THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 330

Appeal No.: 2018/362

Baker J.
Whelan J.
McGovern J.

BETWEEN/

SHEHARYAR RAHIM SUBHAN AND ASIF ALI

APPLICANTS/
APPELLANTS

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms Justice Baker delivered on the 19th day of December, 2019

1. This appeal concerns the test under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 1990), as amended ("the 2006 Regulations") implementing 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, O.J. L158/77 30.4.2004 ("the Citizens Directive"), by which a person is assessed as being a "permitted family member" of a Union citizen for the purposes of the grant of permission to enter and remain in the State.

2. The appeal is from the order of Keane J. made on 31 July 2018 following delivery of a written judgment, *Subhan v. Minister for Justice and Equality* [2018] IEHC 458, by which he refused to grant judicial review of a decision of the Minister for Justice and Equality ("the Minister") made on 15 August 2016 refusing the application of Mr Ali, the second appellant, for a residence card pursuant to the provisions of the 2006 Regulations implementing article 3 of the Citizens Directive.

3. The purpose of the Citizens Directive is set out in some detail in the recitals and will be considered below, but in essence it can be said to have been adopted to support the right of free movement and residence of Union citizens and of their family members. In furtherance to such objective, the Directive imposes obligations on Member States to facilitate the right of extended family members of Union citizens irrespective of their nationality to also move and reside freely, which derives from the right of Union citizens to maintain the unity of the family in a broader sense.

4. The 2006 Regulations implemented the Directive and provide in domestic law for the means by which a Union citizen and his or her family member may enter and reside in the State.

Factual Background

5. Mr Subhan and Mr Ali were both born in Pakistan. Mr Subhan was born in 1978, he moved to the United Kingdom with his parents in 1997 and became a naturalized British citizen on 8 February 2013. He moved to Ireland in January 2015, was employed thereafter for a few months, and since October 2015 has been self-employed within the State. After he came to reside in Ireland he married a woman who is a Pakistani citizen and who, at the time of the High Court proceedings, resided in Peshawar, Pakistan, and it would appear she continues to so reside.

6. Mr Ali is the first cousin of Mr Subhan and was born in 1986. The two first cousins were brought up in the same family compound in Peshawar until Mr Subhan moved to the United Kingdom when his young cousin was eleven.

7. Mr Ali has a third level degree in economics from a university in Pakistan, and in 2010 he travelled to the United Kingdom on a four-year student visa where he pursued a course in accountancy and, later, business administration. While he was studying he resided with his cousin and his cousin's parents and other siblings in a house owned by Mr Subhan's brother. Mr Subhan and Mr Ali entered into a joint tenancy agreement for one year certain with that brother on 11 February 2014, some four years after Mr Ali came to reside in the United Kingdom, and less than an year before Mr Subhan came to reside in the State.

8. Mr Ali's permission to remain in the United Kingdom as a student expired on 28 December 2014 and some ten weeks later, on 5 March 2015, he unlawfully entered the State without a visa by travelling through Northern Ireland. He went to reside with his cousin in his home in a provincial town.

9. On 24 June 2015, Mr Ali applied for an EU residence card as a permitted family member of Mr Subhan in which he claimed that he was dependent upon Mr Subhan and was, for the purposes of the 2006 Regulations, a member of his household in the country from which he had come, the United Kingdom.

10. By a decision issued on 21 December 2015, the Minister refused his application for a residence card. A review was sought of that decision and the decision of the review communicated by letter of 15 August 2016 to Mr Ali states the following:

> "The Minister has examined the supporting documentation submitted in support of your application for residence in the State under EU Treaty Rights. I am to inform you the Minister is satisfied that you have not established that you are in fact dependent [on] the EU citizen Sheharyar Rahim Subhan. In respect of your residence in the United Kingdom you have provided evidence that you resided at the same address as the EU citizen Mr Subhan, however, you have not established that the EU citizen was in fact the head of that household in the United Kingdom."

11. Early in the letter, the Minister had stated that Mr Ali had failed to submit satisfactory evidence that he was a family member of the Union citizen and set out the uncontroverted facts which have been broadly outlined above.

12. The application for judicial review was grounded on an affidavit of Mr Subhan and one of Mr Ali both sworn on 8 September 2016. The trial judge took the view that the replying affidavit of Garrett Byrne sworn on 10 August 2017 had impermissibly sought to clarify the reasons for the decision of the Minister, and it seems to me that trial judge was right to assess the correctness of the decision on its own terms, as he stated in para. 56, and that approach was not seriously in contention in the appeal.

13. The affidavit of Mr Subhan set out that he had lived in the United Kingdom for fifteen years before he was naturalised there in February 2013, that he is married to a Pakistani citizen since February 2016, and that she continues to reside in Pakistan. He says that he moved to Ireland in January 2015 for employment in the IT sector, and that he had been, since October 2015, self-employed in a business importing and selling mobile phone accessories, a business he previously operated from his principal private residence in a midlands town. That business is now run from a storage centre in an industrial estate in Dublin city.

