Neutral Citation Number: 2005 IEHC 397

THE HIGH COURT

[2005 No. 1541SS]

IN THE MATTER OF AN APPLICATION MADE PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

JOSEPH OBINNA ARISUKWU

APPLICANT

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM AND THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND THE GOVERNOR OF CLOVERHILL PRISON AND IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of O'Sullivan J. delivered the 26th day of October, 2005

The key dates

1. The applicant was born in Nigeria on the 17th of January, 1977.

2. On the 24th of March, 2000, he arrived in the State, applied for asylum and exhausted the entire procedure without success.

3. On the 23rd of December, 2002, he was notified of the first respondent's intention to make a deportation order.

4. On the 24th of January, 2003, his application for residency on the basis of his parentage of an Irish born child was received by the authority. The child in question was his son Jack Noel Brennan who was born on the 12th of June, 2002.

5. On the 19th of February, 2003, the first respondent caused an announcement to be made that all cases such as the applicant's for residency would be examined and decided individually. Because no decision had been made prior to that, the applicant's case was therefore dealt with individually and representations were made on his behalf.

6. On the 6th of January, 2004, a report was prepared on the applicant's case by an assistant principal in the first respondent's department wherein full consideration was given to the applicant's application for residency. The applicant had experienced difficulties in establishing formal proof of his paternity of Jack Noel Brennan but his application for residency was dealt with on the basis that he was the father of this infant. This is made clear in the report already referred to.

7. On the 14th of January, 2004, the applicant was refused permission to remain in the State based on his parentage of an Irish born child and a decision was made to affirm the deportation order dated the 23rd of December, 2002.

8. On the 15th of January, 2005, revised arrangements were announced by the authorities for processing applications for residency by non-national parents of Irish born children who were born before the 1st of January, 2005.

9. On the 4th of March, 2005, the applicant applied, again, for residency on the basis of his parentage of an Irish born child. There was some difficulty, continuing, in relation to his ability to formally prove that parentage. The applicant had submitted material supplementary to his application enclosing his son's birth certificate. He was not named as the father on that certificate. He indicated that he had made an application to the District Court to have himself so named. There is some difficulty, which remains unresolved, about the dates on which this material was furnished to the authorities.

10. On the 27th of April, 2005, his second application for residency on the above basis was refused. The reason given was that there was no evidence of identification, no evidence of residency continued since the birth of his child, and no evidence of his role in the bringing up of the child.

11. On the 12th of July, 2005, the applicant wrote including a new birth certificate, this time with his parentage recorded on it and asking for a reconsideration of the decision refusing his application dated 27th April, 2005. He received no answer to this correspondence.

12. On the 27th of July, 2005, he wrote again and enclosed, apparently, a letter from his landlord (which was not available in court), his own Nigerian passport and a bank statement (which was not available in court). He also enclosed a letter showing that he had made an application to have his name on his son's birth certificate and enclosed the birth certificate. Once again there was no response to this correspondence.

13. On the 6th of September, 2005, the applicant wrote again requesting a reply and got one acknowledging this correspondence. The response on this occasion indicated that "non reply by us is deemed a refusal".

14. On the 17th of October, 2005, the applicant wrote again formally requesting that a higher officer would reconsider the refusal of his residency application and requesting an undertaking not to implement the deportation order. He got no such undertaking.

15. Parallel with the more recent of the above developments the applicant had made application for information under the Freedom of Information Act, 1997. The information sought was not specified in court nor was this particular application referred to otherwise than by way of general context and background.

16. On the 18th of October, 2005, the applicant was due to report for deportation and did so. At 4pm on that date he submitted himself for deportation and was told that he would be removed that evening. In reply he said "I'm going nowhere" and challenged Detective Sergeant Stratford with whom he was dealing to arrest him. This was done as will be referred to in a moment.

17. At 4.30pm the applicant initiated judicial review proceedings in the Central Office of the High Court.

18. At 5.45pm the applicant was arrested and placed in handcuffs by Detective Sergeant Stratford. Following this he was put in a jeep with the intention of being driven to the airport together with another intended deportee from Nigeria. There was a demonstration outside the offices of the emigration authorities. There were five in the jeep, namely Detective Sergeant Stratford who was driving, a colleague in the front passenger seat, the applicant in the rear seat in the centre, his fellow intended deportee in the

rear seat on the left and a further immigration officer in the rear on the right.

