THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 640 J.R.]

BETWEEN

LUCIANA ROSA

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 9th day of March, 2018

1. The applicant is a Brazilian national. She came to Ireland to work in the hotel industry in 2003 and had work permits and "Stamp 1" type residency permission from 2003 to 2010.

2. After she accrued five years of stamps on work permits, she applied for "long term residency" permission ("LTR") and naturalisation. She was granted LTR by a decision letter dated 10th November, 2010. She duly registered this permission and received a five year stamp (Stamp 4 permission) from 6th December, 2010 to 10th November, 2015.

3. Some seven months or so following the grant of LTR, the applicant returned to Brazil with her husband and child, due to her husband's wish to return there for medical reasons following a serious injury sustained in this jurisdiction. The applicant and her family departed for Brazil on 25th June, 2011. Following treatment in Brazil, the applicant's husband recovered in or about March, 2012. In the interim, the applicant had found work in Brazil and the family remained there.

4. The applicant's naturalisation application, which she had submitted at the same time as her application for LTR, was approved by letter dated 15th June, 2011 from the Irish Naturalisation and Immigration Service (INIS), subject to her attending at the District Court to make her oath of fidelity to the State and paying the requisite fees.

5. The applicant had not made the oath or paid the requisite fees by the time she departed for Brazil on 25th June, 2011.

6. On 6th March, 2013, INIS wrote to the applicant, with reference to the letter of 11th June, 2011, stating that no reply to the letter had been received. The applicant was advised that any delay in completing the naturalisation procedure could result in the Minister reconsidering his decision to grant naturalisation or an increased fee before a certificate of naturalisation would issue.

7. The applicant was requested to note that her file "will be put away" pending a response from her.

8. The applicant made contact with INIS on 13th March, 2013, requesting information regarding the location of the citizenship ceremony and the payment of the certificate fee.

9. On 3rd May, 2013, she wrote enquiring whether she could have a further period of four weeks to pay the certification fee, advising that while she wanted the Irish passport, she did not have the funds to hand. She gave her address as being Crosby Place, Little Barrack Street, Carlow.

10. A reply was furnished by INIS on 8th May, 2013, noting the applicant's comments and stating that the fee and relevant documentation were awaited.

11. In the absence of further communication from the applicant, the Citizenship Division of the respondent's department wrote to the applicant on 12th May, 2015, requesting that she confirm her current address, that she was still resident in the State and whether she was in a position to submit the requisite fee.

12. No reply was received from the applicant until 25th September, 2015, when she requested information in relation to the payment of the certification fee but did not address the request for confirmation concerning her residence in the State.

13. A further email issue from the Citizenship Division to the applicant on 28th September, 2015, again requesting confirmation as to her address and that she had been resident in the State since 2011, supported by evidence. No response was received to that request.

14. According to Ms Larney's grounding affidavit, the applicant's instructions were that it was always her intention to return to Ireland to take up her naturalisation approval when the time was right for the family to return and when they had the means to do so.

15. The applicant travelled to Ireland on 19th October, 2015, on a flight from Madrid, having originally flown from San Paulo, Brazil. Upon arrival, she was refused leave to land at Dublin Airport. At the time of her arrival in the State, the applicant's LTR stamp on her passport was still extant.

16. The basis for the refusal to land is contained in a "Border Management Unit Entry" report complied by Lisa Lawless, the Immigration Officer who refused the applicant leave to land on 19th October, 2015. It reads as follows:

> "The passenger presented at Immigration and stated she was here to stay with a friend. She then stated that she had permission to reside here. She produced a GNIB [Garda National Immigration Bureau] card, Stamp 4 valid from December 2010 until November 2015. She was asked if she lived in Ireland. She stated no she lives in Brazil with her husband and child. She stated that she had lived in Ireland for nine years but left sometime in December, 2010. Ms. Rosa stated she intended to renew her GNIB card and then she intended to be naturalised. She then produced a letter dated 2011 which purports to show she had an application for naturalisation. She stated she had 200 euro in cash and a credit card. She claimed she would live with a friend. She stated if she gets her card renewed her husband and child would then join her.

ICS Farrelly spoke to the passenger who stated she was here for a visit and was asked how long she intended to stay. She then stated she was entitled to reside here and did not understand why she was being questioned. She claimed she was entitled to naturalisation as she had a card valid till November 2015. She also produced a letter showing she had an application for naturalisation in 2011. Ms. Rosa told ICI Farrelly she left Ireland in 2011. She was asked if she had medical insurance and she stated why would she need it, get permission to live in Ireland.

As she had not lived since 2010 her permission would no longer be valid. Neither is she a genuine visitor as stated to ICS Farrelly.

I am not satisfied if she has access to sufficient funds to cover the potential cost of her stay in Ireland. Passenger is refused accordingly in consultation with ICS Farrelly."

17. "The Refusal Details" state the reason for the refusal as follows:

"(a) that the non-national is not in a position to support himself or herself and any accompanying dependants

(k) There is a reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national."

18. The applicant's solicitor, Ms. Larney, tried to have the decision reviewed by INIS on 21st October 2011, but the review was refused. On the said date, INIS wrote to Ms. Larney in the following terms:

"Our records indicate that your client arrived at Dublin Airport on the 19 October 2015 having travelled from Madrid with Iberia Express. As your client is a foreign national she is required to seek permission to enter the State upon arrival. In the course of the examination necessary to determine her application for permission to enter, the Immigration Officer and subsequently the Officer's supervisor established that your client had left the State in December 2010 and was now seeking to return for a visit.

