

THE HIGH COURT

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

[2018 No. 310 S.S.]

BETWEEN

NINH THU TRANG

APPLICANT

AND

THE GOVERNOR OF THE DÓCHAS CENTRE

RESPONDENT

AND

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

[2018 No. 311 S.S.]

BETWEEN

THI PHUONG VU

APPLICANT

AND

THE GOVERNOR OF THE DÓCHAS CENTRE

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 13th day of March, 2018

1. The applicants applied *ex parte* on 6th March, 2018 for an inquiry under Article 40 of the Constitution. I directed such an inquiry in each case and certificates were produced dated 8th March, 2018. In the case of Ms. Vu, there was an error in the original certificate and I gave liberty to file a corrected version. I have heard helpful submissions from Ms. Sunniva McDonagh S.C. (with Mr. Anthony Hanrahan B.L.) for the applicants and from Mr. John P. Gallagher B.L. for the respondent.

Facts in relation to Ms. Trang

2. Ms. Trang was born in 1995. She arrived in the State on the 1st or 2nd of March, 2015, depending on which version is to be accepted. She had a permission to remain until 3rd June, 2015 as a student. On 3rd August, 2017 she was detected unlawfully working in the State. A proposal to deport was issued dated 10th October, 2017 and a deportation order made on 24th November, 2017. She was arrested on 19th February, 2018 in the context of appearing before Bray District Court having been charged with immigration-related summary offences. She failed to either leave the State by the time specified in the deportation order or present herself in accordance with the notice served with the deportation order. She claims in an unsworn statement exhibited by her solicitor "I did not know what to do with such deportation" (*sic*). She implies that she did not get a translation of the document and also said "I believe that I fully comply with" (*sic*). It seems to me Mr. Gallagher's submission in relation to that statement as set out elegantly in his written submission is well-founded in that he contends that "it would seem quite incredible that having received portentous correspondence of a self-evidently official kind, neither of the two applicants herein asked for or attempted even a basic translation of these letters. Ultimately, whatever the true state of their knowledge, on their own account it would seem that both applicants shrugged their shoulders and carried on, seemingly oblivious to the consequences of ignoring these significant developments. But it is respectfully submitted that this Honourable Court could equally arrive at the view that this ignorance is feigned", and that latter position seems to me much more likely in all the circumstances.

Facts in relation to Ms. Vu

3. Ms. Vu was born in 1996. She arrived in the State in 2014 apparently on a student permission, which lapsed on 20th September, 2016. Again, she was detected working unlawfully and a proposal to deport was made, and a deportation order was then made on 24th November, 2017. She again claims ignorance of the ramifications of this document having become aware of it and a similar situation applies as to the credibility of that statement. She also was arrested on 19th February, 2018.

Evidence

4. On behalf of the respondent, in relation to Ms. Trang, I have received affidavits of Mr. Tom Doyle, assistant principal in INIS and affidavits of D/Garda Deirdre Durcan of the GNIB, para. 9 of which refers to the subsisting intention to deport and of D/Garda Louise Clinton, who also refers to the subsisting intention to deport. In relation to Ms. Vu, there are affidavits of Mr. Doyle, D/Garda Clinton and D/Garda Orla Geoghegan who, at para. 9 refers to the intention to deport. On behalf of the applicants, affidavits have been sworn by their solicitor exhibits correspondence issued by that solicitor, and unexhibited correspondence has also been handed in dated 12th and 13th March, 2018.

Is there a current valid intention to deport?

5. Ms. McDonagh relies on the Court of Appeal judgment in *C.A. v. Governor of Cloverhill* [2017] IECA 46 (Unreported, Court of Appeal, 27th February, 2017), *per* Hogan J., paras. 6-7, which refers to the exceptionality of "preventative civil detention". In *J.A. v. Governor of Cloverhill (No. 2)* [2017] IEHC 610 [2017] 10 JIC 2011 (Unreported, High Court, 20th October, 2017), at paras. 17-22, I previously endeavoured to explore whether the concept of preventative detention was necessarily always applicable to immigration-based detention and I read the Supreme Court decision in *In Re Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19 [2000] 2 I.R. 360 as suggesting not.

6. The other qualification to jurisprudence on the need for a settled intention to deport is that that jurisprudence very much predates the International Protection Act 2015. Therefore the references to the need for an intention to deport within eight weeks seem to me now to be qualified by the understanding that the intention to deport must be to effect the deportation within such time as may be provided under the Immigration Act 1999, as amended by the 2015 Act, which could potentially include an extension of time beyond

the 8 weeks by virtue of the amendments made by the latter Act. However, that is not a matter directly at issue in these proceedings.

