

## THE HIGH COURT

2019 No. 544 SS

## IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION

Between

KULDEEP SINGH

APPLICANT

– and –

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

**JUDGMENT of Mr Justice Max Barrett delivered on 16th May, 2019.**

1. The Governor has provided an affidavit and certificate evidencing that Mr Singh has, since 16 April, been detained at Cloverhill Prison under s.5 of the Immigration Act 1999. Mr Singh has no issue with the instrument of detention. The focus of his application is that his detention conditions do not comply with reg.19 of the EC (Reception Conditions) Regulations 2018, hence his detention is in breach of law and he should perforce be released.

2. By way of preliminary remark, the effect of *Ryan v. Governor of Midlands Prison* [2014] IESC 54 is that when it comes to *all* Article 40 inquiries the focus is whether or not there is some invalidity apparent on the face of the documentation pursuant to which a person is detained. Unlike this case, *Ryan (Midlands)* followed a court order of imprisonment; however, the thrust of the Supreme Court's reasoning in that case is clear, generally applicable, and binding on this Court. As Noonan J. observes in *Ryan v. Governor of Mountjoy Prison* [2017] IEHC 207, para 40: "[T]he procedure by way of Article 40 is suitable for cases where the instrument of detention is so clearly flawed on its face that it cannot amount to a justification of that detention or the procedure by which it was obtained was so fundamentally defective as to amount to a basic denial of justice".

3. The effect of all of the foregoing is that Mr Singh's Art.40 application must fail; if he has an alternative basis on which to seek to quash the decision to detain him, that is properly the subject of judicial review.

4. Notwithstanding the foregoing, as indicated at hearing the court is of the view that Mr Singh cannot rely on reg.19. There are three reasons why this is so:

i. this is an Art.40 inquiry. The Governor has produced the instrument of detention and there is no flaw in same or how it was procured. That is the end of these proceedings; reg.19 does not come into play.

ii. recital 8 of Directive 2013/33/EU, the Directive transposed by the Regulations of 2018 identifies the purpose of that directive in the following terms:

*"In order to ensure equal treatment of applicants throughout the Union, this Directive should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for so long as they are allowed to remain on the territory of the Member States as applicants."*

As Mr Singh is not an "applicant" he does not, per recital (8), come within the intended scope of the Directive. It is not appropriate to divorce a reading of transposing regulations from the purpose of the directive transposed: to divorce matters so is to open the trapdoor to the error into which Mr Singh has fallen, reading the regulations in a way which may make ostensible literal sense but which makes no sense when one considers the purpose of the directive transposed.

iii. as to regulation 19, it provides, *inter alia*, as follows

*"(1) A detained applicant shall, in the place of detention in which he or she is detained – (a) subject to paragraph (b) and paragraph (2) be kept separately from any prisoner detained in the place of detention, and (b) in so far as is possible, be kept separately from other third country nationals who are not applicants and who are detained in the place of detention.*

*(2) Where it is not possible to keep a detained applicant from persons referred to in paragraph (1)(b), this Regulation shall apply to the detention of such persons as it does to the detention of detained applicants".*

Mr Singh does not come within reg.19(1) because he is not a "detained applicant". As to reg.19(2), this seeks to prevent a dilution of the conditions in which a detained applicant is maintained when placed within a pool of defined third country nationals. Mr Singh is not a detained applicant.

5. Given the preliminary point made at para.2, the court considers para. 4.ii and 4.iii to be *obiter*. As indicated at the hearing, the court considers Mr Singh's detention to be lawful.