THE COURT OF APPEAL – UNAPPROVED

Appeal Record Number: 2020/112CA
Neutral Citation Number [2023] IECA 73

Faherty J.
Ní Raifeartaigh J.
Binchy J.

BETWEEN/

RAYMOND HOLLAND

APPLICANT/
APPELLANT

- AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 31st day of March 2023

1. This is an appeal from a judgment of the High Court (Barrett J.) in two separate but closely related proceedings bearing High Court record numbers 2018/1023JR (these proceedings) and 2019/312JR. By these proceedings, the appellant sought an order of *mandamus* compelling the respondent to determine the appellant's application for a review (the "Review Application") of a decision of the respondent of 30th March 2017 (the "First Decision"), whereby the respondent declined to issue a residence card to the appellant's stepdaughter, and also a declaration that the failure to determine the Review Application within a reasonable period of time was in breach of the appellant's right to an effective remedy and/or good administration as provided by EU law.

2. However, before these proceedings came on for hearing in the High Court, the respondent, on 29th March 2019, issued a determination of the Review Application, whereby the respondent confirmed the First Decision and affirmed her refusal to issue a residence card to the appellant's stepdaughter. The appellant then sought leave to issue judicial review proceedings whereby he sought, *inter alia*, an order of certiorari quashing the decision of the respondent of 29th March 2019 (the "Impugned Decision") and leave to do was granted by Humphries J. in the High Court on 24th June 2019. Both proceedings came on for hearing on 4th December 2019 in the High Court before Barrett J., who delivered a single judgment addressing both proceedings on 9th December 2019. This judgment is concerned with the first proceedings issued by the appellant, whereby he sought, *inter alia*, an order of *mandamus* as against the respondent. A separate judgment is being delivered concurrently in the 2019 judicial review proceedings.

Background

3. The appellant is a UK national who has resided in the State since 2005 with his wife, a Vietnamese national who is also an Irish citizen. The appellant's wife's daughter, i.e. the appellant's stepdaughter , whose name is Nguyen Thi Kim Tháo (hereafter Ms. Tháo) arrived in the State on 9th June 2016, having been issued with a tourist visa permitting her to stay in the State for 90 days. In the course of applying for that visa, Ms. Tháo gave an undertaking to leave the State before the expiration of the 90 day period.

4. Instead, however, less than three weeks later, on 29th June 2016, Ms. Tháo made an application for a residence card pursuant to Article 7 of the European Communities (Free movement of Persons)Regulations 2015 (the "Regulations) , on the basis that she is a dependent of the appellant and is therefore a "qualifying family member" of the appellant,

as that term is defined in the Regulations. At the time of her entry to the State Ms. Tháo was 29 years of age.

5. In July 2016, the respondent sought further information in connection with the application. A response was provided by the appellant in November 2016. The application was refused by the respondent by way of the the First Decision, on 30th March 2017, on the ground that Ms. Tháo had failed to provide the respondent with sufficient documentary evidence of her claimed dependency on the appellant. Ms. Thao then submitted the Review Application on 10th April, 2017. Following further requests for information by the respondent , and the provision of same by Ms. Tháo , the respondent issued the Impugned Decision on 29th March 2019, whereby the respondent declined the Review Application. Throughout the process, Ms. Thao was at all times assisted by her solicitors.

6. In his judgment, the trial judge sets out a very useful chronology of events, which I gratefully adopt :

"09.06.2016. Mr Holland's stepdaughter enters Ireland on a visit visa.

29.06.2016. Application made for residence card on basis of stepdaughter's alleged EU Treaty Rights ("EUTR").

26.07.2016. Respondent seeks further evidence in respect of application.

10.11.2016. Mr Holland's solicitor sends the requested information.

15.11.2016. Respondent acknowledges receipt of information.

01.03.2017. Mr Holland's solicitor sends letter noting desire for decision to be made.

27.03.2017. Mr Holland's solicitor writes to indicate that stepdaughter's temporary permission to reside is due to expire and asks that decision be made.

30.03.2017. Respondent refuses application for a residence card on basis that evidence of dependence not submitted.

10.04.2017. Application for review of refusal lodged.

27.04.2017. Respondent's [sic] solicitor sends letter seeking acknowledgement of review application.

02.05.2017. Respondent acknowledges receipt of application and indicates that stepdaughter will be given temporary permission to remain until 10.02.2018. Separate letter of same date also seeks further evidence of stepdaughter's financial and material dependence.

25.09.2017. Mr Holland's solicitor submits additional evidence of stepdaughter's dependence

26.09.2017. Respondent acknowledges receipt of said additional evidence.

01.02.2018. Mr Holland's solicitor writes to indicate that Mr Holland has been made redundant. Letter also noted imminent expiry of stepdaughter's temporary permission and seeks review decision.

02.02.2018. Letter issues from respondent extending stepdaughter's temporary permission to stay to 10.06.2018.

30.05.2018. Minister advised that Mr Holland no longer seeking employment because of illness and basis of residence claim was changed.

05.06.2018. Respondent issues letter extending stepdaughter's temporary permission to 10.10.2018.

11.10.2018. Mr Holland's solicitor writes to indicate that stepdaughter's permission to stay had expired the previous day and seeking that review decision be made.

15.10.2018. Respondent issues letter extending stepdaughter's temporary permission to 10.03.2019.

06.12.2018. Mr Holland commences judicial review proceedings (2018 No. 1023 JR) seeking an order of *mandamus* requiring respondent to determine review application (now no longer being sought) and also a declaration that the respondent's failure to determine the

review application within a reasonable time was in breach of the right to an effective remedy and/or good administration as provided by European Union law (this is still being sought). 29.03.2019. Respondent issues a decision refusing the review application, now also the subject of judicial review proceedings (2019 No. 312 JR)."

7. By order of Humphries J. of 10th December 2018, the appellant was granted leave to apply by way of an application for judicial review for the following reliefs:

(1) "An order of *mandamus* compelling the respondent to determine the applicant's application for a review of the refusal to issue a residence card to his stepdaughter which review [application] was submitted on 10th April 2017.

(2) A declaration that the failure of the respondent to determine the applicant's review application within a reasonable period of time is in breach of the applicant's right to an effective remedy and/or to good administration as provided by EU law".

8. At the outset, it must be observed that while the appellant is the applicant in these proceedings, he was not the applicant either for a residence card, and nor was he the applicant in the Review Application. This is an issue raised by the respondent in her submissions, although not in her statement of opposition. In any case I will return to this issue in due course.

