

Lobi v. Governor of Cloverhill Prison [2002] IESC 58 (19th July, 2002)

THE SUPREME COURT

192/02

Murphy J.

Hardiman J.

Fennelly J.

IN THE MATTER OF ARTICLE 40.4 OF THE CONSTITUTION

and

IN THE MATTER OF THE HABEAS CORPUS ACTS

Between:

CLEMENT LOBI

Appellant/Applicant

and

THE GOVERNOR OF CLOVER HILL PRISON

Respondent

JUDGMENT of Mr. Justice Hardiman delivered on the 19th day of July, 2002. [Nem Diss.]

1. This is an appeal against the judgment and order of the High Court (Murphy J.) of the 26th June, 2002 whereby the Applicant's application for an order directing his release from the custody of the Respondent was refused.

Background.

2. The following is the undisputed background to the present application.

3. On the 20th May, 2002 the Applicant was arrested by Detective Garda Ronan Devaney under Section 5(1) of the Immigration Act, 1999. This was because of Garda Devaney's belief that he was one and the same person who presented himself to immigration officers on the 13th May, 2002 and gave his name as Samuel Nnebe, claiming asylum. A Deportation Order in respect of Samuel Nnebe had been made after his claim for asylum failed. He failed to present himself for deportation to Anglesea Street Garda Station, Cork, on Friday 3rd May, 2002.

4. Having been arrested, the Applicant, under the name Samuel Nnebe, was the subject of a Detention Order pursuant to the Immigration Act, 1999 directing that he be detained in Clover Hill Prison pending the making of arrangements for his removal from the State.

5. There is no dispute as to the validity of all steps taken in relation to the person describing himself as Samuel Nnebe. This is of course, is consistent with the Applicant's case that he is not Samuel Nnebe, as discussed below.

Issues on the present application.

6. The issue on the present application is an extremely net one. The Applicant asserts that his true identity is that of Clement Lobi and that this is a distinct person from the man described as Samuel Nnebe. This contention was rejected in the High Court.

Submissions.

7. For the Applicant, Dr. Michael Forde SC first emphasised that the onus of demonstrating that the Applicant was detained in accordance with law rested on the State. He said that the High Court's finding that the detention had been so justified was irrational. It was substantially based on the identification evidence of the Garda who had dealt with Mr. Nnebe, as he described himself, on his arrival in the State and his identification of this person with the person whom he saw two years later. This he said was implausible. He also submitted that the decision of the learned High Court Judge was fundamentally flawed as he did not satisfy

himself, personally, that the person calling himself Lobi was Nnebe, he merely accepted the garda identification evidence and their view that the person shown in certain photographs purporting to be of Nnebe and Lobi respectively, were one and the same person. He also submitted that the evidence of Detective Garda Devaney had been improperly admitted and considered by the High Court Judge and that certain forms filled in the names of Nnebe and Lobi respectively suggested they were not filled in by the same person.

8. On behalf of the State, Mr. Patrick McEntee SC agreed that he bore the onus. He set out the sequence of events in the High Court application, which was not disputed. He said that the Article 40 application was moved first on the 17th June, 2002 and was returnable on the following day. At that stage the photographs bearing the names of Nnebe and Lobi respectively were to hand but the Applicant's counsel indicated that he would require strict proof of these photographs. The State was not in a position, understandably, to give such proof in the time available and the application was adjourned until the 26th June, 2002. The Applicant then sought bail for that period. Detective Garda Devaney gave evidence on this application in which *inter alia* he indicated his belief, based on the photographs, that the man giving the name Lobi was one of the same person as the man giving the name Nnebe. He did not repeat this evidence on the 26th June but Detective Garda Smith gave evidence on that day. This evidence was challenged.

9. Mr. McEntee pointed out that Garda Smith had interviewed the man giving the name Nnebe. This gentleman had no papers or identification of any sort and the Guard was alert to this. He was in a good position to make a positive identification of Mr. Lobi as the person who had given the name Nnebe at Dublin Airport and did so. Mr. McEntee submitted that the handwriting point was worthless since the relevant forms were filled out outside the presence of any official. He argued that and a number of the points relied on by the Applicant were consistent with making a deliberate difference or distinction from another known document. The Applicant's solicitor in his affidavit had relied on the point that the Lobi form misspelt the word "*Nigeria*" whereas other documents spelt it correctly; that the Lobi document gave the birth date in numerals only, unlike the Nnebe document; that the Lobi document signed in a full name, and not initials as in the Nnebe document.