19. Evidence was given in court by Detective Sergeant Stratford who was cross-examined on behalf of the applicant. The evidence is that the applicant attacked and bit the immigration officer near him and did likewise to Detective Sergeant John Stratford. The aggression was so intense that the officers decided that they would stop at Mountjoy Garda Station to get a more suitable vehicle in which to continue their journey to the Airport. As they approached Mountjoy Garda Station Detective Sergeant John Stratford said that the applicant kicked his left arm and his leg and the handle of the automatic gear shift out of the engaged position and that he momentarily lost control of the vehicle. He had lights and sirens going on the jeep since it left the offices.

20. At the Mountjoy Garda Station they exchanged their vehicle for a marked van and the applicant and his fellow Nigerian were recuffed this time with their hands behind their backs and their legs were bound with Velcro straps. The journey to the Airport was then continued without further risk or danger.

21. At 6.30pm the applicant's lawyers made an application for an interim injunction which was granted by Abbott J. I am told that he indicated that his attitude was that he could not say the applicant had no case and accordingly he was prepared to grant the interim order to continue until 11am on the following Friday morning, 21st October.

22. At around 7pm the applicant arrived with the immigration officers and his fellow Nigerian at the Airport. They were detained with the intention of boarding them on a charter flight bound for Lagos. At 7.02pm Detective Garda Kingston was informed of the making of the injunction referred to at the offices of the migration authorities. At around 7.20 – 7.25pm Detective Sergeant Stratford who was at the Airport by this time became aware of the making of the interim injunction and from that moment on knew that the applicant would not be deported that evening, but would have to await the return date in court. By that time, his evidence was, that the applicant had calmed down so he had to consider whether to release him or to return him to Cloverhill. He decided to detain him on the basis that the applicant intended to avoid removal from the State. He gave evidence that he reached this conclusion on the basis of what the applicant had told him when he had indicated that he would have to be deported that evening ("I'm going nowhere") and also on the basis of his violent behaviour in the police car on the way to the Airport.

23. He further gave evidence that it was his intention to implement the deportation order but also to abide by any order of the court.

24. At 7.40pm the applicant arrived at Cloverhill in the company of Detective Sergeant Stratford where he was handed over and where Detective Sergeant Stratford completed the detention form.

25. At around 8pm the applicant's solicitor who had been informed that the applicant was being deported, proceeded to the Airport and there informed the immigration authorities of the making of the injunction. The response he got from a Senior Garda Officer was "he (the applicant) won't be going anywhere".

26. On the 19th of October, 2005, at 4pm an application was made under Article 40 of the Constitution and a conditional order was made returnable for 20th of October at 2pm. This order was made by deValera J. At 6pm approximately notice of the making of this order was served on the Chief State Solicitor and on the Governor of Cloverhill Prison.

27. On the 20th of October, 2005, an application was made to Cloverhill District Court in the morning session and the applicant was charged with two offences arising out of his behaviour in the immigration van on the way to the Airport. At 2pm which was the time for the return date of the conditional order made the previous evening under Article 40, the matter was not mentioned to me in court. There may have been some confusion in relation to paperwork and some document I understand was in fact handed to the registrar of the court. At 4pm the matter was mentioned to me, I made my inquiry into the circumstances and adjourned the matter for a full hearing on the following day. On the 21st of October, 2005, at 11am that hearing began before me and included a lengthy cross-examination of Detective Sergeant John Stratford.

28. Arising out of these matters the applicant makes five challenges to the lawfulness of his detention as follows:-

> 1. He says that notwithstanding the decision to refuse him residency on the basis of an Irish born child which was dated the 24th of April, 2005, the subsequent correspondence requesting that this application be reconsidered was never dealt with and for a long time remained unacknowledged and he submits that therefore the first respondent could not lawfully maintain an intention to deport him. Reliance was placed on the judgment of Finlay Geoghegan J. in *Ojo v. Governor of Dochas Centre* (Unreported, 8th May, 2003) which, it was submitted, was a similar case. It was submitted further that the detention of the applicant must be unlawful if it was for the purpose of deportation which itself was unlawful.
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> In response it was submitted that the present case unlike the circumstances in Ojo is one where the respondents do not accept that any decision remains to be taken before the applicant can be deported. On the contrary there has been one decision to refuse his application for residency on the basis of his Irish born child (one in which, it will be noted, the applicant was treated as being the father of the Irish born child, notwithstanding certain difficulties of proof) and indeed there was a second refusal. The respondents rely on another decision of Finlay Geoghegan J. which *was Igbojionu v. The Minister for Justice Equality and Law Reform and Another* (Unreported 20th July, 2004).
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> In my opinion this is a correct submission. The Minister had decided not once, but twice, to refuse the applicant's application for residency based on his parentage of an Irish born child. On the first occasion, moreover, the decision was based on an assumption that he was indeed the father of Jack Noel Brennan born on the 12th of June, 2002, despite the applicant's inability to demonstrate this on his passport or on the child's birth certificate. Whilst the evidence shows that his solicitors wrote following the second decision to refuse his residency application requesting a reconsideration of this refusal and indeed further that they wrote requesting an appeal from a deemed rejection of this request, this does not in my opinion establish – or even suggest – a change of heart on the part of the respondent, still less an acknowledgement by the respondent (as was the case in Ojo) that something more had to be done before they implemented the deportation order.
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> The request for a reconsideration, therefore, cannot as a matter of law have the consequence contended for by the applicant.
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> Moreover, the correspondence which followed the second refusal of the 27th of April, 2005, cannot as a matter of fact have the consequence that the first respondent's decision to deport thereby somehow became other than a concluded decision.

