THE HIGH COURT
IN THE MATTER OF AN ENQUIRY PURSUANT TO ARTICLE 40.4.2° OF THE CONSTITUTION OF IRELAND
[2017 No. 1468 SS]

BETWEEN

GULSANGA DELSOZ

APPLICANT

AND
THE GARDA NATIONAL IMMIGRATION BUREAU

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 4th September 2018

Introduction
1. Who must bear the costs of an Article 40 Inquiry into the lawfulness of the detention of the applicant, Mrs Gulsanga Delsoz, that Humphreys J directed on 13 December 2017 but which became moot when Mrs Delsoz was released from detention before it could begin the following day?

Background
2. Bashir Ahmad Delsoz, is a citizen of the United Kingdom and the husband of Mrs Delsoz. Mr and Mrs Delsoz and their children have been residing in the State since 2 June 2015. Mr Delsoz has been doing so as a Union citizen exercising his free movement rights under European Union law. Mrs Delsoz and the couple's five children, all of whom are nationals of Afghanistan, have been doing so as family members of Mr Delsoz and, hence, beneficiaries together with him of the free movement and residence rights conferred by Directive 2004/38/EC ('the Citizens' Rights Directive'), currently transposed by the European Communities (Free Movember of Persons) Regulations 2015 ('the 2015 Regulations').

3. On 19 September 2016, the Irish Naturalisation and Immigration Service ('INIS') wrote to Mrs Delsoz to inform her that her application for a residence card under Reg. 7(5) of the 2015 Regulations, as a Union citizen family member entitled to reside in the State under Reg. 6 of those Regulations, had been approved. In that letter, Mrs Delsoz was specifically asked to note that the onus was on her to advise the INIS of any change in circumstance that may affect her right to reside in the State under the 2015 Regulations.

4. Regulation 11 of the 2015 Regulations states in material part:

> '(1) A person residing in the State under Regulation 6, 9 or 10 shall be entitled to continue to reside in the State for as long as he or she satisfies the relevant provision of the regulation concerned and does not become an unreasonable burden on the social assistance system of the State.
>
> (2) A family member to whom paragraph (1) applies who is not a national of a Member State shall notify the registration officer of the registration district in which he or she is located—
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> (a) of any of the following, within 7 days of its occurrence:
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> (i) a change in his or her place of residence in the State;
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> …
>
> and
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> (b) of an absence by him or her from the State for a period that is longer than one month, which notification may be made before his or her departure from the State but, in any case, shall be made no later than 7 days after he or she has been absent from the State for a period of one month.'

5. On 12 April 2016, Mr Delsoz had emailed the INIS to inform it that he and his family had moved to a particular address in Limerick City. Unhappily, Mr Delsoz and his family later moved to another address in Limerick City without notifying the relevant registration officer.

6. It subsequently came to the attention of the INIS that the payment by the Department of Social Protection to Mr Delsoz of 'Family Income Supplement' (a weekly tax free benefit for the families of persons at work on low pay), which had begun on 29 September 2016, had ceased on 7 June 2017 on the basis that Mr Delsoz was no longer in employment. That discovery prompted the INIS to write to Mrs Delsoz on 11 October 2017 at the address that had been provided to the authorities, requesting evidence of her family's current activities in the State, to include details of the employment, self-employment, involuntary unemployment, independent means or course of study, and the place of residence, of each of them. That letter was returned to the INIS marked 'returned not called for.'

7. On 31 October 2017, the INIS wrote to Mrs Delsoz again, referring to the events just described, and pointing out that the requirements of Reg. 11 (2) of the 2015 Regulations had not been complied with. The letter continued that, as the evidence then available to the Minister for Justice and Equality ('the Minister') appeared to establish that Mr Delsoz had left the State, since he had not been exercising free movement rights in the State since June 2017, the derived residence rights of Mrs Delsoz and of the couple's children as family members of Mr Delsoz had ceased. Mrs Delsoz was invited to make written representations within 15 working days on why her permission to remain in the State should not be revoked.

8. The INIS did not receive any written representations from Mrs Delsoz. On 21 November 2017, it wrote to her again at the address that had been provided on her behalf, notifying her of the revocation of the residence permission that had been granted to her under the 2015 Regulations for the reasons already summarised. The letter informed Mrs Delsoz of her entitlement to seek a review of that decision under Reg. 25 of the 2015 Regulations.

9. Regulation 25 of the 2015 Regulations provides, in material part, as follows:

> '(1) A person who has, or who claims to have, an entitlement under these Regulations to enter or reside in the State may

seek a review of any decision concerning such entitlement or claimed entitlement.

(2) An application for review under this Regulation shall be submitted to the Minister within 15 working days of the receipt by the person concerned of the decision and shall set out in writing the grounds for review and the particulars specified in Schedule 4.

(3) The Minister may, where he or she is satisfied that it is warranted in the particular circumstances, extend the period referred to in paragraph (2) within which a review must be submitted.

…

(6) A person who makes an application under paragraph (1) for the review of a removal order may, at the same, make an application for the suspension of the enforcement of the order.

(7) Where a person makes an application under paragraph (6), the removal of him or her from the State shall, unless the officer carrying out the review is of the view that the removal decision is based on imperative grounds of public security, be suspended until such time as that officer makes his or her decision under paragraph (5).'