14. In para. 6 of his affidavit, Mr Subhan avers to the financial support that he afforded to his first cousin, Mr Ali, and that he was dependent upon him for all his living expenses and college fees whilst they lived under the same roof in London between July 2010 and January 2015. He says it was “expected of me by my family in Pakistan to look after my cousin”. He says he, his parents, his brother, and his sister lived with Mr Ali in a house which was owned by one of his brothers.

15. Mr Subhan says that his move to Ireland was “specifically for employment purposes”, and that since Mr Ali came to reside with him in Ireland in March 2015, he is “fully and totally dependent” upon him. With regard to the test that Mr Ali was part of his “household” in London, he avers that it was he and he alone who had responsibility for looking after and financially supporting his cousin, that his brother, who owned the house, was in fact spending more time in Pakistan than in London, and that his parents are elderly, and his father retired from employment. He says he was the only person in the household working and the only person paying household utility bills.

16. In his verifying affidavit of 8 September 2016, Mr Ali avers he is unemployed. He exhibits copies of receipts for seven money transfers to Mr Ali between 3 February 2009, when Mr Ali was approximately 22 years old, and 13 May 2010, when Mr Ali was 24, amounting in the aggregate to £4,675 over that fifteen-month period. For the greater part of the four years Mr Ali spent in the United Kingdom studying accounting and business administration, he says he did not have a bank account and that his cousin, Mr Subhan, covered his rent, paid for his studies, and gave him money for his general living expenses.

17. In November 2014, Mr Ali opened a building society account in the United Kingdom into which Mr Subhan made four transfers, totalling £700, between 6 November 2014 and 13 January 2015, and Mr Ali's account statements are exhibited.

18. The trial judge set out these payments in detail and made observations on them in para. 64 *et seq*. of his judgment.

First instance decision

19. The Irish Naturalisation and Immigration Service ("INIS"), by its letter of 21 December 2015, informed Mr Ali that the Minister had decided to refuse his application for a residence card for the reasons set out, and it is useful to summarise these:

    (i) a failure to provide satisfactory evidence that Mr Ali was a family member of the Union citizen, a member of his household, or dependent upon him in the manner provided in the 2006 Regulations;

    (ii) that the Union citizen obtained United Kingdom citizenship in February 2013 and that, therefore, the time Mr Ali and he resided together for material purposes is less than two years. This observation is presumably to take account of the caselaw and, in particular, the decision in *Moneke v. Secretary of State for the Home Department* [2011] UKUT 341, [2012] INLR 53, that what is to be assessed is the living arrangements of the Union citizen since that person became an Union citizen, wheresoever this occurred;

    (iii) that the Union citizen's father, brother, and sister shared the same address, and that whilst documentation did show that Mr Ali and Mr Subhan shared a mutual address, this was not sufficient to demonstrate that Mr Ali was a member of the household of the Union citizen;

    (iv) that the bank statements submitted did not explain Mr Ali's financial dependence between 2010, the date on which the last direct transfer of funds was made, and November 2014;

    (v) that there was a failure to provide satisfactory evidence that the Union citizen's business was actively trading in the State and, thus, that the Union citizen was exercising EU rights;

20. That decision was appealed, and further documentation and information furnished. The argument made was that Mr Subhan provided cash payments to his first cousin whilst they resided under the same roof in London and that he paid all bills, including rent of the household. Evidence of transfers of money to Mr Ali from October 2014 for a period of three months up to the time Mr Subhan moved to Ireland was also furnished. A recent standing order directed to a newly opened account of Mr Ali in Ireland was also shown.

21. It is not in dispute that Mr Ali has to show that he was a member of the household of his first cousin in the United Kingdom before his first cousin exercised his EU Treaty rights, and that he was dependent upon him there. The decision of *Moneke v.Secretary of State* is clear regarding the geographical nexus and no argument was made in the course of the present appeal or before the High Court that the relevant dependency may take place within Ireland.

22. By letter of 15 August 2016, Mr Ali was informed that his review had been unsuccessful.

23. It was in that letter that the expression "head of the household" appeared and the Minister's decision was based, *inter alia*, on the fact that Mr Ali had not provided evidence that Mr Subhan was, in fact, the head of the household in which he and Mr Ali resided in the United Kingdom. There is no contest regarding the fact that the first cousins lived under the same roof. With regard to the fact of dependence, the letter is curt and merely says that the Minister was not satisfied that Mr Ali was, in fact, dependent on his first cousin, the Union citizen.

The Citizens Directive

24. The Citizens Directive recites as its purpose the conditions governing the exercise of the right of free movement within the territory of Member States by a Union citizen and their family members and provides the framework within which permanent residence in the territory of a Member State for Union citizens and their family members is to be considered.

