

An Chúirt Uachtarach



The Supreme Court

O'Donnell J
MacMenamin J
Charleton J
O'Malley J
Baker J

Supreme Court appeal number: S:AP:IE:2020:000120
[2021] IESC 000
High Court Record Number: 2018/ 788
[2020] IEHC 360

Between

MIH

-and-

SIH, a Minor suing by her Mother and next Friend, MIH
Respondents/Applicants

- and -

Minister for Justice and Equality
Appellant/Respondent

Judgment of Mr Justice Peter Charleton delivered Tuesday 11 May 2021

1. The essence of the issue for decision in the context of immigration is whether delay in issuing a deportation order, in and of itself, can create rights to remain in the State where otherwise foreign nationals have no entitlements of residence.

2. MH and her daughter SH, are Pakistani nationals. They were born in 1978 and 2001, respectively. They came to Ireland in July 2014, from the UK as part of the extended family of MH's brother, a Mr C, born in 1987, and thus the uncle of SH. He is of Pakistani origin but also is a British subject and had resided in England for many years. MH, after being widowed at a young age in Pakistan, moved to England to reside with her brother Mr C. He had apparently financially supported her and her daughter since the death of her husband. Mr C, the brother of MH, moved

to Ireland to start up a business, as he was free to do as a European Union citizen. MH and SH moved with him. In May 2015, MH and SH applied for EU1 Residence Cards. In November of that year, the applications were refused by the Minister. In February 2017, an application to review that decision also resulted in a refusal to grant the residence card on the basis that MH and SH did not meet the requirements. The Minister at that time issued notifications in respect of MH and her daughter SH that proposed to make a deportation order pursuant to s 3 of the Immigration Act 1999, as amended. However, it was not until 5 September 2018, some 18 months following on from that correspondence, that such a deportation order was notified to MH and SH by what is called s 3(3)(b)(ii) notice. The deportation orders themselves were signed by the Minister about a fortnight earlier on 24 August 2018.

3. MH and her daughter SH brought judicial review proceedings against the Minister's issuance of the deportation order. This came on for hearing before Barrett J. The High Court quashed the order on a number of grounds, which have not been appealed, and the judgment also indicated a view that the delay between the proposal for deportation and the making of the order itself gave rise to substantive and procedural rights; Barrett J 22 July 2020 [2020] IEHC 360. This judgment was sought to be appealed directly to this Court and by Determination dated 22 December 2020, leave to directly appeal was granted; [2020] IESCDET 148. The determination granted leave on the following issue:

What matters here...is the time delay point and the application of constitutional principles and of principles from the European Convention on Human Rights to the gap as between refusal of permission and the issuance of a deportation order.

4. An issue paper agreed by the parties outlined the relevant questions in more expansive form than the leave granted by the Court:

1. Whether the delay of 18 months between the notification of the refusal to remain/proposal to deport and the notification of the decision to deport in respect of the Respondents/Applicants forms part of the *ratio* of the High Court decision, as opposed to *obiter dicta*.
2. Whether the delay of 18 months between the notification of the refusal to remain/proposal to deport and the notification of the decision to deport in respect of the Respondents/Applicants has the effect that the making of the deportation orders amounts to a breach of the constitutional rights and/or the ECHR rights of the Respondents/Applicants.
3. Whether the Charter of Fundamental Rights of the European Union applies to the making of the deportation orders in respect of the Respondents/Applicants, and if it does so apply, whether the delay of 18 months between the notification of the refusal to remain/proposal to deport and the notification of the decision to deport in respect of the Respondents/Applicants has the effect that the making of the said deportation orders amounts to a breach of such rights as may be enjoyed by the Respondents/Applicants pursuant to the Charter.
4. Whether the delay of 18 months between the notification of the refusal to remain/proposal to deport and the notification of the decision to deport in respect

of the Respondents/Applicants vitiates the deportation orders made in respect of the Respondents/Applicants at the conclusion of that period.

