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IN THE HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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Rong Chen's Application [2015] NICA 2

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY RONG CHEN

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Before: Morgan LCJ, Coghlin LJ and Gillen LJ

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MORGAN LCJ (giving the judgment of the court)

[1] The appellant is a national of the People's Republic of China and the spouse of a UK national. On 6 July 2012, following a guilty plea, she was convicted at Belfast Crown Court on two counts of controlling prostitutes for gain, two counts of entering into an agreement to acquire criminal property and two counts of trafficking within the United Kingdom for the purpose of sexual exploitation. She was sentenced to concurrent determinate custodial sentences of four years for the prostitution and criminal gain offences and seven years for the trafficking offences, comprising 3 ½ years in custody and 3 ½ years on licence. Subsequently the Secretary of State made a deportation order in respect of her. Treacy J granted leave to appeal on one ground. She now appeals the refusal of leave on the other grounds. Mr Dornan appeared for the appellant and Ms Murnaghan QC for the respondent. We are grateful to both counsel for their helpful written and oral submissions.

Background

[2] Treacy J set out the appellant's immigration history. On 29 December 2004 she applied for a marriage visa whilst in China. This was granted from January 2005 until July 2005. She entered the United Kingdom on 1 February 2005. On 27 June 2005 she applied for further leave to remain as the spouse of a British National after marrying David Alexander Thornton. Leave was granted until 18 July 2007. On 13 June 2006 correspondence was received from her husband stating that she had left him after she had gained leave to remain and that the marriage was no longer subsisting. She remained in the United Kingdom in breach of her visa conditions

until 18 July 2007 when she returned to China. On 27 August 2007 she applied for a visa as a spouse of a British citizen on the basis of her marriage to Jason Owen Hinton. This application was refused on 27 September 2007 but was overturned on appeal on 7 November 2007. A visa was issued which was valid until 7 November 2009. She entered the United Kingdom on 30 November 2007. On 21 October 2009 she submitted a settlement application based on her marriage to Mr Hinton. A decision on that application has been deferred.

[3] On 31 July 2013, while in custody serving her sentence, the appellant was notified of the decision to deport her and a deportation order was served on 5 August 2013 (the first deportation order). On 8 August 2013, the appellant filed an appeal to the First-Tier Tribunal (Immigration and Asylum) Chamber. At the deportation hearing on 10 October 2013, the appellant challenged as unlawful the first deportation order on the basis that the appellant still had an outstanding appeal in respect of some of the underlying offences. The Home Office informed the Tribunal that the Secretary of State would revoke the first deportation order pursuant to her powers under section 34(4) of the UK Borders Act 2007. The appellant submitted that the Notice of Decision dated 31 July 2013 must also be withdrawn. It was argued that, in revoking the first deportation order, the Secretary of State was compelled to issue a new Notice of Decision. The Tribunal agreed with the Home Office that the appeal hearing challenging the Notice of Decision should proceed.

[4] On 12 November 2013 the Home Office informed the appellant and the Tribunal that the Notice of Decision to make a deportation order dated 31 July 2013 was withdrawn. On 18 November 2013, the Home Office issued the appellant with a Notice of Decision identical to that which was withdrawn along with a new deportation order dated 15 November 2013 (the second deportation order). The appellant lodged an appeal against that deportation order. On 27 November 2013, the appellant's legal representatives wrote to the UK Borders and Policing Unit stating that the procedure followed by the Home Office and the Secretary of State in issuing the second deportation order was not in compliance with immigration laws and rules and the order had been issued prematurely. It was asserted that a new deportation order could only be made after (a) the first deportation order had been revoked and (b) the Tribunal had issued a notice confirming withdrawal of the original appeal. The Tribunal issued its notice of withdrawal of the original appeal on 5 December 2013.

[5] On 9 December 2013, the appellant's custodian at Hydebank was issued with a Notice of Detention by the Secretary of State. The custodial portion of the appellant's sentence was due to expire on 12 December 2013. She applied for bail to the First Tier Tribunal on 10 December 2013 in respect of her anticipated detention on foot of the deportation order. Judge Fox held that, as the appellant was not at that time in immigration detention he did not have jurisdiction to grant bail. The appellant submitted that neither the appellant not her solicitors were advised prior

to or during the bail hearing on 10 December 2013 that the Notice of Detention had been issued on 9 December 2013 and the Tribunal was not advised that the Secretary of State considered the appellant to be subject to immigration detention on 9 December 2013.

