APPROVED

THE HIGH COURT

IN THE MATTER OF AN APPLICATION

PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

[2024] IEHC 216

Record No. 2024 437 SS

BETWEEN/

TM

(South Africa)

Applicant

-AND-

THE GOVERNOR OF CLOVERHILL PRISON

AND THE GARDA COMMISSIONER OF AN GARDA SÍOCHÁNA

Respondents

-AND-

THE MINISTER FOR JUSTICE

Notice Party

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 25th day of March 2024

INTRODUCTION

Preliminary: ex parte application

1. On Friday 22nd March 2024 at approximately 12.30pm, an application was made on behalf of TM ("the Applicant") for an inquiry into his detention pursuant to Article 40.4.2 of the Constitution. The Applicant is a South African national and is the subject of a deportation order dated 8th February 2024 which was issued to him on 13th February 2024, and he is currently detained in Cloverhill Prison having been arrested on foot of the deportation order.

2. Eamonn Dornan BL appeared for the Applicant, and he submitted that the Applicant was in unlawful detention for, essentially, two reasons.

3. First, and the central contention on behalf of the Applicant, was that the Notice of Deportation contained in a letter dated 13th February 2024 stated that it "*required*" the Applicant "*to leave the State within 7 days of the date of this letter, if you do not do so you are at risk of arrest and detention for the purpose of enforced deportation.*" (Emphasis as per the original letter). Mr. Dornan BL submits that this requirement is an arbitrary curtailment of what he states is the Applicant's statutory right to a 28 day period in which to challenge the deportation order under section 5(oj) of the Illegal Immigrants (Trafficking) Act 2000.

4. Second, Mr. Dornan BL submits that one of the grounds of the related judicial review application, which was filed on 19th March 2024 in the Central Office of the High Court but not yet opened, is that the Applicant did not receive 'the section 50

determination' (contained in the prohibition of refoulement report) and therefore he contends that the Applicant has been denied his right to interrogate the basis on which the decision to deport him was held not to be contrary to section 50 of the International Protection Act 2015 ("IPA 2015").

5. On foot of Mr. Dornan's application, I directed that an inquiry be held into the Applicant's detention pursuant to Article 40.4.2 of the Constitution and that inquiry commenced at approximately 15:00 before me and concluded shortly after 16:35 on Friday 22nd March 2024. This judgment arises from that hearing.

6. Mr. Dornan BL had indicated that it was not necessary for the Applicant to be brought to court for the inquiry.

THE INQUIRY

7. Alexander Caffrey BL appeared for the Respondents and the Notice Party on the return of the Article 40.4.2 inquiry.

Detention

8. Mr. Caffrey BL produced a Certificate in writing signed by the Assistant Governor of Cloverhill Prison, Stephen Nolan, dated 22nd March 2024, in which the Assistant Governor certified that the Applicant was being held in custody in Cloverhill Prison pursuant to a Warrant of Detention dated 8th March 2024 which was exhibited to the Certificate. The Warrant of Detention (which had been referred to by Mr. Dornan BL earlier when moving his initial *ex parte* application) stated as follows:

"*An Garda Síochána*

Immigration Act, 1999 as amended

WARRANT OF DETENTION

To: The Governor of Cloverhill Prison…

In exercise of the powers conferred on me under Section 5 of the Immigration Act, 1999 as amended, and under the Immigration Act, 1999 (Deportation) Regulations, 2005 (S.I. No. 55 of 2005), as amended,

on…Friday 8th March, 2024, I arrested one

[Applicant's Name] with a date of birth [Date of Birth Given]

And I direct that pending the completion of arrangements for that person's removal from the State that they be detained in Cloverhill Prison, which is a prescribed place of detention for the purposes of Section 5(3) of the Immigration Act, 1999 (No.22 of 1999) as amended, in the custody of such officer of the Minister or member of the Garda Síochána for the time being in charge of the place.

