

THE SUPREME COURT

[S.C. No. 380 of 2005]

**Denham J.
Geoghegan J.
McCracken J.**

**In the Matter of an Application Pursuant to Article 40 of the
Constitution of Ireland
Between/**

Joseph Obinna Arisukwu

Applicant/Appellant

and

**The Minister for Justice, Equality and Law Reform,
The Commissioner of An Garda Síochána,
The Governor of Cloverhill Prison,
The Attorney General, and
Ireland**

Respondents/Respondents

Judgment delivered the 9th day of March, 2006 by Denham J.

1. Appeal

This is an appeal from a refusal of an application for *habeas corpus*. It is an appeal by Joseph Obinna Arisukwu, hereinafter referred to as ‘the applicant’, from a decision of the High Court (O’Sullivan J.), given on the 26th day of October, 2005, which held that the applicant was being detained in accordance with law.

2. Facts

The factual background was set out by the learned High Court judge and I gratefully adopt his findings.

2.1 The applicant was born in Nigeria on the 17th day of January, 1977.

2.2 On the 24th day of March, 2000, he arrived in the State, applied for asylum and utilised the entire procedure without success.

2.3 The applicant then applied for residency on the basis of his Irish-born child, which application was also unsuccessful. On the 14th day of January, 2004, the applicant was refused permission to remain in the State based on his parentage of an Irish born child, and a decision was made to affirm the deportation order dated the 23rd day of December, 2002.

2.4 On the 15th day of January, 2005, revised arrangements were announced by the authorities for processing applications for residency by non-national parents of Irish born children who were born before the 1st day of January,

2005. On the 4th day of March, 2005, the applicant applied, again, for residency on the basis of his parentage of an Irish-born child. There was some difficulty in relation to his ability to prove the parentage. The applicant submitted material supplementary to his application enclosing his son's birth certificate, on which he was not named as the father. He indicated that he had made an application to the District Court to have himself so named. There is a difficulty, which remains unresolved, about the dates upon which this material was furnished to the authorities. On the 27th day of April, 2005, the second application for residency, on the above basis, was refused. The reason given was that there was no evidence of identification, no evidence of residency continued since the birth of his child, and no evidence of his role in the bringing up of the child. On the 12th day of July, 2005, the applicant wrote including a new birth certificate, this time with his parentage recorded on it and asking for a reconsideration of the decision refusing his application dated 27th April, 2005. He received no answer to this correspondence. On the 27th day of July, 2005, he wrote again and enclosed, apparently, a letter from his landlord (which was not available in court), his own Nigerian passport, and a bank statement (which was not available in court). He also enclosed a letter showing that he had made an application to have his name on his son's birth certificate and enclosed the birth certificate. There was no response to this correspondence. On the 6th day of September, 2005, the applicant wrote again requesting a reply and received an acknowledgment of the correspondence. The acknowledging letter indicated that "non reply by us is deemed a refusal". On the 17th day of October, 2005, the applicant wrote again formally requesting that a higher officer would reconsider the refusal of his residency application and requesting an undertaking not to implement the deportation order. He got no such undertaking.

2.5 Parallel with the more recent stated developments the applicant had made application for information under the Freedom of Information Act, 1997. The information sought was not specified in court nor was the application referred to otherwise than by way of general context and background.

2.6 On the 18th day of October, 2005, the applicant was due to report for deportation and he did so. At 4.00 p.m. on that date he submitted himself for deportation and was told that he would be removed that evening. In reply he said "I'm going nowhere" and he challenged Detective Sergeant Stratford, with whom he was dealing, to arrest him.

2.7 At 4.30 p.m. judicial review proceedings were initiated in the Central Office of the High Court on behalf of the applicant.

2.8 At 5.45 p.m. the applicant was arrested and placed in handcuffs by Detective Sergeant Stratford. He was put in a jeep with the intention of being driven to the airport, together with another intended deportee from Nigeria. There was a demonstration outside the offices of the emigration

authorities. There were five in the jeep, Detective Sergeant Stratford, who was driving, a colleague in the front passenger seat, the applicant in the rear seat in the centre, his fellow intended deportee in the rear seat on the left, and a further immigration officer in the rear on the right.

