

THE HIGH COURT

[2022] IEHC 313

Record No. 2021/1321 SS

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

BETWEEN:

H.B

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 30th of May, 2022.

INTRODUCTION

1. This matter comes before me on the Applicant's application for costs limited to the *ex parte* application made seeking an inquiry pursuant to Article 40.4.2 of the Constitution. The application is brought in circumstances where an inquiry was directed with a requirement that the grounds of detention be certified and the Applicant be produced before the Court but where the Applicant had been released from custody prior to the return date on the Inquiry.

2. The Respondent resists the application for costs contending that the Applicant moved the application on a version of events which has been flatly contradicted, has abandoned her proceedings and has failed to comply with the directions of the Court regarding the filing of an affidavit in her own name.

BACKGROUND

3. The Applicant claims to be a Sudanese national. She was apprehended at Dublin Airport on or about the 18th of September, 2021 when she failed to produce a valid travel

document. A stolen British passport and boarding card was located on the aircraft from which she had disembarked. During her exchanges with Gardaí at the Airport she indicated an intention to apply for asylum. She was refused leave to land and arrested for an offence contrary to s. 18 of the Criminal Justice (Theft) Act, 2001 (as amended), namely possessing a British passport which had been reported stolen and cancelled. During a subsequent interview she admitted to unlawful possession of the passport and to having attempted to destroy the document to prevent the Irish authorities discovering that she had used it. It is claimed that during this interview she expressed a wish to return immediately to Sudan which the interviewing Garda interpreted as an implied intention to no longer pursue her international protection application.

4. She appeared via video link from Kevin Street Garda Station before the District Court on the 20th of September, 2020 charged with related offences on a number of charge sheets. She pleaded guilty and a plea in mitigation was entered in which it was indicated to the Court on her behalf that she intended to apply for asylum in the State. In sentencing the Judge applied s. 1(1) of the Probation of Offenders Act, 1908, it being noted that she wished to make an application for international protection.

5. There are two different versions of what next occurred.

6. On the Applicant's instructions, her solicitor (who is a different solicitor to the solicitor who attended before the District Court) has sworn that she was intercepted by the Gardaí on the Quays, Dublin City as she made her way to Mount Street, Dublin 2 to the offices of the International Protection Office in an apparent attempt to frustrate an application for asylum. Thereafter she was taken to Mountjoy Prison where, according to her instructions to her solicitor, she also reported to prison officers a wish to apply for asylum. When she had a consultation with her solicitor on the 22nd of September, 2021, it was understood that there was a proposal to deport her on the following morning, namely, the 23rd of September, 2021.

7. Following the consultation on the 22nd of September, 2021, her solicitors emailed Mountjoy Prison confirming in writing that the detention was considered to be unlawful, that the Applicant wished to apply for asylum and requesting that she be provided immediately with an application form followed by her release. This email was sent at 18.24 and is exhibited in

the affidavit grounding the later application that same evening to the High Court for an inquiry under Article 40.4.2 of the Constitution.

8. It is important to note that when making application for an inquiry, the Applicant's lawyers elected not to make an application under the Legal Aid in Custody Scheme.

9. On the other hand, contrary to the averments made on the Applicant's instructions by her solicitor in grounding the application for an inquiry, the Garda deponent (Garda Breen) avers that on leaving Kevin Street Garda Station at circa 15.00 on the 20th of September, 2021 following the conclusion of the District Court hearing, the Applicant was given directions to the International Protection Office at Mount Street, Dublin 2. It is contended by Garda Breen that she subsequently made enquiries to discover that the Applicant had not presented at the International Protection Office, Mount Street before that office closed at 16.00. Garda Breen claims that she then went to Mount Street and observed the Applicant outside the offices, sitting down. Garda Breen claims that she approached the Applicant and asked whether or not she still wished to apply for asylum. She avers on affidavit that the Applicant indicated that she did not wish to make an application, stating that she wished to meet with a friend and would fly home to Sudan the next day.

