

UNAPPROVED



THE COURT OF APPEAL

Record No.: 2020/18

Donnelly J.

Neutral Citation Number [2021] IECA 286

Noonan J.

Binchy J.

BETWEEN/

AMMAD MAHFOOZ

APPELLANT

-and-

THE MINSITER FOR JUSTICE AND EQUALITY

RESPONDENT

AIJA NAMIKE

NOTICE PARTY

JUDGMENT of Ms. Justice Donnelly delivered on the 28th day of October, 2021

1. This appeal concerns matters relating to the appellant's immigration status. In writing a judgment it is usual to set out at an early stage the issues between the parties. That is not possible in this case because the parties take opposing views on what the underlying appeal is actually about. It is therefore necessary to set out in some detail, the reliefs sought and the history of the litigation between the parties.

2. On the 1st July, 2019, the High Court (Humphreys J.) gave leave to the appellant to apply by way of an application for judicial review for the following reliefs as set forth in the statement of grounds:

- I. An order of *mandamus* to compel the Minister to make a determination of the appellant's application under s. 3(11) of the Immigration Act, 1999 ("the Act of 1999") for revocation of the deportation order issued in respect of the applicant dated the 3rd August, 2018;
 - II. An order of *mandamus* to compel the Minister to make a determination of the review under regulation 25 of the European Communities (Free Movement of Persons) Regulations, 2015 ("the Regulations") of his application for permission to remain as a "permitted family member" of a European Union national under Regulation 5(2) of the Regulations;
 - III. A declaration that, where an applicant's application as a "permitted family member" of a European Union national is being considered by the Minister, his servants or agents, at first instance under Regulation 5 or on review under regulation 25 of the Regulations, then the applicant may only be removed under the provisions of the Regulations and/or Directive EU 2004/38/EC ("the Directive") and may not be deported only or at all under the provisions of the Act of 1999.
 - IV. An injunction, including an interim injunction, restraining the Minister, his servants or agents, from taking any further steps in relation to the removal of the applicant from the State pending the determination of the within proceedings.
- 3.** What is unusual about the grant of leave is that by the time the order granting leave was made the injunctive relief claimed at IV was completely moot. On the 13th June, 2019 following an unsuccessful appeal to the Court of Appeal in Article 40 proceedings, the appellant had been deported to his native country of Pakistan.
- 4.** Another curious feature of the order granting leave to apply for relief is that it refers to affidavits of the notice party and the solicitor for the appellant both filed on the 6th June, 2019,

whereas we have an affidavit of the notice party sworn on the 11th June, 2019 and an affidavit of the solicitor on the 12th June 2019. Even more curiously the affidavit of the solicitor for the appellant entitled “Second Affidavit” was sworn on the 11th June, 2019 and apparently filed that day.

5. This litigation is the appellant’s third set of proceedings taken against the State in respect of his immigration status. The notice party to these proceedings, the appellant’s partner (now purported wife), a Latvian national exercising her rights to live and work in the State under the Directive, took a fourth set of proceedings against the State in respect of the appellant’s immigration status. It appears that the same solicitor and counsel acted for the appellant and notice party in all four proceedings. Subsequent to the oral hearing of the appeal, we were informed that the notice party, has withdrawn those proceedings.

6. The relevant background to those claims can be set out as follows;

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| 1 January 2015 | The appellant, a Pakistani national, entered the State without permission. |
| 10 February 2015 | The appellant applied for asylum on the ground of fear of persecution for political opinion. |
| 19 September 2017 | The application for international protection was denied by the International Protection Officer. The appellant was also denied permission to remain under s. 49(4)(b) of the International Protection Act 2015 (“the Act of 2015”). |
| 21 March 2018 | An appeal by the appellant to the International Protection Tribunal was refused. |
| 16 May 2018 | The appellant sought a review of the refusal to grant him leave to remain under s. 49(7) and (9) of the Act of 2015 |

with the submission of additional information on the 16th May, 2018.

- 29 June 2018 The Minister upheld the decision to refuse the appellant leave to remain.
- 26 July 2018 The appellant was notified of the decision of refusal for leave to remain.
- 3 August 2018 The Minister signed the deportation order pursuant to s. 50 of the Act of 2015.
- 14 August 2018 Letter dated the 14th August, 2018 notified the appellant of the signed deportation order.
- 10 September 2018 Appellant granted leave for judicial review of the s. 49(7) decision, Record No. 2018/690/JR.
- 15 January 2019 Appellant and notice party receive a notice of an appointment from the Civil Registration Service regarding their proposal to marry, scheduled for the 31st January, 2019.
- 24 January 2019 Appellant submits an application for revocation of the deportation order under s. 3(11) of the Act of 1999.
- 25 January 2019 Appellant withdraws his application for judicial review, Record No. 2018/690/JR.
- 25 January 2019 Appellant's solicitors write to the Irish Naturalization and Immigration Services (INIS) requesting revocation of the deportation order and an undertaking not to implement the deportation order.