3. Evidence was given in court by Detective Sergeant Stratford, who was cross-examined on behalf of the applicant. The evidence was that the applicant attacked and bit the immigration officer near him and did likewise to Detective Sergeant John Stratford. The aggression was so intense that the officers decided that they would stop at Mountjoy Garda Station to get a more suitable vehicle in which to continue their journey to the airport. As they approached Mountjoy Garda Station Detective Sergeant John Stratford said that the applicant kicked his left arm and his leg and the handle of the automatic gear shift out of the engaged position and that he momentarily lost control of the vehicle. He had lights and sirens going on the jeep since it left the offices.

4. At Mountjoy Garda Station they exchanged their vehicle for a marked van and the applicant and his fellow Nigerian were recuffed, this time with their hands behind their backs and their legs were bound with Velcro straps. The journey to the airport was then continued without further risk or danger.

5. Interim injunction

At 6.30 p.m. lawyers on behalf of the applicant applied for an interim injunction, which was granted by Abbott J.. Later, in his judgment, O'Sullivan J. stated that Abbott J. indicated that his attitude was that he could not say the applicant had no case and accordingly he was prepared to grant the interim injunction to continue until 11.00 a.m. on the following morning.

6. At 7.00 p.m. approximately the applicant arrived, with the immigration officers and his fellow Nigerian, at the airport. The deportees were detained with the intention of boarding them on a charter flight bound for Lagos. At 7.02 p.m. Detective Garda Kingston was informed of the making of the interim injunction. At around 7.20 – 7.25 p.m. Detective Sergeant Stratford, who was at the airport by this time, became aware of the making of the interim injunction and from that moment on he knew that the applicant would not be deported that evening, but would have to await the return date in court. Detective Sergeant Stratford's evidence was that the applicant had calmed down, so he had to consider whether to release him or to return him to Cloverhill Prison.

7. Decision to detain

Detective Sergeant Stratford decided to detain the applicant on the basis that the applicant intended to avoid removal from the State. Detective Sergeant Stratford gave evidence that he reached this conclusion on the basis of what the applicant had told him when he had indicated that he would be deported that evening ("I'm going nowhere"), and also on the basis of his violent behaviour in the police car on the way to the airport. Detective Sergeant

Stratford gave evidence that it was his intention to implement the deportation order but to abide by any order of the court.

8. At 7.40 p.m. the applicant arrived at Cloverhill Prison in the company of Detective Sergeant Stratford where he was handed over and Detective Sergeant Stratford completed the detention form.

9. At around 8.00 p.m. the applicant's solicitor, who had been informed that the applicant was being deported, proceeded to the airport and there informed the immigration authorities of the making of the injunction. The response he got from a Senior Garda Officer was "he (the applicant) won't be going anywhere".

10. Habeas Corpus Application

While the applicant has brought multiple court proceedings, this appeal relates solely to the *habeas corpus* application pursuant to Article 40 of the Constitution of Ireland. Article 40.4.2 provides that upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint.

At 4.00 p.m. on the 19th day of October, 2005, application was brought and a conditional order of *habeas corpus* was made, returnable to 20th day of October at 2.00 p.m., by deValera J.. At 6.00 p.m., approximately, notice of the making of this order was served on the Chief State Solicitor and on the Governor of Cloverhill Prison.

11 Charges

On the 20th day of October, 2005, at Cloverhill District Court, the applicant was charged with two offences arising out of his behaviour in the immigration van on the way to the airport.

12. High Court

At 2.00 p.m., on the 20th day of October, 2005, which was the time for the return date of the conditional order of *habeas corpus* made the previous evening under Article 40, the matter was not mentioned in court to O'Sullivan J. There may have been confusion in relation to paperwork, it appears that some document was handed to the registrar of the court. At 4.00 p.m. it was mentioned to O'Sullivan J. who made an inquiry into the circumstances and adjourned the matter for a full hearing on the following day. On the 21st day of October, 2005, at 11.00 a.m. the hearing began before O'Sullivan J. and it included a lengthy cross-examination of Detective Sergeant John Stratford.

13. In this *habeas corpus* application before the High Court the applicant made five challenges to the lawfulness of his detention.

