

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 78 J.R.]

BETWEEN

ZHIGANG SHAO

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 26th day of November, 2019

1. The applicant arrived in the State from China on 26th April, 2002. He was given a student permission for slightly less than three months until 23rd July, 2002. In fact, he stayed unlawfully for a further seventeen years. The applicant appears to have had an address in the IFSC area initially.
2. On 23rd September, 2009 he was stopped on Parnell Street by D/Garda Byrne who was attached to the GNIB and who observed the applicant at around 8.30 pm obstructing traffic. D/Garda Byrne says that he was able to converse with the applicant in English, although in the present proceedings the applicant has sworn an affidavit in Mandarin. The applicant gave a false name, Junyun Wang, and was asked by D/Garda Byrne to produce a passport or identity document or to provide a reasonable excuse for not being in possession of such papers. Having failed to do so, the applicant was arrested pursuant to ss. 12 and 13 of the Immigration Act 2004. D/Garda Byrne has averred that "*the name and address given to me by him following his arrest was 'Zhigang Shao' of '25 Broadmeadow, Drogheda, Co. Louth'*" and the relevant notebook is exhibited.
3. On 22nd November, 2009, the applicant failed to attend District Court No. 44 in connection with this charge and a bench warrant was issued. On 2nd November, 2009, D/Garda Byrne wrote to D/Sgt Stratford of the GNIB Evader Tracking Unit enclosing a copy of the registration details as they then stood (a document that was not exhibited by the State) and requesting the issue of a proposal to deport following non-attendance. This was passed up the system and on 10th November, 2009 D/Superintendent Tallon wrote to the Assistant Principal in the registration division seeking a notification under s 3(4).
4. On 27th November, 2009 such a proposal was sent to the applicant at "25 Broadmeadows" in Drogheda. There is no specific evidence whether there is or is not any such address, although the fact that the letter was returned marked "insufficient address" does raise an inference that is at least slightly more likely than not that there is no such precise address. The applicant avers at para. 8 of his affidavit that he lived at 25 Boyne Meadow and that he "did not knowingly give the Garda an incorrect address".
5. The relevant statutory provisions were struck down as unconstitutional in *Dokie v. DPP* [2011] IEHC 110 (Unreported, Kearns P., 20th March, 2011). As against that it might be said that the concept of doing something without reasonable excuse occurs throughout

the criminal law and is not necessarily problematic in itself, so the conclusion of unconstitutionality might on one view not be entirely self-evident, but I have not been asked to revisit that decision in this particular case.

6. Following that decision, the charges against the applicant were struck out. An examination of file took place in the Department of Justice and Equality on 7th August, 2012 and a deportation order was made on 20th February, 2013. That order was then purportedly served under cover of a notice under s. 3 of the Immigration Act 1999 at the same address in 25 Broadmeadows in Drogheda and again was returned marked "insufficient address".
7. On 21st March, 2018, the applicant married another Chinese national who was lawfully resident in the State and then applied to the Department for permission to remain in the State on foot of that marriage. On 15th November, 2018, the applicant was given a notice, again at least initially anyway, addressed to 25 Broadmeadows, requiring him to present to GNIB on 21st February, 2019. On 5th November, 2018 the applicant was written to at an address in Brunswick Court in Dublin and informed of the deportation order and also informed that he was being treated as an evader. It was noted that his correspondence (that is on foot of the marriage) would be treated as an application for revocation of the deportation order under s. 3(11) of the Immigration Act 1999.
8. The applicant's solicitors then made a request under the Freedom of Information Act 2014 for relevant documents. That was replied to on 2nd January, 2019. Certain documents were furnished; others were refused. A data protection request followed on 25th January, 2019 and on 8th February, 2019 the statement of grounds in the present proceedings was filed, the primary relief sought being certiorari of any notification under s. 3(3) of the 1999 Act including the notice dated 27th November, 2009, *certiorari* of the deportation order of 20th February, 2013 and if necessary an order extending time.
9. On 27 February, 2019 the applicant's solicitors were given a data access response which included the current registration details held by GNIB, showing the applicant's address as being in the IFSC, suggesting that the address had never been updated since his arrival in the State. The applicant didn't appear to appreciate the significance of this document initially and didn't exhibit it prior to the hearing date.
10. On 11th February, 2019, I granted leave and a stay on the deportation order and on 4th July, 2019, a commendably succinct statement of opposition was delivered, which was essentially a traverse of the statement of grounds. I have now received helpful submissions from Mr. Conor Power S.C. (with Mr. James Buckley B.L.) for the applicant and from Mr. Anthony Moore B.L. for the respondent.