The basis for such arrest and detention is that I with reasonable cause, suspect that the said person against whom a deportation order is in force:

(a) has failed to leave the State within the time specified in the order…

(e) intends to avoid removal in the State

In accordance with Section 5 of the Immigration Act 1999, as amended, the said person may be detained until such time as they are

removed from the State, but in any event shall not be detained under this section for a period or periods exceeding 8 weeks, otherwise than in accordance with the terms of that section.

Previous to today, the subject of this warrant has spent 0[1] *days in detention on the deportation order.*

Signed: Joseph Gavin *Rank: Detective Garda*

AUTHORISED PERSON

MEMBER OF AN GARDA SÍOCHÁNA

AN GARDA SÍOCHÁNA
GARDA NATIONAL IMMIGRATION BUREAU
08 MAR 2024
DETECTIVE SERGEANTS OFFICE
13/14 BURGH QUAY
DUBLIN 2

Executed within order by lodging the person of

[1] Zero.

[Applicant's Name]

D.O.B [Applicant's date of Birth] On 08th March 2024 At 21:14.

am/pm

In Cloverhill Prison (Prescribed Place of Detention)

Signed: Joseph Gavin *Rank: Detective Garda*

AUTHORISED PERSON

MEMBER OF AN GARDA SÍOCHÁNA".

9. On this Article 40.4 application, Mr. Dornan BL does not take issue with the fact of the detention of the Applicant by the Assistant Governor, insofar as he says that the Governor cannot look behind the basis of the Warrant of Detention dated 8th March 2024.

10. On behalf of the Applicant, issue is taken with that part of the Warrant of Detention which states that "*the basis for such arrest and detention is that I with reasonable cause, suspect that the said person against whom a deportation order is in force … (a) has failed to leave the State within the time specified in the order*". The Applicant's contention, therefore, is that insofar as the Notice of Deportation dated 13th February 2024 "*required*" the Applicant to leave the State within 7 days of the date of the letter – *i.e.*, within 7 days of 13th February 2024 and that if he failed to do so, he was at the risk of arrest and detention for the purpose of enforced deportation – this requirement, it is submitted, is an arbitrary curtailment of what is stated to be the Applicant's statutory right to 28 days in which to challenge the deportation order under section 5(oj) of the Illegal Immigrants (Trafficking) Act 2000.

11. For the following reasons, I do not agree that the Applicant's detention is unlawful.

12. First, the letter of notification of the deportation order dated 13th February 2024 (the "section 51" notice), which was sent to the Applicant at his last known address, accurately sets out the legal position and also sets out the relevant background and context to this Article 40 application.

13. This letter/notification was sent from Ms. Coughlan, Repatriation Division of the Department of Justice to the Applicant, at his last known address (this second issue is dealt with later in this judgment) and also to the Applicant's solicitor, Siobhán Conlon Solicitors, The Spade Centre, North King Street, Dublin 7, enclosing a copy of correspondence which was stated to have been recently issued to the Applicant, and also copied to the GNIB.

14. The letter/notification addressed *inter alia* the following matters:
    (a) the first paragraph stated that, as the Applicant was aware, his application for International Protection had not been successful – he had not been granted refugee status, subsidiary protection or permission to remain in the State (pursuant to section 47 and 49(4) of the IPA 2015);
    (b) the second paragraph stated that the Applicant was advised in correspondence dated 26th October 2023 that the Minister for Justice intended to issue a deportation order to the Applicant and that he had had the opportunity since then to confirm that he would voluntarily leave the State. The letter continued that as the Applicant had not either confirmed that he would voluntarily leave the State, or had voluntarily left the State, the Minister for Justice had made a deportation order (under section 51 of the IPA