10. Garda Breen further claims to have advised the Applicant that if she was not making an application for asylum she would be arrested and returned to Doha International Airport, Qatar. She claims to have been satisfied that the Applicant understood her options and had not wish to follow-up with any application for asylum with the International Protection Office. Thereafter the Applicant was arrested pursuant to the provisions of s. 5(2) of the Immigration Act, 2003 (as amended). It is claimed that she then further confirmed through an interpreter that she did not wish to apply for asylum but preferred to return to Sudan. A warrant for temporary detention was signed to execute her removal from the State in an orderly and timely manner. She was due to be removed from the State early on the morning of the 23rd of September, 2021 but these arrangements were cancelled. According to Garda Breen (para. 13 of her Affidavit):

“the flight and related removal arrangements were scheduled for quite early Thursday morning but were halted when the terms of her production were established to the satisfaction of GNIB”.

11. It is claimed by the Garda deponent that the first clear indication of an intention to claim asylum was given when an email was received from the Applicant’s solicitor on the evening of the 22nd of September, 2021 proximate in time to the moving of the application for an inquiry on an *ex parte* basis before the High Court and when there was no one available to attend to the correspondence. It is contended that on making her application for protection, the Applicant’s position changed, and she was accepted as a protection seeker by the International Protection Office thereby becoming automatically entitled to a statutorily prescribed right to remain in the State and consequently she was released. It is nonetheless contended that until such time as she made her application for protection, she had no temporary right to reside in the State and her statutorily prescribed detention for the purposes of her removal remained fully and validly in force. As Garda Breen deposes (para. 15 of her Affidavit):

“As matters stood when the application was commenced on Wednesday evening, the Applicant had no right to remain in the State and the Minister retained the intention to remove her within the relevant statutory timeframe. Once the position changed and she had been accepted as an applicant by the IPO, as occurred after the proceedings were in being, then she became automatically entitled to a statutorily prescribed right to remain in the State for the duration of her protection hearing/appeal and of course the Garda would not endeavour to remove her during this period (other than in some rare and exceptional circumstances established by law); such would be the case for any person similarly positioned.”

12. When it was originally moved, the application for an inquiry pursuant to Article 40.4.2 of the Constitution was grounded on an affidavit sworn by the Applicant’s solicitor on instructions from the Applicant and was premised on a hearsay version of events which centred around the Gardaí intercepting the Applicant on the Quays in Dublin City for the seemingly untoward purpose of obstructing her from making her way to the International Protection Office. In response, Garda Breen provided a sworn account which contradicts the account contained in the Applicant’s solicitor’s affidavit and flatly contradicts that the Applicant was

arrested on the Quays for the purpose of preventing her attending at the International Protection Office to seek asylum as had been contended before the Court.

13. By the return date for the Inquiry pursuant to Article 40.4.2 of the Constitution on the 24th of September, 2021, the Applicant was no longer in detention. She did not appear in Court but was legally represented and her advisors informed the Court that she was having difficulty finding the Court being unfamiliar with Dublin city. The Court (Heslin J.) was appraised as to the conflict of facts as between the parties and directed the filing of affidavits and specifically an affidavit from the Applicant. Further directions were made for the disclosure of the DVD of interview (upon receipt of statutory letter of consent from the Applicant), custody records concerning the Applicant together with documents signed by her while in custody and the DAR from the Court hearing on the 20th of September, 2021.

14. Despite clear Court directions no further steps have been taken in the proceedings on behalf of the Applicant and her legal representatives confirm that they have no instructions from her. The Respondent refers on affidavit to information received that the Applicant travelled to Belfast from Dublin on the 24th of September, 2021 but no further information is available to the court as to where the Applicant is now or what her current position is. Suffice to say that she appears not to have pursued her application for international protection in the State following her release nor has she provided an affidavit which confirms her instructions to her solicitors in relation to the manner of her arrest and detention or rebutted the assertions made that she had indicated to the Gardaí that she no longer wished to pursue an asylum application but was intent on returning to Sudan.

