

THE HIGH COURT

[2021] IEHC 223

[2020 No. 152 JR]

(1)

BETWEEN

MARIE PAMELA CHEVATHYAN

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

(2)

[2020 No. 345
JR]

BETWEEN

KAMINI PEMSING

APPLICANT

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 10th March 2021.

I

Facts

1. Pamela and David hail from beautiful blue-skied Mauritius. They fell in love there, came to Ireland together on student visas in 2009 and have lived here since. They have been a couple for about 20 years.
2. After their student visas expired, both Pamela and David stayed on illegally in Ireland. Then they got lucky, or at least David did. Following the Minister's defeat in the *Luximon* and *Balchand* student overstay cases back in 2018 (see [2018] IESC 24; [2018] 2 IR 542), a 'Special Student Scheme' was introduced that aimed to regularise the position of various non-EEA nationals who had held a student permission in the State during a prescribed period.
3. Pamela and David made application under this Scheme. However, neither of them had been a student over the period of time required under the Scheme. So their applications were correctly refused. They each then applied for a review of their respective refusals.
4. Unbeknown to them, Pamela and David had now embarked down a path which would see a very strange sequence of events unfold.
5. Following their applications for a review of their respective initial refusals, both David and Pamela received letters (the letter to Pamela is dated 30th July 2019) affirming the initial refusal under the Scheme. So far, so good: they were undoubtedly ineligible under the Scheme. Now came the strange bit:
 - the civil servant who did David's review, and who was acting at all times in the name of the Minister, exercised a discretionary power to send David's case forward for consideration for exercise of the Minister's freestanding discretionary power to let someone stay in Ireland. The civil servant did this, his letter to David states, because of David's "*longstanding and currently precarious immigration status*" in

Ireland. Four days after sending this letter, another letter issued to David indicating that the Minister had exercised his freestanding discretionary power in David's favour to allow David to remain in Ireland, with the result that David was now fully free to live and settle here.

- the civil servant who did Pamela's review, and who was acting at all times in the name of Minister, did not send Pamela's case forward for consideration for exercise of the Minister's freestanding discretionary power to let someone stay in Ireland. Instead Pamela, whose case was in all material respects identical to David's, and who had precisely the same "*longstanding and currently precarious immigration status*", was sent a letter dated 17th October 2019, affirming the initial refusal, and told, "Your review request is now closed".

6. So things ended well for David and dreadfully for Pamela. Though their respective cases were in all material respects identical, they found themselves treated in a radically different manner and to have arrived at diametrically opposed end-situations. No good explanation has ever been offered as to why matters proceeded so differently in Pamela's case from how they proceeded in David's case. As one would expect, Pamela is considerably perplexed as to how David (whose case is in all material respects the same as hers) could end up with a 'golden ticket' to settle in Ireland, while she has in effect been told 'You lose'.

II

Eight Suggested Reasons Why All is in Order

7. Unsurprisingly, Pamela has brought the within proceedings challenging the review decision. The respondents have, remarkably, come up with, by the court's reckoning, eight reasons as to why the invidious and nonsensical position in which Pamela currently finds herself placed (as the hapless recipient of a negative immigration decision in a situation where her partner, whose case is in all material respects identical to hers, has been treated in a diametrically opposite manner) should be allowed to stand. These eight reasons are as follows:
 - (1) The first reason is that Pamela was ineligible under the Special Student Scheme. She got a 'no' under the Scheme. She got a further 'no' on review. So what is she complaining about? There is some sense to this reasoning. Thus, to the extent that it was contended (and it was contended) for Pamela that the Minister should have exercised a contended-for discretion to dis-apply elements of the Scheme even as the Minister was applying the Scheme, the court does not consider such a discretion to present: that would in effect be a lawless scenario in which, Magritte-like, a scheme would simultaneously be a scheme and not-a-scheme, a proposition which need only be stated to see that it could not present in any system constructed on the rule of law. However, that aside, this first reason offered by the Minister does not make sense. Why so? Because as part of the review process, there was clearly a discretion vested in the civil servants doing the reviews to send a file forward for consideration for exercise of the Minister's freestanding discretionary power to let someone stay in Ireland. That discretion was exercised in David's favour. Yet it was

not considered and/or not exercised in Pamela's case even though their two cases are for all intents and purposes identical. How could that be? To this last question the Minister's sole answer to date has been, 'Ah you see, I exercised my freestanding discretion to let David stay'. That is not a complete answer (it is, with respect, scarcely an answer at all) as to how two cases which in all material respects were identical could be and were treated in such a manner as to arrive at diametrically opposite ends.

