Judgment Title: Omar -v- Governor of Cloverhill Prison

Neutral Citation: [2013] IEHC 579

High Court Record Number: 2013 1968 SS

Date of Delivery: 17/12/2013

Court: High Court

Composition of Court:

Judgment by: Hogan J.

Status of Judgment: Approved

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THE HIGH COURT

[2013 No. 1968 SS]

BETWEEN /

TAREEQ OMAR

APPLICANT

AND

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 17th December, 2013

1. Where members of An Garda Síochána arrive late at night at the private dwelling of failed asylum seekers and require the three family members (including a seven and half year old boy) to accompany them while they make the trip from Limerick to Dublin Airport under Garda escort can it be said that the three family members are thereby under a form of arrest? This is in essence the principal question which arises in this application for an inquiry under Article 40.4.2 of the Constitution into the legality of the detention of one of those family members, Tareek Omar, the husband of Sheilah Omar and the father of Tevin Omar.

2. The Omars arrived in Ireland in April, 2005 and their son, Tevin, was born here in May, 2006. He, in fact, has lived here all his life and has never left the State. Up to the events of 7th November, 2013, and 8th November, 2013 (which I am about to describe), he was in second class in a primary school in Limerick. On the 17th

September, 2013, however, the Minister for Justice and Equality made deportation orders in respect of all three family members. It followed, therefore, that none of three members of the family had any entitlement to be in the State after 12th October, 2013, which was the date specified in the deportation order as the date on which they were required to leave the State.

3. The family had then been required to present at Garda National Immigration Bureau in Dublin on 15th October, 2013, with which requirement they duly complied. At the request of their solicitor, Ms. Ryan, it was agreed that they could thereafter present themselves at Henry Street Garda Station in Limerick. On 24th October, 2013, all three family members were informed by letter that they were next to present at Henry Street on 14th November, 2013, "in order to facilitate your deportation from the State."

4. That letter also stated that:

> "If you fail to comply with any provision of the Deportation Order or with any requirement in this notice, an Immigration Officer or a member of the Garda Síochána may arrest and detain you without warrant in accordance with s. 5(1) of the Immigration Act 1999, as amended by the Illegal Immigrants (Trafficking) Act 2000."

5. Before considering in any detail the facts giving rise to the present application, it is necessary first to set out the powers of arrest and entry in relation to immigration matters which have been granted to the Gardaí by the Oireachtas.

The power to arrest

6. It is, however, critical to an understanding of the factual and legal issues which arise in this case to appreciate the power to arrest a person against whom a deportation order is in force is confined to the categories of cases set out in s. 5(1) of the Immigration Act 1999 (as amended)("the 1999 Act").This sub-section (as so amended) provides as follows:-

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

7. There is, accordingly, a power to arrest a non-national who has not complied with the terms of a deportation order. As the Omar family had been required by the Minister to leave the State by 12th October, 2013, they were therefore liable for arrest under s. 5(1)(a) of the 1999 Act for failure to comply with the terms of the

deportation order. I cannot accept the argument advanced by Mr. Fitzgerald S.C. that the presentation letter of 24th October, 2013, had the effect of staying the deportation order until the new date on which they were required to present, namely 12th November, 2013. It is perfectly clear from the terms of the letter that the addressee was nonetheless liable to arrest once he or she had failed to leave the State after the date specified in the deportation order. In these circumstances it follows that the Omars might well have been arrested under s. 5(1)(a) for failing to comply with the terms of a deportation order once the 12th October, 2013, had come and gone.

8. Critically, however, for reasons which I will detail later in this judgment, it is also clear that the Gardaí have no power to enter a dwelling for the purposes of effecting an arrest under s. 5(1)(a).

9. As it happens, however, this particular power of arrest was never formally exercised in the present case. The applicant, Mr. Omar, was, however, arrested in Dublin Airport in the early hours of the morning of 8th November, 2013, under the provisions of s. 5(1)(d) of the 1999 Act (on the ground that he had manifested an intention to avoid removal from the State) in circumstances I will presently describe. It is the legality of this arrest which grounds this present application for an inquiry into the legality of his current detention at Cloverhill Prison. As we shall presently see, that question cannot be determined in isolation from a consideration of the events which proceeded it.