- 20 February 2019 Appellant applies for a residence card based on his relationship with the notice party as a “partner in a durable relationship” under Regulation 5(2) of the Regulations.
- 26 March 2019 Minister refuses EEA application based on “insufficient evidence of a durable relationship”.
- 2 April 2019 Appellant and notice party lodge notice with the Civil Registration Service of their intention to marry on the 25th July, 2019.
- 9 April 2019 Appellant’s solicitors write a letter to INIS requesting revocation of the deportation order and an undertaking not to implement the deportation order.
- 11 April 2019 Appellant applies for a review of EEA refusal under Regulation 25 of the Regulations.
- 15 April 2019 EU Treaty Rights Review Unit confirmed it would carry out a review under Regulation 25 of the Regulations.
- 16 April 2019 Request for an undertaking denied by the INIS.
- 25 April 2019 Office of the Registrar General advises the Civil Registration Office that the notice party’s divorce of the 16th August, 2018 was in order and that the marriage may proceed provided all other requirements have been met.
- 30 May 2019 Appellant’s solicitors write again to INIS requesting revocation of the deportation order and confirmed “marriage of convenience” interview had been scheduled with the HSE for the 24th June, 2019. Solicitors

- requested the INIS not to implement the deportation order pending consideration of the EEA review.
- 7 June 2019 Appellant arrested and taken into detention by the Garda National Immigration Bureau.
- 11 June 2019 Appellant's solicitors issue a pre-action letter demanding his release and revocation of deportation or provide an undertaking not to remove the pending determination of same.
- 11 June 2019 Article 40 inquiry directed by Owens J..
- 12 June 2019 Article 40 inquiry heard by Pilkington J. who found appellant's detention to be lawful.
- 12 June 2019 Appellant lodged judicial review proceedings seeking *mandamus*. No application for leave actually moved before the High Court.
- 13 June 2019 Appellant's Article 40 appeal to the Court of Appeal denied.
- 13 June 2019 Appellant deported to Pakistan.
- 24 June 2019 Notice party presents alone to the HSE for the "marriage of convenience" interview but is told she could not proceed in the appellant's absence.
- 1 July 2019 Appellant granted leave to apply for judicial review, Record No. 2019/369/JR.
- 5 July 2019 Application for leave to appeal to Article 40 decision made to the Supreme Court.

25 July 2019	Notice party travels to Pakistan with her son and marries the appellant. That marriage is contested by the Minister.
26 July 2019	The marriage is registered in Pakistan.
19 September 2019	Court of Justice of the European Union (“the CJEU”) issues decision in <i>Chenchooliah v. Minister for Justice and Equality</i> (Case C-94/18) (hereinafter “ <i>Chenchooliah</i> ”).
20 November 2019	Judicial review hearing in present case before Barrett J..
9 December 2019	Judgment given in this case denying the appellant’s application for relief.
7 January 2020	Application for leave to appeal the decision of the High Court (Barrett J.) to the Supreme Court.
18 February 2020	Leave to appeal to the Supreme Court in relation to Article 40 refused.
9 December 2020	Appellant receives letter from the Department of Justice notifying him that review of the refusal for him to be considered as a permitted family member of an EU citizen in accordance with Regulation 25 of the Regulations had been unsuccessful.

The First Proceedings – *Ammad Mahfooz v. The Minister for Justice and Equality*, (*High Court Record No.: 2018/690JR*).

7. Those proceedings were issued on the 14th August, 2018 and sought to quash the decision refusing the appellant permission to remain pursuant to s. 49(7) of the Act of 2015 and the deportation order. The Minister gave an undertaking that the appellant would not be deported pending the outcome of the proceedings. The day before the proceedings were due

to be heard on the 25th January, 2019, the appellant withdrew his case on all grounds and the matter was struck out. The appellant claimed that new circumstances had arisen as he was in a relationship with an EU national and that this enabled him to apply for permission to remain in the State pursuant to Directive 2004/38/EC and the Regulations. The relationship had not previously been disclosed to the Minister in any prior application.

8. On the 25th January, 2019, the appellant submitted an application to revoke the deportation order under s. 3(11) of the Act of 1999 based on his “durable relationship” of 6 months with the notice party, an EU national, and his intention to marry her. The notice party was also a notice party to the first set of proceedings.

9. On the 20th February, 2019, the appellant applied for a residence card claiming a status of a permitted family member of an EU citizen exercising her European Union Treaty Rights pursuant to the Directive and the Regulations. The appellant’s residence card was refused on the 26th March, 2019. On the 11th April, 2019, the appellant sought a review of the decision not to grant a residence card to him.

The Second Proceedings – *Ammad Mahfooz v. The Commissioner of An Garda Síochána & Ors*, (High Court Record No.: 2019/674/SS).

10. The appellant was arrested on the 7th June, 2019 and detained at Cloverhill prison on foot of a deportation order for the purpose of his removal from the State.

11. On the 11th June, 2019, the appellant issued proceedings pursuant to Article 40.4.2^o of the Constitution that his detention was unlawful, claiming that he had a right to remain in the State pending review of his application pursuant to Regulation 25 of the Regulations.

12. By order of Owens J. the Article 40.4.2^o inquiry was directed to take place on the 12th June, 2019 on which date Pilkington J. in an *ex tempore* judgment, held that the appellant’s detention had been properly certified and that Regulation 25 of the Regulations did not provide a right to the appellant to remain in the State pending his review application.

13. The appellant sought an urgent appeal to the Court of Appeal. On the morning of the 13th June, 2019, in an *ex tempore* judgment delivered by Birmingham P. (Whelan J. and Costello J. concurring), the appeal was dismissed on the basis that the Court was satisfied that the detention of the appellant was in accordance with the law and that the High Court had been correct to find that Regulation 25 did not provide a right to remain in the State pending a review of an application for a residence card. The Court of Appeal held that the Minister was entitled to deport the appellant pursuant to the Act of 1999.

