THE HIGH COURT

[2018 No. 1048 JR]

BETWEEN

CHARLOTTE PUONG (A MINOR SUING BY HER MOTHER AND NEXT FRIEND PHEI WOOI CHEW) AND PHEI WOOI CHEW

APPLICANTS

– AND –

THE MINISTER FOR FOREIGN AFFAIRS AND TRADE

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered 14th day of November, 2019.

1. Ms Chew and Miss Puong are a Malaysian mother and daughter. Ms Chew originally came to Ireland as a dependent of her husband. Miss Puong was born in Ireland on 30.01.2018 and an Irish passport issued to her on 13.04.2018, on the basis that Ms Chew had been lawfully resident in Ireland for three of the four years prior to Miss Puong's date of birth. (Although Ms Chew and her husband remain married, at some time she entered into what is a continuing relationship with Mr Puong, the father of Miss Puong). Following the issuance of the passport on 13.04.2018, the Minister for Foreign Affairs later decided that the passport had issued in error and the passport has been cancelled.

2. The permissions given to Ms Chew for the four years prior to the birth of Miss Puong are endorsed on her passport and are detailed below:

Permit/ Stamp type	**Reckonable Residence**	**From**
	From	**To**
Stamp 2	30.01.2014	25.07.2014
Stamp 2	29.07.2014	24.07.2015
Stamp 3	25.07.2015	12.07.2016
Stamp 3	13.07.2016	20.06.2017
Stamp 3	21.06.2017	30.06.2018

3. In addition to the above, Ms Chew was present in Ireland on successive Stamp 3 permissions (by virtue of being here with her husband) from 14.04.2010 to 09.03.2012 (there appears to have been a three-day gap in 2011 when her previous permission had elapsed and the next one had yet to issue; nothing turns on this gap in the within application).

4. Section 6A(1) of the Irish Nationality and Citizenship Act 1956 ('Act of 1956') provides:

> *"A person born on the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years."*

5. Because Miss Puong was born on 30.01.2018, it is the four-year period prior to that date which counts for the purposes of arriving at the necessary three years or more of residence in this case.

6. Section 6B(4) of the Act of 1956 provides:

> *"A period of residence shall not be reckonable for the purposes of calculating a period of residence under section 6A if – (a) it is in contravention of section 5(1) of the Act of 2004, (b) it is in accordance with a permission given to a person under section 4 of the Act of 2004 for the purpose of enabling him or her to engage in a course of education or study in the State…".*

7. Stamp 2 permission is permission given for the purpose referred to in subsection (b), albeit that it comes coupled with a condition allowing a limited take-up of work.

8. Applying the above rules to the case at hand one arrives at the following result:

Permit/ Stamp type	**Residence**	**From**	**Comment**	**Overall Result**
	From	**To**		
Stamp 2	30.01.2014	25.07.2014	Stamp 2, so not reckonable	Time requirements of s.6A(1) not met.
Stamp 2	29.07.2014	24.07.2015		
Stamp 3	25.07.2015	12.07.2016	Reckonable	
Stamp 3	13.07.2016	20.06.2017	Reckonable	
Stamp 3	21.06.2017	30.06.2018	Reckonable to 30.01.2018	

9. As mentioned, a passport was issued to Miss Puong. The Department of Foreign Affairs subsequently had its attention drawn to the difficulty with reckonable residence identified in the last table above. By letter of 02.08.2018, the Department of Foreign Affairs contacted Ms Chew, indicated that the passport required to be cancelled and invited representations which could be made up to 15.09.2018, with the possibility of extension of that timeline.

10. By letter of 06.09.2018, the solicitors for the applicants indicated to the Department of Foreign Affairs, *inter alia*, that:

. In March 2012, Ms Chew's marriage was in some difficulty and consequently her husband would not attend the Garda National Immigration Bureau ('GNIB') with her and she was therefore refused a Stamp 3 permission. The applicants claim that this

was in error because Ms Chew's husband was still resident and working in Ireland and she was at that time still in Ireland as his dependent, and his unwillingness to cooperate should not have resulted in a decision to refuse her Stamp 3 permission.

. Ms Chew was therefore given Stamp 2 permission by virtue of her being a student at a particular educational institution from March 2012 to July 2015.

