Neutral Citation Number: [2011] IEHC 24

THE HIGH COURT

[2011 No. 135 SS]

IN THE MATTER OF AN INQUIRY UNDER ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND

BETWEEN

ANNASTACIA ROBERSTON

APPLICANT

AND

GOVERNOR OF THE DOCHAS CENTRE

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 25th January, 2011

1. This application for an order releasing the applicant from detention pursuant to Article 40.4.2 of the Constitution again presents the question of what constitutes ordinary residence for the purposes of the Immigration Act 1999 ("the 1999 Act"). The issue arises in the following circumstances: the applicant is a South African national who arrived in Ireland in 2000 under the alias of Martha Kenny. Using this false name the applicant made an unsuccessful application for asylum. When this was ultimately rejected the Minister then made an order providing for her deportation. To this end, the applicant was required to present to the Henry Street Garda Station in Limerick at a specified time and date in November 2002, but she left the State before this could happen. The applicant was thus classed as an evader, albeit under this false name.

2. The applicant then returned to Ireland under her true name of Annastacia Robertson in August 2004. The applicant first registered with the Garda National Immigration Bureau in November 2004, whereupon she was given a student visa. This visa was renewed every year up to November 2010. During this period Ms. Robertson participated in a business computer course and thereafter lawfully worked as a child minder.

3. Ms. Roberston subsequently married a Latvian national, Mr. Aviars Kalnietis, on 16th November 2009. In view of her marriage, she then applied to the Irish Naturalisation and Immigration Service for a residence card. That application was dated the 2nd December 2009 and was signed both by Mr. Kalnietis and Ms. Roberston. One of the questions posed in the form was whether the applicant had ever been the subject of a deportation order in Ireland and, if the answer was in the affirmative, details were required. Ms. Robertson, however, gave an incorrect answer to this question by stating that she never been the subject of such an order.

4. While Ms. Robertson was granted temporary residency on foot of this application, this was ultimately refused by decision of the Minister in June 2010. The Minister had taken the view that because Mr. Kalnietis had left his employers of his own volition in April 2010, he was not satisfied that Mr. Kalnietis was exercising his free movement rights in accordance with Article 6(2)(a) of the European Communities (Free Movement of Persons)(No. 2) Regulations 2006. As it happens, it appears that the whereabouts of Mr. Kalnietis are presently unknown and it would seem that he is not presently residing in the State.

5. The Minister then wrote to Ms. Robertson advising her that he was considering making a removal order against her in accordance with Article 6(2) of the 2006 Regulations. This was not then pressed, because in correspondence Ms. Robertson's solicitors drew the Minister's attention to the fact that she independently had permission to reside in the State until the end of November 2010. In the meantime, the member of Naas Garda Station with responsibility for immigration matters, Garda Loughnane, had served a series of notices on Ms. Robertson pursuant to s. 14(1)(b) of the Immigration Act 2004 requiring her to attend on a specified dates in October, November and December. It is only fair to record that Ms. Robertson duly complied with these directions.

6. Matters came to a head earlier this month. The Minister wrote to Ms. Robertson on 6th January 2011 saying:-

> "Your client previously arrived in the State and presented herself as a South African national, Martha Kenny, who was issued with a deportation order under this identity.
>
> Having considered all the information regarding your client, held on file and made known to us, I am to inform you that your application for further permission to remain in the State on behalf of your client is refused.
>
> Your client should present herself to the Immigration Officer in Naas Garda Station on the 17th January 2011."

7. Ms. Robertson's solicitors responded by stating that she refuted the allegations contained in the letter and seeking further particulars of the evidential basis for the contention made in respect of the Martha Kenny alias. Ms. Robertson duly presented herself to Naas Garda Station on the date in question, whereupon she was arrested by Detective Garda Hanrahan in circumstances I will later describe. On the 19th January 2011 counsel for Ms. Robertson applied to me for an order pursuant to Article 40.4 of the Constitution for an inquiry into her detention. I made an order for such an inquiry in the course of which both the applicant and the two members of An Garda Síochána, Detective Garda David Hanrahan and Garda Aidan Loughnane gave evidence.

Section 3(9)(b) of the Immigration Act 1999

8. The principal question before me is whether Ms. Robertson was "ordinarily resident" in the State for the purposes of s. 3(9)(b) of the Immigration Act 1999 such as would require the Minister to have given the three month notice period stipulated by the sub-section. It is conceded that no such notice has been given.

9. Section 3(9)(b) provides:-

> "A person who is ordinarily resident in the State and has been so resident for a period (whether partly before and partly

after the passing of this Act or wholly after such passing) of not less than 5 years and is for the time being employed in the State or engaged in business or the practice of a profession in the State other than—

(i) a person who has served or is serving a term of imprisonment imposed on him or her by a court in the State, or

(ii) a person whose deportation has been recommended by a court in the State before which such person was indicted for or charged with any crime or offence,

shall not be deported from the State under this section unless 3 months' notice in writing of such deportation has been given by the Minister to such person."

