

**THE HIGH COURT
JUDICIAL REVIEW**

[2019 No. 878 JR]

BETWEEN

LEANDRO CAMARA COSTA FERNANDES

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 9th day of March, 2020

1. The applicant is a Portuguese citizen who arrived in the State on a Brazilian passport travelling from Spain on 2nd December, 2019 and was refused leave to land. He interacted with Garda Michael Freeney of the Border Management Unit and there has been some dispute as to what, precisely, he told Garda Freeney.
2. Neither side has sought cross-examination of the other side's deponent for the purpose of clarifying the facts, so consequently I emphasise that I cannot make a definitive finding of fact as to what exactly happened at the border. However, bearing in mind that the onus is on the applicant at all times, certainly his version cannot be accepted insofar as it differs from Garda Freeney's.
3. Garda Freeney says that he ascertained that the credit card used to book the applicant's accommodation had been declined. The card was in the name of the applicant's brother who was present in the State on a stamp 2 permission. The applicant had €900 in cash on his person. The applicant claims he asserted Portuguese citizenship on arrival, but Garda Freeney says he never made any claim of that kind. He did, however, have in his possession what purported to be a Portuguese birth certificate.
4. Garda Freeney avers that the applicant said he knew nobody in Ireland, but it is clear that the applicant's brother was here at all material times. Garda Freeney goes on to say that the applicant said that the brother was in Brazil. He says that the applicant was shown a picture of the brother and eventually admitted that the brother resided in the State. The applicant was asked for proof of employment in Brazil, which was produced in the form of an unsigned letter stating that he was on vacation until the 31st December, 2019. Garda Freeney says he examined the applicant's WhatsApp messages and the majority of the conversations and the internet history had been wiped. Consequently, he formed the suspicion that this was done to conceal information from the immigration authorities. Messages from the brother were on the phone, but to the effect, in Garda Freeney's opinion, of coaching to the applicant as to what to say at the border. The applicant was then refused leave to land under s. 4(3)(k) of the Immigration Act 2004 on the basis that the proposed entry was for purposes other than those expressed by the non-national concerned.
5. He was detained under s. 5 of the Immigration Act 2003 and taken to Cloverhill Prison. On 2nd or 3rd December, 2019 the applicant's brother contacted the Portuguese Embassy in an attempt to confirm the applicant's EU citizenship. On 3rd December, 2019 the

brother obtained a birth registration document, which appears not to be the same as the birth certificate in the possession of the applicant at Dublin Airport. On 4th December, 2019 the applicant's solicitors wrote to INIS on behalf of their client. They asserted the applicant's Portuguese nationality, but no written confirmation from the embassy in that regard was included with the correspondence.

6. The applicant sought an interim injunction against removal from the State on the afternoon of 4th December, 2019 and I granted that application. The matter was mentioned again after 4:30 p.m. that day, and I extended the injunction on notice to the respondents until 6th December, 2019. I did not determine the leave application at that stage and indeed leave was never in fact granted.
7. The following day, the parties agreed that the matter could be adjourned for one week with an undertaking. The applicant indicated an intention to apply for release. At 3.00 p.m. on 5th December, 2019 the Portuguese Embassy telephoned the CSSO stating that the applicant held Portuguese nationality because his father was such a national. On that basis, the State agreed to release the applicant from custody, on the understanding that the applicant would apply for a Portuguese identity card. The applicant was transferred from Cloverhill Prison to Irishtown Garda Station and released later on 5th December, 2019. On 6th December, 2019 the Portuguese Embassy emailed the CSSO to state that the application for a Portuguese identity card had been made.
8. The applicant then indicated an intention to seek to amend the proceedings to look for damages, but that application was sensibly not pursued and accordingly the only issue now remaining is that of costs. In that regard I have received helpful submissions from Mr. Colm Kitson B.L. for the applicant and from Ms. Sarah K.M. Cooney B.L. for the respondent.

General approach

9. In *M.K.I.A. (Palestine) v. International Protection Appeals Tribunal* [2018] IEHC 134, [2018] 2 JIC 2708 (Unreported, High Court, 27th February 2018), I endeavoured to summarise the Supreme Court jurisprudence in relation to the costs of moot proceedings, particularly that in *Cunningham v. President of the Circuit Court* [2012] IESC 39, [2012] 3 I.R. 222, *Godsil v. Ireland* [2015] IESC 103, [2015] 4 I.R. 535, and *Matta v. Minister for Justice, Equality and Law Reform* [2016] IESC 45 (Unreported, MacMenamin J. (Dunne and O'Malley JJ. concurring), Supreme Court, 26th July, 2016).
10. The essential questions are whether the proceedings became moot due to the unilateral act of one party and, if so, whether that had a causal nexus with the proceedings.

