THE COURT OF APPEAL

IN THE MATTER OF AN APPLICATION PURSUANT

TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

Neutral Citation Number: [2017] IECA 46

Record No. 2017/42

Peart J.
Hogan J.
Hedigan J.

BETWEEN/

C.A.

APPELLANT

- AND -

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 27th day of February 2017

1. This is an appeal taken by the applicant, C.A., from the decision of the High Court (Keane J.) delivered on 7th February 2017 refusing to direct his release from custody pursuant to Article 40.4.2: see *C.A. v. Governor of Cloverhill Prison* [2017] IEHC 48. I will presently set out the nature of the detention and the fundamental ground upon which the legality of that detention is challenged. It is first necessary, however, to sketch out the background facts to this application.

2. The applicant is a Pakistani national who was born on 1st January 1961. A deportation order has already been made by the Minister for Justice and Equality in respect of Mr. A. as far back as 21st September 2011. The validity of that deportation order has not been challenged at any stage by the applicant.

3. The applicant first applied for refugee status within the State on the 17th February 2010. He travelled with his wife and five children. They arrived in the State from Belfast some time that month, having flown from Pakistan to Manchester on the previous 8th January 2010. The Office of the Refugee Applications Commissioner ("ORAC") recommended the refusal of the applicant's claim for refugee status in May 2010. The applicant then appealed to the Refugee Appeals Tribunal ("the Tribunal"). In July of that year, the Tribunal recommended that the ORAC decision be affirmed.

4. On the 22nd September 2010 the applicant applied for leave to remain in the State, as well as an application for subsidiary protection. The application for subsidiary protection was refused in August 2011. The applicant was then refused leave to remain and a deportation order was signed on the 21st September 2011. The applicant was notified of that fact by letter dated three days later. Deportation orders were made in respect of the applicant's wife and five children on the same date. Despite the making of these orders the applicant and his family have nonetheless remained illegally in the State during this intervening period.

5. The applicant was arrested on 9th January 2017 by members of the Garda National Immigration Bureau pursuant to the powers of the arrest conferred by s. 5 of the Immigration Act 1999 ("the 1999 Act") (as amended) and he was then detained in Cloverhill Prison. The basis for the arrest was that the arresting officer suspected that the applicant had failed to comply with the terms of a deportation order or the requirements of a notice addressed to him under s. 3(3)(b)(ii) of the 1999 Act. In effect, therefore, the applicant was arrested because he was regarded as an evader who had failed to comply with the terms of the earlier deportation order and he was directed to be detained pending the making of arrangements for him to be removed from the State. The validity of that arrest is not under challenge in this application.

The nature of the detention provided for by s. 5(6) of the 1999 Act

6. The only issue which arises in this application is whether there is a settled intention on the part of the authorities to deport the applicant within the 8 week time limit prescribed by s. 5(6)(b) of the 1999 Act (as amended). It is perhaps worth emphasising that the arrest and detention of an applicant such as Mr. A. pending deportation represents a form of preventative civil detention. Mr. A. has not, of course, been imprisoned in respect of any crime and a measure of this kind is one which is and must always remain an exceptional one in any free and democratic society. In *re Article 26 and the Illegal Immigrants (Trafficking) Bill* [2000] 2 I.R. 360 the Supreme Court held that detention for the purposes of securing the orderly deportation of non-nationals against whom deportation orders had been made and which was accompanied with appropriate safeguards (such as the eight week time limit) was not unconstitutional in these circumstances for these very reasons.

