

THE HIGH COURT

[2021] IEHC 17
[2019 No. 754 JR]

BETWEEN

SHAKEEL AHMED DAR

APPLICANT

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 19th January 2021.

1. Mr Dar is a UK national who came to Ireland in 2004 in exercise of his free movement rights; he operates a business here. Mr Dar's mother (born in 1948), a non-EU/EEA national, came to Ireland in 2016 and has remained here since, living with Mr Dar. Consistent with Art.2 of the Citizens' Rights Directive (Directive 2004/38/EC) and pursuant to the EC (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015), the applicant sought an EU residence card by application of 25/8/2016 on the basis that she is a "qualifying family member" within the meaning of reg.3(5). That application was refused on 12/6/2017. A review was sought under reg.25 of the Regulations, this was unsuccessful, judicial review proceedings were commenced and compromised, and the impugned review decision eventually issued on 26/8/2019, affirming the refusal of the residence card.

2. The impugned decision refers to the nature of the review sought and its key part states:

"You maintain that your son provides for all of your needs – food, accommodation, clothing, utilities, medical supplied, and everyday necessities. It is noted, however, that you have submitted little documentation of probative value in this connection or in respect of this review. Although you have furnished numerous receipts for grocery shopping and several receipts for GP visits and other minor medical expenses, it is not considered that these documents speak to dependency or can be relied upon in this application. Significantly, there is no indication on file who paid for these groceries or medical expenses. There is no indication on file that you have ever been in receipt of financial assistance from your son. Indeed, there are no financial records whatsoever for you on file. Your legal representatives assert that you are a person who would not be able to meet your essential living requirements without the financial assistance of the EEA national and that you, therefore, should be considered dependent upon the EEA national. It is noted, however, that you have not submitted any documentation that might attest to your receipt of financial assistance from your son. As noted above, there are no financial documents on file for you at all and there is nothing to suggest that you have ever received any financial transfers or assistance from your son."

3. The sole question arising for adjudication in these proceedings is whether the Minister erred in law and/or acted in breach of EU law in applying the incorrect test for establishing dependency in breach of the correct approach to the issue of dependency as identified by the High Court in *Kuhn v. Minister for Justice and Equality and Anor.* [2013]

IEHC 424 and the European Court of Justice in *Reyes v. Sweden (Case C-423/12)* [ECLI:EU:C:2014:16]. Other case-law was touched upon at the hearing and/or in the written submissions, including the Court of Appeal's decision in *K v. Minister for Justice* [2019] IECA 232 and this Court's decision in *Ali Agha v. Minister for Justice and Equality* [2019] IEHC 883.

4. At the hearing, the key thrust of the Minister's contentions, consistent with the impugned decision, was that while it looks like the Minister was furnished with lots of receipts (and she was), in fact there is nothing to connect many of those receipts to expenditure by the applicant on his mother; moreover, as the above-quoted segment of the decision states, there "*are no financial documents on file for [the applicant's mother]...and there is nothing to suggest that [the applicant's mother]...ever received any financial transfers or assistance from your son.*" (There was also mention that the narrative supplied by the applicant was not sufficient; however, this is not a reason that features in the impugned decision and so is not considered here). Whether or not the court agrees with the Minister's conclusion is irrelevant: it was undoubtedly open to the Minister properly to conclude as she did regarding the client's financial conditions by reference to what she perceived to be a want of financial documents. The Minister refers in the impugned decision to the provision of accommodation by Mr Dar, so the court does not accept that the Minister was unaware as to the accommodation arrangements. The court respectfully does not accept the proposition that because an elderly mother lives with her adult son it follows, *ipso facto*, that she is dependent upon that son.
5. Where the Minister, with respect, erred in her decision was that (i) she fails to have any, or any proper, regard to, and (ii) fails to reach a reasoned decision in respect of, the emotional and social dependence which exists between the applicant and his mother, a non-EU/EEA woman in her seventies who resides, and has now for some years resided in her son's home. As Baker J. observes in *K v. Minister for Justice* [2019] IECA 232, at para.81, "*The test for dependence is one of EU law and an applicant must show, in the light of his financial and social conditions, a real and not temporary dependence on a Union citizen*" [emphasis added], noting also, at para.82 that "*The concept of dependence is to be interpreted broadly and in the light of the perceived benefit of family unity and the principles of freedom of movement.*" In passing, the court notes that the judgment of the Court of Appeal in *K* receives commendation in the Court of Appeal's judgment earlier this month in *Shishu and Miah v. Minister for Justice and Equality* [2021] IECA 1, as a decision that "*puts beyond doubt the correct interpretation of dependency*". Consistent with *K*, this Court observed in *Ali Agha*, at para.6, "*As is clear from Jia [(Case C-1/05) [ECLI:EU:C:2007:1]], at para. 37 (as touched upon in Chittajallu v. Minister for Justice and 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]*". There is no (or no proper) consideration, in the impugned decision of the social conditions presenting; it but records the perceived position as regards the financial documents provided. This being so, the court will grant the order of *certiorari* sought.

