3) A person who contravenes this section shall be guilty of an offence.
>
> (4) This section does not apply to any person (other than a non-national) coming from or embarking for a place in the State, Great Britain or Northern Ireland."

Section 12 of the Immigration Act 2004 provides:

> "(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, and
>
> (b) in case he or she is registered or deemed to be registered under this Act, his or her registration certificate.
>
> (2) A non-national who contravenes this section shall be guilty of an offence.
>
> (3) In this section 'on demand' means on demand made at any time by any immigration officer or a member of the Garda Síochána.
>
> (4) This section does not apply to-
>
> (a) a non-national who is under the age of 16 years, or
>
> (b) a non-national who was born in Ireland."

Section 13 of the Immigration Act 2004 states:

> "(1) A person guilty of an offence under this Act shall be liable on summary conviction to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 12 months or to both.
>
> (2) A member of the Garda Síochána may arrest without warrant a person whom he or she reasonably suspects to have committed an offence under this Act (other than section 10) or section 2(1) of the Employment Permits Act 2003)."

SUBMISSIONS OF THE APPLICANT
Section 12 of the Act of 2004 confers upon an Immigration Officer or a member of An Garda Siochana the power to stop any non-national and demand the production of their passport if the individual in question is subject to mandatory registration requirements. The section creates a criminal offence punishable by up to one year's imprisonment for the failure of a non-national to give a satisfactory explanation of circumstances which prevent them from providing a passport and a registration certificate when demanded of them by an Immigration Officer or member of An Garda Siochana.

Counsel argued that s. 12 is objectionable on various grounds which include the following:- (i) the words purporting to create a criminal offence are too vague and imprecise; (ii) s. 12 is a disproportionate interference with the equality provisions in the Constitution; and (iii) the procedure provided for under s.12 either constitutes or permits an abuse of process in that the applicant should have been either prosecuted under s. 11 of the Act or made the subject of civil detention under s. 9 of the Refugee Act 1996. It was argued that to prosecute the applicant repeatedly under s. 12 when, to the knowledge of the gardai, she did not have a valid passport or proof of identity, is objectionable as an abuse of process.

In relation to (i), counsel argued that a person must be able to ascertain, with some measure of certainty, what conduct is prohibited before they can be subject to the criminal law. Counsel stated that she had been unable to find any other criminal offence in which the absence of a "*satisfactory explanation*" forms part of the *actus reus* of the offence as provided for by s. 12 of the Act. Due to the uncertainty of the phrase "satisfactory explanation" in s. 12, it could not properly form the basis of any criminal offence. In advancing that argument, counsel contended that as the section contained no standard for determining what constituted a "*satisfactory explanation*" the test became a subjective test, that is to say, a test of what in the opinion of the arresting garda constituted a 'satisfactory explanation'. A further difficulty lay in the fact that s. 12 imposed a heightened obligation on a suspect to provide a 'satisfactory' rather than a 'reasonable' explanation. Counsel submitted that there was a significant difference between a 'satisfactory' and a 'reasonable' explanation and the test of an objective standard could only attach to the latter of the two. By definition a 'satisfactory' explanation was one which had to satisfy an individual member of an Garda Síochána. In that context a particular explanation offered might satisfy one member but not another. The same could be said in respect of any judge called upon to determine whether or not to convict the applicant.

Counsel further submitted that once the absence of a "*satisfactory explanation*" becomes part of the *actus reus* of the offence it must be the case that the section violates the principle against self - incrimination. The section thus also violates Article 38.1 of the Constitution which provides that "No person shall be tried on any criminal charge save in due course of law" and also Article 40. 4. 1° which provides that "No citizen shall be deprived of his personal liberty save in accordance with law." Counsel also placed reliance upon Article 5 of the European Convention on Human Rights which provides that "Everyone has the right to liberty and security of person." In this regard, counsel relied upon the cases of *Steel & Ors. v. The United Kingdom* [1998] E.C.H.R. 95 and *Gillan and Quinton v. The United Kingdom* [2010] E.C.H.R. 28 as authority for the proposition that the law must be formulated with sufficient precision to reasonably allow an individual to foresee the consequences of his or her acts or omissions.