2015) in respect of the Applicant and a copy of the deportation order dated 8th February 2024 was enclosed with the letter. That deportation order *inter alia* stated "*AND WHEREAS the provisions of section 50 (prohibition of refoulement) of the International Protection Act 2015 are complied with in the case of [the Applicant's name and variations of the Applicant's name are set out]…NOW, I, David Gilbride, on behalf of the Minister for Justice, in exercise of the powers conferred on me by subsections (1) and (2) of section 51 of the International Protection Act 2015, hereby require you the said [the Applicant's name and variations of the Applicant's name are set out] to leave the State within the period ending on the date specified in the notice given to you under subsection (3) of the said section 51 and thereafter to remain out of the State. GIVEN UNDER the Official Seal of the Minister for Justice, this 8th day of February, 2024 [signed David Gilbride] (A person authorised by the Minister for Justice to authenticate the Official Seal of the Minister)*";

(c) the third paragraph stated that in making the deportation order, the Minister was satisfied that the provisions prohibiting refoulement were complied with in the Applicant's case (per section 50 of the IPA 2015);

(d) the fourth paragraph (emphasised in bold) stated the following "***[y]ou are required to leave the State <u>within 7 days of the date of this letter,</u> if you do not do so you are at risk of arrest and detention for the purpose of enforced deportation.***" (Per section 5(1) of the Immigration Act 1999 (as amended));

(e) the fifth paragraph stated that if such circumstances arose, *i.e.*, that the Applicant did not leave the State within 7 days of 13th February 2024, enforced deportation would be carried out when satisfactory documentation had been organised, and arrangements had been put in place to effect the Applicant's removal from the State. The letter added at this point:

"*This will not affect your right to bring a legal challenge against the deportation order or your right of access to the courts.*"

(f) the sixth paragraph stated that for an enforced deportation, the Applicant was required to co-operate in any way necessary to enable a member of An Garda Síochána or Immigration Officer to obtain a travel document, passport, travel ticket or other document required for the purpose of such removal and that the Applicant would also be required to produce any travel documents, passports, travel tickets or other documentation in the Applicant's possession which may facilitate his removal from the State;

(g) the seventh paragraph stated that in the event of an enforced deportation, it was an offence to obstruct or hinder a person authorised by the Minister in effecting the Applicant's removal from the State (pursuant to section 8(2) of the Immigration Act 1999 (as amended);

(h) the eighth paragraph stated that the enforcement of the Minister's deportation order was a matter for the Garda National Immigration Bureau ("GNIB") and any queries regarding its enforcement should be directed in writing to the GNIB at 13/14 Burgh Quay, Dublin 2;

(i) the ninth paragraph stated that if the Applicant considered that his personal circumstances had changed to such an extent as to warrant a review by the Minister of the deportation order in his case, it was open to the Applicant to make submissions to the Minister (under section 3(11) of the Immigration Act 1999);

(j) finally, the last paragraph stated that if the Applicant did not understand any part of the letter dated 13th February 2024, it was recommended that he seek the assistance of a trusted advocate or legal advisor.

15. The Affidavit of the Applicant's solicitor, Siobhán Conlon, sworn on 22nd March 2024, for the purposes of exhibiting documentation in relation to this Article 40 application, states that the Applicant was issued with the deportation order on 14th February 2024 and adds that this was not accompanied by the report/determination dealing with the prohibition of refoulement under section 50 of the IPA 2015 (this is addressed later in this judgment).

16. Second, Ms. Conlon's Affidavit also refers to and exhibits judicial review proceedings, which were filed and date stamped from the Central Office of the High Court dated 19th March 2024 under *Record No. 2024/386 JR* which have been brought by the Applicant entitled *[The Name of the Applicant] v The Minister for Justice, The Commissioner of An Garda Síochána (Respondents) and the Governor of Clover Hill Prison (Notice Party)*. I was informed that the judicial review proceedings have not yet been opened and moved and that a date was being sought when the Legal Term resumes sometime after 8th April 2024.

