High Court of Ireland Decisions

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THE HIGH COURT

[2014, No. 574SS]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN/

PARRY IGUNMA

APPLICANT

AND

GOVERNOR OF WHEATFIELD PRISON, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 29th April, 2014

1. This application for an inquiry under Article 40.4.2 into the legality of the applicant's detention raises once again difficult questions concerning the interpretation of the Free Movement Directive, 2004/38/EC ("the 2004 Directive") and the relevant transposing Regulations, European Communities (Free Movement of Persons) Regulations 2006 ("the 2006 Regulations").

The procedural history of the application

2. Before examining this matter, it is first proper to record that the original application for an inquiry under Article 40.4.2 was made in the first instance on the evening of April 2nd. to McGovern J. who refused the application for an inquiry. McGovern J. made it clear, however, that the applicant was free to make a fresh application to any other judge of this Court. I have examined the affidavit which was filed in support of that particular application. It was a slender document, bereft of almost any detail. It is little wonder that that application was refused. Later that evening the matter was also mentioned to MacEochaidh J. who, as it happened, was also hearing another Article 40.4.2 application. Having satisfied himself that the applicant stood in no imminent danger of being deported that evening, MacEochaidh J. made no order and by reason of other commitments that evening did not examine the merits of the application.

3. The applicant was renewed before me on the following day, April 3rd. It is only proper to record that counsel for the applicant, Mr. McMorrow, made full disclosure to me of the earlier application to McGovern J. and the abortive application to MacEochaidh J. By this stage, the applicant's legal team was in a position to file far more extensive affidavits and canvass more elaborate arguments. Anxious to ensure that this application for an inquiry remained within the parameters of the right to go from judge to judge under Article 40.4.2 as determined in my own judgment in *Joyce v. Governor of the Dóchas Centre* [2012] IEHC 326, [2012] 2 I.R. 666, I directed that the respondents be put on notice of these facts. The respondents raised no jurisdictional issues and being myself satisfied that this application did come within the parameters of *Joyce*, I decided to entertain this application and I accordingly directed the appropriate inquiry.

The background facts

4. The applicant is a Nigerian national who applied for refugee status in October 2009, but that request was refused. He was then invited by the Minister for Justice and Equality then to apply for subsidiary protection but apparently failed to do so. Nor did he made any submissions regarding the question of whether a deportation order should be made. A deportation order was then made by the Minister for Justice and Equality under s. 3 of the Immigration Act 1999 on 20th October 2010. That order has never been challenged and, subject to an important proviso which I am about to describe and which is a central feature of the case, it remains fully effective.

5. The applicant has been required from time to time to present at the offices of the Garda National Immigration Bureau at Burgh Quay, Dublin 2. It is acknowledged that he did so, but complaint is made that when he presented on 2nd April 2014 he was arrested by Detective Garda Conroy under s. 5(1)(a) of the 1999 Act(as amended by s. 10(b) of the Illegal Immigrants (Trafficking) Act 2000). This provides:

> "Where an immigration or member of the Garda Siochána with reasonable cause suspects that a person against whom a deportation order is in force -
>
> (a) has failed to comply with any provision of the order or with a requirement of a notice under s. 3(3)(b)(ii)….
>
> he or she may arrest him or her without warrant and detain him or her a prescribed place."

6. The basis for the arrest was accordingly that the applicant had failed to comply with the provisions of that deportation order. In my view, assuming that the deportation order remained valid and effective, that would be a perfectly valid arrest, since - subject again to the critical proviso I am about to address - the applicant had no lawful basis to be in the State after the period specified in the deportation order and, by definition, had failed to comply with its terms: see, *e.g.*, to this effect my own judgment in *Omar v. Governor of Cloverhill Prison* [2013] IEHC 579, [2014] 1 I.L.R.M. 254, 259.

7. The essential issue in the case is a different one. It is accepted that the applicant married a Czech national, Ms. Zuzana Benakova, on 23rd February 2011 in Navan, Co. Meath. No suggestion has been made that this marriage was a marriage of convenience or that it is not otherwise a valid and effective marriage. In the wake of this Mr. Igunma then applied for residency in the State on 15th March 2011 based on his marriage to an EU national who had exercised her Treaty rights to establish herself in this State.