25. Recital 1 of the Citizens Directive provides that the right to move and reside freely within the territory of the Member States is a "primary and individual right" of every citizen of the Union, subject to the limitations and conditions laid down in the Treaties. The broad principle of free movement is described as constituting "one of the fundamental freedoms of the internal market", an area "without internal frontiers", and recital 5 of the Citizens Directive provides that the proper exercise of the right to move and reside freely within the territory of other Member States means the right should also be granted to their family members irrespective of nationality:

> "The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality."

26. Recital 8 makes reference to "facilitating the free movement of family members who are not nationals of a Member State."

27. Recital 10 notes the need to reconcile a number of competing interests, including the undesirability that persons exercise their right of residence becoming an "unreasonable burden on the social assistance system of the host Member State".

28. Recital 17, having noted that the enjoyment of permanent residence by Union citizens who have chosen to settle long term in a host Member State "would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion", provides that a right of permanent residence should be laid down for all Union citizens and their family members subject to the conditions in the Directive.

29. The scheme of the Citizens Directive provides for a different approach to family members and extended family members. Family members who come within the definition in article 2(2) of the Directive are afforded the right of entry and residence in the Union citizen's host Member State, provided certain conditions are met. A family member, in that sense,

is a spouse, a civil partner, a direct descendant under the age of twenty-one, or dependent, and those of the spouse or partner, and any dependent direct relatives in the ascending line of the Union citizen and of the spouse or partner.

30. The present case concerns the category of permitted family members who do not come within the definition of "family member" in article 2 of the Citizens Directive, and whose application for entry and residence in the host Member State is to be facilitated, but who cannot be said to have a right of entry or to remain. Article 3(2) of the Citizens Directive is the focus of the present appeal, and it is convenient to quote it in full:

> "Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
> (b) the partner with whom the Union citizen has a durable relationship, duly attested.
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

31. It is common case that Mr Ali is not a family member within the definition of article 2 of the Citizens Directive and that, if he has any rights to be considered under the Directive, they arise if he can properly be considered to be a family member who was dependent upon, or a member of the household of the Union citizen, Mr Subhan.

32. The Citizens Directive was given effect in this jurisdiction by the 2006 Regulations and it makes a distinction between a "qualifying member" and the category relevant to the present case, a "permitted family member". The definition of a permitted family member under r. 2(1) of the 2006 Regulations is central to this appeal:

> "permitted family member", in relation to a Union citizen, means any family member, irrespective of his or her nationality, who is not a qualifying family member of the Union citizen, and who, in his or her country of origin, habitual residence or previous residence -
>
> (a) is a *dependant of the Union citizen*,
> (b) is a *member of the household of the Union citizen*,
> (c) on the basis of serious health grounds strictly requires the personal care of the Union citizen, or
> (d) is the partner with whom the Union citizen has a durable relationship, duly attested" (emphasis added).

33. Mr Ali claims that he is a permitted family member of his Union citizen first cousin as he is dependent upon his first cousin and is a member of his household. He claims, in those circumstances, to be entitled to the benefit of r. 5 of the 2006 Regulations, and to be entitled therefore to enter the State and to apply for a residence card.

34. Keane J., having considered the evidence and arguments, concluded that Mr Ali was neither dependent upon the Union citizen, his first cousin, nor was he a member of his household. He found persuasive a number of decisions of the Courts of England and Wales and of the Immigration and Asylum Chamber of the Upper Tribunal. In the course of this judgment I will refer to these in greater detail.

The grounds of appeal

35. The notice of appeal identifies six numbered grounds of appeal, which can be summarised as follows:

    1) that the trial judge erred in interpreting the meaning of the term "members of the household of the Union citizen" in the definition of "permitted family member" found in the 2006 Regulations (grounds 1, 2, 3, 4 of the notice of appeal);

    2) that the trial judge erred in concluding that the Minister had given sufficient reasons for the conclusion that Mr Ali was not dependent on his first cousin (ground 6 of the notice of appeal);

    3) that the trial judge erred in concluding that the Minister had properly "facilitated" the application in accordance with article 3(2) of the Citizens Directive and, specifically, erred in his conclusion that the Minister did not fail to provide guidance as to the type of information required to establish either dependency or membership of a household (ground 5 of the notice of appeal).

36. The notice of opposition denies that the trial judge erred, whether in law or in fact, and that the phrase "member of the household" of the Union citizen found in the Citizens Directive and the 2006 Regulations is to be given its normal meaning, connoting that the household is the household of that person and that persons living together under the same roof are, by that fact alone, to be considered to be a household or to share a household. It is also denied that there has been a failure to facilitate the objectives of the Citizens Directive or that there is any requirement, as a matter of law, for the publication of a detailed list of requirements which are to be satisfied by an applicant for a residence card. The respondent argues that each case is to be decided by the Minister on the facts adduced and that the Citizens Directive does not require that national legislation provide a check-list. It is pleaded that the decision of the trial judge on dependency was correct on the facts.

