

THE HIGH COURT

[2014 No. 1982 S.S.]

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

BETWEEN

KAHINDE REBECCA ASHADE

APPLICANT

AND

THE GOVERNOR OF THE DOCHAS CENTRE

RESPONDENT

JUDGMENT of Mr. Justice Robert Eagar delivered on the 19th day of December 2014

1. By an affidavit sworn on the 1st December 2014 Brian Burns, Solicitor made a complaint pursuant to Article 40.4 of the Constitution that the applicant was being illegally detained in the Dochas Centre, Mountjoy Prison. Upon the ex parte application of counsel for the applicant grounded upon the said affidavit, MacEochaidh J. made an order pursuant to Article 40.4.2 of the Constitution that the respondent produce the applicant to the court at 4pm on the 1st December and that the respondent certify in writing the grounds of the detention of the applicant. Maria Connolly, the assistant governor of the Dochas Centre produced the detention order dated the 20th November 2014 and exhibited same. The detention order was a detention order under the Immigration Acts 1999 and s. 5 of the Immigration Act (as amended) provided for the Immigration Act 1999 (Deportation) Regulations 2005 made in exercise as a power confirmed by s. 7 of the Immigration Act 1999. The notification of detention order confirmed that the governor of Mountjoy Womens Prison was directed that the applicant be detained in Mountjoy Womens Prison pending the making of arrangements for her removal from the State. The basis of the arrest and detention is that Detective Garda Moran stated that with reasonable cause he suspected that the person against whom the deportation order is enforced:-

- a) Had failed to comply with the provision of the order.
- b) Had failed to comply with a requirement in a notice under s. 3 (3)(b)(ii). It also indicated that the applicant was lodged in the Dochas Centre on the 20th November 2014.

History

2. The affidavit of Martin O'Mahony, Higher Executive Office in the Legal Services Support Unit at the Irish Naturalisation and Immigration Service in the Department of Justice swore an affidavit on the 3rd December 2014. He sets out the background of the applicant's position within the State and indicated that the applicant claimed asylum in the State on the 10th March 2008. He said that she completed an ASY1 Form on that date at the offices of the Refugee Applications Commissioner. The applicant was interviewed by the Refugee Applications Commissioner on the 29th April 2008 and the Commissioner prepared a report under s.13 of the Refugee Act dated the 1st May 2008 in which she recommended that the applicant not be declared a refugee. The applicant then unsuccessfully appealed the Commissioner's negative recommendation to the Refugee Appeals Tribunal and both the Commissioner and the Tribunal found the applicant's claim to lack credibility.

3. Mr O'Mahony indicated that the Minister had written to the applicant and notified her that he had decided to refuse to give her and her daughter declarations of refugee status, that their entitlement to stay in Ireland had expired and then set out the options open to them including applying for subsidiary protection or to make representations to remain temporarily in the State under s.3 of the Immigration Act 1999.

4. Mr O'Mahony stated that applications for subsidiary protection and leave to remain were made on behalf of the applicant and her daughter by a solicitors firm other than the solicitors firm who are acting for the applicant at this time. He states that the application for subsidiary protection which was based on the same assertions as underpinned her application for refugee status, was unsuccessful due to lack of credibility and in the alternative the availability of state protection to the applicant in Nigeria. It is somewhat unhelpful that the application for subsidiary protection and the letter of response from the Minister dated the 29th April 2009 has not been exhibited to the court.

5. Mr O'Mahony continued by indicating that the application for leave to remain was unsuccessful although he does not specify the date in which it was unsuccessful but continues to state that on the 18th November 2009 the Minister signed deportation orders in respect of the applicant and her daughter. He further says that the deportation orders were notified to them by letter dated the 20th November 2009 which is exhibited by Mr O'Mahony. The letter was addressed to the Eglinton Hotel, The Promenade, Salthill, Co Galway by registered post with copies to the Garda National Immigration Bureau and the solicitors then acting for the applicant.