Power to enter premises

10. Article 40.5 of the Constitution provides that::

> "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."

11. It is important to stress at the outset that this provision applies to every home in the State, irrespective of the nationality or status of the occupants of the dwelling. The Supreme Court has made it clear that the fundamental rights provisions of the Constitution apply without distinction to all persons within the State: see *Re Article 26 and Electoral (Amendment) Bill* [1984] I.R. 268.

12. At common law members of An Garda Síochána could enter a dwelling without a warrant for the purposes of effect an arrest where they had a reasonable suspicion that the arrested person had committed a felony: see *The People (Attorney General) v. Hogan* (1972) 1 Frewen 360. The distinction between felonies and misdemeanours was, however, abolished by s. 3 of the Criminal Law Act 1997 ("the 1997 Act"). This common law power of arrest was then replaced by a statutory power of arrest contained in s. 6 of the 1997 Act. Section 6(2) empowers a Garda, subject to certain conditions, to enter a dwelling without a warrant for the purpose of effecting an arrest in respect of an arrestable offence (which itself is defined by s. 2 of the 1997 Act as embracing any offence carrying a punishment of imprisonment of at least five years or more) and to search the premises.

13. So far as immigration matters are concerned, s. 15 of the Immigration Act 2004 ("the 2004 Act") provides:

> "(1) Where, on the sworn information of a member of the Garda Síochána not below the rank of sergeant, a judge of the District Court is satisfied that—
>
> (a) it is reasonably necessary for the purpose of the enforcement of this Act that a place specified in the information should be searched by

members of the Garda Síochána, or

(b) there are reasonable grounds for suspecting that evidence of or relating to an offence under this Act is to be found at a place specified in the information, the judge may issue a warrant for the search of that place and any persons found at that place.

(2) A warrant issued under this section shall authorise a named member of the Garda Síochána, alone or accompanied by such other members of the Garda Síochána and such other persons as may be necessary—

(a) to enter, within 7 days from the date of the warrant and if necessary by the use of reasonable force, the place named in the warrant,

(b) to search that place and any persons found there, and

(c) to seize anything found there, or anything found in the possession of a person present there at the time of the search, which that member reasonably believes to be evidence of or relating to an offence under this Act.

(3) A member of the Garda Síochána acting in accordance with a warrant issued under this section may require any person found at the place where the search is carried out to give the member his or her name and address.

(4) Any person who—

(a) obstructs or attempts to obstruct any member of the Garda Síochána acting in accordance with a warrant issued under subsection (1),

(b) fails or refuses to comply with a requirement under this section, or

(c) gives a name or address to such a member which is false or misleading,

shall be guilty of an offence.

(5) In this section, "place" includes any dwelling, any building or part of a building and any vehicle, vessel, structure or container used or intended to be used for the carriage of goods by road."

14. A similar power is contained in s. 7 of the Aliens Act 1935 ("the 1935 Act") (as substituted by s. 4 of the Immigration Act 2003 ("the 2003 Act"). This provides:

"(1) Where, on the sworn information of a member of the Garda Síochána not below the rank of sergeant, a judge of the

District Court is satisfied that—

(a) it is reasonably necessary for the purpose of the enforcement of—

(i) an aliens order, or

(ii) an order under section 3 or 4 of the Immigration Act 1999 ('the Act of 1999'),

that a place specified in the information should be searched by members of the Garda Síochána, or

(b) there are reasonable grounds for suspecting that evidence of or relating to an offence under section 6 or section 3, 4 or 8 of the Act of 1999 is to be found at a place specified in the information,

the judge may issue a warrant for the search of that place and any persons found at that place.

(2) A warrant issued under this section shall authorise a named member of the Garda Síochána, alone or accompanied by such other members of the Garda Síochána and such other persons as may be necessary—

(a) to enter, within 7 days from the date of the warrant, and if necessary by the use of reasonable force, the place named in the warrant,

(b) to search it and any persons found there, and

(c) to seize anything found there, or anything found in the possession of a person present there at the time of the search, which that member reasonably believes to be evidence of or relating to an offence under section 6 or section 3, 4 or 8 of the Act of 1999.

(3) A member of the Garda Síochána acting in accordance with a warrant issued under this section may require any person found at the place where the search is carried out to give the member his or her name and address.