Indeed he had indicated no intention to change his mind.

Accordingly this ground of challenge to the validity of the applicant's detention must fail.

2. Secondly it is submitted that, as a matter of law, the first respondent may not have a lawful intention to deport given

> a. that judicial review proceedings challenging his detention (and arrest) commenced prior to the applicant's arrest and therefore preceded what the applicant's counsel described as the operation and implementation of the intention to deport him;

b. that an injunction was granted prohibiting the Minister from deporting the applicant, and

c. that the doctrine of separation of powers, it is submitted, prohibits the executive from presupposing the outcome of these judicial review proceedings.

Clearly, as a matter of fact, and as I have already held, the first respondent intends to deport the applicant.

Can it be that as a matter of law, the very issuing of judicial proceedings in and of itself and indeed the making of an interim injunction upon the basis already described, results inevitably in that factual intention becoming unlawful or in some way becoming superseded by operation of law?

The injunction, I am told, was granted by Abbott J. at 6.30pm on the 18th of October, 2005, on the basis that he indicated (as I have already said) that he could not say that the applicant did not have a stateable case and he was therefore prohibiting deportation until the court could consider the matter; if I may say so, this was an entirely fair and humane response to a last ditch application where the outcome was potentially of great significance to the applicant. It was by no means, however, an indication that the deportation order must be called off, still less that it was bad because of the existence of a judicial review proceedings. It was simply an order freezing the situation and maintaining the status quo until the case could be looked at by the High Court with a little more time than was available in the late evening of a working day.

Indeed as Mr. Donnelly on behalf of the respondent submitted the temporary did not order the release of the applicant – which it might have done if it were to be more consistent with the notion that the court was accepting the proposition that the very issuing of proceedings themselves undermined the legal basis for the first respondent's intention to deport. Again, the interim order was made without hearing the first respondent and it would be quite inappropriate, in my view, to infer that Abbott J. accepted in those circumstances that the first respondent's intention to deport had become a legal nullity without even hearing his side of the case. In my opinion it is straining interpretation to read into the granting of the injunction anything more than an order maintaining the status quo ante and accordingly I reject the submission that once an interim injunction was made, automatically and without more the consequence was that the first respondent could not legally thereafter continue to have an intention to deport the applicant.

Not only is this consistent with common experience where ex parte injunctions are granted, but it is also consistent with the statutory provisions which deal with legal challenges to deportation orders of this kind. See s. 5(5) of the Immigration Act, 1990.

3. A third submission relies on the doctrine of the separation of powers and contends that the respondent cannot, validly, continue to maintain an intention to deport given the existence of judicial review proceedings challenging his decision because this, it is said, would be to usurp the function of the courts.

In my view the Minister and the courts have different functions and different questions, each of them, to determine. The first respondent has to decide whether or not to deport the applicant – the court has to decide whether or not his decision is valid: these are two quite different questions. One involves a question of applying administrative policy to the specific circumstances of an individual: the other is a question of applying law to a different set of circumstances. They are not, therefore, the same question at all or the same decision so that the making and maintaining by the Minister of the one in no usurps the making by the courts of the other; nor does it in any way suggest that if ordered to refrain from deportation in this case the first respondent will do other than comply with such an order: on the contrary, the evidence in the case is that the respondents maintain an intention to deport but subject to any order of the court. Furthermore I note that in Ojo (pp. 35/6) my colleague Finlay Geoghegan J. reached a similar conclusion on this point.