Notwithstanding your client's stated intention to pursue an application for naturalisation the Officer was satisfied that the grounds for refusal set out at (a) and (k) in Section 4 of the Immigration Act, 2004 had been satisfied. Consequently your client was refused leave to land and transferred into the custody of An Garda Siochana to effect her removal from the State. Matters pertaining to her custody are appropriate to the Garda National Immigration Bureau."

19. By order of Mac Eochaidh J. on 16th November, 2015, the applicant was granted leave to seek relief by way of judicial review for:

1. An order of *certiorari* by way of an application for judicial review quashing the decision of 19th October, 2015, to refuse the applicant leave to land under s. 4(3)(a) and/or 4(10)(a) of the Immigration Act, 2004 ("the 2004 Act").

2. An order of *mandamus* compelling the respondent to delete references to and immigration records of a refusal of "leave to land" in respect of the applicant.

3. Damages.

20. The grounds upon which leave was granted are as follows:

1. The applicant who, as a Brazilian, is visa-exempt already had LTR permission when she came to Ireland and a valid permission stamp. She was not applying for visitor type permission at the airport.

2. It was not a condition of LTR permission that the beneficiary resides in Ireland at all times, or at all. It is a matter for the respondent whether the five year permission is revoked or renewed at the end of the five years.

3. The Immigration Officer at the airport has no jurisdiction to revoke permission granted by the respondent.

4. The decision to refuse leave to land was unreasonable, arbitrary and/or disproportionate in circumstances where the applicant already had permission to reside and work in Ireland. Sufficient resources tests in respect of entry do not apply in circumstances where the person already has LTR permission to live and work in the State. Further, or in the alternative, even if the Immigration Officer was correct to treat the applicant as a visitor/holidaymaker as opposed to a person with valid and current LTR permission, the applicant did have sufficient resources for a visit.

5. The finding that the applicant was not here for the stated purposes was unreasonable. She said she was returning to try to take up the offer of naturalisation while she still could. The applicant had a return ticket to Brazil but did not intend returning until she was naturalised as an Irish citizen.

6. The applicant was imprisoned for three days as a result of this decision. She was very distressed by what happened and is upset at how she has been treated by the Irish authorities. She is also now in a position where her LTR has expired and there is a record of a refusal of leave to land which will prevent her from returning to Ireland.

The applicable statutory provisions

21. Section 4 of the Immigration Act 2004 ("the 2004") Act provides:

"4.—(1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as "a permission").

(2) A non-national coming by air or sea from a place outside the State shall, on arrival in the State, present himself or herself to an immigration officer and apply for a permission.

(3) Subject to section 2 (2), an immigration officer may, on behalf of the Minister, refuse to give a permission to a person referred to in subsection (2) if the officer is satisfied—

(a) that the non-national is not in a position to support himself or herself and any accompanying dependants;

(b) that the non-national intends to take up employment in the State, but is not in possession of a valid employment permit (within the meaning of the Employment Permits Act 2003);

(c) that the non-national suffers from a condition set out in the First Schedule;

(d) that the non-national has been convicted (whether in the State or elsewhere) of an offence that may be punished under the law of the place of conviction by imprisonment for a period of one year or by a more severe penalty;

(e) that the non-national, not being exempt, by virtue of an order under section 17 , from the requirement to have an Irish visa, is not the holder of a valid Irish visa;

(f) that the non-national is the subject of—

(i) a deportation order (within the meaning of the Act of 1999),

(ii) an exclusion order (within the meaning of that Act), or

(iii) a determination by the Minister that it is conducive to the public good that he or she remain outside the State;

(g) that the non-national is not in possession of a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality;

(h) that the non-national—

(i) intends to travel (whether immediately or not) to Great Britain or Northern Ireland, and

(ii) would not qualify for admission to Great Britain or Northern Ireland if he or she arrived there from a place other than the State;

(i) that the non-national, having arrived in the State in the course of employment as a seaman, has remained in the State without the leave of an immigration officer after the departure of the ship in which he or she so arrived;

(j) that the non-national's entry into, or presence in, the State could pose a threat to national security or be contrary to public policy;

(k) that there is reason to believe that the non-national intends to enter the State for purposes other than those expressed by the non-national.

(4) An immigration officer who pursuant to subsection (3) refuses to give a permission to a non-national shall as soon as may be inform the non-national in writing of the grounds for the refusal.

(5) (a) An immigration officer may, on behalf of the Minister, examine a non-national arriving in the State otherwise than by sea or air (referred to subsequently in this subsection as "a non-national to whom this subsection applies") for the purpose of determining whether he or she should be given a permission and the provisions of subsections (3), (4) and (6) shall apply with any necessary modifications in the case of a person so examined as they apply in the case of a person coming by sea or air from a place outside the State.

(b) A non-national to whom this subsection applies and who is not exempt, by virtue of an order under section 17 , from the requirement to have an Irish visa shall have a valid Irish visa.

(c) A non-national to whom this subsection applies and who is arriving in the State to engage in employment, business or a profession in the State shall within 7 days of entering the State—

(i) report in person to the registration officer for the place in which he or she intends to reside,

(ii) produce to the officer a valid passport or other equivalent document, issued by or on behalf of an authority recognised by the Government, which establishes his or her identity and nationality, and

(iii) furnish such information as the officer may reasonably require regarding the purpose of his or her arrival in the State.