7. As I explained in a judgment delivered by me as a judge of the High Court in *Li v. Governor of Cloverhill Prison* [2012] IEHC 493, [2012] 2 I.R. 400, 406:

> "When Article 40.4.1 provides that no person shall be detained "save in accordance with law", this means that the law in question must one which respects "the fundamental norms of the legal order posited by the Constitution: see *King v. Attorney General* [1981] I.R. 227,257 per Henchy J. While preventative detention is not excluded on an *ex ante* basis, respect for these fundamental norms means that the necessity for any such detention must be compelling: this seems necessarily implicit in the comments of Keane C.J. in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 408-412.
>
> In that case, of course, the constitutionality of the detention provisions contained in s. 5 of the Immigration Act 1999

was upheld, precisely because detention provisions of this kind were deemed necessary to enable effect to be given to deportation orders. Those provisions apply *only* to persons who have already been refused asylum and they, of course, are persons who by definition have no right to remain in the State. Section 5(6) contains, moreover, a maximum detention period of eight weeks, *albeit* (unlike the present case) there is no direct judicial supervision of that detention. It was against that *particular* background that the constitutionality of the Bill was upheld, precisely because the necessity for a measure of this kind was objectively necessary to uphold a fundamental State interest, namely, the effective and orderly operation of the deportation system.

The fact that the applicant may- presently- have no legal right to be in the State does not *in itself* mean that the State can detain him pending the outcome of an application for asylum. Had the 2000 Bill contained a measure that would have potentially sanctioned the preventative detention of asylum seekers *merely* (and I again emphasise this word) because they were otherwise in breach of statutory regulation or administrative rules and practices governing the asylum and immigration system, one must greatly doubt whether it would have survived constitutional scrutiny by the Supreme Court.

If it is said that there is a compelling State interest in ensuring that persons who happen to have committed breaches of these immigration rules do not remain at liberty and must therefore be detained on a preventative basis pending the outcome of their applications for asylum *simply* by reason of this fact, then I fear that preventative detention would become routine and regular. I refuse to believe that such a state of affairs could be constitutionally sanctioned in a State which is committed to the rule of law and where the words of the Preamble commit the State to ensuring that the 'dignity and freedom of the individual may be assured.

These considerations must inform both the scope of the sub-section, as well as its judicial application."

8. Applying these principles to the circumstances of the present case, it is clear that even if the underlying arrest was lawful, the continuing detention would become unlawful if there was no immediate prospect of deporting the applicant within the eight week period. This point was expressly stressed by the Supreme Court in the Illegal *Immigrants Bill*, with Keane C.J. observing ([2000] 2 I.R. 360, 404):

"There is no question of any new or draconian power of detention being introduced by the Bill. The detention, if it is to remain lawful, must be confined to statutory purposes in accordance with the principles enunciated by Flood J. in *Gutrani v. Governor of Cloverhill Prison*, High Court, 19th February 1993…"

9. In *Gutrani* Flood J. held that the detention of the applicant pending his deportation to Libya had become unlawful by reason of the failure of the Minister to make appropriate and timely arrangements to ensure that this had been achieved within a reasonable period. It is, accordingly, clear from the existing case-law that detention pursuant to s. 5 becomes unlawful if there is no prospect that the deportation cannot be realistically achieved during this statutory period.

10. The leading post-*Gutrani* authority for *this proposition is the decision of Finlay Geoghegan J. in BFO* v. Governor of the Dóchas Centre [2005] 2 I.R. 1. In that case the applicant's application was under consideration by the Minister following the birth of her (Irish citizen) son some three weeks earlier and it had been expressly conceded in that case that the applicant could not be deported until her application for asylum had been finally determined. It is difficult to avoid the conclusion that the applicant in that case had been detained on a quasi-preventative basis pending the outcome of that decision by the Minister. It was for that reason (among others) that Finlay Geoghegan J. held that the continued detention was unlawful: see [2005] 2 I.R. 1 at 15-16:

"In most instances, the making of a deportation order will be evidence of a final or concluded intention to deport the person in question. The facts of this case are unusual. The deportation order was made in August, 2002. At that stage there was a final and concluded intention to deport the applicant. The birth of her son in the State changed in a significant way the family circumstances. Counsel for the respondents submitted that the making of the application for residency based upon the birth of her Irish born son and the acknowledgment received did not alter the legal status of the applicant in Ireland. This is correct in the sense that the applicant remains a person who has no right to be in Ireland. However, as stated by the Supreme Court in the Article 26 reference [*Re Article 26 and the Illegal Immigrants (Trafficking) Bill* [2000] 2 I.R. 360] this does not mean that she is a person without rights. In addition, there now exists her son, an Irish citizen with rights.