Pleadings

Notice of Motion

9. A notice of motion in the terms of which leave was granted (see above) was issued on 13th December, 2018.

Statement of Grounds

10. The statement of grounds is commendably succinct, and it is as expedient to quote the relevant parts in their entirety, as it is to attempt any summary thereof. The grounds upon which relief is sought are as follows:

"**Factual Background**

1. By application dated 29th June 2016 the applicant applied to the respondent for a residence card for his stepdaughter as a qualifying member of an EU citizen residing and exercising his EU Treaty rights within the State. On 30th March 2017 the application was refused on the basis that the applicant had not established that his stepdaughter was dependent on him. The applicant submitted a request for a review of the said refusal on 10th April 2017. By letter dated 11th October 2018 the applicant's solicitor wrote to the respondent calling for a decision to be made in respect of the said review. No such decision has issued.

Grounds

(a) The respondent has failed and/or neglected to determine the applicant's application for a review of the decision to refuse a residence card in respect of his stepdaughter, which review was submitted on 10th April 2017. The said delay is inordinate, unreasonable and/or in breach of fair procedures and/or in breach of Directive 2004/38 and/or EU law and/or the decision of the High Court in *Druzinins v. Minister for Justice* [2010] IEHC 84."

Affidavit of appellant

11. The statement of grounds is grounded upon the affidavit of the appellant of 23rd December 2015. By this affidavit, the appellant sets out the chronology of events summarised above and in the concluding paragraph he says: *"It is now over 29 months since we applied for a residence card for my stepdaughter, and over 19 months since we appealed*

the respondent's refusal of a residence card. I say and believe that the respondent has acted unlawfully for the reasons set out in the statement of grounds herein and I therefore pray this Honourable Court for an order granting leave to seek judicial review."

Decision of 29th March 2019

12. On 29th March 2019, following upon the commencement of proceedings, and before the delivery of the statement of opposition of the respondent, the respondent issued a decision refusing the Review Application. Unsurprisingly, this development gave rise to submissions that the within proceedings were moot from that point in time onwards, and I will address those submissions in due course.

Statement of opposition

13. In her statement of opposition, the respondent denies that the statement of grounds adequately summarises the relevant steps taken and issues arising in the respondent's treatment of the application for review of the decision to refuse Ms. Tháo's application for a residence card. The respondent then proceeds to outline the requests for information which it was necessary to make in the course of the application process, the responses to those requests for information and also the further information provided by the appellant in relation to his own circumstances, firstly on 1st February 2018, and secondly on 30th May 2018, each of which required consideration in the context of the appellant's status as a worker having the benefit of the rights created by the Directive. The respondent pleads that the time taken to determine the Review application was a function of all of the matters mentioned above, as well as:

- The complexity of assessment of dependency;
- The need to take account of the appellant's changed circumstances as notified on 1st February 2018, and 30th May 2018;

- The volume of applications for review of an EU residence card and the need to address such applications fairly and in turn;
- The need to ensure the integrity of the State's borders and in that regard the need to conduct a careful and individualised assessment of each application.

14. The respondent pleads that there is in place an orderly, rational and fair system for dealing with applications for review of EU residence card refusals and that Ms. Tháo's application was dealt with lawfully and properly in accordance with that system. It is pleaded that the appellant had no entitlement to "jump the queue" of such review applications, and it is expressly denied that the time taken to determine the Review Application was inordinate or unreasonable, or in breach of fair procedures.

15. It is denied that the time taken to determine the Review Application was in breach of the Directive or EU law. The respondent was entitled and obliged pursuant to the Directive and as a matter of EU law to undertake necessary investigations and to make further necessary requests for relevant information and evidence prior to determining the application for review.

16. The respondent pleads that the judgment of the High Court in *Druzinins v. Minister for Justice* confirms that there is no rule that applications for review of a refusal of an EU residence card must be determined within a six month period, and that the question of whether the time taken to determine a review is reasonable will depend upon the nature and terms of the review, the error alleged and the submissions made.

Affidavit of Mark Carleton

17. An affidavit was sworn on behalf of the respondent by Mr. Mark Carleton, Higher Executive Officer in the EU Treaty Rights Division of the Irish Naturalisation and Immigration Service within the respondent's Department. Mr. Carleton sets out the

background to the decision of the respondent refusing a residence card. He avers that the supporting documentation in relation to dependency provided with the application was "thin" and essentially only amounted to documentation in relation to Ms. Tháo's phone and a letter of support. Accordingly it was necessary to seek further documentation. He addresses the requests for information made by the respondent, and the replies thereto received from Ms. Tháo.

18. Mr. Carleton avers that the further information provided regarding the status of the appellant was potentially significant. The fact that he had been made redundant and was in receipt of job seekers allowance could impact on the claim of dependency advanced by Ms. Tháo.

19. Similarly, Mr. Carleton avers, information provided by the appellant concerning his health, and an application made by him for illness benefit, which had been notified by the appellant to the respondent on 30th May 2018, was a potentially significant development.

20. Mr. Carleton strongly disputes the claim that the respondent "acted unlawfully" for the reasons set out in the statement of grounds, and he rehearses the reasons why it took as long as it did to review the application, being the same reasons as are relied upon in the statement of opposition. He avers that *"Given the applicant's failure to provide adequate evidence of dependency, and the aforementioned significant changes to his circumstances notified to the respondent, the applicant had no entitlement to jump the queue of such review applications. Further, this would have amounted to unfair preferential treatment of the review application in comparison to other such applications, and would have delayed the treatment of those applications."*

21. Mr. Carlton avers that it is misleading to suggest that there was a period of delay of 19 months, or anything approaching that figure, on the part of the respondent in dealing with the Review Application, having regard to the gaps in evidence provided by the applicant,

and the need to seek additional information, as well as changes in the circumstances of the appellant which gave rise to the necessity for the respondent to reassess the sufficiency of the evidence provided by the applicant. Mr. Carleton avers that in his belief the time taken to determine the Review Application was reasonable and appropriate in all of the circumstances.

Judgment of the High Court

22. The trial judge held that these proceeding became moot upon the delivery of the decision of the respondent of 29th March 2019. In these circumstances, the trial judge considered that an order of *mandamus* would be entirely redundant. He further held that it would be unnecessary and inappropriate for the court to grant the declaratory relief sought, because the granting of such relief would serve no useful or legitimate purpose. In this regard the trial judge referred to the decisions of the High Court (Henchy J.) in *The State (Doyle) v. Carr* [1970] IR 87 and the Supreme Court in *The State (Toft) v. Galway Corporation* [1981] ILRM 439, in each of which the court declined to grant an order of certiorari because the proceedings had been overtaken in each case by subsequent events and no useful purpose would have been served by the grant of the order sought.

23. The trial judge rejected an argument that if the appellant for any reason has to re-engage with the respondent in any future application, the existence of a previous declaration of the kind sought would be likely to ensure greater promptitude in any such future application. The trial judge rejected this argument because the respondent could not give the appellant priority over other applications simply by reason of the fact that he had previously obtained a declaration in these proceedings; the respondent would be obliged to deal with all applications chronologically. He concluded:

> *"Nothing in the pleadings or submissions discloses any reason why declaratory relief is appropriate or necessary in proceedings 2018 No.1023JR. The within are like many*

other cases in the asylum and immigration list where proceedings become moot due to the issuance of a decision but where the applicant had sought some ancillary declaratory relief. The court must therefore decline to consider the issues raised."