(d) A non-national to whom this subsection applies shall not remain in the State for longer than one month without the permission of the Minister given in writing by him or her or on his or her behalf by an immigration officer.

(6) An immigration officer may, on behalf of the Minister, by a notice in writing to a non-national, or an inscription placed on his or her passport or other equivalent document, attach to a permission under this section such conditions as to duration of stay and engagement in employment, business or a profession in the State as he or she may think fit, and may by such a notice or inscription at any time amend such conditions as aforesaid in such manner as he or she may think fit, and the non-national shall comply with any such conditions.

(7) A permission under this section may be renewed or varied by the Minister, or by an immigration officer on his or her behalf, on application therefor by the non-national concerned.

(8) A non-national, being a member of a class of persons declared by order under section 17 to require a transit visa to enter the State, shall have a valid transit visa.

(9) A non-national who contravenes subsection (2), paragraph (b), (c) or (d) of subsection (5) or subsection (6) or (8) is guilty of an offence.

(10) In performing his or her functions under subsection (6), an immigration officer shall have regard to all of the circumstances of the non-national concerned known to the officer or represented to the officer by him or her and, in particular, but without prejudice to the generality of the foregoing, to the following matters:

(a) the stated purpose of the proposed visit to the State,

(b) the intended duration of the stay in the State,

(c) any family relationships (whether of blood or through marriage) of him or her with persons in the State,

(d) his or her income, earning capacity and other financial resources,

(e) the financial needs, obligations and responsibilities which he or she has or is likely to have in the foreseeable future,

(f) whether he or she is likely to comply with any proposed conditions as to duration of stay and engagement in employment, business or profession in the State,

(g) any entitlements of him or her to enter the State under the Act of 1996 or the treaties governing the European Communities within the meaning of the European Communities Acts 1972 to 2003."

22. It is clear that the provisions of s. 4 apply both to permissions granted by Immigration Officers at point of entry of a non-national into the State and to renewals or variations of permission by the Minister.

23. In her grounding affidavit, Ms Larney, the applicant's solicitor, avers as follows:

> "17. I say and believe that the applicant did have a return ticket for Brazil and it was not her intention (I am informed) to use this ticket if she had managed to sort out her citizenship. In the event of her naturalisation, her intention was for her family to join her in Ireland.
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> 18. I say and believe that it is not a condition of long term residence permission that a person resides in Ireland nor does a person have to indicate that they intend to reside in Ireland most or any of the time. The Minister might not renew the permission if the person didn't really use it but that is a different matter."

In an affidavit sworn 12th December, 2016 Mr. Albert Llussà a solicitor in the firm of Daly, Lynch Crowe and Morris, the applicant's solicitors, avers as follows:

> "3. I am a solicitor specialising in asylum and immigration law with over thirteen years' experience in the area. I have represented many clients with long term permission to remain and am familiar with the nature of the said permissions. A person with long term residence permission (granted to them by the respondent) is not restricted from leaving the State by the terms of such permission. As far as I am aware, where a person with long term residence permission does travel outside of the State, on re-entry at Dublin Airport they present at passport control and a date stamp is placed on their passport, for the purposes of recording the date of entry. The entry date stamp can be used by INIS to calculate periods of actual residence in the State, for example to calculate if a person has accrued the residence period required to qualify for naturalisation. The entry date stamp is not a residency permission stamp as such. The quite logical practice is that persons with long term residence permission are not required to re-apply for such permission and on each occasion where they leave the State and then return. Such a system would be totally at odds of the nature of a long term permission in any event.
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> 4. Furthermore, if a system whereby a person with long term residence permission, who already has a long term (5 year) residency permission stamp in his or her passport, had to apply for and be granted another different residency permission each time they travelled outside the State, was in operation then the person could then have two (or more) different residency permission stamps covering the same period with different conditions. This would make no sense."

24. In response, Mr. Neville Kenny, of the respondent's department, swore an affidavit on 21st December, 2016, wherein he avers that all non-nationals arriving in the State by air or sea to present to an Immigration Officer to apply for permission to land in accordance with s. 4(2) of the 2004 Act. He avers that this includes non- nationals previously granted a Stamp 4 permission such as the applicant. He further avers as follows:

> "9. … If the Immigration Officer's decision is a positive one, or if the Supervisor on duty does not approve the initial Immigration Officer's negative decision, the non-national will be furnished with permission to land. I say that it is only in these circumstances where the non-national is granted permission to land that a "date stamp" as referred to by Mr. Llusa in his affidavit maybe placed on a passenger's passport. The practice of using a date stamp on re-entry is a pragmatic/practical approach to implementing requirement of s. 4(1) of the 2004 Act which requires an inscription in the passport (or a document to be provided) evidencing the entry permission.
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> 10. I say and believe that in the within case the initial Immigration Officer's negative decision is approved by the Supervisor on duty and the within Applicant was duly refused leave to land. Therefore, the matter of placing a "date stamp" as referred to by Mr. Llusa in his affidavit did not arise in the within case.
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> 11. Mr. Llusa is correct to state at para. 3 of his affidavit that an entry date stamp is not a residency permission and that a non-national possessing a stamp 4 permission, withdraws the within Applicant, is not restricted from leaving the State. For the avoidance of doubt, I say and believe that the Respondent has not advanced an argument to the contrary.
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> 12. Furthermore, I say that Mr. Llusa averment at para. 4 of his affidavit that if an effective person "had to apply for and be granted another different residency permission at the time they travelled" they could have more than one residency

permission in play at any time and that "this would make no sense" is misconceived. The requirement to seek entry to the State is a separate matter on each occasion such entry is sought to any resident's permission the person may have held prior to their departure." (source loose document).

