[2020] IEHC 93

**THE HIGH COURT**

**[2020 No. 179 S.S.]**

**BETWEEN**

**BAO FENG NIAN**

**APPLICANT**

**AND**

**THE GOVERNOR OF CLOVERHILL PRISON**

**RESPONDENT**

**(NO. 1)**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 10th day of February, 2020**

1. The applicant was born in China in 1983, and has resided in the State since 2013. A proposal to deport him was made in September 2019, and representations were made in response on 17th October, 2019. A deportation order appears to have been made, although has not as yet been produced. The applicant claims that neither he nor is solicitor on record at the time were notified of it.

2. The applicant was arrested on 4th February, 2020 on foot of an allegation that he failed to comply with a requirement in a notification under s. 3 of the Immigration Act 1999. On 7th February, 2020, he applied to Heslin J. for inquiry under Article 40.4.2° of the Constitution, grounded on an affidavit of his solicitor, Mr. Donal Quigley. At around 3.30 p.m. on that date, an inquiry was directed returnable for 2.00 p.m. on Monday 10th February, 2020. By around 7.00 p.m. that evening, however, the applicant was in the process of being released.

3. I am dealing now with the return to the order for an inquiry, although in fact, no certification of the lawfulness of the applicant's detention has been produced, because the applicant has been released in the meantime. There has been some dispute between the parties as to what the scope of the court's function now is, and I deal with that issue in the present judgment. In that regard, I have heard helpful submissions from Mr. Gavin Keogh B.L. for the applicant and from Mr. John P. Gallagher B.L. for the respondent.

4. Mr. Keogh asks me to inquire into the lawfulness of the applicant's detention between 4th and 7th February, 2020. He agrees that I cannot order release of the applicant because the applicant has already been released, but suggests that I could make a declaration, or at least come to conclusions as to the legality of that detention.

5. The older law used to be that remedies in a *habeas corpus* context were strictly limited and that the court could only "*reach a single decision namely whether the detention of the person concerned is or is not in accordance with law*" and in particular could not put any stay or conditions on immediate release, *per* Finlay C.J. In *Re D. (Application of Midland Health Board)* [1987] I.R. 449 at 457, in a passage that the learned Chief Justice himself acknowledged was *obiter*. Such an inflexible approach no longer applies in the sense that the court can, when necessary, adjourn or stay an order for release, in the overall interests of justice, or even attach conditions to such an order. It is fair to say that, to a degree, that jurisdiction is exceptional, but such flexibility is a marked step forward in the

overall project of the alignment of law with common sense. But whatever about staying an order for release in such exceptional circumstances, the court does not have jurisdiction under Article 40 to grant stand-alone relief like a declaration. If an applicant wants those, he or she needs to bring separate proceedings. As put by O'Donnell J. in *Michael Farrell v. Governor of St. Patrick's Institution* [2014] IESC 30, [2014] 1 I.R. 699 at para. 66(2), "*The order which the court makes at the conclusion of the inquiry is either to order the release of the person, or not.*"

6. As to the question of whether, and to what extent, I should get into the legality of the applicant's detention between 4th and 7th February, 2020, the general rule is that the court should not trouble itself with the merits of a moot action, as that would amount to giving an advisory judgment, which our system leans against: see *e.g. Sinnott v. Minister for Education* [2001] 2 IR 545 at 636 *per* Keane C.J.. There is something particularly abstract and disembodied about an advisory judgment that is not the product of a close hammering of very specific and live factual controversies. The classic saying is that "*argued law is tough law*" (*per* Megarry J. (as he then was) in *Cordell v. Second Clanfield Properties Ltd*. [1969] 2 Ch. 9, at 16). The live controversy provides a crucible in which legal propositions are really put to the test. That is certainly true, and is another reason why the abstract, advisory or moot opinion is very much the exception rather than the rule in our legal system. The fact that the applicant seems to be contemplating some form of separate civil action for damages does not constitute a reason for departing from that general principle. Admittedly, given that appellate courts will consider moot appeals if major systemic legal issues arise, even in an Article 40 context, one could not rule out entirely the possibility of exceptions to that general principle; but such an exception does not seem appropriate here. There is no developed evidential matrix, only hearsay from the applicant's solicitor. The general principle that an applicant cannot be held to have been in breach of a notification if he or she was not actually or constructively notified in accordance with the 1999 Act, is not in doubt. So, there is really no point of law at all, just the factual question (at best) as to whether such notification was effected in this particular case. There is no compelling reason to get into that fact-specific issue. Thus, the default rule applies that the court should not get into the merits of a moot case.

7. The only issue then is costs, and in that regard the jurisprudence in recent years has developed in such a way as to rule out any necessity for the court to get into the merits of a case simply to dispose of costs of a moot action. The issues in the costs context focus around questions such as whether the mootness arose from unilateral actions of one party and, if so, whether there is a causal nexus with the proceedings. The logic of this approach, therefore, is simply to strike out the proceedings and address the question of costs separately.

8. Mr. Keogh complains that the State was ordered to put in a certificate justifying the detention, but did not do so. But so what? It would not achieve anything, and would be a pointless formality, when an applicant has already been released. Mr. Gallagher very properly said that while his clients were more than happy to provide a certificate for the record, he took the responsibility for the decision not to do so as had been envisaged by

the timescale in the order for the inquiry. Such a position is in its own way courageous, but also, in my view, correct. "Wait a second", I hear you say, "how can it be correct to intentionally fail to comply with a court order?" There may be many answers to that, but the one most pertinent in this particular case is that the order was made on a particular unarticulated factual premise, namely the continued detention of the applicant as of the return date. If that unstated factual premise ceased to obtain, the stated obligation in the court order impliedly ceased to obtain as well. It is also worth adding that apart from this point, in many circumstances when a court orders a party to do something (such as file opposition papers, or a certificate justifying detention, to take two examples), there is an unarticulated rider to such an order, which is "if that party wants to". Thus while the order was expressed in mandatory terms, its meaning was not mandatory. It effectively meant that "if the respondent wishes to contest the application" he should certify the grounds of the detention. Here, there is no need to do so. That doesn't mean that the detention was unlawful, merely that it is over.

9. Thus all that remains is costs. I would have preferred to get into the costs issue forthwith, but Mr. Gallagher has now sought time to put in an affidavit on that issue.

**Order**

10. I reject the application to consider declaratory relief as being outside the jurisdiction of the court in the context of an Article 40 application. I also decline to otherwise decide on the merits of the Article 40 application on the grounds that the proceedings became moot on 7th February 2020 on the release of the applicant. Therefore, the order will be:

    (i). that the proceedings be struck out;

    (ii). for the avoidance of doubt, I will clarify that the respondent's obligation to certify the legality of the detention, impliedly ended on the applicant's release; and

    (iii). that the question of costs be adjourned for one week, with the respondent having liberty until 13th February, 2020 to deliver a further affidavit.