Notice of Appeal

24. The appellant raises four grounds of appeal. In substance these are, simply, that the trial judge erred in law and in fact in the conclusions that he reached above. Specifically, the appellant claims that the trial judge was in error in reaching the conclusion that the proceedings would serve no useful purpose. The appellant may have to make another application to the respondent for a residence card for Ms. Tháo in the event that his appeal in the substantive proceedings is unsuccessful. Thus, it is crucial, if another review is required, that it is carried out in an expeditious manner as required by the Directive. Furthermore, it is likely that there are other individuals within the immigration system who would benefit from a declaration of the court requiring the processing of such reviews in a timely manner. The appellant claims that it is well established that a court may still grant declaratory relief to an applicant in circumstances where the vindication of an applicant's legal rights remains at the discretion of a state entity with which an applicant may have to engage in the future.

25. Furthermore, the appellant contends that it is well established that even when proceedings have become moot, a court may still entertain the proceedings where the general issue remains live in a large number of other cases. The appellant relies upon *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2006] IESC 62, [2007] 1 IR 328 and *O'Brien v. Moriarty* [2016] IESC 36, [2016] IR 501. The appellant distinguishes the cases of *The State (Doyle) v. Carr* and *The State (Toft) v. Galway Corporation* and says that neither case is authority for the proposition for which the trial judge relied upon them.

26. The appellant relies upon the cases of *Druzinins v. Minister for Justice* [2010] IEHC 84, *El Menkari v. Minister for Justice* [2011] IEHC 29 and *Saleem v. Minister for Justice* [2011] IEHC 49 and *Mahmood v. Minister for Justice* [2016] IEHC 600 for the proposition that any review of a decision under the Directive must be carried out expeditiously and within the context of the six month time limit that applies to the initial decision required to be taken by the respondent. While the appellant accepts that the Regulations do not explicitly impose a time limit for the completion of the review of the initial decision, the appellant contends that the review decision must be given within a reasonable time, and a decision of the court to this effect would benefit all applicants.

Respondent's notice

27. The respondent maintains that the trial judge correctly relied on the principle that a court should decline to award relief where it would confer no practical benefit on the applicant and no legitimate purpose would be served thereby. The trial judge was also correct in finding that no evidence had been put before the court as to any practical benefit that would be achieved by the grant of the declaratory relief sought by the appellant. Accordingly, the trial judge correctly held that the proceedings had become moot due to the issuance of the Impugned Decision on 29th March 2019 by the respondent.

28. The trial judge was therefore correct in declining to consider the substantive issues raised by the appellant in these proceedings, and in considering only the issues raised by the substantive proceedings whereby the appellant sought an order of certiorari of the Impugned Decision.

Submissions

Submissions on mootness

29. As far as mootness is concerned, the appellant submits that, where the general issue raised by proceedings remains live in a large number of other cases, it can still be appropriate

to determine the matter. The appellant relies on *O'Brien v. Personal Injuries Assessment Board* and *O'Brien v. Moriarty.* In this case, it is submitted that a large number of other cases are likely to be impacted by the same issue of administrative delay.

30. The appellant refers to the judgment of McKechnie J. in the Supreme Court in *Lofinmakin v. Minister for Justice* [2013] IESC 49, [2013] 4 IR 274. In that case, McKechnie J., having set out the factors to be taken into account when considering whether or not a case has become moot, went on to consider the factors to be taken into account by a court when deciding, in the exercise of its discretion, whether or not it should hear and determine a point, even though it has become moot. Those factors are to be found at para. 82(vii) of his judgment and include:

> "(b) the form of the proceedings, the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked;
>
> (c) the type of relief claimed and the discretionary nature (if any) of its granting, for example *certiorari;*
>
> (d) the opportunity for further review of the issues in actual cases;
>
> (f) the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law".

31. The appellant further relies upon the decision of the Supreme Court in *Okunade v. Minster for Justice Equality and Law Reform* [2012] IESC 49, [2012] 3 IR 152 in which case the Supreme Court decided that it was appropriate to entertain an appeal notwithstanding that the proceedings had become moot by having been set down for an early hearing date by the Supreme Court. At para. 36 of his judgment for the court, Clarke J. (as he then was) observed that the court had been told that the issues arising on the appeal were issues that, at least at the general level of principle, would arise in a significant number of

other cases so that an early determination by the court of the substantive appeal had been considered desirable for the purpose of clarifying the law in the area. This was before the proceedings had become moot. At para. 37, he noted that the case *"had, therefore, been, in a sense, designated as an appropriate test case by reference to which the broad issues which are addressed in this judgment were to be determined…."*. Furthermore, he went on to observe, the issues were of a kind that any time that they would arise, they would be likely to become moot within a relatively short period of time and before the hearing of any application for leave to issue judicial review proceedings that might be brought. In those circumstances, the court decided to entertain the appeal, notwithstanding that it was clearly moot.

32. In this case, the appellant submits, a large number of other cases are likely to be impacted by the same of issue of administrative delay. That this is so is evident from the stance taken by the respondent that the application of the appellant to the respondent simply took its place in the existing queue. Accordingly, it is appropriate for this Court to engage with the issue and give a determination.

33. The appellant submits that the cases of *The State (Doyle) v. Carr* and *The State (Toft) v. Galway Corporation* are not comparable. These were cases involving applications for *certiorari* that had no significance beyond the scope of the proceedings, for any parties other than the litigants in those proceedings.

34. The respondent on the other hand argues that the proceedings are clearly moot, and there is no convincing reason why the court should take the unusual step of exercising its discretion to grant declaratory relief in these circumstances. The respondent argues that the relief sought would confer no practical benefit on the applicant and would serve no other legitimate purpose. For this reason, it is submitted that the trial judge was correct to rely on *The State (Doyle) v. Carr* and *The State (Toft) v. Galway Corporation.*

35. Insofar as the appellant has argued that a decision in these proceedings is likely to have an impact on other cases, the respondent submits that the appellant failed to particularise this argument. However, the respondent made no comment on the argument advanced by the appellant that it is very likely that the issue raised will affect many other parties, because the respondent herself has made the point that it is necessary to deal with all such matters in the order in which they are received.

36. The respondent further submits that if the court decides to adjudicate on the appellant's application for declaratory relief, it will be difficult to distinguish this case from very many others in the asylum and immigration list where proceedings become moot due to the issuance of a decision, but where the applicant has also sought some ancillary declaratory relief based on similar legal arguments to that prayed in aid of the principal relief sought.