(4) Any person who—

(a) obstructs or attempts to obstruct any member of the Garda Síochána acting in accordance with a warrant issued under subsection (1),

(b) fails or refuses to comply with a requirement under this section, or

(c) gives a name or address which is false or

misleading,

> shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 12 months or both.
>
> (5) A member of the Garda Síochána may arrest without warrant any person whom the member reasonably suspects of having committed an offence under subsection (4).
>
> (6) In this section, 'place' includes any dwelling, any building or part of a building and any vehicle, vessel, structure or container used or intended to be used for the carriage of goods by road."

15. What is striking about these provisions is that while s. 7 of the 1935 Act and s. 15 of the 2004 Act both allow the District Court to issue a search warrant for the purposes of searching a premises for the purposes of enforcing the Immigration Acts, neither section permits the Gardaí to enter premises *for the purposes* of effecting an arrest in respect of a person against whom a deportation order has been made. The only power of arrest given in such circumstances is where any person present on the premises which is being searched pursuant to a warrant attempts to obstruct the Gardaí or fails to comply with a requirement under the relevant section or gives a false name or address: see s. 7(5) of the 1935 Act and s. 15(4) of the 2004 Act respectively.

16. In this respect these provision may also be contrasted with s. 6(2) of the 1997 Act which sub-section does gives the Gardaí the power both to search a dwelling *and* to effect an arrest therein. It is clear, therefore, that the Oireachtas has not given the Gardaí the power to enter a dwelling - even pursuant to a search warrant - for the purposes of an arrest in order to give effect to a deportation order. This is a very important consideration which must be borne in mind in considering whether the Gardaí acted lawfully in the present case.

Did the Gardaí have an implied licence to enter the premises and did they exceed that licence?

17. It is clear from the case-law that the Gardaí have an implied licence to go on to the pathway or driveway leading up to a dwelling. As O'Flaherty J. said in *Director of Public Prosecutions v. Forbes*[1994] 2 I.R. 542, 548:

> "It must be regarded as axiomatic that any householder gives an implied authority to a member of the Garda to come onto the forecourt of his premises to see to the enforcement of the law or to prevent a breach thereof."

18. The courts have accordingly generally upheld the right of the Gardaí to come unto the curtilage of a dwelling for law enforcement purposes pursuant to this implied licence (see, *e.g., Director of Public Prosecutions (Dooley) v. Lynch* [1998] 4 I.R. 437, *per* Costello P. and *Director of Public Prosecutions v. Sullivan* [2007] IEHC 248, *per* Herbert J.), although there may also be cases where the implied licence is held to have been revoked by the householder (see, *e.g., Director of Public Prosecutions v. Gaffney* [1987] I.R. 193, *per* Walsh J., *Director of Public Prosecutions (Riordan) v. Molloy*[2003] IESC 17, [2004] 3 I.R. 321, 324-325 *per* McCracken J.). In those latter category of cases the Gardaí have been held to be trespassers once the permission – whether express or implied – has been revoked by the householder.

19. The entry into a dwelling itself is quite a different matter. It is clear from the Supreme Court's decision in *Director of Public Prosecutions v. Gaffney* [1987] I.R. 193 that, in such cases, "the burden lies upon the entrant to prove that the inviolability of that dwelling has not been breached": see [1987] I.R. 193, 184, per McCarthy J. The decision of Carney J. in *Freeman v. Director of Public Prosecutions* [1996] 3 I.R. 565 is in much the same vein. In that case Carney J. stressed that the guarantee of inviolability of the dwelling in Article 40.5 was "no empty formula" and that express statutory authority was required for any entry into a dwelling.

20. Professor Casey has summarised the law thus (*Constitutional Law in Ireland*, Dublin, 2000 at 513):

> "….absent a warrant, or specific statutory authority, Garda officers or other state agents may enter a dwelling only by invitation or permission. Such invitation or permission may be express, or it may be inferred from the circumstances: thus a failure to refuse entry might be construed as an implied permission to enter. But everything depends on the circumstances of the particular case."

21. This is clear from the facts of *Gaffney* itself. Here the Gardaí pursued the driver of a motor vehicle who had appeared to drive the vehicle in a dangerous and erratic fashion. They then eventually pursued the driver to a particular dwelling. The accused's brother initially refused them entry to the house on two occasions. On a third occasion a Garda inspector approached an open front door and knocked on it. Having asked whether anyone was inside, a male voice answered "yes, in here." The Gardaí then entered the dwelling an arrested the accused under the Road Traffic Acts.

