

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 546

RECORD NO: 2020/1004/JR

BETWEEN:

CHAIN WEN WEI

APPLICANT

AND

**THE MINISTER FOR JUSTICE AND
THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

RESPONDENTS

AND

**THE HIGH COURT
JUDICIAL REVIEW**

RECORD NO: 2020/1003/JR

BETWEEN:

TANG TING TANG

APPLICANT

AND

**THE MINISTER FOR JUSTICE AND
THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

RESPONDENTS

JUDGMENT of Ms Justice Tara Burns delivered on the 20 July, 2021

The Facts

1. This judgment relates to a motion brought by the Applicants seeking directions, or such order as the Court deems necessary, to enforce the terms of an undertaking given by the Respondents, through Counsel, to this Court on Friday 26 March 2021, and to compel the Second Respondent to comply with the said undertaking, to include, if necessary an order for the attachment and committal of the Second Respondent and/or Detective Garda O'Mahony and/or Detective Garda Nagle for failure to comply with the said undertaking.
2. The application arises in quite shocking circumstances which the Court has been informed are very unusual. The Court can only hope that that is the case and that events of this nature are an aberration in terms of how An Garda Siochana conduct their business. What occurred in this case should not occur again.
3. On 23 March 2021, this Court delivered an electronic judgment in both of the above entitled proceedings, holding against the Applicants and refusing the reliefs sought by them.
4. In very brief summary, the Applicants are Malaysian nationals, who sought to enter the State on 12 December 2020 to undertake an English Language course commencing on 4 January 2021. They were refused permission to land pursuant to s. 4 of the Immigration Act 2004 by Detective Garda O'Mahony and Detective Garda Nagle because these courses would be conducted online in light of COVID 19 restrictions. The Immigration Regime for Full Time Non-EEA Students Scheme does not permit a student to come to Ireland to undertake a distance learning course. This Court held that the refusal of permission to

land was lawful. In light of that ruling, the Applicants did not have permission to be within the State.

5. On 13 December 2020, the Applicants obtained a stay from the High Court on the notifications of refusal of leave to land. This stay was continued from time to time until the hearing of the actions on 9 and 10 March 2020. The hearing on 9 March 2020 was a physical hearing in light of the cross examination which had been directed by the Court of Detective Garda Nagle and Ms Ting. Both Detective Garda Nagle and Detective Garda O'Mahony were present for that hearing. However, matters were resumed remotely on 10 March for the purpose of concluding legal argument in the case. Detective Garda O'Mahony has stated in evidence that he was not present for the remote hearing on 10 March. At the conclusion of the hearing, the Court indicated that it was reserving judgment in relation to the matter. Counsel for the Applicants requested that the stay which was in being on the notifications of refusal of leave to land be extended until the date of the judgment and for a further seven-day period thereafter. Counsel for the Respondents took instructions in relation to the matter and indicated that the Respondent would continue the operation of stay for this period.
6. As already indicated, the Court delivered judgment electronically on 23 March 2020.
7. On Friday 26 March 2020, the solicitor acting on behalf of the Applicants organised that these matters be listed before the Court for the purpose of bringing to the Court's attention that they wished to move an application seeking a certification of an appeal in both matters. A date for the hearing of that application was set for 5 May 2021. Counsel for the Applicants requested that an undertaking be given by the Respondents not to take steps against the Applicants in light of the proposed certification application. Counsel for the Respondents, having taken instructions, was in a position to give that undertaking to 5 May.
8. On Saturday 27 March 2020, Detective Garda O'Mahony accompanied by Detective Garda Nagle went to the address which they had been notified of as the location where Ms Wei was staying. They met Ms Wei on the street in the company of her cousin and her husband, having made enquiries about her whereabouts. In very brief summary, Detective Garda O'Mahony enquired as to what Ms Wei's intentions were in light of the outcome of the court case. Ms Wei's cousin informed Detective Garda O'Mahony that Ms Wei was appealing. Ms Wei was informed that if she did not leave the jurisdiction voluntarily she could be arrested, detained and deported. She was told that the guards would revisit her at the end of the following week to see what her position was; that she should not have gone to court; and that her solicitor was just interested in money.
9. Ms Wei immediately informed her solicitor what had occurred. A letter was written to the Chief State Solicitor's Office the following day (28 March) setting out what had occurred and calling for confirmation that the undertakings which had been given in Court would be complied with and that there would be no contact with Ms Ting or any further contact with Ms Wei.

