

THE HIGH COURT

Record No: 2015/1437/SS

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

BETWEEN

MOUSTAFA MOHAMED ALY ABBAS

APPLICANT

-AND-

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

EX TEMPORE JUDGMENT of Ms. Justice Donnelly delivered this 25th day of September, 2015.

1. The Applicant is the subject of a Deportation Order. He unsuccessfully challenged the making of the Order by way of judicial review. He has a further outstanding judicial review of the failure of the Minister to revoke the Deportation Order. It is unnecessary to detail further the history leading up to the relevant events which begin on 8th September, 2015.

2. On 8th September, 2015, the applicant attended the offices of the Garda National Immigration Bureau ("GNIB") at Burgh Quay as he was required to report there on that date. He was arrested and subsequently detained in Store Street Garda Station. What is termed a detention order was supplied by Sergeant Doyle to the Member in Charge. That detention order is headed "An Garda Síochána, Immigration Act, 1999 (as amended) (No. 22 of 1999), Notification of Detention". The notification of detention recites that Sergeant James Doyle "[i]n exercise of the powers conferred on me by Section 5 of the Immigration Act, 1999, as amended and by the Immigration Act, 1999 (Deportation) Regulations, 2005 (S.I. No. 55 of 2005), as amended made in exercise of the powers conferred by Section 7 of the Immigration Act, 1999 (No. 22 of 1999) as amended, on (Day) Tuesday the (Date) 8/9/2015 I arrested Moustafa Ali Abbas D.O.B. 13/11/1979 and I direct that pending the making of arrangements for his removal from the State that the said Moustafa Abbas be detained in Store St. Garda Station a prescribed place of detention for the purpose of Section 5(1) of the Immigration Act, 1999 (No. 22 of 1999) as amended."

3. Sergeant Doyle indicated that the basis of such arrest and detention is "that I with reasonable cause suspect[ed] that the said person against whom a deportation order is in force: (a) has failed to comply with a provision of the order, and (b) has failed to comply with a requirement in a notice under Section 3 (3)(b)(ii)."

4. On the morning of 9th September, 2015, Detective Garda Conor Boland went to Store Street Garda Station for the purpose of "releasing [the applicant], from his detention there into my custody and escorting him to Dublin Airport for the purpose of removing him from the State." He was aware of the Deportation Order and of the failure of the applicant to comply with it. Detective Garda Boland and his colleagues from GNIB sought to bring the applicant to Dublin Airport to put him on a flight leaving the State. There is disagreement between the applicant and the Gardaí as to the nature of his resistance to the deportation but it is unnecessary to explain further. Suffice to say that the applicant resisted his deportation and that as a result of his behaviour, it was necessary to abort the attempt to remove him from the State.

5. In his affidavit, Detective Garda Boland states that a colleague went to the GNIB offices in Dublin Airport and "he returned a few minutes later with a detention order." Garda Boland says he explained to the applicant that he would be detained in Cloverhill Prison pending his removal from the State. Garda Boland states that he "handed over the detention order" to the Assistant Chief Officer at Cloverhill Prison and explained to him "that [Garda Boland] had detained Moustafa Mohamed Ali Abbas on foot of the deportation order."

6. An application for an enquiry pursuant to Article 40.4.2 of the Constitution was made on 15th September, 2015. The affidavit of the solicitor grounding the application for the enquiry exhibited a detention order under which she said her client was being detained in Cloverhill Prison. This detention order, or more properly this document entitled "Notification of Detention", is the same detention order that the Governor of Cloverhill Prison has certified in writing, pursuant to the Order of 15th September, 2015 as the grounds for the applicant's detention.

7. The detention order is in similar, but not identical terms, to the original detention order lodged in Store Street Garda Station above. It is signed by Detective Garda Boland and it reads: "In exercise of the powers conferred on me by Section 5 of the Immigration Act, 1999, as amended, and by the Immigration Act, 1999 (Deportation) Regulations, 2005 (S.I. No. 55 of 2005), as amended made in exercise of the powers conferred by Section 7 of the Immigration Act, 1999 (No. 22 of 1999) as amended, on (Day) Wednesday the (Date) 09/09/2015 I arrested Moustafa Mohamed Ali Abbas D.O.B. 13/11/1979 and I direct that pending the making of arrangements for his removal from the State that the said Moustafa Mohamed Ali Abbas be detained in Cloverhill Prison, a prescribed place of detention for the purpose of Section 5(1) of the Immigration Act, 1999 (No. 22 of 1999) as amended."