17. It is noted that the reliefs and grounds sought in the intended judicial review application under *Record No. 2024/386 JR*, repeat some of the grounds set out in this application under Article 40.4.2 of the Constitution. For example, in addition to seeking orders of *certiorari* in relation to the deportation order dated 8th February 2024 and issued on 13th February 2024, mandamus in relation to the prohibition of refoulement decision under section 50 of the IPA 2015 (and in the alternative an order of certiorari of any prohibition of refoulement decision under section 50 of the IPA 2015), an order of *certiorari* in relation to the Warrant of Detention, an extension of time to challenge the deportation order and costs, the Applicant also seeks the following reliefs:

"*(5) An order under section 5(7) of the Immigration Act 1999 (as substituted by s.78 of the 2015 Act) releasing the Applicant from detention, subject to conditions the Honourable Court may deem appropriate, pending the determination of the within proceedings;*

(6) In the alternative to relief (d)(4) above, an Injunction restraining the Respondent herein, and her servants or agents, including the Garda National Immigration Bureau, from taking any further steps in relation to the execution of the Deportation Orders pending the determination of the within proceedings;

(7) A Declaration that the arrest and detention of a non-national subject to a deportation order made under s. 51 of the 2015 Act, which arrest and detention is based on s.5(1)(a) of the Immigration Act 1999 for failure to leave the State within the time specified in the order, is unlawful if effected prior to the expiration of 28 days, representing the period of time permitted for the right to an effective remedy granted by section 5 (oj) of the Illegal Immigrants (Trafficking) Act 2000 (as amended by s.79 of the 2015 Act)".

18. Third, the main contention on behalf of the Applicant that his detention is allegedly unlawful because the 7 day requirement from 13th February 2024 to leave the State curtails his right to challenge the Deportation Order within the period of 28 days incorrectly conflates two pieces of legislation and makes an incorrect assertion that if the Applicant is deported that his rights to an effective remedy are set at nought. (I should

add that I make no determination on this Article 40 application in relation to any future application for an extension of time in the judicial review proceedings and it will be a matter for the court hearing the judicial review application, in due course, to assess whether or not the time for bringing the judicial review application was Friday 15th March 2024 and in that regard whether the operative date was 28 days after 16th February 2024 (being a possible date when the Applicant was deemed served with the relevant documentation) and whether or not (a) an extension of time is required and (b) it should or should not be granted).

19. In this case, section 51(2) of the IPA 2015 provides that a deportation order shall require the person specified in the order to leave the State within such period as may be specified in the order and thereafter to remain out of the State. As referred to earlier in this judgment, the deportation order dated 8th February 2024 in exercise of the powers pursuant to section 51(1) and (2) of the IPA 2015 required the Applicant to leave the State within the period ending on the date specified in the notice given to him under section 51(3) of the IPA 2015 and thereafter to remain out of the State. That notice was the letter/notification dated 13th February 2024 from Ms. Clionadh Coughlin, the full detail of which has been set out earlier in this judgment and which included the 7 day requirement from the 13th February 2024 that the Applicant leave the State and failure to do so meant that he was at risk of arrest and detention pursuant to Section 5 of the Immigration Act, 1999 (as amended), which in fact occurred on Friday 8th March 2024 as per the Warrant of Detention.

20. Having regard to the aforesaid, I accordingly hold that the Applicant is in lawful detention.

21. Further, these matters do not curtail the provisions of section 5 of the Illegal Immigrants (Trafficking) Act 2000 (as substituted by section 34(1) of the Employment Permits (Amendment) Act 2014) and further amended by section 79 of the IPA 2015 which insofar as the deportation order under section 51 of the IPA 2015 is concerned, provides that an application for leave to apply for judicial review shall be made within the period of 28 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed.