- (2) The second reason is that Pamela is engaged in what counsel for the Minister described as 'whataboutery'. By this counsel meant that Pamela is asking 'What about David's case?' when in fact she should focus on her own case and not trouble herself with how David was treated. But that, with respect, is to misdescribe what Pamela is doing in these proceedings. She has not come to court saying, 'What about David's case?' As David's partner she loves him, but as a litigant all she cares about is that like cases should be treated in a like manner. In this regard she points to David's case as one that is in all material respects identical to hers, yet which has ended up with a diametrically opposite conclusion, and asks, 'how could that be fair and lawful'? There is nothing objectionable about Pamela's proceeding so. It is no different from a woman walking into court and saying, 'I do the same work as my male co-worker but I get paid half the hourly rate that he gets paid' and asking, 'how could that be fair and lawful?' To Pamela's question the Minister's sole answer to date has been, 'Ah you see, I exercised my freestanding discretion to let David stay'. That is not a complete answer (it is, with respect, scarcely an answer at all) as to how two cases which in all material respects were identical could be and were treated in such a manner as to arrive at diametrically opposite ends.
- (3) The third reason is the proposition that the law leans against the replication of error. The court accepts that proposition to be true but respectfully fails to see what it has to do with this case. The Minister maintains that she acted entirely correctly in Pamela's case. If so, what error falls to be replicated? And even if this Court were to find that there is error presenting in how Pamela was treated and to seek to correct that error, the court would be correcting error, not replicating it.
- (4)-(6) The fourth, fifth and sixth reasons relate to case-law. Thus:
- the Minister considers that this case falls to be treated in the same way as the Supreme Court decided *Bode v. Minister for Justice* [2008] 3 IR 663. The critical paragraph in *Bode*, for present purposes, is para.72 of the then Denham J.'s judgment, where she observes that "*The decision of the Minister was that the second applicant did not come within the scheme and his application was refused. There is no reason to interfere with that decision. It was a decision made by the Minister within the terms of the scheme.*" Again, to the extent that it was contended (and it was contended) for Pamela that the Minister should have exercised a contended-for discretion to dis-apply elements of the Scheme even as the Minister was applying the

Scheme, the court, for the reasons stated previously above, does not consider such a discretion to present. But there is a dimension to what occurred here that is not caught by the decision of the Supreme Court in *Bode*, viz. that dimension of matters whereby the civil servant tasked with reviewing the initial refusal under the Special Student Scheme had a clear discretion to send a file forward for further internal consideration as to whether it was a fit case in which to apply the Minister's general discretion to allow a person to remain in Ireland. No good reason has ever been offered as to why Pamela, unlike David, was not extended the benefit of that discretion, and this in circumstances where her case was in all material respects identical to that of David. The Minister's sole answer to this discrepancy of treatment to date has been, 'Ah you see, I exercised my freestanding discretion to let David stay'. That is not a complete answer (it is, with respect, scarcely an answer at all) as to how two cases which in all material respects were identical could be and were treated in such a manner as to arrive at diametrically opposite ends.

- the Minister considers that this case falls to be treated in the same way as the Court of Appeal recently decided *STP v. Minister for Justice and Equality* [2021] IECA 50, pointing in particular to the observations of Faherty J. at para.41 of her judgment in that case, where she observes, *inter alia*, that "*The fact that a different outcome was arrived at in the appellant's partner's leave to remain application (determined some months after his) does not, to my mind, render it arguable, much less on a 'substantial grounds' basis, that the different outcomes amounted to discriminatory treatment.*" But, of course, the parties in STP were given reasons for how they were treated. Pamela has no idea why she has been treated so very differently from her partner even though his case is in all material respects identical to hers. The Minister's sole answer to date has been, 'Ah you see, I exercised my freestanding discretion to let David stay'. That is not a complete answer (it is, with respect, scarcely an answer at all) as to how two cases which in all material respects were identical could be and were treated so diametrically differently.
- the Minister seeks to rely on *McCarron v. Kearney* [2010] 3 IR 302. But that case is clearly distinguishable on its facts. It was concerned with the outcome of separate decision-making processes involving different decisionmakers (Garda superintendents). Here, everything relevant that is done within the Department by Department officials is done in the name of and ostensibly by the Minister, a single, unitary decisionmaker. As a consequence, the court does not consider *McCarron* further.

