THE SUPREME COURT

[S.C. 70 of 2005]
[S.C. 71 of 2005]
[S.C. 72 of 2005]
[S.C. 73 of 2005]

Denham J.
McGuinness J.
Hardiman J.
Geoghegan J.
Fennelly J.

In the matter of Article 40.4 of the Constitution and in the matter of the Habeas Corpus Act, 1782.

Between/

Bosun Adebayo
Peter Chinedu Igwe
Folashade Jacob, Oyeshola Jacob and Ronké Jacob
Jide Johnson Ondukan

Applicants/Respondents

and

Commissioner of An Garda Síochána

Respondent/Appellant

and

The Minister for Justice, Equality and Law Reform

Notice Party/Appellant

Judgment delivered on the 2nd day of March, 2006 by Denham J.

1. I concur with the judgment of Geoghegan J. on the issues for determination on this appeal.
2. Although it does not arise for decision, the issue as to whether the institution of judicial review proceedings challenging the validity of a deportation order has the automatic effect of staying the implementation of the order pending the outcome of those proceedings, was the subject of submissions before the Court.

2.1 There was a finding by the High Court. The High Court (Peart J.) held that:

> "- I am compelled to the view that once judicial review proceedings have been properly commenced, and I include within that concept proceedings commenced outside the fourteen day time limit, but in which an extension of time is being sought, it is unnecessary for any injunction to be sought in order to ensure that steps are not taken to give effect to the very deportation order sought to be impugned in those proceedings."

Such an analysis means that once a motion seeking judicial review has been filed – even if it was outside the 14 days required by statute but that it sought an extension of time – the State would be stayed from proceeding with the deportation and that it would not be necessary to seek an injunction.

2.2 The Oireachtas has established a statutory scheme providing for the means of access to the courts by persons subject to orders under the immigration legislation. The portion of the legislation relevant to this analysis is s. 5(1) of the Illegal Immigrants (Trafficking) Act, 2000. It refers to a variety of orders and decisions under immigration legislation. For the purpose of this case I shall refer only, as an example, to the reference to a deportation order. Thus s. 5(1) provides:

> "**5.**—(1) A person shall not question the validity of—
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> . . .
>
> (*c*) a deportation order under section 3(1) of the Immigration Act, 1999,
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> . . .
>
> otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (hereafter in this section referred to as "the Order").
>
> (2) An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in *subsection (1)* shall—
>
> (*a*) be made within the period of 14 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending

the period within which the application shall be made, and

(*b*) be made by motion on notice (grounded in the manner specified in the Order in respect of an *ex parte* motion for leave) to the Minister and any other person specified for that purpose by order of the High Court, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed.

(3) (*a*) The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

(*b*) This subsection shall not apply to a determination of the High Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution.

(4) The High Court shall give such priority as it reasonably can, having regard to all the circumstances, to the disposal of proceedings in that Court under this section.

(5) The Superior Court Rules Committee may make rules to facilitate the giving of effect to *subsection (4)*."

2.3 This legislation was considered by the Supreme Court in **Re Illegal Immigrants (Trafficking) Bill, 1999** [2000] 2. I.R. 360, which held, *inter alia*, that the requirement to proceed by way of judicial review within a limited period served the legitimate public policy objective of seeking to

bring about, at an early stage, legal certainty as regards administrative decisions and facilitated the better administration and functioning of the system for dealing with the applicants for asylum or refuge status. As to the extension of time provisions, it was held that the discretion of the High Court to extend the time period for good and sufficient reason was sufficiently wide to avoid injustice and to enable persons who had shown reasonable diligence to have sufficient access to the courts and was not unreasonable. The Court, referring to the constitutional right of access to the courts, held that it was sufficient to say that such a right means the right to have all justiciable questions involving the administration of justice heard and determined by a court established by or in accordance with the Constitution. In considering the conditions and limitations imposed on non-nationals, the Court held that the scheme was consistent with the constitutional right of access to the courts and the principles of constitutional justice.

The Court said of s.5 (1):

> "It is within the competence of the Oireachtas to regulate by law, by primary legislation or, in the due exercise of its powers, by way of secondary legislation, such as statutory instruments, procedural matters, including procedural remedies, before the courts provided constitutional rights and other provisions of the Constitution relating to the courts are not infringed. Section 5(1) specifies judicial review as the only procedure by which a person may question the validity of any decision or other matters referred to at paragraphs (a) – (n) of the subsection. All of those matters fall to be decided in an administrative process by persons authorised by law to decide them. It is not the function of the courts to decide such matters anew on their merits but to determine the validity of the decisions taken as a question of law. Should a person seek to challenge the validity of any of the matters covered by the subsection, he or she will not be limited as to the grounds upon which the validity of a decision may be attacked by virtue of being confined to judicial review as the only form of remedy. Given that the jurisdiction of the courts is limited to reviewing whether any such matter has been decided in accordance with law, the grounds for challenging such validity would not be any more extensive under other procedures

> such as proceedings commenced by plenary summons. Indeed judicial review is a remedy which is regularly opted for by persons seeking to challenge the validity of administrative decisions. The court concludes that judicial review as such is not an inadequate remedy."