37. Furthermore, the respondent submits that such an approach is very likely to lead to a significant and unnecessary drain on judicial resources in the asylum and immigration list, as it would mean that many cases would proceed to a full hearing, with the attendant costs and use of court time that this entails, despite the fact that the principal relief sought has been granted by the issue of a decision. The respondent submits that instead of such an approach, the appropriate course of action is that the costs of the proceedings should be addressed "in the normal way" meaning that it is open to the appellant to make submissions for payment of his costs if he claims that the proceedings have become moot due to an intervening event brought about by the respondent.

Decision on mootness

38. The primary purpose of the within proceedings was to bring about a decision on the Review Application. The respondent issued such a decision, on 29th March 2019, before these proceedings came on for hearing. In these circumstances, I do not think that there can be any doubt but that, in the words of McKechnie J. in *Lofinmakin "a decision thereon can*

have no practical impact or effect on the resolution of some live controversy between the parties" and *"the issue has materially lost its character as a lis"* and *"the essential foundation of the action has disappeared".* I am not persuaded by the argument advanced by the appellant that, since the fact of the delay is not extinguished by the issue of a decision by the respondent, the proceedings cannot be said to be moot. There can be no doubt but that the primary purpose of the proceedings was to bring about a decision on the part of the respondent. In my view, once the respondent issued the decision on the Review Application, the "essential foundation of the action", in the words of McKechnie J. in *Lofinmakin,* disappeared. Accordingly, the appropriate question to ask is whether the court should, in its discretion, entertain the appeal, notwithstanding its obvious mootness, having regard to the principles identified in authorities such as *Lofinmakin* and *Okunade.* In my view, this is an appropriate case in which to do so.

39. By any measure, the period between the Review Application and the adjudication of that application, being a period of 23 months, is significant. While I will address presently the reasons advanced by the respondent for this delay, it is the respondent's case - not disputed by the appellant - that the appellant's application has at all times been dealt with by the respondent in chronological order. While the facts and the sequence of events in such applications will undoubtedly vary from case to case, nonetheless, it has not been suggested by the respondent that the period of time taken to bring the appellant's application to a conclusion is in any way unique or exceptional, or that it is confined to the unusual circumstances of this case. That being so, it is not unreasonable to surmise that, as the appellant contends, a decision on his application for declaratory relief is likely to have an impact in many cases.

40. Moreover, the issue with which the proceedings are concerned – being the determination of fundamental rights conferred upon EU nationals and their family members,

weighs very heavily in favour of a consideration of the issues raised by the appellant in his application for declaratory relief. Accordingly, I will now proceed to consideration of that issue.

Was the period of time taken by the respondent to decide upon the Review Application inordinate or unreasonable or a breach of the appellant's rights to an effective remedy and/or to good administration as provided by EU law?

Submissions of the parties

41. The appellant's case is relatively straight forward. He points to the fact that it took the respondent nine months to issue the initial decision on the application for a residence card. From the time that the Review Application was lodged, it took a further 23 months and 19 days for the respondent to make a decision on that application. However, the respondent contends that it is a distortion of the facts to say that it took 23 months to issue the decision on the Review Application, having regard to the need to request Ms. Tháo to provide further information, and the need to consider the further information received in response to that request, and also having regard to the further information provided by the appellant on two occasions regarding his status, and the need to consider that information. On the other hand the appellant contends that even from the date on which the last information was provided – being the information provided by the appellant on 30th May 2018 that he was no longer seeking employment because of illness, it still took the respondent a further eleven months to arrive at a decision on the Review Application.

42. The appellant relies on Article 10(1) of the Directive which stipulates a six-month time limit for the determination of an initial application for a residence card. While acknowledging that the Regulations do not stipulate a time limit for the determination of an application for a review of a refusal of a residence card, the appellant argues that, having

regard to the imposition of the six-month time limit in respect of an initial determination, a similar period should apply as the absolute outer limit for the determination of a review of a refusal to grant a residence card. Otherwise, it is submitted, the initial 6-month requirement becomes completely otiose in effect. In support of this submission**,** the appellant relies upon the cases of *Druzinins v. Minister for Justice* [2010] IEHC 84, *El Menkari v. Minister for Justice* [2011] IEHC 29 and *Saleem v. Minister for Justice* [2011] IEHC 49. I address those authorities below.

43. The appellant further contends that the period taken to determine the Review Application was unreasonable and in breach of the right to good administration as guaranteed by the Charter of Fundamental Rights for the European Union (specifically, Article 41 of the Charter) and the right to an effective remedy as guaranteed by Article 47 of the Charter. The appellant relies on the decision of the CJEU in *H.N. V Minister for Justice, Equality and Law Reform, Ireland and the Attorney General*, case C-604/12 in support of this argument, which decision is also considered below.

44. For her part, the respondent contends that the authorities relied upon by the appellant are distinguishable, and that reliance on Article 47 of the Charter is misconceived. The respondent contends that she is obliged to treat applications in the order in which they are received, and is likewise obliged to deal with information subsequently provided after receipt of the initial application in chronological order. The respondent relies upon the decision of the High Court (Cooke J.) in *Nearing v. Minister for Justice* [2009] IEHC 489, [2010] 4 IR 211 and, and says that there is in place an orderly, rational and fair system for dealing with applications for review, and that ultimately the respondent made the decision on the Review Application once it had reached the top of the queue. The respondent therefore contends that the time taken to make a decision on the Review Application was both lawful and reasonable.

45. The respondent also argues that the right to apply for a residence card and, therefore, the right to apply for a review of a refusal of that application enure for the benefit of Ms. Tháo, as the person claiming to be a dependent family member of an EU citizen, and not for the benefit of the appellant. Accordingly, it is submitted that any alleged right to an effective remedy for breach of that right can only enure for the benefit of Ms. Tháo, and not the appellant.

Authorities Relied upon by the parties.

Druzinins v Minister for Justice.

46. Both parties rely upon *Druzinins,* a decision of Cooke J. in the High Court delivered on 16th March, 2010. In *Druzinins*, the proceedings were issued by a husband and wife who sought an order of mandamus requiring the respondent to issue to the second named applicant a family member residence card under the then applicable regulations, being the European Communities (Free Movement of Persons) Regulations 2006 ("the 2006 Regulations"). The second named applicant, who was from Belarus, had married the first named applicant, who was from Latvia, and as such a Union citizen. The application for a residence card was made on 26th January 2009, and refused on 10th June 2009. It was refused because Mr. Druzinins had been made redundant, and the respondent considered that he was no longer exercising his EU Treaty rights in the State. On 25th June 2009, the applicants requested a review of the refusal under the 2006 Regulations, which for the purposes of these proceedings, contained identical provisions to those in the Regulations. They maintained that the first named applicant had retained his status as a worker by registering as a job seeker with the Department of Social and Family Affairs.