(7) The seventh reason is that Pamela has brought her application out of time. For the reasons set out in the Appendix hereto the court will extend the time for the bringing of Pamela's application to the time when it was in fact brought

- (8) The eighth reason is that if the court finds error to present in how Pamela was treated by reference to how David was treated and grants her relief, that will be to open the 'floodgates' (unleash administrative pandemonium) in this regard. This is because, the court is told, the Minister will be forever looking over her shoulder if she exercises her discretion in any one case and wondering if someone else might come along and say 'My case was entirely identical, so why was your discretion not exercised likewise in favour of me?' Four points might be made in this regard.

First, if the Minister has a history of arriving at diametrically opposed ends in separate cases that are in every material respect identical, then the court regrettably finds itself the bearer of bad news: yes the Minister could well face future litigation for not treating like cases in a like manner.

Second, it is difficult not to see in this 'floodgates' argument a hint of a hankering for an extensive discretion not far removed from the form of discretion to which Hogan J. rightly and eloquently took such objection in *Hussain v. Minister for Justice, Equality and Law Reform* [2013] 3 IR 257, at pp. 263-64.

Third, on a practical note, the court wonders how many such cases would in actuality fall to be discovered. Pamela only knows how differently David was treated because she lives with him; were that not so, she might never have discovered that she was treated so very differently from someone whose case was in every material respect identical to hers. That the Minister might not get caught out in treating practically identical cases in a diametrically different manner is not a justification for meting out such treatment in the first place; however, it does suggest that in practical terms, the 'floodgates' argument may be, if the court might be forgiven a mixed metaphor, rather 'over-egged'.

Fourth, the court accepts that, in the operation of any administrative scheme, Civil Servant A sitting at one desk may proceed differently from Civil Servant B sitting at another desk. But that, with respect, is the Minister's problem to resolve, not Pamela's and not anyone else's. It is always open to the Minister, should she wish, to establish systemic checks within the context of any one administrative process that seek to minimise the possibility that such process will yield diametrically opposed end-results in practically identical cases. But if the Minister elects, for whatever reason, not to establish such checks and/or such checks as may be established fail in any one instance, and if the Minister then, for whatever reason, declines to resolve matters at the administrative level, she can expect that related judicial review proceedings will likely commence and, if the facts presenting in any such proceedings are akin to those that present here, she can expect also that she will lose in them, just as, and this must by now be clear, she has lost here.

III

Conclusion

8. The court considers there to be the clearest breaches of fairness of procedures in how Pamela has been treated in that:
- Pamela had no idea that the sending of her case forward for consideration for the application of the Minister's general freestanding discretionary power to allow a person to remain in Ireland was a potential outcome of an application for review of a refusal under the Special Student Scheme. This appears to have been an essentially secret aspect of the Scheme's operation and were it not for the fact that Pamela and David live together might well have gone undiscovered by Pamela. Not knowing how she could be treated denied Pamela the ability of forming an informed conclusion as to how in fact she was treated and making any (if any) such informed complaint as she then thought appropriate in this regard.
 - Pamela had/has no idea from the impugned decision (nor indeed does she know even after these proceedings) whether it was ever even considered to apply the discretion to send her case forward for consideration for the application of the Minister's general freestanding discretion to allow a person to remain in Ireland and if not, why not. Not knowing how she was treated denied her the ability of forming an informed conclusion as to how in fact she was treated and making any (if any) such informed complaint as she then thought appropriate in this regard. Again, were it not for the fact that Pamela and David live together as a couple, it is possible that Pamela might never have discovered that such a sending forward was a possible outcome of the review process.
9. Something of a conundrum presents for the court in how now to deal with matters. This is because Pamela was ineligible under the Special Student Scheme, was rightly refused permission to stay under the Scheme, and the review decision, so far as it affirms that she was ineligible under the Scheme, is correct. The key problem presenting is that there is no indication in the impugned decision (and still the Minister has not indicated) whether or not the civil servant who undertook the review of Pamela's refusal considered exercising her discretion to send on the file for consideration of the application of the Minister's freestanding discretion to allow Pamela to stay in Ireland, and if not, why not.
10. On balance, it seems to the court that the fairest thing to do in all the circumstances presenting is to quash the impugned decision and send the review of Pamela's refusal back for fresh consideration. Pamela can expect that the initial refusal under the Scheme will be affirmed. The court will and does request, however, that the fresh decision to issue will indicate, in addition to whatever else the Minister may wish to say (i) whether or not it has been decided to send Pamela's case forward for consideration for the application of the Minister's free-standing discretion to allow her to remain in Ireland, and (ii) if not, why not.