8. Detective Garda Boland indicated on that form that the basis of the arrest and detention was that he, Detective Garda Boland, "with reasonable cause suspect[ed] that the said person against whom a deportation order is in force: (a) has failed to comply with a provision of the order and (e) intends to avoid removal from the State."

9. From the affidavit of the solicitor for the applicant, it appeared that the grounds upon which the Article 40 enquiry was moved related to issues arising from the detention at Store Street Garda Station and at Dublin Airport. The High Court made an Order directing the production of the applicant before the Court and that the Governor of Cloverhill Prison certify the grounds of the applicant's detention in writing. That was made returnable to the same day. The matter was then adjourned to the 18th September, 2015 and then to be heard before me on the 21st September, 2015. On that date, counsel for the respondent objected to the matter proceeding as it now appeared that the applicant was relying on a separate issue, that is the fact that it was Detective Garda Boland

who detained him in Cloverhill Prison. After hearing both sides, I adjourned the matter to 2pm on 22nd September, 2015.

10. In her principle submission, counsel for the applicant relied upon a recent decision of Eagar J. in *Ononkwange v. The Governor of the Dóchas Centre*, delivered on 24th July, 2015. This case is under appeal and there is no written judgment available. It is agreed by both parties that Eagar J. held that when a Garda or Immigration Officer arrests a non Irish national pursuant to s. 5(1) of the Act of 1999, the arresting Garda or Immigration Officer must personally detain the non-Irish national in a prescribed place and cannot delegate the responsibility for doing so to another Garda. In that case, the original arresting Garda detained the non Irish national in a Garda Station and another Garda brought the applicant to Dóchas Prison.

11. Counsel for the applicant submits that this Court is bound by that decision. In response to the submission from the respondent that the decision was given without consideration of, and contrary to, relevant authorities, she submits that authorities were opened and that the decision is correct.

12. In reliance on the Supreme Court decision of *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, and while acknowledging that a different provision of the section was at issue therein, counsel submits that in interpreting s. 5(1) "the court cannot adopt a flexible or purposive interpretation of a provision designed to protect personal liberty, all the more so when such an interpretation would do violence to the clear language of the Oireachtas." In her submission, the interpretation of s. 5(1) is clear: only the Garda who arrested the person may detain the person. With respect to the word "detain", while counsel may be prepared to accept that the continued physical act of detention in a prescribed place is to be carried out by a Member in Charge or a Governor, she submits that the person standing over the detention must be one and the same as the person who made the arrest. Counsel says that this interpretation flows from the reference in the section to prescribed place.

13. Section 5(1) of the Immigration Act, 1999 as amended states as follows:

"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."

14. Regulation 7 of the Immigration Act 1999 (Deportation) Regulations, 2005, relied upon by the applicant, provides as follows:

"Where an immigration officer or member of the Garda Síochána arrests a person pursuant to section 5(1) of the Act and where he or she proposes to detain the person in a prescribed place, he or she shall, in writing, inform the Member in Charge, in the case of a Garda Síochána station, or the Governor, in any other case, of the arrest and direct that the person be detained until further notice."

15. In reply, counsel for the respondent distinguishes *Kadri*. Counsel submits that *Kadri* dealt with s. 5(6) of the Act of 1999 and there is an important distinction between that subsection and subsections 5(1) and 5(2) of the said Act. Section 5(6) deals with the length of time a person may be kept in custody and directly concerns the personal liberty of a person. Section 5(1), when dealing with detention, is dealing with the procedural aspect of ensuring that effect can be given to the Deportation Order. She submits that to require that it be the same Garda who detains the person would lead to an absurd result. She submits that nothing in *Kadri* prevents the Court from placing an interpretation on s. 5(1) that permits a second Garda to carry out the detention.

16. Most importantly, counsel submits that the decision of Eagar J. is wrongly decided by virtue of previous decisions of the High Court. She accepts that this court has an unenviable task of having to decide between conflicting decisions of the court but in her submission, the correct decisions to follow are those set out in the prior written decisions.

17. The first decision relied upon by counsel for the respondent is that of Edwards J. in *Darchiashvili v. Governor of Mountjoy Women's Prison* [2011] IEHC 264. In that case, Edwards J. observes that detention under s. 5(1) is in a civil context and not a penal sanction. It is, therefore, amenable to a purposive interpretation under s. 5 of the Interpretation Act, 2005. Edwards J. observed "[h]owever, the Court regards the entitlement of an authorised person to transfer the physical custody of a detained person, and/or to delegate the custody of the detained person...[i]t would be absurd, having regard to the scheme of the Immigration Act 1999 as a whole, if an authorised person having initially arrested and briefly detained an intended deportee under s. 5 of the Act of 1999, and who was desirous that that person should be further detained in a prescribed place, but not being himself or herself in charge of the prescribed place, could not hand over the detained person to the person who is in fact in charge of the prescribed place."