. Following a (temporary) re-kindling of her marital relationship Ms Chew was granted a Stamp 3 permission from 13.07.2016.

11. Having considered all the submissions made, the Department of Foreign Affairs indicated by letter of 19.09.2018 that in the absence of evidence from the Department of Justice, Miss Puong was unable to demonstrate an anterior entitlement to Irish citizenship and hence had no entitlement to an Irish passport. This was reiterated in a letter of 31.10.2018 following receipt of a letter of 02.10.2018 from the solicitors for the applicants, which essentially alleged a breach of fairness of procedures (non-engagement with the submissions made in the letter of 06.09.2018). The closing paragraph of the latter letter is strikingly reasonable, stating:

> *"It should be noted that if Ms Chew is successful in any case that she may make to the Department of Justice and Equality, which is responsible for immigration matters, to have her stamp 2 permissions changed to stamp 3 permissions, the Department [of Foreign Affairs] will consider a new passport application for the Applicant. It would be important to support such an application with a [suitable] letter from that Department".*

12. Following on the above, the solicitors for the applicants wrote to the Department of Justice on 21.11.2018. With their letter to the Department of Justice, the solicitors included the correspondence of 06.09.2018, 19.09.2018, 02.10.2018, and 31.10.2018 (the letter containing the last-quoted text). So the Department of Justice was apprised of exactly what was afoot and it must or should have been clear to it from the just-quoted text why it was being approached on Ms Chew's behalf. It is worth quoting the mainstay of the text of the letter of 21.11.2018, which reads as follows:

> *"Dear Sirs*
>
> *We refer to the above matter and in particular to the correspondence which we have exchanged with the Department of Foreign Affairs and Trade…*
>
> *1) Letter of the Department of 6th September 2018;*
>
> *2) Letter from the Department [of] 19th September 2018;*
>
> *3) Letter to the Department [of] 2nd October 2018;*
>
> *4) Letter from the Department [of] 31st October 2018.*

We enclose herewith copy of the said correspondence for your attention.

You will note that the Department of Foreign Affairs and Trade has now cancelled Ms Charlotte Puong's passport.

You will further note that it is our submission that the true and correct position is that Ms Chew was at all times of the relevant period of calculation, resident in the State owing to her marriage to a Stamp 4 Resident in the State.

Strictly without prejudice to our client's right to challenge the decision of the Department of Foreign Affairs and Trade, and in light of the final paragraph of the Departments [i.e. the Department of Foreign affairs'] correspondence of the 31st October 2018, we would be obliged if you could revert to us as a matter of urgency to confirm that [the] position is as stated in our client's submissions, namely that she was at all times entitled to a Stamp 3 permission in the State, notwithstanding that she was given a Stamp 2 at the relevant time owing to her particular circumstances, and that therefore the period of January 2014 to July 2015 should be reckonable for the purposes of determining the eligibility of Charlotte Puong to Irish citizenship by birth. We rely in that regard on the submissions we have made to the Department of Foreign Affairs as attached herein…"

Ms Chew and her child have been considerably prejudiced by the decision to revoke the passport of Charlotte Puong and we believe that the decision should not have been taken without the Department of Foreign Affairs seeking a clear and detailed analysis of the position from the Department of Justice and Equality in light of the submissions which were made by [us]…".

13. Further to the last-quoted paragraph, having had regard to s.6B(4) and the stamps in Ms Chew's passport, the Minister for Foreign Affairs was and is (correctly) not satisfied that the requisite reckonable residence presents at this time for Miss Puong to enjoy citizenship. Citizenship is a necessary anterior status that must exist for a passport to issue; so here a passport just cannot issue at this time, and the issued passport falls to be cancelled. (See, e.g., *Gao v. Minister for Foreign Affairs and Trade* (Unreported, High Court, Peart J., [Date not stated in judgment], July 2014)). The Immigration Act 2004 ('Act of 2004') does not confer any power on the Minister for Foreign Affairs to grant, refuse or vary a permission; such matters are for the Minister for Justice. If anything the Minister for Foreign Affairs went beyond the call of duty by steering Ms Chew in the direction of the Department of Justice and he also properly indicated a willingness to reconsider Miss Puong's passport application if the applicable facts change. There is no 'double bind' of the type contended for by Ms Chew, in which the Minister for Foreign Affairs did a legal wrong and the Department of Justice then did a further legal wrong, leaving Ms Chew, to borrow a colloquialism, 'between a rock and a hard place' in terms of seeking relief and/or knowing how to advance her case.