The Court analysed the requirement that the application for judicial review be brought within 14 days and the power of the High Court to expand that right. The Court held that a non-national has a constitutional right of access to the courts to challenge the validity of a decision such as a deportation order. Thus there are both the constitutional right and statutory rights to consider.

2.4 The statutory scheme is bedded on the procedure under Order 84 of the Rules of the Superior Courts, 1986 Order 84, r. 18 (1) provides that an application for an order of *certiorari, mandamus,* prohibition or *quo warranto* shall be made by way of an application for judicial review in accordance with the provisions of Order 84. Provision is also made for an application for a declaration or injunction. Order 84, r. (20)(2) provides that an application for leave to apply for judicial review shall be made by motion *ex parte* grounded upon recited documents. The court on considering the application may grant leave on such terms as it deems fit. Order 84, r. 20(7) specifically provides that where leave to apply for judicial review is granted than if the relief sought is an order of *certiorari* or prohibition and the court so directs the grant of leave shall operate as a stay of the proceedings until the determination of the application or court order. There is no explicit provision for a stay prior to the court order on the application for leave to apply for judicial review.

2.5 The Oireachtas provided that applications from non-nationals be brought under this scheme of judicial review. Historically judicial review arose from the prerogative writs where conditional orders were sought on *ex parte* applications by applicants and an order made on the *ex parte* application. Subsequently, permanent orders were made after the full hearing. In such a process an interim order, including an interim injunction, was available on the initiation of the process. However, this process has changed under Order 84 of the Rules of the Superior Courts, 1986, the legislation and the practice and procedures which have developed. The current system involves the filing of a notice of motion in the Central Office of the High Court and receiving a future date for the moving of the motion for leave to apply for judicial review. Even if an applicant has papers ready within the 14 days, he or she may receive a date for the motion to proceed some considerable time in the future. This is a gap in the judicial review process which would not have existed under the historic system of *ex parte* applications where parties went to court for leave to apply, with the papers. There is no doubt that because of the volume and complexity of cases, case management is

necessary today and the procedure which served well for hundreds of years is not such as to cope efficiently with the position today. However, constitutional and statutory rights, if they exist, may not be nullified by procedural rules.

2.6 The Court referred to the situation in **The Illegal Immigrants (Trafficking) Bill, 1999** [2000] 2 I.R. 360 at p. 391 where it stated:

"It must be remembered that the statutory power to make a deportation order and its implementation derives from s. 3 of the Immigration Act, 1999. The court has already held that a non-national has a constitutional right of access to the courts to challenge the validity of a decision such as a deportation order. The second objection raised by counsel assigned by the court is to the effect that, if the power to deport under the Act of 1999 is exercised in a particular fashion, particularly when that Act, or some other Act, does not contain a provision preventing deportation before a minimum period has elapsed, there would be a denial of that person's right of access to the courts. Whether a person is entitled to remain within the State for a minimum period of time in order to exercise a constitutional right to bring judicial review proceedings, is a matter to be determined in appropriate proceedings in the High Court concerning the powers of deportation deriving from the Act of 1999. Section 5 of the Bill does not purport to affect the exercise by the State of its power or its discretions in the implementation of a deportation order. On the contrary, it allows for a means of access to the courts to challenge its validity." [The underlying is added].

2.7 As this important issue does not require to be decided in this case I offer no opinion, other than to acknowledge its significance and potential.

3. Conclusion

In conclusion, I agree with the judgment of Geoghegan J. on the issues for determination on this appeal.

As to the issue of whether the bringing of an application for leave within time to take judicial review proceedings challenging the validity of a deportation order under s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 has the automatic effect of staying any deportation pending the hearing of that application, I express no opinion and await a case where it is an issue.

Judgment of Mr. Justice Geoghegan delivered 2nd March 2006

Four more or less identical appeals have been brought by the Commissioner of An Garda Síochána and the Minister for Justice, Equality and Law Reform against the portion of the judgment of the High Court (Peart J.) delivered on the 27th October, 2004 as provided that the above-named applicants who brought four separate sets of proceedings would be permitted to re-enter the State having been deported therefrom, pending a final

determination of their respective judicial review proceedings challenging the respective deportation orders or thereafter in the event that such applications be successful. Also before this court is a composite notice of motion brought in all four sets of proceedings seeking an order that such part of the appeal of the Commissioner and the Minister as does not relate to a contempt application disposed of by Peart J. should not be heard until such time as there has been full compliance with certain orders of Gilligan J. which will be hereafter referred to. In relation to each of the appeals there is a *"notice to vary/cross-appeal"* relating to various questions which arose before the High Court and which I will specify in more detail later in the judgment.