18. *Darchiashvili* was delivered prior to the Supreme Court decision in *Kadri*. However, it represents a High Court decision to the effect that the delegation of certain functions is permissible.

19. Counsel for the respondent also relied upon the decision of MacEochaidh J. in *Kristo v. The Governor of Cloverhill Prison* [2013] IEHC 218. I have been informed that this decision was opened to Eagar J. but was distinguished by him. In that case, which concerned the Immigration Act, 2003, MacEochaidh J. found at para 33 that there was "...no illegality attaching to the fact that a number of different Gardaí appear to have controlled the custody of the applicant from the moment of his arrest to the moment of his delivery to the prescribed place."

20. A further issue raised by counsel for the applicant was the uncertainty in the so-called "detention order" relied upon by the respondent. As set out above, the respondent has certified that the Notification of Detention is the basis for the detention. Yet, in written and oral submissions "it is accepted on behalf of the Respondent that D/Garda Boland did not himself arrest the Applicant on 9 September 2015".

21. From the recital of the facts above, it is demonstrably clear that the Notification of Detention does not recite the true a) date of arrest, b) identity of the Garda arresting him, or c) the precise grounds upon which the arrest had actually been made. Indeed, the

Notification of Detention makes a positive assertion to the contrary, *i.e.* that another Garda has arrested him, on a particular date while holding a particular reasonable suspicion.

22. During the course of counsel for the respondent's oral submissions, the Court raised the issue of whether the so-called detention order was defective by virtue of the failure to correctly state the identity of the arresting Garda and the date of his arrest of the respondent, the latter in fact being relevant to the time period for which the respondent may be held. Counsel for the respondent relied upon the judgment of Fennelly J. in *Kadri* at para. 20 in which reliance had been placed upon the judgment of Denham C.J. in *Ejerenwa v. Governor of Cloverhill Prison* [2011] IESC 41. The argument in each of those cases differed slightly from each other. In *Kadri*, the issue was that the detention order did not show the date of expiry, whereas in *Ejerenwa* the argument was that it was necessary to show the time permitted for detention, *i.e.* eight weeks. Denham C.J. dismissed the argument in holding that the permitted period of detention is a matter of general law; it is provided for by statute; a warrant of detention is not required to make statements of law. Denham C.J. went on to say that if the order stated an eight week period, it could be defective as the eight week period will stop running in certain situations, *e.g.* litigation brought by the detained person.

23. Counsel for the respondent particularly relies upon the following statement by Denham C.J.: "*Also, any such requirement could be misleading. For example, the order in issue was made on the 2nd August, 2011. It was the second order. The first was made on the 1st August, 2011. Therefore the eight weeks did not run from the 2nd August, 2011, but from the 1st August 2011.*" Counsel submits that this passage confirms that the indication as to date is unnecessary as the time period is fixed by law and is not required to be stated on the detention order. Counsel submits that as the applicant was properly arrested and detained by Sergeant Doyle, he is in lawful custody on foot of that detention.

24. The passage referred to by counsel for the respondent must be read in the context of the facts of the case and the legal point being argued. The point I understand that the Supreme Court is making, is that if the detention order stated that he was being detained for a period of eight weeks, it could be misleading where in fact the time could be running from a date which predates the date of the warrant for detention.

25. In *Ejerenwa*, the facts were that a Garda had, pursuant to s. 5 of the Immigration Act, 2003 arrested and detained the applicant on 1st August, 2011 in a Garda Station and the next day the same Garda had detained him at Cloverhill Prison. Neither detention order specified that the Garda had arrested him. The detention orders merely recited that in the exercise of his powers under the relevant Act, the Garda directed that he be detained pending the making of arrangements for his removal from the State. The first and defining issue in the case was that the document was defective on its face. At issue was the failure to give the basis for his arrest and detention.

26. Denham C.J. held at paras. 31 - 32:

"[a] document, such as in issue here, should contain clear information on its face as to the basis of its jurisdiction. This information is required so that it be available to, for example, (a) the person in custody, such as the appellant; (b) the Governor of the Prison, or any other, who is holding a person in custody; and (c) the Court which is requested to inquire into the custody pursuant to Article 40 of the Constitution.

In this case the document of 2nd August refers only to s. 5(2)(a) of the Immigration Act, 2003...[t]hat is insufficient to show jurisdiction. The document is defective because it does not state on its face the reason for the arrest and the detention of the appellant. Section 5(2) confers on an officer or member of the Garda Síochána a power of arrest and detention of 'a person to whom this section applies.' Thus it is necessary to see what, if any, provision of s. 5(1) applied to the appellant."