14. By letter of 22.03.2019 (after the Department of Justice had had a good length of time to consider comprehensively the letter of 21.11.2018 and the attachments thereto), a

lawyer from within the Department issued a reply to that letter, indicating that "*I am unable to provide this confirmation*", and also indicating that "*[Ms Chew's] husband notified Immigration that they had separated in March 2011 and on 28th March 2012 she was advised that she should write to INIS to obtain permission in her own right*". Some time was expended at hearing as to whether this letter constitutes a decision at all. It seems to the court that it can only be read as reflecting a decision to refuse to accede to all that was sought in the letter of 21.11.2018.

15. In passing, the court does not see why Ms Chew would necessarily have been "*advised*" as she was on 28.03.2012. The court has before it an affidavit in which a Higher Executive Officer at the Department of Justice avers, *inter alia*, as follows:

> *"I say that where a non-EEA spouse/dependent of the employment permit holder presents for a stamp 3 renewal, it is the Second Named Respondent's policy not to renew the stamp 3 permission unless there is in place a continuing marriage/dependency relationship, which is in fact subsisting at the time a person presents at INIS seeking a permission renewal".*

16. It is not entirely clear what "/" means when used in the text above. Perhaps more often than not one would use "/" to show alternatives, but even assuming that here it means 'and', the fact that a husband and wife separate does not mean that they are not married and does not yield the inexorable conclusion that the wife (assuming she has previously been a dependent wife) is no longer dependent. So it does not follow as a matter of logic that because Ms Chew and her husband separated in March 2012 she immediately and inevitably needed to obtain permission other than Stamp 3 permission. Ms Chew was undoubtedly still married, she may then have been (she claims that she was) in a continuing state of dependency on her husband, and hence Stamp 3 permission may then have continued to be (she claims it was) the appropriate permission.

17. The court also does not see that Ms Chew's application and/or these proceedings represents an impermissible collateral attack on how Ms Chew was treated following her separation from her husband back in 2012. If it remains open to the Minister to vary the issued permissions under s.4 of the Immigration Act 2004, and, the court having raised this issue by way of question at hearing, there was common agreement in this regard between counsel for both sides to this application that the Minister can so do (in fact counsel for the Ministers interjected when counsel for Ms Chew addressed this point in his closing arguments to indicate that she had said 'yes' in response to the court's question), then it does not seem to the court that it can reject as impermissible an application which in its substance seeks to achieve what statute (s.4(7) of the Act of 2004) recognises as (and all of the counsel before the court accept is) *permissible*, and which the Department of Foreign Affairs in its letter of 31.10.2018 clearly accepts is open to Ms Chew to make.

18. Arising from the above-outlined facts, four key questions are contended to arise in the within judicial review proceedings and are considered hereafter.

1. Does the respondents' opposition to the within proceedings demonstrate a fundamental dysfunction in the decision-making process in reckonable residence in this case that the impugned decision(s) should be quashed?

19. Whether or not one can describe it as a "*fundamental dysfunction in the decision-making process*", there is a fundamental error presenting in the decision of 22.03.2019 in that the Minister has failed to engage with the key issues raised by the solicitors for Ms Chew in their letter of 21.11.2018. In that letter the solicitors are clearly making the point 'My client ought to have been given Stamp 3 permission despite being separated' and the reply in effect is 'Your client was given Stamp 2 permission because she was separated'. Unaddressed are the consequences that flow from Ms Chew's particular separation and, in particular, whether or not a variation should issue such that Ms Chew can return to the Department of Foreign Affairs with the type of letter contemplated by that Department in the closing paragraph of its letter of 31.10.2018 (and to which the attention of the Minister for Justice was expressly drawn in the letter of 21.11.2018). In this regard, the court finds for the applicants under point E(ix) of the amended statement of grounds, though noting that (as was correctly contemplated by the Department of Foreign Affairs in its letter of 31.10.2018) reckonability can only arise if the impugned Stamp 2 permissions are varied to Stamp 3 permissions.