47. When refusing the application for a residence card, the respondent had informed the second named applicant that her current permission to remain in the State (by way of Stamp

4 Visa) would expire on 28th July 2009. The solicitors for the applicants expressed concern about this and asked for an extension of the Stamp 4 permission while the application for a review was pending. On 21st August 2009, the solicitors for the applicants responded to a request for further information received form the respondent regarding, inter alia, the first named respondent's work status. A number of reminders were subsequently issued by the solicitors for the applicants to the respondent, and eventually, when no decision had been made on the review application, proceedings were issued on 3rd November 2009. A statement of opposition was filed by the respondent on 11th December 2009, and the case was fixed for a priority hearing on 26th February 2010. However, before the case came on for hearing, the respondent made a decision on the review application on 17th February 2010, whereby it was decided to issue the second named applicant with a residence card. The issue for the High Court (Cooke J.) was whether or not the applicants should receive an order for payment of their costs, in circumstances where the proceedings had become moot before the trial date by reason of the issue of a decision by the respondent on the review application before the trial date.

48. This required Cooke J. to engage in an analysis as to whether or not there was any default on the part of the respondent in the time taken in adjudicating upon the review application, and as to whether or not the proceedings were justified. Cooke J. considered that there had been no culpable delay on the part of the respondent in addressing the review application, because it in fact amounted to a new application based on the new circumstances of the first named applicant who had become unemployed since the application for a residence permit was first made. He therefore held that it was appropriate to assess the justification for seeking relief by way of mandamus by reference to the period of six months stipulated in Regulation 7(2) from the date on which the applicants provided that information to the respondent, being 21st August 2009. On that basis, he found that the review

application had been determined within six months from the relevant date. As to whether or not the six-month period within which a decision is to be made has any application to the review process, Cooke J. said:

> *"It should not be taken, therefore, that the six month period applies to the review process. Whether or not there is delay in deciding upon a review as such will depend upon the nature and terms of the review requested, the error alleged, the submissions made and the other circumstances of the individual case. For present purposes it is sufficient to point out that there is no obvious reason why the period of ten weeks from 21st August 2009 to the commencement of this proceeding at the beginning of November 2009 should be considered as so excessive as to amount to a wrongful refusal on the part of the Minister to decide the review."*

49. Nonetheless, on the facts of the case, Cooke J. considered that the proceedings were justified because of the threat posed to the second named respondent on account of the fact that her Stamp 4 visa had expired, and the Minister had failed to confirm renewal thereof – she therefore remained liable to be deported at any time.

50. Taking all factors into account, Cooke J. considered that the balance of justice would be served by awarding the applicants an order entitling them to recover 50% of their costs incurred in the proceedings.

El Menkari v Minister for Justice

51. The second decision in the sequence of decisions relied upon by the appellants is that of *El Menkari & Anor. v. The Minister for Justice & Ors*, also a decision of Cooke J., delivered in this instance on 28th January 2011. In this case, the first respondent, a Moroccan national, had married the second respondent, a Lithuanian national on 12th February 2009. The first named applicant applied for a residence card on 2nd March 2009 and this was refused on 20th August 2009 apparently because the respondent had concerns arising out of

discrepancies in the addresses provided by the parties in the course of the application process. The first named applicant sought a review, in or about September/October 2009 (there was confusion as to the precise date).

52. Following a number of reminders, proceedings were commenced on 14th December 2009, whereby the applicants sought reliefs by way of certiorari and mandamus, as well as declaratory relief.

53. In the course of his judgment, Cooke J. noted that the replying affidavit filed on behalf of the first named respondent was confined to an explanation of the procedure employed within the Department for processing applications for residence cards, and providing statistics regarding the number of applications received and processed during the course of 2009. He noted that it was clear that by the time the proceedings came to be heard, not only had no decision been taken by the Department upon the review application, but no further inquiries had been carried out in order to resolve discrepancies in the addresses provided by the applicants with a view to determining the application for review. Cooke J. held: *"In these circumstances the court is satisfied that the application must succeed but only in part. It is not contested that the second named applicant is an EU citizen who is residing in the State and is in full time employment. Nor is it contested that the applicants are married."* Cooke J. went on to say that the Minister had good reason to query the discrepancy in the addresses provided. That being so, the refusal of the application could not be said to be wrong or unreasonable. As to the application for review, Cooke J. said:

> *"The court is equally satisfied, however, that once a review was applied for under Regulation 21 there arose a duty upon the part of the Minister to make whatever inquiries were considered necessary in order to resolve that issue so as to give a decision upon the review application within a reasonable time. Having regard to the target period of six months provided in Regulation 7(2) for the issue of a card, it is*

clearly in excess of a reasonable period for a decision on a review application to be delayed for a longer period particularly when the explanation has crystalised the net issue for decision by the Minister and the review request is not, in effect, a new application requiring the verification and appraisal of new information or proofs not previously considered by the Minister."

54. Since a period of eight months had elapsed since the request for a review of the refusal, the court granted an order of mandamus directing the Minister to make a decision on the application within 28 days of perfection of the Order.

Saleem & Anor v. The Minster for Justice & Ors.

55. This is the third judgment in the sequence of the three judgments of Cooke J. relied upon by the appellants. The judgment was handed down in these proceedings on 16th February 2011.

56. The first named applicant in the proceedings was a national of Pakistan who arrived in the State in September 2005 on a student visa. He subsequently met and married the second named applicant, a Polish national, on 1st December 2008. The first named applicant applied for a residence card on 9th December 2008. While the application was pending, the first named applicant was informed that he could obtain a Stamp 4 endorsement on his passport which would validate his residence until 17th June 2009. On 16th June 2009 the application was refused because the Minister was not satisfied that the second named applicant (the EU national) was exercising her free movement rights in accordance with the requirements of the 2006 Regulations.

57. The applicants sought a review of the refusal of the application. This request appears to have been made on a number of occasions by different parties on behalf of the applicants between 15th July 2009 and 28th July 2009. On 12th August 2009, solicitors wrote on behalf of the applicants requesting that the first named applicant be provided with a Stamp 4 visa.

Following another reminder, the Minister responded on 2nd November 2009 saying that the review application was being dealt with in strict chronological order and stating that *"there is no time limit within which a decision must be made".* Cooke J. refused the application for certiorari on the basis that the Minister, in the course of dealing with the application, had made certain inquiries that he was entitled to make to satisfy himself as to the eligibility of the applicant to a residence card. When he did not receive the documents requested, he was entitled to refuse the application.