37. It is also pleaded that the reasons for the decision of the Minister were clear and sufficient to meet the standards identified in the authorities.

Arguments on appeal

38. The first limb of the argument on appeal is that the trial judge misconstrued the meaning and effect of the phrase "member of the household" of a Union citizen. That is found in the Irish Regulations and in the English version of the Citizens Directive itself. There is no definition in either. The appellants argue that in order for the second appellant to meet the criterion of being a member of the "household of a Union citizen" he must establish that he is a permitted family member, and that he cohabited or lived under the same roof as his first cousin in the United Kingdom, the country from which he had come. Keane J., at para. 37, having noted the requirement for consistent interpretation of the Citizens Directive throughout the Member States and that the concept is to be treated as an autonomous concept for the purposes of EU law, referring to the case decided by the Court of Justice in *CILFIT v. Ministero della Sanità (Case C-283/81)*, ECLI:EU:C:1982:335, held that:

> "It is difficult to reconcile the applicants' argument on interpretation, predicated as it is on a definition drawn from a dictionary of American English, with the application of the principles just described."

39. In this approach, he was correct. Keane J. did not accept that a person who cohabits or lives under the same roof as a Union citizen is, as a result of that cohabitation, a member of his or her household. He postulated the requirement that there be some notional "head" of a household to properly understand and apply the phrase. That language comes from the decision of Cooke J. in *Wang (a Minor) v. Minister for Justice, Equality and Law Reform* [2012] IEHC 311, a decision given in an application for leave to seek judicial review and where the question was whether the minor Union citizen could be "the basis of the household" for the purposes of the Citizens Directive. There, the Chinese national mother of a Hungarian infant sought to argue that she was a member of the household of her Union citizen daughter. Cooke J., who, it must be recalled, was considering whether to grant leave, considered that it was at least stateable or, as he put it, "not beyond argument" that the phrase "household of a Union citizen" as used in the Citizens Directive:

> "[…] is not used in that proprietary sense but is open to the interpretation that if one individual is a Union citizen all members of the group could be regarded as equal members of the household", at para. 33.

40. Cooke J. granted leave to apply for judicial review notwithstanding that the ordinary sense of the word "household" normally connotes a group of individuals living together under a head of household. The case did not thereafter proceed to a hearing.

41. The respondent argues that the judgment of Keane J. had not determined the meaning of the term "head of the household" by reference to an attempt to identify the "head" of that household, but had rather focused on the test as being one of establishing that the household was that of the Union citizen and a question to be determined on the facts in each case. Keane J. understandably made the observation that there could be more than one "head" of a household, at para. 50.

42. It is argued that the Citizens Directive does not require that the Minister would set out in detail the criteria to be met by a person seeking to establish that he or she is a "permitted family member" for the purpose of the Irish Regulations and whether an applicant satisfies the test is to be determined on the facts of the individual case.

43. It is argued by the appellants that the High Court judge erred in his consideration of the means by which the Minister interrogated the documentation provided by Mr Subhan and Mr Ali. The respondent argues that the trial judge correctly said that the burden of proof lay on an applicant to establish dependency and that the trial judge was correct in holding that the test required a consideration of the "duration and impact upon personal financial circumstances" in the assessment of dependency. Many of the cases referred to in the judgment by the trial judge, for example *Chen v. Secretary of State for the Home Department (Case C-200/02)* ECLI:EU:C:2004:639, had at their core the question of whether dependency had to occur in a Member State or whether it could occur in a third State, an issue not raised in the present appeal, although the evidence was that Mr Subhan did pay a contribution towards the education of his first cousin in Pakistan.

44. In summary, the issues to be decided on the appeal are, therefore, as follows:

(i) in the light of the principles applicable to the interpretation of EU law, what is the meaning of the term "member of the household of a Union citizen" for the purposes of the Citizens' Rights Directive and the 2006 Regulations?

(ii) was the Minister obliged to expressly identify or notify an applicant of a requirement to establish or identify a head of household?

(iii) was the Minister's conclusion that Mr Ali had not shown a dependence on Mr Subhan correct, made in accordance with law, and properly reasoned?

The "household" of the Union citizen

45. The parties agree that the question for determination by the deciding officer was whether Mr Ali could show that he was part of Mr Subhan's household or that he was dependent on Mr Subhan in the United Kingdom, and this approach derives from the fact that the principle underlying the Citizens Directive is support for the free movement rights of Mr Subhan. What one examines is whether the free movement rights of the Union citizen might have been impeded or restricted to a material degree were his cousin not to be permitted to join him Ireland.

