THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2016] IECA 330

Birmingham J.
Mahon J.
Edwards J.

IN THE MATTER OF APPLICATIONS PURSUANT TO

ARTICLE 40.4 OF THE CONSTITUTION

No. 2016/493

BETWEEN

EMIRION GJONAJ

APPELLANT

V

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

AND

No. 2016/490

DIBYASWOR SHARMA

APPELLANT

V

MEMBER IN CHARGE STORE STREET GARDA STATION

RESPONDENT

AND

No . 2016/491

PRINCE IGHODARO

APPELLANT

V

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of the Court delivered on the 15th day of November 2016 by

Mr. Justice Birmingham

1. These appeals which raise identical issues have been heard together. At issue are appeals from the judgment and order of the High Court (Humphreys J.) dated the 7th November, 2016, refusing to order the release of the applicants/appellants.

2. In summary the position is that each of the applicants/appellants has been arrested under s. 5 of the Immigration Act 1999 and brought to a "prescribed place", Cloverhill Prison or Store Street garda station. Each applicant/appellant is the subject of a deportation order. In the case of Mr. Sharma there was an application for an inquiry, pursuant to Article 40 of the Constitution, dated the 20th October, 2016, and subsequently an application in the case of Mr. Gjonaj on the following day and one in respect of Mr. Ighodaro on the 24th October, 2016.

3. The detainers certified the grounds for detention as follows. In the case of Mr. Sharma, Sergeant Karl Murray certified in writing that the appellant was held "pursuant to detention order" dated the 20th October, 2016. The certificate in question was signed on the 21st October, 2016 and exhibits a "notification of arrest and detention".

4. In the case of Mr. Gjonaj, Mr. Ronan Maher, Governor of Cloverhill Prison certified that the appellant was held "pursuant to detention order" dated the 19th October, 2016. The certificate was signed on the 25th October, 2016 and exhibited in notification of arrest and detention.

5. In the case Mr. Ighodaro, Governor Maher of Cloverhill prison certified that the appellant was held "pursuant to detention order" dated the 21st October, 2016 and exhibited a notification of arrest and detention.

6. In essence, the appellants in each case have complained that the documents the detainers have sought to rely on were not in fact and did not purport to be warrants of detention. To this challenge the respondents have asserted that there is no basis for the

criticism of the original detention orders, but furthermore have sought, on a without prejudice basis, to amend the certified grounds of detention. The proposed amended certificates of detention provided as follows: in the case of Mr. Sharma, Sergeant Murray certified that the appellant was held pursuant to a warrant of arrest and detention dated the 20th October, 2016. The certificate was signed on the 26th October, 2016 and exhibits a new document entitled "Warrant of arrest and detention". Similar certificates were produced by Mr. Joseph Hernan, Assistant Governor of Cloverhill Prison in the cases of Mr. Gjonaj and Mr. Ighodaro. For ease of reference I am appending to this judgment a copy of the original and amended documentation in relation to Mr. Gjonaj. It is in each case a pre-printed form where the spaces left blank have been completed in handwriting.

The statute and statutory instruments

7. The statute and statutory instruments in issue provides as follows:

> "The International Protection Act 2015
>
> Part 13 Miscellaneous Amendments
>
> Amendment of Immigration Act 1999.
>
> 78. The Immigration Act 1999 is amended by the substitution of the following for section 5:
>
> 5(1) Where an immigration officer or a member of the Garda Síochána, with reasonable cause, suspects that a person against whom a deportation order is in force—
>
> (a) has failed to 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),
>
> (c) intends to leave the State and enter another state without lawful authority,
>
> (d) has destroyed his or her identity documents or is in possession of forged identity documents, or
>
> (e) intends to avoid removal from the State,
>
> the officer or member may arrest the person without warrant, and a person so arrested may be taken to a place referred to in subsection (3) and detained in the place in accordance with that subsection.
>
> (2) Where a person against whom a deportation order is in force is serving a term of imprisonment in a prison or place of detention, an immigration officer or a member of the Garda Síochána may, immediately on completion by the person of the term of imprisonment, arrest the person without warrant and detain him or her in accordance with subsection (3).
>
> (3) A person who is arrested and detained under subsection (1) or (2) may be detained—
>
> (a) in a prescribed place . . ."

8. In relation to the statutory instruments in issue, the Immigration Act 1999 (Deportation) (Amendment) Regulations 2016 provide as follows:-

> "(1) These regulations may be cited as the Immigration Act 1999 (Deportation) (Amendment) Regulations 2016.
>
> (2) These Regulations come into operation on 10 March 2016.
>
> 2. In these Regulations, "Regulations of 2005" means the Immigration Act 1999 (Deportation) Regulations 2005 (S.I. No. 55 of 2005).
>
> 3. Regulation 5 of the Regulations of 2005 is amended by the substitution of "section 5(3)" for "section 5(1)".
>
> 4. The Regulations of 2005 are amended by the substitution of the following for Regulation 7:
>
> 7. A person who is arrested under subsection (1) or (2) of section 5 of the Act may, for the purposes for his or her detention, in a prescribed place, under that section—
>
> (a) be taken by an immigration officer or a member of the Garda Síochána to a prescribed place, and
>
> (b) be detained, until further notice, in the prescribed place under warrant of the immigration officer or member of the Garda Síochána who arrested him or her."