The applicant's submissions

25. The applicant's principal argument is that on the date she arrived in the State, 19th October, 2015, she was in possession of a valid LTR permission. As confirmed in the statement of opposition, this permission was not revoked by the decision refusing the applicant leave to land. It is submitted that the respondent's position would thus appear to be that on 19th October, 2015 the applicant was simultaneously a person in possession of a valid immigration permission to be in the State but was also a person who was refused permission to be in the State by the Immigration Officer at the airport. It is submitted that this is untenable, and that in circumstances where the applicant had a valid LTR, the respondent had no basis upon which to refuse her leave to land.

26. Counsel for the applicant refers to the decision of Cooke J. in *Saleem v. Minister for Justice, Equality and Law Reform (No. 2)* [2011] IEHC 223 in aid of his submission that permissions granted under s.4 of the 2004 Act are not just those granted by immigration officers, and that consequently, the Immigration Officer who dealt with the applicant was obliged to recognise that the applicant was in possession of a permission which had been granted by the respondent. Cooke J. stated:

> *"4. As this Court pointed out in an interlocutory ruling given in this case on the 4th February, 2011 (Saleem v Minister for Justice, Equality and Law Reform, Unreported High Court, Cooke J., 4 February 2011 [2011] IEHC 55), the expression "long term residency" is not one used in the Immigration Act 2004, although it does appear in the Long Term Residency (Fees) Regulations 2009, (SI No. 287/2009). If one leaves aside the special arrangements applicable to migrant workers who are nationals of a Member State of the European Union or of a state in the European Economic Area, the arrangements governing an entitlement to enter or land in the State and to remain within the jurisdiction thereafter, derive in effect from ss. 4 and 5 of the Immigration Act 2004. Section 5 of that Act provides that no non-national may be in the State other than in accordance with the terms of a permission given under the Act by or on behalf of the Minister, or given before the passing of that Act. Section 4 provides that an Immigration Officer may on behalf of the Minister give a non-national, either by means of a document or by placing a stamp on his or her passport, "an authorisation to land or be in the State". No general conditions are prescribed by s. 4 in relation to the grant of such permissions. Subsection (3), however, prescribes a series of circumstances in which an immigration officer on behalf of the Minister may refuse to give permission and subsection (6) provides that a permission can be given subject to such conditions as to duration of stay and engagement in employment, business or profession as may be thought fit. Accordingly, the combined effect of the stamping of the passport with permission to remain for a given duration with reference to the terms of a specific work permit, is that the non-EEA national has permission to be in the State for the purposes of s. 5 upon the conditions as to duration and engagement in a particular employment as are specified in the endorsement on the passport.*
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> *5. It follows, accordingly, that in s. 4(1) of the Immigration Act 2004, the Oireachtas has conferred on the Minister a discretion exercisable through his immigration officers to grant to non-nationals (that is, non-EEA nationals in present circumstances,) permission to land or remain in the State and to prescribe conditions for such permissions including those as to the length of stay and the employment, business or profession that might be engaged in.*
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> *6. The Act of 2004 does not otherwise distinguish between standard forms of permission to remain by reference to specific periods of time. The term "long term residency" effectively derives from the way in which the discretion under s. 4 is exercised in practice. While permissions issued to migrant workers are for short periods of, typically, two years, the respondent has published a scheme which is given the title "Long Term Residency" and which sets out the circumstances in which the Minster will be prepared to entertain and decide upon applications for continued residency in the State for a period of five years before further renewal is required. The publication appears to take the exclusive form of its presentation on the website of the Irish Naturalisation and Immigration Service (INIS). The terms of the scheme appear to be changed from time to time and neither party has been able to put in evidence the version which was in operation in July, 2008, when the applicant made his application. Nevertheless, it is not disputed that one of the essential conditions laid down as to the basis upon which an application might be made was that such applications were confined to "persons who have been legally resident in the State for a minimum of five years (ie. 60 months) on work permit/work authorisation/working visa conditions". Nor does it appear to be disputed that the published conditions for the scheme at all material times stipulated that to be valid, an applicant had to have a permission to remain in the State which was valid when the application was made and be in gainful employment and that both the permission to remain and the employment continued during the application process. In ground no. 3 of the statement of grounds in this case, it was acknowledged:-*
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> > *'It is a criteria (sic) under the scheme that an applicant keep his permission to remain up to date at all times, including the period while their application is being processed.'"*

27. The applicant submits that no reasonable Immigration Officer could refuse leave to land or visitor permission under s. 4 of the 2004 Act to a person who the Immigration Officer knew was the holder of a valid LTR, particularly in circumstances were the Immigration Officer did not propose to revoke the said valid immigration permission (as has been acknowledged in the respondent's statement of opposition).

28. It is thus submitted that this constitutes the threshold for an unreasonable decision which merits quashing of the decision of 19th October, 2015.