Taking the motion, the appeal and the cross-appeal combined the issues before this court were essentially threefold. They are as follows:

1. In a case where an order under Article 40 of the Constitution is granted *ex parte* in respect of a person detained but about to be deported and that person is deported before notice of the order is received, is a failure to make a return to the conditional order by producing the body a contempt of court?
2. Does a preliminary order under Article 40 or its statutory equivalent, a conditional order of *habeas corpus* in any circumstance remain effective notwithstanding a) that the relevant person alleged to be detained is out of the jurisdiction and/or b) no longer in detention?
3. In a case where notice of a preliminary or conditional order of the kind already described and/or an interim injunction preventing deportation are not implemented because of an absence of notice and not because of any deliberate disregard of the orders is the trial judge in circumstances where he is precluded from making any order on the validity of detention entitled instead to make money and other orders with a view to, as far as possible, restoring the original *status quo ante*?

I should state at the outset that I would refuse the free standing motion brought to this court seeking that none of the issues be dealt with by this court other than the question of contempt. I am quite satisfied that that would not be a correct approach as all the issues are tied in with each other. There is nothing more I need say on this matter.

Before dealing with each of the three legal issues which I have identified, I want briefly to set out the material facts in each of the four cases in respect of which the learned trial judge gave one composite judgment and in respect of which I am likewise now doing the same.

The Adebayo case

A deportation order in respect of Mr. Adebayo, a Nigerian, as were all the

other applicants, was made on the 6th March, 2004. It was served on the following day i.e., 7th March, 2004. At the time of service this applicant was arrested and detained. He brought a *habeas corpus* application which was refused on the 25th March, 2004. On the 6th April, 2004 the applicant's solicitor who acts for each of the applicants learned of his likely deportation that night and he, thereupon, filed an application for leave to bring judicial review proceedings seeking a quashing of the deportation order. The return date assigned for that application was the 21st April, 2004. No interim injunction was applied for in the judicial review proceedings preventing the deportation but the reliefs to be sought on the return date included an interlocutory injunction to that effect. On the same night i.e., 6th April, 2004 the said solicitor sent a letter by fax to the Repatriation Unit at Burgh Quay informing the authorities that judicial review proceedings had been filed and served with a return date of the 21st April, 2004 and stating in the letter the following:

> *"We trust therefore that no action will be taken in the interim to give effect to the challenged order and thereby deprive him of access to the courts."*

On the findings of the learned High Court judge that fax and its equivalent in the other cases was probably received and read by the unit but as far as the authorities and the gardaí were concerned, no undertaking was given not to deport and no interim injunction had been granted. It was, therefore, not considered that there was any obligation to stop the deportation. When however the solicitor received no reply he caused an application to be made that night to Gilligan J. seeking an Article 40 Inquiry and/or conditional order of *habeas corpus* coupled with an interim injunction. This order was granted with the following day as the return date and an interim injunction was also granted preventing the deportation before the hearing of the application the following day. Notice of that order was also faxed to the same unit. However, it emerged from oral evidence heard in the court below that the unit is unmanned between 12.00 midnight and 8.00 a.m. The learned High Court judge was satisfied and, in my opinion, was entitled to be satisfied that the second fax was not received until after 8.00 a.m. the following day. The aeroplane used to deport the applicant had taken off shortly after midnight in the early hours of the 7th April. The learned trial judge went on to find, as he was entitled to find, that there was no deliberate disobedience to either the interim injunction or the conditional order of *habeas corpus* itself.

The Igwe case

The history of this case was similar as far as relevant facts are concerned as

the Adebayo case except that in this instance the deportation order was served on the 6th March, 2004 and then arrested and detained. The legality of his detention was challenged by *habeas corpus* and that application was refused on the 22nd March, 2004. The procedural history and its sequence were similar and I need not repeat it.

There were, however, some minor differences in the factual history. In the Adebayo case Mr. Adebayo claimed that his mobile phone had been confiscated and that this was tantamount to a deliberate refusal of access to his solicitor. No such allegation was made by Mr. Igwe. Certain other points, however, were made in his case that were not made in Mr. Adebayo's. On route to deportation, he was temporarily held in Harristown House which is at or near the airport. It was argued that this was not an authorised place of detention as it was not listed in the Second Schedule to the Immigration Act, 1999 (Deportation) Regulations, 2002 (S.I. No. 103 of 2002) as a prescribed authorised place of detention. The learned High Court judge, quite rightly in my view, rejected that argument on the basis that it could never have been intended that every place used for transit purposes would have to be specified in the regulations. On behalf of Mr. Igwe it was also argued that by reason of similarity of treatment of several other Nigerians in comparable circumstances it should be inferred that the gardaí were not exercising powers of detention properly under the relevant Act but were effectively operating an automatic system. The learned High Court judge rightly rejected this argument also. Where an aeroplane has been specially chartered to travel to Lagos for the purpose of deporting a large number of Nigerians it is inconceivable that in a very substantial number of those cases there would not be genuine apprehension of deliberate avoidance on the part of the gardaí and, therefore, on the basis of numbers alone it would not be proper to draw any adverse inference.