As already stated, it was accepted on behalf of the respondents that subsequent to the 3rd January 2003, the applicant could not be deported without a decision made by the Minister on her application for residency. Hence, I have concluded that there was not, at any time subsequent to the application for residency based upon the birth of her Irish born son, which was acknowledged on the 3rd January, 2003, a final or concluded intention to deport the applicant. Hence, a necessary precondition to the exercise of the power of detention under s. 5(1) of the Act of 1999 did not exist on the 27th January 2005."

11. A similar point has also been made in a number of other cases. *Om v. Governor of Cloverhill Prison* [2011] IEHC 341 was a decision delivered by me as a judge of the High Court. In that case the applicant had claimed to be Liberian, but the Liberian Embassy officials who interviewed him rejected that claim. In view of that fact and the complete uncertainty as to his origins - assuming that he was not Liberian - I concluded that there was no real prospect that the applicant could be deported within the statutory time period. It was on that basis that I directed his release.

12. This issue also arose in *FI v. Governor of Cloverhill Prison* [2015] IEHC 639 where Humphreys J. found that there was no continuing intention to deport in the case of the applicant whose application to be re-admitted to asylum system was under consideration by the Minister.

13. Other cases have fallen on other sides of the line. In Toidze *v. Governor of Cloverhill Prison* [2011] IEHC 395 it emerged during the course of a similar Article 40 application that the one obstacle which had previously stood in the way of the deportation of the applicant – namely, the unwillingness of the Georgian Embassy to issue a laissez passer in the absence of appropriate evidence as to the applicant's identity - had been effectively resolved. Distinguishing decisions such as *BFO* and *Om*, I concluded that:

"It is thus now clear, for example, that the applicant is in fact Mr. Abulia and not Mr. Toidze and that a Georgian passport actually issued to him in his real name in March 2009. In these circumstances, there seems no reason why the Georgian authorities would not be willing to receive him.

For those reasons, I am of the view that there was and is a settled intention to deport the applicant and that this can be

achieved within the remainder of the eight week time frame permitted by s. 5(6)(a) of the 1999 Act (as amended)."

14. In that case I also held that the fact that the applicant had made an application pursuant to s. 3(11) of the 1999 Act seeking to have the deportation order revoked was not in itself inconsistent with the existence of a settled intention to deport.

The claim in the present proceedings
15. In the present case the applicant seeks to make a *BFO*-style argument in the following way. Although, as I have already noted, the applicant is already married with several children, he nonetheless applied to the Minister for Justice and Equality on 23rd October 2016 pursuant to Article 5(2) of the European Communities (Free Movement of Persons) Regulations 2015 ("the 2015 Regulations") for a decision that he be treated as a permitted family member of a Union citizen, a Ms. B. Ms. B. is a U.K. national and she happens also to be the applicant's sister-in-law. The applicant claims to be in a durable relationship of more than two years' standing with Ms. B.

16. The applicant's case is that the very fact of that application is sufficient to preclude his immediate deportation pending the ultimate determination of this matter by the Minister. It follows, therefore – or, at least, so the argument runs – that since in those circumstances there cannot be a settled intention to deport the applicant, his continuing detention for that purpose under s. 5(6) of the 1999 Act was thereby rendered unlawful.

