

THE HIGH COURT**IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4 BUNREACTH NA ÉIREANN 1937****2011 1423 SS****BETWEEN****T. M.****APPLICANT****AND****THE GOVERNOR OF MOUNTJOY PRISON****RESPONDENT****Judgment of Mr. Justice Charleton delivered ex tempore on 26th day of July 2011**

1. Since this is a habeas corpus application and under Article 40.4 of the Constitution I am obliged to consider the legality of the detention of the applicant forthwith, I propose to give judgment straight away.

2. The background to this case is that the applicant came to Ireland from the Congo when he was about twelve years of age. I presume, though I do not know, that he applied for asylum and was refused refugee status. A deportation order was eventually made against him. Approximately a year ago in May 2011, when he was twenty-two years of age, he was sentenced to imprisonment by the Circuit Criminal Court in Dublin in respect of serious assaults. As I understand it, he would be released from his sentence in the event of ordinary remission on the 9th January 2012. Whatever process was gone through in relation to the applicant's deportation, I have to assume that the procedure in that regard was gone through in full by the Minister and his officials. No complaint is made in that regard. A deportation order having been made, the difficulty which arose, and which is in sharp focus in this case, is that because the applicant was in prison, he had to be deported from there. A special procedure was followed in order to seek to lawfully effect that process. This procedure was, according to the evidence of Inspector Joe Dignam of the Garda National Immigration Bureau ("GNIB"), whose testimony I accept fully, what has become the normal procedure in the circumstances. In accordance with this procedure, a temporary release order was made by the governor of Mountjoy Prison on 13th July 2011. I now want to refer to a portion of that temporary release order. It informed the prisoner, the applicant, that he was being released from Mountjoy Prison for the period from 14.00 on the 13th July 2011 to 23.59 on the 9th January 2012, the date of release assuming normal remission on his sentence, for the purpose of removal from the State. According to the document addressed to the applicant, this release was to occur "following your handover to the Garda National Immigration Bureau and that your release is subject to the following conditions with which you are obliged to comply during the period of your release." These conditions included that he "be removed from the State" and others such as that he maintain sober habits, keep the peace and is to be "handed over to the GNIB at Mountjoy Prison". The document is signed by the Governor of Mountjoy Prison. A note appended to the temporary release order indicates that a failure to return on or before the expiration of the period of temporary release, or a breach of any of the conditions attached to the period of temporary release, is an offence under s. 6 of the Criminal Justice Act 1960, punishable on conviction by imprisonment for a term not exceeding six months.

3. I assume the applicant acknowledged the terms and conditions of his temporary release and I assume as well that the applicant speaks very good English. On the 13th July 2011, the members of An Garda Síochána, under the command of Inspector Dignam, went to Mountjoy Prison and took custody of the applicant pursuant to the terms of the temporary release order. On that day, a charter flight was leaving Dublin Airport. It was bound for a number of countries in Africa, including Congo and Nigeria. The aircraft was full of persons who had sought asylum or subsidiary protection and were being deported from Ireland by reason of failing to be declared refugees, or for other reasons. In addition to those being deported on this flight, there were an approximately equal numbers of members of An Garda Síochána in order to maintain good order while the flight was airborne. What happened when the flight took off is something that I understand had not ever happened before. The aircraft left Dublin Airport and travelled in the direction of Africa. When it was over the Mediterranean Sea, the pilot sought leave to fly across Algerian airspace but that leave was refused. The pilot turned around and the aircraft landed in Dublin Airport after having being airborne for several hours. None of the passengers were told of this unexpected development until touchdown back in Dublin. This particular passenger, the applicant, on arriving back in Dublin was simply told that he was being returned to Mountjoy Prison to complete his sentence; as I have indicated his sentence would not have expired until the 9th January of 2012. The State seeks to justify the detention of the applicant on the basis that: firstly, he was in effect arrested for breach of the temporary release order and returned to Mountjoy Jail; secondly, he must be taken to be continuing to serve his sentence as the purpose of the temporary release order has not been fulfilled; and, thirdly, that the airplane on which he was travelling had never left the jurisdiction of Ireland and that he is, in effect, awaiting deportation under the deportation order as facilitated by the temporary release order and may be detained pending such deportation. As a matter of fact, however, the applicant was not arrested for breach of his temporary release order; nor was he arrested for not presenting to an immigration officer and seeking leave to land, or on refusal of leave to land; and nor was he arrested at all. Whatever is the possible power to hold him, it depends on either the warrant of the Circuit Criminal Court detaining him in Mountjoy Jail, but this is not possible as that detention has been suspended, or on the terms of the temporary release order from that imprisonment. Arising out of this situation, many legal problems concerning deportation and jurisdiction outside the State have been argued and I want to deal with these briefly. First of all, I need to refer to the Criminal Justice Act 1960 ("the Act of 1960"); which is the Act whereby the Minister for Justice has the power to temporarily release people.