46. The parties agree that there is relatively little EU or Irish jurisprudence concerning the meaning of "household" for the purposes of the Citizens Directive, and the first case in which article 3(2) was considered, a decision of the Court of Justice on a preliminary reference from the Upper Tribunal of the United Kingdom, was *Secretary of State for the Home Department v. Rahman (Case C-83/11)* ECLI:EU:C:2012:519, which was concerned with questions of dependency and the correct approach to the Citizens Directive, and remains the leading judgment on that approach. What is important, however, for the analysis in the present case is the emphasis in *Secretary of State for the Home*

Department v. Rahman on the centrality of the free movement rights of the Union citizen and whether these are likely to be materially impeded.

47. The deciding officer accepted that the appellants were resident together in the United Kingdom but not that Mr Ali was a member of the household of Mr Subhan. The appellants argue that the correct approach to the question of whether a person is part of the same household of a Union citizen requires a focus on the family links and whether extended family members are living under the same roof, and that the Citizens Directive and caselaw do not require the additional element of identifying a head of the household or a hierarchy within the living arrangements.

48. The difference between the approach for which the parties contend comes down to a relatively simple proposition. The appellants argue that the word "household" refers to those persons who reside together in the same dwelling, and the household of the Union citizen, therefore, consists of those persons who are family members who reside in the same dwelling as the Union citizen. Distilled down to its essence, the appellants' argument is that a member of the family of a Union citizen who cohabits with that citizen is a member of his or her household. The submissions made to the deciding body focussed on what was described variously as "the shared residence" or the "joint residence" of Mr Subhan and Mr Ali.

49. The Minister, on the other hand, argues that what is to be established is that the household concerned is that *of* the Union citizen, as the focus of the Citizens Directive and of the 2006 Regulations is the protection of the free movement rights of the Union citizen, not the rights asserted by the non-Union citizen family member. The centrality of the Union citizen in the family living arrangements is to be assessed.

50. It is accepted that, for the purposes of the 2006 Regulations, the appellants resided together in the same residence in London since February 2013. That house was owned by Mr Subhan's brother, and his siblings and parents resided there for many years before Mr Ali came to reside there in 2010.

51. It is not argued that the Union citizen must establish a proprietary interest, whether one of ownership or a tenancy in the relevant dwelling, although evidence of ownership or of tenancy agreement could be relevant, but the Minister argues that for the living arrangement to be a household in the sense in which it is meant in the Citizens Directive and the 2006 Regulations, the Union citizen must be central in the household, and that this is borne out by the fact that it is the rights of the Union citizen which are to be protected, and any obstacles to the free movement of the citizen which might arise from the refusal to permit a member of his household to travel with him must be removed, to give effect to the stated purpose of the Citizens Directive.

52. It is the Union citizen who is to be the beneficiary of the Citizens Directive and the Union citizen's rights are protected if, *inter alia*, a permitted family member is entitled to accompany or join the Union citizen in the host Member State.

Discussion

53. The appellants argue that the trial judge impermissibly posited a requirement that there be identified a "head" of the household, a phrase which appears throughout his judgment, and which was described in the Court of Appeal for England and Wales in *KG (Sri Lanka) v. Secretary of State for the Home Department* [2008] EWCA Civ 13, [2008] WLR D 11, at para. 77, as a "colloquial term". The trial judge, however, expressly set out his views on this matter at para. 52:

> "Attributing a normal meaning to the words "members of the household of the Union citizen" does not require or entail the identification of a *designated* "head" (or the identification of the *designated* "heads") of a household. The question of whether a household was, or is, that of the Union citizen concerned is one of fact in EU law, just as the question of whether a family member is a dependant of a Union citizen is" (emphasis in original).

54. I accept the argument of the Minister that the High Court judge did not posit such a test, and that it is not found in either the Citizens Directive or the 2006 Regulations, but it remains the fact that what has to be identified is the household of the Union citizen, and thereafter whether the applicant for permission to enter and remain is a member of that household. The centrality of the Union citizen is what is in issue, not whether the Union citizen heads up the group or governs the living arrangements within the dwelling. Insofar as the phrase "head of household" is used in the authorities from England and Wales, it seems to me that it was used more as a matter of convenience or as a colloquial expression. What is required is that the core members of the household are to be identified for the purpose of identifying the factual link between the family unit thus defined or identified and the non-Union citizen who seeks to derive a right therefrom.

55. That the household has a "head" or indeed, as Keane J. noted, more than one "head", was described by Cooke J. in his judgment as "normal" and that expression appears in a number of authorities from England and Wales, which I will turn to presently. I merely note now that the task is not to ascertain the "head" of the household but rather to identify the Union citizen whose free movement rights are said to be impacted, and how the absence of the family member from the household of the Union citizen might impact upon his or her exercise of free movement rights.