6. The letter indicates that a copy of the deportation order was enclosed with the letter which is exhibited. It also stated that a copy of the Minister's considerations pursuant to s.3 of the Immigration Act 1999 (as amended) and s. 5 of the Refugee Act 1996 (as amended) are enclosed with this letter. However these latter documents do not seem to have been exhibited with the affidavit of Mr O'Mahony.

7. This letter indicates that the reasons for the Minister's decision were that the applicant was a person whose application for a declaration as a refugee has been refused. Further that having had regard to the factors set out in s.3 (6) of the Immigration Act 1999 (as amended) including the representations received on behalf of the applicant, the Minister is satisfied that the interests of the public policy and the common good in maintaining the integrity of the asylum and immigration system outweigh such features of the applicant's case as might tend to support her being granted leave to remain in the State. The letter further goes on to say that the

applicant is obliged to leave the State by the 8th December 2009 and to advise the office of the travel arrangements. It further continues that if the applicant did not leave the State by the 8th December 2009 she is liable to be deported. There is no mention good, bad or indifferent of what the Minister was requiring of the child save that she was subject to a deportation order as well.

8. Mr O'Mahony's affidavit is silent as to whether or not the letter was sent back so in those circumstances I am taking it that the applicant and her daughter did receive the letter from the Repatriation Unit dated 20th November 2009.

9. Mr O'Mahony further states that the applicant never sought to challenge the validity of the deportation orders by way of judicial review and that the applicant did not leave the State by the 8th December 2009. He continued to say that the applicant was then classed as evading deportation and her whereabouts remained unknown to the Minister for Justice and Equality until by letter dated the 23rd October 2014 her current solicitors Burns Kelly Corrigan Solicitors wrote to the Minister on her behalf and requested the Minister to revoke the deportation orders in respect of the applicant and her daughter. This letter is headed "Application to revoke the applicant's deportation orders pursuant to the s.3 (11)". The letter continues to identify that the applicant has four children, that her daughter B.M.A. (date of birth 14th March 2008) was born in the State. Her address was given as a named address in Oranmore, Co Galway. A substantial amount of detail is given in this letter including the family and domestic circumstances particularly of BMA including the length of time in the State and included reference letters. There are also details of the fears that the applicants have in relation to the issues arising in Nigeria in particular in relation to children and women and there are also some legal points made by the letter.

10. Mr O'Mahony states that receipt of that application was acknowledged by letter of the 24th October 2014 from the Repatriation Unit and on the 28th October 2014 the Repatriation Unit of the Department of Justice and Equality wrote to the applicant's solicitors in response to their letter of the 23rd October 2014. This letter pointed out that the applicant had failed to present with the GNIB (Garda National Immigration Bureau) since 2009 and as a result was classed as evading deportation and was liable to arrest. This letter is exhibited in the affidavit of Brian Burns, Solicitor on behalf of the applicant and it states that:-

Re: Your Client, Kahinde Rebecca Ashade

Dear Sir/Madam,

I am directed by the Minister for Justice to acknowledge receipt of your correspondence dated the 23rd October 2014 in relation to the above named client.

As you are aware your client has failed to present with the Garda National Immigration Bureau since the 8th December 2009 as requested. She is therefore classified as an evader and is liable to arrest. Please advise your client to present to the Garda National Immigration Bureau within 5 working days in order for us to consider your request to the Minister to use her discretion pursuant to s. 3(11) of the Immigration Act 1999 (as amended) to revoke the deportation order. Please note that the request will not be considered until your client presents to the Garda National Immigration Bureau.

We are unable to provide your client with an undertaking in this case. Please be advised that your request is non-suspensive of the deportation order made in respect of your client.

The enforcement of the deportation order remains an operational matter for the Garda National Immigration Bureau (GNIB). Please direct any further queries you may have to them.

11. What is interesting is that there is no mention of Ms Ashade's daughter in this letter and it appears to me that the Repatriation Unit clearly overlooked the fact that her daughter was someone who had a vested interest in this correspondence.