8. This application was originally refused on 25th August 2011 on the ground that it was found that Ms. Benakova was not exercising her EU Treaty rights to pursue a course of study here (as had been claimed). Inquiries had disclosed that that she had not attended her course since March 2011 and that the college in question was not on the international register maintained by the Department. This all suggests, however, that *as of the date on which the parties had married in February 2011*, Ms. Benakova was *then* at that point exercising her EU free movement rights, specifically by attending a course of further education in the State, whatever may have been the situation at a later stage.

9. Mr. Igunma then sought a review of that decision in which he stated that Ms. Benakova was then attending another college. It appeared that Ms. Benakova had only intermittently attended this other college, with an attendance rate of some 50%, although she also supplied a medical certificate which covered her absence from 26th September 2011 to 16th October 2011. Inquiries conducted by the Department with teaching staff suggested that Ms. Benakova was escorted by the applicant to the class, apparently under some duress. There were further suggestions that the marriage had flounded and that Ms. Benakova had subsequently found a new boyfriend. This decision was upheld on 21st December 2011.

10. Mr. Igunma for his part says that Ms. Benakova was involved in a workplace accident which incapacitated her. Although he encouraged here to attend school, she complained that she could not sit down for too long and she did not want to attend. This was essentially why a residence card was refused. It is, however, not in dispute but that Ms. Benakova moved out of the family home in 2012 and she has rebuffed all entreaties from Mr. Igunma ever since. I was informed at the hearing that Ms. Benekova is currently in receipt of disability allowance.

11. I should say, incidentally, that I was never informed of the date on which Ms. Benakova arrived in the State. It may well be that she could be able to claim in her own right an autonomous right of permanent residence by virtue of five years' continuous residence here for the purposes of Article 16 of the Directive.

12. At all events, the review process regarding the residence card culminated in two

further reviews conducted within the Department of Justice and Equality in November, 2012 and December, 2012 respectively following a fresh application made in that behalf by Mr. Igunma on 18th January, 2012. These reviews affirmed the earlier decisions to refuse the residence card on the ground that Ms. Benakova was not exercising her free movement rights at the date of that original decision in August 2011. While noting that a deportation order remained in force against the applicant, the official in the EU Treaty Rights Review Unit concluded his decision of 8th November 2012 by noting that:

> "as the applicant has no current legal immigration status in the State, I further recommend that his file be forwarded to the removals unit for their consideration under regulation 20 [of the 2006 Regulations] with such consideration also including the status of the EU national in the State. It should be noted that there is a deportation order in existence in respect of the applicant."

13. No challenge has ever been made to these decisions. The applicant, however, maintains that the deportation order is now ineffective and that he can only now be physically removed from the State in accordance with the removal order procedure provided for in Article 20 of the 2006 Regulations. If this argument is correct, then it is plain that his detention is unlawful, since that detention was premised on the very assumption that the deportation order is still valid and operative as against Mr. Igunma.

14. This is, accordingly, the critical question in this case. In effect, the question is whether Mr. Igunma is a person to whom the provisions of 2004 Directive and 2006 Regulations still apply *for the purposes of physical removal from the State*, even if it is accepted that he has not established *any right of residence* here under the 2004 Directive.

Directive 2004/38/EC

15. Article 2(2)(a) of the 2004 Directive defines "family member" as the spouse of the Union citizen. Article 3 is headed "Beneficiaries" and provides that it shall apply:

> "to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them."

16. The 2004 Directive was transposed into Irish domestic law by the European Communities (Free Movement of Persons)(No.2) Regulations 2006 (S.I. No. 656 of 2006)("the 2006 Regulations"). Article 2(1) of the 2006 Regulations provides that the term "qualifying family member" in relation to an EU citizen includes that citizen's spouse.

17. Article 3(1) originally provided that "these Regulations shall apply to -

> "….(b) subject to paragraph (2), qualifying family members of Union citizens who are not themselves Union citizens."

