THE HIGH COURT

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 40.4.2° OF THE CONSTITUTION

[2018 No. 1601 S.S.]

BETWEEN

M.B. (ALGERIA)

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

AND

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 40.4.2° OF THE CONSTITUTION

[2018 No. 1602 S.S.]

L.S. (ALGERIA)

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of December, 2018

1. These two Article 40 applications were heard together and relate to the same point of statutory interpretation.

Facts in relation to Mr. M.B.
2. Mr. M.B. states that he arrived in the State on 8th October, 2012. He applied for asylum unsuccessfully. He then "married" a Polish national on 5th March, 2013. He later applied for a residence card as a non-EEA national family member and was granted permission to remain in the State. On 19th July, 2017 the Minister revoked that permission under reg. 28(2) of the European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 548 of 2015) on the grounds that the marriage was one of convenience. Furthermore, information provided in the application was false and misleading. It is accepted on his behalf that the wife has returned to Poland, although it is claimed this was only recently, for the purposes of divorcing him. A deportation order was signed on 14th December, 2017. He was arrested on 11th December, 2018 on the grounds of failure to leave the State by the time stated in the order and non-compliance with the terms of a notice under s. 3 of the Immigration Act 1999, which implies some level of evasion. I am informed that he has in fact been evading since 4th December, 2018.

Facts in relation to Mr. L.S.
3. Mr. L.S. states that he arrived in the State on 17th March, 2014. He also applied for asylum, an application that was rejected by the Refugee Applications Commissioner. That was appealed to the Refugee Appeals Tribunal but he failed to attend the oral hearing, so the appeal was dismissed. He then applied for subsidiary protection but failed to attend for interview on 7th January, 2016, so that was also unsuccessful. He "married" a Slovakian national on 29th January, 2015, and was granted permission to remain on that basis. On 31st December, 2016, he was notified of a decision to revoke his residence permission on the basis that this was a marriage of convenience. He was then notified of an intention to make a deportation order. In submissions under s. 3 of the 1999 Act, he accepted that the "wife" had returned to Slovakia, although claimed that this was in August, 2016. The Minister's consideration states that the wife admitted to the Slovakian authorities that she had entered into in a marriage of convenience for €1,000. Enquiries indicated she was not in the employment of her alleged employer and the landlord had no knowledge of her. The applicant was arrested on 11th December, 2018. I am informed that he had been evading since February, 2018.

4. I have received helpful submissions from Ms. Rosario Boyle S.C. and Mr. Anthony Lowry B.L., who also addressed the court, for the applicants, and from Mr. John P. Gallagher B.L. for the respondents. Certificates have been produced which have provided a *prima facie* justification for the detention. Mr. Gallagher has very properly drawn attention to two minor infelicities: the use of the third person as opposed to first person and the inversion of the name of Mr. L.S., but Ms. Boyle has stated that no point is being taken under those headings. It was also accepted by her that the statutory instruments relevant to the application were to be taken as admitted and did not require formal proof. Mr. Gallagher made the initial objection that judicial review was a more appropriate remedy but I do not agree. The gist of the applicant's argument challenges the detention warrants. Even insofar as the challenge could be construed as one to the regulations, an applicant can challenge an enactment in the Article 40.4 context, as Article 40.4.3° expressly recognises.

Alleged ineffectiveness of regulation 5 of the 2005 regulations
5. The Immigration Act 1999 (Deportation) Regulations 2005 (S.I. No. 55 of 2005) provide in reg. 2 that "*In these Regulations* "the Act" *means the Immigration Act 1999 (No. 22 of 1999) as amended by the Illegal Immigrants (Trafficking) Act 2000 (No. 29 of 2000) and the Immigration Act 2004 (No. 1 of 2004).*" Regulation 5 provides that "*Each place listed in the Second Schedule to these Regulations and every Garda Síochána station is a place prescribed for the purposes of section 5(1) of the Act.*" The second schedule includes "*Cloverhill Prison*" as one of the places.

6. Ms. Boyle argues that the regulations fall to be interpreted now as if the words "*the Act*" in the 2005 regulations means the 1999 Act as amended in 2000 and 2004, disregarding subsequent amendments, and that disregarding those amendments renders reg. 5 ineffective.