10. Later, on the evening of 28 March, Detective Garda O'Mahony and another garda attended at Ms Ting's house. She was told by Detective Garda O'Mahony that she was illegal and had to leave the State; that she had wasted government money and that she should not waste any further money on solicitors. She was asked how she was going to pay for the case and whether her aunt, who resides in this jurisdiction, was going to pay.
11. The motion presently being considered by the Court, grounded on an affidavit of the Applicants' solicitor, was moved before a duty judge of the High Court on 29 March and thereupon was adjourned to this Court to the 12 April. When the matter came before this Court, criticism was made of the Applicants continuing with the contempt motion as a written undertaking had been given on behalf of the Second Respondent that there would be no further interaction with the Applicants.
12. The Court listed the contempt motion for hearing. Before the motion came on for hearing, Detective Garda O'Mahony swore an affidavit which placed a different tone on the conversation which he had with Ms Wei in relation to her potential deportation, although a factual dispute regarding this aspect of the conversation did not particularly emerge. No reference was made in Detective Garda O'Mahony's affidavit regarding what he was asserted to have said in relation to the Applicants' solicitors.
13. On the morning of the hearing of this motion, further affidavits were filed in the matter by Ms Wei and Ms Ting, setting out their recollection of events. A transcript of an audio recording of the conversation between Ms Wei and Detective Garda O'Mahony was exhibited in Ms Wei's affidavit. It transpired that Ms Wei had recorded what had passed between the parties on her telephone unbeknownst to Detective Garda O'Mahony. This conversation lasted for sixteen minutes rather than five minutes, as had been averred by Detective Garda O'Mahony. In light of the new affidavit evidence, the motion was adjourned to allow consideration of it.
14. At the resumption of the motion hearing, a discussion ensued between the Court and Counsel with respect to the admissibility of the audio recording and privacy issues arising. Having considered the issue, the Applicants did not seek to have the audio recording admitted into evidence.
15. Detective Garda O'Mahony was cross examined by Counsel for the Applicants and accepted that he had said "if the girls don't leave then we'll have to deport them and then there will be a bad record" and that he had said "we might have to arrest her, imprison her and deport her if a deportation order was to be issued in the case". He agreed that he gave her until the following Friday to decide what she was going to do: if she was not going to leave voluntarily, he would make an application for a deportation order. He also accepted that he said that if she was in Malaysia, she would be in prison now. Detective O'Mahony indicated that he was unaware of any appeal being lodged to the courts. He accepted that Ms Wei's cousin mentioned to him that there was going to be an appeal. Ms Wei has averred that Detective Garda O'Mahony's response to this information from her cousin was that "it was fine if [she] was appealing but that [she] was getting a deportation order." Detective Garda O'Mahony stated in evidence that he instead said

“that’s fine, if you appeal obviously that’s a matter for the courts to decide going forward.” Ms Wei has not been cross examined on her affidavit in this regard, although she was available for cross examination. An acknowledgement was made by Counsel for the Respondents of the veracity of Ms Wei’s account of the interaction between herself and Detective Garda O’Mahony. Accordingly, I accept her affidavit evidence in this regard.

16. Detective Garda O’Mahony accepted in evidence that he said to Ms Wei that she should not have gone to court; that money had been wasted on solicitors and barrister; that solicitors were only interested in money; that the tax man was paying for the solicitor and that that is going to come to a stop. Detective Garda O’Mahony indicated that he “meant no slight to anybody”, that his actions were “maybe a foolish attempt on my behalf to exert some leverage to bring this matter to an end.... I was merely trying to finalise these matters with these girls because I was of the belief that the court had finished... and I was just trying to finalise the whole incident.”
17. Mr Paul Maguire was also cross examined on behalf of the Applicants. His evidence revealed very significant deficiencies with respect to the notification of the continuation of the stay on 10 March and the undertaking given on 26 March. It transpired that he was unaware of the continuation of the stay on 10 March, accordingly, this had not been brought to anybody’s attention within An Garda Siochana. With respect to the undertaking of 26 March, he emailed a general GNIB email address at 17.52 on the 26 March with notification of the undertaking. This was the appropriate single address to be notified according to protocol.
18. Detective Garda O’Mahony gave evidence that he was unaware of the continuation of the stay for seven days after the delivery of the judgment. The Court accepts that this must have been the case as the evidence establishes that nobody was notified of this. In relation to the undertaking of 26 March, he gave evidence that he only became aware that the Applicants were desirous of appealing the Court’s decision on Tuesday 30 March; therefore he was unaware that any undertaking having been given on 26 March. In light of the evidence before the Court, Counsel for the Applicant made the concession that Detective Garda O’Mahony was not aware of either the continuation of the stay or the giving of the undertaking.
19. Having concluded the evidence in the matter, the matter was adjourned for legal argument. At the recommencement of the hearing, the Second Respondent made an application for an adjournment and release of the DAR recording to the Second Respondent. This was a most unusual application in light of the fact that the Second Respondent was fully represented before the Court. The Court acceded to both applications, noting that the application was most unusual. The Court also sought confirmation that an issue did not arise with respect to the representation of Detective Garda O’Mahony before the Court.
20. On the adjourned date, another legal team indicated that they were present on behalf of Detective Garda O’Mahony, however after discussions took place between Counsel, there