18. Article 3(2) then further provided that the Regulations should not apply to such family members "unless the family member is lawfully resident in another Member State." This requirement was, however, held to be unlawful by the Court of Justice in Case C-127/08 *Metock* [2008] ECR I-6241 following an Article 267 reference from this Court. In the wake of the decision in *Metock* in July 2008, Article 3 of the 2006 Regulations was itself subsequently amended by Article 3 of the European Communities (Free Movement of Persons)(Amendment) Regulations 2008 (S.I. No. 310 of 2008). This now provides:

> "(1) These Regulations shall apply to-
>
> > (a) Union citizens,
> >
> > (b) qualifying family members of Union citizens, who are not themselves Union citizens, and-
> >
> > > (i) who seek to enter the State in the company of

those Union citizens in respect of whom they are family members, or

(ii) who seek to join those Union citizens, in respect of whom they are family members, who are lawfully in the State…"

19. It is, of course, true that in one sense Mr. Igunma cannot satisfy either proviso to Article 3(1) of these Regulations because the parties married in the State in February 2011 and, accordingly, it cannot be said - again in this sense - that Mr. Igunma "sought to enter the State in the company" of Ms. Benekova or that he had sought "to join" her in Ireland. But in *Metock*, the Court of Justice made it absolutely clear (at paras. 91-99 of the judgment) that such a literal interpretation of the provisions of Article 3(1) of the 2004 Directive could not be accepted:

> 91. "Second, it must be determined whether, where the national of a non-member country has entered a Member State before becoming a family member of a Union citizen who resides in that Member State, he accompanies or joins that Union citizen within the meaning of Article 3(1) of Directive 2004/38.
>
> 92. It makes no difference whether nationals of non-member countries who are family members of a Union citizen have entered the host Member State before or after becoming family members of that Union citizen, since the refusal of the host Member State to grant them a right of residence is equally liable to discourage that Union citizen from continuing to reside in that Member State.
>
> 93. Therefore, in the light of the necessity of not interpreting the provisions of Directive 2004/38 restrictively and not depriving them of their effectiveness, the words 'family members [of Union citizens] who accompany them' in Article 3(1) of that directive must be interpreted as referring both to the family members of a Union citizen who entered the host Member State with him and to those who reside with him in that Member State, without it being necessary, in the latter case, to distinguish according to whether the nationals of non-member countries entered that Member State before or after the Union citizen or before or after becoming his family members.
>
> 94. Application of Directive 2004/38 solely to the family members of a Union citizen who 'accompany' or 'join' him is thus equivalent to limiting the rights of entry and residence of family members of a Union citizen to the Member State in which that citizen resides.
>
> 95. From the time when the national of a non-member country who is a family member of a Union citizen derives rights of entry and residence in the host Member State from Directive 2004/38, that State may restrict that right only in compliance with Articles 27 and 35 of that directive.
>
> 96. Compliance with Article 27 is required in particular where the Member State wishes to penalise the national of a non-member country for entering into and/or residing in its territory in breach of the national rules on immigration before becoming a family member of a Union citizen.
>
> 97. However, even if the personal conduct of the person concerned does not justify the adoption of measures of public policy or public security within the meaning of Article 27 of Directive 2004/38, the Member State remains entitled to impose other penalties on him which do not interfere with

> freedom of movement and residence, such as a fine, provided that they are proportionate……..
>
> 98. Third, neither Article 3(1) nor any other provision of Directive 2004/38 contains requirements as to the place where the marriage of the Union citizen and the national of a non-member country is solemnised.
>
> 99. The answer to the second question must therefore be that Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State."

20. Article 35 of the 2004 Directive (referred to at paragraph 95 of the judgment) provides that:

> "Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."

21. There is, however, no suggestion that the marriage at issue in the present case was a marriage of convenience. It is, nevertheless, important to recall that, as the Court of Justice recently stated in Case C-456/12 *O and B* [2014] E.C.R. I - 000:

> "Article 21(1) TFEU and Directive 2004/38 do not confer any autonomous right on third-country nationals …..Any rights conferred on third-country nationals by provisions of EU law on Union citizenship are rights derived from the exercise of freedom of movement by a Union citizen."