The High Court judgment
17. In a detailed and careful judgment Keane J. concluded following a review of the 2015 Regulations that he could find nothing therein which "confers any permission to reside in the State on a person who has applied, under Regulation 5(2) of those Regulations for a decision that he be treated as a permitted family member of a Union citizen, pending the making of that decision." Keane J. added:

> "Nor is there any concession in this case, equivalent to that of the respondents in B.F.O. that the applicant cannot be deported pending a decision by the Minister on his application for permitted family member status. Here, the respondent contends that the deliberate effect of the 2015 Regulations is to confer no permission to reside in the State upon a person based solely upon the making of an application to be treated as a permitted family member."

18. Noting that in the case of asylum claimants, Article 7(1) of the Procedures Directive (Directive 2005/85/EC) provides for a general right on the part of asylum seekers to remain in the host State pending the determination of their application, Keane J. observed:

> "I cannot identify the existence of any comparable legal issue in this case to that which arose in *F.I.* In particular, while passing reference has been made on behalf of the applicant to Directive 2004/38/EC ('the Citizens' Rights Directive'), which underpins the 2015 Regulations, no attempt was made to identify any provision in that Directive comparable to Article 7 of the Procedures Directive and I have been unable to find one. Article 3 of the Citizens' Rights Directive deals with the obligation of a host Member State to facilitate entry and residence to persons in the category of 'permitted family members' (although that term is not used in the Directive) 'in accordance with its national legislation.'"

19. This is also the fundamental question at the heart of the present appeal. If the making of such an application has the effect that the applicant is entitled to remain in the State pending the outcome of that determination, then it is unlikely that the matter will or could be determined within the existing eight week statutory detention period and the applicant's continued detention would therefore become unlawful. The answer to that question turns on a consideration of the provisions of the 2015 Regulations and I propose now to examine for this purpose the language and structure of these provisions.

The 2015 Regulations
20. The 2015 Regulations are expressed to give "further effect" to the terms of the Citizens' Rights Directive, Directive 2004/38/EC ("the 2004 Directive"). The 2015 Regulations deal with the position of both what are described as "qualifying" and "permitted" family members and their rights of entry to and residence in the State. Article 3(5) of the 2015 Regulations lists the categories of qualifying family members: they are, broadly speaking, spouses and civil partners of the Union citizen and their immediate dependent descendants and ascendants. Article 3(6) then provides for an additional category of "permitted" family members, defined as a family member in respect of whom the Minister has determined that he or she should be treated as "a permitted family member of the Union citizen."

21. Article 5(1)(b) then lists as one of the categories of permitted family members as "the partner with whom a Union citizen has a durable relationship." Article 5(2)(c) provides that a person claiming to have such a relationship with a Union citizen must provide the Minister with "documentary evidence of the existence of a durable relationship with the Union citizen." Article 5(3) requires the Minister to conduct an examination for this purpose and then, by Article 5(6), to notify the applicant of the decision. In view, however, of the definition of "permitted family member" in Article 3(6), a person claiming such an entitlement does not achieve that status absent a positive decision to this effect on the part of the Minister.

22. Article 6(1) of the 2015 Regulations permits a person within one of several defined categories (which categories include that of permitted family member) to reside in the State for up to 3 months, subject to certain specified conditions. Article 6(2) then provides that Union citizens (and their qualifying and permitted family members) are entitled to reside in the State beyond that period if they have taken up employment or if they are seeking such employment and have "a realistic prospect of being engaged in employment."

23. Article 7 then permits a non-EU family member to apply to the Minister for a residence card which in principle will last for at least five years. Article 7(6) provides that an applicant for such a card "may remain in the State pending a decision on the applicant." Again, of course, while the concept of "family member" extends to "permitted" family members, persons claiming this status only become such when (and if) the Minister has made a positive decision to this effect in their favour.

24. Article 7 of the 2015 Regulations reflects in this respect the provisions of Article 10 of the 2004 Directive. Article 10(1) of the Directive envisages that such cards can be issued for the purpose of "evidencing" the rights of the family members in question. That, accordingly, is the background against which Article 7(6) of the 2015 Regulations may be viewed, since it would be strange if a person in respect of whom the Minister had already made a positive determination (and who, accordingly, had all but a positive entitlement to reside here as a result) was to be denied the right to remain in the State for want of the timely processing of an evidential certificate to this effect, namely, the residence card.