10. To understand one of the arguments advanced on behalf of Mrs Delsoz, it is also necessary to note that, under Reg. 24, where a notice under the 2015 Regulations is sent to a person by registered post at the address most recently furnished by him or her, it is deemed to have been duly served on, or given to, that person on the third day after the day on which it was sent. Thus, Mrs Delsoz was deemed to have received notification of the revocation of her residence rights on 24 November 2017. Under Part 2 of the Schedule to the Interpretation Act 2005, 'working day' means a day which is not a Saturday, Sunday or public holiday. Under s. 18(h) of that Act, where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period. Hence, Mrs Delsoz had until 15 December 2017 to seek as of right a review of that decision and the suspension of its effect for that purpose. Thereafter, it was for the Minister, if satisfied that it was warranted, to extend the period for seeking a review.

11. This was the background against which, when Mrs Delsoz and the couple's two daughters sought to enter the State through Dublin Airport on 11 December 2017 on a flight from Dubai, they were refused permission to land or be in the State, under s. 4(3)(e) of the Immigration Act 2004, as amended ('the 2004 Act'), on the ground that, although each was a non-national subject to the requirement to have an Irish visa, none of them had one.

12. Masoma Delsoz, the couple's eldest daughter was then 22 years old. It appears that, having been refused leave to land, she was arrested at Dublin Airport and detained in a prescribed place, namely the Dóchas Centre in Mountjoy Prison, under the provisions of s. 5(2) of the Immigration Act 2003, as amended ('the 2003 Act'), pending her removal from the State.

13. Wahida Delsoz, the couple's youngest daughter, was at that time 15 years of age. Under s. 5(2)(b) of the 2003 Act, a person under 18 years of age cannot be subject to the arrest and detention provisions of that section. And under s. 5(2)(d) of that Act, where a child under the age of 18 years is in the custody of a parent who is detained under that section, the immigration officer concerned is obliged to notify the Child and Family Agency of the relevant circumstances immediately. It appears that, through a concern not to separate the minor daughter from her mother by placing the former in the care of the Child and Family Agency and committing the latter to prison, the Garda National Immigration Bureau ('GNIB') arranged for the accomodation of Wahida Delsoz at the Balseskin Accommodation and Reception Centre, close to the airport, and permitted Mrs Delsoz, who - it seems reasonable to assume - would otherwise have been committed to prison, to accompany her. The Minister's position, which Mrs Delsoz does not accept, is that the two women were accommodated, but not detained, there, pending the making of arrangements for their removal from the State.

14. By fax and email sent at 5.32 p.m. on 12 December 2017 (that is to say, just after close on business on that date), a solicitor on behalf of the Delsoz family wrote to the GNIB, asserting that Mrs Delsoz and the couple's two daughters were entitled to avail of free movement and residence rights under EU law as family members of Mr Delsoz.

15. As happens peculiarly often in cases of this kind, the letter set out at considerable length the text of various provisions of the 2015 Regulations, the Citizens' Rights Directive and, indeed, the Treaty on the Functioning of the European Union ('TFEU'), although it can hardly have been imagined that the INIS and the Minister were unfamiliar with the relevant law.

16. As also happens surprisingly frequently in such cases, the letter was much less forthcoming about the factual basis upon which Mr Delsoz and his family members claimed a continuing entitlement to the benefit of the relevant rights under EU law. The letter asserted that Mr Delsoz continued to exercise those rights in the State but provided only very limited information in support of that assertion. Specifically, it stated that Mr Delsoz had been admitted to Limerick Regional Hospital on 5 December 2017, having fractured his leg in two places, but had just discharged himself to travel to Dublin Airport to assist his wife and daughters. The letter went on to point out, as has never been in dispute, that, under Regulation 6(3)(c) of the 2015 Regulations, a Union citizen in employment or self-employment in the State who ceases to be in that employment or self-employment may continue to reside in the State where he 'is temporarily unable to work as the result of an illness or accident.' The letter provided no information concerning the prior employment of Mr Delsoz or when it had ceased. The reference heading at the top of the letter included a new home address in Limerick City for Mr and Mrs Delsoz and their two daughters, as well as their former address there, but the letter contained no further information on when that change of address had occurred or why it had not been previously notified to the INIS.

17. The letter concluded by referring to the procedural rights mandated under Articles 30 and 31 of the Citizens' Rights Directive, though not the provisions of Reg. 25 of the 2015 Regulations transposing them into the law of the State, before requesting that Mrs Delsoz and her daughters be granted temporary admission to the State - i.e. not because they had sought a review of the decision to revoke their residence rights but simply because of the existence of an entitlement to seek such a review.

18. The same solicitor sent an undated letter by email to the INIS on the same date, seeking details of the circumstances of the revocation of the residence permission of Mrs Delsoz and her daughters. Although the Delsoz family were aware, as we shall see, that Mr Delsoz had left the employment by reference to which he and his family had initially claimed residence rights under Reg. 6(3)(i) and (iv) of the 2015 Regulations (transposing Art. 7(1)(a) and (d) of the Citizens' Rights Directive); that the family had left the address in the State that they had notified to the INIS as their residence; and, indeed, that Mrs Delsoz and the children had left the State for a period of more than one month without notifying the relevant authority, their solicitor wrote that they had 'no idea why any proposal to revoke their residence cards … may have been issued.'