Non-nationals without permission

5. It is unnecessary to again analyse the basic principles regarding the precarious nature of non-nationals without permission to enter a State which is party to the European Convention on Human Rights, or to pursue any answer to arguments that Charter rights somehow transform the entitlements of non-nationals beyond those provided for already in European Union legislation. Family rights, the Constitution and the Charter, have been considered in *Esmé v Minister for Justice and Law Reform* [2015] IESC 26 and *A, S and S and I v Minister for Justice and Equality* [2020] IESC 70, Dunne J, and *Prudence v Minister for Justice and Equality* [2015] IESC 64, and in many other decisions. Nor is any further consideration required in this judgment of the meaning of who constitutes, and in what circumstances they may be taken as constituting, a member of the household of an EU citizen for the purposes of rights of free movement, since this has been the subject of a reference in *S & anor v Minister for Justice and Equality* [2020] IESC 78 (C-22/21) and the interpretation of the directive has been considered in *S & anor v Minister for Justice and Equality* [2020] IESC 78. The facts here, as they seem to be, and these are a matter for the Minister, are rather simple and require little further in terms of analysis than their statement, effectively mere reiteration, below.

Comment

6. One matter, however, emerges from the papers in this matter as requiring comment. With the benefit, in early course, of the decision of the Court of Justice of the European Union in *S & Another* it will no doubt be easier for the Minister to decide as to who may be a member of an EU citizen's household as a matter of national and of European law, under the European Communities (Free Movement of Persons) (No 2) Regulations 2006 (SI No 656 of 2006), as amended, which in turn implements Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, OJ L158/77 30.4.2004. It is possible that the Minister was hampered by understandable scepticism as to the brother-sister and uncle-niece relationship asserted, according to the analysis by the Minister, without sufficient documentation. There was, however, a mass of documentation and perhaps any query could more properly relate to reliability. A later DNA test, for instance, demonstrating family relationship was not there at the start. Consequently, that decision did not fully address the three means whereby the movement of family members may be asserted: through dependency, through family relationship and through being a member of a household of an EU citizen. Dependency was rejected but, as the judgment of Barrett J indicates, insufficient attention was paid to, and insufficient information was provided as to, the household ties, or lack of ties, whereby Mr C moved as an EU citizen to Ireland with MH and SH, apparently at the same time. Since the deportation order has been quashed by the High Court on other grounds than the delay point at issue in these proceedings, and is thus inoperative, and since as of 29 December 2020, there is a fresh and widely documented application on behalf of MH and SH to the Minister for residency cards as permitted family member of an EU citizen, it is to be hoped that this issue will now be addressed, particularly the issue of who is or is not a member of the household of Mr C on his exercising his free movement rights. Unless, however, there is an entitlement under legislation to be in the State, and there was in this case for but a short time while the application was being considered, the status of MH and SH is governed by s 5 of the Immigration Act 2004, as amended, which provides:

(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given to him or her after such passing, by or on behalf of the Minister.

(2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State.

The facts

7. In 2009, MH was widowed in Pakistan. As a result, it appears, she and her daughter SH were left in precarious circumstances. MH's brother Mr C provided her with some degree of financial support during this period. In August 2009, it is asserted that he sent MH money, as perhaps did her mother, to facilitate her and her daughter's travel to Britain, where Mr C resided as a national, MH and SH lived in MH's brother's residence in the UK from 2009 to July 2014, at which point the brother moved to Ireland to open a business, it appears related to imports and sales. MH and her daughter, it is asserted, relocated with him. In May 2015, MH and SH applied for EU1 Residence Cards, pursuant to the then European Communities (Free Movement of Persons) Regulations, 2006 and Directive 2004/38/EC, the Citizenship Directive. Their applications were based on their asserted status as 'permitted family members' of an EU citizen, as a result of their dependence on MH's brother, Mr C. On 26 November 2015, the application for residence cards was refused by the Minister. On 14 December 2015, MH and SH requested a review of this refusal. Further documentation was provided by MH following requests for information from the Minister on 20 January and 16 September 2016. As there were some doubts about their familial connection, MH and her brother offered to undergo DNA testing. Though there was no response to this offer, they had the test done nonetheless and the results confirmed MH and Mr C as siblings. On 23 February 2017, the result of the review of the Minister's decision was communicated to the respondents: they did not satisfy the requirements of 'permitted family members' as they failed to show that they were dependent on the EU citizen, a member of the EU citizen's household, or that they required the personal care of the EU citizen on serious health grounds. On the same date, the Minister issued notifications in respect of the respondents that proposed to make a deportation order pursuant to s 3 of the Immigration Act 1999, as amended. This enabled MH and SH to apply for leave to remain on humanitarian grounds, set out in detail in s 3, including their ties to Ireland and their involvement in the economy and community where they then resided. As Murray CJ noted in *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701, 732:

The specific matters which the first respondent is required to take into account in deciding whether to make a deportation order are as set out in s. 3(6) [Immigration Act 1999] and are generally referred to as the humanitarian grounds upon which the first respondent may decide not to make a deportation order notwithstanding that the person concerned has no legal right to remain in the State. The subsection is cited in detail above but the matters to be taken into account include the personal circumstances of the persons concerned such as their duration of residence, family and employment history and humanitarian considerations generally as well as the common good and considerations of national security and public policy.

8. On 16th March 2017, the respondent's solicitor forwarded written submissions to the Minister regarding why the deportation order should not be made. Essentially, this reiterated the dependency submission, already considered by the Minister, but included some reference to humanitarian grounds under the 1999 Act. It was also sought to make a fresh application under Regulation 3 of the European Communities (Free Movement of Persons) Regulations 2015 that

the respondents be treated as permitted family members of an EU citizen. The Minister made no reply to these submissions. On 5th September 2018, some 18 months after the notification had been issued, the Minister wrote to the respondents to inform them that a deportation order had been made against them which required that they leave the state by 6th October 2018. After the High Court judicial review proceedings were issued seeking to quash the Minister's decision to make deportation orders in respect of MH and SH, their solicitor wrote to the Chief State Solicitor's Office on 28 January 2019 to state that her clients were "obtaining further DNA evidence" and that she would like an officer from the Department to be present to witness the taking of DNA samples. By letter dated 30 January 2019, the Chief State Solicitor's Office replied and asked the solicitor to note that the Minister had not requested her clients to undergo such a DNA test to verify their relationship and that, as such, no officer would be in attendance to witness the taking of samples.

The High Court

9. On 22 July 2020, the High Court gave judgment in favour of MH and SH and subsequently an order of certiorari was made quashing the Deportation Order issued in respect of the respondents. The assessment of the High Court was thus:

12. the court considers that: (i) the respondent erred in law and perhaps also fact in making the decision to deport; (ii) the respondent's deliberations in the deportation matter are inchoate; (iii) the decision to deport was unreasonable; and (iv) the respondent erred in law and perhaps also fact in failing to have proper regard to the provisions and consequences of s.3(6) of the Immigration Act 1999, Art.8 ECHR and s.50 of the International Protection Act 2015. Though the point was not pursued at length at hearing, the court further considers that the respondent erred in law and perhaps also in fact in issuing the deportation orders without due regard for the welfare of Ms SH as a minor, in breach of Art.42A of the Constitution (and, if that had not been breached, in breach of Art.8 ECHR).

10. On the delay point, the issue on this appeal, the High Court noted the gap in time between potential notification and the ultimate issuing of the deportation order as lacking in a proper explanation and, at paragraph 7, stated that such delay could be contrary to the rights guaranteed under Articles 40, 41 and 42A of the Constitution as well as Article 8 of the European Convention on Human Rights:

No good explanation has been offered for the 18-month delay which presented in terms of making the deportation order; the court suspects that this is because no good reason exists. As it happens, there is a legal dimension to the foregoing. The court accepts the contention by counsel for the applicants that a delay of 18 months between the prospect of deportation being raised and the issuance of the related deportation orders can have, and in this case has had, an adverse impact on the applicants in the unhindered exercise of their personal and family rights under Arts. 40, 41 and 42A of the Constitution (and, even if this were not so, has had like impact on their private and family law rights under Art. 8 ECHR) in circumstances where the respondent is obliged to have regard for such rights and humanitarian conditions in considering the appropriateness or otherwise of deportation.

