Neutral Citation No. [2011] IEHC 341

THE HIGH COURT

IN THE MATTER OF AN APPLICATION FOR

AN INQUIRY PURSUANT TO ARTICLE 40.4.2

OF THE CONSTITUTION

2011 1478 SS

BETWEEN

FRANCIS DAVID OM

APPLICANT

AND

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 1st day of August, 2011

1. This application under Article 40.4.2 of the Constitution represents in its own way a paradigmatic example of one of the fundamental difficulties facing those who are charged with administering the asylum system, namely the nearly impossibility of ascertaining accurately the true state of affairs in distant countries of which we have but little knowledge. At the heart of the present case is the question of whether the applicant, Mr. Om, is a Liberian national, yet the resolution of this factual dispute requires Gardaí, civil servants, diplomats and, to some extent, this Court, to make an assessment of whether this is or could be true.

2. The problem in the present case arises in the following way. While the applicant has consistently claimed to be a Liberian national since his arrival in the State on 14th July, 2003, when he sought asylum, his precise origins have always been a matter of doubt. In its decision of 7th April, 2004, rejecting the asylum claim on credibility grounds, the Refugee Applications Commissioner concluded that he showed a "distinct lack of knowledge of Liberian history and geography". The Refugee Appeals Tribunal took a similar view in its decision of 26th March, 2007, when the Tribunal member stated:-

> "While the applicant has some knowledge of Liberia, his account is not consistent with someone who claims to have lived all his life in Liberia and to have worked in Liberia for some time and these discrepancies serve to undermine the credibility of his account.

3. Following the rejection of the asylum application, Mr. Om made an application for subsidiary protection which was refused on 27th March, 2009. The Minister for Justice, Equality and Law Reform made a deportation order on 5th March, 2009, and an application to revoke that order was also rejected on 16th November, 2009. It is worth noting that all these decisions nevertheless proceeded on the assumption that the applicant was Liberian. From that point the applicant was required regularly to report to the offices of the Garda National Immigration Bureau ("GNIB") which he has done for over two years.

4. The events giving rise to the present application really commenced on 18th July, 2011, when an official from the Liberian Embassy in London, Mr. Morris Barsee, travelled to the GNIB offices in Dublin with a view to assisting them with the interviewing of Liberian nationals who were the subject of deportation orders in this State. On that day Mr. Om attended at GNIB and was subsequently introduced to Mr. Barsee. The latter interviewed him for the best part of thirty minutes, in part it seems by reference to a pre-printed questionnaire. Mr. Barsee concluded that, based on what were said to be basic errors in relation to the history, geography and languages of Liberia, Mr. Om was not Liberian and the Embassy was not, accordingly, prepared to issue a travel document for him.

5. Detective Garda Fallon of GNIB then went to speak with the applicant in the company of Detective Garda Boland. They put it to Mr. Om that he could not be Liberian in view of the assessment conducted by Mr. Barsee and that any Liberian national would be expected to have an elementary knowledge of Liberian geography, history and politics. The applicant nonetheless insisted that he was Liberian.

6. At that point the Gardaí informed Mr. Om that they believed that he was frustrating the attempts of the GNIB to progress his deportation from the State by stating that he was not Liberian when he was not. As no new information was forthcoming from the applicant, he was arrested by Detective Garda O'Honrahan pursuant to s. 5(1) of the Immigration Act 1999 ("the 1999 Act")(as amended) on the basis that his actions constituted an attempt to avoid removal from the State. As Detective Garda Fallon put it in his affidavit, he was "satisfied that the applicant was not Liberian and [that he] had been given a genuine opportunity to prove or disprove same". The arrest took place at 3.40pm on 18th July, 2011, and the applicant was brought to Cloverhill Prison where, as evidenced by the notification of detention form, he was detained at 4.30pm later that day.

7. Following an application in that behalf to this Court on 21st July, 2011, I directed that an inquiry into the legality of the applicant's detention under Article 40.4.2 of the Constitution should be commenced. Shortly after the inquiry was commenced, it came to Detective Garda Fallon's attention that the applicant had previously furnished what he claimed were a Liberian identity card and a Liberian birth certificate to the immigration authorities in 2003. He then arranged to bring these papers to the Liberian Embassy in London where they were subsequently pronounced to be false documents. I will return to that issue presently.