IV

Kamini's Case

11. It was conceded by the Minister that Kamini's application would rise or fall with that of Pamela. Thus, as Pamela has triumphed, so too must Kamini. (The opposite, the court

notes, also applies. Had it written this judgment by reference to Kamini's circumstances, Pamela's case would have risen or fallen accordingly). Hence the same order will issue in Kamini's case as in Pamela's for the same reasons, *mutatis mutandis*, as the court has given in Pamela's case. The only substantive factual difference between the two applications is that to Kamini, David is 'merely' a fellow Mauritian national and not her partner.

APPENDIX

Delay

i. Overview

1. Both of the within proceedings were commenced out of time. The Minister objects to an extension of time being granted in which to allow the applicants to apply for judicial review. The Minister's objection in each set of proceedings in this regard has failed. In this Appendix, the court explains why this is so.

ii. Order 84, rule 21(3)

2. Of relevance to this aspect of the court's considerations is O.84, r.21(3) RSC which provides, *inter alia*, that the period within which an application for leave to apply for judicial review may only be extended where the court is satisfied that "(a) *there is good and sufficient reason for doing so, and (b) the circumstances that resulted in the failure to make the application for leave...(i) were outside the control of, or (ii) could not reasonably have been anticipated by the applicant for such extension*" (here each of the two applicants).

3. It seems to the court that in deciding whether the requisite "*good and sufficient reason*" presents for the purposes of r.21(3)(a), the court (1) *may* weigh into the balance the fact that the court adjudging upon the issue of delay, having already reasoned through the applicable facts and law knows that it will be granting the relief sought if the time for bringing the application is extended, and (2) *must* (even as regards point (a)) weigh into the balance the circumstances that resulted in the failure to make the leave application within the standard three-month timeframe.

4. Why has the court reached the view just stated at point (2) above? Because even if a court knows, for example, that someone to have a winning case, how could there be "*good and sufficient reason*" for allowing that party to proceed where, for example, the reason for that party's delay is that, e.g., she sat back and knowingly did nothing even at a time when she knew the three-month clock was ticking? That would be to reward the very indolence that r.21(3) is clearly intended to combat.

iii. Some Observations on the Application of Order 84, rule 21(3)

5. An extension under O.84, r.21(3) is granted by way of exception to the standard three-month timeframe; it would defeat the purpose of r.21(3) if extensions were granted as a matter of course.

6. Before a court may grant an extension it must be satisfied that there "*is good and sufficient reason for doing so*". That is a relatively high standard. Moreover, it is not inconceivable that one could present with a good reason but that, despite being

possessed of such a good reason, that good reason would not be considered a sufficient reason. 'Not inconceivable', though perhaps not very common either – how many cases can there be in practice in which a "good" reason will not also be found to be a "sufficient" reason? However, the requirement, as worded, is a twofold one, i.e. the reason that presents (or the reasons that present) must be "good" and "sufficient".

7. Next, a court must also be satisfied that the circumstances that resulted in the failure to make the application for leave within the applicable three-month period either were outside the control of the person seeking the extension or could not reasonably have been anticipated by that applicant.
8. Prudent counsel/solicitors seeking an extension application will likely therefore ensure that in any affidavit furnished in support of an extension application the court is provided with sufficient detail (and any justification for extension will lie in the detail) so as to be able to answer 'yes' to Questions 1 and 2 and either 3(a) or 3(b) below:
 - (1) Has the applicant provided good reason to justify the extension sought? (O.84, r.21(3)(a))

AND
 - (2) Is the good reason referred to at (1) sufficient to justify the extension sought? (O.84, r.21(3)(a))

AND EITHER
 - (3) (a) Were the circumstances that resulted in the failure to make the application for leave outside the control of the applicant for the extension? (O.84, r.21(3)(b)(i))