22. The Supreme Court held that the arrest was unlawful and in that the Gardaí were trespassers. As Walsh J. observed ([1987] I.R. 173, 179) the "absence of an express refusal or of an express order to leave cannot be construed as an implied invitation or permission to enter, particularly in the circumstances of this case."

The events of November 7th/8th November

23. It is clear from the evidence that the Gardaí called to the house of the applicant just after 11 pm on the evening of 7th November, 2013. Mr. and Ms. Omar were in bed at the time and their son was asleep. Ms. Omar went to the bedroom window to see who was there and she was surprised to learn that the Gardaí were present. Mr. and Ms. Omar went downstairs in their nightclothes and invited the four GNIB officers into the front room where the couple then conversed with the officers. The Gardaí stated that the couple and their son were to be deported to Tanzania. Ms. Omar produced a letter from their solicitors which showed that they had applied for a revocation of the deportation orders, but the Gardaí explained that this would not have the effect of preventing the execution of the deportation order.

24. The Gardaí then permitted the Omars to speak to their solicitor, Ms. Ryan, by telephone. Ms. Omar was the first to speak with Ms. Ryan and when Ms. Ryan explained that there was nothing which she could do at that time of night, Ms. Omar simply handed the telephone to her husband who continued with the telephone conversation. It appears that Ms. Ryan advised them to co-operate with the Gardaí and to contact her upon their arrival in Tanzania.

25. At that point the Omars were required to get dressed, to gather their belongings and given time to compose themselves. Thus, for example, Mr. Omar was given a

cigarette by one of the Garda escort team and allowed to smoke the cigarette in peace.

26. A female officer accompanied Ms. Omar as she went upstairs to pack. I think that it clear that the officer entered the bedroom where the child was sleeping. It is not really disputed that the officer generally gave instructions to Ms. Omar regarding the packing of bags and when the child was to be roused. Ms. Omar pointed out to the officer that she had only one bag and arrangements were made for her brother-in-law to bring over some plastic bags to enable them carry the rest of their belongings. At this point two uniformed Gardaí arrived outside the house, but they did not enter the dwelling. At the last minute the female officer instructed Ms. Omar to rouse the child. He was then woken, brought downstairs and the family were then escorted to the waiting Garda cars. The four GNIB officers remained in the dwelling for the best part of one hour and a half.

27. I am quite satisfied that the individual officers who attended at the house behaved with individual personal propriety and showed courtesy to the Omars. I further accept that the Gardaí were well intentioned in their actions in that they intended to execute the deportation orders with a minimum of fuss and an informal fashion. Although I am about to find that their actions were unlawful – and, in some respects, gravely unlawful – it is important to state that there was no question of *mala fides*, malice or dishonesty on the part of the individual Gardaí. They sincerely believed that they had the necessary powers in law to act as they did.

28. There are, nevertheless, features of the entire episode which are unsettling and, candidly, disquieting. Who could not but be deeply troubled by the late night knock on the door, the absence of a search warrant, an exchange with surprised parents in their pyjamas, the rousing of a young boy from his sleep, the bundling of that boy into a Garda car and the driving of the boy with his family in that car over two hundred kilometres *through the night* and the holding of the family (including the boy) in a place of the detention at an airport?

29. Here the circumstances of the young boy must be considered, even though, of course, he is not an applicant in these Article 40 proceedings. Although he is not an Irish citizen, he was born here and, according to Ms. Omar's evidence (which I fully accept) he has never previously left the State. He is now aged seven years and six months and he is in second class at a primary school in Limerick. It is not altogether clear to me what (if any) steps were taken to safeguard his welfare. It is, however, impossible to believe that this entirely innocent young boy did not find the entire episode bewildering, traumatic and frightening. It is simply distressing beyond words to think that a State committed to safeguarding the best interests of children would ever contemplate subjecting a young boy of seven years and six months to such an ordeal, even if he was not an Irish citizen and even if he had no right to be in the State.