19. There is no unconditional right to reside in another Member State for a period of longer than three months vested in a Union citizen under Reg. 6(3)(i) of the 2015 Regulations or Article 7(1)(a) of the Citizens' Rights Directive. The right to do so is available to Union citizens who demonstrate specific characteristics as economically active (or semi-economically active) persons for as long as they continue to do so (or longer where the extending provisions of Reg. 6(3)(c) of the 2015 Regulations, transposing Art. 7(3) of the Citizens' Rights Directive apply). In the case of Mr Delsoz, the relevant characteristic had previously been that he was an employed person (or 'worker') in the State. Article 21(1) of the TFEU makes it quite clear that the free movement and residence rights of the Union citizen are subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

20. One of the concluding paragraphs of the solicitor's letter to the INIS demonstrates the two fundamental misunderstandings upon which the present application for costs appears to be based. It states:

> 'You will be aware that the Minister is not entitled to do anything to affect the substance of the rights conferred on this family and, in particular, the Union citizen, by [the Citizens' Rights Directive]. If there have been any administrative errors on the part of the Minister or our clients these can be dealt with. One way or the other, Mrs Delsoz and her children as members of the immediate family of a Union citizen exercising his treaty rights in the [State] should not be detained in prison or have been taken into the care of the State.'

21. The first misunderstanding evident from the preceding paragraph is that the EU law free movement and residence rights that Mr Delsoz and his family (including Mrs Delsoz and the couple's two daughters) had established in 2015 were somehow either unconditional or, at the very least, that their enduring validity was not subject to any requirement to keep the relevant authorities apprised of even the most basic information concerning the employment status of Mr Delsoz or of the family's place of residence, or even of their presence, in the State. Thus, the letter implies that the revocation in November 2017 of the residence permission that each of the family members had obtained in September 2016 had resulted, not from the family's failure in October and November 2017 to satisfy the Minister that they remained entitled to exercise EU law free movement and residence rights, but from the Minister's unwarranted interference with the substance of those rights in a manner prohibited under EU law.

22. Starkly absent from the extensive legal submissions made to the GNIB and INIS by the solicitor for Mrs Delsoz, and from the similarly extensive submissions made to the court by counsel on her behalf, is the acknowledgment of any onus on the Delsoz family to provide the relevant authorities with the limited information necessary to establish that they continued to satisfy the conditions for the exercise of the relevant EU law free movement and residence rights under Reg. 6 of the 2015 Regulations, transposing the provisions of Art. 7(1) of the Citizens' Rights Directive. Instead, the implicit argument advanced on behalf of Mrs Delsoz is that to require the Delsoz family to provide the evidence necessary to establish a continuing entitlement to those rights is to make the exercise of them impermissibly dependent upon the fulfilment of mere administrative formalities, contrary to the principle recognised in Recital 11 of the Citizens' Rights Directive. That is to confuse an essential evidential requirement with an incidental administrative one.

23. The second misunderstanding stems from a failure or refusal to recognise that, at the time when the present application for costs was before the court between December 2017 and January 2018, the INIS had taken no steps of any kind to address, much less sanction or punish, what the solicitor for Mrs Delsoz described as possible 'administrative errors' on the part of his clients. As has already been noted, Mrs Delsoz had breached Reg. 11(2)(a)(i) and Reg. 11(2)(b) of the 2015 Regulations by failing to notify the relevant registration officer of her change of address or of her absence from the State for a period of more than one month. Under Reg. 30(1)(c) and (e) of the 2015 Regulations, a person who fails to comply with those regulations is guilty of an offence, punishable, in the former case, by a class C fine (i.e. one not exceeding €2,500) or imprisonment for a term not exceeding 3 months, or both and, in the latter, by a class A fine (i.e. one not exceeding €5,000) or imprisonment for a term not exceeding 12 months.

24. I refer to these aspects of the law to emphasise the distinction between the proposed deportation of Mrs Delsoz as the consequence of her failure to comply with the immigration law of the State, having failed to establish an existing entitlement to the benefit of EU law free movement and residence rights, which on the evidence before me was the situation that arose here, and her proposed deportation from the State as a disproportionate and discriminatory sanction for mere failure to comply with an incidental administrative formality, despite an established continuing entitlement to EU law free movement and residence rights, which was not.

25. Returning to the narrative of relevant events, the Delsoz family solicitor wrote to the GNIB for a second time on 12 December 2017. In that letter, he reiterated that Mrs Delsoz and the couple's children were not aware of the revocation of their residence cards and stated that it was their wish to seek a review of that decision 'when they become aware of the factual situation.'