DISCUSSION AND DECISION

15. Three authorities have been identified to the Court as relevant by the parties, namely, *Dempsey v. Member in Charge of Tallaght Garda Station* [2011] IEHC 257 (Herbert J.) High Court (Unreported, 17th June 2011), *M.K.I.A. (Palestine) and C.Z. v. The International Protection Appeals Tribunal, the Minister for Justice and Equality, Ireland and the Attorney General* [2018] IEHC 134 (Humphreys J.) High Court (unreported, 27th February 2018) and *Bao Feng Nian v. The Governor of Cloverhill Prison* [2020] IEHC 145 (Humphreys J.) High Court (Unreported, 17th February 2020).

16. It is contended on behalf of the Respondent that *Dempsey* no longer represents good law in view of later decisions. In *Dempsey*, an issue was raised on an Article 40.4.2 inquiry as to the constitutionality of s. 30(1) of the Offences Against the State Act, 1939 (as amended) [hereinafter “the 1939 Act”]. This section provided that a member of the Garda Síochána may arrest without warrant any person whom he suspects of having committed or being about to commit or being or having been concerned in the commission *inter alia* of a scheduled offence for the purpose of Part V of the 1939 Act or whom he suspects of carrying a document relating to the commission or intended commission of any such offence or being in possession of information relating to the commission or intended commission of any such offence as aforesaid.

17. It appears from the judgment that at the time issues as to constitutionality of the provision had been raised on other occasions but had not been tested in a manner which resulted in a court determination. In response to an order directing an inquiry and the production of the body of applicant in court, a garda member in that case deposed that the Applicant was detained and was subject to the provisions of the detention at the time of the bringing of the application before the court, but that in fact the questions which required to be put to the Applicant were reaching an end at the time of the bringing of the application and therefore the further detention of the Applicant was no longer required. The application was then adjourned by consent and it was agreed that the application be struck out, but reserving the issue of costs to be determined by the court.

18. At the hearing of the application relating to costs it was submitted on behalf of the Applicant that it was necessary to bring this application to achieve the unconditional release of the Applicant from his detention. Reliance was placed on the Court’s discretion under O. 99, r. (1) of the Rules of the Superior Courts and the rule in O.99, r. (1)(4) as amended and substituted by S.I. No. 12/2008, Rules of the Superior Courts (Costs) 2008, which provided that the costs of every issue of fact or of law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event. It was contended that the event was the unconditional release of the applicant from detention. Counsel for the respondent submitted that in considering the issue of costs the appropriate test for the court to apply was to consider whether the Applicant would have succeeded had the matter proceeded to a hearing. On the question of costs Herbert J. ruled (para. 39):

“In my judgment an applicant should be entitled to the costs of a conditional order in an application pursuant to the provisions of Article 40 of the Constitution if it was reasonable in the circumstances of the case to have made the application. In assessing this question the Court must have regard to a number of matters which include, whether the making of the application was appropriate, for example, that it was not based on a mere technicality or that no reasonable preliminary steps had been taken to secure the applicant’s release, whether the facts and the circumstances of the case so far as possible had been carefully ascertained and fully presented, whether a sufficient doubt was shown that the applicant’s detention might not be lawful or whether there was uncertainty as to the constitutionality of the legislation on foot of which the applicant was detained. I do not intend this list to be exhaustive and other issues as to reasonableness may arise on the facts of individual cases. I am, however, satisfied that in the instant case the application meets all of these criteria and I am satisfied that the application for the conditional order was reasonably and properly made. In R. (O’Sullivan) v. Military Governor of Hare Park [1924] 58 I.L.T.R. 62, the applicant was imprisoned by reason of mistaken identity and was released a day after a notice of motion for a conditional order of habeas corpus. No order was made on the application but Maloney L.C.J. held that under the circumstances the applicant was justified in coming to the court and ought to be paid his costs. In State (Carney) v The Governor of Portlaoighise Prison [1957] I.R. 25, Teevan J. (affirmed by the Supreme Court on appeal), discharged a conditional order of habeas corpus made by Haugh J. but held that:- “In view of the doubts existing as to which sentence the prisoner was detained on at the time the conditional order was applied for, I allow him his costs of the conditional order. Each party will abide his own costs of the present application, [allowing cause shown and discharging the conditional order].” I am satisfied that in each of these cases the Court awarded the applicant the costs of the conditional order because it considered that regardless of the outcome it was reasonable for the applicant to have made the application for habeas corpus. The court will therefore order that the applicant be entitled to the costs of the application for the conditional order to include the costs of this issue as to costs.”