27. While *Ejerenwa* dealt with the provisions of the Immigration Act 2003, the principles of law are equally applicable to arrest and detention under the Immigration Act, 1999. No issue was made before me that the reference in s. 5(2) of the Immigration Act, 2003 to a warrant of the Garda rendered the statements of law peculiar to that sub-section. In my view, that was not material to the principle of law identified by the Supreme Court. Indeed, under the Immigration Act, 1999, the Regulations provide for a form of "warrant" by way of written notice to be given to the Governor or Member in Charge. Furthermore, in *Darchiashvili*, Edwards J. identified similar legal principles applicable to the detention of a person pursuant to s. 5(1) of the Immigration Act, 1999.

28. In *Darchiashvili*, the notification of detention was, like *Ejerenwa*, silent as to the fact of the arrest pursuant to section 5(1). The notification simply made a request to detain "in the exercise of powers conferred on [the Garda] by section 5 of the Immigration Act, 1999, as amended...". In that case, the specific failure to comply with an essential precondition to the lawful exercise of the power conferred on the Garda by s. 5 of the Immigration Act, 1999 and imposed by Regulation 7 of the Regulations was raised by the applicant and she complained that the Governor had not been notified in writing of her arrest. Edwards J. observed that because the total period of deprivation of liberty was set at eight weeks, the person in charge of the prescribed place had to know if the person has spent previous time in detention and if so, how long they have been in detention up to that point.

29. Edwards J. held that "*[f]or practical purposes, that means that the person in charge of a prescribed place needs to be told, or be able to ascertain, whether the intended deportee was arrested before being presented to him or her for detention. If the person in charge of a prescribed place is duly informed of the fact of an earlier arrest he or she will, by virtue of being so informed, be prompted to ascertain from the arresting officer both the time of arrest (or arrests as the case may be), and the duration of the previous detention or detentions, and can thereby satisfy himself or herself as what portion, if any, of the theoretical maximum of eight weeks deprivation of liberty in aggregate remains during which the intended deportee might be lawfully detained.*"

30. While the facts of the present case can be distinguished in that the Governor was told (albeit incorrectly) of the arrest of the applicant, such difference does not affect the legal principle identified by Edwards J. In *Darchiashvili*, no mention of arrest had been made on the written notification of detention. On the basis of the written notice provided to him in this case, the Governor was entitled to assume that the information he was being given was correct. The purpose of requiring that written notification be given to the entity detaining a person is to demonstrate the basis of jurisdiction for that detention. Therefore, where the fact and date of an arrest had been given, there was no need for the Governor to ask further questions. The problem in this case is that the information given to the Governor was simply incorrect and was, by virtue of its contents, misleading in material particulars. It wrongly records an arrest by a particular Garda and wrongly records the date of the actual arrest upon which his detention was to be based. It does not set out in precise detail the basis for the reasonable suspicion of the original arresting Garda that grounded the arrest and detention pursuant to s. 5(1) of the Act of 1999.

31. Counsel for the respondent seeks to distinguish *Ejerenwa* in submitting that what was at issue in that case was a failure to show jurisdiction where no indication had been given as to the reasons for that applicant's arrest and detention. She points to the reasons

given in the present case and in particular to the failure to comply with the Deportation Order. She submits there can be no doubt as to why he is being detained. Jurisdiction, she submits, has been identified.

32. In my view, that is not sufficient to deal with the issue of jurisdiction. In *Ejerenwa*, the decision was based not just on the fact that the detention order did not state the immigration status of that applicant, but also that it did not state that the arresting Garda had the necessary reasonable suspicion: "*However, the defect in the Detention Order was the failure to state that the appellant had been refused permission to land and, as required by s.5(1) of the Act of 2003, that Detective Garda McGovern had 'with reasonable cause suspecte[d]' that the appellant had been 'unlawfully in the State for a continuous period of less than three months.'*" (para. 32).

33. The jurisdiction to detain a person in a prescribed place under the Immigration Act, 1999 arises where a Garda has arrested him or her on the basis of reasonable cause to suspect that he is a person against whom a deportation order is in force and that at least one of the provisions set out in s. 5(1) has been met. The fact that a particular Garda had arrested him or her, and with reasonable cause suspected that at least one of the conditions set out in s. 5(1) applied to the applicant, forms the basis for that jurisdiction. This information must be stated on the notice which the Governor receives. Regardless of whether a Garda other than the arresting Garda may lodge him in a Garda Station or Prison, or whether a Member in Charge or Governor may physically detain him in a prescribed place, the jurisdiction for such continued detention is the original arrest and detention and the identification of the statutory basis for that arrest and detention.