11. In the same passage, the High Court further indicated that the delay could affect the proportionality of the decision to issue a deportation order:

Additionally (and indeed even if the foregoing were not so), the delay of 18 months has rights implications in determining the proportionality of the deportation decision; in this regard, the court notes that previous courts (foreign and domestic) have recognised that delay may be a relevant factor in considering whether deportation is an appropriate remedy: see in this regard the judgment of Lord Bingham in *E.B. (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41, paras. 14-16 (incl.) and the judgment of MacMenamin J. in *PO v. Minister for Justice* [2015] IESC 64, para.33. The court does not accept that the delay here is insufficiently long to come within this case-law.

The Minister's submissions

12. Notwithstanding the foregoing qualification by the trial judge, the Minister is principally, if not exclusively, concerned that the breadth of the High Court judgment constitutes an innovation whereby through delay rights may be held to arise. In particular, the Minister is concerned with the trial judge's suggestion that a person who is in the State without permission might have an entitlement to remain where there has been a significant delay in issuing a deportation order. The Minister submits that the trial judge erred in his judgment in suggesting, obiter, that the delay between the s 3 proposal and the making of the deportation orders could give rise to constitutional or European Convention rights which might potentially challenge the legality of the deportation order.

13. In that regard, the submissions of the Minister emphasise that MH and her daughter were illegally in the State when they arrived; s5(1) Immigration Act 2004: and that, consequently, the deportation order did not make their presence in the State illegal, rather the deportation order was issued in response to the illegality of their presence in the State. The Minister argues that the trial judge erred in law in finding that Article 8 of the European Convention on Human Rights may be breached by the delay. All countries are entitled to control the entry of aliens into its territory, the Minister asserts.

Submissions by MH and SH

14. MH and SH contend that the *ratio* of Barrett J's decision is as follows: the Minister's deliberations in the deportation matter are inchoate; the decision to deport was unreasonable; and the Minister failed to have proper regard to the provisions and consequences of s 3(6) of the Immigration Act 1999, Article 8 of the European Convention on Human Rights and s 50 of the International Protection Act 2015. They submit that the decision of the trial judge was principally inspired by the final factor. On this view, whilst the trial judge was critical of the 18-month delay between notification of proposal to deport and the order being made, this did not form part of the *ratio* of the decision. At [7], it is correctly pointed out, the trial judge prefaced his criticism regarding the delay by saying "separate from the legalities presenting". The *ratio* of his decision, it is claimed, is encapsulated at [9]-[12], rather than [6]-[7] where he criticises the delay. The delay issue thus, it is asserted, does not form part of his reasoning.

15. The second point dealt with by the submissions of MH and SH is whether the delay issue gives rise to a breach of constitutional and human rights. They submit that decisions should be made in a timely manner and with the utmost of transparency, including adequate reasons. Procedural delays undermine public confidence in the administration of justice. The relevant provisions of the Constitution affected, it is asserted, by delay are Articles 40.3.1, 40.3.2, 41.1, 41.2, 42A.1. Articles 6 and 8 of the European Convention on Human Rights may be infringed by a lengthy delay, as well as Articles 7, 41, 47 of the EU Charter of Fundamental Rights. They submit that the Charter is applicable here because the applications for residence status were made pursuant to Council

Directive 2004/83/EC. The delay experienced, it was said, has exacerbated an already long-drawn out residency application process. This delay has, it is claimed, caused both mother and daughter immense stress: both were reliant on MH's brother, Mr C; both were engaged in education, particularly SH, then a teenager of 16 years; and they were awaiting a reply from the Minister to their detailed representations submitted. A delay such as this one, they assert, has rights-implications in determining the proportionality of deportation. The courts have recognised, it is asserted, that delay may be a factor in considering whether deportation is an appropriate remedy.

Delay as a source of rights under the Convention

16. There is no sound authority for the proposition that delay in processing an application for residency thereby gives rise to a conversion from a perilous legal status in immigration terms, or a situation of illegal presence in the State, into legal status. As a matter of general legal principle, the passage of time may lead to a situation where other rights arise which are not generated by the delay itself but which might result from a significant change in circumstances during the period of delay. In that regard, it may be useful to reiterate some principles.