The Third (Present) Proceedings – *Ammad Mahfooz v. The Minister for Justice and Equality*

14. On the 12th June, 2019 the appellant also issued proceedings seeking orders of *mandamus* to compel the Minister to make a decision on his application to revoke the deportation order under s. 3(11) of the Act of 1999 and to make a decision in respect of the review of the refusal to grant him a residence card under the Directive/Regulations. He also sought declaratory relief. Leave was granted by Humphreys J. on the 1st July, 2019. The *mandamus* proceedings were heard before Barrett J. in the High Court on the 20th November, 2019.

15. In his judgment delivered on the 9th December, 2019 ([2019] IEHC 837), Barrett J. held that the appellant was not entitled to an order of *mandamus* in respect of his pending s. 3(11) revocation application or the review of his application to be treated as a permitted family member. The declaratory relief was also refused.

16. The trial judge also held that delay was not pleaded in the case, but had it been, such a claim would be defeated by the fact that the appellant had continued to submit representations to the Minister for the purpose of the s. 3(11) application, which the Minister would have needed time to consider.

17. The appellant sought leave to make a ‘leapfrog’ appeal of the decision of Barrett J. directly to the Supreme Court on the 7th January, 2020. In the Supreme Court Clarke C.J., Irvine J. and Baker J. (*A.M. v. The Minister for Justice and Equality* [2020] IESCDET 21) refused to grant leave to appeal. The Supreme Court viewed the proceedings as premature as the Minister had not yet made a decision on either of the applications. Reference to this application was made in the submissions of the Minister but are absent from those of the appellant.

The Fourth Proceedings – *Aija Namike v. The Minister for Justice and Equality*, (High Court Record No.: 2020/598 JR).

18. These proceedings were not referenced in the submissions of the appellant but were mentioned in a fifth affidavit filed by the solicitor for the appellant on the 21st March 2021. The present appellant was a notice party to those fourth proceedings.

19. Leave was granted by Burns J. on the 7th October, 2020 for judicial review where the present notice party, as applicant, was seeking *inter alia*;

- a) Order of *certiorari* to quash the Minister’s proposal to uphold the decision to refuse the EU Permitted Family Member Assessment application filed by the appellant’s spouse on the basis that the appellant and notice party had entered into a marriage of convenience.
- b) Order of *mandamus* to compel the Minister to make a determination under Regulation 25 of the Regulations of the review of refusal of permission to the notice party to enter the State as the appellant’s “permitted family member” under Regulation 5(2) of the Regulations.
- c) Order of *mandamus* to compel the Minister to make a determination of the application to revoke the deportation order issued in respect of Mr. Mahfooz pursuant to s. 3(11) of the Act of 1999.

- d) Declaration that where an applicant who is subject to a deportation order under s. 3 of the Act of 1999 provides proof of marriage to an EU national for the purposes of joining his/her spouse in the State under the provisions of Article 5 and Article 15 of the Directive, the deportation order must be revoked, unless the Member State has proper reasons to restrict entry under Article 27 and Article 28 and subject to the safeguards under Articles 30 and 31 of the Directive.
- e) Damages for breaches of rights under the Constitution and the European Convention on Human Rights.

20. Subsequent to the hearing of this appeal, the solicitor for the appellant engaged in correspondence with the Court informing the Court about certain proposals put forward to the Minister in that case. Ultimately it appears these proceedings have been struck out.

The Appellant's Further Representations and Applications to the Minister

21. Between the grant of leave in the present proceedings and the hearing of the application for substantive relief in the High Court, the appellant continued to submit further documentation and make representations to the Minister as part of his revocation application. The date of these representations, the source of that information and the general nature of those representations are as follows:-

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| 12 August 2019 | (Fourth Affidavit of Cristina Stamatescu sworn on the 8 th November, 2019) – Submission of representations which included supporting documentation arising from the marriage of the appellant and the notice party in Pakistan on the 25 th July, 2019. |
| 30 August 2019 | (Fourth Affidavit of Cristina Stamatescu sworn on the 8 th November, 2019) - Submission of proof of marriage and |

additional supporting documentation concerning the notice party's employment in the State.

6 September 2019 (Fourth Affidavit of Christina Stamatescu sworn on the 8th November, 2019) - Appellant submitted further employment documentation relating to notice party.

23 September 2019 (Fourth Affidavit of Christina Stamatescu sworn on the 8th November, 2019) Appellant wrote to Minister seeking to rely on decision of the CJEU in *Chenchooliah*.

18 October 2019 Appellant submitted photographs of the wedding between the appellant and the notice party.

22. The appellant has also engaged in numerous applications after the delivery of Barrett J's judgment, the subject of the within appeal. These include further submissions to the Minister, application for a visa to enter the state and an appeal against that refusal which are all set out in in the fifth affidavit of Christina Stamatescu sworn on the 15th March, 2021.

THE JUDGMENT OF THE HIGH COURT

23. In the course of his judgment refusing relief, Barrett J. recited the grounds set out in statement of grounds as follows:-

“e) Grounds upon which the relief is sought;

1. In seeking to implement the deportation order, and in failing to make a final determination in relation to the Applicant's application for revocation of the Deportation Order under s.3(11) of the Immigration Act 1999, the Respondent continues to err in law, including European Union law and /or has fettered his discretion;

(i) the Respondent has failed to consider or implement the Applicant's procedural right to remain in the State pending his

application for permission to remain in the State pending his application for permission to remain as a 'permitted family member' of a European Union national under Regulation 5(2) of the Regulations and /or review of the denial of that decision under Regulation 25 of the Regulations;

(ii) the Respondent has failed to consider the rights of the Applicant and/or the Notice Party under Articles 40.3.1° and 41.3.1° of Bunreacht na hÉireann as well as Arts. 7, 12, 41 and 47 of the European Charter on Fundamental Rights and/or Articles 8 and 12 of the European Convention on Human Rights.”

