THE HIGH COURT

[2016 No. 1184 S.S.]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2° OF THE CONSTITUTION OF IRELAND

BETWEEN

LIN QING also known as QING LIN

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND

AND THE ATTORNEY GENERAL

NOTICE PARTY

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 859 J.R.]

BETWEEN

LIN QING also known as QING LIN

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

(No. 2)

JUDGMENT of Mr Justice David Keane delivered on the 2nd July 2019

Introduction

1. There are two sets of proceedings before the Court.

2. The first is an inquiry, pursuant to Article 40.4.2° of the Constitution of Ireland, into the lawfulness of the detention of the applicant on foot of a 'notification of arrest and detention' ('the detention warrant'), issued pursuant to s. 5(8)(a) of the Immigration Act 1999, as amended ('the Act of 1999'), on 24 September 2016. The respondent and notice party contend that the applicant's detention is lawful. The applicant has been released on bail, pending the outcome of that inquiry.

3. The second is an application for the judicial review of both a deportation order made against the applicant on 23 December 2013, pursuant to s. 3(1) of the Act of 1999 ('the deportation order'), and a notification in writing of the decision to deport, dated 12 February 2016, pursuant to the requirements of s. 3(3)(b)(ii) of the same Act ('the written notification').

4. In *Lin Qing Aka Qing Lin v Governor of Cloverhill Prison* [2016] IEHC 710, (Unreported, High Court, 25th November, 2016), Mac Eochaidh J, having ordered and embarked upon the Article 40.4.2□ inquiry, and having considered the decision of the Supreme Court in *The Illegal Immigrants (Trafficking) Bill*, 1999 [2000] 2 IR 360 (at 398-9), granted the applicant an extension of time to bring an application for leave to seek judicial review of the lawfulness of both the deportation order and the written notification, and then acceded to that application for leave.

The issues raised

5. While the applicant pursues the reliefs he seeks in the judicial review proceedings on twenty one separate grounds (excluding the discrete grounds on which he sought injunctive relief and an extension of time in which to bring his proceedings), and while Mac Eochaidh J identifies four issues in his decision to grant the extension of time sought, it became clear – and was accepted - in the course of argument that the proceedings turn on two specific issues.

6. The first, or principal, issue is whether the requirement in an order made under s. 3(1) of the Act of 1999 that the non-national to whom it is directed leave the State 'within such time as may be specified in the order' requires a specific deadline for departure to be specified in the text of the order or permits that deadline to be incorporated by reference in the order to a date specified in another document, such as the notification of decision required under s. 3(3)(b)(ii) of the same Act.

7. The second, or subsidiary issue, is whether there was a breach in this case of the Carltona principle, whereby a ministerial function entrusted to a departmental official must be performed by an official at an appropriate level of seniority and within the scope of his or her department's responsibility, in that the notification was signed by a higher executive officer in the Department of Justice and Equality ('the department'), whereas the deportation order was signed by the then Director General of the Irish Naturalisation and Immigration Service ('the INIS').

8. In the course of argument, the applicant sought to raise a third issue. It is that the detention warrant is defective because it is wrongly described on its face as a 'Notification of Arrest and Detention', rather than as a warrant. The alleged error here is a failure to acknowledge that the former power of the arresting officer under the original Reg. 7 of the Immigration Act 1999 (Deportation) Regulations 2005 to 'direct' the detention of the person concerned in a prescribed place (whether prison or Garda station), was replaced by a power to detain that person 'under warrant' under the new Reg. 7 of the 2005 Regulations substituted by Reg. 4 of the

Immigration Act (Deportation) Amendment Regulations 2016 with effect from 10 March 2016.

9. In *Sharma & Ors v Member in Charge of Store Street Garda Station* [2016] IEHC 611, (Unreported, High Court (Humphreys J), 7th November, 2016), where the same alleged error had been made on the face of both the warrant and the certificate of grounds of detention provided in accordance with Article 40.4.2□ in respect of three different detained persons, Humphreys J accepted that it did amount to an error but concluded that this Court has the jurisdiction to permit an amendment of the certificate (and, by implication, to permit the creation of new warrant) in each case to properly reflect the provisions of the statutory scheme and that the jurisdiction should be exercised in the circumstances presented because the error was minor when placed in context and did not warrant release of the detained persons on the principle of proportionality. On appeal, *sub nom Gjonaj & Ors v Governor of Cloverhill* [2016] IECA 330, (Unreported, Court of Appeal (Birmingham J; Mahon and Edwards JJ concurring), 15th November, 2016) the Court of Appeal found that the original document in each case was valid, although not described on its face as a warrant, and that, had it been persuaded otherwise, it would have permitted the creation of a new warrant and the amendment of the certificate of grounds of detention, just as the High Court had done. It must at once be acknowledged that the Supreme Court granted a certificate of appeal in a determination *sub nom P.(I) v Governor of Cloverhill Prison* [2016] IESCDET 145, (Unreported, Supreme Court (O'Donnell, McKechnie and Dunne JJ), 23rd November, 2016) but, as matters stand, I am bound by the decision of the Court of Appeal.