17. First, unless rights arise under legislation, including entitlements to remain in the State while an application asserting asylum rights, arising out of an allegation of persecution in the country of origin, is considered, merely being on the territory of the State as a foreign national gives rise to no legal status; *FP v Minister for Justice* [2002] 1 IR 164. There, Hardiman J noted at 172 that the applicants as immigrants “lacked any entitlement to remain in the country save that deriving from the procedures they were operating.” At 174, Hardiman J continued:

To put this another way, each of the Applicants was, at the time of making representations, a person without title to remain in the State. This fact constrains the nature of the decision to be made. The legislative scheme is that such a person may be deported. If this were not so, such persons would be enabled in effect to bypass the normal system of application for entry into the country, made from outside. There is no reason of policy why they should be enabled to bypass this system simply on the basis that they had made an application for asylum which had failed, or might even have been found manifestly unfounded.

18. Coming to a country without an appropriate visa, overstaying a visa entitlement, or merely arriving, in effect on mere hope, does not in the decisions of the European Court of Human Rights give rise to entitlements under the Convention. Immigration or overstaying does not guarantee foreign nationals “a right to choose the most suitable place to develop family life”: *Abmut v The Netherlands*, judgment of 28th November 1996. Neither does it impose “a general obligation to respect immigrants’ choice of the country of their matrimonial residence and to authorise family reunion in its territory”: *Gül v Switzerland*, judgment of 19th February 1996. In this context, however, a distinction may be drawn between settled migrants and unsettled migrants; a principle reiterated in *Pormes v The Netherlands* (Application 25402/14). Those who are unlawfully present in the member state are not settled migrants. In *Nnyanzi v The United Kingdom* (Application No. 21878/06, 8 April 2008) [76], the Court stated:

Her stay in the United Kingdom, pending the determination of her several asylum and human rights claims, has at all times been precarious and her removal, on rejection of those claims, is not rendered disproportionate by any alleged delay on the part of the authorities in assessing them.

19. Second, the proposition that moving as a family to the State creates rights in that family unit to remain, either under the Constitution or the European Convention on Human Rights, is untenable. In *Nunez v Norway* (55597/09, § 66, 28 June 2011) [70], the European Court of Human Rights affirmed that it was an important consideration whether family life was created at a time when the situation of one or more of the persons involved was precarious. If so, the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances. This is relevant to the relationship between MH and her brother Mr C. No case has as of yet found that mere delay in the making of an administrative immigration decision will give rise to any right to resist deportation or expulsion: hence in *Konstadinov v The Netherlands* (Application 16351/03, 2007), [49] the ruling included this:

[T]he Court notes that the applicant has never held a Netherlands provisional admission or residence title and that the relationships relied on by her were created at a time and developed during a period when the persons involved were aware that the applicant's immigration status was precarious and that, until Mr G complied with the minimum income requirement under the domestic immigration rules, the persistence of that family life within the Netherlands would remain precarious. This is not altered by the fact that the applicant's second request for a residence permit to stay with Mr G filed on 1 November 1991 was left undetermined for a period of more than seven years because her file had been mislaid by the responsible immigration authorities.

20. Third, it is not delay which may give rise to rights but the interrelationships which may arise due to the passage of time and which may be such as to require protection where not to do so would lead to an injustice. In *Butt v Norway* (Application 47017/09 4 December 2012), a case concerning two adults who had lived in Norway since ages 3 and 4, the Court held that a deportation order would breach Article 8. This is far removed from the present case. In *Ejimson v Germany* (Application 58681/12 1 March 2018) the applicant challenged a refusal to grant a residence permit and as a result steps to deport him were suspended. The Court, at paragraph 61 did not find a breach of Article 8:

In the light of the length of these proceedings, if the applicant were eventually deported to Nigeria, there would have been a significant lapse of time between the final decision denying him a residence permit on 16 February 2012 and the actual deportation, allowing the Court to have regard to the developments during that time...the failure to execute the deportation order for the period of time outlined above has ensured that the applicant has been able to enjoy family life with his daughter for most of her life, barring the period spent in prison.