OR
 - (3) (b) Were the circumstances that resulted in the failure to make the application for leave such as could not reasonably have been anticipated by the applicant for such extension? (O.84, r.21(3)(b)(ii))
9. A court in arriving at a conclusion as to whether or not to grant the extension sought will also likely typically have regard to the effect which an extension of the three-month period might have on a respondent or third party (O.84, r.21(4) indicates that the court "may" have such regard; however, a court may consider that the constitutional mandate as to basic fairness of procedures requires it to have at least some such regard).
 - iv. The Justifications Here Offered
10. Turning to the case at hand, what are the circumstances that resulted in the failure on the part of the applicants in each of the two sets of within proceedings to make their respective leave applications within the standard three-month timeframe?

a. Pamela

11. When it comes to the delay presenting in Pamela's case, her solicitor has averred, *inter alia*, as follows:

"10. *I have been advised by Counsel that an application of this kind must be brought within three months of the date of knowledge of the impugned decision. I say that based on the foregoing the herein proceedings are brought out of time and that an extension of time is therefore required. I say that by my calculation the extension of time required is 33 days.*

11. *I say that there was some unavoidable delay in bringing these proceedings due to the necessity to obtain the relevant documentation required to be exhibited, thereafter the requirement on the Applicant to swear her affidavit and that the cumulative impact of the foregoing resulted in these proceedings being filed outside of the time limits set down.*

12. *I say and believe and am so advised that the test to be applied in seeking an extension of time is to establish that there is good and sufficient reason for the extension sought. [Court Note: With respect, this is not entirely correct. The solicitor but refers to O.84, r.21(3)(a) whereas O.84, r.21(3)(b) also falls to be satisfied in this regard.] I say and believe that the instant case involves matters of significance for the Applicant herein but also matters which go beyond the facts of this particular case and pertain to the workings of an administrative scheme which itself came into existence due to decisions of the courts...[and] that in the event that an extension is not granted in the instant case that the issues raised would escape judicial scrutiny and that it would not be in the interests of justice for this to occur".*

b. Kamini

12. When it came to the delay presenting in Kamini's case, her solicitor has averred, *inter alia*, as follows:

"10 *....I have been advised by Counsel that an application of this kind must be brought within three months of the date of knowledge of the impugned decision. I say that based on the foregoing the herein proceedings are brought out of time and that an extension of time is therefore required. I say that by my calculation the extension of time required is 130 days.*

11. *I say that the Applicant appreciates that on the face of things this appears a very significant period of delay but I say that there is a substantial explanation for same and that there were extenuating circumstances and a number of mitigating factors which were outside of the Applicant's control.*

12. *I sat that, in general terms, there was some unavoidable delay in bringing these proceedings due to the necessity for the Applicant to obtain advice, to seek out and gather the relevant documentation required to be exhibited, and thereafter the requirement on the Applicant to swear her Affidavit and that the cumulative impact*

of the foregoing resulted in these proceedings being filed outside of the time limits set down.

- 13. I say that the Applicant was informed of the review decision the subject matter of the within proceedings by letter dated 17th October 2019, I say that subsequent to receiving this correspondence she sought advices and considered how best to proceed. I say that in making her application at first instance under the Special Student Scheme and in seeking the subsequent review, the Applicant had been assisted by The Immigration Services Centre, then of [Stated Address], Dublin 7 and that all correspondence with the immigration authorities had been through that office. I say that in or around January 2020, prior to the expiry of the three-month period for seeking judicial review, the Applicant again sought assistance from The Immigration Services Centre.*
- 14. I say and believe and am so advised that in or around December 2020, prior to the Applicant seeking such advice and assistance, the said Immigration Services Centre had ceased to operate from its previous address, had physically moved out of that premises, and was actively seeking new offices. I say and believe and am so advised that all files which were not at that time 'live' or in progress were placed into short term storage at a facility in Tallaght, Dublin 24. I say and believe and am so advised that this created significant difficulties...in terms of accessing, locating and retrieving the Applicant's file and necessary papers thereon.*
- 15. I say and am advised that, upon the retrieval of the Applicant's file and review of the documents, it was deemed advisable and necessary that she attend at the office of a solicitor for investigation, advice and, subject to such advice, consideration of the possible issuing of High Court proceedings for judicial review.*
- 16. I say that the Applicant attended at the offices of [her solicitor]...on or about 23rd March 2020 and met with the deponent. I say that it was not apparent that not all documents were in the Applicant's possession or on the file retrieved by the Immigration Services Centre. On inquiry, it further became evident that additional documentation of relevance, including papers pertaining to a previous High Court [action]...might be held by or in the possession of the offices of another firm of solicitors who had acted for the Applicant at that time. I say that I formed the view that it would be necessary to see the papers from the previous High Court [action]...prior to instigating any new proceedings in order to satisfy myself as to [the] nature and outcome of that application, to consider what impact or bearing, if any, these proceedings might have on the review contemplated herein; and in order to facilitate compliance with the Practice Direction and with the duties owed to the Court of good faith and candour. I say that on or about 23rd March 2020 the Applicant signed an Authority authorising this office to write to her previous solicitors to take up any relevant files or papers in their possession, to include previous judicial review proceedings. I say that immediately thereafter I wrote to the said firm of solicitors, both in hard copy and by email, enclosing the Applicant's*