30. I must break off this narrative at this juncture to say something about the testimony of Ms. Omar. She was a remarkably impressive witness who gave evidence with a quiet nobility and resolution. No one who heard her could possibly doubt the accuracy of her account, most of which was not, in any event, seriously disputed. For my part I accept every word of her evidence so far as the events of 7th November and 8th November were concerned. Insofar as there is any conflict between her evidence and that tendered on behalf of the respondents, I found her evidence to be more satisfactory.

31. I accordingly find that the Omars were, in fact, instructed to pack their bags and were certainly given to understand that they had no option but to accompany the

Gardaí to Dublin Airport. I fully accept the evidence of Ms. Omar that a female officer rejected her request to delay travelling until the morning given that her son was asleep. I further find that this officer told Ms. Omar to back her bags. When Ms. Omar asked for a few more minutes to gather her belongings, the officer told her to hurry up and said that there was little time. I also find that the officer told Ms. Omar to wait until the last minute before rousing her son from his sleep.

32. I cannot avoid observing that I found this latter evidence to be deeply disturbing. By what possible authority could this Garda officer take it upon herself to invade the sanctity of the bedroom of a sleeping child in the middle of the night and give directions to its mother as to when it was to be woken? Absent a search warrant or express statutory authority or an acute emergency which immediately threatened life and limb (such as was at issue in *Director of Public Prosecutions v. Delaney* [1997] 3 I.R. 453), such conduct entirely compromised the substance of the Article 40.5 guarantee in respect of the inviolability of the dwelling. The object of this provision was summarised thus by Hardiman J. in *The People v. O'Brien* [2012] IECCA 68:

> "This constitutional guarantee presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world. In so doing, Article 40.5 complements and re-inforces other constitutional guarantees and values, such as assuring the dignity of the individual (as per the Preamble to the Constitution), the protection of the person (Article 40.3.2), the protection of family life (Article 41) and the education and protection of children (Article 42). Article 40.5 thereby assures the citizen that his or her privacy, person and security will be protected against all comers, save in the exceptional circumstances presupposed by the saver to this guarantee."

33. The protections afforded to the dwelling by Article 40.5 are, therefore, at the heart of what make us a free society. A society whose basic law did not provide for protections either of the kind afforded by Article 40.5 or by something like it (such as Article 8 of the European Convention of Human Rights) could not call itself truly free. The importance of compliance with the requirements of Article 40.5 is, therefore, of paramount importance in a free society: see, e.g., the comments of Carney J. in *Director of Public Prosecution v. Dunne* [1994] 2 I.R. 537 and those of Hardiman J. in *The People (Director of Public Prosecutions) v. Cunningham* [2012] IECCA 64.

34. Here it must be recalled that the Gardaí had no search warrant to enter the dwelling of the Omars for the purposes of a search, still less for an arrest under the Immigration Acts. Absent an acute emergency, therefore, the only possible basis, therefore, by which the child's bedroom could have been entered, would have been if one of the parents had freely given consent for this purpose. But what parent would ever freely give consent so as to permit a complete stranger to enter a child's bedroom in the middle of the night as that child slept or give that stranger authority to wander around the bedroom giving instructions as to when and how the child was to be woken?

35. In any event, I am perfectly satisfied from the evidence of Ms. Omar that no true consent was ever given by either herself or her husband or that any such consent would ever have been so given. It was rather a case of where the female officer purported by her conduct and demeanour to insinuate to Ms. Omar that she had, in fact, such an authority to enter the bedroom where the child was sleeping. Viewed objectively and in the absence of either a search warrant which authorised this course of conduct or a true and genuine consent on the part of the parents, this

was in itself an extremely serious breach of Article 40.5. It represented a gravely illegal act which this Court views with dismay.

36. The whole pattern of the events are, in any event, wholly inconsistent with the suggestion that the Omars freely consented to what had occurred. It is quite unrealistic and, indeed, disingenuous to suggest otherwise. Who, having been awoken from their beds at night by a knock on the door from strangers, would spontaneously agree to make a long trip of this nature, not least without any advance planning and preparation? What parent would agree to the rousing of their seven year old from his bed in the middle of the night to be driven through the night from Limerick to Dublin Airport, not least in the middle of the school week?

