THE HIGH COURT

[2024] IEHC 103

[Record No. 2023/247 JR]

BETWEEN:-

KHALID MOHAMED SAID HUSSAIN ELBAHLAWAN

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr Justice Barr delivered on the 23rd day of February 2024.

Introduction.

1. In this application, the applicant seeks an order of *certiorari* in respect of a decision of the Minister dated 6 December 2022, holding that he did not come within the principles set down by the CJEU in *Chenchooliah v Minister for Justice & Equality* (Case C-94/18), which would have meant that he was entitled to be removed from the State pursuant to Directive 2004/38/EC, rather than be deported pursuant to s. 3 of the Immigration Act 1999.

2. The applicant argues that the impugned decision was flawed, because the Minister did not have regard to the fact that he had acquired EU treaty rights (hereinafter 'EUTR'), as a qualifying family member, during the period that he resided in Ireland with his Swedish wife, Ms Bjuhr, in the period 2009 to 2013.

3. The applicant further argues that the impugned decision should be set aside for failure to provide any, or any adequate, reasons why he did not come within the *Chenchooliah* principles, or in the alternative, for failure to state when it was alleged by the Minister that he lost the capacity to rely on such principles.

4. In response, it was argued on behalf of the respondent that having regard to the complex immigration history of the applicant in the years after the breakdown of his marriage to Ms Bjuhr and her departure from the State in 2013; and having regard to the fact that the applicant had acquired a right to remain in the State pursuant to a number of Stamp 4 visas thereafter; and having regard to the fact that he had left the State in 2018 and returned to Egypt, where he had remarried; the Minister was correct in holding that any rights that he may have acquired upon the departure of his Swedish wife in 2013, had long since been spent, by the time of his further application in 2022.

5. In relation to the reasoning point, it was argued that while the decision had not set out the applicant's immigration history in detail, that history was well known to the applicant. It constituted a correct basis on which the Minister was entitled to reach her decision. In these circumstances, it was denied that there was any material want of reasoning in the impugned decision.

Background.

6. The applicant's immigration history in the State is somewhat complex. It is relevant to the decision that was issued by the Minister on 6 December 2022. Accordingly, it is necessary to give a brief summary of the applicant's immigration history.

7. The applicant entered the State as an asylum seeker on 8 December 2001. In a decision dated 5 July 2002, his asylum application was refused.

8. The applicant married one, Ms Elmakky, in Egypt on 21 July 2004. The applicant returned to Ireland on a student visa (Stamp 2) and registered this permission with the respondent on 21 December 2004. His marriage to Ms Elmakky broke down. He obtained a certificate of divorce in respect of that marriage on 27 November 2007.

9. The applicant subsequently began a relationship with Ms Bjuhr, who is a Swedish national. They married on 2 May 2009. On the basis of this marriage, the applicant applied for and was granted a Stamp 4 EU Fam visa, valid from October 2009 until October 2014. The applicant was granted EUTR permission by letter of 26 April 2010, as a qualifying family member of Ms Bjuhr.

10. The applicant's marriage to Ms Bjuhr broke down, after which she returned to Sweden. The applicant's EUTR permission was revoked by decision of 23 April 2013, on the basis that the applicant's EU citizen wife no longer resided or exercised her EUTR in the State; accordingly, the applicant did not qualify for residency under the Free Movement Regulations 2006 and 2008. That decision was upheld on review by a decision dated 18 June 2013, in which it was also found that the applicant had no basis for the retention of his EUTR permission under the 2006 and 2008 regulations.

11. Pursuant to a proposal to deport the applicant, he was invited to make submissions. The applicant made submissions as to why he should not be deported. On 13 February 2014, the Minister granted a discretionary Stamp 4 permission to the applicant to remain in the State for a period of two years. In or around 12 February 2016, his permission to remain in the State was renewed for a further three years, until 11 January 2019.

12. In August 2018, the applicant travelled to Egypt for a short holiday. While in Egypt, the applicant alleges that he was involved in a serious RTA on 25 August 2018. It is alleged that he suffered serious injuries in that accident, including fractures to both legs. He states

that he was hospitalised for a prolonged period. As a result, he was unable to return to Ireland before the expiration of his visa.

13. The applicant applied for a visa to return to Ireland on 9 April 2019. In August 2020, his application was refused. His appeal against that refusal, was upheld in a decision dated 22 November 2021, on the basis that he had *inter alia* submitted false/misleading documents in support of his visa application.

14. The appeals officer imposed a five year ban on the applicant from making any further visa applications in the State from the date of the submission of the visa application on 9 April 2019, as it was the opinion of the appeals officer that the applicant had repeatedly and knowingly submitted additional and misleading documentation and information to support false documents. It was found that the applicant had failed to adequately address concerns raised in respect of a number of supporting documents, namely police and hospital reports concerning his accident and a number of marriage certificates.

15. In his affidavit sworn in the present proceedings, the applicant stated that after his accident in Egypt, he remarried his first wife.

16. During the applicant's absence from the State, he was granted citizenship of the State, but because of his absence, he could not finalise same, as he was not in a position to make the declaration of fidelity to the nation and loyalty to the State. Subsequently, on a reconsideration of the citizenship application on 30 March 2022, the applicant was refused citizenship by reason of the matters arising in the visa application.