26. Yet, at the material time, the Delsoz family had the assistance of a solicitor who, in the course of these proceedings, has sworn an affidavit in which he describes himself as one 'with a large advisory practice in the field of immigration law.' The relevant requirements of the 2015 Regulations are simple and straightforward. The Delsoz family were in possession of all of the material information concerning the employment status of Mr Delsoz; their change of residence; their lengthy absence from the State; and the failure of Mrs Delsoz and of the couple's children to provide the information required under Reg. 11 of the 2015 Regulations to the appropriate authorities. Against that background, it is difficult to be sympathetic to the assertion that the fundamental problem at this point was the failure of the State to provide the solicitor for Mrs Delsoz and the children with the information necessary to allow them to seek a review of the revocation of their residence cards, since the relevant asymmetry of information ran far more obviously in the other direction.

The first Article 40 Inquiry

27. On 13 December 2017, Humphreys J directed an Article 40 inquiry into the detention of Wahida Delsoz, which inquiry opened that afternoon. The State's position was that, having been refused leave to enter the State on 11 December 2017, Wahida Delsoz had been brought to Balseskin Accommodation and Reception Centre, accompanied by Mrs Delsoz but that neither of them had ever been detained there. The State asserted that this was done in recognition of the provisions of s. 5(2) of the 2003 Act, whereby, although an adult to whom leave to land in the State has been refused may be arrested and detained under warrant in a prescribed place, a person under the age of 18 years may not.

28. I gather that, while the parties remain in dispute concerning whether the presence of Mrs Delsoz and her daughter at Balseskin amounted to the detention of either of them there, they agreed that the absence of any inhibition upon the departure of Wahida Delsoz from that place rendered nugatory the Article 40 inquiry into the lawfulness of that alleged detention.

29. Thus, having made a recommendation to the Legal Aid Board that the provisions of the *Legal Aid - Custody Issues Scheme* should be applied to the representation of Wahida Delsoz, Humphreys J made no further order.

The present Article 40 Inquiry

30. At the conclusion of that proceeding, counsel for Mrs Delsoz applied to Humphreys J to direct an Article 40 inquiry into her detention, as the State confirmed that she had been taken into custody at the Balseskin Reception Centre that afternoon and brought to the Dóchas Centre at Mountjoy Prison. Humphreys J directed an inquiry to begin at 11am the next day.

31. The following morning, the Assistant Governor of Mountjoy Prison certified the detention of Mrs Delsoz. The relevant committal warrant is one made under the 2003 Act, as amended. It recites that Mrs Delsoz was refused leave to land as a non-national who was required to hold an Irish visa but did not have one, and that, having been arrested at 2.50pm on 11 December 2017 under s. 5(2) of the 2003 Act, her detention in the Dóchas Centre at Mountjoy Prison was directed pending the making of arrangements for her removal from the State. The warrant is certified as having been executed - by lodging Mrs Delsoz in the Dóchas Centre at Mountjoy Prison - on 13 December [2017].

32. Although the relevant correspondence was not exhibited, in an affidavit sworn on 15 December 2017, Damien Brennan, a higher executive officer with the INIS, avers that it received an email from the solicitor for Mrs Delsoz on 14 December 2017, asserting that the Delsoz family had moved address in Limerick City in August 2017; that Mr Delsoz had been seeking new employment after his employment ceased; and that Mr Delsoz had commenced a new role on 13 November 2017. Copies of a P60 (annual certificate of income and tax paid), a P45 (certificate on termination of employment) and various payslips for Mr Delsoz were included as attachments to that email.

33. Mr Brennan avers that, although the email concerned did not formally request a review of the residence permission revocation decision, and although the time for seeking such a review had expired (a conclusion that was, in my view, incorrect; see para. 10 above), the INIS (on behalf of the Minister) decided to deem it warranted to extend the relevant period in which a review could be sought for each of the Delsoz family members as, in Mr Brennan's words, 'an exceptional measure', in light of the new information and documentation contained in that email.

34. In the meantime, also on 14 December 2017, Mr Delsoz swore an affidavit in support of the application for the release of Mrs Delsoz under Article 40.4.4° of the Constitution. Even then and with the benefit of legal advice, Mr Delsoz deposed that he did not know why his wife was being detained.

35. Mr Delsoz went on to aver, in material part, as follows. He had commenced work in a particular grocery store in Limerick City on 22nd June 2015, which employment ceased on 7 June 2017.

36. On 20 June 2017, Mr Delsoz travelled with his entire family from Ireland to Afghanistan following the death of the parents of Mrs Delsoz in a car bomb explosion. Mr Delsoz and one of the couple's three boys re-entered the State seven weeks later without incident. The couple's other two sons also encountered no problem when they returned to Ireland after twelve weeks.

37. Upon his return to Ireland on 8th August 2017, Mr Delsoz actively sought work. He did not claim jobseeker's allowance as he did not wish to be a burden on the State. His search for employment was successful and he took up employment as 'business promotion and advertising officer' with a fast food takeaway restaurant in Limerick on 13 November 2017.

38. When he swore his affidavit on 14 December 2017, Mr Delsoz had not worked since 3 December 2017 because he suffered a fall on 5 December 2017 which, as his solicitor had already asserted on his behalf, resulted in two leg fractures for which Mr Delsoz was due to undergo surgery.

39. Mr Delsoz (and by implication, Mrs Delsoz and the couple's children) took up residence at a new address upon his return from Afghanistan to Ireland on 8 August 2017, having apparently left their old address when they departed the State to visit Afghanistan on 20 June 2017.