37. A few further examples must suffice to illustrate this point. The Omars were "permitted" to telephone their solicitor at about 11.30pm to seek advice as to what they should do. But if the Omars were not otherwise under some form of *de facto* restraint, the question of their being "permitted" to telephone anybody would simply not arise. When Ms. Omar produced the letter showing that they had applied for the revocation of the deportation order, the Gardaí responded that this would not be enough to stay the operation of the deportation order. While this was legally correct, at no stage were the Omars told that they were under no legal obligation to accompany the Gardaí. Even if (contrary to my own view) words such as "instruction" or "direction" or "require" were not used, the entire impression given to the Omars – which the Gardaí did nothing to dispel – was that they had no alternative other than to go along with that which the Gardaí required and that they were to that extent under a *de facto* compulsion to follow those directions.

38. The Omars were then put into the back of one of the Garda cars at about 12.30am and their luggage was placed in the other Garda car. They were then driven by the Garda escort team to Dublin Airport where they arrived at about 2.30am. Ms. Omar gave evidence that when her husband sought to open the backdoor of the Garda car in order to adjust a seat belt he could not open it from the inside. This might be because it was a simple issue of the inadvertent application of a child lock – as was suggested to Ms. Omar in cross-examination – but I consider that it is altogether more likely in the circumstances that these locks were deliberately applied.

39. The Garda vehicles did stop once the course of the journey to Dublin Airport to enable Mr. Omar to visit the bathroom at a service station. This, however, was done only with the consent of the Gardai and under their supervision. The evidence suggested that the Gardaí would have formally arrested Mr. Omar under s. 5(1)(d) of the 1999 Act had, for example, he refused to get into the Garda car.

40. I further accept Ms. Omar's evidence that upon arrival at Dublin Airport that the Omar family were escorted to a detention room and that the door was then locked. Ms. Omar had by this stage become quite unwell and required sedation by a general practitioner for extremely low blood pressure. The young boy was also distressed by these events and the parents sought to comfort him. All these examples re-inforce the conclusion that the Omars had been in effect placed in a form of detention, a point under further underscored by a consideration of the case-law on this topic which I will shortly consider.

41. The family were then to be put on a flight to Amsterdam at 6.10 am and from there they were to be flown onwards to Dar-es-Salaam in Tanzania. Some time after 5am Mr. Omar declared that while he would accept being deported to Kenya, he did not want to return to Tanzania. Following this exchange Mr. Omar was formally arrested by a member of An Garda Síochána pursuant to s. 5(1)(d) of the 1999 Act

on the basis that he intended to avoid removal from the State. Mr. Omar was then removed to Cloverhill Prison. As we have noted, it is this detention which has given rise to the present application for an inquiry under Article 40.4.2 of the Constitution. Ms. Omar and her son were then taken by the Gardaí to Balseskin Accommodation Centre.

42. Returning again to the question of whether the entry of the Garda team into the Omars dwelling was a lawful one and whether they freely and voluntarily consented to their conveyance from Limerick to Dublin Airport. I am prepared to allow that the initial entry into the dwelling was lawful in the sense that the Gardaí were genuinely invited into the dwelling. But it is clear that the Gardaí quickly exceeded the boundaries of that implied consent to come into the premises and because no sooner had they entered the dwelling that they subjected Mr. and Ms. Omar to a form of *de facto* restraint and arrest. What really happened is that the Gardaí entered the dwelling for the purposes of *de facto* arresting the Omars in order to give effect to the deportation order. The Oireachtas has, however, never given such a power to enter a dwelling for this purpose.

43. All of this may be illustrated by the judgment of Hamilton J. in *The People (Director of Public Prosecutions) v. Coffey* [1987] I.L.R.M. 727. In that case an accused person voluntarily went to a Garda station to assist with the investigation into a murder. Indeed, it appears that he drove to the station and parked his car close by. Commencing at 3p.m. he was subjected to repeated questioning and members of the Gardaí remained with him at all times. At about 6.50 p.m. one of the Gardaí asked for and received from him the keys of his car which keys were never returned to him in the course of questioning which continued until to close on 2am on the following morning.