12. The second point of interest is that the letter suggests that the request to the Minister to use her discretion pursuant to s.3 (11) of the Immigration Act 1999 to revoke the deportation order will not be considered until Ms Ashade presents to the GNIB.

13. On the 20th November 2014 the applicant reported to the Offices of the Garda National Immigration Bureau. As the letter only specified that she report and as her daughter had to attend school she went alone. The applicant was arrested and detained at the Dochas Centre.

14. The affidavit of Detective Garda Eamonn Moran states that he was on duty at the GNIB's Offices and was working with the GNIB's Arrangements Unit which deals with persons who are subject to deportation orders and are required to present to GNIB for the purposes of making arrangements for their deportation from the State. He states:-

"It helps the GNIB to keep abreast of the current circumstances of the persons presenting at any given time, as they may be relevant to the practicality of their deportation from the State. "

15. He was contacted by the official with the Arrangements Unit in GNIB that the applicant had presented herself to that official. The official's identity is not known. The official told Detective Garda Moran that the applicant had evaded deportation since 2009 and that he (the official) had checked with the Department of Justice and Equality and learned there was no impediment to the enforcement of her deportation.

16. Detective Garda Moran then went down to interview the applicant so as to obtain information from her about her background and her current circumstances. He asked why she had come to the GNIB at this juncture. She had explained to him that she had been on her own for the past five or six years and that she needed to obtain medical attention for her daughter. She had contacted a local TD and he advised her to make contact with the immigration authorities. As part of the interview Detective Garda Moran sought to elicit information about her daughter, where she was attending school and who was looking after her. He further stated that he brought the matter to the attention of his superior officer Detective Inspector Tallon of the GNIB before deciding what to do. Following that conversation he decided to arrest the applicant under s. 5 (1) (a) of the Immigration Act 1999 (as amended) and brought her to the Dochas Centre.

17. Extensive written submissions were provided to the court by the applicant and the respondent. The submissions on behalf of the applicant sought to rely on the rules of constitutional justice under the Irish Constitution and in particular Article 40.4.3° of the Constitution and Article 41 of the Constitution. Reliance was also placed on breach of the applicant's rights under Article 5 and Article 8 of the European Convention on Human Rights (E.C.H.R.)

18. Counsel on behalf of the respondent dealt with the entitlement of the Minister for Justice and Equality to ask the applicant to

present to the GNIB before her request for revocation will be considered. The submission also dealt with the legality of the applicant's detention in the light of Articles 5 and 8 of the European Convention of Human Rights.

19. It is worth noting that the task that the Minister undertakes is not affected by any secondary legislation pursuant to statutory instruments. Section 3 (11) of the Immigration Act 1999 (as amended) provides as follows:-

"The Minister may by order amend or revoke an order made under this section including an order under this subsection.
"

20. The real issue to consider is whether or not the Minister was entitled to put conditions on the applicant in circumstances where the applicant through her solicitors had made an application under s. 3 (11) of the Immigration Act 1999 (as amended) to revoke the deportation orders made under s. 3 of the Act. The Minister in this case had made her consideration of the application for revocation conditional on the applicant presenting herself to the Garda National Immigration Bureau (in circumstances where the enforcement of the deportation orders remained an operational matter for the Garda National Immigration Bureau). The Minister has a discrete role in considering whether or not to revoke a deportation under s.3 (11) of the Act. The placing of a condition which was not irrelevant to the issue to be decided by the Minister means that the Minister was acting ultra vires in the exercise of her discrete decision which she had to make under s.3 (11) of the Act.

21. In those circumstances it appears to me that the requirement made in the letter to the applicant's solicitor dated 28th October 2014 imposing that condition was unlawful, and the subsequent arrest of the applicant and detention in the Dochas Centre was also unlawful. I therefore direct that the applicant is free from the bail conditions imposed by me on the 2nd December 2014.

22. As a result of my finding I do not need to deal with the Constitutional or E.C.H.R. arguments.