4. Section 2 of the Act of 1960 has been amended by s. 1 of the Criminal Justice (Temporary Release of Prisoners) Act 2003. That amendment was in relation to the category of a person who may be temporarily released and the place where any such prisoner may go and the conditions under which he or she may be required to stay there, but that amendment does not impact on the situation in this case as it was not invoked. Instead s. 6 and s. 7 of the Act of 1960 are applicable. Section 6 refers to persons who are unlawfully at large and s. 7 refers to the arrest of person unlawfully at large. Section 6 provides:-

"(1) A person who, by reason of having been temporarily released under section 2 or section 3 of this Act, is at large shall be deemed to be unlawfully at large if—

(a) the period for which he was temporarily released has expired, or

(b) a condition to which his release was made subject has been broken.

(2) A person who is unlawfully at large shall be guilty of an offence under this section and on summary conviction thereof shall be liable to imprisonment for a term not exceeding six months.

(3) Where, by reason of the breach of a condition to which his release under section 2 or section 3 of this Act was made subject, a person is deemed to be unlawfully at large and is arrested under section 7 of this Act, the period for which he was temporarily released shall thereupon be deemed to have expired.

(4) The currency of the sentence of a person who is unlawfully at large for any period shall be suspended in respect of the whole of that period."

Section 7 provides:-

"A member of the Garda Síochána may arrest without warrant a person whom he suspects to be unlawfully at large and may take such person to the place in which he is required in accordance with law to be detained"

5. Now I want to make a brief comment in relation to the above. In relation to this applicant, the period for which he has been temporarily released has not expired. The issue is whether a condition to which his release was made subject has been broken. Does 'broken' in this sense mean that it has not been fulfilled; or does it require some wilful act on the part of the applicant?

6. It is to be noted that under the Act of 1960 a person who is unlawfully at large is guilty of an offence carrying a term of six months imprisonment. It is to be remembered as well that, apart from regulatory offences, the general presumption in Irish criminal law is that every offence carries with it a mental element; *The People (DPP) v Murray* [1977] I.R. 360. I do not believe that we are dealing here with a regulatory offence. The use of the word 'broken' and the use of the phrase 'breach of condition' in section 6 coupled with that presumption in law of a mental element for a criminal offence seems to me to imply that the offence of being unlawfully at large encompasses some wilful element, or some purposive conduct, whereby a person under temporary release is aware of a condition of release and does something whereby they break that condition of release; thus rendering him or her liable to criminal prosecution. The applicant did not act of his own accord during this journey; he went where he was brought and returned to Dublin with the aircraft when it could not land at its intended destination. I turn now to the point as to the continuance of jurisdiction on the airplane whereby it is argued by the State that the applicant at all times continued in Garda custody and has not yet been deported.

7. The aircraft in question was an Anatolia Airlines jet chartered by the Irish government. One of the key issues which arises is whether or not the deportation for the purpose of the Criminal Justice Act 1960 temporary release notice, to which I have already referred, actually took place or not. Under the Air Navigation and Transport Act 1973, criminal law, but not civil law for the purpose of detention in this context, is applied to aircraft under the control of Ireland. The necessity for such a provision will be appreciated, as in international law only military aircraft and ships are generally regarded as remaining the territory of the country controlling same on leaving that nation's territorial airspace or seas. Section 2 of the Act of 1973 states:-

"(1) Any act or omission which, if taking place in the State, would constitute an offence under the law of the State, shall, if it takes place on board an Irish controlled aircraft while in flight elsewhere than in or over the State, constitute that offence.

(2) Proceedings for an offence under this Act or an offence referred to in subsection (1) of this section may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in the State."