authority and requesting that they furnish to this office the relevant files and documentation. I say that a response was received in short order and that the following day 24th March 2020 I attended at the office of the said firm of solicitors in person to collect the files. I say that thereafter the said papers were reviewed, sent to counsel for advice and that papers were drafted.

17. *I say that any further delay since that time is directly attributable to the global coronavirus pandemic, the national public health emergency, and the various restrictions on movement, travel and activity introduced by the Government of Ireland....I say that by my calculation approximately half of the period of delay in bringing the within proceedings, and therefore half the period of the extension of time sought, is directly attributable to this unprecedented and unforeseeable situation, which has caused widespread disruption across all sectors of Irish society and which lies wholly and entirely beyond the Applicant's control. I say that the week beginning 18th May 2020 was the first possible opportunity for the Applicant to have attended for the purposes of verifying the Statement of Grounds and swearing her grounding affidavit and that she has acted expeditiously in this regard.*

18. *In an application for an extension of time, I say and believe and am so advised that the test to be applied in seeking same is to establish that there is good and sufficient reason for the extension sought. [Court Note: Again, with respect, this is not entirely correct. The solicitor but refers to O.84, r.21(3)(a), whereas O.84, r.21(3)(b) also falls to be satisfied in this regard.] I say and believe that the instant case involves matters of great significance for the Applicant herein but also of the matters which go beyond the facts of this particular case and pertain to the workings of an administrative scheme which itself came into existence due to decisions of the courts. I say that in the event that an extension is not granted in the instant case the issues raised would escape judicial scrutiny and that it would not be in the interests of justice for this to occur. I further say that the delay, in the main, is not attributable to the Applicant herself and regard ought to be had to the particular circumstances and difficulties herein, not least the wide-ranging disruption wreaked by the Covid 19 pandemic which I say and believe requires a flexible and sympathetic approach be taken in the interests of justice."*

v. Analysis of Justifications by reference to Order 84, rule 21(3).

13. Returning to the questions identified above and treating with each of Pamela and Kamini in turn:

a. Pamela

14. Question (1).

Has Pamela provided good reason to justify the extension sought? (O.84, r.21(3)(a)).

15. Answer (1).

- (i) Pamela's solicitor avers that "*there was some unavoidable delay in bringing these proceedings due to the necessity to obtain the relevant documentation required to be exhibited*". Although further detail would have assisted in this regard, the court considers that this is good reason. (That said, there will likely come a time in anticipated judicial review proceedings when, with the clock ticking fast down, an intending applicant may have to go to court without all necessary documentation and seek leave to bring the proceedings on the basis of what one has (with the undertaking to procure and provide it as soon as possible), explaining to the leave judge the issue presenting as regards sourcing the necessary documentation. It will doubtless be a challenge for solicitors and counsel as to quite when they are approaching the Rubicon in terms of making such an application in any one case. However, given the potential consequences for their clients they ought perhaps to err on the side of caution in this regard. Conversely, in the interests of fairness of procedures, there would seem to be a corresponding obligation on the judge confronted with such an application to show understanding and perhaps even a degree of indulgence to litigants who come armed with incomplete documentation but also with a good explanation as to why the documentation is as yet incomplete).
- (ii) Pamela's solicitor further avers that there was delay presenting in satisfying the "*requirement on the Applicant to swear her affidavit*". Obviously there will be some elapse of time between the drafting of an affidavit and getting a client to swear it up, which elapse of time will not per se be delay. However, to the extent that Pamela delayed in this regard, the court does not accept that delay in getting her to swear her own affidavit offers good reason for granting an extension: she lives in Dublin, her solicitor is in Dublin and there is no justifiable basis for any protracted delay in this regard.
- (iii) Pamela's solicitor avers that "*the instant case involves matters of significance for the Applicant herein but also matters which go beyond the facts of this particular case and pertain to the workings of an administrative scheme which itself came into existence due to decisions of the courts...[and] that in the event that an extension is not granted...the issues raised would escape judicial scrutiny and that it would not be in the interests of justice for this to occur*". Unless Pamela's solicitor knows for a fact that there is no other case with facts similar to those of Pamela (and as he is also the solicitor for Kamini, such a scenario cannot present, though the court struggles to see how, absent omniscience on the part of the solicitor, it could in any event present), he cannot properly aver that by refusing an extension of time in Pamela's case, questions as to the operation of the Special Student Scheme would escape judicial attention. However, this case has such profound effects for Pamela's own future that the court considers that that of itself offers good reason for the extension. By way of further buttressing factor, the court is mindful too, in this regard, of the conclusion that it will reach in its judgment if the extension is granted in the proceedings brought by Pamela.