29. It is submitted that as a person who had long term leave to remain in the State and someone who had a stamp 4 work permit, it would be bizarre for the applicant to have to obtain permission to enter the State. Furthermore, the LTR which the applicant had did not prohibit her from leaving the State. There was nothing which suggested that were she to do so, and then re-enter the State, that she would have to apply for a further permission to be in the State. It is submitted that the only condition which was contained in the LTR of the type the applicant had was that a visa may be required to enter the State, which was not applicable to the applicant because, as a Brazilian national, she was visa-exempt.

30. Given the nature of the permission she had been granted in 2011, it cannot be correct that the applicant would require another form of permission to enter the State.

31. Counsel maintains that it is not logical that the applicant would be forced to have two permissions in circumstances where she already had a permission effectively granted by the respondent pursuant to s. 4(7) of the 2004 Act.

32. It is submitted that it is not correct for the respondent to say that the applicant's LTR was in someway overridden by the fact that she had left the State and then re-entered, in circumstances where the LTR was still extant.

33. Counsel also submits that it is not the applicant's case that an Immigration Officer could never refuse someone in the applicant's position entry into the State. It is acknowledged that a refusal as provided for in s. 4(2) of the 2004 Act could arise for a reason pursuant to s. 4(3), if, for example, the applicant were found to be suffering from an infectious disease or found in possession of drugs or such like. It is submitted however that some of the provisions in s. 4(3) in reality can only apply to persons who seek tourists/visitor type permissions. Moreover, the provisions of s. 4(6) and s.4(10) of the 2004 Act cannot be said to be relevant to the applicant's circumstances, given that she had LTR, and given that, in reality, many of the considerations as set out in s. 4(10) of the 2004 Act would already have been taken into account when the applicant's application for long term leave to remain was considered in 2011.

34. It is acknowledged that a logical reading of s. 4(2) of the 2004 Act means that a non-national has to present to an Immigration Officer, however the issue is what type of permission a person who has land LTR requires. It is submitted that the applicant only required an "entry" into the State.

35. In aid of the second ground of challenge, it is submitted that even if the applicant was required to obtain permission to land, the refusal of same was still unreasonable in circumstances where, as documented in the Border Management Unit Entry report, the applicant had told the Immigration Officer that she intended to renew her GNIB card and complete the naturalisation process. The latter intention is also documented in the respondent's email to Ms Larney of 25th October, 2015. It is submitted that while the applicant may have been misguided as to any possible outcome of the naturalisation process, she had given a clear reason for her return to the State. Yet the Immigration Officer found that there was reason to believe that the applicant intended to enter the State for reasons other than those expressed by her. It is submitted that in the circumstances, this was an irrational conclusion. The applicant had with her the letter of June, 2011 regarding her naturalisation application, and her GNIB card. Moreover, the Immigration Officer does not set out what purpose she believed the applicant had in mind. Accordingly, the Immigration Officer's finding cannot be regarded as rational, particularly when the Immigration Officer did not put forward any counter version as to the purpose of the applicant's return to the State to that which had been expressed by the applicant. While Ms. Lawless's affidavit makes reference to the applicant having stated that she had returned to the State for a holiday, that is at odds with what is contained in the Border Management Unit Entry report which clearly documents that the applicant advised she had returned to the State to complete the naturalisation process.

36. It is further submitted that it was not rational for the Immigration Officer to refuse the applicant entry to the State by reference to her resources. In the first instance, that ground of refusal could not be applicable given that the applicant had a LTR permission. In any event, as she instructed her solicitor, the applicant had €200 in cash and three credit cards with a limit of €2,000 on each card. Counsel submits that the failure even to ascertain what credit limit the applicant had rendered the finding that she was without sufficient resources unreasonable and irrational.

The respondent's submissions

37. The respondent rejects the argument that the applicant was exempt from the requirement to obtain leave to land on the basis that she had long term leave to remain in the State. It is submitted that s. 4(2) of the 2004 Act provides for an unqualified prerequisite that all non-nationals arriving in the State by air or by sea apply for permission to land or be in the State. The applicant was a non-national coming by air from a place outside the State: the fact that she produced an "in-date" GNIB card on arrival did not entitle her to circumvent immigration control; she was required to apply for permission to land. In this regard the respondent relies on *Pachero v. Minister for Justice, Equality and Law Reform* [2011] 4 I.R. 698.

38. Counsel also submits that, for the purposes of the present case, the applicable test is that set out in *F.K. v. Minister for Justice, Equality and Law Reform* [2008] 4 I.R. 1, namely whether it appeared to a reasonable Immigration Officer that the applicant was a non-national who should be refused permission to land in the State. It is submitted that as long as the Immigration Officer was satisfied that the applicant in this case fell into any of the grounds set out in s. 4(3) of the 2004 Act, she was entitled to refuse the applicant permission to land. It is submitted that neither *Pachero* nor *F.K.* supports the applicant's argument that she did not require permission to land in the State.

39. The question which arises is whether it was reasonable for the Immigration Officer to refuse leave to land. It is contended that, as documented in the Border Management Unit Entry report, the applicant's reasons for travelling to the State changed in the course of her interview with the Immigration Officers. Having said to ICS Farrelly that she was coming for a "visit", she then said she was coming to process her naturalisation and that, if successful, her husband and her children would then join her. It is submitted that these positions were contradictory. It is also submitted that it was reasonable for the Immigration Officer to conclude that the applicant had insufficient finances to support herself during a visit in circumstances where she had presented to Immigration Control with one credit card with an unknown amount of credit available and €200 cash. Counsel submits that in all of the circumstances the decision to refuse the applicant leave to land cannot be properly to said to offend fundamental reason and common sense, which is the test set out in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, and which was followed by Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 and by Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701.