This last sub-section is presumably for the purpose of establishing Circuit Court and District Court jurisdiction to try any such offence in a local and limited manner. In relation to an Irish controlled aircraft the question is what status that space has while outside the State; s. 1 of the Act of 1973 defines a "state aircraft" as an "aircraft of any state used in the military, customs or police services of that state". This definition would not seem to apply to the aircraft in this case, though it is not necessary for me to so decide. The definition section proceeds in defining an aircraft to which Irish criminal jurisdiction applies as one which:

(a) is for the time being registered in the State; or

(b) is not for the time being registered in the State but which satisfies for the time being, the requirements of such registration specified in Article 7 of the Air, Navigation, Nationality and Registration of Aircraft Order 1963; or

(c) is registered in another State and is for the time being chartered by demise, let or hire and, could but for paragraph 2 of the said Article be registered in the State under para. 3 of that Article.

As this was an aircraft chartered by the Irish government, in those circumstances it seems to me that perhaps the conditions were fulfilled such as to apply criminal law under s. 2 of the Act of 1973. But, in that legislation there is no mention of civil jurisdiction and there is no provision for the continuation of the powers of An Garda Síochána outside the State. I do not believe, even if the conditions of charter of this aircraft by Ireland fulfilled the conditions for continuance of criminal law aboard it has any effect for the purposes of extra-territorial jurisdiction whereby Garda powers are extended by the Act of 1973 so that same may be exercised outside the limits of the State's airspace. It has perhaps never been regarded as necessary to extend Garda powers to an Irish controlled aircraft while in flight outside Irish airspace. It is to be noted in the Act of 1973, as Inspector Dignam helpfully outlined to me in evidence, that under s.3 the commander of an aircraft registered in a Tokyo contracting state may put a person under restraint for good reason and that the commander of aircraft where a person is put under such restraint may notify an appropriate authority. Under s.14 a person who is a non-national is to be treated as not landing in the State where that person may be refused leave to land, despite the disembarkation of that person from an aircraft. That is the only exception to the proposition of ordinary sense that where a person coming from abroad disembarks from an aircraft, the person enters the jurisdiction of the country where the airport is. Under s. 5 of the Act of 1973 the commander of an aircraft who has restrained a passenger may disembark that person. Provisions in relation to notification are therein set out together with provisions to the powers of An Garda Síochána in that situation; see sections 6, 7, 8 and 9. Section 11 creates an offence in relation to the unlawful seizure, or highjacking, of an aircraft. Other provisions deal with the immunity of commanders of aircraft in the restraint of passengers where they have acted under the Act of 1973. There are also extradition provisions. While the State's case has been attractively argued, none of this is of assistance. In reality as well as in law, the applicant did disembark the aircraft and then went to jail in Ireland. Such provisions emphasise the independent nature of civil aircraft on leaving the airspace of Ireland. The next issue that I need to consider is in relation to the powers of An Garda

Síochána in relation to the deportation; how far such powers extend and whether or not those powers can continue aboard a civil aircraft once it had left Irish airspace and what the effect such extra territorial jurisdiction might have.

8. Under s. 5(1) of the Immigration Act 1999 as substituted by the Illegal Immigrants Trafficking Act 2000, s. 10(b):-

"(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 comply with any provision of the order or with a requirement in a notice under section 3(3)(b)(ii),
- (b) intends to leave the State and enter another state without lawful authority,
- (c) has destroyed his or her identity documents or is in possession of forged identity documents, or
- (d) intends to avoid removal from the State,

he or she may arrest him or her without warrant and detain him or her in a prescribed place."

9. The Immigration Act 1999 (Deportation) Regulations 2005 (S.I. No. 55 of 2005) simply provide that immigration officers and members of An Garda Síochána are authorised to deport persons for the purposes of s. 3 of the Immigration Act 1999, as amended; it does not provide for any civil powers apart from those conveyed by the Irish Air Navigation of Transport Act 1973. In this case, Inspector Joe Dignam is both an immigration officer and a member of An Garda Síochána. A person who is detained for the purposes of deportation under s. 5(2) of the Immigration Act 1999, as amended, may be taken from the State by an immigration officer by appropriate transport and "shall be deemed to be in lawful custody whilst so detained until the ship, railway train, road vehicle or aircraft leaves the State." Central to this application for a declaration that the applicant is now in unlawful custody is whether the vehicle in which the applicant was travelling ever left the State. While there is no doubt that the plane had left the State's airspace, there is no legislative measure which suggests that the members of An Garda Síochána on board the plane had any power pursuant to Irish law save for those powers conferred by the Irish Navigation and Transport Act, 1973 whereby they might act, when so required, under the independent control of the commander of the plane.