40. Mr Delsoz concludes the relevant portion of his affidavit by averring that any failure of his wife and daughter to notify the INIS of the relevant matters was merely an administrative oversight that he did not believe could lead to the refusal of leave to land to his wife and daughters upon their return from Afghanistan.

41. There is no suggestion anywhere in the evidence adduced on behalf of Mrs Delsoz for the purpose of either the substantive Article 40 inquiry or the present application for her costs of that inquiry against the State that she ever informed the relevant authorities of her family's change of address or of her departure from the State for a period of more than one month, at any time prior to seeking an Article 40 inquiry. While it is impossible not to have sympathy for Mrs Delsoz in light of the probable significance in that regard of the tragic death of both of her parents at around that time, the repeated assertion on her behalf in evidence and argument that her failure to comply with her legal obligations was the result of 'mere administrative oversight' does not alter the consequences of that failure. Similarly, the professed inability of Mr Delsoz to believe that the failure of his family members to comply with those quite limited legal obligations could have any effect on the assessment of their entitlement to enter and reside in the State is also, I regret to say, beside the point.

42. Just as the hearing of the Article 40 application was due to commence on 14 December 2017, the court was informed that, on considering the information that had been furnished to the INIS that morning, the Minister was prepared, as an exceptional measure, to review the decision to revoke the residence cards that had been given to Mrs Delsoz and the couple's children and to allow the release of Mrs Delsoz and her other daughter from detention under the 2003 Act on that basis, subject to their agreement to submit the appropriate applications for such a review within a further seven days.

43. This rendered the proposed Article 40 inquiry moot.

44. Mrs Delsoz now seeks her costs of that inquiry against the State. The State counters that, while in its submission it is entitled to its costs of the inquiry against Mrs Delsoz, the appropriate course for the court to adopt is to make no order.

The arguments

i. was there an 'event' for costs to follow in this case?

45. The first argument advanced on behalf of Mrs Delsoz is that the normal rule on costs should apply, that is to say, costs should follow the event, the event being the achievement of the objective that Mrs Delsoz had in view in seeking an Article 40 inquiry, namely her release from detention.

46. I have no hesitation in rejecting that argument.

47. In giving judgment for the Supreme Court in *Godsil v Ireland* [2015] 4 IR 535 at 555-6, McKechnie J (Dunne and Charleton JJ concurring) stated:

> 'It seems to me that even where the substantive point has become moot, the first inquiry which a court must make on a follow on costs application is to decide whether or not there exists an "event" to which the general rule can be applied. If such can be identified there will be no necessity to resort to the principles discussed in *Cunningham v. President of the Circuit Court* [2012] IESC 39 , [2012] 3 I.R. 222. In fact, it was precisely because of the absence of such event that it was necessary in *Cunningham v. President of the Circuit Court* [2012] IESC 39 to assess the costs issue by reference to some other criteria. The question which therefore arises is whether by an examination of the circumstances of this case, an "event", in the sense understood by O. 99, r. 1(4), can be identified by reference to which the costs issue can be determined.'

48. As Clarke J explained in *Cunningham v President of the Circuit Court* [2012] 3 IR 222 at 229-230:

> '[22] The problem in dealing with the costs of proceedings which have become moot is that there will, in reality, be no event which those costs have to follow….
>
> [23] [I]n this case, there will never be a decision on the substantive merits of the appeal and there never will, therefore, be a decision as to whether, in light of the result of an appeal on the merits, it is appropriate to award the costs of the High Court to the applicant. This case fairly and squarely raises the question of the proper approach to costs of proceedings that have become moot.'

49. In this case also there will never be a decision on the lawfulness of the detention of Mrs Delsoz because her release on the day of the inquiry rendered that inquiry moot. According to the sworn evidence adduced on behalf of the Minister, the decision to release Mrs Delsoz and her daughter Masoma Delsoz was prompted by the receipt of the information and documentation which it is common case was provided on behalf of the Delsoz family for the first time that morning. I accept that evidence. I can find no basis on the facts of this case to conclude, as the Supreme Court did on the unusual facts in *Godsil* (at 557), that the actions that rendered the proceedings moot were carried out in direct response to the issue of the proceedings. There has never been an implicit or explicit acknowledgment or admission by the State of any unlawfulness in the detention of Mrs Delsoz. It follows that there is no 'event' in this case by reference to which the issue of costs can be determined.

ii. Is an Article 40 inquiry that has become moot different from other moot proceedings?

50. Although the argument was not raised in the written legal submissions made on behalf of Mrs Delsoz and, indeed, seems inconsistent with the arguments those submissions do contain, in the course of oral submissions counsel for Mrs Delsoz contended that, on a 'first principles' basis (since she could cite no authority), the approach to the costs of moot proceedings endorsed by the Supreme Court in *Cunningham* should not apply when the proceeding concerned is an Article 40 inquiry in which the applicant is seeking an order for costs against the State. In such cases (including the present one), the test should instead be 'whether in the circumstances it was reasonable for the applicant to have sought an inquiry.'