19. Notwithstanding more recent case-law and the introduction of s. 169 of the Legal Services Regulatory Authority Act, 2015 [hereinafter “the 2015 Act”], Counsel on behalf of the Applicant maintains a reliance on *Dempsey* and argues that the Applicant is entitled to her

costs of the conditional order because the making of the application was appropriate and was not based on a mere technicality and was preceded by an email, albeit the same evening as the court application, as a preliminary step to secure the Applicant's release in circumstances where a sufficient doubt existed that the Applicant's detention might not be lawful.

20. The more recent case-law identified by the Respondent and properly opened to the Court by counsel for the Applicant are the decisions of Humphreys J. in *M.K.I.A. (Palestine) and C.Z. v. The International Protection Appeals Tribunal, the Minister for Justice and Equality, Ireland and the Attorney General* [2018] IEHC 134 and *Bao Feng Nian v. The Governor of Cloverhill Prison* [2020] IEHC 145.

21. In the earlier of these two cases, *M.K.I.A.*, the Court was concerned not with an application for an inquiry under Article 40.4.2 but with a challenge by way of judicial review to a decision that an asylum application should be transferred to another EU State. Following that decision, the applicant applied for residency based on his marriage to an EU national. While the EU residency application was pending, the judicial review proceedings were commenced. Subsequently, the Minister accepted the application for residency, rendering the proceedings moot with the exception of the issue of costs. In his judgment Humphreys J. reviewed the case-law on costs in moot proceedings to establish certain general principles and stated at para. 3:

*“It seems to me that the principles set out by the Supreme Court 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 and Equality* [2016] IESC 45 (Unreported, Supreme Court, 26th July, 2016) (MacMenamin J.) are the operative ones. Particular pains were taken in both *Godsil* and *Matta* to attempt to ensure that those principles were seen as having priority over previous approaches to costs. McKechnie J. made the point in *Godsil* that “In some of the cases mentioned in argument, the issue of costs seems to have been determined in a number of ways or, on occasion, even within the same case, by a variety of means”, referring to *Garibov v. Minister for Justice, Equality and Law Reform* [2006] IEHC 371 (Unreported, Herbert J., 16th November, 2006) where the emphasis was on the reasonableness or otherwise of taking the proceedings and *Mansouri v. Minister for Justice, Equality and Law Reform* [2013] IEHC 527 (Unreported, McDermott J., 29th January, 2013) and*

Nearing v. Minister for Justice, Equality and Law Reform [2009] IEHC 489 [2010] 4 I.R. 211, where Cooke J. stressed the issue of whether the applicant had demonstrated an entitlement to the relief claimed. McKechnie J. then proposed a clearer approach to resolving these issues. It must now be considered that the previous High Court case law must be taken to be decided on its special facts as stated by MacMenamin J. in Matta, in relation to Garibov. Thus, primary recourse must be had to the three Supreme Court decisions I have referred to and the factors referred to in those cases, rather than to the factors referred to in previous High Court cases such as the reasonableness of taking the action or whether the applicant would have won in any event, a somewhat inconvenient test from any standpoint because it would require the court to determine the case to adjudicate on the issue of costs.”