56. In para. 45, Keane J. set out his thinking regarding the normal meaning of the expression "the household of the EU citizen":

> "[…] affording that term its normal meaning (and, in particular, paying due regard to the use within it of the preposition "of"), it seems to me that the interpretation accepted in the jurisprudence already described is the correct one. There is a striking difference between the phrase actually used in Article 3(2) – i.e. "household of the Union citizen" - and the meaning of that phrase for which the applicants contend, namely "same household as the Union citizen" (emphasis in original).

57. Some emphasis was placed by both parties, on *Secretary of State for the Home Department v. Rahman*, where the questions for consideration included the nature or duration of dependency referred to article 3(2) of the Citizens Directive. The opinion of Advocate General Bot, *Secretary of State for the Home Department v. Rahman (Case C-83/11)*, ECLI:EU:C:2012:174, was referred to in argument by both parties and by the trial judge in his judgment. Advocate General Bot identified a number of rules of interpretation from the caselaw, including that the provisions of the Citizens Directive must be given a teleological interpretation having regard to their objective to promote the primary and individual right of the Union citizen to move and reside freely within the territory of the Member State subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

58. He noted too the second objective of the Citizens Directive is to promote family unity, including the family unity in "a broader sense". Further, the interpretation of national rules must respect the autonomous meaning of the Citizens Directive as a matter of EU law and uniform interpretation throughout the Member States is to be achieved. The Advocate General referred to:

> "the context in which the terms occur and the purposes of the rules of which they form part", at para. 39.

59. The view of the Advocate General, at para. 58, was that the Citizens Directive imposes upon Member States "an actual obligation to adopt the measures necessary to facilitate entry and residence for persons coming within the scope" of article 3(2) of the Citizens Directive. The obligations entail procedural obligations which require that the Member State carry out "an extensive examination" of the personal circumstances of an applicant", at para. 60, and also that the Member State justify the denial of entry or residence. The Advocate General was, however, of the view that what in Ireland are termed "permitted family members" do not benefit from a presumption of admission, at para. 63.

60. Paragraph 75 of the opinion presents a helpful explanation of the concept of family life in the context of the interpretation of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. He described "family life" in that context as:

> "characterised by the presence of legal or factual elements pointing to the existence of a close personal relationship, which makes it possible, for example, to include, under certain circumstances, ties between grandparents and grandchildren or ties between brothers and sisters."

61. The trial judge found helpful the decisions of the authorities from England and Wales which he considered in some detail. From these emerges the primary proposition that the purpose of the Citizens Directive was to support rights of free movement of the Union citizen "not in order to support family values as such, but in order to make real the right of movement of the Union citizen "who may be deterred from exercising that right if he

cannot take his relevant family with him", *KG (Sri Lanka) v. Secretary of State*, at para. 33, *per* Buxton L.J. As Buxton L.J. later said in that judgment, at para. 36:

> "family reunification" is relevant, but relevant only, to the extent to which it assists in the exercise of the Community right of the Union citizen."

62. Accordingly, while the caselaw does mention the maintenance of the unity of the family in a broader sense, that unity can be said to be an objective of the Citizens Directive only and to the extent in which it assists the Union citizen in the exercise of rights where he or she might be dissuaded from moving to another Member State without the presence of close relatives.

63. As to how one is to identify the members of the "household" of the Union citizen, Buxton L.J., in *KG (Sri Lanka) v. Secretary of State for the Home Department*, at para. 77, said that the test was not whether the Union citizen and the relative were members of a "communal household", nor was it a test of whether they lived under the same roof, but rather the requirement was that the family member have been living with the Union citizen "under his roof" (my emphasis). As he said, it was based on living in that circumstance that the Union citizen could have a reasonable wish to be accompanied by that person when he exercised his free movement rights to travel to another country.

64. Keane J., in his later judgment in *Rehman v. Minister for Justice* [2018] IEHC 779, at para. 46, returned to the concept of "household" and, having reviewed the English authorities including those after the Court of Justice gave its decision in *Metock v. Minister for Justice, Equality and Law Reform (Case C-127/08)* ECLI:EU:C:2008:449, said the following, at para. 44:

> "As I observed in *Subhan*, I see no reason why there cannot be more than one head of household, comprising a person or persons of any gender or, for that matter, none. There is no basis for Mr Rehman's suggestion that the term so construed is in any way limited in its application to the "traditional family in which the husband is the breadwinner and the wife takes care of the household and the children", which, according to Advocate General Geelhoed in his Opinion in Case C-413/99 *Baumbast* (5 July 2001) (at para. 23), was the sort of family relationship that the social legislation of the 1950s and 1960s made provision for at the time when Regulation 1612/68, the predecessor of the Citizens' Rights Directive, was adopted."

65. He went on at para. 45 to observe that:

> "[T]here must be at least one person in any family household, however constituted, with the necessary level of authority, responsibility or control to be the householder."