17. The applicant re-entered the State on 8 January 2022 and was refused leave to land at Dublin Airport. On that occasion, he sought to re-enter the International Protection System pursuant to s.22 of the International Protection Act 2015. That application was refused by letter dated 5 May 2022.

18. By letter dated 7 July 2022, the applicant's solicitor sought a temporary Stamp 1 visa on the applicant's behalf, claiming that he came within the CJEU decision in *Chenchooliah*. By email dated 6 December 2022, the respondent found that the applicant did not come within the principles set out in that judgment. It is that decision that is impugned in the present proceedings. On 20 June 2023, the applicant was granted leave to seek judicial review in respect of that decision.

Relevant parts of the Impugned Decision.

19. The impugned decision is very brief. The relevant paragraphs are as follows:

> *"I am directed by the Minister for Justice to refer to your office's correspondence dated 25 November 2022 in relation to the immigration case of your above named client. The position is that your client's immigration case remains that he was not accepted as being a family member of an EU citizen who was exercising EU Treaty Rights in the State.*
>
> *Having examined your client's immigration history, it is not accepted that his case falls within the parameters of the ECJ Ruling in the Chenchooliah case. This is on account of the fact that your client was not found to be a permitted family member of an EU citizen for the purposes of the European Communities (Free Movement of Persons) Regulations 2006 and 2008. These regulations were no longer valid once your client's EU national spouse ceased exercising EU Treaty Rights in the State. Therefore, it is evident that the European Court of Justice (ECJ) ruling in the Chenchooliah case has no bearing on your client's case."*

Conclusions.

20. The decision of the CJEU in *Chenchooliah v Minister for Justice* determined that while the applicant had been no longer a beneficiary within the meaning of Art. 3(1) of the Citizens' Directive 2004/58/EC, it was not appropriate that she should be subject to an exclusion order pursuant to national law, having previously been a beneficiary of rights under the Directive. The court held that where the applicant had been a beneficiary under the provisions of the Directive, the Minister had erred in law in attempting to deport her.

21. In its judgment, the court noted that the Directive contains not only rules governing the conditions under which various types of residence may be obtained and the conditions to be met in order to enable a person to continue to enjoy the rights concerned; it also laid down a set of rules intended to govern the situation arising in which entitlement to one of those rights was lost, inter alia, where the Union Citizen had left the host member state. The court noted that in Art. 15 of the Directive, it was provided that the procedures provided for by Arts. 30 and 31 of the Directive were to apply by analogy to all decisions restricting free movement of Union Citizens and their family members on grounds other than public policy, security or public health. The court further noted that Art. 15 (3) of the Directive provided that the host member state may not impose a ban on entry in the context of an expulsion decision.

22. The court went on to state in paragraph 73 that where a family member of the Union citizen had enjoyed rights under the Directive, they would still enjoy certain rights under it, even where they no longer had such a right of residence, following the departure of the Union Citizen from the host member state. The court stated as follows at para. 73:

> "*However, if, at any time, those persons no longer satisfy the conditions laid down in Directive 2004/38, meaning that they lose their status as 'beneficiaries' within the meaning of Article 3(1) of that directive, and therefore their rights of entry to and*

residence in the host Member State, this does not mean that other provisions of that directive do not apply to them. Such other provisions govern not only the conditions for retention of a right of residence and the conditions under which that right ceases to exist (Articles 12 to 14) but also the restrictions on the rights of entry and of residence and protection in the event of expulsion (Article 15)."

23. The court noted at paragraph 88, that in the circumstances of the *Chenchooliah* case, where the applicant's spouse had returned to Portugal from Ireland, any expulsion decision that may be made in relation to the applicant, could not under any circumstances impose a ban on re-entry into the territory. The court went on to answer the question posed to it, in the following way at para. 89:

"*Directive 2004/38 lays down restrictions and procedural safeguards applicable to the expulsion of Union citizens and their family members. More specifically, that directive draws a distinction between* two different sets of rules *which are based on the grounds justifying the expulsion. Thus, an expulsion decision may be justified either on grounds of public policy, public security or public health (Chapter VI), or on* other grounds *(Article 15), inter alia the fact that a beneficiary of Directive 2004/38 ceases to fulfil the conditions of residence laid down in that directive*."

24. I turn now to the present application. Having regard to the decision which the court has reached on the issues in this case, it is appropriate to take the second issue, first; being the lack of reasons point.

25. The duty on a decision maker to give reasons for his or her decision, has been long established at Irish law. In *Connelly v An Bord Pleanála* [2018] 2 ILRM 453, Clarke J (as he then was), when considering the caselaw in relation to the duty to give reasons, set out the following at para. 6.15:

"*6.15. Therefore, it seems to me that it is possible to identify two separate but closely*

related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review."