10. It may also be noted that on the form seeking refugee status in the name of Clement Lobi, he stated that he had arrived in Ireland from Madrid, Spain. Mr. Nnebe refused to give any information as to how he had arrived in Ireland. Garda Smith however noted on the relevant form that "*It is likely that he came on Air France flight AF-5008 as he came to Pier C Dublin Airport shortly after this flight landed*".

Conclusions.

11. The sole issue raised in this case is whether the Applicant is one and the same as the person who gave his name on entering Ireland as Samuel Nnebe. There was *prima facie* evidence of this identification from Garda Smith, based on his meeting with the person giving the name Nnebe and his subsequent sight of the person claiming to be Clement Lobi. There was contrary evidence in the form of an Affidavit from the Applicant. It appears to me that the learned trial judge was entitled to accept the evidence of the Detective Garda if he was satisfied that it was reliable, as he clearly was. If he was so satisfied, it followed, indisputably, that the detention of the Applicant was lawful.

12. There was also the evidence of Garda Devaney based on a comparison of the photographs of a man giving each name respectively: Garda Devaney was satisfied that they were one and the same person. These photographs were taken in the circumstances described in the Affidavit of Mr. Lohan of the Department of Justice.

13. In those circumstances, there was ample opportunity for the learned High Court Judge, who saw and heard the evidence of Detective Garda Smith, to be satisfied as to the identity of "*Nnebe*" with "*Lobi*". In order to do this, it was not necessary to elevate Detective Garda Smith to the status of an expert in the making of visual identifications. It is undoubtedly true that an immigration officer would look carefully at a person presenting himself to seek asylum but visual identification must always remain a subject to be approached with caution and it is doubtful if any amount of experience can convert a person into an "*expert*" as that term is understood in the law of evidence. Nevertheless, such evidence may be accepted if the Court is satisfied of its accuracy.

14. In view of this finding it is not necessary to put particular weight on the identification from photographs. However, in my opinion, a study of the photographs provides no foundation for a challenge to the evidence of Detective Garda Smith. It tends, on the contrary, to confirm it.

15. There are two other aspects of the submissions which should be noted. Firstly, in the pleadings it was alleged that the appeal ought to succeed, *inter alia*, because "*The Respondent could have adduced fingerprint evidence of the individual(s) who made the two refugee applications, but did not do so*". It transpired that it was not possible to adduce fingerprint evidence because no fingerprints had been taken, in accordance with the practice at the relevant time. Dr. Forde on behalf of the Applicant stated that his client would have been greatly advantaged had fingerprints been taken at the point of entry to the State. It seems clear that this step would indeed prevent an innocent party from being the subject of mistaken identification, and protect the community from being imposed upon by an unsuccessful applicant for refugee status changing his identity to avoid deportation. The question of fingerprints has a particular significance in relation to alleged refugees because many of them enter the State without documentation or authenticated photographic identification of any sort.

16. Finally, Dr. Forde supported his contention that the identification by Detective Garda Smith was implausible and unreliable with the remarkable general proposition that (to quote his solicitor's affidavit) "*It is widely accepted that persons of one race do not notice to the same extent facial differences in persons of other races than persons of their own race. I have heard of Japanese persons who are of the view that all white people look the same, until they had spent some time with white people*".

17. The Court does not find this line of argument at all convincing or attractive. The race of the person being identified, and that of the person purportedly identifying, is no more than one of a great number of factors to be considered in assessing the reliability of an identification. Certainly, the Court is not prepared to hold that there is some *a priori* impediment to an identification of a person of another race rendering any such identification necessarily unreliable. So to hold would, indeed, amount to a form of racial stereotyping based on the sort of *canard* perpetuated in the solicitor's affidavit ("*I have heard of Japanese persons who*").

18. I would dismiss the appeal and affirm the Order of the learned High Court judge.