In relation to (ii), the applicant argued that s.12 is unconstitutional as a disproportionate interference with various constitutional rights to which the applicant is entitled. Article 40.1 of the Constitution provides:-

> "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

Article 40.3 of the Constitution provides that :-

> "1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

Counsel argued that s. 12 fails to accord equal treatment to the applicant and in fact discriminates against her on the grounds of her status as an undocumented non-national. There is no requirement on Irish nationals to carry identification and the fact that a non-national is required under s.12 to carry identification documents at all times amounts to unequal treatment. This unequal treatment is without any adequate justification and the requirement to carry both forms of documentation amounts to a disproportionate interference with the applicant's right to equality. Furthermore, as s. 12 requires that both documents be provided, it does not satisfy the test set out by the Supreme Court in the case of *In re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321 in that the requirement to produce a passport and a TRC upon demand is too onerous and fails to be justified as an adequate and objective requirement in fulfilling a legitimate purpose of the State's need to control immigration. This requirement amounts to treatment that is unfair, arbitrary or invidious so as to constitute unequal treatment within the meaning of Article 40.1 of the Constitution.

Counsel also noted Article 14 of the European Convention on Human Rights which provides:-

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

It was submitted that Article 14 of the Convention was engaged and the applicant relied upon the case of *Belgian Linguistic Case (No.2)* (1968) 1 E.H.R.R. 252 in this regard.

Counsel directed the attention of the Court to provisions of the Immigration Residence and Protection Bill 2010 noting that the section purporting to replace s.12 has an either/or element *i.e*. either the individual's valid passport/equivalent identification documentation *or* the TRC would be requested from a person on foot of such a demand from a demanding officer. This could be seen as an acknowledgement that the requirements under s.12 of the Act of 2004 were excessive.

Counsel also argued in the context of proportionality that it had been open to the respondent in this case to have invoked s. 9(8) of the Refugee Act 1996, which provides for civil detention, as opposed to s. 12 of the Immigration Act 2004 which provides for offence, conviction and criminal detention. S. 9 (10) of the Act of 1996 further provides that the maximum period of civil detention will be 21 days, although this term can be renewed by the District Court where satisfied that continued detention is merited. Section 10 (4) of the Refugee Act 1996 prescribes that a person detained under the provisions of the Act of 1996 must be dealt with expeditiously. No such savers appear in s. 12 of the Act. The essence of the applicant's argument in this regard was that there is a less draconian regime available which the respondent should have utilised in the circumstances of this case.

In relation to (iii), counsel argued that the arrest and prosecution of the applicant for the further alleged offence on 29th May, 2008 in circumstances where the respondent was aware that the applicant was unable to produce a valid passport or other equivalent document constituted an abuse of process, particularly as the applicant had been previously prosecuted for failing to produce the same category of documentation. The gardai were aware that on that date the applicant was in possession of a valid TRC, albeit that that document did not establish her identity or nationality. It did however constitute evidence of her entitlement to reside in the State and was evidence that she had complied with her obligation to register her presence in the State pursuant to s. 9 of the Act of 2004. Counsel emphasized that to the extent that the State might be seen to be prosecuting the applicant in order to establish her identity, any such deployment of the section would amount to an abuse of process. That had been made clear in the judgment of O'Neill J. in *Olafusi v. Governor of Cloverhill Prison & Anor*. [2009] I.E.H.C. 558.

SUBMISSIONS OF THE RESPONDENT

Counsel for the respondent stressed that s. 12 of the Act enjoys a presumption of constitutionality. In the case of *In re Article 26 and the Planning and Development Bill 1999* [2000] 2 I.R. 321, the Supreme Court held that the presumption of constitutionality applied with particular force to legislation dealing with controversial social and economic matters. Counsel argued that the presumption of constitutionality applies with particular force to the provisions of the Immigration Act 2004 as the Oireachtas is given significant power to legislate in respect of non-nationals and their activities in the State.