Before moving to the next set of applicants, I want to signpost in passing at this stage that both Mr. Adebayo and Mr. Igwe brought their judicial review applications within the fourteen day time limit under the statute. I will advert later to the relevance (if any) of this point.

The Jacob cases

These applicants are brother and sister to each other. Deportation orders in respect of them were made on the 5th September, 2003 and the making of the orders was notified to each by letter of the 20th November, 2003. None of these applicants was arrested or detained when served with the deportation orders. As far as subsequent court proceedings are concerned the pattern was the same as in the other two cases to which I have referred. The

judicial review proceeding and the application for interim relief and *habeas corpus* to Gilligan J. were made in the same manner and with the same consequences. There is, however, one difference. The judicial review application was well outside the fourteen day time limit and, therefore, it cannot strictly speaking have been regarded even as a valid application for leave unless and until the time was extended.

Although these applicants were not arrested following the notice of the deportation orders they were arrested and detained on the night of the deportation. They alleged that they had thought they were only required to attend the gardaí and that it never occurred to them that they were going to be deported that night and they expressed strong grievance that they were being treated differently than certain other members of their family. This led to aggressive shouting which in turn understandably led to a belief on the part of the gardaí that they would not freely comply with the deportation orders and, accordingly, an arrest was made at that stage. I am merely giving a brief summary of the position. The judgment of Peart J. gives the full details.

The Ondukan case

In this case, the deportation order was made on the 17th January, 2003. There was no immediate arrest but as a consequence of a failure to report to the gardaí this applicant was arrested and detained on the 8th January, 2004. He successfully obtained a *habeas corpus* order on the 18th February, 2004 and he filed a judicial review application including a claim for interlocutory relief on the 24th February, 2004. However, he had in fact obtained no further relief as of the 6th April, 2004, the date of the intended deportation. He was given notice to attend the Bureau on that date and then given notice to be in attendance at Dublin Airport at a particular time before the flight. He alleged that he was deprived of his mobile phone and, therefore, of a means of access to his solicitor. Otherwise the procedural history was the same as in the other cases though it should be explained that the initial return date for the judicial review proceedings which he had commenced in February, 2004 was the 21st April, 2004 the same date as applied to the much later judicial review proceedings in the other cases. Otherwise the position is identical because although interlocutory injunctions were sought in the February application at no stage was an interim injunction sought. Nor was any undertaking given by the State. It will, of course, be noted from the dates that the judicial review application in so far as it sought to quash the deportation order was well out of time and would have required an extension of time which had not been given as of all material time.

I turn now to the law and I will deal with each of the identified issues

mentioned above in turn.

The contempt issue

In relation to the contempt issue, the learned High Court judge had this to say:

> *"There is no doubt that as a matter of pure fact the orders obtained by each applicant on the 6th April 2004 were not complied with in the sense that (a) the bodies of the applicants were not produced before the court on the following morning and against the terms of the orders the deportations were actually effected.*
>
> *It is also beyond doubt that these orders are still extant, since an opportunity to bring an application to have them vacated on the ground of mootness was not availed of by the respondent.*
>
> *However it is also the evidence, which I accept as bona fide and correct, that those having charge of this operation were never made aware of the making of the orders at 11.30 p.m., since the aircraft was already airborne by the time the applicants' solicitor managed to get through to any appropriate personnel at garda headquarters or Command and Control at Dublin Airport. I am also satisfied that, as a matter of fact, the faxes were sent to GNIB following the making of the orders were not seen until the following morning."*

Later on in his judgment, the judge found as follows:

> *"Firstly, and for the reasons which I have already given, I am not satisfied that there has been a deliberate disobedience of the orders of this court made on the 6th April, 2004, and accordingly, I am not satisfied that the respondents are in contempt, and I therefore refuse any relief on foot of the applicants' Notices of Motion seeking the attachment and committal of the Commissioner of An Garda Síochána."*

I believe that there is nothing which I can usefully add to those findings of the learned trial judge which were clearly correct. I am deliberately avoiding any analysis of contempt law in general and case law in particular because the precise definitions of criminal and civil contempt respectively and the role of *mens rea* in them and the role (if any) of vicarious liability have never been definitively established in any modern Irish case law and I do not think that this is at all a suitable case in which to attempt to embark on such an exercise. It is perfectly obvious that on the facts as found by the learned trial judge there was no contempt of court in this case.