7. Considerations of workability dictate that references to statutes must generally be taken to be to those statutes as amended from time to time. Thus where an enactment, either a statute or a statutory instrument, refers to another enactment, that means that enactment as amended from time to time. That approach is now embodied in s. 14(2) of the Interpretation Act 2005, which provides that "*A citation of or a reference to an enactment shall be read as a citation of or reference to the enactment as amended*

(including as amended by way of extension, application, adaptation or other modification of the enactment), whether the amendment is made before, on or after the date on which the provision containing the citation or reference came into operation." That is an important and necessary provision. As put by Mr. Gallagher in submissions at para. 13, "*if this section cannot be made to work, must we instead change the multitude of other enactments which call its name every time the 1999 Act is amended*." The same goes for any statutory provision, of which there are tens of thousands. Such an approach of express amendment in every case is unworkable. Therefore, the words "*as amended by the Illegal Immigrants (Trafficking) Act 2000 (No. 29 of 2000) and the Immigration Act 2004 (No. 1 of 2004)*" in the 2005 regulations can only have been inserted out of an abundance of caution, albeit that Mr. Gallagher makes the point that the Interpretation Act 2005 commenced on 1st January, 2006 (see s. 1(2)) whereas the 2005 regulations commenced on their making on 3rd February, 2005. However, since the commencement of the 2005 Act, such an abundance of caution is no longer necessary. The inclusion of those words in no way implies an intention that any subsequent amendments are to be disregarded. It merely records the state of the 1999 Act as of the date of the regulations. The case has nothing really to do with the concept of a specific definition of a term, as arose in *BUPA (Ireland) v. Health Insurance Authority* [2008] IESC 42 [2012] 3 I.R. 442, and nor does it have anything to do with the law on ambiguous provisions (s. 5 of the 2005 Act). The purpose of the definition was to enable the Minister to use the term "*the Act*" rather than the full phrase "*the Immigration Act 1999*". It would be illogical and a usurpation of the executive function to read anything more into it than that. It would be to nullify the 2005 regulations contrary to the separation of powers to interpret them in a way that renders them ineffective. Ms. Boyle's argument therefore comes down to s. 4(1) of the 2005 Act, which provides that: "*A provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made*." It would be totally unreal to construe the 2005 regulations as embodying a contrary intention, especially as the amendment enacted in 2015 did not exist at that point.

8. The UK *Office of the Parliamentary Counsel Drafting Guidance* (July, 2018) does not deal directly with this point, although para. 6.1.8 states: "*Textual amendments, so far as Westminster legislation is concerned, are sometimes said to be "always speaking". So the first enactment is regarded as having effect subject to a continuing amendment by the second."*, citing Daniel Greenberg, *Craies on Legislation*, 11th ed. (London, 2016), para. 14.3.5. Not perhaps directly in point but certainly consistent with the approach to be adopted here.

In any event, the regulations have been validly amended

9. The original s. 5(1) of the 1999 Act stated: " *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 has failed to comply with any provision of the order or with a requirement in a notice under section 3 (3)(b)(ii), he or she may arrest him or her without warrant and detain him or her in a prescribed place*." The subsequent amendment made by s. 78 of the International Protection Act 2015 substitutes a new s. 5 of the 1999 Act, which provides, in relevant part: *"(1) 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 [sets out various conditions] the officer or member may arrest the person without warrant, and a person so arrested may be taken to a place referred to in subsection (3) and detained in the place in accordance with that subsection"*. Subsection (3) says: "*A person who is arrested and detained under subsection (1) or (2) may be detained (a) In a prescribed place…"*

10. The difference for present purposes is that the reference to prescribed place has been moved from sub-s. (1) to sub-s. (3). However, even if the provision had not been textually amended, s. 26(2)(f) of the Interpretation Act 2005 applies. That provision states that "*Where an enactment ("former enactment") is repealed and re-enacted, with or without modification, by another enactment ("new enactment"), the following provisions apply…reference in any other enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read as a reference to the provisions of the new enactment relating to the same subject-matter as that of the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be disregarded in so far as is necessary to maintain or give effect to that other enactment."*