8. There are essentially two principal legal issues which arise here. First, was the arrest of the applicant lawful? Second, assuming that it was, is the continued detention of the applicant lawful? We may consider these in turn.

Was the arrest of the applicant lawful?
9. Section 5(1) of the 1999 Act (as amended) provides that:-

> "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-
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> (a) has failed to comply with any provision of the order or
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> with the requirement in a notice under section 3(3) (b) (ii),
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> (b) intends to leave the State and enter another state without
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> lawful authority,
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> (c) has destroyed his or her identity documents or is in
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> possession of forged identity documents, or
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> (d) intends to avoid removal from the State,
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> he or she may arrest him or her without warrant and detain him or her in a prescribed place."

10. In essence, the question here is whether the Gardaí might reasonably have concluded that the applicant intended to avoid removal from the State in circumstances where they had grounds for believing that he was not a Liberian national. As the language of the 1999 Act itself makes clear ("reasonable cause"), the question of whether the suspicion was justified is itself an objective one. While this Court must always be solicitous of personal liberty and while also fully acknowledging that the reasonableness of a suspicion of this kind is fully open to review, one must equally observe that Gardaí operating in the sphere of immigration matters must be permitted to have some latitude in this regard. As Detective Garda Fallon said in evidence, officers from GNIB are daily confronted with perhaps a dizzying array of documentation from a host of different jurisdictions. Difficult judgments and decisions may have to be made in a short space of time.

11. In the present case, the Gardaí were confronted with the firm views of a senior diplomatic official in the Liberian Embassy that the applicant was not Liberian. The applicant was given an opportunity to respond, but did so in a way which the Gardaí were entitled to regard as unsatisfactory. In these circumstances, they could reasonably form the suspicion that the applicant had persistently sought to assert a false identity and, working from that premise, seek to arrest the applicant pursuant to s. 5(1)(d) of the 1999 Act.

12. In this regard, it may be recalled that in *Walshe v. Fennessy* [2005] IESC 51, [2005] 3 I.R. 51 the Supreme Court held that the Gardaí who effected the arrest of another member of the force pursuant to s. 30 of the Offences against the State Act 1939, had the requisite suspicion in circumstances where their information derived from information contained in a highly sensitive Garda intelligence document. By a parity of reasoning, it may be said that the Gardaí were entitled to act on the basis of the information supplied by Mr. Barsee, at least once the applicant was given an opportunity to respond to this development.

13. In arriving at that view, I do not overlook the argument pressed by Ms. McDonagh SC in argument to the effect that this suspicion that the applicant might seek to evade the deportation order was not a reasonable one given that the applicant had regularly attended at the GNIB offices for over two years, despite the fact that such an order had been in existence for all of this period of time. It may be noted, however, that, prior to the visit of Mr. Barsee, the Gardaí had no independent means of verifying the applicant's claims with regard to his origins.

14. I further agree that perhaps no fair inference could have been drawn in the circumstances from some of the questions asked. For example, one of the questions required Mr. Om to name "at least seven former Presidents of Liberia", with the words "at least" underlined. Mr. Om could name only two: Mr. Samuel Doe and the present incumbent, Ms. Ellen Johnson-Sirleaf (although the latter's name was mis-spelt).

15. Here Liberia's unusual history may briefly be recalled. Liberia was declared to be an independent state in 1847 having been established by former freed American slaves and other African-Americans. The Liberian founders were highly educated individuals who, while naturally affronted by the slavery and bondage of ante-bellum United States, were nevertheless deeply attracted to American and European cultural norms. The Americo-Liberians quickly established themselves as a cultural and political elite within Liberia and set up what was in essence a one party state with the True Whig Party, modelled - ironically enough - on the cultural, political and legal norms of the ante-bellum South from whence their ancestors had come.