7. Ms. McDonagh submitted that because of the pending District Court proceedings which are next due before the court eight weeks from the original arrest, it could not be the case that there was a settled intention to deport within the eight week period, assuming that to be required. However the respondent's deponents averred that the criminal matters can be "*readily brought forward*" and in the absence of any cross-examination of those deponents, it seems to me that I can and indeed should accept that evidence. They also averred that the subsisting charges do not disturb the intention to deport and again I consider I should accept that evidence. Ms. McDonagh in submissions questioned the mechanics of how this would be done but it seems to me that any effective challenge to that evidence would have to be by cross-examination, which was not availed of here. In any event the mechanics have pretty much been clarified by the respondent's submission and it is reasonably clear that the proposed mechanism would be to apply to strike out the charges if that was thought necessary and appropriate. So it seems to me that the factual basis for this particular submission just simply does not exist and there is not a factual similarity to that in, for example, *O.M. v. The Governor of Cloverhill* [2011] IEHC 341 (Unreported, Hogan J., 1st August, 2011).

Whether expediting the criminal case for immigration purposes would be an interference with the criminal process

8. Ms. McDonagh relies on *Cashman v. District Judge Clifford* [1989] I.R. 121 [1990] I.L.R.M. 200, *The State (C) v. Minister for Justice* [1967] I.R. 106 and *Quinlivan v. The Governor of Portlaoise Prison* [1998] 2 I.R. 113 and submits that it would not be appropriate for immigration Gardaí to, as she puts it, "*direct*" or even request a judge of the District Court to expedite the proceedings. However, she does accept that it would not be wrong for prosecuting Gardaí to request a judge to expedite proceedings if appropriate, but she asks the question as to how the matter would come to the attention of such prosecuting Gardaí and says that if the State's position as set out in affidavit were to be given effect to, that would amount to interference with the criminal process, either by immigration Gardaí or even by the Minister. It seems to me that one first of all has to discount a certain amount of hyperbole in the submission. There is certainly no question of directing a judge to do anything nor is there any question of the Minister being involved. Enforcement of the deportation orders is an operational matter for the Gardaí.

9. Turning to the kernel of this particular submission though, the Garda Síochána is not a body corporate, but nonetheless different branches of that organisation are entitled to co-operate and co-ordinate their efforts, all under the ultimate direction of the Commissioner. Thus prosecuting members of the Garda Síochána are, in my view, clearly entitled to apply to bring forward criminal proceedings to facilitate action being taken by their colleagues to facilitate a deportation, and it is again quite clearly not unlawful if that expedition of proceedings is carried out on foot of an application by prosecuting Gardaí as a result of information or requests received from immigration Gardaí, for want of a better term. It is not an interference with the judicial process for a party to make an appropriate request to a judge nor is it necessary for the State in an Article 40 context to demonstrate that deportation within either an eight-week period or that period as extended under the 2015 Act is certain, just that there is an intention to do so and a reasonable belief that that is feasible. If this is demonstrated *prima facie*, it is then for the applicant to show that that is unlikely, in the absence of which the State will have discharged the onus of proof under Article 40 which of course lies with them.

The submission that detention should only be a last resort

10. I think that there is a distinction between the routine detention of asylum seekers or immigrants, as I referred to in *J.A. (No. 2)* at para. 26, and detention with a view to immediate deportation of a particular individual who is in breach of immigration law, which I referred to at para. 22 of that judgment, citing *Chahal v. the United Kingdom* (Application no. 22414/93, European Court of Human Rights, 15th November, 1996). The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, at p. 2 of a factsheet dated March, 2017 (CPT/Inf (2017) 3), emphasise that immigration detention should be a "*last resort*" for the purposes of art. 5 of the ECHR, which in my view means that it should not be resorted to as a routine procedure for illegal immigrants generally, but there is no basis for erecting an exceptionally high hurdle to preclude immigration detention in the case of persons who are in breach of their obligations to comply with immigration law, particularly in relation to the obligation to leave the State within the time specified in a deportation order or the accompanying notice. It seems to me that the requirements of art. 5 of the ECHR are satisfied by Irish law, as outlined in the *Trafficking Bill* case, that detention must be "*necessary*" and that there is a reasonable prospect of carrying it out within the eight week period or such period as is extended under the 2015 Act. In the present case, D/Garda Geoghegan at para. 6 of her affidavit and D/Garda Durcan at para. 6 of her affidavit referred to the detention as being necessary or in the case of D/Garda Geoghegan as arising from her fears that the applicant would not comply with the order or would evade arrest. It seems to me that in the circumstances of the case, those averments, which as I adverted to earlier are not challenged on cross-examination and which therefore can and should be accepted, are supported by a number of other facts in the case, particularly:

- (i). The illegal presence of the applicants in the State.
- (ii). Their failure to leave the State by the time specified in the deportation order.
- (iii). Their failure to present to GNIB as required by their notice accompanying the deportation order.
- (iv). The inadequate explanations for the failure to present, as set out at para. 5 of the D/Garda Durcan's affidavit in the case of Ms. Trang, and the failure to give any answer in the case of Ms. Vu, as set out at para. 5 of D/Garda Geoghegan's affidavit.
- (v). Ms. Trang's implausible claim to have reported, which was not borne out on GNIB records per para. 3 of D/Garda Durcan's affidavit.
- (vi). The failure of the applicants to produce their passports when originally requested (see D/Garda Durcan's affidavit at para. 7 and D/Garda Clinton's affidavit at para. 3).