24. In the operative part of his judgement, Barrett J stated as follows at paragraph 3:-

“A number of points fall immediately to be made: (a) the deportation order has been implemented; (b) there have been separate High Court and Court of Appeal decisions in the course of the within proceedings which have each decided that there are no procedural rights of the form referred to at item (i) above; (c) although there has been no decision in respect of the 'permitted family member' application, that application appears effectively to have been overtaken by the marriage of last July; moreover any claim of delay in this regard (and delay has not been pleaded) would be greatly weakened if not completely defeated by the fact that the applicant has at various times provided fresh information in respect of that application which fresh information requires post-receipt to be considered; (d) as regards item (ii) above, the within application is an application to compel the making of decisions; there cannot have been a failure to consider certain constitutional rights in the course of making as yet unmade decisions; and (e) as mentioned, delay has not been pleaded and thus does not require

to be considered. Having regard to these various factors, it follows that the orders of mandamus sought by Mr Mahfooz must, respectfully, be refused.”

25. Barrett J. went on to consider that even if delay had been pleaded the appellant could not have succeeded in his application having regard to the decision in *Nearing v. The Minister for Justice Equality and Law Reform* [2010] 4 I.R. 211. He held that all things being equal the effect of the judgment was that when it came to delay an order of *mandamus* will only issue in situations that might roughly be described as *in extremis i.e.* to borrow from the wording of Cooke J. at p. 217 of the above case, that there was “... *such an egregious and unjustified delay in dealing with [an] ... application as to be tantamount to a refusal in its effect.*”

THE ISSUES AS IDENTIFIED BY THE APPELLANT

26. In the course of his submissions, the appellant has identified the following as the issues to be decided:-

1. Did the High Court Judge err in failing to find any urgency in relation to the appellant’s application for revocation of the deportation order in light of the CJEU’s decision in *Chenchooliah* and/or his right to family life under the Constitution and human rights instruments, and/or in light of the Minister’s actions in deporting him pending review? Grounds 1, 2, 6, 7 and 9.
2. Did the High Court err in finding that the absence of any pleading of “delay” in decision-making was dispositive and/or would have failed under *Nearing v. Minister for Justice, Equality and Law Reform*? Grounds 3, 4, 5 and 8.

THE ISSUE IDENTIFIED BY THE MINISTER

27. The Minister contests that the issues identified by the appellant actually arise in these proceedings. The Minister argued that although there was no issue with the entitlement to bring the proceedings of *mandamus* – the real issue was that the appellant did not establish to

the satisfaction of the High Court that he has an entitlement to the relief sought, and that there is no doubt that the trial judge was correct.

28. The Minister submits that the arguments the appellant sought to make were misconceived and:-

- a) have limited relevance in the context of a *mandamus* application;
- b) are matters not pleaded;
- c) are matters that have been already determined by the Court of Appeal in the Article 40 Inquiry *i.e.* the procedural right to remain claim.
- d) have not yet arisen because the Minister has not made the decisions in question.

29. The Minister referred to the determination by the Supreme Court, in refusing leave to “leapfrog” in *A.M. v. Minister for Justice and Equality*, acknowledged the proceedings as premature and narrow in scope in that they related solely to the question of whether orders should be made to compel the Minister to make a determination on the two applications.

30. In the view of the Minister, the only issue that can be before the Court is those that were pleaded in the statement grounding the application for judicial review and the appellant cannot be allowed to argue delay as if that claim had been made in the first instance.

The Case made on Appeal

31. Reliance on the decision in *Chenchooliah* delivered on the 10th September, 2019, was the appellant’s main focus in the appeal and submitted by him to “be his strongest ground”. He submitted it was a decision in which the Advocate General’s opinion (in essence upheld by the CJEU) had been delivered shortly before the Article 40 proceedings and that the Minister would have been well aware of the likelihood that the Court would follow that path. The appellant submits that in light of the decision of the CJEU in *Chenchooliah*, which identified the right of Union citizens and their family members to move and reside freely in the territory of a Member State, the High Court, in relation to the order of *mandamus*, had failed to give

proper regard to the Minister's refusal to fulfil her obligation to make an urgent determination in relation to the revocation application.

32. In *Chenchooliah*, the question for the CJEU was whether, in circumstances where a Mauritian national's spouse was no longer exercising his rights of free movement in Ireland, she was still a "beneficiary" for the purposes of Article 3(1) of the Directive. If so, her removal would be governed by Articles 27, 28, and 31 of the Directive. Rather than claiming a right of residence deriving from her married status to an EU national, she claimed that under the protection of Articles 27 and 28 of the Directive she was entitled to have her residence ended by way of an expulsion order rather than a deportation order. A deportation order, under s. 3 of the Act of 1999, automatically imposes an indefinite ban on entry into the territory. In *Chenchooliah* the CJEU held that the expulsion of a third country citizen based on the loss of status of "beneficiary" within the meaning of Article 3(1) of the Directive was not governed by national law but by the Directive which under Article 15(3) provides that the host Member State may not impose a ban on entry in the context of an expulsion decision. The CJEU went on to state that the scope of Article 15 extended to the expulsion of family members of EU citizens who choose to depart and return to the Member State of which they are a national.

33. As a "beneficiary" under Article 3(1) of the Directive being a family member of an EU national, the appellant submitted that the decision in *Chenchooliah* compelled an immediate revocation of the Deportation Order which permanently banned his entry to the State. In denying the appellant's application for *mandamus*, the High Court failed to give proper regard to the appellant's right to return as the spouse of an EEA national with immediate effect pursuant to Article 5(2) of the Directive.