22. From his review of the caselaw cited he concluded (para. 6):

“6. So it seems then the law applicable in relation to costs of a moot action can be summarised as follows:

(i). The first inquiry that a court is required to make is to decide whether or not there existed an “event” to which the general rule that costs follow the event can be applied (see Godsil).

(ii). An act that could only be regarded as an explicit acknowledgment and admission of the legal validity of the plaintiff’s challenge is such an event, as in Godsil.

(iii). Thus the event must normally in some way be caused by the applicant’s proceedings; per MacMenamin J. in Matta.

(iv). If the proceedings are moot due to a factor outside the control of either party, the view should be taken that there is no event in the Godsil sense and therefore the default order is no order as to costs, as discussed in Cunningham.

(v). If the proceedings are moot due to a factor which is within the control of one party but that has no causal nexus with the proceedings or which relates, as it is put in Cunningham, to an underlying change in circumstances, then again there seems to be no event in the Godsil sense, so the court should lean in favour of no order (see per MacMenamin J. in Matta at para. 20).

(vi). Finally, if the proceedings are moot due to a factor within the control of one party that does have a causal nexus with the proceedings then there is an event in the *Godsil* sense and the default order should be costs in favour of the other party (see *Cunningham and Godsil* in particular). Application of those principles to the present case.”

23. Humphreys J. applied the above principles to the facts in issue determining that the proceedings were rendered moot by the issue of the residence card. The issue of the residence card was brought about by an application by the First Named Respondent that was not related to the proceedings and therefore there was no “event”. In consequence the Court concluded that the default order in such circumstances is no order as to costs.

24. Given that the decision on costs in *M.K.I.A.* did not relate to an inquiry under Article 40.4.2 to which arguably different principles may apply, more directly relevant to this case is the more recent decision of Humphreys J. in *Nian v. The Governor of Cloverhill Prison* (No. 2) [2020] IEHC 145 dealing with costs in connection with an inquiry directed in respect of the detention of a Chinese national who was being held for deportation at the onset of the Coronavirus in February, 2020. In relevant part the background as more fully set out in the judgment of Humphreys J. was that the Respondent had decided to release the Applicant, a Chinese national, then in custody in circumstances where imminent deportation was no longer proposed. On the same day this decision was taken and without any warning or pre-action letter, the Applicant applied to Court (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 duly directed but unaware of this development, the GNIB sent an order for the Applicant’s release to Cloverhill Prison on the same day in circumstances where it was the Respondent’s position that the Applicant’s release had nothing to do with the Article 40.4.2 Inquiry proceedings and had been directed without knowledge of same.

25. In addressing the legal test for costs of moot proceedings in his later judgment in *Nian* Humphreys J. referred to his earlier decision in *M.K.I.A. (Palestine) v. The International Protection Appeals* [2018] IEHC 134 (Unreported, High Court, 27th February, 2018) in which a principled approach was identified, stating that (para. 7):

“The approach involves general guidelines, not absolute ones.”

26. Notably, he further referred to the Applicant’s reliance on caselaw of “*some antiquity*” citing in particular *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). He found that the focus in those cases was 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. He added:

“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.”

27. Humphreys J. then reiterated the ratio of his judgment in *M.K.I.A.* as follows (paras. 9 to 10):

“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.

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.

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."

28. Finally, he concluded that the mootness arising in that case related to an underlying change of circumstances. He was satisfied that there was no causal nexus to the proceedings in securing the underlying change of circumstances.

29. It seems to me that the costs considerations in an Article 40.4.2 inquiry may not be precisely the same as in other types of proceedings. One difference is that an application for an inquiry into detention may be made by any person if there appear to be grounds for so contending. More fundamentally, the application is rooted in the provisions of the Constitution itself and is unique in this regard. It reflects the primary importance attached in our constitutional order to the protection of liberty and guarding against arbitrary detention and imprisonment without warrant. The central importance of personal liberty under the Constitution means that the detainer has to stand over the detention in law. Given the importance of the Article 40.4.2 inquiry application in safeguarding the constitutional right to liberty, it is essential that cost rules are not developed or applied in a manner which undermines the effectiveness of that great remedy. It is a given that for the remedy to be effective, the Courts must be accessible in a real way and for this it is necessary that lawyers be prepared to act, a position which will only prevail where they are paid for the services they provide. Absent provision for payment for legal services, legal assistance cannot be assured to a person in unlawful detention who wishes to establish that unlawfulness through a court enquiry.