[6] On 11 December 2013, the appellant's legal advisers wrote to the UK Borders Litigation and Policing Unit requesting Chief Immigration Officer bail for the appellant immediately on completion of her custodial sentence on 12 December 2013. The appellant was removed from this jurisdiction on 12 December 2013 following the completion of her custodial period and was detained at Yarl's Wood Immigration Removal Centre. On 13 December 2013 the appellant's legal representatives wrote to the Home Office expressing concerns about the *mala fides* of the Home Office in misleading the Tribunal by not disclosing the Notice of Detention served on 9 December 2013.

[7] On 17 December 2013, the Tribunal heard the appellant's second application for bail. Judge Turkington decided, in principle, to grant bail. He indicated he would grant bail on the basis of two sureties offered of £20,000 each and on the conditions indicated. As the offer of one of the sureties was not signed and was effectively withdrawn, Judge Turkington then refused the application for bail. On 18 December 2013 the appellant's legal representatives wrote to the Home Office urging that Chief Immigration Officer bail be granted immediately as bail had been granted in principle and the appellant was agreeable to the bail conditions. On 23 December 2013 the Home Office refused bail.

[8] Between 6 and 10 January 2014 the appellant's legal representatives wrote to HM Courts and Tribunals Service advising that the bail conditions were acceptable to the sureties and it was requested that the original terms of bail granted in principle on 23 December 2013 be reinstated. The bail application was relisted at short notice for 14 February 2014. Since the sureties were given less than 24 hours' notice the hearing was abandoned.

[9] The appellant's deportation hearing was held on 18 February 2014 but the appellant was not produced either personally or by videolink. Judge Fox gave *ex tempore* directions that the appellant's appeal hearing be relisted within 10 days of 18 February 2014 at a hearing centre close to her place of detention in England. On 18 February 2014, the appellant's legal representatives wrote to the Home Office to renew an application for Chief Immigration Officer bail and to assert that the appellant's appearance and live testimony were crucial to her appeal and the failure of the Home Office to produce her was in violation of Article 6 ECHR. On 19 February 2014 the Home Office replied refusing bail.

[10] On 26 February 2014, the appellant filed an ex parte docket for a writ of *Habeas Corpus Ad Subjiciendum* and leave to apply for judicial review. On 27 March 2014, the appellant filed a further application for bail with HM Courts and Tribunals

Service. The bail application took place on 1 April 2014 and was refused by Judge Grimes.

[11] The application for leave to issue a writ of *Habeas Corpus Ad Subjiciendum* and leave to apply for judicial review was heard before Mr Justice Treacy on 25 March 2014, 1 April 2014 and 11 April 2014. On 23 May 2014, Treacy J gave judgment dismissing all grounds other than the challenge to the failure of the respondent to produce the appellant on 18 February 2014. On 28 May 2014, a Notice of Appeal was lodged. The appellant made a further bail application and was admitted to bail on 11 July 2014. She now resides in Kidderminster. Her deportation appeal is listed for hearing in England on 18 March 2015.

[12] From 12 December 2013 until her release on bail the appellant was being detained under Schedule 3 of the Immigration Act 1971 as the subject of a deportation order requiring her to leave the UK and was being detained pending her removal or departure from the UK.

Statutory Background

[13] The Immigration Act 1971 (the 1971 Act) provides the statutory basis for making a deportation order. Section 3(5) deals with the basis upon which to decide to make an order.

> "3 (5) A person who is not a British citizen is liable to deportation from the United Kingdom if—
>
> (a) the Secretary of State deems his deportation to be conducive to the public good; or
>
> (b) another person to whose family he belongs is or has been ordered to be deported."
>
> Section 5 of the 1971 Act deals with the making of the order.
>
> > '(1) Where a person is under section 3(5) … above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the

> United Kingdom given him before the order is made or while it is in force.
>
> (2) A deportation order against a person may at any time be revoked by a further order of the Secretary of State, and shall cease to have effect if he becomes a British citizen'."

[14] The statutory basis for the making of deportation orders was affected by section 32 of the UK Borders Act 2007 (the 2007 Act) which makes provision for the automatic deportation of certain non-UK nationals:

> "(1) In this section "foreign criminal" means a person—
>
> (a) who is not a British citizen,
>
> (b) who is convicted in the United Kingdom of an offence, and
>
> (c) to whom Condition 1 or 2 applies.
>
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
>
> (3) Condition 2 is that—
>
> (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (serious criminal), and
>
> (b) the person is sentenced to a period of imprisonment.
>
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good.
>
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).

(6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless—

(a) he thinks that an exception under section 33 applies,

(b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or

(c) section 34(4) applies."