The jurisdiction issue

As already mentioned, by the time the relevant authorities had any notice of the conditional order under Article 40 made by Gilligan J. the applicants had not only landed in Lagos but were free from any detention. The applicants were, of course, accompanied by a force of gardaí in the flight. Questions as to the precise status of the applicants while in the aeroplane or as to whether the Commissioner of the gardaí or anyone acting on his behalf would have had authority in some circumstances to require the pilot to turn around and go back to Ireland do not seem to me to arise. I agree with the view of the learned High Court judge that the *habeas corpus* proceedings became moot once the detention ceased. I also agree with the learned trial judge that once the applicants are outside the jurisdiction of the Irish courts and certainly if they are no longer under the control of persons amenable to the jurisdiction of the Irish High Court, the Irish courts are bereft of any jurisdiction to make a determination as to the validity of the detention. In this connection the observations (albeit *obiter dicta*) of Finlay C.J. in a judgment in this court in the case of **In re D.** [1987] I.R. 449 at 457 and with whose judgment Walsh J., Henchy J., Hederman J. and McCarthy J. agreed are apposite. The former Chief Justice said the following:

> *"Though on my view of the case it does not arise for decision, I feel I should express my view that, on my understanding of the provisions of Article 40, s. 4, sub-s. 2 of the Constitution, the High Court on the hearing of an application pursuant to that sub-article must reach a single decision, namely, whether the detention of the person concerned is or is not in accordance with law. If it is, then the application must be refused. If it is not, the person must be discharged from the custody in which he is. Such a procedure does not appear to me to admit of any supervision or monitoring of the interests of the person*

concerned, even allowing for a condition of mental retardation or other want of capacity."

Neither an order for release nor an order refusing release by Peart J. would have been appropriate here and, in my view, that is the end of the matter as far as the *habeas corpus* proceedings were concerned. It is true that there have been exceptional circumstances where a *habeas corpus* proceeding has been permitted to continue notwithstanding its apparent mootness but such exceptional circumstances do not arise here.

The alternative reliefs issue

In the light of those findings in relation to contempt and *habeas corpus* the learned trial judge decided nevertheless that the *status quo ante* ought to be restored and for that purpose he took the view that there was an inherent jurisdiction in the court to make any suitable orders which would achieve that purpose. There was a combination of reasons why the learned trial judge adopted this approach. First of all in relation to some but not all of the applicants he found that as a matter of probability their mobile phones had been confiscated and he accepted that that would have prevented them contacting their solicitor. I think it can also be reasonably inferred that he took the view that if proper systems had been in place notice would have reached the authorities in time to prevent the deportations. Over and above these reasons however the learned High Court judge, having found that the relevant authorities were on notice of the respective judicial review proceedings, considered that notwithstanding the absence of any undertaking from the State not to deport pending the hearing of those proceedings and the absence of any interim injunction or undertaking there was no entitlement to implement the deportation order once those proceedings were pending and had not been determined. The formal substituted order which the learned trial judge made was that each applicant, should he still retain a wish to return to this jurisdiction for the purpose of continuing to prosecute the judicial review proceedings in respect of the deportation order, be facilitated in that regard as to the reasonable costs involved in so returning and that on so returning he be permitted to re-enter pending a final determination of those proceedings.

In point of form, that order is included in the only order of Peart J. before this court which is the order of the 4th November, 2004 and in each case is headed *"In the Matter of Article 40.4 of the Constitution and of the Habeas Corpus Act, 1782".* However, it must be said that it was not entirely clear from a reading of the judgment in the High Court as to how this novel and imaginative order was to be slotted in in the proceedings before the court. At one stage in the judgment there were indications that it was intended to be

made in the attachment and committal motion. In another part of the judgment there seemed to be a suggestion that not only was there an inherent jurisdiction in the court to make this order but that no particular motion or proceeding was required to be before the court to enable it to do so. The judge may have meant by that that there did not have to be an express application for it included in the proceeding before him. Finally, there were indications that the learned trial judge was making the order effectively in the *habeas corpus* proceeding. That was obviously the view of the registrar who drew up the order. Nothing turns on any of this, in my view, because I am satisfied that this order requiring the State to facilitate the return of the applicant to Ireland for the purpose of pursuing the judicial review proceedings could not as a matter of law be made in either the contempt proceeding or in the *habeas corpus* proceeding. That does not necessarily mean that such an order could never be made and I will shortly explain what I mean by that. But as matters stand, that order in each case must, in my opinion, and for the reasons which I have indicated be set aside and the appeal allowed.