11. The reference to s. 5(1) in the 2005 regulations would therefore have been best construed as being one to s. 5(3) by virtue of s. 26(2)(f) of the 2005 Act. That is, however, redundant because there is an express amendment, but even if there was not, the 2005 Act would have dealt with the position. I note in passing that in *S.G. (Albania) v. Minister for Justice and Equality* [2018] IEHC 184 [2018] 3 JIC 2311 (Unreported, High Court, 23rd March, 2018), the State argued for an expansive interpretation of s. 27 of the 2005 Act and a narrow interpretation of s. 26. This is the second time since that case that such an interpretation would have produced results unfavourable to the State, the previous case being *A.A.D. (Somalia) v. Chief International Protection Officer* [2018] IEHC 337 [2018] 5 JIC 1406 (Unreported, High Court, 14th May, 2018). The State, of course, have a constitutional right to seek leave to appeal in *S.G.*, a decision on which is entirely a matter for the Supreme Court and on which I am no way reflecting, but the point I made in *S.G.* was that if its arguments in that case were to be upheld, that was going to cause the State significant difficulty in other cases. Overall, a wide interpretation of s. 26 and a narrower interpretation of s. 27 is generally much more in the interests of the smooth working of public administration. Nonetheless, of course, if the State want to attempt to score an own goal of potentially major proportions that is entirely a matter for them so we can simply await developments at the appellant level in relation to *S.G.* I might also add that the practice that has been adopted since S.G. and which has appeared in a number of cases before the court since then of applying s. 50 of the 2015 Act "*in ease of the applicant*" rather puts out in the open the humbug involved in the State's position that the utilisation of s. 27 in this context is necessary to preserve the "*right[s]"* of applicants. It is a novel species of "*right*" if disregarding it amounts to a position in ease of an applicant.

12. The Immigration Act 1999 (Deportation) (Amendment) Regulations 2016 commenced on 10th March, 2016. Regulation 3 provides that: "*Regulation 5 of the Regulations of 2005 is amended by the substitution of 'section 5(3)' for 'section 5(1)'.*" This corrects the reference concerned. Also quite obviously it indicates an intention on the part of the Minister to give effect to the 2015 Act. But it is not necessary to express indicate such an intention, because an intention to give effect to the relevant legislation is always implied in the absence of anything to the contrary.

13. For good measure, the applicant's arguments on this point have already been rejected in *Mkhitaryan v. Governor of Cloverhill Prison* and *Edibiri v. Governor of Cloverhill Prison* (*ex tempore*, Not circulated, Faherty J. 18th April, 2016). That decision is recorded in John Stanley, *Immigration and Citizenship Law* (Dublin, 2017) (p. 594, n. 4) as holding that *"even though the 2005 Regulations have been amended in 2016, the list of prescribed places has not changed".* Even though the judgment has not been circulated, its precedential status has been enhanced by there being a written record in an academic textbook of its *ratio*, and I would follow that decision here.

The argument that the 2016 regulations do not amount to prescribing of places

14. The argument is made that the 2016 regulations do not amount to a proper prescribing of places because they do not state specifically that the Minister has made a decision that specified places are being prescribed. They merely amend the 2005 regulations. As Ms. Boyle puts it, they do not "*show that the Minister actually considered the matter*". That inventive argument is without logical

basis. There is no magic formula as to how the Minister goes about this. He or she can prescribe places narratively or amend or extend that as prescribed at a previous point in time. The Minister made the 2016 regulation subsequent to and by reference to the 2015 Act to enable that Act to function. It is obvious what the intention was and no defect, legal or logical, has been demonstrated. The importance of personal liberty does not come into it because nobody can be in any doubt about the net effect of the 2005 and 2016 regulations. Mr. Gallagher eloquently summarises the applicant's argument by saying that it amounts to a *"view that the Minister must approach each new regulation as if it were a tabula rasa".* That would not be a valid approach to legislation or statutory instrument. Law is a continuous fabric and any one enactment sits in a web of other related enactments and must be read with them. I made the point in *Star Elm Frames Ltd and the Companies Act 2014* [2016] IEHC 666 [2016] 10 JIC 0313 (Unreported, High Court, 3rd October, 2016) (para. 22) that rules of court are not self-contained and that any individual rule of court is a statutory instrument or an element of a statutory instrument that has been inserted into a larger scheme. But the same point arises on a wider canvas in relation to any enactment including a statutory instrument which must sit as part of the larger scheme of the statute book as a whole, and must be read in a way that coheres with that larger scheme.

Order

15. As I am satisfied that the applicants are in lawful detention. I will dismiss both applications.