34. In relation to the immediacy of the review of his EEA application and his status as a "permitted family member", the appellant submitted that the High Court erred in failing to give proper regard to his rights and/or those of the notice party under Art. 40.3.1° and Art 41.3.1° of

Bunreacht na hÉireann by finding at para. 3 that “*there cannot have been a failure to consider certain constitutional rights in the course of making yet unmade decisions.*” The appellant claims that such rights were invoked as a consequence of the deportation order in rendering the family apart.

35. Citing Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701: “[*t*]he purpose of judicial review is to provide a remedy to persons who claim their rights have been prejudiced by an administrative decision which has not been taken in accordance with law or the principles” and reiterating the rule of the law of *mandamus* as stated by the Supreme Court in *State (Modern Homes (Ireland) Ltd.) v. Dublin Corporation* [1953] I.R. 202, the appellant submits that the High Court had erred in not arriving at a decision that *mandamus* was warranted due to the Minister’s execution of the deportation order notwithstanding the intention to marry and the pending revocation application.

36. The appellant submits that the question he presented to the High Court was not focussed on delay, but rather the timeframe which could be considered to be reasonable under the circumstances. The appellant submits that the High Court erred and misapplied the holding in *Nearing v. Minister for Justice, Equality and Law Reform* in finding that the appellant was required to plead “delay” in order to prevail in his application for *mandamus*. The appellant submits that although an action for *mandamus* may be grounded on delay it is not an essential element of a *mandamus* application.

37. The appellant also submits that the High Court judge erred in holding that the fresh information provided by him in relation to his application justified additional or continuing delay. The appellant was obliged to provide the Minister with fresh information in respect of any change in circumstances while his application was being processed. The appellant submits that once the Minister was notified of his marriage to the notice party no further consideration was necessary in respect of a determination on revocation or the EEA application. In all those

circumstances, the appellant submits that there was an urgency to the determination of the matter by the Minister and the order of *mandamus* ought to have been granted by the High Court.

38. The Minister contests that any such issue arose because the High Court was not required to address a different case than the one the appellant had pleaded for at the hearing and that the trial judge had been generous to the appellant in considering whether there was delay in the progressing of the appellant's applications even though it had not been pleaded. In having regard to the principles expressed in *Nearing v. Minister for Justice, Equality and Law Reform* the trial judge correctly identified that the level of urgency that would have made the timeframe for consideration of the applications egregious or unjustified did not exist in the present case. The judge also noted that the appellant had continued to submit fresh information subsequent to the issuing of proceedings, on the 12th August 2019, 30th August 2019, 6th September 2019, 23rd September 2019 and the 18th October 2019 and such documentation would need time to be verified and considered.

39. The Minister's deponent, Mr. Jim Boyle averred in his affidavit sworn on the 30th October, 2019 to the premature nature of the proceedings in light of the procedural nature in processing applications;

“... Both of these applications are currently being considered and they will be processed in the order in which they were received like all other applications. The Applicant has not given any reason why his applications should be given priority over any other person's application. Given that the Applicant issued the present proceedings only two months after submitting his review, his application for *mandamus* is entirely premature.”

40. In light of the timeframe between the application for revocation of the deportation order, the issuing of judicial review proceedings and the continued submission of fresh

information needing verification and consideration, the Minister submits that the Court ought to dismiss the appeal as it presents as manifestly unfair to the Minister and is an improper use of Court time.

41. The Minister submits that it was not necessary to consider *Chenchooliah* as it did not arise in the case. However, in the event that this Court wished to do so, the Minister made further submissions. The Minister submits that in relying on the *Chenchooliah* decision of the CJEU, the appellant claims that he *is* a beneficiary of the Directive and as such is subject to the removal procedures contained in said Directive. The benefit of *Chenchooliah* could only belong to those covered by Article 15(1) of the Directive, namely “Union citizens and their family members.” In claiming to be in a ‘durable relationship’ and thus a permitted family member, the appellant did not meet the basic requirements of Regulation 5(2) of the Regulations. At the date of the application on the 20th February, 2019, the appellant and the notice party had only been in a relationship for a period of 6 months. Such facts, the Minister submits, differentiate the present case from that of *Chenchooliah* where in that case, the lawfulness of the marriage of the applicant was not in dispute nor that she had been given a temporary residence card for three months, which at that time afforded her the status of ‘beneficiary’ under Article 3(1) of the Directive.

42. Such factual differences are instrumental in determining whether EU or domestic law applies in a removal/deportation context. In the present proceedings the Minister was entitled to proceed to enforce a valid deportation order pursuant to s. 3 of the Act of 1999, as the appellant had not submitted sufficient evidence of being in a ‘durable relationship’ and so could not be treated as a permitted family member and as such was not a beneficiary under Article 3(1) of the Directive. Nor was the appellant given temporary permission to be in the State under the Regulations pending his first instance application.

43. Whether the appellant was said to come within the judgment of *Cheenchooliah* or not was in the first instance, deemed by Barrett J. “*a matter for the Minister as decision maker*” to decide. *Cheenchooliah* may have been relevant in the pleadings in respect of the declaration the appellant sought however as Barrett J. understood in the High Court that that application had been abandoned and deemed that it could not be ruled on.

44. The Minister takes issue with the appellant’s failure to plead his case and submits that the High Court judge was correct in his approach.