The court concludes that there is good reason for granting an extension for the reasons stated.

16. Question (2).

Is the good reason referred to at (1) sufficient to justify the extension sought? (O.84, r.21(3)(a)).

17. Answer (2).

The court considers that the good reasons referred to in Answer (1), offer good and sufficient reason for granting the extension sought.

18. Question (3)(a).

Were the circumstances that resulted in the failure to make the application for leave outside the control of the applicant for the extension? (O.84, r.21(3)(b)(i)).

19. Answer (3)(a).

As regards item (iii) as referred to in Answer (1), the court's answer is 'no'. Pamela finds herself placed in the position she is in because of how the Minister has acted but the Minister's actions did not yield such delay as has ensued in commencing these proceedings.

As regards item (i) as referred to in Answer (1), it will be recalled that Pamela's solicitor avers that "*there was some unavoidable delay in bringing these proceedings due to the necessity to obtain the relevant documentation required to be exhibited, thereafter the requirement on the Applicant to swear her affidavit and that the cumulative impact of the foregoing resulted in these proceedings being filed outside of the time limits set down.*" The court, for the reasons stated previously above, does not accept that the delay in swearing the affidavit can count, on the facts presenting, towards justifying an extension. As regards sourcing documentation, such sourcing is notoriously out of the control of the solicitor (and can in fact be an extremely frustrating process). So to some extent, yes, the circumstances that resulted in the failure to make the application for leave were outside the control of the applicant.

The court's Answer to Question (3) is 'yes', some of the circumstances were.

20. Having answered 'yes' to Questions (1) and (2) and 3(a), the court does not need to proceed to answer Question 3(b) but does so for the sake of completeness:

21. Question (3)(b).

Were the circumstances that resulted in the failure to make the application for leave such as could not reasonably have been anticipated by the applicant for such extension? (O.84, r.21(3)(b)(ii)).

22. Answer (3)(b).

As regards item (i) as referred to in Answer (1), insufficient detail is provided by Pamela's solicitor to enable the court to answer this question.

As regards item (iii) as referred to in Answer (1), Pamela finds herself placed in the position she is in because of how the Minister has acted but the Minister's actions did not yield such delay as has ensued in commencing these proceedings.

The court cannot properly answer Question 3(b) on the evidence presenting.

23. The court does not see as a matter of fair procedures how it can properly adjudicate on the question of whether or not to grant an extension without regard to the effect which an extension of the three-month period might have on the Minister, albeit that the court accepts that O.84, r.21(4) RSC but indicates that the court "may" have such regard. Here the result of the extension is that the Minister will have to meet a case that she would not otherwise have to meet. As against that, if the extension is not granted the Minister's actions will escape scrutiny in a case where those actions have had the most profound implications for Pamela.

24. Having regard to the foregoing the court will extend the time for the bringing of Pamela's application to the time when it was brought.

b. Kamini

25. Question (1).

Has Kamini provided good reason to justify the extension sought? (O.84, r.21(3)(a)).

26. Answer (1).

The court does not propose to recite the entirety of Kamini's solicitors averments in this regard. The move of her initial advisors and the ensuing difficulties that presented in terms of sourcing relevant and necessary documentation, as well as the challenges posed by the Covid 19 lockdowns, lead the court to conclude that the answer to Question (1) is 'yes'. By way of further buttressing factor, the court is mindful too, in this regard, of the conclusion that it will reach in its judgment if the extension is granted in the proceedings brought by Kamini.