First, notwithstanding the decision to refuse residency to the applicant on the basis of his Irish-born child, which was dated the 24th April, 2005, it was submitted that the subsequent correspondence requesting that the application be reconsidered was never dealt with and for a long time remained

unacknowledged; and that therefore the Minister could not lawfully maintain an intention to deport him.

The High Court held that the Minister had decided not once but twice to refuse the applicant's application for residency based on his parentage of an Irish-born child. The High Court referred to the subsequent correspondence on behalf of the applicant but held that the request for a reconsideration cannot have the consequence that the Minister's decision to deport becomes other than a concluded decision. On this ground the application failed.

Secondly, it was submitted that as a matter of law the Minister may not have a lawful intention to deport given the pending judicial review proceedings challenging the applicant's detention (and arrest) and given that an injunction was granted prohibiting the Minister from deporting the applicant. It was submitted that the doctrine of the separation of powers prohibits the executive from presupposing the outcome of the judicial review proceedings.

The High Court held that the Minister had the intention to deport the applicant and it rejected the submission that once an interim injunction was made that automatically the Minister could not legally thereafter continue to have an intention to deport the applicant.

Thirdly, it was submitted that arising from the separation of powers the Minister cannot validly continue to maintain an intention to deport given the existence of judicial review proceedings challenging his decision because, it was submitted, this would usurp the function of the courts. O'Sullivan J. held:

“In my view the Minister and the courts have different functions and different questions, each of them, to determine. The first respondent has to decide whether or not to deport the applicant – the court has to decide whether or not his decision is valid: these are two quite different questions. One involves a question of applying administrative policy to the specific circumstances of an individual: the other is a question of applying law to a different set of circumstances. They are not, therefore, the same question at all or the same decision so that the making and maintaining by the Minister of the one in no [way] usurps the making by the courts of the other; nor does it in any way suggest that if ordered to refrain from deportation in this case the first respondent will do other than comply with such an order: on the contrary, the evidence in the case is that the respondent maintains an

intention to deport but subject to any order of the court.”

Fourthly, a submission was made that because the detention in issue was based on a conclusion by Detective Sergeant Stratford that the applicant intended to avoid deportation it was therefore unlawful. Reference was made to the fact that the applicant presented himself voluntarily to the immigration authorities and to the lawful attempts of his solicitors to avoid his removal from the State. It was submitted that Detective Sergeant Stratford had no basis for holding that the applicant intended to avoid deportation.

The learned High Court judge pointed to the physical and violent resistance by the applicant and that when confronted by the information that he was about to be deported he had said “I’m going nowhere”. O’Sullivan J. held:

“In my view of the evidence of which there is a full transcript, Detective Sergeant Stratford had ample grounds for forming the view that the applicant intended to avoid deportation and accordingly for detaining him upon that basis as he has done.”

The learned trial judge referred also to the fact that the applicant was, prior to that time, under lawful arrest and detention because the arrest and detention had been imposed on him for the purpose of deportation.

O’Sullivan J. cited also the circumstances of the applicant’s judicial review proceedings and their initiation, that they were issued half an hour after he was due to present himself for deportation and some six months after the decision challenged.

The final point raised on behalf of the applicant was that he has a right of access to the courts which was infringed by his continuance in detention. The submission was that because judicial review proceedings challenging the applicant’s detention and arrest were in existence at the time of his arrest that therefore his detention was unlawful.

The High Court pointed out that the Act of 1999 makes specific provision for the detention of a person during the pendency of proceedings, such as the instant application: see 5 (5) of the Immigration Act, 1999. The High Court held:

“If the [Minister’s] intention to deport is lawful – and I hold that it is – then clearly it can also be lawful for the [Minister] to detain the applicant on the grounds that he intends to avoid such deportation. The question of whether or not the applicant intends to avoid such deportation is a question of fact upon which I have already made my ruling.”

The High Court was satisfied that the applicant's detention was lawful and so refused his application for an order under Article 40 of the Constitution.

14. Appeal

The applicant has appealed to this Court from the decision of the High Court. It was submitted that the High Court erred on the facts and/or law or on mixed questions of fact and law in not granting the relief sought; in holding that the detention was lawful; in holding that the lawful detention of the applicant was based upon a suspicion on the part of Detective Sergeant Stratford that the applicant intended to avoid deportation; in finding that the arrest was lawful; in holding that it was lawful for the Minister to have and continue to have the intention to deport the applicant notwithstanding the judicial review proceedings having been issued and served and an interim injunction granted.