Considerations

40. The applicant's position is that the decision should be quashed on the basis (a) that the provisions of s.. 4(3) (a) and (k) of the 2004 Act did not apply to the applicant and (b) even if they did, the decision is not rational for the reasons already outlined.

41. Was the applicant obliged to apply for permission to land? In *F.K*, a case involving a Nigerian national who was refused leave to land in circumstances where she had previously been granted permission to remain in the State on the basis of her parentage of an Irish child, Charleton J. considered what is meant by "permission to land". He stated:

> *"21 I am satisfied that the statutory scheme applying to citizens of Nigeria requires them to have a visa to enter the State. Neither the existence of any visa, supposing it to be a valid one on a valid passport, the last matter being in some serious doubt in this case, nor the permission granted to the applicant to stay in Ireland in order to take care of her son A., give her any automatic permission to land in the State once she has left. The statutory scheme makes this clear by referring to a permission "to be" in the State or "to land" in the State. The context makes the use of these words disjunctive. The legislation allows an immigration officer to refuse leave to land in the State where the proposed visitor*

does not hold a visa, but that is only one of several grounds and not one that was invoked here…"

42. After setting out the provisions of s. 4 of the 2004 Act, Charleton J. continued:

> *"22 Section 4(4) requires the immigration officer who refuses to give to a person seeking to come into the State leave to land, to furnish them with a written notice indicating the grounds for refusal. The applicant was in possession of a conditional permission to be in the State, in order to stay and care for her Irish child in Ireland which permission was extended, I am told and her Garda National Immigration Bureau card confirms, up to the 23rd August, 2008. Once the applicant chose to leave the State and go to the United Kingdom and to return to the State, she had to apply for permission to land. In the circumstances of this case, the issue before me is whether it could appear to a reasonable immigration officer that on the 13th August, 2006, the applicant was a non-national who should be refused permission to land in the State under s. 4(3) of the Immigration Act 2004 on the grounds set out in the statutory notice quoted above..."*

43. The applicant's submission is that the respondent's reliance on *F.K.* is misconceived as, in that case, quite different circumstances applied to those of the applicant. It is submitted that in *F.K.*, the permission granted was conditional and the refusal for leave to land in that case related to a person who had four passports and who had breached Immigration laws in the UK. While that may indeed be the case, I am satisfied that the fundamental premise underlying Charleton J.'s decision in *F.K.* was the recognition that a non-national entering the State, irrespective of already extant permissions, is required to present himself or herself upon entry and that it is for the Immigration Officer to determine whether leave to enter should be granted. I am satisfied that this is reinforced by the decision in *Pachero*.

44. In *Pachero*, the applicants were two students who came to Ireland from Bolivia to study. They received an initial permission to land at the airport on 14th December, 2011. They were then obliged to go to the GNIB to register. Before doing so, they travelled to Scotland where they were arrested on the basis that they had unlawfully entered the UK since they had no visa for that country. They were returned to Northern Ireland and the UK authorities intended to deport them to Bolivia. Enquiries were made by the UK authorities as to whether their permission to be in Ireland was still valid. The GNIB expressed the view that their permission had lapsed once they left the State. They applied to the High Court effectively for an interlocutory declaratory that their permission to be in the State until 14th January, 2012, had not lapsed as a matter of law once they had left the State.

45. Thus, the issue under consideration in the case was whether a permission previously granted under s. 4(1) of the 2004 Act lapsed once the beneficiaries left the State, thereby requiring them to re-apply for permission to enter the State on return. Hogan J. held that the initial permission lapsed once the beneficiaries had left the State. He found that s. 4(1) of the 2004 Act cannot be read in isolation, and it must be read in conjunction with s. 4(2) thereof. He stated:

> *"[22] It is against that background that we can now examine the legal situation of the applicants. At the heart of this application is the status of the permission to land which was originally granted to them on their arrival in Ireland on the 14th December, 2011. Did this permission lapse by operation of law in the manner contended for by Detective Inspector Tallon and the respondents once the applicants left the State? This requires a close examination of the provisions of s. 4(1) and (2) of the Immigration Act 2004. Section 4(1) provides:-*
>
> > *"Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as 'a permission')."*
>
> *[23] Counsel for the applicants contended that the original permission of the 14th December, 2011, was not simply a permission to land, but drawing on the language of s. 4(1), submitted that it was also a permission "to be in the State" until the 14th January, 2012. On this view, the applicants had the right to be in the State until that date and that permission did not lapse simply because they left the State in the meantime.*
>
> *[24] If s. 4(1) could legitimately be read in isolation, the applicants' argument would be correct. But it cannot be so read in isolation. It must be read in conjunction with s. 4(2) which provides:-*
>
> > *"A non-national coming by air or sea from a place outside the State shall, on arrival in the State, present himself or herself to an immigration officer and apply for a permission."*
>
> *[25] While s. 4(2) does not say so in quite as many words, the only sensible interpretation of this provision is, as counsel for the respondents urged, that a permission previously granted under s. 4(1) lapses once the applicant leaves the State. This is because s. 4(2) provides for an unconditional requirement that all persons (other than Irish citizens and, by virtue of the Aliens (Exemption) Order 1999, British citizens) arriving in the State by air or by sea apply for a permission. As s. 4(2) does not exempt from that obligation persons who have been already granted permission to be in the State, the necessary inference to be drawn from this latter provision is that any permission previously granted under s. 4(1) lapses once the traveller leaves the State and that he or she must apply afresh for permission to enter the State."*