9. To provide some context for the arguments that have arisen it is helpful to refer to the terms of the Statute and Statutory Instrument that were previously applicable relating to the Immigration Act 1999. Section 5(1) of the Immigration Act 1999, 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 s. 3(3)(b)(ii), he or she may arrest him or her without warrant and detain him or her in a prescribed place. Regulation 7 of the Immigration Act 1999 (Deportation) Regulations 2005 – S.I. No. 55/2005 was in these terms:

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

10. It is agreed that resolution of this dispute requires that consideration be given to three issues, though the parties are in disagreement as to the order in which the issues are best addressed. The questions that arise for determination are as follows:-

> 1. Does the original certification accompanied by the documentation exhibited which is headed up "Notification of arrest and detention" provide a valid basis for detention?
>
> 2. Should the respondents be permitted to amend their certificates, based on new documentation headed up "Warrants and arrest and detention"?
>
> 3. Is the new documentation invalidated by errors of such a fundamental nature that they cannot be relied upon?

The approach of the trial judge

11. The trial judge took the view that the original documents, the notifications of arrest and detention were erroneous. At para. 12 he commented:

> "To validly justify detention under the legislation, a warrant of the arresting officer must be produced, not a document purporting to be a notification. This issue cannot be dismissed as a mere heading."

He concluded this section of the judgment by saying at para. 19:-

> "Overall, a review of other statutory instances of forms of warrant supports the conclusion that it is generally regarded as material insofar as personal liberty is concerned that the instrument actually describe itself as a warrant, either in the heading or the body of the document. A warrant is a distinct category from a notification (even allowing for the point that the content of the notification also includes a direction to detain)."

12. The High Court judge then addressed the question of whether the level of error involved was such as to justify release. He commented whether that was so depends on the nature of the detention. He then analysed the situation as being as follows:-

> (i) In the context of a convicted person, the illegality must be in relation to a particularly fundamental requirement (in the case of State (McDonagh) v. Frawley).
>
> (ii) In the case of detention under any other court order, the error must appear on the face of the record or amount to an absence of jurisdiction, a fundamental denial of justice or a fundamental flaw (*Ryan v. Governor of Midlands Prison*).
>
> (iii) In the case of administrative detention, not involving a court order, a broader range of errors may justify release particularly if they go to jurisdiction (see *G.E. v. Governor of Cloverhill Prison* [2011] IESC 41 at para. 31; *Joyce v. Governor of Dóchas Centre* [2012] 2 I.R. 666); but subject to an overall consideration of whether release is a proportionate response to the error identified (Grant).

13. He went on to observe that the present application fell firmly into the third category where the bar was not low, but relatively lower. However, because of the conclusions that he had reached on the question of amendment, it was not in fact necessary for him to make a final finding as to whether the error in the original certificate was of such a nature as to justify release under Article 40.4.

14. The judge's finding that it was necessary that a document relied on should actually describe itself as a warrant is the subject of a cross appeal by the Governor of the Prison and the Member in Charge.

15. The High Court judge then turned to the question of whether the respondents should be permitted to amend their certificates. He reviewed a number of a cases going back to the 17th century. He then concluded that section of the judgment as follows:-

> "52. Having regard to the authorities I would draw the following general conclusions in relation to the power to permit amendment:
>
> > (i) The court enjoys a power to permit a respondent to amend his or her certificate under Article 40.4. A certificate cannot be amended without leave.
> >
> > (ii) That jurisdiction may be exceptionally ousted where the nature of the statutory scheme under which the detainee is held does not permit the variation of any underlying document.
> >
> > (iii) The power to give liberty to amend a certificate is not confined to a case where the original certificate has not been filed, or to a case where the original underlying document is a court order.
> >
> > (iv) Any amendment must be applied for in the course of the inquiry and that application may be made at any time up to, but not after, it has been determined that the current justification for detention is not adequate.
> >
> > (v) If leave to amend is given, a respondent may rely on an amended certificate even if the court subsequently forms the view that original certificate, if left unamended, would not have justified the detention (provided that the court has not already formed and articulated that view prior to the time the amendment was made).
> >
> > (vi) Subject to the foregoing, the jurisdiction is a discretionary one, and in exercising it, the court should be mindful of the need for a proportional response to any alleged infirmity in the materials before it.
>
> 53. An amended certificate is generally by way of addition to the material before the court, rather than complete substitution, in the sense that the original certificate remains as part of the record of the court, and all documents can be read together to understand the sequence of events. Both are part of the material before the court, although the amended certificate is in a sense the operative document.
>
> 54. In the present case, I conclude that I have jurisdiction to permit the amendment, and that it is appropriate to do so, because the primary consideration in terms of the rule of law is that the documentation underlying the detention of the

> applicants (and other similarly situated persons) should correctly reflect the statutory scheme, which the amended certificates do to a greater extent than the original (although they do not do so perfectly, an issue to which I now turn), and there is no pressing reason of public policy not to permit the respondent to do so."