Although on the view which I have taken it does not strictly arise, I intend to give at least tentative consideration to the question of whether the institution of a judicial review proceeding challenging the validity of a deportation order has the automatic effect of staying the implementation of the order pending the outcome of those proceedings. This is a most important question and as there was considerable argument on it before this court, I would like to address it. There are a number of different aspects to the problem and I would list them as follows:

1. Given that there is a statutory fourteen day period within which a deportee may apply for leave to bring judicial review proceedings challenging the validity of the deportation order is he entitled to remain in Ireland for the fourteen day period at least?
2. If he is so entitled, is he further entitled in the event of his seeking such leave within the fourteen day period to remain in Ireland pending the outcome of the proceedings including the actual judicial review itself if leave is given?
3. Alternatively, is he at least entitled to remain in Ireland until the question of leave is determined and then to continue living in Ireland pending the outcome of the proceeding if but only if the judge granting the leave so directs?
4. What is the position in relation to any of the above alternatives (if they apply at all) where the fourteen day period expires without any application being brought and is then followed by an application to extend the time?
5. In such a case would an interim injunction have to be obtained to render an actual deportation pending the hearing of the application to extend the time unlawful?

First of all, I am of opinion that the learned High Court judge is not correct in the view he took that even in the case of an application for leave which required an extension of time, the State, if on notice of such application, would not be entitled to implement the deportation order even in the absence of an interim injunction. In my opinion, that would lead to an unworkable interpretation of the Act. In this particular case, the applicants were all being deported to Nigeria. Nigeria is a particularly good example for illustrating the principle in that there are no scheduled flights between Ireland and Nigeria. On this occasion and, it seems to be understood on all occasions, when a number of Nigerians are being deported a large jet aircraft is chartered for the purpose. If the view of the learned trial judge is correct, every one of the intended deportees could contact their solicitors and procure that an application for leave to obtain judicial review would be lodged even if it was well outside the fourteen day period and none of them could then be deported. That, in my opinion, would lead to an absurdity. The Act has to be given a reasonable workable interpretation which respects the rights of the proposed deportees on the one hand but also renders deportations provided for under the Act to be possible and achievable. I would, therefore, hold that if the fourteen day period has expired and, therefore, time has to be extended, the State is entitled to go ahead with the deportation notwithstanding an application for leave to bring judicial review proceedings with the accompanying application for extension of time unless an interim injunction has been obtained from the court preventing the deportation.

I take a different view, however, (tentatively as I have indicated) in relation to proposed deportees who bring the application for leave within the fourteen day period. This is an express statutory entitlement and I find it inconceivable that the Oireachtas ever intended that a person having exercised his statutory entitlement to bring the application within the fourteen days may, nevertheless, be deported in the meantime against his will unless he obtains an interim injunction, a procedure not mentioned or in any way provided for under the Act itself, it being historically a chancery remedy though ultimately incorporated in the Supreme Court of Judicature Act. It is quite true that in theory and, indeed, in practice the judicial review application can proceed normally in the applicant's absence. For that reason, I do not consider that any constitutional issue as to access to the courts arises. The applicant in such a case has not been deprived of his constitutional right of access to the courts. My view is based on the interpretation of the Act itself. This Act is concerned with individuals being forced against their will to leave the country. If there is a time limit provided by the Act to enable them to challenge such an event, it does not seem to be a sensible interpretation of the Act to suggest that, notwithstanding the exercise of the statutory entitlement to apply for leave for judicial review requiring no extension of time, they may nevertheless be spirited out of the

country. On any reasonable and purposive interpretation of the Act that cannot be so. It is not, therefore, a question of an implied statutory stay. It is simply a matter of substantive interpretation of the Act though, of course, the end result is the same as if a stay was expressly provided for.

It is no answer to the view which I have expressed that a deportee is entitled to apply for an interim injunction and that if he obtains it, that will prevent the deportation. First of all, he is entitled to have a full fourteen days within which to consider and take advice as to whether he will in fact apply for judicial review. Yet on the State's argument, if, say, on day three of that period the deportation was about to be implemented the applicant would have to hurry into court and obtain an interim injunction. That does not seem to be consistent with his fourteen day entitlement. Secondly, the person to be deported may never at any material time have had the services of a solicitor and, indeed, he may deliberately not wish to have one. I ask the rhetorical question, how is an unrepresented Nigerian to know in the ordinary way that there is such a remedy as an interim injunction notwithstanding that it is nowhere mentioned in the only Act which he could reasonably be expected to consult and furthermore that he would be required to obtain it if he wanted to remain in the country notwithstanding that the fourteen day period had not run out. In arriving at the correct interpretation of the Act, it is irrelevant that in any given incidence, such as these four cases, the applicants do in fact have solicitors. It is a necessary corollary to what I have said, that if in fact an application is brought lawfully within the fourteen day period the right not to be deported must continue at least until the matter first comes before a court. At that stage I would hold that an interlocutory injunction would be required to preserve the right to remain in the country. In that respect I differ from the view of the learned High Court judge. This requirement, in my opinion, arises from the wording of the relevant section itself.