was no change of representation before the Court. On this occasion, a statement was read into the record on behalf of the Second Respondent which indicated that "the facts relating to this matter will be reviewed from a policy and lessons learned perspective to ensure that the necessary mitigants are put in place to reduce the risk of any reoccurrence of this type." The Statement went on to specifically address the Court in relation to the comments made by Detective Garda Nagle in relation to taking legal advice and bringing Court proceedings. The Second Respondent indicated that "An Garda Siochana fully recognises the fundamental right of any individual to take legal advice as necessary and to bring court proceedings on foot of same". He acknowledged that any comments which were contrary to this position were inappropriate. He withdrew these comments and apologised to the Court on behalf of An Garda Siochana. It is very surprising that the Second Respondent did not take this opportunity to also apologise to the Applicants in this case and the Applicants' solicitors who were the subject of these comments.

Civil Contempt for breach of the undertaking and continuation of the stay by Detective Garda O'Mahony and Detective Garda Nagle

21. Counsel for the Applicants accepted that the evidence did not established that Detective Garda O'Mahony and Detective Garda Nagle knew of undertaking given on 26 March or the continuation of the stay on 10 March. However, it was asserted that they were put on notice of the existence of an appeal by the utterances of Ms Wei's cousin.
22. The height of the evidence in this regard is that the guards were put on notice that Ms Wei wanted to appeal. That does not mean that an appeal had in fact been lodged or more importantly that an undertaking had been given not to take steps against the Applicants. Accordingly, as the evidence does not establish that the Detective Guards had any notice that there was a prohibition on taking steps against the Applicant, it cannot be established that they possessed an intention to defy the undertaking or the stay. A contempt of court has not been established on these grounds.

Civil Contempt for breach of the undertaking and continuation of the stay on the part of the Second Respondent

23. Civil contempt of court has been alleged on the part of the Second Respondent on the basis that the appropriate division of An Garda Siochana, according to protocol, were notified of the undertaking of 26 March and yet took no action whatsoever to ensure that it would be complied with.
24. This is a matter of grave concern to the Court. Nobody was made aware of the continuation of the stay for seven days and the notification of the undertaking was completely ineffective. The giving of such undertakings in the Asylum List is extremely frequent. The concept that such undertakings could be treated in such a haphazard and nonchalant manner undermines the general working of the list and the acceptance by the Court of such undertakings without the necessity to grant Court Orders. The giving of such undertakings assists greatly with the running of the list and saves a significant amount of Court time. It would be an extremely unfortunate state of affairs if the Court was in a position where it could no longer accept such undertakings as an effective manner in which to run its list.

25. Despite the Court's extreme surprise and disappointment with what occurred in this case, the issue of proof of intention to breach the undertaking given, or the extended stay, arises. The undertaking and stay were breached as a result of a hopelessly inadequate notification system rather than deliberate behaviour on the part of any Guard who operates under the command of the Second Respondent. Accordingly, on a strict proof basis, intention or deliberate action has not been proved in this case. If negligence was instead the test, this would have been easily established in this case.
26. Accordingly, civil contempt for breach of the undertaking and the stay as against the Second Respondent has not been made out.

Criminal Contempt for the disparaging remarks relating to the Applicants' solicitor

27. The remarks of Detective Garda O'Mahony regarding the Applicants' solicitors are shocking. It is a fundamental requirement within a democracy that all persons are entitled to legal assistance and advice. Quite alarmingly, Detective Garda O'Mahony acknowledged that he was attempting to exercise leverage on the Applicants by speaking of their solicitors in these disparaging terms. Detective Garda O'Mahony has characterised his comments as foolish: they are far more serious than that. The Court assumes that the inappropriateness of his comments have become clear to him since the bringing of this motion before the Court.
28. In light of the manner which Detective Garda O'Mahony met this issue, namely not controverting the facts asserted by Ms Moakley in the grounding affidavit relating to this motion, the Court will not proceed to consider further the issue of an asserted criminal contempt with regard to this matter. Suffice it to say that these comments were completely inappropriate and should not have been made. The Court notes the comments made by the Second Respondent in relation to this aspect of the motion and assumes that steps will be taken by him to bring home to those under his command the inappropriateness of commenting in a negative manner on the legal representatives of any person who they have an interaction with.
29. Accordingly, in light of the fact that appropriate assurances have been given that the undertakings given on 26 May will be enforced and that nothing inappropriate has since occurred, the Court will abstain from issuing directions in this matter.