10. There is no question but that Ms. Robertson has been physically in the State since 2004. But for the question of the prior deportation order, there seems no question but that she would *otherwise* have been entitled to the requisite degree of notice.

11. The words "ordinarily resident" have not been defined by the 1999 Act. Nor are these words legal terms of art, so that they cannot be taken to have a special and defined meaning in a legal context, even in the absence of a legislative definition. However, as Maguire C.J. observed in *The State (Goertz) v. Minister for Justice* [1948] I.R. 45 at 55:-

> "...the words 'ordinarily resident' should be construed according to their ordinary meaning and with the aid of such light as is thrown upon them by the general intention of the legislation in which they occur and, of course, with reference to the facts of the particular case."

12. This, of course, is no more than an exemplification of the principle of *noscitur a sociis* whereby the meaning of a statutory phrase is to be ascertained by reference to the overall purpose of the legislation in question and the context in which the statutory language actually appears: see, e.g., the judgment of Henchy J. in *Dillon v. Minister for Posts and Telegraphs,* (Supreme Court, 3rd June 1981) and that of Hamilton P. in *United State Tobacco International Inc. v. Minister for Health* [1990] 1 I.R. 394. Thus, for example, a person who was unlawfully in the State but who had nonetheless worked here for the last five years might well be said to be "ordinarily resident" here for the purposes of taxation law or perhaps even for the purposes of the application of private international law rules which were founded on residency. But it would not necessarily follow that such a person was "ordinarily resident" in the context of either citizenship law or immigration law.

13. It is perhaps appropriate at this stage to say something about the decision in *Goertz* itself. The applicant in that case was a German intelligence agent who had covertly arrived in Ireland on an espionage mission by parachute from a Luftwaffe aircraft in May 1940. He remained at large until November 1941 when he was arrested. He spent the remaining five years in detention as an internee. Following his release from detention in October 1946 he was employed as the secretary of an organisation known as the "Save the German Children" Society. In April 1947 he was arrested and served with a deportation order. He contended that by virtue of the provisions of s. 5(5) of the Aliens Act 1935 - the statutory predecessor to s. 3(9)(b) of the 1999 Act - he was entitled to three months' notice by virtue of the fact that he had been ordinarily resident in the State for more than five years.

14. This argument was - not surprisingly - rejected by the Supreme Court. As Murnaghan J. put it ([1948] I.R. 45 at 57):-

> "A person who came here and who remained in hiding, or who lived here under various disguises, could not reasonable be held to be ordinarily resident, although physically in the country. The phrase should, I think, refer to the character, as well as to the duration, of the residence."

15. Maguire C.J. also stressed that the purpose of the notice provision as being one designed to give the bona fide immigrant a reasonable opportunity to organise their affairs prior to departure.

16. A similar view of the meaning of this phrase was taken by Peart J. in *Sofroni v. Minister for Justice, Equality and Law Reform,* (High Court, 9th July, 2004) where he held that the applicant's stay in Ireland for a period of five years as an asylum seeker did not come within the category of "ordinary residence", even though she had been also permitted to work for some of this period. Peart J. observed that the term "is not intended to refer to residence derived only from an application for a declaration of refugee status." MacMenamin J. endorsed the approach of Peart J. when he was required to construe the phrase in the context of the Irish Nationality and Citizenship Act 1956 in *Simion v. Minister for Justice, Equality and Law Reform* [2005] IEHC 298.

17. It follows, therefore, that if the applicant's residence in Ireland from 2004 onwards was unlawful, she cannot on that account be said to have established an ordinary residence in the State. This, however, begs the fundamental question, namely, whether the applicant's residence in the State from August 2004 onwards was a lawful one.

Was the applicant lawfully in the State from August 2004?

18. It is true that Ms. Robertson was given permission by the Minister to reside in the State for the purposes of s. 5 of the Immigration Act 2004. Of course, that permission is ostensibly valid and it has not been set aside or quashed in judicial review proceedings. I further agree that, generally speaking, an applicant who was the beneficiary of such a permission could be said to be ordinarily resident in the State.

19. That, I fear, cannot, however, be said of Ms. Robertson. She had engaged in a fundamental deceit by applying under an alias for asylum. When that application was rejected and she made the subject of a deportation order, she evaded deportation by not presenting as required by law at Henry Street Garda Station in Limerick in November 2002. She then entered the State in her own name in August 2004 without disclosing the critical fact that she was the subject of a deportation order, albeit in the name of an alias which she had deceitfully provided.

20. Her failure to make such a disclosure is tantamount to entering the State through deception and disguise. As Murngahan J. pointed out in *Goertz*, the concept of "ordinary residence" also involves an assessment of the character of that residence. Moreover, as Black J. noted in that case, the presumption against surplusage means that the word "ordinarily" was "intended to have, and must be given, some effective meaning." To my mind, in this statutory context, the phrase "ordinary residence" connotes a residency which is lawful, regular and bona fide. As *Goertz* itself illustrates, mere physical residence in the State is not in itself enough, since a residence which is irregular, covert or unlawful is not an "ordinary residence" in this sense.