22. At the heart of the present case, however, is whether the application of the 2004 Directive to the spouse of an EU citizen is always contingent on proof that such spouse is presently exercising her free movement rights in the manner contemplated by the Directive. Put another way, if a third country national is validly refused residency rights by the host Member State does this also mean that the 2004 Directive (and, specifically, the removal provisions thereof) ceases to apply to such third country national? If the answer to that question is in the affirmative, then, of course, the original deportation order remains valid and effective.

Is the scope of application of the 2004 Directive contingent on proof of residency rights?

23. It seems clear, however, that the 2004 Directive differentiates between the scope of application on the one hand and residency rights on the other. After all, as we have seen, Article 3(1) of the Directive provides that it "shall apply to all Union citizens" who exercise their free movement rights and their family members (including spouses). There are, moreover, provisions such the right of exit (Article 4) and entry (Article 5) which are not contingent on proof of a right of residency on the part of the EU national and his or her spouse.

24. Chapter III of the Directive deals with the right of residence. Article 6 gives EU nationals and their spouses a right of residence for up to three months. Article 7 gives such EU nationals (and their spouses) a right of residence beyond that period where they are either workers or self-employed or, for example, they are engaged in a course of study. Chapter IV (Article 16 *et seq*.) deals with the right of permanent residence, which in principle Union citizens (and their spouses) who have resided legally for a continuous period of five years in the host Member State will enjoy.

25. Chapter VI (Article 27 *et seq.)* then deals with restrictions on the right of entry and

the right of residence on grounds of public policy, public security or public health. Thus, Article 27(1) provides that:

> "Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends."

26. Article 28(1) then deals with expulsion decisions in respect of EU nationals and their family members on grounds of "public policy and public security", whereas Article 28(2) confines the expulsion of Union citizens and family members who have a right of permanent residence to those cases of "serious grounds of public policy or public security." The obvious implication from Article 28(2) is that Article 28(1) applies to all EU citizens and family members to whom the Directive applies who have not the right of permanent residence. On this analysis, this would mean that the public policy and public security test contained in Article 28(1) applies indistinctly to the spouses of EU nationals living in the host Member State for less than a continuous period of five years, irrespective of whether they have been given a residence card under Article 7 or not.

27. Article 28(1) provides:

> "Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her link links with the country of origin."

28. Of course, the fact that where (as here) a particular applicant has been refused a residence card and had previously been the subject of a deportation order would be relevant considerations to these public policy considerations. Certainly the arguments based on public policy would seem, all other things being equal, to be much stronger in this sort of case as compared, for example, with the case of an EU spouse and her husband who both were employed by the host State for a number of years, even if they could not actually establish a right to permanent residency under Article 16. The critical point, nevertheless, is that the expulsion provisions of Article 27 and Article 28 apply to all EU citizens and their spouses, even if neither party can establish a right of residence under Article 7.

29. In the present case, of course, it must be accepted that the Department has validly refused to grant Mr. Igunma a right of residence because it was not satisfied that Ms. Benakova was genuinely following a course of study as of the date of that original decision in August 2011. This, however, is not quite the point so far as the application of Article 27 and Article 28 of the 2004 Directive is concerned, since what is critical is whether the person sought to be removed is a person to whom the Directive applies within the meaning of Article 3(1).

30. In the light, therefore, of the reasoning of the Court of Justice in *Metock* it seems clear beyond argument that the Mr. Igunma is a person to whom both Article 3(1) of the 2004 Directive and Article 3(1) of the 2006 Regulations applies *simply* by virtue of his marriage to Ms. Benakova, an EU national who has exercised free movement rights in this State. This continues to be so even if Mr. Igunma was validly refused a residence card.