15. Grounds of Appeal

Initially counsel on behalf of the applicant moved on four grounds of appeal, submitting that the arrest and subsequent detention of the applicant was unlawful. However, these grounds were reduced subsequently to three in the course of the hearing.

The four original grounds of appeal may be referred to as:

- (i) Contempt of Court,
- (ii) Pending judicial review proceedings,
- (iii) Right of access, and
- (iv) Fair hearing.

16. Decision

While the applicant has brought other proceedings this appeal relates only to an application for relief pursuant to Article 40 of the Constitution, in other words it was an application for *habeas corpus*. On such an application the issue for the court is whether the applicant is in lawful custody. There are two possible results, either the applicant is found to be in lawful custody, or he is not. Consequently, if the applicant is found to be lawfully detained then his application must fail. If, on the other hand, it is found that he is not in lawful custody then he is entitled to relief, and that relief is that then he must be released. The issues on the appeal require to be considered in light of the relief available to the applicant.

16.1 It was submitted that for the State to have the intent to deport in the circumstances is a contempt of court, that it is a contempt of court to prejudge the outcome of court proceedings. Reference was made to **C. Miller, Contempt of Court** (3rd Ed. Oxford University Press, 2000) p. 374 et seq. and p. 408 et seq. I would affirm the judgment of the High Court and would dismiss this ground of appeal.

There was ample evidence upon which the learned trial judge could make the findings of fact which he did. This includes his finding that the Detective Sergeant had the intention to deport the applicant, subject to any court order. This is the factual matrix upon which the appeal rests.

The authorities on behalf of the respondents in this case have at all times indicated that while the planned deportation did not proceed because of the interim injunction, initially, and the pending proceedings thereafter, it remained their intention to deport the applicant, subject to the court's order. I am satisfied that such an intent is not incompatible with the court or with the court proceedings. While the intent to deport continued it was clearly stated at all times that the respondents would abide by any court order. Thus there was no contempt of court nor was any contempt of court anticipated. The applicant was arrested lawfully for his deportation, the respondents had the intent to deport him, and this intent continued, subject to court orders and steps taken by and on behalf of the respondents to comply with the court orders. The granting of interim court orders does not nullify the intent to deport by the executive.

The applicant is not challenging the legality of the deportation order in these proceedings, he has raised issues of process and fair procedures. Thus the right to deport under the deportation order per se is not in issue. Therefore the right to deport continued, as did the intent to deport, which was restrained by the interim court order. An *ex parte* order by a court on the application of the applicant does not alter the intent of the respondent to deport.

The continuation of the intent ultimately to deport the applicant, subject to court order, is not a prejudgment of the outcome of proceedings. It is a specific intent, subject to court proceedings. It is not a 'wish' of the respondent, as suggested by counsel for the applicant. It is a contingent intent to deport the applicant, subject to a court order. This situation is distinguishable from a case where the legality of the deportation order is in issue, although a case could be made even in such circumstances that a contingent intention existed, contingent on the finding of the court. That is not the situation here. The granting of the injunction by the High Court did not render the intention of Detective Sergeant Stratford unlawful. The granting of an injunction did not nullify the intent of the Detective Sergeant. One thing which is clear from the facts of this case is that multiplicity of proceedings may lead to confusion. However, it does not mean that one set of proceedings (the injunction) nullifies the intent of the Detective Sergeant. The order for deportation stands, as does the intention of the Detective Sergeant, pending orders of the court.

I am satisfied that there has been no contempt of court in this case. I would affirm the judgment of the High Court on this issue.

The executive has certain duties in relation to deportation. It is not a contempt of court for the executive to perform a function which is a duty of the executive. Indeed it is peculiar to suggest that such an action is a contempt of court. The executive at all relevant times maintained an intent to deport, as it was entitled to do, but the intent was held subject to a court order. Thus the separation of powers, between the executive and the courts,

was preserved and honoured. The courts have the power to judicially review the procedures and this duty was not impinged upon by the continuing intent (subject to court order) of the executive.

