[2019] IEHC 834

THE HIGH COURT

[2018 No. 418 JR]

BETWEEN

MUHAMMAD NADEEM

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL (NO. 3)

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 9th December, 2019.

1. This matter has been the subject of two previous judgments handed down by the court, respectively, on 29th January and 5th March last. The court was asked, pending the decision of the European Court of Justice in *Chenchooliah (Case C-94/18*) [ECLI:EU:C:2019:693], to leave over the issue as to whether the Minister should have properly proceeded to institute the removal order process under the European Communities (Free Movement of Persons) Regulations 2015 ("Regulations of 2015") and not the deportation process under the Immigration Act 1999, as amended. That decision has now been handed down and, following on a further hearing, on 22nd November 2019, the within text addresses the *Chenchooliah* dimension of Mr Nadeem's application.

2. The court has been referred by counsel for Mr Nadeem, inter alia, to the affidavit sworn by staff-member of INIS in the course of the within proceedings in which she avers, *inter alia*, as follows:

> *"9. On 25 August 2016, the EU Treaty Rights section of INIS determined that sufficient evidence had been furnished to provide a temporary permission to the Applicant whilst the residency of the EU citizen was being investigated. Therefore, the Applicant was recognised as a permitted family member as part of this two-step process on a temporary basis….The copy of the Decision dated 25 August 2016…was communicated to the Applicant on that date".*

3. That averment, with respect, does not fully capture the thorough-going, robust and definite nature of the decision made on, and communicated by a letter of, 25th August 2016, which letter states, inter alia, as follows:

> *"I wish to inform you that your application to be treated as a permitted family member of a Union citizen…has been approved on the basis that you are a partner with whom that Union citizen has a durable relationship under Regulation 5(1)(b) of the Regulations*
>
> *The Minister will now consider your application for a residence cared of a family member of a Union citizen under Regulation 7(1) of the Regulations".* [Emphasis added].

4. Clearly Mr Nadeem was recognised to have a right under the Citizens' Rights Directive, being recognised as a permitted family member (which right was later lost, yet

nonetheless pertained for a time), thus coming within the scope of the Citizens' Rights Directive in the manner contemplated by Chenchooliah.

5. In this regard, the court recalls:

(1) para.90 of the judgment of the European Court of Justice in Chenchooliah:

> *"Article 15 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States…is to be interpreted as being applicable to a decision to expel a third-country national on the ground that that person no longer has a right of residence under the directive in a situation, such as that at issue in the main proceedings, where the third-country national concerned married a Union citizen at a time when that citizen was exercising his right to freedom of movement by moving to and residing with that third-country national in the host Member State and, subsequently, the Union citizen returned to the Member State of which he is a national. It follows that the relevant safeguards laid down in Articles 30 and 31 of Directive 2004/38 are applicable when such an expulsion decision is adopted and it is not possible, under any circumstances, for such a decision to impose a ban on entry into the territory",* and

(2) the text of an inadvertently misdated letter of 4th August 2018 (it issued on 4th May 2018) from INIS to Mr Nadeem, which letter notified Mr Nadeem that it was proposed to make a deportation order against him and states, inter alia, that any such deportation order "*will require you to leave this State and to remain outside the State hereafter".*

6. The court cannot but conclude from the foregoing that Mr Nadeem does come within the ambit of the decision in *Chenchooliah* and that the form of deportation order contemplated by the letter of 4th August/May 2018 is unlawful in light of the decision in *Chenchooliah*.

7. It is important to note that this conclusion/judgment does not, with respect, have the effect contended for by counsel for the Minister at hearing, viz. that:

> *"Anyone who applies at any stage saying that they have any rights whatsoever under the Regulations by virtue of a relationship specified or enumerated or identified in Article 3(2) of the [Citizens' Rights] Directive must as a result of the application in itself…acquire rights such that they could not be deported under the provisions of national law, in other words that if you make an application for a residence card, no matter how sham or how bogus that application is, as a matter of fact and as a matter of law, that brings you automatically within the protection conferred by Article 15 of the Directive and the relevant provisions governing removal orders and exclusion periods provided for by the Directive".*

8. This was not the case argued by Mr Nadeem, nor does it properly capture the scope of the within judgment. Mr Nadeem's case, accepted by the court, is simply that the conclusion reached by the court in paragraph 6 above arises for him as a person who was, to borrow from the terminology deployed by his counsel at hearing, granted (and he was granted) the status of permitted family member "*ab initio*", albeit that he lost it thereafter.

9. The court will discuss with the parties the form of the order now to issue.