26. The duty to give reasons is a product of the overall duty of fairness owed to an applicant by an administrative body. In *Mallak v Minister for Justice* [2012] 3 IR 297, Fennelly J stated at para. 66:

"*The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.*"

27. Specifically in an asylum context, this duty does not require the Minister to provide an exact reason for its decision on each individual assertion made by the applicant, but rather they must provide their main reasons for the decision (see *MEO v. IPAT & Ors* [2018] IEHC 782 and *RR (No. 2) v. Refugee Appeals Tribunal & Ors* [2013] IEHC 468).

28. In argument at the bar, Ms McMahon BL on behalf of the respondent put forward a strong case that the decision that had been reached by the respondent was correct in law. She argued that this case was different to the *Chenchooliah* case in a number of significant

respects: first, the applicant was no longer married to Ms Bjuhr, who had left Ireland in or about 2013, following the breakup of her marriage with the applicant. Secondly, when the Minister had proposed to deport the applicant in 2014, he had made submissions why he should be allowed to remain in the State. Those submissions had been successful. The Minister had exercised her discretion to grant him a Stamp 4 visa for two years. That had been renewed in 2016 for a further three years. It was submitted that during that period, the applicant's EU Treaty Rights had ceased and he had relied on a permission granted under national law, as his lawful basis for remaining in the State. In the interim, his marriage with his Swedish wife had been ended by a decree of divorce.

29. Thirdly, he had voluntarily left the State in August 2018 to return to Egypt, where he had remarried his first wife. Fourthly, there had been intervening applications for further visas and for citizenship, as outlined earlier in the judgment. Fifthly, it was not until nine years after the cessation of his EU Treaty Rights in 2013, that, in 2022, the applicant had sought to rely on his previous marriage to Ms Bjuhr and her presence in the State up to 2013, to ground his claim to derivative *Chenchooliah* rights.

30. It was submitted that in these circumstances such *Chenchooliah* rights as had been enjoyed by the applicant upon the departure of Ms Bjuhr from the State in 2013, had long since expired and had been eclipsed by the events that had intervened between 2013 and 2022.

31. While the court can appreciate that there is merit in this argument, it is not reflected in the somewhat terse decision of the Minister of 6 December 2022. The decision does not explicitly acknowledge that at one stage the applicant had EU Treaty Rights in the period 2009 to 2013 and that he had derivative rights pursuant to the *Chenchooliah* decision, upon the departure of Ms Bjuhr from the State in 2013.

32. More importantly, the decision does not state why, or when, such rights may have become spent. I do not think that such reasoning can be inferred from the second paragraph of the decision.

33. Indeed, it could be argued that the Minister had made an error of law when she stated that the 2006 and 2008 regulations were no longer valid, once the applicant's EU national spouse had ceased exercising her EU Treaty Rights in the State. The decision seems to state that it was on that basis, that the ruling of the CJEU in the *Chenchooliah* case had no bearing on the applicant's case. It seems to suggest that such rights as the applicant enjoyed under the 2006 and 2008 regulations were no longer valid upon the departure of Ms Bjuhr from the State. Therefore, the ruling in the *Chenchooliah* case did not have a bearing on his application. That is clearly wrong. The whole point of the *Chenchooliah* decision is that once a person's EU Treaty Rights cease to exist, due to the departure of their EU spouse or partner from the State, it is then, that the rights recognised in the *Chenchooliah* decision kick in.

34. At para. 23 of her written submissions, counsel for the respondent, quite rightly, seemed to accept this as being a correct statement of fact, when she stated as follows:

> *"In the present case, if the Minister had sought to deport the applicant when his EUTR permission was revoked pursuant to Article 15 of the Directive on 23 April 2013, this may have been impermissible on the same basis as the ruling in Chenchooliah. However, the applicant was in fact granted permission under national law on 13 February 2014, rather than being removed…".*

35. The key point of the decision made on 6 December 2022, was when the Minister considered that such rights were spent. That is not made clear in the decision. When a person has been resident on and off in the State since 2001, they are entitled to a decision in which the reasoning is made clear. The reasons given in the decision of 6 December 2022, were not clear, or adequate. At the very least, the applicant was entitled to a decision which

acknowledged that he had once held EUTR; that he had also held derivative rights under the *Chenchooliah* decision; and a clear statement as to when the Minister considered that such rights had become spent, or had otherwise been eclipsed by subsequent events. As none of this was stated in the impugned decision, it will have to be struck down for failure to provide adequate reasons for the decision.

36. As the court has ruled that the reasoning in the impugned decision was not sufficient and that on that basis the decision must be set aside and that the matter will have to be considered afresh by the Minister, it is not appropriate for the court to express any opinion on the substantive issue of whether the applicant is entitled to rely on any rights pursuant to the *Chenchooliah* decision. That issue will have to be considered by the Minister when the application is remitted to her for reconsideration.

37. There was no objection to the application on behalf of the applicant for an extension of time within which to bring the present judicial review proceedings.

38. In light of the findings reached by the court in this judgment, it is proposed that the final order will provide for an extension of time within which to bring the within judicial review proceedings up to and including 20 June 2023, being the date on which the leave application was moved; there will be an order setting aside the decision of the respondent dated 6 December 2022; the matter will be remitted to the Minister for further consideration.

39. As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

40. The matter will be listed for mention at 10.30 hours on 14th March 2024 for the purpose of making final orders.