16.2 While the second ground of appeal was the subject of much legal debate it was ultimately withdrawn at the oral hearing. However, I shall return to this matter later.

16.3 The third ground raised on behalf of the applicant relates to his right of access to the court. Counsel submitted that in theory deportation where proceedings challenging the decision to deport are pending does not prevent access to the courts. In theory, a client could give instructions from the Congolese jungle, the Gobi desert, or the Venezuelan swamps. However, in many instances, the continued prosecution of the judicial review proceedings would be severely impeded and quite frequently entirely frustrated by the absence of the client from this jurisdiction. Heroic endeavours would be expected of solicitors to prosecute judicial reviews to conclusion. It was submitted that allowing the proceedings to be first determined does not bar effective implementation of the Minister's decision; if the person is in custody, s. 5(6)(b)(iii) of the Act of 1999 permits the person's continued detention until he is 'ultimately unsuccessful'. Counsel queried how the State is significantly handicapped if it cannot deport persons whose deportation orders are being challenged in High Court proceedings. It was submitted that the Minister may invoke s. 5(4) of the Illegal Immigrants (Trafficking) Act, 2000 and seek an early hearing of the proceedings which he regards as without foundation.

The appeal falls to be decided on its own facts. The applicant has had no difficulty to date in access to the courts and has brought many proceedings. There is no issue of him being deported contrary to a court order or having to face bringing proceedings in Ireland while he is elsewhere.

Counsel informed the Court that the applicant's leave for judicial review was refused by the High Court on the 13th December, 2005, and that interlocutory relief was also denied. Thus there are no other extant proceedings of the applicant. No proceedings are pending. Thus no issue arises of proceedings in his absence.

The applicant has been in this country a considerable time in excess of fourteen days after the order for his deportation, and he has brought multiple proceedings before the courts. The applicant has not been denied access to the courts and in all the circumstances of the case I would dismiss this ground of appeal also.

16.4 In the fourth ground of appeal counsel invoked article 6(1) of the European Convention on Human Rights which guarantees litigants a 'fair and public hearing within a reasonable time'. Counsel submitted that except perhaps for some prisoners this right includes an entitlement to be present at the court hearing. Counsel submitted that if the Minister's answer was that the deported litigant may be allowed back into the State in order to be

present at his judicial review proceedings – then what purpose can his prior deportation have achieved? Counsel submitted that deporting persons whose challenges to orders are pending, without any compelling justification for doing so, contravenes article 6(1) in conjunction with article 14 of the European Convention on Human Rights. It was submitted that article 6 (1) of the European Convention on Human Rights guarantees a fair and public hearing within a reasonable time. It was submitted that this right includes entitlement to be present at the court hearing. Counsel submitted that a litigant has a right to be present for the hearing of his case and that if it is pending he should not be deported.

While these references to the Convention were made in the written submissions, the oral case was argued on the Irish law – cases and legislation. The circumstances of the case are that the judicial review proceedings have been determined, there are no further hearings.

The core of this appeal was the query as to whether the ‘intent’ of the Detective Sergeant could co-exist with court orders, and the subsequently withdrawn argument as to pending judicial review proceedings. In view of the circumstances of this case, where all other proceedings have been determined, I would dismiss this ground of appeal also.

17. Opinion

The second ground of appeal which was ultimately withdrawn was the subject of written and oral submissions. It was submitted that persons should not be deported after they have commenced judicial review proceedings as contemplated by s. 5 of the Act of 2000, pending a court order. However, after considerable legal argument before the Court as to the special procedures established under the immigration legislation for applicants to proceed by way of judicial review within 14 days, it transpired that the proceedings in this case were brought by way of ordinary judicial review proceedings under Order 84 of the Rules of the Superior Courts and not under the specific immigration legislation. Consequently counsel withdrew this ground of appeal.

The issue of the effect of the institution of judicial proceedings pursuant to s.5 of the Act of 2000 in immigration cases is a matter of importance. I referred to this in **Adebayo and ors v. Commissioner of An Garda Síochána & ors**, Supreme Court, 2nd March, 2006. I express no opinion as to this matter which awaits consideration and decision in a case where it arises as an issue.

18. Conclusion

For the reasons given I would affirm the judgment of the High Court and dismiss the three grounds of appeal advanced in this case.