11. The present situation where there are clearly a number of breaches of duty on the part of the applicants and therefore an entirely reasonable apprehension on the part of the Gardaí that the detention of the applicants is necessary for the purposes of the statute is not in my view contradicted by the grant of bail in the criminal matter by the District Court. That is a separate matter and the District Court is not necessarily conducting a review of the applicant's immigration history for those purposes. It seems to me that Mr. Gallagher's submission is again well founded when he eloquently states at paras. 7 and 8 of his written submissions that "*a devil's advocate could perhaps hypothesise that it was conceivable that the two applicants might have remained at their then addresses and therefore remained amenable to being located by the Gardaí at some future point in time. However it is also well within the realm of the possible if not the probable that either or both would move address and go missing for another couple of years thereby setting the previous detections at naught.*"

12. The issue then, essentially, is whether the Garda view on these matters was lawful, and in my view it was: first of all because that view is not challenged in cross-examination, and secondly because it is very much consistent with and supported by the other evidence.

Whether the applicants are entitled to remain in the State as victims of trafficking.

13. The applicant's solicitor Mr. Con Pendred wrote on 12th March, 2018 and again on 13th March, 2018 to the department and the GNIB raising this issue and expressing in the letter of 13th March, 2018 what he described as "*our concerns regarding possible human trafficking of our clients*". Certainly the concerns were phrased as those of Mr. Pendred rather than the applicants themselves and, as follows from what I have said earlier, there is in this case no affidavit as to any of the matters under discussion from the applicants themselves nor is there any positive statement, either by or on behalf of the applicants, that their human rights have been breached as such. The matter is pitched no higher than there are matters of concern. So it seems to me that the factual basis for particular complaint under this heading has not been made out; and indeed if anything the affidavit of Mr. Pendred grounding the *ex parte* application contradicts the claim now being suggested.

14. However, having said that, it is clear that the Minister's administrative arrangements in relation to victims of human trafficking require that persons who are identified as such victims may be given a sixty-day period of reflection and recovery, during which they will not be removed from the State. Now while that does not necessarily in of itself create a right to be allowed that period, it does create a situation where the Minister should not remove an applicant where the issue has been raised in at least a *prima facie* credible form without making a decision on whether to apply the administrative arrangement to the applicant. Having said that, that decision, whether it be positive or negative as far as these applicants are concerned, can presumably be made within what remains of the eight week period or certainly within that period as extended by the 2015 Act, or to put it another way there is nothing to suggest that that decision cannot be so made within the reasonably near future. The fact that the decision has not been made as of this precise moment in time does not mean that the applicants are in unlawful detention now. It cannot be assumed that the Minister will act unlawfully and indeed Mr. Gallagher accepted that I could take it that the applicants were not going to be removed from the State until a decision was made as to whether to afford them the period of reflection and recovery (that is, whether to recognise them as victims of trafficking) or not. So while the applicants can take comfort from that position, the fact that that decision has not been made as yet does not render their current detention unlawful because that decision can be made within the statutory period let alone within that period as potentially extended under the 2015 Act.

The questions posed by the applicants

15. Turning finally to the list of questions posed by the applicants in the written submissions, the position can be summarised as follows:

(i). As to whether the Minister can be said to have a concluded intention to deport, the issue rather is whether the Gardaí who are responsible for implementing the deportation order have that intention. That criterion is satisfied on the evidence in this case. Insofar as the Minister's intention is in issue, that is to be inferred from the existence of the deportation order in the absence of anything rebutting that; which does not arise here.

(ii). As to whether there is any realistic prospect of deportation within eight weeks where the applicants are currently the subject of criminal proceedings, again I would hold that there is on the evidence in this case such a realistic prospect.

(iii). The third question is given that the District Court granted bail has any evidence been presented which justifies the stated Garda belief as to the necessity for detention. In the absence of any effective challenge to the Garda belief, as well as the other evidence supporting it, I am accepting it.

(iv). As to whether any evidence has been presented which justifies the belief that Ms. Vu intends to avoid removal from the State and the Garda belief that her detention is necessary, the foregoing applies. The Garda belief has not been effectively challenged.

(v). The next question is whether the Minister has complied with the principle that detention should be used as a measure of last resort and if not does this render the detention unlawful. Again, here the belief that the detention was necessary (and therefore, equivalently, a last resort for legal purposes) has not been effectively challenged. So I am accepting the respondent's evidence.

(vi). The sixth point is whether the Minister and/or the Garda Síochána acted with sufficient urgency in seeking to arrange for the deportation of the applicants and if not does this render the detention unlawful. In relation to that, it seems to me on the evidence that no unlawfulness or failure of duty has been established.

(vii). There was a seventh point in relation to the form of the warrant but that was not pursued. I have already dealt separately with the additional point not raised in the written submissions regarding the status of the applicants as possible victims of trafficking.

Order

16. For those reasons the State has discharged the burden to demonstrate that each detention is in accordance with law, so I will dismiss the applications.