45. The Minister also refers to the time frame between the submission for review of the refusal of the appellant’s application to be treated as a permitted family member on the 11th April, 2019 and the issuing of the present proceedings was 2 months. Within this timeframe the appellant sent a pre-action letter on the 10th June, 2019 which the Minister was unable to properly consider in light of the Article 40 inquiry proceedings being filed for the 11th June, 2019. It is submitted by the Minister that the subsequent marriage of the appellant to an EU national renders the review application moot and his remedy was to make a fresh application rather than *mandamus* proceedings.

46. The Minister refers also to the request for revocation of the deportation order made by the appellant on the 25th January, 2019 and to the numerous representations and documentation submitted by the appellant to the Minister on a variety of dates. The Minister contends that the trial judge was correct in finding that even if delay had been pleaded it would have been greatly weakened if not totally defeated by the fact that the appellant has at various times submitted fresh information which requires post-receipt consideration.

ANALYSIS AND DETERMINATION

47. At the hearing of the appeal, counsel for the appellant made certain concessions. He agreed that the first ground regarding the issue of whether he was a permitted family member within the meaning of the Directive had already been decided against him. He submitted that

the issue then was ground two above. Despite that concession, counsel maintained arguments that had as their central core his claim that he was a “permitted family member” and that the Minister was obliged to respect that.

48. In his submissions, the appellant referred back to the facts of the case and the various applications made by him to the Minister. Much of his written submissions were taken up with arguing the entitlement *to bring mandamus* proceedings, but, as shown above, the Minister did not contest that entitlement. The Minister contested the matter on the basis of the pleadings and what had already been decided by the Courts in relation to the issues.

49. Order 84, rule 20(2) of the Rules of the Superior Courts, 1986 (as amended) (“the RSC”) states that a moving party’s initiating document must include “a statement of each relief sought and of the particular grounds upon which each such relief is sought”. Order 84, rule 20(3) gives guidance as follows:-

“It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state, precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground.”

50. It is now well settled law that the hearing of the judicial review application must be based upon the order granting leave to make the application (see *AP v. DPP* [2011] 1 I.R. 729). An applicant is entitled to amend pleadings. In circumstances where the appellant made no such application, he or she is confined to seeking the relief set out in the order granting leave on the grounds set out in the order.

51. The first ground upon which he sought relief was, as identified in the judgment of Barrett J., that the Minister has failed to consider or implement the appellant’s *procedural right to remain in the State pending his application* for permission to remain in the State pending his

application for permission to remain as a “permitted family member” of a European Union national under Regulation 5(2) of the Regulations and/or review of the denial of that decision under Regulation 25 of the Regulations. As Barrett J. held, that ground was decided against the appellant in the High Court and the Court of Appeal. The Supreme Court has also determined not to grant leave to appeal.

52. I am satisfied therefore that this particular ground cannot be relied upon to support any of the relief sought by this appellant in these proceedings. It has already been conclusively determined in the prior proceedings, as was correctly acknowledged by the appellant during the appeal. The ground (or issue) pleaded was the failure to consider or implement his procedural right to remain in the State *pending* his application for permission to remain. That was fully determined in the Article 40 proceedings.

53. During the course of oral argument, the appellant submitted that he had sought to move these judicial review proceedings at the same time (or in the immediate aftermath) of the refusal of his Article 40 relief in the High Court and had then sought to raise that on appeal (orally). From what the Court was told neither mention was “an application” to the court; there was no formal application for leave before the High Court and thus no matter to “appeal” to the Court of Appeal. That observation is not central to this judgment, but it may explain why the Statement of Grounds reflects the situation prior to the refusal of Article 40 relief and the subsequent deportation. The unfortunate reality is that the pleadings do not cover what has become a mainstay of the appellant’s argument.

54. The appellant persists in the argument that the High Court erred in not finding any “level of urgency” in the circumstances of the case where Barrett J. suggested that the clock stops in *mandamus* applications on the date of lodgement and not the date of hearing notwithstanding that the factual and legal landscape in the case had already developed by the date of the hearing. As I view the appellant’s argument, he submits that his second ground *i.e.*

that in seeking to implement the deportation order or in failing to make a determination on his application the Minister failed to consider his rights, covers a wide range of criteria such as delay and lack of urgency which in themselves give him scope to argue that the decision in *Chenchooliah* required a decision to be made in his favour. That requires a closer consideration of the pleadings, the procedural history and the judgment of the High Court.

55. As set out in detail at para. 2 above, the appellant claimed four substantive reliefs. The legal position with regard to those reliefs are as follows:

(i) His third claim was for a declaration that in light of the application he had made under Regulation 5 (and on review Regulation 25), he could not be removed or deported. This claim was decided against him in previous proceedings.

(ii) His fourth claim for an injunction prohibiting his deportation is moot. He has been deported.

(iii) His first claim was for *mandamus* to compel the Minister to make a determination of his application for revocation of the deportation order. Although this claim may appear moot, the appellant seeks to argue that *Chenchooliah* requires this deportation order to be quashed.

(iv) His second claim was *mandamus* refers to his application for permission to “remain”. That also appears moot. Even if one reads that as seeking an order for *mandamus simpliciter* in respect of an application to be treated as a permitted family member of an EU national under Regulation 5(2) and on review Regulation 25, problems remain because of the manner in which this application was pleaded.

56. Of the two grounds on which those reliefs were claimed only one remains alive in the proceedings. As indicated above the first ground referred to his procedural rights and has been decided against him in the first proceedings. The second ground pleaded in the present judicial review application concerned a failure to consider rights under the Constitution, the EU Charter

and the European Convention on Human Rights. Those matters all related to the nature of what must be considered by a decision maker and are not related to the delay or even urgency in respect of the matter.