51. Although counsel did not cite the case, the test contended for is the one that was applied in *S.G. and N.G. v The Minister for Justice* [2006] IEHC 371, (Unreported, High Court (Herbert J), 16th November, 2006). That was a judicial review application to quash deportation orders that had been made against the applicants. The proceedings became moot when the Minister granted the applicants exceptional leave to remain in the State and revoked the deportation orders. The applicants sought their costs of the proceedings against the State. In addressing that application, Herbert J stated:

> 'It appears to me that the question which the court must ask in considering this application for costs is, whether in the circumstances it was reasonable for the applicants to have commenced their application for leave to seek judicial review.

52. However, in *Matta v Minister for Justice [*2016] IESC 45 (Unreported, Supreme Court (MacMenamin J; Dunne and O'Malley JJ concurring), 26th July, 2016), MacMenamin J pointed out that *Garibov* must now be regarded as having been decided on its own facts and superseded by the judgments of the Supreme Court in *Cunningham* and *Godsil*. When pressed on why the test in S.G. and N.G. should be viewed, nonetheless, as continuing to apply to any Article 40 inquiry that has become moot, counsel for Mrs Delsoz submitted that this simply follows from the importance of both the right to liberty and the special status of the procedure for the vindication of that right under Article 40.4.2° of the Constitution. While there is no doubt that the right to personal liberty properly holds a prominent place in the hierarchy of fundamental rights and that the *habeas corpus* procedure is enshrined in Article 40.4.2° of the Constitution, it does not seem to me to follow that this requires the adoption of a completely different approach to the costs of a moot Article 40 inquiry than to the costs of moot proceedings generally, much less that it requires the application of a the particular approach that the Supreme Court has expressly disapproved in *Matta*.

53. Lest I am wrong in that conclusion, I will return to the issue of the reasonableness of commencing the application for an Article 40 inquiry later in this judgment.

iii. the proper approach to the costs of proceedings that have become moot where there is no event

54. In *Cunningham* (at 230), the Supreme Court set out the correct approach to dealing with the costs of proceedings that have become moot. Although not one that should be applied over-prescriptively, the basic rule is that, in the absence of significant countervailing factors, the court should lean ordinarily in favour of making no order as to costs where a case has become moot due to a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot.

55. Counsel on behalf of Mrs Delsoz argues that these proceedings became moot due to the unilateral action of the Minister in directing the release of Mrs Delsoz on 14 December 2018. In my judgment, there is at least as strong an argument to be made that the proceedings became moot when the the Delsoz family, through their solicitor, for the first time provided the limited information necessary to suggest that Mr Delsoz and his family members might still be exercising EU law free movement rights in the State, which led to the Minister's decision to release Mrs Delsoz on the understanding that an application for a review of the decision to revoke her residence card would be made within a further seven days.

56. Nonetheless, assuming without deciding that it was the unilateral action of the Minister in directing the release of Mrs Delsoz that rendered the Article 40 inquiry moot, it is next necessary to consider and apply the following significant qualification upon the basic rule that Clarke J identified in *Cunningham* (at 230-2):

'[25] It must, of course, be acknowledged that some cases which have become moot may not fit neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the unilateral action of one of the parties, on the other hand. In particular there will be cases where the immediate reason why proceedings have become moot is because a statutory officer or body has decided not to go ahead with a threatened course of action (such as the criminal prosecution in this case). However, the reason why it may have been necessary or appropriate for that statutory officer or body to adopt a changed position may, to a greater or lesser extent, be due to wholly external factors. To take a simple example, one might envisage a criminal prosecution which was, on any view, wholly dependent on the evidence of an individual who unfortunately had died before the case could commence. If there had been a challenge, on judicial review grounds, to that prosecution which was not finalised, and if, as here, the second respondent were to enter a *nolle prosequi* because of the death of the only real witness, then it might superficially be said that the judicial review challenge had become moot by reason of the unilateral action of the second respondent but in truth the real reason why the judicial review challenge had become moot would have been because of the death of the witness which made it necessary for the second respondent to bring the criminal process to an end.

[26] In that context it is, of course, important to note that statutory officers and bodies have an obligation to exercise their powers in a proper manner. If circumstances change then it is, of course, not only reasonable but necessary for such officers and bodies to reflect the new circumstances by adopting a position (even if different) which takes into account the circumstances as they have come to be. The mere fact, therefore, that a statutory officer or body adopts a changed position which renders judicial review proceedings moot does not, of itself, necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a unilateral act of one party.

[27] If there were no change in underlying circumstances and if the statutory officer or body had simply changed his or its mind or adopted a new and different view, then such a characterisation might be appropriate. Where, however, there is an underlying change of circumstance, it is necessary to consider the extent to which it can properly be said that the proceedings have become moot by reason of the unilateral act of one party, on the one hand or, in reality have become moot by reason of a change in underlying circumstances outside the control of either party, on the other hand. The result of any such analysis should play an important role in the court's consideration of the justice of where the costs of proceedings rendered moot should lie.

[28] It does, however, seem to me that, where the immediate or proximate cause of proceedings becoming moot is the action of such a statutory officer or body but where it is sought to argue that the true underlying reason is an external factor outside the control of that officer or body, it is incumbent on the officer or body concerned to place before the court sufficient evidence to allow the court to assess whether, and if so to what extent, it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances.'