46. Counsel for the applicant contends that while at first blush the decision in *Pachero* might be said to be supportive the respondent's position, the circumstances in that case are entirely distinguishable from the applicant's. It is submitted that it is in the context where the students in question only had a most basic permission to be in the State that Hogan J. said that their permission had lapsed. It is argued that this cannot be equated with the applicant's circumstances when she had LTR and was in possession of an extant GNIB card.

47. I am not persuaded by this submission. While I accept that the factual matrix in *Pachero* was different to that pertaining to the applicant in that the applicant was in possession of an extant LTR permission, I am satisfied, given the manner in which ss. 4(1) and (2) of the 2004 Act have to be read, that the applicant was not exempt from the requirements of s. 4(2). I am fortified in this conclusion by the dictum of the *dictum* of Charleton J. in *F.K.*, as quoted above.

48. Accordingly, I find that the first ground of challenge has not been made out.

49. I turn now to the second ground of challenge, namely that the decision to refuse the applicant entry for the reasons stated was

unreasonable and irrational.

50. The question which arises is whether the Court can intervene to quash the decision on the grounds of unreasonableness or irrationality, applying the applicable test, as set out in *Keegan*, as followed in *O'Keeffe* 39 and *Meadows*. The test is:

> 1. Whether the decision is fundamentally at variance with reason and common sense.
>
> 2. Is it indefensible for being in the teeth of plain reason and common sense?
>
> 3. Can the Court be satisfied that the decision-maker has breached his or her obligation whereby he or she "*must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision*"?

51. Furthermore, as set out by Finlay C.J. in *O'Keeffe*:

> *"The court cannot interfere with the decision of an administrative–making authority clearly on the grounds that (a) it is satisfied that on the facts it has found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made that the authority was much stronger than the case for it."* (at p.71)

52. As to the refusal under s. 4(3)(k) of the 2004 Act, the applicant maintains that contrary to the respondent's contention, there is no contradiction in the applicant's position as to the purpose of her return to the State. It is contended that she clearly stated that she had returned to the State to complete the naturalisation process. It is further contended that the respondent has not explained, in the decision of 19th October, 2015, what is meant "some other reason". It is submitted that as this is a ground for refusal of leave to land as provided for in s. 4(3)(k) of the 2004 Act, it behoved the respondent to state the basis upon which the conclusion that the applicant had not disclosed her true intention, was arrived at. It is submitted that the failure to do so renders the decision irrational. I find myself in agreement with the applicant's submissions. Given the circumstances of this case, in particular the fact that the applicant presented her GNIB card and documentation pertaining to her naturalisation application, and in the absence of any indication in the impugned decision as to what the applicant's purpose might otherwise be, I find that the reason for refusal under s.4(3)(k) cannot be considered rational or reasonable. In the course of her submissions to the Court, counsel for the respondents submitted that the applicant gave contradictory accounts for her return to the State by firstly stating that it was for a visit and only later saying it was to pursue the naturalisation process. I do not believe that a reading of the Border Management Unit Entry report supports this submission. The report is largely concerned with the applicant's statement that she intended to renew her GNIB card and then intended to be naturalised. It is also of note, to my mind, that the Immigration Officer was of the belief that "[a]s [the applicant] has not lived here since 2010 her permission would no longer be valid." It is accepted by the respondents in the course of the within proceedings that the applicant's LTR was not revoked on 19th October, 2015. I accept that to be the case. That being so, it is, to my mind, difficult to rationalise how it was concluded on 19th October, 2015 that the applicant intended to enter the State "for purposes other than those expressed", particularly when she presented with a valid residence card and evidence (by way of letter of June 2011) that she had approval for naturalisation subject to her making the necessary declaration and paying the requisite fee. While the applicant may well have been misguided and/or unduly optimistic about whether her residence would be extended by the respondent and as to whether naturalisation would come about it, in the absence of any indication in the decision as to what the other reason for coming to the State might be, I am constrained to find that it was not rational or reasonable to refuse leave to enter pursuant to s.4(3)(k) of the 2004 Act.

53. What then of the other reason for the refusal? If this is upheld, then irrespective of the Court's finding as regards the s. 4(3)(k) refusal, the decision cannot be impugned since an Immigration Officer can refuse leave to land for any one of the reasons set out in s.4 of the 2004 Act.

54. As to the resources issue (s.4(3)(a) of the 2004 Act), it is not in dispute that the applicant had €200 in cash and a credit card. Ms. Larney informs the Court that her instructions are that the applicant had €200 cash and three credit cards, each with a limit of €2000. There is thus conflict between what is deposed to in Ms Larney's affidavit and what is recorded in the Border Management Unit Entry report. Counsel for the applicant makes the case that even if it was the situation that the applicant had €200 and only one credit card as of 19th October, 2015, there is no reference in the report to any enquiry having been made by the Immigration Officer as to the credit limit on the applicant's card. It is submitted that before considering whether the applicant had sufficient resources, it behoved the Immigration Officer to ascertain what the limit was on the applicant's credit card.