57. The appellant did not contest that *mandamus* will not issue against a decision maker simply because the decision maker has a duty to make a decision. The following *dicta* of Cooke J. in *Nearing v. Minister for Justice, Equality and Law Reform* illustrates the nature of the relief of *mandamus*:

“Mandamus lies to make good an illegal default in the discharge of a public duty. There must have been either expressly or by implication, a wrongful refusal to make a decision or such an egregious and unjustified delay in dealing with the application as to be tantamount to a refusal in its effect.” (Emphasis added)

58. Neither of the alternatives proposed by Cooke J. (a wrongful refusal to make a decision or an egregious delay) is pleaded in the statement of claim. Instead, the appellant pleaded that certain fundamental rights (whether they be of constitutional, Convention or Charter origin) were not being considered. The High Court judge identified correctly that *“there cannot have been a failure to consider certain constitutional rights in the course of making as yet unmade decisions”*. It is logically inconsistent to grant *mandamus* compelling a person to make a decision on the ground that they are failing to consider fundamental rights. The trial judge correctly refused to grant the relief on that basis. On the other hand, it would not necessarily be logically inconsistent to seek an order of *mandamus* compelling a decision maker to take into account certain rights in the decision-making process; such a claim might be appropriate, depending on circumstances, where a decision maker has indicated an unwillingness to do so. That is not what was pleaded in this case, however. Indeed, at no point in the oral hearing of the appeal did the appellant seek to demonstrate that any of these fundamental rights were at issue. Instead, as stated above, his main case was that there had been a failure to recognise his

specific EU rights in accordance with *Chenchooliah*. I will return to this in the context of the issue of delay. It is appropriate to observe however that the fundamental rights issues raised by the appellant appeared related to family/privacy issues which were part of his claim for the declaration and injunction and which were already dealt with.

59. The trial judge concluded that delay itself had not been pleaded. There was nothing on the face of the statement of grounds that indicated that this was a claim for an order of *mandamus* on the basis of the delay in making a decision. The trial judge however, went on to consider what would have happened should delay have been pleaded. The trial judge identified the type of delay necessary to grant *mandamus* as being a situation of “*in extremis*” relying on Cooke J in *Nearing v. Minister for Justice, Equality and Law Reform* as set out above. The trial judge found there was no such delay in the present case, given the 5½ month/2 month time-periods that were in issue after the revocation/review applications had been respectively commenced.

60. The appellant’s submission is that he did not have to plead delay and that in any event the issue was not one that lent itself to the consideration of a time frame but to a consideration of what was reasonable. He relied upon *Mahmood & Anor. v. Minister for Justice and Equality* [2016] IEHC 600 to summarise the legal position in relation to the granting of an order for *mandamus* by emphasising points at para. 138 – 151 of that judgment. In that case, Faherty J. at para. 138 had quoted with approval from Cooke J. in *Saleem v. Minister for Justice* (a case involving a residence card which required the decision to be made within 6 months) as follows:

“Where the authority has power to make a decision but no time is fixed by law for it to be made there is nevertheless a duty to make the decision within a reasonable time.”

61. The appellant referenced the discussion in *Mahmood & Anor. v. Minister for Justice and Equality* at paras. 91-142 of the judgment relating to the urgency required as a matter of

law, as set out in Article 5(2) of the Directive, in issuing family members of EU nationals right of entry to Member States “*grant such persons every facility to obtain the necessary visas [which] shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.*”.

62. Citing Edwards J. in *K.M. and D.G. v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 234 the appellant lists the factors to be taken into account in determining reasonableness. These were the period in question, the complexity of the issues to be considered, the amount of information to be gathered and the extent of the enquiries to be made, the reasons advanced for the time taken, the likely prejudice to the applicant on account of delay.

63. It is however also unsatisfactory for the appellant not to plead unreasonableness in his grounds seeking *mandamus*. In truth it is difficult to see that there is any real difference in this context between calling a failure to make a decision within a particular time period a complaint of delay or a complaint of unreasonableness in failing to make a decision. In the same way as delay ought to have been pleaded, then so too should have been a claim that the time taken to give a decision was unreasonable. Nonetheless, even accepting that the issue is one of reasonableness there is no basis for considering this point on any different threshold to that which was applied by the trial judge. He had decided the question of delay based upon the delay being egregious and unjustified. That was the wording also used by Faherty J. in reaching her conclusions in *Mahmood & Anor. v. Minister for Justice and Equality* (see para. 140). Therefore, the issue is whether the trial judge was correct in reaching the conclusion that he did on this issue.

64. The trial judge accepted that in certain circumstances, the timeframes at issue in the present case might be held to be egregious and unjustified, but that these circumstances did not present in this case. The fact that further information was provided was correctly identified by

the judge as relevant to this case (although he noted it would not preclude the Minister at any previous time from making a decision by reference to the material before him).

65. I am satisfied that the appellant has not put before this Court sufficient material to demonstrate that the High Court judge was incorrect in his refusal to grant the relief of *mandamus* on the basis of unreasonableness. This was not an obvious case of excessive time frames *per se*. The periods were not *prima facie* overlong. Moreover, considerable new information was being put before the decision maker (including after proceedings issued) and the matters were of complexity. Contrary to the appellant's submission on appeal, there was an explanation for the lapse of time put forward by the Minister (see affidavit of Mr. Jim Boyle sworn on the 30th October, 2019 at para. 14, being the fact that his decision would be processed in turn after the processing of earlier applications. The deponent had also stated that the appellant had not given any reason why he should have priority.