Section 5 of the Illegal Immigrants (Trafficking) Act, 2000 expressly provides that a person shall not question the validity of a deportation order under section 3(1) of the Immigration Act, 1999 *"otherwise than by way of an application for judicial review under O. 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986)".* Subsection (2) goes on to provide that the application for leave to apply for judicial review must be made within the fourteen day period commencing on the date on which the person was notified of the making of the deportation order *"unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made."* It is clear, therefore, that subject to the modifications contained in the Act itself the provisions of O. 84 of the Rules of The Superior Courts shall apply. O. 84, r. 20(7) provides as follows:

> *"Where leave to apply for judicial review is granted then-*
>
> *(a) If the relief sought is an order of prohibition or certiorari and the court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or unless the court otherwise orders;*
>
> *(b) If any other relief is sought, the court may at any time grant in the proceedings such interim relief as could be granted in an action begun by plenary summons."*

Having regard to the incorporation of the whole of Order 84 expressly provided for by the said Act of 2000, it would seem to me that implementation of the Deportation Order following on leave being granted for judicial review would only be stopped if the court makes an order to that effect.

In summary, therefore, I take the view that no deportation may be implemented during the currency of the fourteen day period and that if in fact an application for leave is brought within that period no deportation order may be implemented until the court determines the application for leave and only then if the court does not order otherwise upon the granting of leave. Having regard to the very nature of this legislation and its intent it would seem likely that a court properly exercising its discretion would normally grant the stay or the injunction as the case might be if leave was being given.

The person who has not applied within the fourteen days has *prima facie* no right to remain in the State and the State is perfectly entitled to make appropriate arrangements for the implementation of his deportation. Nothing in the Act would lead an applicant to believe that if the time has not in fact been extended he cannot be deported. The court may, of course, grant him an interim injunction. It is unfortunate, in my view, that the right to apply for such interim injunction in such a situation is not expressly provided for in the Act so that persons unacquainted with Irish law and particularly unrepresented deportees would be aware of what they had to do if they had any chance of stopping the deportation. I have already indicated that it is not satisfactory that a chancery remedy such as an interim injunction unprovided for in the Act should have to be availed of. But there is no alternative in a case where an extension of time has to be obtained. Otherwise for the reasons which I have given the Act would be potentially unworkable.

I now want to make some observations which must necessarily be *obiter*

dicta on the unusual form of relief granted by the learned High Court judge. Earlier in this judgment, I have given reasons why, in my opinion, it was not open to him to give such relief in the actual proceedings which were before him. Again, as I mentioned, this does not rule out such relief being granted in other proceedings. Counsel for the Commissioner and the Minister, Mr. Patrick McCarthy, S.C. did not dispute that a remedy of the kind given by the learned High Court judge might be appropriate in cases where there had been a deliberate flouting of a court order by the State authorities. Mr. McCarthy, however, argued that where there was no longer actual custody of the applicants and where there was if anything simply a *"collateral purpose"* i.e. to be allowed to return to pursue the judicial review proceedings the court should not intervene by way of restoring the *status quo ante* in the absence of *mala fides* on the part of the authorities such as was found in the case of **The State (Quinn) v. Ryan** [1965] I.R. 70 and the **Trimbole** case. With reference to Mr. Ondukan's case, the learned High Court judge in his judgment referring to the removal of the mobile telephone said the following:

> *"If I am correct about this, it seems to me that the case comes within the principles of the* ***State (Quinn) v. Ryan****... even though that case might concern a considerably more extreme instance of a deliberate effort to deprive a person in custody of his constitutional rights. In my view any deliberate removal of the mobile phones, when combined with a denial of a request be permitted to communicate with a legal adviser, must amount to a denial of a constitutional right."*

I am very doubtful that the **Quinn** case has relevance. It was held in that case by this court that it is contempt of court for police officers to arrange to remove a prisoner out of the jurisdiction of the Irish courts on an English warrant with such speed that he has no opportunity to apply to the courts to question the validity of such warrant or to apply to the court for an order of habeas corpus. In that case however there was evidence of a deliberate conspiracy by the gardaí to ensure that the prosecutor would be removed out of the jurisdiction without a court proceeding. In brief it was a *mala fides* activity whereas in this case the garda behaviour would appear to have been *bona fide*. If a remedy of the kind which was granted in this case by Peart J. is to be granted in an appropriate case, it should be granted in the judicial review proceedings challenging the deportation order and not in contempt or *habeas corpus* proceedings. The judicial review proceeding challenging the validity of the deportation order is the appropriate vehicle for seeking such remedies. It would be a matter for the judge dealing with the judicial review application to decide whether, as a matter of justice, such an order should be

