

THE HIGH COURT

[2019 No. 374 JR]

BETWEEN

FAIZAAN ALI AGHA

APPLICANT

– AND –

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 23rd December, 2019.

1. Mr Agha is a British national who has come to live and work in Ireland. His mother, who is unwell, currently lives in Pakistan. By appeal decision of 26.03.2019 (the 'Impugned Decision'), his application for a visa for his mother to enter Ireland pursuant to Art.3(1) of Directive 2004/38/EC (the Citizens' Rights Directive) has been unsuccessful. The following chronological summary is of assistance in understanding the issues arising:

04.05.1991.	Mr Agha is born in Pakistan. He enjoys British citizenship by descent.
Early-2004.	Mr Agha moves to United Kingdom. His older brothers were already living there. His mother remains in Pakistan.
Dec. 2007-	
Jul. 2008.	Mr Agha lives in Pakistan.
Jul. 2008-	
Mar. 2017.	Mr Agha lives in UK until moving to Ireland in March 2017. (He has lived and worked here since then).
21.02.2017.	Mr Agha submits visa application to Ireland explaining that he intends to move to Ireland and is seeking a visa to allow his mother to join him as she is (he claims) dependent on him.
24.11.2017 &	
11.12.2017.	Mr Agha makes further submissions in support of application
28.03.2018.	Mr Agha solicitors send pre-litigation warning letter to respondent.
04.04.2018.	Mr Agha's solicitors send further supporting documents.

09.04.2018.	Respondent refuses visa application for two reasons: (i) an alleged failure to prove his relationship with the EU national; and (ii) failure to establish dependency.
28.05.2018.	Mr Agha appeals decision.
05.10.2018.	Mr Agha's solicitor threatens judicial review proceedings if a decision does not issue within 21 days.
25.10.2018.	Respondent seeks various additional information.
07.01.2019.	Respondent issues letter indicating decision will issue within 3 weeks.
30.01.2019.	Mr Agha's solicitor writes indicating that deadline has passed and seeking decision.
31.01.2019.	Mr Agha's solicitor sends pre-litigation warning letter.
11.02.2019.	High Court grants leave to seek judicial review.
26.03.2019.	Respondent refuses visa appeal in respect of applicant's mother.
24.06.2019.	Leave to bring within application granted.
20.12.2019.	Application heard.

2. Decision-making processes take time. However, the periods of 21.02.2017 - 09.04.2018 to make the initial decision and the period of 28.05.2018 - 26.03.2019 to arrive at the appeal decision, yielding a just over two-year period from visa application to the Impugned Decision seems like a very long time for a visa application process to work from start to finish.

3. A number of questions arise for consideration in the within application. However, by way of preliminary objection, the Minister contends that Mr Agha ought to have joined his mother as a co-applicant in the within proceedings. This objection was not taken at any previous stage during the application/appeal process. If the Minister wants to refuse to deal with EU Treaty Rights applications from the outset or at a very early stage because he considers that he is confronted with the wrong applicant then he should do so and see where he gets in the near-inevitable legal challenge that will ensue, but to allow an applicant to go through a protracted application and appeals process and then to come to court alleging that there is a want of locus standi seems to the court to be but an effort to avoid having the court scrutinise the substantive

application before it. In any event, it seems also to be misconceived: not a single authority has been cited before the court as to why a primary beneficiary under the Directive cannot bring an application in respect of a claimed derivative beneficiary.

4. Five legal questions are contended to present. These are addressed below.

[1] Did the Minister err in law and/or apply the incorrect test and/or fail to have regard to relevant considerations in refusing Mr Agha's application for a visa for his mother as a qualifying family member?

5. 'Yes'. Administrative decisions do not fall to be parsed like, e.g., statute-law. However, words have meaning. The Impugned Decision states that "*other family members are as responsible, if not more responsible, for providing financial support to meet your essential needs*". The natural reading which falls to be given to this observation is that the Minister accepts that some level of financial support is provided by Mr Agha, together with other family members, to meet the essential needs of Mr Agha's mother, *i.e.* to a level of support sufficient to meet the dependency test identified in *Jia (Case C-1/05)* [ECLI:EU:C:2007:1]. The court has also been referred in this regard to *Kuhn v. Minister for Justice & Equality* [2013] IEHC 424, *Khan v. Minister for Justice & Equality* [2017] IEHC 800 and *V.K. v. Minister for Justice & Law Reform* [2019] IECA 232. In truth, however, the court does not need to step outside *Jia*, a decision binding on all Irish courts. If the Minister accepts (and the just-quoted text shows him clearly to accept) that Mr Agha made a financial contribution with his brothers, and that his mother needed this to meet her essential needs, it follows that she is dependent upon Mr Agha. In passing, if it is suggested that Mr Agha's mother must have been solely responsible at all times for the provision of material support vis-à-vis his mother's essential needs, this is not a requirement of European Union law.