31. The decision in *Metock* also makes it clear that it is immaterial for the purposes of 2004 Directive (and, therefore, by extension, the 2008 Regulations) that the parties married in this State only after Ms. Benakova herself arrived in this State. As Cooke J. explained in *Decsi v. Minister for Justice and Equality* [2010] IEHC 342:

> "One of the effects of that judgment [in *Metock*] is to make it clear that it is immaterial to the valid exercise of the rights of entry to and residence in a Member State by the spouse of a Union citizen whether the marriage takes place before or after the arrival of the spouse in the host Member State."

32. Proceeding, therefore, from this premise, it would seem that the deportation order made prior to the marriage cannot now be validly invoked against Mr. Igunma following that marriage to Ms. Benakova. After all, Chapter VI of the 2004 Directive limits the capacity of the host Member State physically to remove family members from the State save by reference to procedures and grounds which are appreciably different from the deportation order procedure specified in s. 3 of the Immigration Act 1999. While many examples of these differences could be given it is, perhaps, sufficient for this purpose to note simply the temporal difference between a deportation order on the one hand and a removal order on the other: whereas the former is in principle permanent in its effect, the latter is in principle simply of two years' duration: see Article 20(1)(e) of the 2006 Regulations.

33. It is, of course, true that Mr. Igunma has been refused a residence card (which refusal has, as we have seen, been upheld on appeal) with the result that, as Cooke J. noted in Decsi, the spouse of the EU citizen accordingly remains liable to have his entitlement to reside here revoked with retroactive effect as a result. But that is by no means the same thing as saying that he could then be deported as an illegal alien under the provisions of the Immigration Act 1999, since the entitlement of this State to remove the third country national would still be governed exclusively by the terms of the removal procedure in Article 20 of the 2006 Regulations (which transpose the relevant provisions of Article 27 and Article 28 of the Directive) because for all the reasons we have just discussed the applicant is nonetheless a person to whom the 2004 Directive applies.

34. Counsel for the State, Ms. Carroll, freely does not dispute much of this. She, however, maintains that the Supreme Court has decided to the contrary in an *ex tempore* judgment delivered by Fennelly J. in *Rachki v. Governor of Cloverhill* Prison on 5th December 2011 and that I am accordingly bound by that judgment. It is accordingly necessary to examine that judgment in order to ascertain what it determined.

The decision in Rachki v. Governor of Cloverhill Prison

35. The applicant in *Rachki* was a Moroccan national whose application for asylum in this State failed. That process culminated in the making of a deportation order under s. 3 of the Immigration Act 1999 on 21st July 2009. Mr. Rachki had, however, married a Polish national on 28thJanuary 2009. The applicant then applied for a residence card, but in that application it was disclosed that the parties were not living together and that he was applying for asylum. The Minister refused that application on the ground that there was "no evidence of residence rights of the EU citizen or that she was exercising her EU Treaty rights." The Supreme Court noted that the Polish spouse had, in any event, returned to Poland.

36. The applicant never sought to appeal or otherwise to seek a judicial review of this decision. In November 2011 Mr. Rachki was arrested on the same ground as in the present case, namely, that he failed to comply with the provisions of the 2009 deportation order. He then sought an order of release pursuant to Article 40.4.2 on the ground that his detention under the deportation order was unlawful. This application was refused in this Court by MacMenamin J. and the applicant accordingly appealed to the Supreme Court.

37. Fennelly J. summarised the issue for the Court in the following terms:

> "The appellant does not, therefore, challenge the validity of the detention notice under which he is detained. Rather he claims that, because he is the spouse of a citizen of the European Union, he cannot be expelled from the

> State other than in accordance with the provisions of the [2006 Regulations]. This is the sole ground advanced in his notice of appeal and in argument before this court from the decision of the High Court."