10. I am satisfied on the evidence of Inspector Joe Dignam that while the plane was in flight, the members of An Garda Síochána were in fact acting under the command of the captain of the plane; but that does not necessarily resolve the issue as to whether or not the aircraft left the State as a matter of civil law. It seems, therefore, best to analyse what happened by reference to such legislation as gives guidance on that issue. Section 1 of the Immigration Act 2004 ("the Act of 2004"), which is the definition section, defines 'landing' in the State as applied to immigrants and states that this concept includes the "arrival or entry by any form of conveyance and includes entry over a land frontier, and references to landing include references to attempting to land".

11. Under s. 5 of the Act of 2004 the presence in the State of non-nationals is illegal. The way this is expressed is in terms that no non-national may be in the State, other than in accordance with the terms of any permission given to him or her before the passing of the Act, or a permission under the Act given by or on behalf of the Minister by an immigration officer on behalf of the Minister. It was therefore possible on the return of the aircraft to the State for an immigration officer such as Inspector Dignam to refuse permission to land to any non-nationals who disembarked. Section 4 of the Act of 2004 indicates that an immigration officer may on behalf of the Minister give a non-national a document or place in his or her passport, or other equivalent document, an inscription authorising the non-national to be in the State. It is required that every non-national coming by air or sea from a place outside the State shall on arrival in the State present himself or herself to an immigration officer and apply for such a permission. To fail to do so is an offence. The applicant did not apply for permission, though in reality the applicant was not given such an opportunity, and nor was there any discussion on the issue, in the sense that on the aircraft returning to Dublin, the applicant was simply told he was being sent back to Mountjoy jail for the purpose of finishing his sentence. The powers that were available, however, to an immigration officer included a refusal to give permission to land under s. 4(3) of the Act of 2004 which states:-

"(3) Subject to section 2 (2), an immigration officer may, on behalf of the Minister, refuse to give a permission to a person referred to in subsection (2) if the officer is satisfied—

- (a) that the non-national is not in a position to support himself or herself and any accompanying dependants;
- (b) that the non-national intends to take up employment in the State, but is not in possession of a valid employment permit (within the meaning of the Employment Permits Act 2003);
- (c) that the non-national suffers from a condition set out in the First Schedule;
- (d) that the non-national has been convicted (whether in the State or elsewhere) of an offence that may be punished under the law of the place of conviction by imprisonment for a period of one year or by a more severe penalty;
- (e) that the non-national, not being exempt, by virtue of an order under section 17 , from the requirement to have an Irish visa, is not the holder of a valid Irish visa;
- (f) that the non-national is the subject of—
 - (i) a deportation order (within the meaning of the Act of 1999),
 - (ii) an exclusion order (within the meaning of that Act), or
 - (iii) a determination by the Minister that it is conducive to the public good that he or she remain outside the State;
- (g) that the non-national is not 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;
- (h) that the non-national—
 - (i) intends to travel (whether immediately or not) to Great Britain or Northern Ireland, and

(ii) would not qualify for admission to Great Britain or Northern Ireland if he or she arrived there from a place other than the State;

(i) that the non-national, having arrived in the State in the course of employment as a seaman, has remained in the State without the leave of an immigration officer after the departure of the ship in which he or she so arrived;

(j) that the non-national's entry into, or presence in, the State could pose a threat to national security or be contrary to public policy;

(k) that there is reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national."

12. Having considered the applicable legislation, I have no doubt that the reality of this case is that the applicant, as a non-national, left the State in the airplane and once outside Irish airspace that he was not in Ireland and was not subject to Irish civil jurisdiction. It follows that some hours later he then returned to the State by entering Irish airspace and landing at Dublin airport. This was not wilful on his part. For that non-fulfilment of deportation, which is not a breach of conditions of his temporary release order, he could not have been guilty of an offence under s. 7 of the Criminal Justice Act 1960. I doubt that in the circumstances that a Garda could even reasonably suspect him of such a breach and so be entitled to arrest him. Transparently, there was no commission of the mental element of that offence by him. I have no doubt, further, that once the aircraft had left Irish airspace the members of An Garda Síochána on it had no power in terms of their authority beyond acting under the jurisdiction of the commander of the aircraft. I have no doubt as well that the applicant as a non-national with no permission to be in the State was not arrested on arrival back in Dublin Airport pursuant to an application for a permission to land and a refusal for good reason by an immigration officer. Nor was he arrested for not presenting himself to an immigration officer. An argument has been advanced that I am not entitled to grant habeas corpus in this case because the applicant is a convicted prisoner. The situation of a convicted prisoner serving a sentence and complaining about the conditions of imprisonment is not, in my mind, parallel to what is in issue here. In the course of *The State Aherne v. Cotter* [1982] I.R. 188 at 203, Henchy J. said and I quote:-

"Before a convicted person who is serving his sentence may be released under our constitutional provision relating to habeas corpus, it has to be shown not that the detention resulted from an illegality or a mere lapse from jurisdictional propriety but that it derives from a departure from the fundamental rules of natural justice, according to those rules require to be recognised under the Constitution in the fullness of their evolution at the given time and in relation to the particular circumstances of the case. Deviations from legality short of that are outside the range of habeas corpus."