6. There is a further separate error presenting in this regard, *viz.* that, in breach of European Union law, the Minister did not have any regard to the particular illness of Mr Agha's mother and how this impacted on dependence. (Out of respect for the privacy of Mr Agha's mother, the court has elected not to enter into the details of her illness in this judgment). As is clear from *Jia*, at para. 37 (as touched upon in *Chittajallu v. Minister for Justice & Equality* [2019] IEHC 521, at para. 4): "*In order to determine whether the relatives in the ascending line...are dependent...the host Member State must assess, whether, having regard to their financial and social conditions, they are not in a position to support themselves*" [Emphasis added]. No such analysis was not undertaken here (and, offhand, this may well be particularly remiss in the context of the particular illness from which Mr Agha's mother suffers).

[2] Did the Minister err in law and/or act in breach of fair procedures and/or fail to have regard to relevant considerations and/or have regard to irrelevant considerations in

drawing adverse inferences on the basis of a failure to provide evidence of Mr Agha's mother's financial arrangements?

7. 'Yes'. The Minister requested that Mr Agha (whom it will be recalled made his initial application on 21.02.2017) provide evidence of his mother's financial arrangements from the date of her divorce from Mr Agha's father on 15.06.2000 – almost *seventeen* years previously. The Minister is entitled to explore thoroughly the true state of affairs that presents before him in any one application in order to determine, *inter alia*, whether dependence exists. However, it is difficult to conceive of a more flagrant breach of fair procedures than to require of Mr Agha that he provide details of his (ailing) mother's financial arrangements for the previous seventeen years – a period of time so long that it had seen nine persons installed as Ministers for Justice and went back to a time when Mr Agha was but nine years old – in order that he establish that the requisite dependency presented in 2017. That is not a form of factual enquiry which conforms with that contemplated by the European Court of Justice in *Lebon (Case C-316/85)* [1987] E.C.R. I-2811. It is also a request for documentation which most clearly crosses what this Court referred to in *Chittajallu*, at para. 5, as "*the threshold of impermissibility identified by the [European] Court of Justice in Reyes...in seeking documentation that it is not easy to provide in practice...[thereby making] it excessively difficult for...[a direct relative in the ascending line of the Union citizen]...to obtain the right of residence in the host Member State*".

[3] Did the respondent err in law and/or fail to have regard to relevant considerations and/or fail to give a reasoned decision in respect of the finding that the applicant's mother was not dependent on him, in circumstances where there were no transfers made from the applicant's siblings in either of his bank accounts from January 2018 onward, which was relevant to the issue of both assessing the credibility of the applicant's explanation that the previous transactions related to a loan and more importantly that the applicant has been responsible for making the payments for his mother's nursing home and is therefore providing financial support for her essential aid?

8. 'Yes'. The Impugned Decision appears to be internally inconsistent in this regard. As noted above, the Minister's decision states, *inter alia*, that "*other family members are as responsible, if not more responsible, for providing financial support to meet your essential needs*". The natural reading which falls to be given to this observation is that the Minister accepts that some level of financial support is provided by Mr Agha, together with other family members, to meet the essential needs of Mr Agha's mother, *i.e.* to a level of support sufficient to meet the dependency test identified in *Jia*. However, the Impugned Decision also contains text which suggests (and this was confirmed in the submissions by counsel for the Minister) that Mr Agha is viewed by the Minister as but, to borrow from counsel for the Minister, a "*conduit*" through which his siblings donate monies to their mother. In other words, Mr Agha appears to be

accepted to be (i) partly responsible for providing financial support in his own right towards his mother's essential needs, and (ii) not at all responsible for providing financial support in his own right towards his mother's essential needs. It has to be one or the other, it cannot be both, and the Impugned Decision in this regard presents, at the least, with "*terms...so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced*" (Murray C.J. in *Meadows v. Minister for Justice, Equality & Law Reform* [2010] 2 IR 701, at p. 732, as applied by Mac Eochaidh J. in *B.O.B. v. Refugee Appeals Tribunal* [2013] IEHC 187).

[4] Did the respondent err in law and/or act ultra vires in reaching his decision with reference to "the public policy imperative of maintaining the integrity of the State's immigration system, including the integrity and security of the Common Travel Area with the United Kingdom, and the overall security of the State".

9. 'Yes', for the reasons identified by the court in its judgment in *Sadiq v. Minister for Justice & Equality* [2019] IEHC 517, at para. 8. The court cannot also but note in passing that, given the age we live in, it would seem a most serious matter for the interior ministry of a European Union member state to indicate to a person (here a woman who is the mother of several children and who is suffering from an ongoing and serious illness) that she may (the wording is vague it is also possible that she may not) present some sort of security concern, yet not to provide any meaningful detail as to what is meant in this regard.

[5] Did the Impugned Decision fail to properly and fairly examine, weigh and adjudicate upon the submissions and supporting documentation filed by the applicant as part of his appeal against the refusal of a visa for his mother?

10. Not much time was given to this aspect of matters in the oral or written submissions for Mr Agha. It perhaps suffices to state in this regard that the Impugned Decision suffers from the manifold deficiencies identified in the preceding pages.

Conclusion

11. For the reasons identified above, the court will grant the order of *certiorari* identified at item 1 of the Notice of Motion of 28.06.2019 and remit this matter to the Minister for fresh consideration.