16. The judge then turned to the question as to whether the errors that he identified in the amended certificates were such as to require orders for release. He pointed out that the document was headed "Warrant of arrest and detention" though it is only the detention that involves a warrant and the arrest is without warrant. He pointed out that the warrants had essentially been backdated to the original date of detention and he did not consider that to be correct observing that backdating is liable to confuse or mislead. Moreover, the new warrants were filled in as having been executed, whereas it was the original unamended documents that were actually executed. However, he felt that at least on the first occurrence of errors of this kind that such errors were minor in the overall context and did not warrant orders for release having regard to the principle of proportionality. He cautioned that so far as future warrants are concerned, the phrase "Warrant of arrest and detention" was not appropriate and that the correct description of the document is a "Warrant of detention".

Discussion

17. I diverge from the High Court judge in the approach that he took to the validity of the original documentation i.e. the documentation headed "Notification of arrest and detention". For me the starting point for consideration of this issue is the fact that s. 5 of the Immigration Act 1999, as provided for by s. 78 of the International Protection Act 2015, makes no reference to a need for a warrant authorising detention. The relevant part of s. 5 provides that the officer or member (of An Garda Síochána) may arrest the person without warrant, and a person so arrested may be taken to a place referred to in subs. (3) and detained in the place in accordance with that subsection.

18. Regulation 7(b) of the Immigration Act 1999 (Deportation) (Amendment) Regulations 2016 provides that an individual may be detained in a prescribed place under warrant of the immigration officer or member of the Garda Síochána who arrested him or her (emphasis added). I read this regulation as providing that a person may be detained under the authority of an immigration officer or member of the Garda Síochána who made an arrest. I do not believe that an actual warrant, so headed and described, still less a warrant in any particular form is required to provide a basis for detention. If the regulation was prescribing that there was a need for a warrant to be brought into existence one would have expected to see language such as "detained on foot of a warrant issued by the officer or member".

19. Stroud's *Judicial Dictionary* (7th Ed.) defines "warrant" as follows:-

> ""Warrant" has two frequent meanings. (a) a document (ordinarily issued by a magistrate) where the apprehension of an accused person, in order to compel him to appear and answer the charge brought against him or to search for property with respect to which an offence against the Larceny or Theft Acts is suspected to have been committed, (b) a document authorising something to be done, or for the delivery of goods, or for the payment of money."

20. In my view it is para. (b) of the definition that is in issue here and what Regulation 7(b) is speaking of is a document authorising something to be done, the something to be done being in this case the detention of the individual in a prescribed place.

21. Moreover, while the original documentation is not described as a warrant, and indeed the word "warrant" nowhere appears and its heading "Notification of arrest and detention" would seem to be a throwback to the 1999 Regulations, the document expressly directs that pending the making of arrangements for the removal of the individual from this State, that he be detained in Cloverhill Prison/Store Street garda station, a prescribed place of detention. The document also makes clear that the member of the gardaí is exercising powers conferred by s. 5 of the Immigration Act 1999 as amended and by the Immigration Act 1999 (Deportation) Regulations 2005, as amended and the basis for the arrest and detention is set out. Had the document been headed "Warrant" or had it been so referred to in the body of the document it would have *directed* or commanded that the individual in question be detained.

22. In those circumstances it seems to me that the document originally relied on does everything that a warrant could be expected to do. It might well have been better had the document been headed "Warrant for detention", but the fact that the document might have been and perhaps ought to have been drafted differently, does not provide a basis for condemning the document. Neither the Prison Governor or Member in Charge to whom it is addressed nor the person in respect of whom it was issued could have been left in any doubt whatever about what the impact of the document was. There is absolutely no question of anyone being mislead. In those circumstances I am of the view that the documentation originally brought into existence provided a valid basis for justifying the detention and on this aspect I would allow the cross appeal by the Prison Governor and Member in Charge.

23. In those circumstances it is strictly speaking unnecessary to address the second and third issues that have been identified. However, lest I be wrong in relation to the view I have formed on the first issue, I should say that had it been necessary to do so, I would have taken the same view on the second and third issues as did the trial judge. In particular I would have agreed that there was jurisdiction to permit the amendments and that it was appropriate to do so. Then, had it been necessary to do so, I would have permitted the amendments and would not have felt constrained from doing so by the difficulties identified with the warrant of arrest and detention documents.

24. In that regard I would have been influenced heavily by the fact that there was no question that anyone involved be it the person named in the documentation, the person called on to detain or the Court before whom the matter was brought being mislead by the backdating. In summary then I am of the view that in each case the applications for release under Article 40 fail and I would allow the Governor's cross appeal.