22. Fourth, in addition to the aforementioned, similar arguments to the central point made by Mr. Dornan BL – *i.e.*, that the 7 day requirement to leave the State is an alleged arbitrary curtailment of what he states is the Applicant's statutory right to 28 days in which to challenge the deportation order under section 5(oj) of the Illegal Immigrants (Trafficking) Act 2000 (as amended and substituted) and his removal from the State – have been considered and rejected in previous applications. For example, in *JA (Cameroon) v The Governor of Cloverhill Prison* [2017] IECA 286, the Court of Appeal[2] (Hogan J.) stated the following, at paragraphs 13 and 14 of the judgment:

> "*(13) Faced with this difficulty, counsel for Mr. A contended that it was important that he secure access to justice and that his constitutional right of access to the Court might well [sic.] be*

[2] The Court of Appeal comprised Finlay Geoghegan, Peart and Hogan JJ.

jeopardised if he were not physically present in the State while his appeal was being prosecuted. She also submitted that there is a risk that the proceedings would be rendered moot if the applicant were to be deported pending his determination of the constitutional issue on this appeal.

(14) There are, I think, several answers to these concerns. First, it is not necessary that the applicant - who is represented by a solicitor and counsel - should physically remain in the jurisdiction to prosecute this appeal. Second, there are many contemporary instances of where the Supreme Court and this Court has decided important points of law in immigration cases even though the cases were technically moot by the time such appeals were heard. Both the decision in Okunade and, more recently N.H.V. v. The Minister for Justice and Equality [2017] IESC 35, [2017] 2 I.L.R.M. 105 provide examples of where the Supreme Court determined important points of immigration law even though the cases were otherwise technically moot. In P. (I.) v. The Governor of Cloverhill Prison [2016] IESC DET 145, the Supreme Court accepted an appeal in an Article 40 inquiry whilst refusing an injunction to restrain deportation of the applicant. The underlying reality is that given the shortness of the eight week detention period sanctioned by s. 5 of the 1999 Act, it is very unlikely that any challenge to the constitutionality of that legislation could finally be resolved within that statutory timeframe. This, in turn, along with the attitude taken by the Supreme Court in cases such as P. (I.), Okunade and NHV, makes the risk that the

> *courts would decline to pronounce on the merits of the substantive appeal rather unlikely, even if the appeal were otherwise to be rendered moot by reason of the applicant's release from custody*".

23. In the combined cases of *Gayle v The Governor of the Dochas Centre and Gayle v The Minister for Justice & Equality & Others* [2017] IEHC 718, this court (Humphreys J.) had granted an order directing an inquiry pursuant to Article 40 of the Constitution and had also, in related proceedings, granted *inter alia* leave to apply for judicial review. In ultimately refusing the judicial review application and holding that the applicant was in lawful custody, Humphreys J. stated as follows at paragraph 16 of the judgment:

> "*The key authority here is the Supreme Court decision in LC v Minister for Justice, Equality and Law Reform [2007] 2 I.R. 133 [2006] IESC 44. One cannot come back at the Article 40 stage and make a point that one could have made at the time the deportation order was made. Section 5 of the 2000 Act is an exclusive mechanism. The validity of a deportation order cannot be reopened because a person is subsequently arrested on foot of it and brings an Article 40 application. The clear inference I would have drawn from the timing, in any event, was that what stimulated the belated challenge to the deportation order was the applicant's arrest for the purposes of deportation. To permit a belated challenge under those circumstances would clearly undermine any orderly immigration process. That inference is reinforced by Mr. Moroney's affidavit where he avers that only after the applicant's arrest were the present advices sought and obtained. In addition, the affidavit makes clear, inferentially at*

any rate, that there was a positive decision made on behalf of the applicant not to seek judicial review of the deportation order within the limitation period."

Service

24. The second issued to be addressed is whether or not the Applicant was correctly served with the required documentation.

25. Section 5(1)(c) of the IPA 2015 provides that a notice or other document that is required or authorised by or under the IPA 2015 Act to be served on or given to a person shall be addressed to the person concerned by name, and may be so served on or given to the person by sending it by post in a prepaid registered letter, or by any other form of recorded delivery service prescribed by the Minister, addressed to the person at the address most recently furnished by him or her to the Minister under section 16(3)(c) or, in a case in which an address for service has been furnished, at that address; Section 5(1)(3) of the IPA 2015 provides that where a notice or other document referred to in section 5(1) has been sent to a person in accordance with section 5(1)(c) the notice or other document shall be deemed to have been duly served on or given to the person on the third working day after the day on which it was so sent.