The State must legislate for the common good and the protection of the rights of its citizens and it is the right of the State to control and regulate the entry, departure and activities of non-nationals in the State; *Osheku v. Ireland* [1986] 1 I.R. 733; *In re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360; *A.O. & D.L. v. Minister for Justice, Equality and Law Reform*[2003] 1 I.R. 1; and *Bode v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 663 were relied upon in support of this argument. The power of the State to regulate the activities of non-nationals is significantly greater than it is in respect of citizens of the State. Citizens of the State enjoy rights and protections under the Constitution which are not enjoyed by non-nationals. That difference in treatment is legitimately and appropriately grounded in the State's overarching requirement to regulate the admission of non-nationals into the State.

It was not the case that because the applicant has no documentation she is thereby liable to be arrested and convicted. The analogy drawn by the applicant with s. 4 of the Vagrancy Act 1824 was misplaced. There is no compulsion on an applicant to provide an explanation; it is an option which the applicant could have availed of when the demand for documentation was made of her. The applicant in these proceedings did not avail of this opportunity to give an explanation and this fact should be seen as greatly diminishing any claim made by or on behalf of the applicant that she was treated unfairly or oppressively. Furthermore although the applicant was actually in possession of a TRC on the 28th May, 2008 she chose not to produce that document to the member of An Garda Síochána.

Counsel noted that s. 12 contains an important safeguard in that it relieves a non-national from the obligation to produce either of the two documents when they have been demanded where he or she gives a "satisfactory explanation" of the circumstances which prevent him or her from so doing. Counsel for the respondent submitted that the significance of this saver had been entirely overlooked and misunderstood by the applicant. Furthermore, s.12, in not limiting or restricting the range of explanations that may be proffered, affords non-nationals enormous latitude and it is for this reason that the inclusion of this qualification acts as a safeguard in such circumstances. The offence lies in not having a passport. The 'explanation' provided for under the section is not part of the *actus reus* but a defence. It affords non-nationals in such circumstances an opportunity to explain, to the satisfaction of the demanding officer, their reasons for their failure to provide the required documentation. This is an objective test and not subjective to an individual demanding officer. In any event a further safeguard is evident in that it is for the District Court to assess whether a "satisfactory explanation" in fact was given regardless of what the arresting Garda might believe. Section 12 does not require or compel a non-national to provide an explanation. A non-national is perfectly free to provide no explanation and, instead, to provide the passport or other equivalent document which establishes his or her identity and nationality which the non-national is obliged to possess when landing in the State by virtue of s. 11 of the Act of 2004. The obligation to possess a passport or other equivalent document which establishes her identity and nationality is not disputed by the applicant as evidenced by the fact that s. 11 was not challenged in these proceedings. Section 12 does not interfere with the privilege against self-incrimination as there is no obligation to speak or to provide an explanation regarding the required documentation. The applicant's reliance upon the case of *King v. The Attorney General* [1981] 1 I.R. 233 was misplaced. That case concerned the statutory crime of vagrancy under which it was sufficient to prove that the accused was a "suspected person" or "reputed thief" who was loitering. The Supreme Court held, at p.263, that the terms 'suspected person' and 'reputed thief' were so uncertain that they could not form the foundation for a criminal offence. No such uncertainty about the meaning of words arises under s.12 and it was thus clear that the section is not unconstitutional or incompatible with the Convention.

In relation to the applicant's argument that s. 12 breaches the right to equal treatment before the law which is protected by the Constitution, counsel for the respondent claimed that the applicant's complaints based upon Article 40.1 of the Constitution and Article 14 of the Convention were misplaced. Article 40.1 of the Constitution provides that: - "All citizens shall, as human persons, be held equal before the law" but "this shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function". Article 40.1 applies to "citizens" and, *a fortiori*, the applicant, who is not a citizen of the State, is not entitled to invoke Article 40.1 and s. 12 of the Immigration Act 2004, which applies solely to non-nationals, cannot be deemed to violate Article 40.1 of the Constitution. In the event that this Court did not accept that argument, counsel proceeded to argue that there is no basis upon which the Court could conclude that s. 12 breached Article 40.1. In the case of *In re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321 the Supreme Court stated that "Article 40.1, as has been frequently pointed out, does not require the State to treat all citizens equally in all circumstances" and "[e]ven in the absence of the qualification contained in the second sentence, to interpret the Article in that manner would defeat its objectives".