44. Hamilton J. held ([1987] I.L.R.M. 727, 731) that in these circumstances the accused had been detained in a form of unlawful custody:

> "At no stage were the keys returned to him and this fact, in conjunction with the constant care and attention by members of the Garda Síochána and the constant interviewing and questioning of him, would indicate to him that he was not free to leave…At no stage had any indication been given to him that he was free to leave the Garda station. It is irrelevant that he did not ask to leave; it is irrelevant that the members of the Garda Síochána concerned who gave evidence said if he had asked he would have been allowed to leave; the point is that he did not ask and at no stage was he informed that he was free to leave."

45. The present situation is very similar. It is true that the Omars voluntarily admitted the Gardaí to their dwelling once they requested admission, but thereafter the actions of the Gardaí conveyed, in the words of Hanna J. in *Dunne v. Clinton* [1930] I.R. 366, 372, "the intimation in some form of words or gesture that [they were] under restraint and will not be allowed to leave." The Omars certainly never contemplated or envisaged when co-operating with the Gardaí by admitting them to their dwelling that they would then be placed under a form of *de facto* arrest in their own home.

46. Much reliance was placed by counsel for the respondents, Mr. Moore, on a decision of the European Court of Human Rights in *Austin v. United Kingdom* (2012). That case concerned the legality of a police cordon which enclosed perhaps 400 persons in a controlled area in central London in order to keep control of a major riot. The Court noted that there was no crushing and there was space to

walk about within the cordon, albeit that conditions were uncomfortable "with no shelter, food or water facilities." The applicants were detained in this area for periods ranging from between five hours to seven hours. A majority of the Court held that there was no breach of Article 5 ECHR given that the entire object of the restraint was to protect human safety in the face of an acutely challenging and violent public demonstrations.

47. *Austin* is clearly a decision based on special facts relating to crowd control and the protection of public safety in the course of (sometimes violent) street demonstrations. It may be observed that the European Court was at pains to stress (at para. 68 of the judgment) that its conclusion that there had been no deprivation of liberty was based "on the specific and exceptional facts of the case." The Court further hinted that had it not been established that it was necessary "for the police to impose and maintain the cordon in order to prevent serious injury or damage", then the "coercive and restrictive nature" of the cordon "might have been sufficient to bring it within Article 5."

48. In these circumstances, I do not think that the *Austin* principles have any application to the quite different issues arising from the presence of the police within the family home. In any event, the law in relation to the meaning of liberty in Article 40.4.1 of the Constitution is crystal clear. There is no "half way house" between liberty "unfettered by restraint and an arrest": see *Dunne v. Clinton* [1930] I.R. 366, 372, per Hanna J.

49. More in point perhaps is *The People (Director of Public Prosecutions) v. O'Loughlin* [1979] I.R. 85. In that case the Court of Criminal Appeal held that the accused had been de facto arrested when he had been conveyed in a Garda car from Carrick-on-Suir Garda station to Clonmel Garda station without ever having been formally arrested. This was held to be a form of unlawful detention, for as O'Higgins C.J. explained ([1979] I.R. 85,91):

> "'Holding for questioning' and 'taking into custody' and 'detaining' are merely different ways of describing the act of depriving a man of his liberty. To do so without lawful authority is an open defiance of Article 40.4.1 of the Constitution."

50. It is likewise of interest that in *The People (Director of Public Prosecutions) v. Bolger* [2013] IECCA 6 the accused had been stopped on the side of the road by Gardaí and admitted under caution that he had used a false name in respect of the vehicle registration book. Although he never asked to leave, one of the Gardaí who spoke to him at the roadside hinted that he might well have been arrested had he attempted to do so. Another Garda described the accused as having been "in detention" during this period. Carney J. held that the accused was in unlawful detention during this period, a finding which was subsequently upheld by the Court of Criminal Appeal.

51. In the light of these authorities, it is simply stating the obvious to say that Mr. Omar was plainly already in unlawful custody at the point he was arrested at Dublin Airport at 5.15am on the morning of 8th November under s. 5(1)(d) of the 1999 Act. The plain truth of the matter was that, viewed objectively, the Omar family had been subjected to multiple and repeated violations of their constitutional rights. The Gardaí had entered their dwelling without a search warrant for the purposes of effecting a *de facto* arrest in order to give effect to the deportation order - even though, as we have seen, this is a power which they do not enjoy even when a search warrant has been judicially granted under either the 1935 Act or the 2004 Act – and then transported the family over 200km. in a locked Garda car. No true

consent to this was ever given by the Omars and their actions were voluntary only in the sense that they offered no physical resistance to what the Gardaí required.