58. However, Cooke J. did consider it appropriate to grant an order of mandamus requiring the Minister to make a decision on the review application for the following reasons appearing at paras. 15-20 of his judgment, and it is instructive to quote these paragraphs in full:

> *"15. Although the Court would normally decline to exercise its judicial review jurisdiction in a case where a remedy by way of administrative review has not yet been exhausted and the impugned decision is particularly apt for that remedy, the Court will grant an order of mandamus in this case for the following reasons. First, as indicated above, the only issue outstanding when the request for review under Regulation 21 was made was whether the belatedly received documents removed whatever doubts the Treaty Rights Section may have harboured as to compliance with the condition in Regulation 6(2)(a)(i)[of the 2006 Regulations]. That was an assessment that would appear to have been capable of being made within a very short period of time. The Minister however took the stance that once the initial refusal had been decided he was under no duty to deal with the review within any particular time. The letter of 2nd November 2009 stated: "There is no set time limit within which a decision must be made"*

16. While this may be literally true in the sense that the Regulations contain no defined time limit for the review stage, it is, in the judgment of the court, a mistaken view of the obligation of the State towards Union citizens and their family members arising under the Directive. As the court has pointed out in paragraph 25 of its judgment in the Lamasz case, neither Regulation 7(2) nor Article 10.1 of the Directive support the proposition that the period of six months there referred to applies only to the taking of an initial decision on the application and that thereafter the Minister can delay indefinitely deciding the review request. Those provisions require the issue of the card within that period so that the Minister remains under an obligation to do so notwithstanding the passing of the six month period from the receipt of the application.

17. Accordingly, while the Minister may be justified in withholding the issue of the card when he has a genuine reason to question whether the condition is fulfilled, the consequence of the expiry of the six month period is not to afford the Minister an indefinite time within which to decide the review where one is requested. The right exercised in these cases is the Treaty-derived right of the Union citizen to move freely within the territory of the Member States and, subject to the conditions of the Regulations, to have family members participate in the exercise of that right. (See, inter alia, recitals 5 and 11 of the Directive). The residence card is formal evidence of the fact that the right has been exercised but the exercise is not dependent upon its possession. Indeed a non-national family member who presents a valid passport and proof of the family relationship is entitled to enter the State to join the Union citizen and to reside there for three months before an application for a residence card can even be made. (Regulation 7(1)(a).)

18. Mandamus will not issue to require a public authority to take an administrative decision unless there has been an unlawful refusal to do so or such egregious delay in

so doing as to be tantamount to a refusal. 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. As Geoghegan J. put it in Point Exhibition Co. Ltd v Revenue Commissioners, [1993] 2 IR 551: "The respondents have not either granted or refused the licence under s. 7 of the Act of 1835, but at all material times have informed the applicant the matter is still under consideration. ... The questions at issue in this case are by no means capable of easy resolution. I have had considerable difficulty in answering them. Nevertheless, in my view, the applicant was entitled to a decision one way or another within a reasonable time. The respondents obviously did not make such decision within any time span that could be regarded as reasonable. Accordingly, the applicant is entitled to treat the delay as a refusal and to seek an order of mandamus directing the grant of the licence."

19. Given that there is a duty under both the Regulations and the Directive to issue a residence card within a defined period, where that period expires without the definitive decision being taken and the Minister maintains that there is no duty to make the required decision within any particular time, the court considers that the applicants are entitled to treat delay as unreasonable and as justifying an application for mandamus. The refusal decision in this case was taken on the very day the six month period from the application expired. The review request was accepted as having been made on 25th June 2009.... so that a further full period of six months had elapsed without decision when the ex parte application for leave was made to the High Court on 11th January 2010. Having regard to the requirements of the Directive that an immediate certificate of application for the residence card must be given (Article 10.1) and that the card should issue "no later than six months" thereafter, such a delay could not be excused as reasonable especially when all that was required was a

decision as to whether the documents actually received on 16th June 2009 were considered sufficient.

20. There will therefore be an order directing the Minister to take a decision on the review request within 28 days of the perfection of the order."

Mahmood v Minister for Justice

59. The appellant also relies on *Mahmood & Anor v. Minister for Justice & Equality*, a decision of the High Court (Faherty J.) of 14th October 2016. In that case Faherty J. granted an order of *mandamus* requiring the Minister to make a decision upon a visa application (as distinct from an application for a residency card) made by the second named applicant, as the spouse of a British national. Notwithstanding that the Directive (Article 5(2)) requires that such applications be dealt with on the basis of an accelerated procedure, four months later all that the Minister could say was that the application was awaiting examination. The explanation for the delay was a strain on resources caused by an enormous surge in the number of such applications in a very short period of time. At para. 140 of her judgment, Faherty J. held:

"In circumstances where no time span for even the commencement of the examination of the application has been forthcoming from the respondent since the last time frame was advised on 13th November, 2015 and where as of July, 2016 [twelve months after the application was made] no indication has been forthcoming as to when a decision might be expected, I am satisfied that that the applicants are entitled to treat the delay as so unreasonable and egregious as to constitute a breach of the Directive and to justify the application for mandamus."

60. In thus concluding, Faherty J. drew a clear distinction between applications for entry into the State (i.e. visa applications) and applications for a residence card which of their nature involve more extensive documentation and, potentially, issues of complexity.

61. The decision in *Mahmood* was appealed to this Court, and this Court made a reference to the CJEU, but that court ultimately declined to answer the questions referred because by that time the proceedings had become moot).

Article 41 of the Charter and H.N. v Minister for Justice

62. The appellant relies upon Article 41 of the Charter, which provides, in material part:

> "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union."

63. While it is obvious that Article 41 is directed to institutions of the Union, the appellant relies upon the following extract from the judgment of Keane J. in *Straczek v. Minister for Justice* [2019] IEHC 155 where he said, at para. 51: *"…the right to good administration as a general principle of EU law under Article 6(3) of the Treaty on European Union is applicable to Member State action in the scope of EU law."*

64. In those proceedings, the applicants were challenging a decision of the respondent to uphold (on review) a first instance decision to refuse a residence card. It is clear that Keane J. analysed the applicants' claim in that case on the basis of both the right to good administration under Article 41, and the right to natural and constitutional justice and fair procedures under the laws of the State.

65. In *H.N. v Minister for Justice, Equality and Law Reform, Ireland and the Attorney General*, case C-604/12, the CJEU was asked to consider if Article 41 of the Charter permitted a Member State to provide in its laws that an application for subsidiary protection status can only be considered if the applicant has applied for and been refused refugee status in accordance with national law. In considering this question, which it answered in the affirmative, the CJEU held, at para 49: "*As regards the right to good administration, enshrined in Article 41 of the Charter, that right reflects a general principle of EU law*". At para.56 the CJEU held: *"Nevertheless, that right [to good administration] ensures, in the*

same way as the requirements imposed by the principle of effectiveness referred to at paragraphs 41 and 42 above, that the entire procedure for considering an application for international protection does not exceed a reasonable period of time which is a matter to be determined by the referring court."