made. It is a drastic form of order. Where there has been no *mala fides,* one of the factors which a court would in my opinion be entitled to take into account would be the likelihood of leave being granted and even to some extent the likelihood of whether the judicial review would itself be granted. I respectfully disagree with the learned High Court judge that these factors may not be taken into account.
As I have already indicated, the right of access to the courts in these cases has not been interfered with. On the other hand in the case of applications made in time there would be an arguable entitlement not to be deported pending an order by the court under O. 84 of the Rules of the Superior Courts. That factor would have to be taken into account balanced against other factors. In my opinion, an order compelling the State to pay for the return of a deportee would be a remedy to be sparingly granted. None of this however arises in this particular appeal, even if they could arise in the judicial review proceedings which have still to be heard.

I would refuse the independent motion brought before this court. I would allow the appeal of the Commissioner and the Minister and set aside that part of the order of the High Court as ordered that the respective applicants be facilitated in terms of reasonable costs in returning to this jurisdiction and permitting such return.

The notice to vary/cross-appeal raised five issues.
1. A challenge to the finding that there was no deliberate violation of the order of the 6th April.
2. A challenge to the finding of mootness in respect of the respective applicants' arrest and detention.
3. A challenge to an alleged finding that the applicant was not at any time in unlawful custody prior to his being disembarked at Lagos.
4. A challenge to the finding that there was no jurisdiction in *habeas corpus* to make an order where the person in question was outside the territory of the State and no longer in the immediate custody of the State.
5. A challenge to the finding that there was lawful authority to detain an applicant at Harristown House.

Throughout the judgment I have dealt in one way or another with all of these matters and it is clear from the views which I have expressed that I would dismiss the cross-appeal.

Judgment of Mr. Justice Fennelly delivered the 2nd day of March, 2006

I entirely agree with the judgment of Geoghegan J, the reasons he has given and the orders he proposes, except on one point. Indeed, as

Geoghegan J acknowledges, the point probably does not strictly arise. He also expresses his views as being tentative.

The point concerns whether, during the fourteen-day period permitted for an application for Judicial Review of a deportation order and, where an application for leave is made, following the making of such application, there is an automatic stay on the implementation of the order pending the outcome of those proceedings.

Geoghegan J takes "*the view that no deportation may be implemented during the currency of the fourteen day period and that if in fact an application for leave is brought within that period no deportation order may be implemented until the court determines the application for leave and only then if the court does not order otherwise upon the granting of leave.*" His view is based on an interpretation of the Illegal Immigrants (Trafficking) Act, 2000, particularly section 5 and the manner in which it incorporates by reference certain provisions of the Rules of Court.

I find myself unpersuaded. Certainly in a situation where this issue is secondary to the principal points decided, I would be reluctant to reach a conclusion that the Act impliedly imposes a restraint on the implementation of orders duly made. Undoubtedly, the points made by Geoghegan J strongly suggest that there should be such a stay. The problem is that there is simply no statutory provision for it. I find myself in agreement with the submission made on behalf of the Appellants that it has never been the law that the mere institution of proceedings would operate with the same effect as a Court order. I do not think such an important provision can be implied. Nor do I think the problem can be solved by reference to Order 84 of the Rules of the Superior Courts. Section 5 of the Act of 2000 uses that Order as its point of reference for its provisions in respect of Judicial Review. For present purposes, it is important that section 5(2) provides, in relevant part:

> *"An application for leave to apply for judicial review under the Order……shall-*
>
> *(a) be made within fourteen days……, and*
>
> *(b) be made on notice……"*

Order 84, Rule 20(7) provides:

> *"Where <u>leave to apply for judicial review is granted</u> then-*
>
> *"(a) If the relief sought is an order of prohibition or certiorari and the court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or unless the court otherwise orders;*
>
> *……"* (emphasis added).

I do not believe that the provision for a stay, if *"the court so directs,"* where leave is granted, can be extended by implication to the stage where the application is made. It is certainly an unfortunate feature of the legislation that the requirement that leave be applied for on notice and that "*substantial grounds*" be established has, to a large extent, slowed the entire process. In my own view, the normal system of applications ex parte for leave operated as a perfectly effective filter of unmeritorious applications and certainly led to quicker decisions. However, the effect of the legislation is that the only express statutory provision for a prima facie automatic stay does not take effect until leave is actually granted. A fortiori, I am not convinced that there is an automatic stay during the fourteen-day period, where no application for leave has yet been made. On the other hand, I entirely agree that, where the application for leave is itself made outside the fourteen-day period, so that an extension of time is essential, there can be any question of an implied stay.

I repeat that, save in respect of this matter, I am in full agreement with the judgment of Geoghegan J, including his obiter observations regarding the possibility that orders such as that made by Peart J would be made in other cases.