52. The actions, moreover, of the Garda officer in entering the bedroom of a sleeping child after midnight and giving directions to his mother as to when he should be woken up, while then arranging for his transport by Garda car through the night entirely compromised the fundamental protections afforded by Article 40.4.1 (personal liberty) and Article 40.5 (inviolability of the dwelling) of the Constitution. So far as the child is concerned, viewed objectively, these breaches of his constitutional rights must be regarded as being exceptionally serious.

Does the fact that Mr. Omar was in unlawful custody at the time of his arrest render that arrest unlawful?

53. It is clear from the authorities that an arrest which is carried out following a breach of Article 40.5 is entirely unlawful: see, *e.g*., the comments of Walsh J. and Henchy J. respectively in *Gaffney* and those of Hardiman J. to similar effect in *O'Brien*. For the reasons I have already set out, it is clear that Mr. Omar was subjected to an unlawful arrest within his dwelling by Gardaí and then unlawfully conveyed with the rest of his family to Dublin Airport.

54. It is true that, as the Court of Criminal Appeal noted in *Bolger,* there may be cases where a lawful arrest can be effected in circumstances where the person arrested was in unlawful custody. As in that case, however, this is where the new arrest is entirely independent of the earlier unlawful custody. Here the present case is completely different, since the arrest under s. 5(1)(d) of the 1999 Act was simply the final act in a process which had commenced with the unlawful restraint and de facto arrest of Mr. Omar some five to six hours previously. Just as in *Oladapo v. Governor of Cloverhill Prison*[2009] IESC 42, it can be said in the present case that, in the words of Murray C.J., "that unlawful arrest and consequential unlawful detention are the dominant circumstances in this case".

55. In *Oladapo* the applicant had been ostensibly arrested under s. 13 of the Immigration Act 2004 for failing to have appropriate travel documents as he endeavoured to re-enter the State from Northern Ireland. He was then subsequently arrested and detained under s. 5(2) of the Immigration Act 2003. Murray C.J. held that the subsequent arrest was unlawful, precisely because the original arrest was unlawful and simply a device to bring the applicant into custody:

> "Even though the later arrest and detention pursuant to s. 5(2) of the Act of 2003 might otherwise have been lawful, that arrest and subsequent detention is dominated by the fact that it was deliberately facilitated and achieved by bringing the appellant into unlawful custody for that specific and ulterior purpose. This is not simply a question of an otherwise lawful arrest being potentially tainted by an unlawful period of detention because in this case the dominating factor which brought about the arrest under s. 5(2) was the deliberate unlawful arrest and detention under s. 13. What occurred in this case was a fundamental breach of the due process of law. This is not to suggest that there was malice or dishonesty on the part of Garda McGovern. Although his actions were conscious and deliberate he appears to have considered that he was properly endeavouring to apply the provisions of the Immigration Acts to a person who was unlawfully present in the State by virtue of s. 5(2) of the Act of 2004. That however does not alter the position in law, namely that he deliberately

effected an unlawful arrest and detention."

56. In my view, therefore, for the reasons just stated, the present case cannot properly be distinguished from *Oladapo.*

Conclusions

57. In summary, therefore, I have concluded that what really occurred in the present case is that the Gardaí entered a dwelling *without* a search warrant for the purposes of arresting the occupants in order to give effect to deportation orders. Yet the only power given to the Gardaí to enter a dwelling for this purpose under the Immigration Acts is to do so for the purposes of *search* only (and not for the purposes of arrest) and then only once a search warrant has been issued by the District Court on the application of an officer not below the rank of Sergeant, it follows that the entry of the Gardaí into the dwelling of the Omars became unlawful once that true purpose became clear, as was their subsequent *de facto* arrest of the applicant, his wife and 7 year and half year old son. Thus, even if the Gardaí had in fact been granted a search warrant by the District Court (which was not the case), they would even then have had no power to act in the manner which they did.

58. Since the legality of the applicant's current detention is entirely contingent on the validity of that arrest under s. 5(1)(d) of the 1999 Act, it follows, therefore, in view of my earlier findings, that detention has been accordingly rendered unlawful. I will accordingly direct Mr. Omar's release pursuant to Article 40.4.2 of the Constitution.