4. Finally a submission is made that because the detention in this case is based on the conclusion by Detective Sergeant Stratford to the effect that the applicant intends to avoid deportation it is thereby unlawful. In this regard reliance is placed on the fact that the applicant presented voluntarily at the offices of the immigration authorities and also on his lawful attempts through his solicitors to avoid his removal from the State. It is submitted that the arresting officer Detective Sergeant Stratford had no basis therefore for holding that the applicant intended to avoid deportation. On the other hand the evidence shows that as soon as the applicant was faced with his imminent deportation his attitude changed dramatically to one of physical and violent resistance; at one stage causing the police van to go out of control. When confronted with the information that he was about to be deported he said "I am not going anywhere". In my view of the evidence of which there is a full transcript Detective Sergeant Stratford had ample grounds for forming the view that the applicant intended to avoid deportation and accordingly for detaining him upon that basis as he has done.

Nor can there be any question of his having to release the applicant on being informed of the court's injunction (as is contended by the applicant's counsel). This is so because the order did not require the applicant's release but only that the respondents restrain from deporting the applicant before 11am on the 21st of October which they did. Moreover, in my view, the applicant was, prior to that time, under lawful arrest and detention because these (arrest and detention) had been imposed upon him for the purpose of deportation.

In arriving at the foregoing conclusions I have borne in mind that the circumstances of this applicant's judicial review proceedings and their initiation – they were issued a half an hour after he was due to present himself for deportation and some six months after the challenged decision – are very significantly different from the circumstances in the Adebayo case, a decision of my colleague Peart J. to which I was referred. This brings me to the final point, namely, that the applicant has a right of access to the courts which is in some way infringed or impeded by his continuance in detention.

5. The submission is that because judicial review proceedings challenging the applicant's detention (and arrest) were in existence at the time of his arrest, therefore his detention must be unlawful. In particular reliance is placed on the following extract from the judgment of Peart J. in *Adebayo v. Commissioner of An Garda Síochána* (Unreported: 27th October, 2004) at pp. 48/9:-

> "In the context of immigration procedures in particular, where the failure to vindicate the right of access to the courts results in the removal of the person from the State – the prevention of which is the very purpose of wishing to avail of that right of access – I am compelled to the view that once judicial review proceedings have been properly commenced, and I include within that concept proceedings commenced outside the fourteen day time limit, but in which an extension of time is being sought, it is unnecessary for any injunction to be sought in order to ensure that steps are not taken to give effect to the very deportation order sought to be impugned in those proceedings."

The submission appears to be that if it is not possible legally to deport the applicant until the determination of the judicial review proceedings then it becomes impossible for the respondent to have a valid intention to deport and accordingly his detention for the purpose of such deportation must also necessarily be unlawful.

Whatever else was decided in *Adebayo* it was not the foregoing proposition or indeed anything like it. Peart J. in that case was faced with an objective non-compliance with an injunction prohibiting deportation and an initial order under Article 40 where there had been a return date which had not been adhered to for the simple reason that the applicant had been deported to Nigeria before notice of the making of these orders were communicated to the authorities. Notwithstanding, therefore, that the proceedings were "moot", for reasons carefully elaborated in the judgment, Peart J. proceeded to determine certain issues raised in those proceedings and, having concluded as indicated above, made an order:-

"insofar as any of the applicants named in any of these proceedings shall still retain a wish to re-enter the State for the purpose of continuing to prosecute their judicial review proceedings in respect of the deportation order made against them, they will be facilitated in their return to the State as regards the reasonable cost involved in so returning, and that upon arrival they will be permitted to re-enter pending a final determination of those proceedings, or thereafter in the event that their application is successful".

However, my learned colleague continued as follows:-

> "I will allow an opportunity to counsel on both sides to address me on the question of whether upon arrival each applicant or any particular applicant or applicants should be thereupon rearrested and detained, in the light of the court's desire that the status quo ante should be restored to that which pertained up to the time when the orders of the 6th of April, 2004, were made."

From the latter quotation it is quite clear that Peart J. was not deciding that the intention to deport had become unlawful, just as in the instant case it is quite clear that the respondent's intention is to deport the applicant as soon as and if this becomes legally possible. The 1999 Act indeed makes specific provision for the detention of a person such as the present applicant during the pendency of proceedings such as the instant application, (See s. 5(5) of the Immigration Act, 1990). If the respondents' intention to deport is lawful – and I hold that it is – then clearly it can also be lawful for the respondent to detain the applicant on the grounds that he intends to avoid such deportation. The question of whether or not the applicant intends to avoid such deportation is a question of fact upon which I have already made my ruling.

In all of these circumstances therefore, I am satisfied that the applicant's detention is lawful and I refuse his application that I make an order under Article 40 of the Constitution.