That statement of the law does not apply. The decision before me is very simply this, is the applicant now in lawful detention or he is not in lawful detention? Had the applicant not been granted temporary release, there would be no doubt that he would be in lawful detention in Mountjoy jail and serving out his sentence. There would be no doubt as well that in those circumstances habeas corpus would not apply, absent difficult to envisage circumstances embracing the exception to the decision of Henchy J. There is a reality to this case, which is that the applicant was granted temporary release for a particular purpose. That particular purpose has not been fulfilled. That is due to no fault of the applicant. The applicant was removed from the State in accordance with the temporary release order without any volition on his part and, similarly, he came back. He can not be faulted in that regard. No one could reasonably suspect him of an offence of breaking a condition of temporary release. An argument can be made as to what can or should happen on the release of the applicant, but it is not for me to decide what may happen in the future should I order the release of the applicant. It is said the law provides that the applicant should now apply for leave to land and that leave may be refused for some particular reason and that he may then be arrested as a non-national unlawfully in the State. This is not my concern. As was pointed out by Murray C.J. in *Oladapo v The Governor of Cloverhill Prison*, [2009] IESC 42 (Unreported, Supreme Court, Murray C.J., 20th May, 2009) at p. 9 of the judgment:

"It is well established in this Court's case law that a person released from unlawful custody, including the person unconditionally released pursuant to order under Article 40 of the Constitution is not thereafter exempt from due process of law (see for example *The People (Director of Public Prosecution v. Pringle* [1981] 2 Frewen 57). The release of an unlawfully arrested person from unlawful custody in circumstances such as the present case is not a mere formality even if such release were to be immediately followed by a lawful arrest or re-arrest. The relief marks in a substantive manner, the termination of that which has been unlawful in a fundamental way from its inception. It is then for a garda member effecting a subsequent arrest if any, to justify that deprivation of liberty in accordance with law."

13. Another possibility which is mooted as to how the detention of the applicant may become lawful again is that the temporary release order may be cancelled by the Minister. Again, I make no comment on this beyond pointing out that the difficulty which may arise in relation to the revocation of the temporary release order is the decision of the Supreme Court in *The State Michael Murphy v. Kieft* [1984] 1 I.R. 458. It was therein held that a person who was subject to a temporary release order had an entitlement to a hearing before revocation. I do not know if the decision in that case is always applicable even where no fault in fulfilling the conditions of a temporary release order is alleged and I make no ruling in that regard because I am only ruling on this detention of this applicant. It would appear from that decision that the applicant would have an entitlement to make representations on any alleged breach of the temporary release order before being returned to jail in order to serve out the balance of his sentence. Perhaps a temporary release order can be revoked for non-fulfilment of a condition, but I do not know.

14. So, what happens in the future is a matter for the Minister and a matter for the Gardaí. It seems to me that it is possible to argue that there are two possible lacunae in the law as it now applies whereby this situation has arisen. Firstly it may be provided for in legislation, but it is not now provided, that a Garda deporting a non-national from the State may continue to exercise such powers as are available to a Garda within the State, when an Irish registered aircraft or any aircraft chartered by the State for that purpose leaves Irish airspace and that for civil law purposes such an aircraft is to be regarded as being within the State. In such circumstances it might be argued that a temporary release for the purpose of deportation had not been fulfilled by deportation if such an aircraft returns. It might then be asserted that the State might try deportation again. I make no comment on this. Secondly, it may be provided for, and is not now provided for in the wide range of immigration, asylum and nationality Acts, that a person temporarily released from prison for the purpose of deportation may be returned to that prison, should, for any reason, the deportation does not proceed or not take effect by removal of that person to the place or State to which that person is intended to be brought. In the absence, in particular, of the latter provision, given that the temporary release order remains unrevoked, and the applicant is not now under arrest for anything, I have no option but to declare the current detention of the applicant in Mountjoy Jail to be unlawful.