16. Liberia's relative economic and political success had come, however, at the price of the de facto exclusion of its indigenous tribes and peoples from political power. This ended with the violent coup in 1980 organised by Samuel Doe which ended the cultural and political power of the Americo-Liberian elite. President Tolbert was killed following an attack on the presidential palace and most of his cabinet were later publicly executed.

17. Mr. Om was born in 1982 and received four years of schooling, presumably in the late 1980s and 1990s. One might have expected that if he were truly Liberian, Mr. Om would have been able to mention other past Liberian notables such as President Tubman, in much the same way as any Irish citizen might mention Collins or de Valera. Yet it might equally be said that as Mr. Om received his schooling in a context where the Americo-Liberian political heritage had recently become the object of some official disdain - perhaps even contempt - some might regard it unrealistic to expect someone of his background to be able to recall this level of detail in much the same way as, perhaps, it would be, for example, to expect Northern Irish nationalists to be able to recall the names of the Prime Ministers of Northern Ireland up to 1971.

18. I simply mention these considerations simply to show the difficulty of attempting to prove (or disprove) the issue of Mr. Om's identity and how drawing appropriate inferences from a faulty knowledge of country-specific geography, history or politics may not be always quite as straightforward as it seems. A variant of this was seen in relation to the question of the identity card. The London Embassy stated that no identity card system had issued since 1985 and that it followed that the card supplied by Mr. Om must have been false. Mr. Om stoutly maintained in evidence before me that this was not so and that identity cards were issued by the Liberian Government after that date. It has to be said that there is country of origin information emanating from the Canadian Immigration and Refugee Board put in evidence before me which tends to corroborate Mr. Om's account.

19. These considerations notwithstanding - which, if anything, simply underscore the difficult and unenviable task of the GNIB in such matters - I consider that, objectively speaking, Detective Garda O'Hanrahan had a reasonable suspicion that the applicant intended to avoid removal from the State in the light of Mr. Barsee's conclusions in the wake of the interview and Mr. Om's response thereto. It follows that the arrest pursuant to s. 5(1)(d) of the 1999 Act was a lawful one.

Is the current detention lawful?
20. The question of whether the applicant is currently in lawful detention is an altogether different matter. Section 3(1A) of the 1999 Act provides that:-

> "A person the subject of a deportation order under this section may be detained in accordance with the provisions of this Act for the purpose of ensuring his or her deportation from the State."

21. This provision was inserted by s. 10 of the Illegal Immigrants (Trafficking) Act 2000, which section was, while still in Bill form, referred to the Supreme Court by the President pursuant to Article 26 of the Constitution. Delivering the judgment of the Supreme Court in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 Keane C.J. said of this provision that:-

> "The detention, if it is to remain lawful, must be confined to the statutory purposes in accordance with the principles enunciated by Flood J. in *Gutrani v. Governor of Wheatfield Prison and Minister-for Justice* (unreported; judgment delivered 19th February, 1993). In that case, the applicant had been detained for a considerable time for the purpose of deporting him to Libya. It was argued that the Minister was not in a position to effect that deportation and that the detention was no longer lawful. Flood J. observed as follows:-
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> > 'The essence of the present application is that the Minister's power of detention under the said provisions are for the purpose of fulfilling the deportation order and not otherwise, and that such deportation must take place within a reasonable period from the time, having regard to all relevant factors and circumstances.
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> > The applicant's case is that he has been in custody in a penal establishment since August 29, 1991 to the present date. It is considered that his detention up to July 1992 was in large measure due to the processing of his claims in relation to the deportation order through the court. That being said, nearly eight months has elapsed since all litigation as to the validity of the deportation order was finally and conclusively determined by the Supreme Court.'
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> That period is more than a reasonable opportunity for the Minister to make suitable arrangements to enforce the said order to deport the said applicant to Libya."

22. Keane C.J. went on to state that in *Gutrani* Flood J. had found:-

> "....as a fact that there was no evidence before him that the Minister was in a position to provide suitable transportation to Libya in pursuance of the deportation order and that such travel arrangements were unlikely to be available to the Minister in the foreseeable future. In those circumstances, he found the continued detention unlawful. Although the principles applied by Flood J. arose under earlier legislation, the same principles would apply to any detention under the 1999 Act, whether it be pursuant to the extended grounds under this Bill, if it becomes law, or otherwise."