In its decision in the case of *In re Article 26 and the Planning and Development Bill 1999* [2000] 2 I.R. 321, the Supreme Court upheld the entitlement of the Oireachtas to classify and discriminate between persons for relevant legislative purposes and stated at p. 357 that:-

> "Article 40 does not preclude the Oireachtas from enacting legislation based on any form of discrimination: as has often been pointed out, far from promoting equality, such an approach would simply result in greater inequality in our society."

Section 12 achieves a legitimate legislative purpose in a non-arbitrary and rational manner. Article 40.1 can not be read as requiring uniform treatment; *The State (Nicolaou) v. An Bord Uchtala* [1966] I.R. 567 relied upon. It was ultimately the respondent's contention that the applicant failed to establish that s. 12 violates Article 40.1 of the Constitution. For completeness, counsel further argued that s. 12 did not amount to any breach of Article 14 of the Convention as it is clear that the difference in treatment prescribed by s. 12 has an objective and reasonable justification in that it pursues a legitimate aim in a proportionate manner.

In relation to the final ground in which counsel for the applicant argued that s. 12 amounted to an abuse of process, counsel for the respondent stated that there was no evidence before the Court to conclude that s. 12 was applied in respect of the applicant for an improper purpose or that its application amounted to an abuse of process. The applicant could not be allowed to rely upon hypothetical situations divorced from the factual circumstances of her case; *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 relied upon. Any argument that s. 11 should have been availed of by the prosecution was misplaced, as it was clear that the applicant had arrived into the State with a passport of some sort, be it false or otherwise. A prosecution under s. 11 might well have failed for this reason.

DECISION AND DISCUSSION

In considering the net issues to be determined by this Court, it is helpful to reiterate s.12 of the Immigration Act 2004 at this point. Section 12 provides:

> "(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, and
>
> (b) in case he or she is registered or deemed to be registered under this Act, his or her registration certificate.
>
> (2) A non-national who contravenes this section shall be guilty of an offence. (Emphasis added)

I am of the view that the failure to define the term "satisfactory explanation" within s. 12 of the Act does give rise to vagueness and uncertainty. The section as worded has considerable potential for arbitrariness in its application by any individual member of an Garda Síochána. There is no requirement in s.12 that the demanding officer should have formed any reasonable suspicion that the non-

national has committed a crime, is about to commit a crime or is otherwise behaving unlawfully before he/she can require the non-national to provide a 'satisfactory' explanation for the absent documents.

While the failure to provide a "satisfactory explanation" appears to me to form part of the *actus reus* of the offence, I have difficulty in following the respondent's case that it simultaneously operates as a potential defence to the offence of failing to provide the documents specified at subs. (1)(a) and (b) when requested by the demanding officer. I have to say it would have been much more satisfactory if the draftsman had specifically identified the explanation as a defence, as occurred under legislation in the United Kingdom. Section 2 (1) of the Asylum and Immigration (Treatment of Claimants) Act 2004 states that:-

> "A person commits an offence if at a leave or asylum interview he does not have with him an immigration document which – (a) is in force, and (b) satisfactorily establishes his identity and nationality or citizenship."

Section 2 (4) then specifically provides as follows:-

> "It is a defence for a person charged with an offence under subsection (1)….(c) to prove that he has a reasonable excuse for not being in possession of a document of the kind specified in subsection (1)."

The provision cited above sits more comfortably with the configuration of criminal offences with which our criminal law system is familiar. It is also noteworthy that under this British measure the defendant need only produce an explanation which is 'reasonable' and thus susceptible to evaluation by an objective standard.

In my view Section 12 is not sufficiently precise to reasonably enable an individual to foresee 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.