27. Question (2).

Is the good reason referred to at (1) sufficient to justify the extension sought? (O.84, r.21(3)(a)).

28. Answer (2).

The court considers that the reasons referred to in Question (1) offer good and sufficient reason for granting the extension sought.

29. Question (3)(a).

Were the circumstances that resulted in the failure to make the application for leave outside the control of the applicant for the extension? (O.84, r.21(3)(b)(i)).

30. Answer (3)(a).

Yes, the move of Kamini's initial advisors and the ensuing difficulties that presented in terms of sourcing relevant and necessary documentation, as well as the challenges posed by the Covid 19 lockdowns, were outside Kamini's control.

31. Having answered 'yes' to Questions (1) and (2) and 3(a), the court does not need to proceed to answer Question 3(b) but does so for the sake of completeness:

32. Question (3)(b).

Were the circumstances that resulted in the failure to make the application for leave such as could not reasonably have been anticipated by the applicant for such extension? (O.84, r.21(3)(b)(ii)).

33. Answer (3)(b).

Yes, the move of Kamini's initial advisors and the ensuing difficulties that presented in terms of sourcing relevant and necessary documentation, as well as the challenges posed by the Covid 19 lockdowns, were circumstances that could not reasonably have been anticipated by Kamini.

34. The court does not see as a matter of fair procedures how it can properly adjudicate on the question of whether or not to grant an extension without regard to the effect which an extension of the three-month period might have on the Minister, albeit that the court accepts that O.84, r.21(4) RSC but indicates that the court "*may*" have such regard. Here the result of the extension is that the Minister will have to meet a case that she would not otherwise have to meet. As against that, if the extension is not granted the Minister's actions will escape scrutiny in a case where those actions have had the most profound implications for Kamini.

35. Having regard to the foregoing the court will extend the time for the bringing of Kamini's application to the time when it was brought.

**TO THE APPLICANTS:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?**

Dear Applicants,

I am always concerned that because applicants in immigration cases are foreign nationals for whom English may not be their first language, they should, if possible, be placed by me in a position where they can read and understand for themselves a judgment that has a sometimes profound impact on their lives. Sometimes short, simple judgments are not possible, though they should in truth be more common than they are.

*Because much of what I have written in the main body of my judgment above may seem like legal jargon, I identify below some key elements of my judgment and what it means for you. **This summary is not a substitute for what is stated in the main body of my judgment. It is meant merely to help you understand some key elements of what I have stated. The other parties require no such assistance. So this section of my judgment is addressed to you, the applicants, though copied to all of the parties.***

Pamela's Case

For the reasons identified by me in my judgment, it seems to me that there are clear breaches of fairness of procedures presenting in how Pamela has been treated in that:

- Pamela had no idea that the sending of her case forward for consideration for the application of the Minister's general freestanding discretionary power to allow a person to remain in Ireland was a potential outcome of an application for review of a refusal under the Special Student Scheme. This appears to have been an essentially secret aspect of the Scheme's operation and were it not for the fact that Pamela and David live together might well have gone undiscovered by Pamela. Not knowing how she could be treated denied Pamela of the ability forming an informed conclusion as to how in fact she was treated and making any (if any) such informed complaint as she thought appropriate in this regard.*
- Pamela had/has no idea from the impugned decision (nor indeed does she know even after these proceedings) whether it was ever even considered to apply the discretion to send her case forward for consideration for the application of the Minister's general freestanding discretion to allow a person to remain in Ireland and if not, why not. Not knowing how she was treated denied her the ability of forming an informed conclusion as to how in fact she was treated and making any (if any) such informed complaint as she thought appropriate in this regard. Again, were it not for the fact that Pamela and David live together as a couple, it is very possible that Pamela might never have discovered that such a sending forward was a possible outcome of the review process.*

I consider that the fairest thing to do is to quash the challenged decision and send it back for fresh consideration. Pamela can expect that the initial refusal under the Scheme will again be affirmed. However, I will request that the fresh decision which issues from the Minister also indicate, inter alia, (i) whether or not it has been decided to send Pamela's case forward for consideration for the application of the Minister's free-standing discretion to allow her to remain in Ireland, and (ii) if not, why not.

Kamini's Case

It was conceded by the Minister that Kamini's application would rise or fall with that of Pamela. Thus, as Pamela has triumphed, so too must Kamini. Hence the same order will issue in Kamini's case as in Pamela's.

Yours faithfully,

Max Barrett (Judge)