25. The very fact, however, that Article 7(6) of the 2015 Regulations expressly addresses the right to reside in the State of actual qualifying and permitted family members pending the processing of the residence card while no similar provision is contained in the Regulations for those (such as Mr. A.) who have simply applied for the status of permitted family member is, in its own way, telling. Like Keane J. in the High Court, I can find nothing in Article 7 or, for that matter, anything in any other provision of the 2015

Regulations that confers permission to reside in the State on a person who has applied, under Article 5(2) of those Regulations for a decision that he be treated as a permitted family member of a Union citizen, pending the making of that decision.

26. The applicant's case, therefore, rests on what must be an implied provision of the 2015 Regulations that he has the right to remain pending such a determination. The answer, however, to that suggestion is that if there were such a right to remain, one would have expected that the 2015 Regulations would have provided so expressly in the same manner as does Article 7(6) in relation to those awaiting the processing of residence cards. Nor is there anything in the structure of the 2015 Regulations which suggests that such a right to remain must be necessarily implied in the circumstances.

27. For completeness, I might add that there is nothing either in the 2004 Directive which provides for such an entitlement. Again, had the Union legislator envisaged that there would be such a positive entitlement along the lines of Article 7 of the Procedures Directive, one imagines that this could have been provided for with relative ease. In this regard, it must also be observed that the Court of Justice has already indicated that it is clear from the wording of Article 3(2) of the 2004 Directive that the Member States may, subject to the principle of effectiveness, determine and regulate the scope of any entitlement to be recognised as a qualifying family member: see C-83/11 *Secretary of State for the Home Department v. Rahman* EU: C: 2012: 519. The very fact that the Union legislator allowed such latitude to the Member States in such matters in its own way also contra-indicates the existence of any general-EU derived right to remain in the State pending the determination of the application to be treated as a permitted family member.

28. It follows, accordingly, that the mere fact that the applicant has applied for the status of a qualifying family member cannot *in and of itself* interrupt the smooth operation of the deportation process by conferring on such an applicant the right to remain in the State pending the determination of that application. This has the further consequence that there is nothing in the present application to suggest that the authorities do not have the settled intention to effect the speedy deportation within the time frame permitted by s. 3(6) of the 1999 Act.

29. In all these circumstances, I am therefore obliged to conclude that the applicant remains in lawful custody.

Scope of Article 40.4.2 proceedings
30. In view of this conclusion, it is not strictly necessary to address the alternative submission advanced by the respondent, namely, that the applicant should have proceeded by way of judicial review in the manner required by s. 5 of the Illegal Immigrants (Trafficking) Act 2000 (as substituted by s. 34 of the Employment Permits (Amendment) Act 2014), as this application amounted to an impermissible collateral attack on the validity of a deportation order made by the Minister. As the applicant remains in custody following arrest, one might have assumed that the remedy of Article 40.4.2 was the most obvious method of challenging the legality of that detention, not least because, as counsel for the respondent was obliged to concede in the course of this appeal, the words of the Constitution actually say as much.

31. For my part, given the express words of Article 40.4.2 and the centrality of this remedy in any free and democratic society, I would be exceptionally loath to accede to any argument along the lines advanced by the respondent unless compelled by the clearest of authority to hold otherwise. Subject to these observations, however, I agree that, in strictness, this issue must await its formal determination in any subsequent proceedings

Conclusions
32. In summary, therefore, for the reasons given, I am satisfied that there is a settled intention to deport the applicant within the statutory time period. As the respondent has accordingly established that the applicant is detained in accordance with law, I must therefore refuse to order his release for the purposes of Article 40.4.2 of the Constitution.