As a result, the offence purportedly created by s. 12 is ambiguous and imprecise. In my view it lacks the clarity necessary to legitimately create a criminal offence.

The difficulties arising from such imprecision and vagueness were identified in the case of *King v. The Attorney General* [1981] 1 I.R. 233. S. 4 of the Vagrancy Act 1824 described the offence of loitering with intent to commit a felony as the frequenting by "every suspected person or reputed thief" of any of the places listed in the Act with the intention of committing a felony. The Supreme Court found this language to be too vague to create a criminal offence as is apparent from the following passage from the judgment of Henchy J. in *King v. The Attorney General* at p. 257:-

> "The ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance."

The Supreme Court held that the portion relating to the offence committed by "every suspected person or reputed thief" was unconstitutional as it was inconsistent with the various constitutional requirements including the following: Article 38.1 - that no person shall be tried on a criminal charge save in due course of law, Article 40.4.1° - that no citizen shall be deprived of his liberty save in accordance with law, Article 40.1 – which provides for the principle of equality before the law and Article 40.3 – which sets out the State's duty to defend and vindicate the personal rights of citizens.

This Court similarly acknowledges the potential of s.12 to breach the applicant's constitutional rights in offending the right not to incriminate oneself as provided for both under Irish law and by virtue of Article 6 of the European Convention on Human Rights. I see no reality in the respondent's submission that the non-national can elect to remain silent. The plain fact of the matter is that silence equates in these circumstances with the failure to provide a satisfactory explanation and thus becomes proof of the commission of the offence. It should also be stated that there is no saver in the section to the effect that the 'explanation' given be inadmissible in any criminal proceedings other than those brought under s. 12 of the Act.

On the issue of proportionality, the Court acknowledges that the maintenance and control of the asylum and immigration system in the State is aptly categorised as a legitimate purpose in furtherance of the common good and public policy. The State is entitled, and indeed under a duty, to control the entry, deportation and activities of non-nationals in the State. The Supreme Court in the case of *In re Article 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 was cognisant of this reality and stated as follows at p. 383:-

> "For this reason, in the sphere of immigration, its restriction or regulation, the non-national or alien constitutes a discrete category of persons whose entry, presence and expulsion from the State may be the subject of legislative and administrative measures which would not, and in many of its aspects, could not, be applied to its citizens."

The Supreme Court decisions in *Laurentiu v. Minister for Justice, Equality and Law Reform* [1999] 4 I.R. 26 and *Leontjava v. Director of Public Prosecutions* [2004] 1 I.R. 591 reiterated that a wide latitude had been afforded to the Oireachtas in adopting whatever form of legislation it considered appropriate. In *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795 Denham J. observed at p. 813 that "[a]t all times the State retains the right to control immigration".

However, it is well established that any legislative infringement on rights contained in Article 40.1 must satisfy a proportionality test. The critical test by which to adjudge whether a person's constitutional rights have been infringed was enunciated by Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593. Costello J. in his landmark judgment stated as follows at p. 607:-

> "In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal

> restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society…. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:—
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right as little as possible, and
>
> (c) be such that their effects on rights are proportional to the objective."

The section that is being challenged provides that a non-national must produce two specified documents on demand. Taking the scenario in the abstract, it is suffice to note that a person who travels to another country without a passport can not reasonably expect to gain entry to that country without their passport. While it is the case that there exists a less draconian regime for such entrants into the State which provides for an administrative form of civil detention under the Refugee Act 1996, that fact alone will not render the section unconstitutional if the interest to be protected requires or warrants a criminal sanction in order to be properly effective. The high importance of having effective immigration control procedures persuades me that a criminal sanction such as is provided for by s. 11 and s. 12 of the Act of 2004 for the failure by a non-national to have a passport when entering the State or to carry both passport and registration certificate thereafter is not a disproportionate legislative response to that requirement. It is for the Oireachtas to determine whether such legislation is necessary and I do not see the existence of a form of administrative civil detention such as that provided for by the Act of 1996 as somehow undermining the respondent's contentions on this particular issue. In my view the equality provision at Article 40.1 is not infringed having regard to the need in the public interest for the State to have suitably strict measures to deal with undocumented entrants into the State.