23. In effect, therefore, the Court upheld the constitutionality of the section on the basis of the existence of certain safeguards, one of which was the principle in *Gutrani* itself. As Keane C.J. put it ([2000] 2 I.R. 360 at 411):-

> "The court considers that in all the circumstances the safeguards which do in fact exist and which will be outlined further in this judgment are perfectly adequate to meet the requirements of the Constitution in the context of the particular form of detention relevant to this reference.....
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> Common sense suggests that there will always be cases where an immigrant who has gone through, or had an opportunity to go through, all the application and appeal procedures for asylum or for leave to remain in the country on humanitarian grounds will still attempt to evade the execution of a deportation order. Depending on the country of origin, travel arrangements may be extremely difficult to put in place and powers of detention between the making of the deportation order and in advance of the deportation itself may well be necessary in some instances.
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> As already pointed out, the principles set out by this court in *East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317 must be applied to the statutory powers of detention. It does not follow that because the section permits of detention for up to eight weeks in the aggregate, the proposed deportee may necessarily be detained for that period if circumstances change or new facts come to light which indicate that such detention is unnecessary...
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> Even though the Irish legislation contains an express time limit of eight weeks in the aggregate subject to certain extensions where proceedings are brought etc., it would still be the case that it would be an abuse of the power to detain if it was quite clear that deportation could not be carried out within the eight weeks."

24. It is perfectly clear from this decision that the detention under s. 5 must be for the purposes of effecting the deportation order and, furthermore, that it must also be evident that the deportation can actually be effected within the eight week statutory period. This was also the view of Finlay Geoghegan J. in *BFO v. Governor of Dóchas Centre* [2005] 2 I.R. 1, where she held ([2005] 2 I.R. 1 at 15-16) that the detention of an applicant pursuant to s. 5 of the 1999 Act to ensure that she would be available for deportation in the event that the Minister ultimately confirmed the pre-existing deportation order was unlawful in the absence of a "final or concluded" intention to deport.

25. There is no doubt but that the detention in the present case was for the purposes of effecting the deportation. The real question, therefore, is whether there is any likelihood that the detention can actually be effected within the remaining six weeks or so of the eight week detention period. This seems to me to be quite unlikely.

26. First, if the applicant is not Liberian, then his nationality is far from obvious. It is possible that Mr. Om hails from a neighbouring West African country such as Sierra Leone, Guinea and Côte d'Ivoire. In the course of the hearing evidence was also given that it was shortly proposed to have the applicant interviewed by an official from the Nigerian Embassy in Dublin to see if he is in truth Nigerian. The investigation of these questions will probably all take time.

27. Second, it may be recalled that the pre-existing deportation order is predicated on the assumption that Mr. Om would, in fact, be deported to Liberia. If it were established that Mr. Om was a national of another country, then it would be necessary for the Minister to consider the matter of *refoulement* afresh, since, by definition, Liberia will not be the receiving state.

28. Third, even if this were all done speedily - and I am not convinced that it can be - then the question of organising a deportation flight within the relevant time period looms large. This might well prove easier to organise in the case of some countries rather than others.

29. Since it does not seem likely that there is presently any real prospect that the applicant can or will be deported within the remaining six weeks or so of the maximum detention period, it follows that his continued detention for the remainder of this period would violate the *Gutrani* principles as applied by the Supreme Court in the *Illegal Immigrants Bill* and, for that matter, by Finlay Geoghegan J. in *BFO.*

Conclusions

30. In conclusion, therefore, I am of the view that while the applicant's original arrest by Detective Garda O'Hanrahan pursuant to s. 5(1)(d) of the 1999 Act was lawful, his current detention is not. I have reached this conclusion because it is not clear, for the reasons just stated, that there is any real prospect that this applicant's deportation can be effected to his country of origin – whatever state that may be - within the six weeks or so of what remains of the statutory time period which is permissible in respect of this detention.

31. In these circumstances I will therefore direct, pursuant to Article 40.4.2 of the Constitution, that the applicant be released with immediate effect once this Court presently adjourns.