Nearing v Minister for Justice

66. The respondent relies upon the decision of Cooke J. in *Nearing v. Minister for Justice.* This case was concerned with an application by a citizen of the United States, who made application under a non-statutory scheme for what was called "long term residency". The application was made on the basis that the applicant had been living in the State for more than five years. The application had been made on 12th August 2007, and following correspondence in the intervening period, during which it became apparent that the respondent was unwilling to commit to giving a decision by any specified date, the applicant issued proceedings on 27th April 2009, whereby he sought an order of mandamus to compel the Minister to make a decision on his application.

67. However, before the proceedings came on for hearing, the respondent informed the applicant that he had decided to grant the applicant permission to remain in the State. In these circumstances, the applicant sought an order for his costs. In the course of his judgment, Cooke J. stated that*: "It is accepted that he [the applicant] is entitled as a matter of law to have a decision made on his application within a reasonable time….Thus, the issue in this case is one as to what is "a reasonable time" in these circumstances."* Cooke J. observed that there was no element of urgency in the applicant's personal situation, so that there was no necessity for the respondent to depart from the normal administrative order for dealing with such applications. At para. 25, Cooke J. held:

"25. Once it is clear that the department has in place a particular system for the administration of such a scheme, it is not the role of the Court in exercise of its judicial review function to dictate how a scheme could be managed or to prescribe staffing levels or rates of productivity in the relevant section of the department. Once it is clear from the evidence that there is in place an orderly, rational and fair system for dealing with applications, the Court has no reason to infer any illegality in the conduct of the Minister unless some specific wrong doing or default is demonstrated in a given case."

68. Cooke J. rejected a submission that a delay of over a year and a half in dealing with a straight forward application was so unreasonable as to have justified the bringing of the application. He said that what is reasonable (and by implication, unreasonable) depends upon the circumstances of the case, he held that: *"... given the multiplicity and variety of factors that fall to be taken into account in any case, it must be questionable whether any court could ever set down any particular time limit as reasonable even for specific categories of application."*

Discussion/Decision

Conclusions to be drawn from authorities.

69. It is useful as the starting point in this discussion to consider the conclusions that may be drawn from the authorities above, which appear to me to be as follows:

(1) Where an authority (such as the respondent) 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.

(2) What is reasonable will vary from case to case and depends upon the circumstances of each individual case, including the investigations required to be undertaken by the authority concerned and the time taken by an applicant to respond to enquiries made by the respondent.

(3) The six month time limit applicable to the initial determination of applications under the Regulations is informative as to what may be considered a reasonable time to undertake a review of a first instance decision, not least because the only time limit prescribed the Directive is to require the issuance of a residence card within six months of an application.

(4) Generally, it may be said that the review should not take any longer than a further six months, but that is not to say that the review should take that long, in circumstances where, for example, there is no additional information to consider, or any additional information that may require consideration is uncontroversial and may do no more that fill an uncontroversial informational deficit. In such circumstances, the review should be swiftly concluded.

(5) Where there has been an egregious delay in the issue of a decision such as to amount to either a violation of rights or so as to be tantamount to a refusal, mandamus may issue such as in *Saleem*.

(6) The court may award costs in cases where proceedings have become moot, if the court is satisfied the issue of the proceedings was justified such as in *Druzinins*).

Preliminary argument- Standing of Appellant

70. Before attempting to bring those conclusions to bear on these proceedings, it is first necessary to address the argument advanced on behalf of the respondent that the entitlement to an effective remedy (if there is one) in relation to the application for a residence card is that of Ms. Tháo and not the appellant. This argument – which I interpret as meaning that the appellant does not have standing to bring the proceedings - was made in the written submissions of the respondent, but was not pressed at hearing, and I think wisely so, not

least because it is not raised by the statement of opposition of the respondent. Nonetheless, I think it is necessary to address it because it is a peculiar feature of these proceedings that they are brought only by appellant, as the Union citizen exercising his free movement rights, and not by or jointly with Ms. Tháo, as the applicant for a residence card. More often than not, such proceedings are advanced by both parties.

71. The right to free movement is one of the fundamental freedoms of the Union citizens. It has been repeatedly emphasised by the CJEU that the right must not be interpreted restrictively (see, for example *Metock and ors v Minister for Justice*, case C-127/08, para.84). The purpose in giving a defined class of family members the entitlement to accompany or join the Union citizen exercising his/her right of free movement is to remove what would otherwise be a significant inhibition to its exercise. It seems to me therefore that a Union citizen such as the appellant must have the standing to advance and maintain proceedings such as these claiming an entitlement to an effective remedy to his right to be joined by a person who he claims is a qualified family member within the meaning of the Regulations. As Cooke J. observed in *Saleem*: "*The right exercised in these cases is the Treaty-derived right of the Union citizen to move freely within the territory of the Member States and, subject to the conditions of the Regulations, to have family members participate in the exercise of that right. (See, inter alia, recitals 5 and 11 of the Directive).* I am satisfied therefore that this argument (that the appellant is not entitled to assert the right to an effective remedy in these proceedings), to the extent that it was maintained at all, should be rejected.

Did the respondent delay unreasonably?

72. At hearing of this appeal, the parties did not appear to disagree as to the principles to be drawn from the authorities to which the Court was referred, and which I have attempted

to summarise above. I surmise, however, that the respondent might not agree with the statement, at the end of para.70(4) that a review should be swiftly concluded where there is nothing new, or nothing of special complexity, falling for consideration. I think the respondent might not agree with this statement, and might take the view that all such applications must simply take their place in the queue.

73. In any case, the main point of difference between the parties in these proceedings is simple; the appellant contends that the delay on the part of the respondent in determining the Review Application was so long as to be egregious and in violation of his EU Treaty rights, while the respondent contends that there is in place an orderly, rational and fair system for dealing with applications for review, and that the Review Application took its place in the queue for the determination of such applications. The respondent claims that the additional information provided by Ms. Tháo and the appellant prolonged the time the application remained in that queue. Accordingly, the respondent submits, there was no breach of the appellant's rights.

74. However, it is somewhat unclear as to how the queue is operated. If, every time a request for information is made, or a reply to such a request is given, or further information is volunteered, an application goes back to the end of the queue, that might prolong the determination of the application unreasonably, in particular if the information provided is straightforward and requires little consideration. Cooke J. alluded to this in *Druzinins*, at para. 18, where he said:

> *"Indeed, if the review is directed only at correcting an error made by the deciding officer on the original application without altering its basis or requiring new facts or documentation to be considered, it would be consistent with the time limit imposed by Regulation 7(2) [of the 2006 Directive] that the decision should be taken well within a further six month period."*

75. While in this case, the respondent has argued that applications based upon dependency are more complex than cases of the kind relied upon by the appellant, which may only require, for example, proof a marriage, or proof that a person claiming to be a qualifying family member within the meaning of the Regulations is the spouse of a Union citizen, the respondent has not asserted that in this case the issues raised or the information provided were of any particular complexity. The information originally provided by Ms. Tháo in connection with her application included no more than identification documents and receipts. This was subsequently supplemented by bank statements and credit union statements, showing funds being transferred by the appellant to Ms. Tháo. The volume of the documents submitted was modest. The supplementary information submitted following upon the Review Application was of the same kind, comprising receipts, credit union statements and bank statements, and amounted to no more than ten pages approximately. There was nothing complex about the information provided – it simply required an assessment.