On the third aspect of this case, I find unconvincing the suggested explanation for the non-resort by the prosecution to s. 11 of the Act in the particular circumstances of this case. It was clear from the moment the applicant presented to the immigration authorities at Dublin Airport that she had neither a passport or other valid identifying documentation. To suggest that the prosecution did not proceed under s. 11 because of some apprehension that a forged passport might afford a full defence to the applicant is farfetched in the extreme.

S. 12 might be a more convenient method of dealing with non-nationals who have moved on into the community and in respect of whom it is suspected that they lack passports of other valid proof of nationality and identity. Those are not the circumstances which arise here. This is not a case where a 'roadside check' of a person who has integrated into the community occurred. It is a case where, to the knowledge of the authorities, the applicant had no passport on arrival and no other proof of identity. It is not difficult to appreciate the unfairness which can arise if s. 12 is deployed in these circumstances: the applicant may be subjected to repeated prosecutions and will be guilty of a criminal offence on each and every occasion. By contrast, s. 11 provides for a 'once and for all' type of offence which seems to me to be more appropriate on the facts of this case. I think the applicant can legitimately complain that s. 11, and not s.12, should have been utilised in these circumstances.

In this context the High Court has already determined that s. 12 is not to be deployed as a means for identifying a particular applicant. In *Olafusi v. Governor of Cloverhill Prison & Anor.* [2009] I.E.H.C. 558 the applicant was arrested and charged with offences contrary to ss. 12(1) (a) and (2) and s. 13 of the Immigration Act 2004 for failure to produce on demand to a member of An Garda Síochána evidence of his identity and nationality. The applicant was brought before the District Court and entered a plea of guilty but the District Court Judge refused to accept the guilty plea as the applicant's identity had yet to be confirmed. Habeas corpus proceedings were then initiated and O'Neill J. held that the refusal of a guilty plea to facilitate further enquiries concerning the identity of an accused was not a proper basis for refusing a plea. He held that the detention of the applicant amounted to illegal detention. O'Neill J. noted in particular that provision existed for the civil detention of such persons under s. 9 (8) of the Refugee Act 1996, as amended. Insofar as the present case is concerned, and insofar as the prosecution might have had a similar objective, the deployment of s.12 of the Act was, in my view, inappropriate.

In summary therefore I am of the view that, while s. 12 was designed as an immigration control mechanism, its vagueness is such as to fail basic requirements for the creation of a criminal offence. As drafted it gives rise to arbitrariness and legal uncertainty. It also offends the principle that a person be not obliged to incriminate himself. I find it unconstitutional for those reasons. Notwithstanding that a civil mode of detention was available pursuant to s. 9(8) of the Refugee Act 1996, I would nonetheless hold with the respondents on the issue of proportionality having regard to the manifest need for effective measures to regulate the entry into the State of undocumented non-nationals.

Even if I am mistaken in my conclusions on the first issue and the legislation is to be taken as constitutionally sound, I would regard the deployment of s.12 in respect of this applicant as an unconstitutional use of a legislative provision which was designed to be deployed in different circumstances.

Having regard to my conclusions, I do not regard it as necessary to consider arguments based on the European Convention on Human Rights or the case law arising thereunder. I propose at this stage to simply grant two of the reliefs sought which are set out at the beginning of this judgment namely, an injunction restraining the respondent from taking any further steps in the prosecution entitled *Director of Public Prosecutions at the suit of Garda Thomas Morley v. Ebere Dokie*, and also a declaration that s.12 of the Immigration Act 2004 is inconsistent with the provisions of Bunreacht na hEireann and in particular Article 38.1 which provides that no person shall be tried on a criminal charge save in due course of law and with the guarantee in Article 40.4.1 that no person shall be deprived of his liberty save in accordance with law.

I will hear the parties in relation to any other reliefs and the order to be made.