21. It should also be recalled that legislation must be understood and interpreted by reference to certain well-understood general principles of law, one of which is that a person cannot be allowed to profit by their own wrong. If Ms. Roberston's contention were to

be accepted, it would mean that this court would have to avert its eyes to this acknowledged deception and deceit and that she would thereby be allowed to claim the benefit of a statutory entitlement to which she is not justly entitled. It follows that I am coerced to find that Ms. Robertson was not ordinarily resident for the purposes of s.3(9)(b) of the 1999 Act in the sense that I have just indicated - indeed, it could be said that her residence was anything but ordinary, since, as we have just seen, it was grounded on a fundamental deceit.

Section 5 of the Immigration Act 1999

22. We may now turn to the other main issue in these proceedings, namely, the validity of the arrest. Mr. Lowry first raised the question of whether the applicant had been told of the reason for her arrest, but he did not really press the matter during the course of the hearing. It is clear, however, from her evidence that she merely said that she could not recall what was actually said and there was no evidence given to the effect that no reason for the arrest had been furnished. It was on that basis that I ruled against the applicant on this issue during the course of the hearing.

23. An issue of greater substance was whether the arresting officer, Detective Garda Hanrahan, could reasonably have formed the view that the applicant intended to avoid removal from the State, which, after all, was the basis for the detention order which was furnished by the respondent as justification for Ms. Robertson's detention. As we have noted, Ms. Robertson presented at Naas Garda Station on 17th January 2011, whereupon she was arrested by Detective Garda Hanrahan following a short interview. Detective Garda Hanrahan gave evidence that he was aware that Ms. Robertson was the subject of a prior deportation order and that she had failed to appear for a previous statutory requirement requiring her presentation at a Garda station. He added that he was further aware that she had used a second identity and that the fingerprints of the alias, Martha Kenny, and Ms. Robertson matched.

24. Prior to the actual arrest Detective Garda Hanrahan had also asked Ms. Roberston whether she was also Martha Kenny, but Ms. Robertson denied this.

25. The relevant power of arrest is contained in s. 5 of the 1999 Act, which provides that:-

> "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 has failed to comply with any provision of the order or with a requirement in a notice under section 3(3)(b)(ii), he or she may arrest him or her without warrant and detain him or her in a prescribed place."

26. Of course, a statutory power of arrest of this kind - like all statutory powers - must be exercised reasonably, fairly and in a non-arbitrary fashion. I cannot say that Detective Garda Hanrahan did not have reasonable cause to arrest the applicant. It is true that Ms. Robertson had presented herself on every occasion since October 2010 in answer to a series of s. 14 notices, but the very fact that Ms. Robertson denied the alias at the meeting showed once again a willingness to resort to a deceit. There was, in any event, a deportation order extant and Ms. Robertson had failed previously to comply with a requirement to attend at a Garda station in connection with that order and had thereby attempted to evade its application.

27. It is, of course, common case that Detective Garda Hanrahan had simply relied on the information supplied to him by Garda Loughnane prior to effecting the arrest. But this did not mean that Detective Garda Hanrahan did not have reasonable cause within the meaning of s. 5(1) of the 1999 Act to effect the arrest. It is clear that even a short verbal briefing given by one member of the Gardaí to another member of the force "will suffice to constitute the material from which a bona fide and reasonable suspicion may be formed": see *Walshe v. Fennessy* [2005] 3 I.R. 516 at 543, per Kearns J. It follows that Detective Garda Hanrahan had formed the requisite opinion for the purposes of s. 5(1) prior to effecting the arrest, even if he was for that purpose relying on the person with the first hand knowledge of matters, namely, Garda Loughnane.

Conclusions

28. For these reasons, I would reject the argument that the arrest effected by Detective Garda Hanrahan was not a lawful one for the purposes of s.5(1) of the 1999 Act. Nor, for the reasons stated, was she entitled to the benefit of the special notice provisions of s. 3(9)(b) of the 1999 Act.

29. In arriving at these conclusions, I am conscious of the fact that Ms. Robertson gave evidence that she was upset when questioned by Detective Garda Hanrahan about Martha Kenny and it was for that reason she denied using the alias. I am quite sure that this was so. Judged by her demeanour in the witness box, Ms. Robertson has clearly found her present circumstances to be distressing and profoundly upsetting. It was impossible not to feel personal sympathy for her, since I feel certain that in ordinary circumstances she was the kind of person who would live an ordinary life and would not have come to the adverse attention of the authorities. She merely wanted to come to this country to pursue a better life for herself.

30. While that ambition was legitimate and, indeed, understandable at a human level, Ms. Robertson was not entitled, however, to resort to a calculated deceit to circumvent our immigration legislation in order achieve that aim. In view of that deceit I am constrained to find that she is currently in lawful detention and, having regard to the provisions of Article 40.4.2 of the Constitution, I must accordingly refuse this present application to order her release from custody.