It is not disputed that the appellant is a foreign criminal within the meaning of this section.

[15] Section 34 deals with the timing of a deportation order. The relevant portions are set out below:

"34 Timing

(1) Section 32(5) requires a deportation order to be made at a time chosen by the Secretary of State.

(2) A deportation order may not be made under section 32(5) while an appeal or further appeal against the conviction or sentence by reference to which the order is to be made—

(a) has been instituted and neither withdrawn nor determined, or

(b) could be brought…

(4) The Secretary of State may withdraw a decision that section 32(5) applies, or revoke a deportation order made in accordance with section 32(5), for the purpose of—

(a) taking action under the Immigration Acts or rules made under section 3 of the Immigration Act 1971 (c 77) (immigration rules), and

(b) subsequently taking a new decision that section 32(5) applies and making a deportation order in accordance with section 32(5)."

The objection to the first deportation order was that it offended section 34(2) of the 2007 Act.

Consideration

The Habeas Corpus Application

[16] In Quigley v Chief Constable [1983] NI 238 Lord Lowry said that the wrong for which habeas corpus is the remedy is the tort of false imprisonment. False imprisonment is the complete deprivation of liberty for any time, no matter how short, without lawful cause. It is a good return to such a writ to demonstrate that the person to whom it relates was not in the custody of the person upon whom it was served (see Barnardo v Ford [1892] AC 326). It is common case that the appellant has now been admitted to bail. The bail conditions may interfere with her liberty but do not deprive her of her liberty. There is, therefore, no basis upon which to grant leave to issue a writ of habeas corpus in respect of her. The appellant raised issues about the approach of the learned trial judge to the burden of proof on the habeas corpus issue but these no longer arise.

The validity of the deportation orders

[17] There was no dispute about the fact that the appellant still had an outstanding appeal in respect of some of the underlying offences on which the first deportation order was grounded. Section 34(2)(a) of the 2007 Act provides that a deportation order may not be made under section 32(5) while an appeal against the conviction or sentence by reference to which the order is to be made has been instituted and neither withdrawn nor determined. It followed, therefore, that the first deportation order was unlawful and would not have provided a lawful basis for the detention of the appellant prior to deportation or her actual deportation.

[18] At the deportation hearing on 10 October 2013 the respondent indicated that the Secretary of State would revoke the first deportation order pursuant to her powers under section 34(4) of the 2007 Act. There is no direct evidence of a revocation of the first deportation order. There is a reference in the letter of 12 November 2013 from the Home Office to the withdrawal of the first deportation order. The learned trial judge concluded that the letter of 12 November 2013 referring to the withdrawal of the first deportation order together with the issue of the second deportation order constituted a clear revocation of the first order.

[19] The appellant submitted that the Secretary Of State's power to revoke a deportation order is found in section 5(2) of the 1971 Act. Revocation requires a further order of the Secretary of State. The reference to further order must be a

reference to a further order of revocation. The learned trial judge had allowed revocation by implication but this was contrary to authority (see Watson [1986] Imm AR 75).

[20] It was further submitted that section 34(4) of the 2007 Act provided the only mechanism for the issue of the second deportation order under section 32(5) where the earlier order had been made on the same basis. That required that the first deportation order be revoked before a new decision that section 32(5) applied could be made and the second deportation order in accordance with that section made. Since in this case the appellant submitted that the first deportation order had not been lawfully revoked the second deportation order had not been lawfully made.

[21] Watson is a decision of an Immigration Appeal Tribunal in which it was argued that a decision granting entry clearance to a Sierra Leone national impliedly revoked a prior deportation order. The entry clearance officer was not aware of the earlier deportation order at the time of making the entry clearance decision. The Tribunal concluded that revocation could not be effected by implication. It required an unequivocal decision by or on behalf of the Secretary of State resulting in an order, albeit not in any particular form.

[22] We accept that this decision is of long-standing. We agree that in looking at the decision of the Secretary of State the learned trial judge looked both at the letter of 12 November 2013 and the second deportation order made on 15 November 2013. The judge accepted that this was effective to amount to a revocation of the first deportation order. The appellant objected that this amounted to revocation by implication. It is common case that there has been no endorsement on the first deportation order to indicate that it is not effective. In other circumstances where a deportation order is revoked an endorsement by a member of staff of an appropriate rank is made on the back of the deportation order to prevent any reliance on it. It is not now in dispute that the first deportation order was unlawful. In our view the appellant has demonstrated an arguable case requiring further investigation as to whether the first deportation order has been revoked. Accordingly we grant leave to pursue the remedies at paragraphs 2(a) and (b) of the Order 53 Statement on the grounds set out at paragraphs 4 (d) and (e).