38. Yet it does not appear that this issue is actually dealt with elsewhere in the body of the judgment of Fennelly J. Despite what Fennelly J. said at the outset of the judgment, the argument which was actually advanced before the Court seems to have moved on to the right of residency issue. As Fennelly J. later explained in his judgment:

> "But in reality this has become an indirect application for judicial review of the decision to refuse him his residence card. The basis of the claim before the court today is that, as a third party national, who is married to an EU citizen he has a right of residence in the State. That is, of course, based on the provisions of the Treaty, but, in particular, on the provisions of [the 2004 Directive] and, insofar as concerns the appellant, in particular, the relevant provisions would appear to be Article 7 of the Directive which provides for a right of residence for more than three months. It deals firstly with the right of a Union citizen to residence in other Member States, but then Article 7(2) provides that the right of residence provided for in paragraph 1 shall extend to family members, who are not nationals of a Member State, accompanying or joining the citizen in the host member state, provided subject to certain provisos. That is the right which the appellant invokes in seeking to have his release and, indeed, in effect, indirectly to prevent his deportation from the State."

39. The Court then proceed to hold that the applicant could not challenge the refusal of residence card in this indirect fashion using the Article 40.4.2 procedure. It was on this basis that the application was dismissed.

40. In these special circumstances it does not appear to me that *Rachki* is actually an authority on point. While the facts of that case were admittedly very similar to the present one - save that in *Rachki* the EU spouse had already left the State - and although Fennelly J. did say at the outset of his judgment that the deportation/removal issue was the critical one, the matter does not appear to have been further addressed. The *ratio* of the judgment appears to be the (with respect) entirely unexceptionable proposition that Article 40.4.2 proceedings could not be used as a vehicle where the validity of the refusal of the residence card could be indirectly challenged. Rather, the issue in *Rachki* was whether the applicant could be deported when he had - as he claimed - a free standing right of residence in the State.

41. At no stage, however, did the Court engage with the questions of whether a deportation order could be applied to a person to whom the 2006 Regulations applied, the effect of Chapter VI of the 2004 Directive and Article 20 of the 2006 Regulations or the implications of the *Metock* judgment. Since these questions do not appear to have been argued before the Court and were, in any event, simply not addressed at all in the judgment of Fennelly J., I have come most reluctantly to the conclusion that *Rachki* cannot be regarded as an authority on these questions the resolution of which has become central to the present case. Subject, of course, to the decision of the Court of Justice in *Metock*, these matters can accordingly be regarded as *res integra*.

Conclusions

42. In the light of my conclusion that the Supreme Court's decision in *Rachki* is not a direct authority on the issues raised in this case, it remains only to summarise my other principal conclusions.

43. First, given that Mr. Igunma lawfully married a Czech national, Ms. Benekova, in February, 2011 at a time when she was exercising her EU Treaty rights by pursuing a course of study in the State, it follows that he is a person to whom the 2006 Regulations apply for the purposes of Article 3(1)(b) of the 2006 Regulations (and, for that matter,

Article 3(1) of the 2004 Directive).

44. Second, in this respect it matters not that the applicant was subsequently refused a residence card or, indeed, that the marriage has now all but come to an end. Mr. Igunma's failure to secure such a card might well be a factor which should be taken into account in assessing whether public policy requires his removal from the State for the purposes of Article 20 of the 2006 Regulations and Article 27 and Article 28 of the Directive, but this is not at present relevant.

45. Third, what is relevant is that once the 2006 Regulations apply to Mr. Igunma, he can thereafter only be physically removed from the State in accordance with the procedures prescribed by Article 27 *et seq*. of the 2004 Directive and the corresponding provisions of the 2006 Regulations.

46. Fourth, it follows from, in particular, paragraphs 95 and 96 of the judgment of the Court of Justice in *Metock* that a deportation order made prior to the marriage of the third country national to the EU citizen is ineffective unless it complies with the specific requirements of Article 27 of the 2004 Directive, which Article 20 of the 2006 Regulations seeks to reflect. Given, moreover, that there can be no question but that a deportation order made under the 1999 Act differs appreciably from a removal order made under Article 20 of the 2006 Regulations (and, by extension, Article 27 of the Directive) in terms of procedure, grounds and duration, it follows in turn that the deportation order made in 2009 cannot now be invoked as against the applicant following his marriage to Ms. Benekova in 2011.

47. It follows, therefore, that as the applicant's detention is not in accordance with law, I must, therefore, order his release in accordance with Article 40.4.2 of the Constitution.

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