66. Keane J. was satisfied that, although the concept might seem old fashioned, it remained a "useful and enduring one".

Discussion of meaning of "household"

67. Of itself, however, it seems to me, for the reasons that will appear, that the principle is not met by the perhaps formulistic identification of a "head of household", but rather by ascertaining whether the cohabitation or co-living arrangements are more than merely convenient, and whether the non-Union citizen family member is part of a cohesive, long term, coherent and single unit which might generally be called a "household". With that in mind, it seems to me that the living arrangements are not to be viewed with a bird's eye view of a single moment in time but must rather have some regard to the durability of the co-habitation, and also of what future intentions can be objectively presumed regarding the continued existence of the household.

68. It may be more useful to consider the notion of household by reference to what it is not. Persons living under the same roof are not necessarily members of the same household and they may well be what we colloquially call housemates. An element of sharing that is necessary in a household may well be met in that the persons living together may agree on a distribution of household tasks and a proportionate contribution towards household expenses. But because, for the purpose of the Citizens Directive, one must focus on the living arrangements of the Union citizen, the members of the household of the Union citizen must, on the facts, be persons who are in some way central to his or her family life, that those family members are an integral part of the core family life of the Union citizen, and are envisaged to continue to be such for the foreseeable or reasonably foreseeable future. The defining characteristic is that the members of the group intend co-living arrangement to continue indefinitely, that the link has become the norm and is envisaged as ongoing and is part of the fabric of the personal life of each of them.

69. It is not a test of with whom the Union citizen would choose to live, but rather, with whom he or she expects to be permitted or facilitated to live in order that his or her family unit would continue in being, and the loss of whom in the family unit is a material factor that might impede the Union citizen choosing to or being able to exercise free movement rights. That second element, it seems to me, properly reflects the core principle intended to be protected by the Citizens Directive.

70. It may be dangerous to give an example, and I do so by way of illustration only. A family member who had resided in the same house as a Union citizen for many years before free movement rights were exercised might well have become a member of the family with whom there has developed a degree of emotional closeness such that the person is integral to the family life of the Union citizen. That person could be a member of a household because the living arrangements display connecting factors that might, in an individual case, be termed a "household". If the rights of free movement of a Union citizen within the group are likely to be impaired by the fact of that living arrangement, whether for reasons of the moral duty owed to the other members of the group or otherwise, then the rights under the Citizens Directive fall for consideration.

71. The averment by Mr Subhan that it was "expected of me by my family in Pakistan to look after my cousin" suggests factors at the other end of the spectrum, where Mr Subhan asserts an obligation to provide for his first cousin to enable him to study and gain his

own independent living arrangements, or to help him to "get on his feet". It does not support an argument that Mr Ali's continued presence under the roof of his first cousin was core to the exercise of free movement rights, and that this perceived imperative to offer help means that Mr Subhan was impaired in the exercise of his free movement rights as a Union citizen.

72. It is true that recital 6 of the Citizens Directive includes the facilitation of family unity as a purpose of the Directive, but that is because a proper approach to free movement requires support to the person seeking to exercise free movement rights so that his or her family is preserved. The objective is not to keep families together, but rather to permit a Union citizen to have his or her family enter and reside the host Member State for the purpose of the ongoing family life of the Union citizen. The difference might appear subtle when seen in the abstract, but in a concrete case the degree of interconnectedness and the identification of what I might call a "core family" is often less difficult.

73. The colloquial use of the term "head of a household" might seem, in modern parlance, to be somewhat unfortunate, blunt, or even politically incorrect, and Keane J. was right, in my view, to recognise that the head of a household might not always be one person and does not, of course, have to be the male member or even the member of the household who, by reason of personality or otherwise, sets the rules of daily co-existence. The correct approach, it seems to me, is to look at the core family connections of the Union citizen and how those core connections may properly be understood and supported to enable free movement and establishment of the Union citizen in the host Member State. There must, in those circumstances, be at least an intention or an apprehension that the permitted family members would continue to reside under the same roof in the host Member State not merely for reasons of convenience, but for reasons of emotional and social connection, affection, or companionship.

Argument from other languages

74. Some argument was had in oral submissions regarding the recent decision of Barrett J. in *Shishu v. Minister for Justice and Equality* [2019] IEHC 566, where he set out a number of informal translations of the German, Greek, and Spanish text of article 3(2)(1) of the Citizens Directive. He said as follows, at para. 7:

> "[T]he proper meaning to be given to the notion of "*household*" within Art.3(2)(a) appears to be wider than recourse solely to the ordinary English meaning of same is appropriate".

75. For example, the Spanish phrase "*vive con el*", which Barrett J. translated informally into English as "lives with the Union citizen", seems to connote no more than living under the same roof. Barrett J. considered that, in principle at least, the German, Spanish, and Greek versions posited a test of living under the same roof or cohabitating, and that no element of identifying the "head of the household" was required. I am, for that reason, unable to conduct the analysis for which the appellants contend in the light of the bare informal translation carried out by Barrett J. and in the absence of further evidence as suggested.