26. In relation to the documentation furnished by Mr. Caffrey BL on the return to this Article 40 inquiry, I determine, for the purposes of this *habeas corpus* application, that the notification of the making of a deportation order in the letter from Clionadh Coughlan dated 13th February 2024, the Deportation Order dated 8th February 2024 and the Report of the consideration under section 50 of the IPA 2015 (prohibition of refoulement) from

Conor Hayes, International Protection Office dated 7th February, 2024 were served by registered post on the Applicant (who was named) at Airport Orchard B&B, Stockhole Lane, Cloghran, County Dublin and that this correspondence (containing the aforesaid documentation) was returned by way of An Post-Return Letter Branch (TM Meter: FP2 10258) to the Department of Justice & Equality, Chapter House, 26-30 Abbey Street, Dublin 1, D01 C7W6. Accordingly, for the purposes of this *habeas corpus* application, in accordance with section 5 of the 2015 Act, I deem service good and find that the Applicant was served with this documentation (which included the Report of the consideration under section 50 of the International Protection Act 2015 (prohibition of refoulement) from Conor Hayes, International Protection Office dated 7th February 2024). In addition, and as set out earlier, while more appropriately a matter for the judicial review application and the reliefs sought therein, it would appear that when the notification requirements of the IPA 2015 are applied to the facts of this case, it is possible that the third working day is 16th February 2024 when the aforesaid documentation is deemed to have been duly served on or given to the Applicant.

CONCLUSION

27. By way of additional observation, the process envisaged by the Supreme Court in *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19; [2000] 2 I.R. 360 is that a challenge to a deportation order be brought and determined by way of an application for judicial review. This is consistent with traditional jurisprudential axioms such as the presumption of validity of an administrative decision (in this case, a deportation order) and the rule against collateral challenge.

28. In this regard, in joint cases *MA (Pakistan) v The Governor of Cloverhill Prison and MA (Pakistan) v The Minister for Justice* [2018] IEHC 95, Humphreys J., for example, observed at paragraphs 70 and 71 of the judgment that "*[b]y making an Article 40 application, an applicant does not restart the clock and set at nought all previous decisions. The Supreme Court decision in In Re Illegal Immigrants (Trafficking) Bill 1999 [2000] IESC 19 [2000] 2 I.R. 360 establishes that s. 5 is an exclusive procedure to challenge a deportation order or any other decision subject to section 5. Likewise, any administrative decision subject to O. 84 should be challenged in that way. It is not open to an applicant to challenge a deportation order in an Article 40 inquiry. He or she must apply for judicial review. Where, as here, a deportation order is unsuccessfully challenged because I am rejecting the judicial review, the Article 40 application is going nowhere. If likewise, a deportation order is not challenged either in time or at all, or is unsuccessfully challenged, it cannot be challenged in an Article 40 proceeding. It is not open to an applicant to simply wheel into court to impugn a deportation order or any immigration decision, simply because he or she gets arrested and then gets the idea of revisiting past decisions.*"

29. Similarly, Barniville J. (as he then was) in referencing *MA (Pakistan) v The Governor of Cloverhill Prison* in *Mthethwa* [2018] IEHC 342, observed at paragraph 6 of the Court's judgment that as "*the applicant is a detained person he is entitled to apply for an enquiry under Article 40.4 of the Constitution. However, he is not entitled to launch a collateral attack on the deportation order by means of the Article 40 procedure.*"

30. As this is an application under Article 40.4 of the Constitution, the sole issue for me to is to consider whether or not the Applicant is in lawful detention. I have determined for the

reasons set out above that the Applicant is in lawful detention and I therefore refuse the Applicant's application.

PROPOSED ORDER

31. The Applicant's application pursuant to Article 40.4 of the Constitution to be released from detention in Cloverhill Prison is hereby refused.