57. Applying that analysis to the circumstances of the present case, I have reached the following conclusions:

(a) This inquiry became moot when the Minister decided on 14 December 2017 not to continue the detention of Mrs Delsoz.

(b) That decision was due to what was, from the Minister's perspective, an external factor, namely the belated provision on behalf of Mrs Delsoz of the limited information and evidence necessary to establish or, at the very least, strongly suggest that she is entitled to the benefit of EU law free movement and residence rights as a family member of Mr Delsoz, a Union citizen.

(c) As I have already observed, that factor was not an external one from the perspective of Mrs Delsoz. It represented the belated provision of information that was at all material times within her own knowledge and which she was in breach of her legal obligation to provide.

(d) The Minister's change of position in directing the release of Mrs Delsoz was a reasonable, indeed appropriate, response to the change of circumstances represented by the belated provision of information that, if verified, would establish the entitlement of Mrs Delsoz to exercise EU law free movement and residence rights. It is therefore inappropriate to characterise the proceedings as having become moot by the unilateral action of the Minister.

(e) The Minister has placed before the court more than sufficient evidence (in the form of that already summarised) to establish that the proceedings had become moot due to a change of circumstances wholly external to the Minister's own actions.

58. It follows that, in applying the orthodox (and, in my view, correct) test, it is appropriate to make no order concerning the costs of the proceedings.

iv. was it reasonable to have sought an Article 40 inquiry?

59. In *Cunningham*, the Supreme Court (*per* Clarke J) observed (at 229) that only in wholly exceptional circumstances could the scarce commodity of court time be used to determine issues that are moot solely for the purposes of deciding who should pay and who should obtain costs. I can identify no such exceptional circumstances in this case. Later in that judgment (at 233), Clarke J accepted as correct the State's submission the court could not and should not form a view on the merits of the appeal. It follows that, if the correct test to apply in addressing the issue of costs is whether it was reasonable to commence the proceedings (or, in this instance, to seek an Article 40 inquiry), although I have already held it is not, it would have to one that considers the reasonableness of initiating litigation in a manner that does not require the formation of any concluded view on of the merits of that litigation.

60. The issue in respect of which Humphreys J was persuaded to direct an Article 40 enquiry into the alleged detention of Mrs Delsoz was whether she could be lawfully detained in the Balseskin Reception and Accommodation Centre. Counsel for Mrs Delsoz points to the provisions of s. 5(2) of the 2003 Act, whereby a person refused permission to land can only be detained under warrant in 'a prescribed place', and to the terms of the Immigration Act 2003 (Removal Places of Detention) Regulations 2003, in which Balseskin Reception and Accommodation Centre is plainly not included in the list of prescribed places.

61. Counsel for Mrs Delsoz relies on *Ni v Garda Commissioner* [2013] IEHC 134 (Unreported, High Court (Hogan J), 27th March, 2013). That was an Article 40 inquiry into the detention of a Chinese national who had been refused permission to land or enter the State at

Dublin Airport. He was detained at Dublin Airport between 2.45 p.m. and 8.30 p.m. on the day of his arrival, for the purpose of putting him on a flight to Paris. The airport is not a prescribed place under the 2003 Act. He resisted his removal when put aboard the plane and had to be removed from it for the safety of the crew and other passengers. He was then brought to Clontarf Garda Station, a prescribed place of detention for the purpose of the 2003 Act.

62. Hogan J concluded (at paragraph 38 of his judgment), that the language used by the Oireachtas in s. 5(2)(a) of the 2003 Act is clear and unambiguous. A person refused leave to land can only be detained following arrest in a place prescribed by the Minister by regulations and in the custody of either a ministerial official or a member of the Gardaí who is in charge of that place. Thus, the detention of Mr Ni at Dublin Airport from 2.45 p.m. onwards on the day in question had to be adjudged to be unlawful. Hogan J had already concluded (at paragraph 26 of the judgment) that, if the detention at the airport was found to be unlawful, it must follow that the continuation of that detention at Clontarf Garda Station would also be rendered unlawful by reason of that initial illegality, on the authority of the decision of the Supreme Court in *Oladapo v Governor of Cloverhill Prison* [2009] IESC 42, (Unreported, Supreme Court (Murray CJ; Denham and Fennelly JJ concurring, 20th May, 2009).

63. The crucial difference between the circumstances of the present case and those of Ni is that, here, there is an unresolved controversy of fact about whether Mrs Delsoz was ever detained, as opposed to merely accommodated, at Balseskin Reception and Accommodation Centre. In *Ni* there was no such controversy of fact, as it was common case that the applicant there had been detained for approximately 6 hours within the precincts of Dublin Airport. The controversy in Ni was rather one of law, specifically whether the acknowledged detention of the applicant in that place during that period was lawful.

64. Counsel for Mrs Delsoz sought to raise two other issues about the lawfulness of her detention in seeking the costs of the inquiry into it.

65. The first is that the decision to refuse Mrs Delsoz permission to land or be in the State, under s. 4(3)(e) of the 2004 Act, on the ground that she was a non-national subject to the requirement to have an Irish visa who did not have one; or the decision to arrest and detain her on that basis, under s. 5(2) of the 2003 Act, pending the making of arrangements for her removal from the State; or both of those decisions, amounted to the imposition of a disproportionate or discriminatory penalty upon her for breach of a mere administrative formality, in disregard of the fundamental principle that a residence card is merely declaratory, rather than determinative, of a person's EU law free movement and residence rights.