34. In my view therefore, even if a Member of An Garda Síochána or an Immigration Officer is entitled to delegate to another Garda the power to detain (including the power to give the written notice to the Member in Charge or the Governor of the prescribed place), it is a requirement that the detention in a prescribed place be based upon a document that on its face contains clear information as to the basis of the jurisdiction to detain. Only a document that records that on 8th September, 2015 he was arrested and detained by Sergeant Doyle who had reasonable cause to suspect that the conditions of s. 5(1) of the Immigration Act, 1999 as amended, had been met, is a document that shows the jurisdiction under which he is to be detained. Without having to decide whether the decision in *Ononkwange* is correct on the inability to delegate the power to detain, or whether the decisions in *Darchiashvili* and *Kristo* must be followed, this is a case which can be decided on the basis that the document purporting to justify the applicant's detention does not show on its face the jurisdiction relied upon to justify it.

35. The respondent accepts that the document does not record the true position. There has been no attempt to lodge with the Governor a new document containing the true position, i.e. that he was arrested and detained by Sergeant Doyle who had reasonable cause for his suspicions of the detailed breach of s. 5(1) of the Act of 1999 and therefore, it is not necessary to decide if a subsequent filing of a document showing jurisdiction on its face could have rendered the detention thereafter lawful. I would observe, however, that this is not a situation where there is an underlying court order justifying the decision to detain but where there has been a technical defect in the warrant transmitted to the prison. In the absence of a court order justifying detention, it is even more important that a document purporting to justify the deprivation of liberty accurately details the jurisdiction for that deprivation.

36. Finally, it should be noted that the evidence of Detective Garda Boland is indicative of a lack of understanding of the significance of the documentation required under Regulation 7 of the 2005 Regulations. He averred to his colleague obtaining "a detention order" in the office of GNIB at Dublin Airport. He does not state that this was a draft detention order and at no point does he state that he signed the detention order. He does not give any explanation as to why he signed it in the manner he did. He simply recites that he handed over the detention order to the Assistant Chief Officer of Cloverhill Prison and he states that he told the Assistant Chief Officer that he had detained the applicant on foot of the deportation order.

37. I note that Detective Garda Byrne also states that: "D/Garda Boland stated to the Applicant that he was now being detained on foot of the Deportation Order and that he was going to [be] detained under the Immigration Act, 1999 (as amended) at Cloverhill Prison, a prescribed place of detention." Detective Garda Byrne states that they drove to the airport terminal where he got "a new detention order" and returned and handed it to Detective Garda Boland.

38. These statements indicate that the Gardaí were of the view that he was being detained on foot of the original deportation order and not on the basis of the arrest of Sergeant Doyle. The deportation order of itself does not justify a detention in a prescribed place – it is only when the conditions of s. 5(1) of the Act of 1999 have been met, that a person may be so detained.

39. The affidavits of the Gardaí also indicate that they had no real understanding of the nature of the notification order they were to give to the Governor. A blank form does not equate to "a detention order". It only becomes a document which satisfies Regulation 7 of the Immigration Act 1999 (Deportation) Regulations, 2005 when it is duly and correctly completed. In light of the foregoing, the basis for the detention of the applicant at Cloverhill Prison was unclear to the Gardaí and in light of the inaccurate and misleading information contained in the Notification of Detention handed to the prison authorities, the basis for the detention could not have been clear to the Governor. No understanding of the basis of the jurisdiction for the detention of the applicant was evident in the minds of the Gardaí. That lack of understanding is apparent in the documentation upon which the Gardaí relied.

40. The deprivation of liberty, if to be lawful, requires a clearly demonstrable legal basis. Such demonstrable legal basis was lacking from the time when the Gardaí decided, quite legitimately, to abort the removal of the applicant from the State, and thereafter to detain him in Cloverhill Prison. This is not a criticism of the individual Gardaí. The legislative basis for what should occur where a person frustrates the carrying out of a deportation order has been identified as in need of remedy since the decision in *Kadri*. In the absence of direct statutory provision for such circumstances, it is not surprising that Gardaí may err in carrying out their duties.

41. The applicant raised a further issue that his detention on foot of the original arrest by Sergeant Doyle ended with his transfer by the Member in Charge of Store Street Garda Station into the custody of Detective Garda Boland. In light of the conclusions I have reached, it is unnecessary to deal with this ground.

42. In the circumstances set out above, where the document certified as justifying his detention does not show jurisdiction on its face, I am not satisfied that he is being detained in accordance with the law and I therefore Order his release pursuant to Article 40.4.2 of the Constitution.