[23] It is common case that one of the convictions on which the first deportation order was based was still under appeal. It followed that the first deportation order could not have been lawfully made under section 32(5) of the 2007 Act while that appeal was neither withdrawn nor determined as a result of the provisions of section 34(2)(a) of the said Act. Mr Dornan sought some assistance for his submission that the second deportation order could not be made while the first deportation order remained unrevoked from section 34(4) of the 2007 Act. We do not accept that submission. The scheme of the 2007 Act is that a deportation order must be made pursuant to section 32(5) in respect of a foreign criminal. Once made, the power to revoke it under section 34(4) only arises where another immigration decision is to be

made in respect of the subject of the order. The section does not inhibit the Secretary of State from making a further deportation order where the first order was made without jurisdiction. In such a case the first order was not made in accordance with section 32(5) and section 34(4) can, therefore, have no application to it. We agree with the conclusion of the learned trial judge that the second deportation order was valid although we do so for somewhat different reasons.

Detention

[24] There were a number of proposed challenges to the lawfulness of the detention of the appellant before she was granted bail in July 2013. The first challenge concerned the Notice of Detention dated 9 December 2013. That advised the appellant that the Secretary of State "thinks that section 32(5) 0f the UK Borders Act 2007…applies to your case" and that she was liable to detention under section 36(1) of the said Act in order to effect removal. The relevant provisions of section 36 are:

> "36 (1) A person who has served a period of imprisonment may be detained under the authority of the Secretary of State—
>
> (a) while the Secretary of State considers whether section 32(5) applies, and
>
> (b) where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order.
>
> (2) Where a deportation order is made in accordance with section 32(5) the Secretary of State shall exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 (detention pending removal) unless in the circumstances the Secretary of State thinks it inappropriate. "

It is plain from section 36(2) of the 2007 Act that the Secretary of State was required to exercise the power of detention unless she thought it inappropriate. It is also plain from the Notice of Detention that she considered it appropriate to detain the appellant. In agreement with Treacy J we consider that this subsection was the lawful basis for the exercise of her powers in the circumstances of this case.

[25] Secondly, it was contended that the learned trial judge had erred in failing to address whether the Secretary of State had only detained the appellant for the period reasonably necessary to achieve the removal (see ex p Hardial Singh [1984] 1 WLR

704). We are satisfied that the judge addressed this at paragraph 8 of his judgment where he noted that the appeal was the only barrier to the removal of the appellant. He gave leave in respect of the failure to produce the appellant for the hearing on 18 February and that issue and any remedy which might arise from it will be the subject of any further proceedings.

[26] Thirdly it was contended that the approach of the judge to the contention that the refusal of bail was unreasonable was in error. We do not agree. An Immigration Judge was prepared to release the appellant in principle on 17 December 2013 with the security of substantial sureties. It was suggested that the said judge misled the sureties about the circumstances in which the surety may be forfeit. If that was so it was for the appellant's advisors to correct it. The judge made no order of any kind. The proposed respondent was entitled to take into account the caution of the sureties in standing over the appellant's likelihood of honouring her conditions in evaluating all the circumstances. We agree that the earlier judgments on risk were also material but in agreement with the learned trial judge we consider that these matters were within the area of discretionary judgment for the respondent decision maker and in any event were properly pursued through the bail application procedure.

Omissions

[27] It was contended that the learned trial judge failed to deal with the challenges to the refusal of Chief Immigration Officer bail. The proper procedure for the grant of bail where it was refused by the Chief Immigration Officer was by way of application to the First Tier Tribunal. That was the route which the appellant eventually properly took after she had been released from the custodial element of her sentence. It was only at that time that the Notice of Detention became effective. We consider that this is clear from paragraphs 11 and 12 of the judge's decision.

[28] Finally it was submitted that the second deportation order could not be lawfully issued before the First Tier Tribunal notified the parties that the appeal in respect of the first deportation order was withdrawn. In our view once it is accepted that the first deportation order was invalid there was no valid order being appealed. Article 17 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 was not engaged.

Conclusion

[29] In this case we have had the advantage of comprehensive and careful argument on the issues. We are, therefore, in a position to evaluate the extent to which the points in the appeal give rise to an arguable case with a reasonable prospect of success. For the reasons given we consider that further leave should be given only on the points concerning the revocation of the first deportation order. To that extent the appeal is allowed.