Onus of proof

11. The context here is that the onus of proof is on the applicant. The conflict of evidence as to what transacted between D/Garda Byrne and the applicant has to be viewed through that spectrum. The applicant did not challenge D/Garda Byrne's evidence by seeking cross-examination and I therefore must resolve the conflict of affidavits against the

applicant, being the party carrying the onus of proof. That, incidentally, is one reason why the court should take a liberal approach to applications for cross-examination where there is a conflict of fact on a relevant issue: see *Banik v. Minister for Justice and Equality* (Unreported, High Court, 22nd October, 2019). Thus in those circumstances the evidence of D/Garda Byrne must be accepted where it differs from that of the applicant.

Time

12. Given the other issues in the case it is perhaps to be welcomed that the respondent is not making an issue of the extension of time, although if that had been an issue, some complicated questions might have arisen.

Inappropriateness of challenge to a proposal

13. It is not normally appropriate to challenge a mere proposal, particularly after an actual decision has been made. The proposal is superseded by the decision and subsumed into it. For example, supposing a proposal was sent to a wrong address and the ultimate order was then sent to a correct address. The order could be challenged on the grounds of lack of advance notice, but if an applicant does not do that and just wanders back to court years later once he gets a copy of the original proposal, it would seem to be an inappropriate procedure to allow the proposal to be challenged under those circumstances.
14. A further problem is that merely sending a document to the wrong address does not make it invalid. Such a mistake may make a subsequent step invalid but the proposal as such is not invalid merely because there is a wrong address stated in it. The time to make representations does not begin to run in the case of an improperly addressed letter until the applicant gets sufficient actual or deemed notice of it, but certiorari of a proposal is normally totally inappropriate in the absence of ultra vires or mala fides. The proposal was not ultra vires because the applicant was at all material times unlawfully present in the State following the expiry of his very ephemeral permission, nor is it alleged to be, still less shown to be, mala fides. Thus the challenge to the proposal fails in any event irrespective of my views on the challenge to the deportation order.

Challenge to the deportation order

15. Another small bright spot in the case is that there is a degree of common ground between the parties to the extent that it appears to be accepted all round that the deportation order is only valid if it was preceded by a properly served notice under s. 6 of the 1999 Act. That provision allows four methods of service, which can be summarised as follows:
 - (i). Personal delivery.
 - (ii). Recorded post to the address most recently furnished to the registration officer.
 - (iii). Recorded post to the address most recently furnished to the Refugee Applications Commissioner, now the International Protection Office.
 - (iv). In a case where an address for service has been furnished, service at such an address.

16. Common ground continues to the limited extent that it is also agreed that methods 1 and 3 do not arise in this case; but the respondent contends that service was validly effected in accordance with either method 2 or failing that, method 4.
17. As far as method 2 is concerned, the registration officer pursuant to art. 11 of the Aliens Order 1946 means, according to the amendment made by art. 6(b) of the Aliens (Amendment) Order 1975, "the officer in charge of the Aliens Registration Office" in the Dublin Metropolitan Area of the Garda Síochána or the Superintendent of the District elsewhere. In *J.A. (Pakistan) v. Minister for Justice and Equality* [2018] IEHC 343 [2018] 5 JIC 0102 (Unreported, High Court, 1st May, 2018) I articulated my understanding that the Aliens Registration Office is equivalent to the GNIB. That seems obvious although Mr. Power suggests that this perhaps requires positive evidence. But that does not arise here because the applicant was resident outside Dublin at the time of the purported service of the proposal, so the issue is whether D/Garda Byrne can be taken as having acted on behalf of the local superintendent. Mr. Power suggests that there cannot be a delegation under art. 11 of the 1946 Order, but such an interpretation would be impractical. All local immigration functions in any given Garda district cannot be carried out by the local superintendent personally, or the head of the GNIB personally in Dublin. In any properly functioning system, a notification given to a member of the GNIB must be a notification to the head of the GNIB and to any relevant superintendent where that applies. Of course too much laxity with what counts as giving notice of an address or change of address could work against the State in that it would be required to keep track of various informal communications. Some minimum formality is required but what happened here, that is responding to a demand from a member of the GNIB for an address that is then recorded for the purposes of service, surmounts that minimum threshold of formality. The Achilles' heel of Mr. Power's interesting argument is that it disregards the need for joined-up public administration. It would be unreal to say that an address given to a member of the Garda Síochána, particularly a member of the GNIB, isn't also given to that person's peers, colleagues and superiors and those with privity, such as the local superintendent. In any event, no injustice has been done to the applicant in the sense that he was served at the address he actually furnished. It is hardly appropriate to grant him relief in those circumstances.
18. However there is one matter under this heading that requires postscriptual clarification. When I originally gave judgment ex tempore I said that the address had been registered by the GNIB, which was my inference from the papers. When this matter came back before the court on 2nd December, 2019 to deal with costs, the applicant provided a further affidavit indicating that as of February, 2019, the address given to D/Garda Byrne had not in fact been registered by GNIB. This rather casts in a different light the respondent's failure to exhibit the registration details that were sent by D/Garda Byrne to D/Sgt Straftord, Evader Tracking Unit, GNIB, accompanying his minute of 2nd November, 2009 applying for a notification under s. 3(4) of the Immigration Act 1999. The minute was exhibited by the State but the attached registration details were not. The inference one might legitimately draw from the fact that the registration details remained out of date in February, 2019 is that the November, 2009 details, had they been exhibited,