21. In *EB (Kosovo) v Secretary of State for the Home Department* [2009] AC 1159, and *PO v Minister for Justice* [2015] IESC 64 a similar line of reasoning rejected delay as the origin of rights in itself, whilst recognising that a long delay may mean that other rights which have accrued during the period of delay may exceptionally fall to be considered. In *EB (Kosovo)*, the House of Lords identified three ways delay might be relevant to a decision on an application to asylum. These are that the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community; strengthening, albeit not establishing, a claim under Article 8. Also, delay could give rise to the expectation that if the authorities with awareness of the situation had intended to remove an applicant, the executive would have acted and would have taken steps to do so.

22. Finally, delay may be relevant in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is a result of a dysfunctional system.

The High Court judgment should have reflected these principles; but perhaps the relevant law was less emphasised in submissions. Nor does the decision in *PO* support any proposition to the effect that delay could give rise to legal rights. The fact that the child in that case had been in the State for nine years was a factor to be weighed in ministerial discretion and did not give rise, as such, to rights. MacMenamin J in *PO v Minister for Justice* [2015] IESC 64 referred to “the duty of the court to uphold the law, but it is difficult to avoid the observation that real issues of ministerial discretion may arise in this case, which involve an eight-year-old child, and his mother, both of whom have now resided in this state for well-nigh on nine years.” This approach does not differ from the analysis of Lord Bingham in *EB (Kosovo)* where he stated:

14. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant’s claim under article 8 [ECHR] will necessarily be strengthened.

15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order.

16. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes.

Delay under the Constitution

23. Fourth, the Constitution does not support any different analysis. Article 41 protects the rights of the family based on marriage which is not relevant in this case. Article 40 protects a broad spectrum of explicit and inferred rights but since the deportation was to be of both mother and daughter, no interference with rights arose. There is no decision recognising rights as between an uncle and a niece. Any entitlement that might arise would have to be explicitly grounded in rights of free movement in European law coupled with an attachment by dependency to an EU citizen or with being a member of the household of such a citizen. Nor is there authority which would extend Article 40.3.1^o to protect a relationship such as that between MH and her brother, Mr C. In *Esmé v Minister for Justice* [2015] IESC 26, the Supreme Court rejected the right to stay of a grandmother who had arrived in the State illegally to join her daughter and grandchildren. Even if this relationship was protected, such protection would not override the constitutional entitlement of the State to regulate entry and stay of non-nationals, which is a fundamental attribute of statehood and a key component of national independence: *Gorry v MJE* [2020] IESC 55.

24. Fifth, there is a remedy for delay in the event that an applicant for immigration status or a declaration of asylum is kept waiting. That remedy is mandamus, as in *Salman v Minister for Justice and Equality* [2011] IEHC 481, where Kearns P in considering the Minister’s treatment of a citizenship application, rightly suggested that a judicial review remedy might be available. See also *Mahmood v Minister for Justice and Equality* [2016] IEHC 600 where Faherty J considered the issue of delay involving visa applications pursuant to Directive 2004/38/EC. See also *T v Minister for Justice, Equality and Law Reform* [2008] IEHC 361, and *Nearing v Minister for Justice, Equality and Law Reform* [2010] 4 IR 211. The submissions of the Minister on this appeal have addressed, in response to questions from the Court, the pressures the Department is under in dealing with family

reunification cases and with processing immigration and asylum applications generally. Mandamus arises when there is a refusal to deal with an application open to a person in law or where delay becomes such as to entitle the courts to order that the executive deal with their duty of consideration. Cooke J at [217] of *Nearing* considered what a ‘reasonable time’ is and, in so far as unreasonable delay gives grounds for mandamus, it may be stated, as he did, that what is reasonable “depends on the circumstances of each case, including the nature of the decision sought, the particularities of the applicant’s position, and the impact that any delay may have and also on the conduct of the administrative decision maker in dealing with such applications, together with any explanation given for the time taken.”