76. Similarly, the information provided in February and May 2018 regarding the appellant's redundancy and his subsequent illness, while potentially important in relation to his status in the State, did not raise complex issues in this particular instance, not least because it was readily apparent that the appellant had been residing in this country since 2005, and so he had acquired the right to permanent residence in the State pursuant to regulation 12 of the Regulations (reflecting Article 16 of the Directive), although it should be observed that he at first asserted his entitlement to remain on a different basis , pursuant to Article 7(3) of the Directive (as reflected in regulation 6(3)(c) of the Regulations). So, therefore, notwithstanding the respondent's argument about the potential complexity of applications based on dependency, it appears that in this case no special complexity arose and that the application was routine in character, in the general scheme of such applications.

77. The respondent requested further information from Ms. Tháo on 2nd May 2017. This was provided by her solicitors on 25th September 2017, and so the decision on the Review Application could have been taken at any time after that date. It was not until five months later that the solicitors for the appellant (being the same solicitors for Ms. Tháo) wrote, on 1st February 2018, informing the respondent that the appellant had been made redundant and had registered as a job seeker. The approach taken by the respondent implies that this five month period is not to be taken into account in considering whether or not there has been an unreasonable delay, because the clock is effectively reset by the provision of new information. If this is what the respondent means, in my view it cannot be correct. The application was already in the queue and it seems to me that the provision of the additional information should not have the effect of causing it to lose its place, if that is indeed what occurred (although it must be said that this is unclear). This period should be taken into account not least because there was nothing to prevent the respondent giving a decision within that period, before the appellant provided any further information relating to his own status.

78. The same may be said of the four month period between 1st February 2018 and 30th May 2018, when the solicitors for the appellant again wrote to the respondent, on this occasion informing the respondent that the appellant had become unable to work as a result of illness, but submitting that he remained a "worker" for the purposes of the Directive having regard to Article 7.3(a) thereof and, therefore, that Ms. Tháo remained his dependent for the purposes of the Directive. By this time (30th May 2018), the application was in the queue for nine months.

79. However, even if that total period of nine months is ignored, the respondent did not in fact make a decision for a further period of eleven months during which no further information was requested or provided. It would appear that during this period, the Review

Application was simply awaiting its turn, and that there was no unusual complexity in any of the information provided by or on behalf of Ms. Tháo that would have contributed in any way to the delay on the part of the respondent in conducting the review during this period. Even if the application is treated as an entirely new application - as occurred in *Druzinins* - received at the time the appellant served further information on the respondent regarding his own status, in May 2018, the period of 11 months thereafter taken to determine the Review Application appears to me to be unreasonable, not least having regard to the period of six months prescribed for determination of applications in the first instance.

80. By itself, that period is, in my view, and in all of the circumstances of this case (which include that it took 9 months to make a decision on the original application for a residence card), sufficient to justify a finding that the respondent was in breach of duty to the appellant to make a decision on the Review Application within a reasonable period, on the same basis that Cooke J. reached just such a conclusion in both *El Menkari* (see para.53 above) and in *Saleem* (see para. 18 from the judgment of Cooke J., quoted at para. 58 above). Such findings would surely have resulted in the making of an order for mandamus had the respondent not made a decision on the Review Application before the proceedings came on for hearing, and that being so, it follows that the appellant must be entitled to declaratory relief in the terms he seeks.

81. In arriving at this conclusion I have taken into account that because Ms.Tháo's permission to remain and indeed work in the State was at all relevant times continued by the respondent through the repeated extension of her stamp 4 visa there was, at least on one view of it, no pressing urgency to make the review decision. However, the respondent did not make the case that this in any way excused her from making a timely decision on the application, and I think rightly so. The appellant on the other hand submitted that it was difficult for his family - and Ms. Tháo in particular - to make any long term plans for as

long as there was uncertainty regarding her entitlement to be in the State, and this must be correct. So therefore, the issue of the stamp 4 visa, while no doubt of considerable comfort to applicants, cannot be deemed to entitle the respondent to take any longer than is reasonable to determine such applications.

82. I have also taken into account the evidence of the respondent that there is in place an orderly, rational and fair system for considering and adjudicating on applications advanced under the Regulations, and that a strictly chronological system is operated. I am sure that this is indeed so, which suggests that there may not be sufficient resources within the department, although this was not argued, as it was, for example, in *Mahmood*. I am also acutely aware that the demands upon the resources of the respondent's department will fluctuate, both in terms of the numbers of applications received, and the comings and goings of staff, and that for this reason the respondent is entitled to a margin of appreciation in the time taken to process applications under the Regulations. But none of this can be held to afford the respondent an indeterminate period within which to make decisions which, in the case of an initial application for a residence card must be taken within six months, or alternatively, in the case of a review of a decision on such an application, must be considered having appropriate regard to that initial time limit, as suggested by Cooke J. in the decisions discussed above.

83. Accordingly, for the foregoing reasons, and having regard to the fact the primary relief sought by the appellant in these proceedings, i.e. an order of mandamus, is no longer required, I propose making a declaration, that the period of time taken by the respondent to determine the Review Application was inordinate and in breach of the duty of the respondent to determine the Review Application within a reasonable time. However, I make no decision as to whether or not it is also in breach of the appellant's asserted right to an effective remedy and/or good administration as provided by EU law. I would be reluctant to make

such a declaration in circumstances where the declaratory relief afforded to the appellant above is adequate for his purposes, and where the entitlement of a party to seek declaratory relief grounded upon Article 41 of the Charter as against domestic authorities, as distinct from EU bodies or institutions with which Article 41 of the Charter is concerned, is far from clear, and was the subject of only very limited argument in these proceedings.

84. As to costs, my preliminary view is that since the appellant has been entirely successful in this appeal, he is entitled to an order directing the respondent to pay the costs incurred by him in the proceedings, the same to be adjudicated in default of agreement. If the respondent wishes to contend otherwise, he will have liberty to apply to the Court of Appeal office within 14 days of the date of this judgment for a short supplemental hearing on the issue of costs. If such hearing is requested and results in the order proposed herein, the respondent may additionally be held liable for the costs of such supplemental hearing.

85. As this judgment is being delivered remotely Faherty J. and Ní Raifeartaigh J. have authorised me to indicate their agreement with it.