would also have been out of date, and that overall the GNIB failed to update their system on foot of D/Garda Byrne's minute. That would inferentially have been evident to the court had that attachment been exhibited.

19. While I am not convinced that this would have been a winning point, because the legislation speaks of an address furnished to the registration officer rather than one registered by him or her, it would certainly have put the respondents' submissions in a less flattering light. Given the obligation for respondents in judicial reviews to "put their cards on the table", I would permit the applicant to rely on this additional affidavit, and while this development does not in my view change the result, it may arguably have implications for costs unless the respondents aver to some sort of satisfactory explanation for not disclosing this document to the court. Of course if some other forum thinks I am wrong in relation to my analysis of the question of the level of formality required for recording the applicant's address, the fact that a different address was set out in registration details at the time of service might be a highly pertinent or even dispositive factor if the case were looked at on a different legal premise. Admittedly the applicant had information as to the registration details as of a later date, but he doesn't seem to have appreciated their significance, perhaps because he didn't have the November, 2009 attachment. So this is not quite the sort of impermissible drip-feeding that caselaw precludes. Even if it was, it relates to a possible instance of sub-optimal disclosure by the State so I would be prepared to allow such an after-the-event affidavit anyway in the service of the greater good of promoting the maximum degree of candour. Consequently I will give the respondent a chance to reply on affidavit before finalising the costs issue.
20. Consideration of method 4 therefore does not arise but Mr. Moore submitted that since it could be implied that the applicant would be served and communicated with at any address given, the comments of Hogan J. in *M.M. (Georgia) v. Minister for Justice, Equality and Law Reform* [2011] IEHC 529 (Unreported, High Court, 19th September, 2011) apply and the address could be taken as impliedly an address for service. Given my conclusion in relation to method 2 I do not need to resolve that issue here.

De minimis error

21. The fact that a notice was sent to Broadmeadows rather than Broad Meadow, which is what was recorded by D/Garda Byrne, is of no significance. That is a purely de minimis variation or error: see *per O'Donnell J. in People v. Mallon* [2011] IECCA 29 [2011] 2 I.R. 544.

Order

22. Before concluding, it is possibly worth noting that the Supreme Court in *S.E. v. Minister for Justice and Equality* [2018] IESC 20 [2018] 3 I.R. 317 *per O'Donnell J.* at para. 16 and 17 noted that there might be a "lacuna" in the 1999 Act in respect of service where no address whatever was furnished by an applicant. I am not aware of any legislative action having been taken on foot of that, but the present case possibly could be used as evidence that s. 6(1) of the 1999 Act is over-complicated in other respects as well and may raise the question about whether consideration should be given to simply providing service to the last known address is sufficient, as well as providing what is to happen if no

address at all is furnished. On the mysterious question of whether the address recorded exists or not, one wonders whether, when such addresses are furnished, it might be possible to check them on the spot, for example on the Eircode system, and to avoid a situation where, as in this case, ten years later there is still uncertainty about whether the address even exists.

23. Returning then to the disposition of the present case, time is extended but the application is dismissed.

24. By way of postscript, apart from the costs context, in case the matter goes further, it might be desirable that the registration details attached to the minute of 2nd November, 2009 from D/Garda Byrne to D/Sgt Stratford of the GNIB Evader Tracking Unit should be formally part of the papers, so I am inclined subject to hearing from counsel to consider directing the respondent to now exhibit that document in any event, prior to finalisation of costs, and in addition the Department can if it wishes provide an explanation on affidavit for not having done so prior to now.