Did the proceedings become moot due to the unilateral act of one party?

11. The primary relief sought is an order of *certiorari* quashing the refusal of leave to land. Mr. Kitson submits that this relief was in effect obtained in the form of the applicant being allowed to enter the State by being released. Thus, the development that made it unnecessary for the proceedings to be prosecuted was the State's decision to release the applicant, so in that sense, it was the act of the State that gave rise to the proceedings becoming moot.

Is there a causal nexus with the proceedings?

12. It is clear that the real reason for the release was not the proceedings as such, but the telephone contact from the Portuguese Embassy. The State acted immediately in releasing the applicant following that contact. In this regard the State authorities acted perfectly reasonably. In such a context, the comments of Murray J. (Whelan and Costello JJ. concurring) in *P.T. v. Wicklow County Council* [2019] IECA 346 (Unreported, Court of Appeal, 19th December, 2019) at para 38 are particularly relevant: account needs to be taken of: “ ... *how and when information is disclosed, of the need for the decision-making body to consider and apply that information, and of the likely outcome had it done so before the costs were incurred*”.
13. Ms. Cooney correctly deduces from that proposition that “*the case has to be looked at through the prism of the information that was available at the time the proceedings issued*” (para. 31 of respondent’s submissions).
14. A person’s say-so at the border of the State that they are an EU citizen (or I might add, that they have any other right to enter the State), without the appropriate travel documentation, even if a birth certificate of some sort is produced, is not worth anything. The State and its officers cannot reasonably be expected to investigate or rely on this sort of assertion. It is not practicable to do so and it imposes a new, and hitherto unknown, obligation on the immigration authorities. There is no obligation on the State to go chasing embassies to see if an applicant is who they say they are. The onus is on a non-national presenting at the frontier to establish their identity and nationality by presenting a valid passport or equivalent travel document.
15. The applicant did not need to litigate to assert his rights. He ultimately asserted them by getting verbal and written support from the Portuguese Embassy after the proceedings were instituted, but he could have simply applied for a Portuguese identity card *before* travelling to Ireland.
16. Indeed, Ms. Cooney noted *en passant* that the applicant’s brother, who was the effective moving party in the release process, himself also purports to be a Portuguese citizen, but is here on a stamp 2 permission as a Brazilian national, never having actually asserted that Portuguese citizenship. That strange situation certainly does nothing to dilute the conclusion that the applicant himself failed to assert his rights in an appropriate and timely manner.
17. There is no real or adequate nexus between the proceedings as such and the release. Thus, there is a distinction between this case and *Raghoo v. Minister for Justice and Equality* [2019] IEHC 856, [2019] 12 JIC 1004 (Unreported, High Court, 10th December, 2019). The case is rather in the separate category of proceedings where there is no causal nexus between the act rendering the proceedings moot and the taking of the proceedings themselves, such as *M.K.I.A. itself, Abbas v. Minister for Justice and Equality* [2018] IEHC 489, [2018] 7 JIC 2305 (Unreported, High Court, 23rd July, 2018) and *Dar v. Minister for Justice and Equality* [2019] IEHC 194, [2019] 4 JIC 0102 (Unreported, High Court, 1st April, 2019).

18. It is true that the applicant got an injunction, and that helped to buy time to allow the appropriate information to be produced, but that in itself cannot carry with it a right to costs if the overall default approach of no order as to costs would, but for that, apply. Otherwise injunctions and indeed undertakings would be severely disincentivised if it was to be implied that they presumptively carried with them some entitlement to costs at the end of the day. In the circumstances the injunction was, if anything, a concession to the applicant, given that the actual documentary proof of the Portuguese citizenship had yet to be produced at that stage. Costs were reserved, but the intention and effect was that they would travel with the cause. An approach that there is to be order as to the costs of the cause should, unless it is otherwise appropriate, also apply to the injunction; and here it is not otherwise appropriate.
19. In particular, there is no basis to depart from the default approach to allow the applicant the costs of the injunction application because the position at that time had yet to be clarified by the Portuguese authorities. While I will admit that I am somewhat tempted by Ms. Cooney's proposition that I should grant costs of the costs application to the respondent, I will refrain from doing so in all the circumstances of the case, particularly given that the applicant did ultimately establish some sort of entitlement to be in the State.

Order

20. The order, therefore, is no order as to costs including no order as to reserved costs.