76. Counsel for the appellants was unable to identify any caselaw from the domestic courts of Germany, Greece, or Spain, or any decision of the Court of Justice which directly considered the proper meaning of those national transpositions of article 3(2) of the Citizens Directive. Further, no expert evidence was given to the High Court as to how the language has been interpreted in domestic courts, or even as to the possible varying translations of the language.

Dependency

77. The other main issue in the appeal concerns the alleged failure of the trial judge to find that the Minister had failed to give sufficient reasons for the conclusion that Mr Ali was not dependent on his first cousin.

78. Two matters fall for consideration. The first is the contention of the appellants contained in their supplemental written submission and in their oral submissions that the Minister was at the relevant times in the case at issue applying the wrong test for establishing "dependency".

79. I note however that the trial judge observed at para. 58 of his judgment, that:

> "There is no disagreement between the parties concerning the proper interpretation of the term 'dependant of the Union citizen' for the purposes of Reg. 2 of the 2006 Regulations and Art. 3(2) of the Citizens' Rights Directive. […] [B]oth sides invoke the very careful and thorough analysis of the law conducted by Mac Eochaidh J in *[K.] v. Minister for Justice and Equality* [2013] IEHC 424 […] which I am grateful to adopt."

80. The trial judge adopted the test for dependency approved by the Court of Appeal in the linked cases of *V. K. v. Minister for Justice, Equality and Law Reform* and *Khan v. Minister for Justice and Equality* [2019] IECA 232, which was an appeal from decisions of Mac Eochaidh and Flaherty JJ. where what was under consideration was the test of dependency in the light of EU caselaw and, in particular, the decision of the Court of Justice in *Jia v. Migrationsverket (Case C-1/05)*, ECLI:EU:C:2007:1. In the light of the concession made at trial, I do not consider this point now properly falls for consideration on the appeal.

81. Further, insofar as it is sought to now argue that the Minister failed to state what test of "dependency" had been applied, that proposition did not form part of the grounds on which leave to bring judicial review was given by the order of Barr J. made on 12 September 2016, and accordingly cannot form the basis of an appeal.

82. The second element of this ground of appeal concerns the correctness of the approach to the evidence. The decision maker did not accept the evidence adduced by the appellants that Mr Ali was dependent upon his first cousin

83. The decision maker specifically focused on the adequacy of the documentation provided by Mr Ali which consisted of some bank statements and money transfers adduced as evidence of purported dependency. The decision was that "these documents in isolation

are not proof of dependency", and that Mr Ali had not provided complete information detailing his source of finances between 2009 and 2014. The decision maker was correct and a conclusion as to whether a person is dependent must, in the light of the EU caselaw and in the light of the decision in *V. K. v. Minister for Justice and Khan v. Minister for Justice*, involve an analysis of the documentation and evidence. The conclusion was that the documentation did not, on the facts, explain the financial means and needs of Mr Ali and how his means were insufficient to meet his essential needs without the financial support of his first cousin.

The inferences drawn by the trial judge from the facts

84. The statement of grounds pleads that Mr Ali was dependent as a matter of fact and that the evidence of material support was sufficient to establish this such that the Minister's decision was "unreasonable", or that the Minister failed to take into account the relevant evidence furnished.

85. Ground 6 of the grounds of appeal asserts that the High Court judge was incorrect in failing to properly consider the submission made that the Minister had not considered the documentation.

86. At para. 64 *et seq*. of his judgment, the trial judge analysed the evidence of direct financial contributions by Mr Subhan to Mr Ali. He also noted that no documentary evidence had been produced to corroborate the indirect support, and cash payments alleged to have been made by Mr Subhan to his first cousin while he was resident in the United Kingdom.

87. The trial judge then quoted the Upper Tribunal decision in *Moneke v. Secretary of State* which he considered stated the correct test, namely that the obligation to prove dependency still lay on the applicant and that that evidence had to be "cogent", at least, part documented, and had to be evidence which can be tested. He pointed out that Mr Ali was on notice from the first instance decision on 21 December 2015 that the Minister was not satisfied as to the proofs of material support.

88. He was not satisfied that the Minister had failed to have proper regard to the evidence submitted:

> "I can find nothing in that decision to suggest that the Minister failed to have regard to any of the evidence submitted by Mr Ali, nor can I find anything in the decision to suggest that the reasons given for it fail the test of reasonableness under the well-established *Keegan and O'Keefe* principles, confirmed by the Supreme Court in *Meadows v. Minister for Justice* [2010] 2 IR 701", at para. 66.

89. I find that the trial judge's approach to this question was correct, and that the evidence did show that the decision maker engaged in detail with the documentation, and interrogated the various vouching documentation furnished and the correspondence bears this out.

90. I would dismiss this ground of appeal.

Conclusion

91. For the reasons stated, I consider all grounds of appeal must fail.