55. Firstly, the Court will proceed on the basis that what is set out in the Border Management Unit Entry report as regards the applicant's financial means is correct, namely that she had the cash amount indicated and a credit card. There is no basis, to my mind, for the Court to conclude otherwise but that the applicant's statements as regards her financial resources have been correctly recorded in the report. That being said, I am constrained to agree with counsel for the applicant that it is difficult to fathom how it was concluded that the applicant did not have sufficient financial resources if no inquiry of any nature was made as to what the limit was on the applicant's credit card. I have to take note of the fact that a great many people finance their subsistence with non cash means. In all of those circumstances, it seems to me that the Immigration Officer could not rationally conclude that the applicant was without resources without at least making an attempt to ascertain what means she in fact had by way of a credit limit.

56. For all the reasons set out above, I find the applicant's second ground of challenge to be made out.

57. The question now to be determined is whether the applicant should be denied *certiorari* of the decision of 19th October, 2015, by reason of her conduct. It is submitted on behalf of the respondent that even if the Court were to find any of the applicant's grounds made out, the Court has discretion not to grant relief in this case which, the respondent submits, should be the approach adopted. This is in circumstances where the applicant, in response to queries posed by the Citizenship Division of the respondent's department, advised by email dated 3rd May, 2013, that her address was in Carlow, when in fact she was living in Brazil in 2013. It is further submitted that, as deposed to by Mr. Cremins, the applicant subsequently failed to reply to a number of requests from the Citizenship Division for confirmation of her address and whether she was still resident in the State. Counsel for applicant submits that the height of any conduct issue arising in this case is that the applicant gave an address in Ireland at a time when she was living in Brazil. It is acknowledged that it would have been wiser for her to say that she was in Brazil.

58. For the purposes of the relief of *certiorari*, I find that it would be disproportionate to refuse the applicant this relief on the basis of the applicant's conduct in suggesting she was resident in Ireland as of May, 2013, and thereafter failing to reply to reasonable requests, albeit the Court does not in any shape or form condone the applicant advising the respondent that she had an address in Ireland when she was patently resident in Brazil.

59. The applicant also claims relief by way of damages. On foot of the refusal of leave to land on 19th October, 2015, she was

detained for three days before being removed to Brazil. It is submitted on behalf of the applicant that if the refusal of leave to land is found to be unlawful, the applicant should be awarded damages for unlawful detention and removal. In support of the case being made for damages, counsel cites R*aducan v. Minister for Justice* [2011] IEHC 224.

60. In *Raducan*, the applicant was a Moldovan national who had a right under EU law to enter the State with her Romanian husband and who was refused entry into the State. She was detained for three days until she was released following an Article 40 inquiry. In subsequent judicial review proceedings involving oral evidence, it was found as a fact that Ms Raducan had produced her marriage certificate and residence card to Immigration Officers at Dublin Airport. Hogan J. duly found a breach of Ms Raducan's EU rights and her constitutional right to liberty and to her good name.

61. Counsel for the respondent argues that the applicant's reliance on Raducan is misplaced, and that the applicant's factual circumstances, being a Brazilian national who was required to apply for leave to land under s.4(2) of the 2004 Act, and not an EU national, are at a far remove from the circumstances that pertained in *Raducan*. It is further submitted that it is also clear that the level of damages awarded by Hogan J. in *Raducan* (€7,500) was informed in part by the State's failure to put in place facilities to comply with the requirements of Article 2 of the Citizenship Directive. Counsel further submits that there should be no award of damages to the applicant given her conduct in her dealings with the Citizenship Division of the respondent's department.

62. At the end of the day, the Court has found the respondent's decision refusing the applicant entry to be unlawful for the reasons set out in the judgment. The consequence for the applicant of the refusal was that she was incarcerated for three days, and thus deprived of her liberty. For the reasons set out by Hogan J. in *Raducan*, I am satisfied that that the deprivation of her liberty should be marked in damages. However, I am not satisfied that the level of damages should equate to that given in *Raducan*. Firstly, it is clear from the judgment of the learned Hogan J. that a factor in the level of damages in Raducan was the State's failure to have in place facilities in recognition of Ms Raducan's right to enter the State as the spouse of an EU citizen. Secondly, the Court believes it appropriate, as far as an award of damages is concerned, to take account of the applicant's conduct and omissions in her dealings with the Citizenship Division in the matter of her naturalisation application. While her naturalisation application was not before this Court, on the applicant's own admission, its progression was one of the reasons she was seeking to enter the State on 19th October, 2015. It is clear from the correspondence put before the Court that she misled the Citizenship Division as to her place of residence in 2013, and thereafter failed to reply to requests for confirmation of her address and whether she was still resident in the State. Taking into account the aforesaid factors, the Court sets damages at €1000.

63. In the course of his submissions, counsel for the applicant urged on the Court that if the applicant's challenge was upheld, the Court should grant relief by way of an order of *mandamus* directing the respondent to remove any record of the applicant having been refused leave to enter the State. It is submitted that without *mandamus*, the applicant could be affected in the future by virtue of an extant record of the leave refusal of 19th October, 2015.

64. I am satisfied that the relief which the Court grants by way of *certiorari* is adequate given that its effect is to quash the impugned decision. *Mandamus* is therefore refused.