20. At the hearing of this application, counsel for the Ministers (a) made reference to the observation by Hardiman J. in the penultimate paragraph of his judgment in *G.K. v. Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 17th December 2001) that "[*a] person claiming that a decision making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence…of that proposition*", and (b) drew the court's attention to the fact that in the decision-letter of 22.03.2019, the author of same references the receipt of the letter of 21.11.2018 and the attachments to same (and presumably means to indicate thereby that they have been read). However, it is important to remember that Hardiman's J. observation states what it states and states no more: it is authority for the proposition that "*[a] person claiming that a decision making authority has, contrary to its express judgment, ignored representations which it has received must produce some evidence…of that proposition*"; it is not authority for the proposition that having read what has been received, a decision-maker can then be excused when in her/his decision s/he side-steps the substance of the application before that decision-maker, as happened here. Indeed, given the contentions by the Department of Justice at hearing that the decision-letter of 22.03.2019 does not involve the making of any decision (when in fact it does), a question arises whether the Department ever properly understood what was being sought of it in the letter of 21.11.2018, despite this being abundantly clear from that letter and the attachments thereto.

2. Did the Minister for Foreign Affairs adopt an unreasonable procedure and/or breach fair procedures in the manner in which decisions of 19.09.2018 and/or 31.10.2018 were reached.

21. 'No' for the reasons stated above.

3. Did the Minister for Foreign Affairs breach the requirement to consider the proportionality or reasonableness of cancelling Ms Chew's passport by reference to the fact that by so doing he was thereby depriving her of the benefit of citizenship of the European Union and/or the benefits accruing to a passport holder of an EU member state?

22. This point essentially concerns the precise import of the decision of the European Court of Justice in *Rottmann* (Case C-135/08) [2010] E.C.R. I-1449. The court does not consider that it is necessary to explore this point further given its answer to the first question above. Were matters otherwise, the court would have sought further argument from the parties as to whether, in light of the findings of the European Court of Justice in *Kaur* (Case C-192/99) [2001] E.C.R. I-1237 the ultimate sentence of the Chief Justice's observations in *A.P. v. Minister for Justice and Equality* [2019] IESC 47, para. 6.8, and the decision in *Gao*, this Court now could properly and should make a reference to the European Court of Justice concerning the dispute between the parties hereto as to the precise import of Rottmann.

4. Should the decision of the Minister for Justice be quashed as a failure to exercise a relevant power or perform a relevant function?

23. The decision will be quashed for the reasons identified above.

24. Separate to the four questions contended to present, counsel for the Ministers indicated that if the court was minded to quash the decision of 22.03.2019 (it is), it should decline to do so because of a lack of candour shown to the court by Ms Chew. In this regard counsel for the Ministers drew the attention of the court to the fact that when Ms Chew attended at the GNIB on 21.06.2017, she indicated herself to be dependent on her husband when in fact she was in a relationship with Mr Puong and pregnant with his child (Miss Puong). Counsel further drew the court's attention to the fact that on 31.07.2018, Ms Chew swore an affidavit in immigration proceedings concerning Mr Puong, in which she averred, inter alia, as follows:

> *"2. I say that I am in a relationship with Mr…Puong who is the father of my Irish Citizen Child…[Miss] Puong….*
>
> *4. I further say I am on maternity leave at present and my partner is the sole financial provider for both me and our daughter".*

25. It follows from the above that Ms Chew, though still married to her husband, was, as of 31.07.2018, dependent on Mr Puong (though this does not mean that she could not have been dependent on him in June 2017, notwithstanding that she was then pregnant with Mr Puong's child). The reference to "*maternity leave*" suggests that she has (or had) employment in breach of her Stamp 3 permission.

26. The court has no idea when Ms Chew's dependency on her husband (who is still her husband) ceased, save to note that it must have ceased on or before (presumably before) 31.07.2018. Moreover, Ms Chew's counsel indicated that Ms Chew denies any wrongdoing

in her actions. So while Ms Chew may perhaps have some explaining to do in this regard when matters go back to the Minister for Justice, the court nonetheless considers that (a) for the reasons stated above, the decision of 22.03.2019 should be quashed and this matter remitted to the Minister for further consideration, and (b) there is not enough in the alleged want of candour to justify the court refusing to exercise its discretion in the just-described manner.