66. I am satisfied therefore that there is no basis for holding that the trial judge erred in failing to grant an order of *mandamus* on the basis of delay/reasonableness.

67. The appellant sought in the appeal to make the case that the High Court erred in failing to find any urgency to the appellant's application for revocation. This, as stated, appears to be the sense in which the appellant was seeking to bring in the *Chenchooliah* decision into the appeal, bearing in mind that the declaratory relief was no longer live in the case.

68. It is of note that the *Chenchooliah* decision, being the CJEU's judgment, was delivered months after these proceedings commenced. The appellant did not seek to amend the proceedings to incorporate directly any of the issues that he wishes to rely on from that judgment. Reading the statement of grounds, it is apparent that he did not plead that his rights under the Directive were being violated and thus he was entitled to the order of *mandamus*. To the extent that his claim is that the decision in *Chenchooliah* lent urgency to the decision-making process and thus gave him rights which should have been immediately (and almost

automatically) respected by the grant of residency and revocation of the deportation order, the following observations can be made:-

- a) As is self-evident he did not make his application on the basis of the judgment in *Chenchooliah* prior to the application for *mandamus*.
- b) His claim that it gives him automatic rights to residency and revocation is contested by the Minister who says that any rights are dependent on whether a durable relationship between a third country national and an EEA national exists.

69. I do not consider it necessary for me to decide the issue of whether the decision in *Chenchooliah* gives the appellant the legal rights he claims; the very existence of the dispute between the appellant and the Minister as to whether he is covered by the decision had to be resolved by the Minister at first instance. Even if it turns out that the Minister is wrong and that by reason of *claiming* a relationship he is entitled to the benefit of the decision, this was clearly a matter of some complexity which required a reasonable amount of time to consider. The appellant simply did not give sufficient time for the examination of all these issues. The question of the urgency of the situation based upon *Chenchooliah* had simply not arisen at the time these proceedings were taken. Moreover, the appellant's claim was changing substantively in the interim between the application for leave and the hearing of the High Court substantive application. He had produced documents that he said evidenced his marriage in Pakistan. These were clearly matters that the Minister would require time to examine.

70. I conclude that even when the decision in *Chenchooliah* is taken into account, the application for *mandamus* was correctly refused by the High Court. If there is a right based somehow on the decision in *Chenchooliah*, it is clearly a matter which required consideration by the Minister. The proceedings were premature and the appellant ought to have awaited the decision of the Minister when all issues relating to *Chenchooliah* could have been dealt with.

71. Having made the above findings, I also find that the questions proposed by the appellant for reference to the CJEU are premature and unnecessary for the resolution of this appeal.

These questions are:-

1. Where a Member State has implemented a deportation order which serves to exclude a family member of an EEA national from its territories with permanent effect, is the Member State obliged to revoke such a deportation order to permit the EEA family member to avail of the provisions of Directive 2004/38/EC?
2. If so, must a Member State give immediate effect to the revocation of such a deportation order, or is a Member State otherwise obliged to act promptly to effect revocation?

72. In his written submissions, the appellant advances these questions by saying “if there is any remaining lack of clarity arising from the Directive with respect to the rights of family members including “permitted family members” to revocation of a deportation order under s. 3 of the 1999 Act to permit an application for re-entry to be made...”. There is no lack of clarity as to those rights because the question simply does not arise on the facts of these proceedings.

Conclusion

73. The appellant has brought this appeal against a refusal to grant him an order of *mandamus* arising out of his application to revoke a deportation order against him and also to decide on his application for a residence card. The appellant had already lost at first instance and on appeal an application made under Article 40 for his release from detention pending deportation was unsuccessful. As discussed above the main thrust of these judicial review proceedings, issued but not moved at the same time as the Article 40 application, was focused on his right to relief pending determination of his application.

74. The appellant's argument on appeal was primarily directed towards establishing that the decision of the CJEU in *Chenchooliah*, delivered after the leave application but before the High Court hearing, gave him rights which required an urgent decision in his favour on the basis of his relationship with an EU national who was exercising Treaty rights in Ireland. The trial judge was correct in holding that the alleged failure to consider his fundamental rights, the only ground remaining in the case, had not been established where no decision had yet been taken by the Minister. The trial judge held that delay was not pleaded and that on that basis the application could be refused. Nonetheless he went on to consider the issue of delay. He was also correct in holding that there was no delay, in the sense of egregious or unjustified delay in these proceedings. Regardless of whether the lapse of time is termed, delay, lack of urgency or unreasonable, the appellant failed to establish that there was any such breach in the circumstances of the present case.

75. The issues identified in *Chenchooliah* were not part of the pleadings in this case. Even if they were however, they would not alter the outcome of the case. Without deciding whether the appellant is correct or incorrect that these gave him an automatic right to have his residence card granted and his deportation order revoked, these were still issues which required at least some consideration by the Minister. Given the complexity of the issues and the time frame involved there was no error in refusing to grant the appellant an order of *mandamus*.

76. For the reasons stated in this judgment, I would dismiss this appeal.

77. As regards costs, given that the appellant has failed in this appeal, it would appear to follow that the Minister is entitled to the costs of her appeal, to be adjudicated in default of agreement.

78. If the appellant wishes to contend for a different form of order in this appeal (including the order for costs), he will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing. If such hearing is requested and results in an order in the

terms I have provisionally indicated above, the appellant may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

79. *In circumstances where this judgment is being delivered electronically, Noonan and Binchy J.J. have authorised me to record their agreement with it.*