66. The obvious problem with that argument is that it wrongly presupposes that when Mrs Delsoz sought entry to the State at Dublin Airport on 11 December 2017, the continuing free movement and residence rights of Mr Delsoz, as a Union citizen, and her continuing entry and residence rights, as his spouse, were a given, such that the relevant visa requirement must be seen as a mere administrative formality attendant upon her exercise of those rights, rather than as a substantive obligation upon her as a third country national who has failed to establish an entitlement to those rights in the first place. Differently put, while possession of a visa is merely declaratory of the derived free movement rights of a family member of a qualifying Union citizen, the absence of such a visa may be the result of a mere failure to comply with the administrative formalities necessary to obtain one or may be the unavoidable consequence of not (or no longer) having any entitlement to those rights.

67. In the written legal submission filed in support of her application for costs, the legal representatives for Mrs Delsoz dwell at some length on the case law of the CJEU on the consequences of mere failure to comply with administrative formalities. Hence, they cite Case C-48/75 *Procureur de Roi v Royer* [1976] E.C.R. I-6591 (expulsion of a French national from Belgium for failure to comply with registration requirement although free movement and residence rights not in issue); Case C-118/75 *Watson and Belmann* [1976] ECR 1185 (prosecution of a British national au pair in Italy for failure to comply with residence registration requirement although free movement and residence rights not in issue); Case C-157/79 *R v Pieck* [1980] ECR 2171 (prosecution of a Dutch national for failure to renew residence permission although free movement and residence rights not in issue); Case C-353/89 *Roux v Belgium* [1991] ECR I-273 (imposition of social security scheme registration requirement on a French national waitress in Belgium as a precondition to grant of residence permit although free movement and residence rights not in issue); Case C-459/99 *Mouvement contre le Racisme, l'Antisemètisme et la Xènophobie ASBL (MRAX) v Belgian State* [2003] ECR I-6591 (challenge to provision in Belgian law permitting expulsion of third country national spouses of member state nationals exercising free movement rights for failure to obtain appropriate visa where free movement and residence rights not in issue); and C-215/03 *Oulane v Minister voor Vreemdelingenzaken en Integratie* [2005] ECR I-1215 (challenge to strict requirement imposed under Dutch law on French national to prove identity solely through production of passport or national identity card where free movement and residence rights not otherwise in issue).

68. By contrast, in this case, the entitlement of Mrs Delsoz to exercise derived EU law entry and residence rights as the spouse of a Union citizen exercising free movement rights was squarely in issue. Accordingly, although I do not express any view on the merits of the argument that the detention and proposed removal of Mrs Delsoz were unlawful as contrary to EU law, I am not satisfied that it was reasonable for Mrs Delsoz to issue proceedings challenging the lawfulness of her detention, prior to (or instead of) providing the Minister with the limited evidence necessary to establish her entitlement to exercise those rights.

69. After all, it is not in dispute that Mr Delsoz had ceased to be in employment in the State on 7 June 2017; that he and his family left the State on 20 June 2017; and that, without notifying the relevant authorities, they changed address within the State in August 2017. Against that background, it is difficult to understand why, when problems inevitably arose at Dublin Airport on 11 December 2017, instead of urgently addressing the limited evidential requirements necessary to establish their continuing entitlement to exercise EU law entry and residence rights, the family, through their legal representatives, first chose to write to the Minister on 12 December 2017 addressing him at length on the nature and scope of such rights in principle; next sought an inquiry into the lawfulness of the detention of Mrs Delsoz on 13 December 2017; and only finally sought to provide the necessary evidence to establish an entitlement to those rights in practice by email on the morning of 14 December 2017, the day of the proposed inquiry.

70. The second additional issue that counsel for Mrs Delsoz has raised on the lawfulness of her detention in seeking the costs of the proceedings that were brought to challenge it, is that, since the time permitted for seeking a review of the decision to revoke her residence card had not yet expired on 11 December 2017 (see paragraphs 9 and 10 above), that revocation had not yet taken effect, so that Mrs Delsoz was still entitled to enter and reside in the State and, in consequence, the Minister's refusal to grant her permission to enter the State and to detain her pending her removal from the State was unlawful. While that strikes me as a compelling argument, it is no part of my function for the purpose of the present application to attempt to determine any aspect of the merits of the inquiry. Rather, the test that counsel for Mrs Delsoz argues I should apply is whether it was reasonable for Mrs Delsoz to seek that inquiry. For the reasons I have already given, I am not satisfied that it was. Notably, while Mrs Delsoz did not seek a review of the Minister's decision to revoke her residence card within the time permitted *i.e.* by 14 December 2017, the Minister exercised the power vested him under Reg. 25(3) of the 2015 Regulations, to extend the time permitted for seeking that review by a further seven days, promptly upon receipt of the email of 14 December 2017 from the family's solicitor. This serves to emphasise how easily the situation could have been resolved on 12 or 13 December 2017, without recourse to litigation.

Conclusion
71. I will make no order on the costs of this inquiry.