25. Delay may give rise to rights that are enforceable in order to compel a conclusion to a process but there is an absence of authority for delay in itself establishing rights as a matter of law. An exception, which points up the general principle, is such statutory provisions as delay granting a planning permission under the Planning Acts 2010: s34 (8)(f) of the Planning and Development Act, as inserted by Planning and Development (Amended) Act 2010 s 23(b)(ii), transforming a situation that otherwise would be illegal, an unauthorised development, into what is legal that is an authorised development by operation of law through the passage of time in dealing with an application. That transformation of no development permission into development permission because of the delay of a local authority in dealing with an application for planning permission is a specific statutory mechanism. As such, this was a radical change of legal principle and consequently it required insertion into the legislation. It is not a general legal principle.

26. Delay may be a wrong, and for that wrong the remedy is the ordering of the administration to deal with the issue; the remedy does not come in the form of granting the right applied for. An example is *O’Donoghue v Legal Aid Board* [2006] 4 IR 204, where the plaintiff had experienced a delay of 25 months between contacting the Legal Aid Board and ultimately obtaining an appointment with a solicitor and a legal aid certificate. Kelly J considered the case of *Doran v Ireland* (ECHR, 31 July 2003) and the approach of the European Court of Human Rights to the same effect in cases such as *McFarlane v Ireland* (ECHR, application 31333/06, 23 June 2010). He concluded that the plaintiff’s constitutional right in that case had been infringed by the delay and that the court could intervene to protect that right, awarding the plaintiff damages. The delay here did not give rise to constitutional rights but rather infringed upon already existing rights.

27. No mandatory relief had been applied for in this case. In *Iatan v Commissioner of An Garda Síochána* [2007] 4 IR 47, mandamus arose in the context of a family reunification application under s. 18 of the Refugee Act 1996. In granting mandamus, Clarke J at paragraph 6.11 held that there had been “significant delay” on the part of the Minister in dealing with the application but ruled that delay could not, of itself, confer “substantive rights” on the applicant. The High Court, thus, could not be entitled to direct that the application be granted. Similarly see *AN v. Minister for Justice* [2009] IEHC 354.

28. Lastly, it may be reaffirmed that judicial review cannot deal with facts, and cannot substitute a poor decision, or one with which a judge disagrees, with a decision reflecting the court’s view; *Barry & Others v Minister for Agriculture and Food* [2015] IESC 63. Decisions which, on the other hand, fly in the face of fundamental reason and common sense, exceeds jurisdiction and so may be quashed are simply remitted for consideration; *Barry, The State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642. That, to reiterate, is not the transformation of a legal decision; the legal decision is merely quashed to enable further consideration. Part of unreasonableness may be such a lack of proportion in the decision as to undermine its very rationality; *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701. But, these are grounds for compelling a decision, as in

mandamus as a remedy where there is delay, or quashing an unreasonable decision. These are not a basis for making what is an illegal status as regards immigration into a legal one.

Result

29. The High Court quashed the deportation order against MH and SH on grounds that do not relate to this appeal. Those grounds are therefore not before this Court and the High Court order stands in that regard. The deportation order is quashed and there is no proposal to issue a fresh deportation order pending the Minister considering the application for residence by reason of being, it is claimed, part of the household of Mr C when he came from Great Britain as an EU citizen to Ireland in July 2014. That application of 29 December 2020 is not the subject of any comment by the Court. It may be said, however, that grounds of family, dependency and being a member of the household of an EU citizen, if asserted in aid of an application for a residency card, will be considered to establish if these conform to the relevant entitlements in European law. It is possible to infer that the earliest consideration by the Minister lacked this analysis. It must be commented, further, that the analysis of the Minister could have focused more closely on the essential points. In that regard, being a member of a household, the long-standing nature of family relationships and of living together as part of, and this should be enquired into, what is asserted to be a genuinely inter-dependent group of relatives with support from the relationship of siblings and of uncle and niece may or may not exist. That is for the Minister, but under the Directive and Regulations, it is required that pursuant to free movement rights in the European Union, the matter requires to be squarely looked at and conclusions reached based on what the documentation may show or what further correspondence or other steps, if considered necessary, may illustrate.

30. Partly, this may have inspired the comments of the High Court as to delay. This is the aspect of the High Court decision that is under appeal. This has given the Court the context in which to reiterate that delay does not change one's legal status, that of being an illegal immigrant, or someone seeking a legal permit to reside in the State, into a situation of permission to remain. Any such decision is for the Minister.