30. Indeed, it is presumably in recognition of the importance of access to remunerated legal representation as a feature of the constitutional right of access to the Courts that the State operates a Legal Aid in Custody Scheme (formerly known as the Attorney General's Legal Aid Scheme). This is non-statutory administrative scheme whereby payments are made by the Department of Justice and Equality in respect of legal costs in certain types of litigation not otherwise covered under the criminal or civil legal aid scheme. On application under this

Scheme lawyers are remunerated irrespective of whether the application is successful. Accordingly, lawyers bringing an application under Article 40.4.2 are not dependent either on their client's ability to pay them for legal services or on their client recovering costs under a costs order at the conclusion of proceedings where they have elected to rely on the Scheme.

31. As a corollary, however, those who do not elect to make their application under the Scheme in the hope or expectation of securing a costs order in their favour at the conclusion of the case, do so on peril of the Court determining that it is not an appropriate exercise of discretion to award costs. Thus, lawyers who *bona fide* pursue an application on instructions from their client, may find that payment for their services are not ultimately secured by cost orders in their client's favour. At a principled level this reflects the fact that the entitlement to recover costs is an entitlement which vests in the client and not the lawyers. It does not reflect on the services provided but on the merits of the application and the rules guiding the exercise of a costs discretion by the Court.

32. In this case, it seems to me that had the account given by the Applicant to her legal representatives been true, then the application would have been entirely justified and would also almost certainly have been effective in securing not only her release from unlawful detention but also the prevention of a premature deportation and the vindication of the Applicant's right to make an application for protection in the State and have it considered in accordance with law. In such circumstances, it seems to me that the Applicant would have been entitled to recover the costs of the proceedings properly instituted and the outcome of the application would have justified the steps taken.

33. As it transpires, however, the Applicant has not appeared before the Court to substantiate the claim she made in the instructions originally given to her lawyers upon which the Article 40.4.2 Inquiry was predicated. Instead, the Respondent has adduced evidence which paints an entirely different picture as to the *bona fides* of the Applicant and the truthfulness of her expressed intention to claim protection in the State. It seems to me that even on an application of the *Dempsey* or *Rostas* test, the reasonableness or appropriateness of the application could only ever be determined on the basis of evidence to substantiate the factual claims advanced upon which the asserted illegality of detention which required inquiry depended.

34. Absent affidavit evidence from the Applicant, I am not in a position to accept the hearsay account of the Applicant's solicitor in favour of the direct testimony of Garda Breen. Accepting Garda Breen's account as true, which I must absent other direct evidence to contradict it, it follows that the reason the Applicant's release from detention was secured in advance of the Inquiry date was the making of an application for protection by the Applicant which was accepted by the International Protection Office and not the bringing of the Article 40.4.2 Inquiry application before the Court. Hence there was no "event" in the sense of the proceedings yielding a result. The proceedings were rendered moot by the separate action of the Applicant in making application for international protection, an application which on the un rebutted Garda evidence she could have pursued earlier but did not.

35. Similarly, while counsel on behalf of the Applicant seeks costs of the *ex parte* application for a conditional order in the absence of any further instructions from his client (which in itself begs questions which were not raised during the hearing before me in circumstances where a cost application is pursued not for the lawyer's but the client's benefit) and urges on the Court that the Applicant would have been deported but for the making of the Order directing an Inquiry under Article 40.4.2, I am not satisfied that this justifies a court order for costs.