10. Towards the conclusion of the oral submissions made on behalf of the applicant a separate argument was briefly raised, and shortly afterwards abandoned, within the rubric of the Article 40.4.2 inquiry. It was that there was no evidence that the arresting member of An Garda Síochána was satisfied of the period within which the applicant was to leave the State in accordance with the deportation order when reciting on the face of the detention warrant that he had reasonable cause to suspect that the applicant had failed to leave the State within that time. This was an attempt to bring the applicant's position within the *ratio* of the decision in *Parvaiz v Commissioner of An Garda Síochána* [2016] IEHC 772, (Unreported, High Court (Mac Eochaidh J), 21st December, 2016) (at para. 21). The respondents argued that the evidence of the arresting guard in this case concerning the reasonable cause he had to suspect that the applicant had failed to leave the State within the time specified in the deportation order against him went significantly beyond that which Mac Eochaidh J found to be insufficient to properly ground the arrest and detention in *Parvaiz* . As that particular argument was expressly withdrawn in the course of the hearing before me, I do not propose to rule on it.

Subsequent developments

11. After judgment was reserved, the proceedings were relisted at the request of the parties because, on 19 June 2017, the Supreme Court had granted leave to appeal in the case of *S.E. v Minister for Justice and Equality* [2017] IESCDET 62. On consent between the parties, I was requested to re-open the proceedings and to adjourn them pending the determination of the appeal in that case.

12. On 21 March 2018, the proceedings came back before me. Counsel for the applicant acknowledged that the decision of the Supreme Court in *M.A.K. v Minister for Justice and Equality* [2018] IESC 18, (Unreported, Supreme Court (O'Donnell J; McKechnie, MacMenamin, O'Malley and Finlay Geoghegan JJ concurring), 13th March, 2018) had resolved the principal issue in this case against his contention that the deportation order against him fails to comply with requirements of s. 3(1) of the Act of 1999.

13. However, counsel for the applicant submitted that there was still an issue on the validity of the detention warrant and, hence, on the lawfulness of the applicant's detention for the purpose of the Article 40 inquiry, because of the recital on its face (signified by ticking a box beside it) that the basis for the applicant's arrest and detention was the relevant officer's suspicion, with reasonable cause, that the applicant, against whom a deportation order was in force, had 'failed to leave the State within the time specified in the order'. The relevant argument is based on the following passage from the judgment of Mac Eochaidh J granting the applicant leave to challenge the deportation order in this case (at para. 38):

> 'If this were a judicial review unconnected to a *habeas corpus* application, it would, I think, be difficult for an applicant to challenge a deportation order on the basis that the departure date is not in the order but in an attached notice instead. It is hard to see what prejudice an applicant suffers from this, even if it is unlawful. On the other hand, where the point is raised in *habeas corpus* proceedings the focus is not on the standing of the applicant or how the illegality affects the applicant but rather the focus is on the conduct of the Gardaí who declare that they are detaining a person for failing to comply with a provision of a deportation order which is required to be in the deportation order, when at first glance the matter is absent and the absence is, prima facie a breach of a statutory requirement.'

14. And later (at para. 40):

> 'The intended judicial review proceedings are intrinsically connected with an application for *habeas corpus* where the applicant is in civil detention. The Gardaí had a statutory power to detain the applicant for failure to comply with a provision of the deportation order and on its face the provision relied on is absent in circumstances where s. 3(1) of the [Act of 1999] says that the provision must be in the order and not in any extraneous document. Where a person is in civil detention, greater scrutiny of the powers of detention will occur and courts will be less forgiving of errors than in, for example, court ordered detention, (see *(State) McDonagh v Frawley* [1978] IR 131 and *Sharma v Member in Charge of Store Street Garda Station* [2016] IEHC 611; [2016] IECA 330).'

15. The observations of Mac Eochaidh J have undoubted force, but they cannot avail the applicant here. This is not a case in which a technical infirmity that might not mandate the grant of discretionary relief in an application for judicial review must nonetheless result in an order for the applicant's release where that infirmity taints the detention warrant relied upon to deprive him of his liberty. As the decisions of the Supreme Court in both *P. v Minister for Justice, Equality and Law Reform* [2002] 1 IR 164 and, now, *M.A.K.*, already cited, make clear, there is no legal infirmity in the form prescribed under the Immigration Act 1999 (Deportation) Regulations 2005 in failing to prescribe in it the date of effect of the deportation. Thus, applying the closest scrutiny, there has been no error in the exercise of the relevant power of detention.

16. Although the point was not pressed when the proceedings came back before me, for completeness I should say that I was not persuaded by the argument that the execution of the s. 3(3)(b)(ii) notification in writing by a higher executive officer in the Minister's department was a breach of the *Carltona* principle. I accept the argument put forward by Nuala Butler S.C. on behalf of the Minister that a notification in writing under s. 3(3)(b)(ii) of the Act of 1999 is not the same as the decision to make a deportation order under s. 3(1) of that Act, in that, while the latter engages considerations of fundamental rights under the Constitution, the European Convention on Human Rights and, perhaps also, the Charter on Fundamental Rights of the European Union, as well as important statutory considerations of *non-refoulement*, the former involves matters that are essentially procedural in nature. Thus, I conclude that, in delegating the execution of that notice in writing to a higher executive officer, the Minister was entrusting that function to a departmental official at an appropriate level of seniority, and within the scope of responsibility of the Minister's department.

Conclusion

17. The applicant is not entitled to the relief sought in his judicial review proceedings and those proceedings are dismissed.

18. I am satisfied that the detention of the applicant on foot of the deportation order under challenge is lawful and that concludes the Inquiry pursuant to Article 40.4.2° of the Constitution of Ireland.