[2020] IEHC 145

**THE HIGH COURT**

**[2020 No. 179 S.S.]**

**IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2° OF THE CONSTITUTION**

**BETWEEN**

**BAO FENG NIAN**

**APPLICANT**

**AND**

**THE GOVERNOR OF CLOVERHILL PRISON**

**RESPONDENT**

**(NO. 2)**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 17th day of February, 2020**

1. In *Nian v. The Governor of Cloverhill Prison (No. 1)* [2020] IEHC 93 (Unreported, High Court, 10th February, 2020) I ordered the proceedings to be struck out, and the only remaining issue is that of costs. I have now received a further affidavit from D/Superintendent Peter Mulryan and further helpful submissions from Mr. Gavin Keogh B.L. for the applicant, who seeks his costs, and from Mr. John P. Gallagher B.L. for the respondent, who asks for no order as to costs.

2. It is unnecessary to fully recite all of the facts as set out in the *Nian (No. 1)* judgment, but the key dates for present purposes are as follows.

3. As of 4th February, 2020, the information communicated from the Department of Justice and Equality to GNIB was that deportations to China were still occurring in a number of jurisdictions notwithstanding the coronavirus outbreak, and that the issue was being considered on a case-by-case basis. Nonetheless, the situation was clearly evolving. The applicant was arrested on 4th February, 2020 on foot of a deportation order and an associated notification under s. 3 of the Immigration Act 1999. He was brought to Cloverhill Prison on 5th February, 2020.

4. At 12.40 on 7th February, 2020, Mr. Alan King, Assistant Principal in the repatriation division of INIS, informed D/Inspector Patrick Linehan and another member of GNIB that there was to be a change in approach to deportation to China at the present time. Having consulted with the head of Immigration Service Delivery (which seems to be a reference to the Director General of INIS) it was considered that there was no realistic prospect of removing Chinese nationals at that point, but the matter would be kept under review. The GNIB was to take appropriate steps in terms of the two Chinese nationals then in detention.

5. At 13.45 on that date, D/Inspector Linehan informed D/Superintendent Mulryan that, in the light of this recent development, he was going to instruct the release of the applicant and the other Chinese national then in custody. At around 15.30 on the same day, without any warning or pre-action letter, the applicant applied to Heslin J. under Article 40 of the Constitution for an inquiry into the legality of his detention. The grounds advanced had nothing to do with the coronavirus, but rather related to an allegation that

the applicant did not knowingly fail to comply with presentation conditions. An inquiry was directed returnable for 14.00 on 10th February, 2020. That order was notified to the CSSO at 15.45. Unaware of this development, the GNIB sent an order for the applicant's release to Cloverhill Prison at 15.57 on the same day, accompanied by an email from the clerical officer in the arrangements unit, GNIB, Burgh Quay, asking for the applicant to be "ready to collect" at 17.00. He was to be collected by a D/Garda from GNIB who would give him official documentation (a new presentation letter).

6. The CSSO notified GNIB of the order under Article 40 at 16.19. The applicant was released at around 17.39 and, as envisaged in the message to the prison, was met by a Detective Garda who gave him a new presentation letter. The second Chinese national was released for the same reasons around the same time, reinforcing the point that this applicant's release had nothing to do with these proceedings.

**The legal test for costs of moot proceedings**

7. In *M.K.I.A. (Palestine) v. The International Protection Appeals* [2018] IEHC 134 (Unreported, High Court, 27th February, 2018), I endeavoured to summarise the leading Supreme Court cases on this issue, *Matta v. Minister for Justice, Equality and Law Reform* [2016] IESC 45 (Unreported, Supreme Court, MacMenamin J. (Dunne and O'Malley JJ. concurring), 26th July, 2016), *Cunningham v. The President of the Circuit Court* [2012] IESC 39, [2012] 3 I.R. 222 and *Godsil v. Ireland* [2015] IESC 103, [2015] 4 I.R. 535. The approach involves general guidelines, not absolute ones.

8. Mr. Keogh in seeking his costs relies on caselaw of some antiquity, *Rostas v. Governor of Mountjoy Prison* [2012] IEHC 33 (Unreported, High Court, Peart J., 2nd February, 2012) following *Dempsey v. Member in Charge Tallaght Garda Station* [2011] IEHC 257 (Unreported, High Court, Herbert J., 1st June, 2011). The focus in those cases is on costs as a discretionary matter and also on whether, and to what extent, it was reasonable for the applicant to have made the application. Unfortunately for the applicant, these are no longer the primary questions. That approach has been superseded by the Supreme Court jurisprudence that I have just referred to, and the decisions in *Rostas* and *Dempsey* need to be viewed now as being (at best) confined to their own facts and not of particular forensic utility going forward.

9. The first question set out in the Supreme Court jurisprudence is whether the proceedings have become moot due to the unilateral act of one party. Here that is clearly satisfied. The proceedings have become moot by the unilateral act of the respondent in releasing the applicant.

10. The next question is whether that unilateral act is connected to the proceedings. On the basis of D/Superintendent Mulryan's affidavit, that is clearly not the case. The decision to release the applicant had already been made before the Article 40 application was even moved, let alone notified. Furthermore, the rationale for the release was not a point ever made by or on behalf of the applicant. Unfortunately, the applicant's release cannot on any rational view be regarded as having any nexus with the proceedings.

11. Certainly one could envisage rules on the costs of moot proceedings that are more favourable to applicants than the current rules, but that is really neither here nor there. Even accepting that the court has a residual discretion above and beyond the default approach, I do not see any strong basis to depart from the default approach here. Apart from anything else, it is not clear that the applicant ever was in unlawful detention. Insofar as any point is now made based on the coronavirus outbreak, he was released as soon as the State decided that he could not be proximately deported. It is not clear at this stage that there was any unlawfulness in the detention up to the 7th February, 2020. Insofar as the grounds on which reliance was placed when the application for the inquiry was made are concerned, admittedly the applicant's point as to not having been notified of the deportation order has yet to be tested, but we never got to the point of hearing the respondent's case on that.

12. As regards detention on the 7th February, 2020 itself, Mr. Keogh complains about the applicant being in detention for a couple of hours after the decision to release him. But that is not a point of great substance. The system worked reasonably efficiently and the preparation of a certain amount of documentation and paperwork is inherent in the practical mechanics of release. A detention does not become unlawful merely because the prison gates are not flung open instantly in some kind of wide-eyed panic the moment that the phone rings with a development of legal significance. As Lord Clark puts it, "*things must be made to work*" (Kenneth Clark, *Civilization* (London, 1969) at p. 197); and the fact that a human system involves the modest inherent delay in a certain exchange of documentation between human actors in the course of giving effect to a decision does not create an unlawful detention, or any unlawfulness at all.

**Order**

13. As put in *Cunningham*, the mootness here related to an underlying change of circumstances. There was no causal nexus to the proceedings as referred to in *Matta* (para. 20). Accordingly, in the absence of any sufficient reasons to depart from the default position, the order here will be no order as to costs.