36. On the evidence, which has not been contested by the Applicant, she was released because she made an application for international protection which was accepted for consideration by the International Protection Office. While it is admitted by the Respondent that plans to remove the Applicant from the State were not pursued on the 23rd of September, 2021 by reason of the orders made under Article 40.4.2, on the Garda evidence those plans would never have been made in the first place had an application for protection been made earlier. Instead, the evidence before the Court from Garda Breen confirms that the Applicant clearly indicated that she did not wish to pursue a protection application but wished instead to return immediately to Sudan.

37. While Counsel who appeared for the Applicant at the *ex parte* stage urged on the Court in seeking the costs of that application that one might harbour concerns about the Garda account, it is my view that he cannot properly pursue this line of argument in the absence of evidence before the Court and instructions from his client, neither of which he has.

38. If I were in a position to conclude that the only reason the protection application was not made sooner was because the Applicant was prevented from making the application, then it would be open to me to conclude that by securing the processing of the application on behalf of the Applicant, the release of the Applicant was nonetheless connected to the proceedings in a manner which would entitle the Applicant to recover her costs. On the basis of Garda Breen's undisputed affidavit, it is not open to me to draw this conclusion.

39. Accepting, as I consider I must, the evidence adduced on behalf of the Respondent, then I conclude that the proceedings became moot due to the unilateral act of the Applicant in belatedly making application for international protection. I cannot characterise the subsequent release of the Applicant as a unilateral act of the Respondent because it was occasioned by the fact of the Applicant's application, an application which she could have made earlier. While the Applicant's release has a nexus with the proceedings on the account she gave her solicitors, this account has not been substantiated by the Applicant and cannot properly be relied upon in determining the costs application in the Applicant's favour herein.

40. I am reassured as to the correctness of this conclusion by the terms of s. 169 of the 2015 Act. While an inquiry was directed pursuant to Article 40.4.2 of the Constitution on an *ex parte* application and the Applicant was therefore not removed from the State but subsequently availed of an opportunity to make an application for protection and was released from detention, I cannot conclude that this was because she had brought a successful application for an inquiry under Article 40.4.2.

41. Nor is this a case in which I would consider it appropriate to depart from a "*costs follow the event*" approach by reference to the discretionary factors identified in s. 169(1) of the 2015 Act. Having regard to the Applicant's conduct (s. 169(1)(a) of the 2015 Act) before the proceedings as detailed on affidavit by Garda Breen, it seems to me that it weighs very strongly against the award of costs. Indeed, it is my view that the Applicant's conduct as described by Garda Breen and not contested by the Applicant is strongly suggestive of an abuse of the immigration system for purposes other than the proper pursuit of a protection claim. Furthermore, the Applicant's conduct having instituted an application for an inquiry but then failing to appear in Court, failing to comply with Court directions and failing to stand over the

claims she made to her solicitors when instructing them to make application leans strongly against rather than in support of awarding costs in the Applicant's favour.

42. On the basis of Garda Breen's evidence, it was never reasonable (within the meaning of s. 169(1)(b)) in my view for the Applicant to pursue an Article 40.4.2 application as she had not been prevented from making a protection claim but had elected not to do so. Further, the failure to substantiate her claim in the face of an entirely different account of what actually happened tends to support a conclusion that the Applicant's account as reflected in the instructions she gave her lawyers was not truthful (and therefore a distorted or exaggerated version of reality as contemplated by s. 169(1)(d)).

CONCLUSION

43. I have no doubt that the Applicant's lawyers made a *bona fide* application for an inquiry into the lawfulness of her detention based on what she told them. However, the account she gave them has not been substantiated. Having elected not to make an application under the Legal Aid in Custody Scheme but to instead seek to recover costs in these proceedings, it follows that the entitlement to costs falls to be determined in accordance with established costs principles with due regard to the nature of the proceedings which enjoy a special constitutional position. Notwithstanding this special constitutional position, on the facts and circumstances of this case, I am satisfied that I would not be justified in making a costs order in favour of the Applicant.

44. I am satisfied that the appropriate order as to costs in this case in all of the circumstances is no order.