6. The court considers in still more detail, in the Appendix hereto, the case presenting in the within application. That Appendix, and this and the preceding paragraphs, together comprise the court's judgment in these proceedings.

APPENDIX

A. Background Facts

1. Mr Dar is a British citizen who came to Ireland in 2004 in exercise of his EU treaty rights and has resided and worked here since. His widowed mother, Mrs Kauser, a national of Pakistan, has resided with Mr Dar since she arrived in Ireland on 27/5/2016 on foot of a visa granted by the Minister. She was born in 1948, so not very long after Pakistan had acquired its rightful place among the community of nations as an independent sovereign state. She arrived on a visit to Ireland on 27/5/2016 and had intended to return to Pakistan after her trip. However, Mr Dar, it seems, decided that it was in his mother's best interests to remain with him in Ireland so that he could look after her and provide for her. By letter dated 25/8/2016, mother and son submitted an EU1 application to the Minister seeking a residence card for Mrs Kauser on the basis that she was residing with, and dependent upon, Mr Dar. The cover letter to the application, prepared by the solicitor for mother and son, states as follows (where named medical or retail outlets or service providers are referred to in the letter, the name has been dropped to preserve the privacy of both Mr Dar and Mrs Kauser):

"Dear Sir/Madam

We represent the above-mentioned EU citizen, Mr Dar and we have been instructed in relation to an application for residence in the State on behalf of his elderly mother, Mrs Kauser who is dependent upon her EU citizen son.

We enclose for your attention [a] completed Form EU1 along with the following documents:

- colour copy of Mr Dar's British passport.*
- colour copy of the bio-data page of Mrs Kauser's Pakistan passport along with copies of all pages.*
- copy family registration certificate.*
- letter from Mr Dar's landlord dated the 23rd of August 2016.*
- Bank statement in respect of Mr Dar dated the 15th July 2016.*
- [Telephone] bill in respect of Mr Dar dated the 4th of July 2016.*
- Invoice from [named service provider] in respect of Mr Dar dated the 23rd of June 2016.*
- [Mobile phone] bill in respect of Mr Dar dated the 23rd of May 2016.*

- *Income tax in respect of Mr Dar's business dated the 23rd July 2015.*
- *[Bank] statements in respect of Mr Dar dated the 29th July 2016.*
- *Letter of support signed by Mr Dar dated the 25th of August 2016.*
- *2 passport sized photographs in respect of Mrs Kauser.*
- *2 passport sized photographs in respect of Mr Dar.*

We are instructed that Mrs Kauser's husband passed away a number of years ago. Mrs Kauser is dependent upon her son whom she resides in the State with. Mr Dar is economically active in the State and has sufficient funds to support his elderly mother.

We submit that Mrs Kauser is a person who would not be able to meet her essential living requirements without the financial assistance of the EEA national and therefore she would be considered dependent upon the EEA national....".

2. Form EU1, in Section 4, contains a relatively comprehensive "Document Checklist" which states as follows:

"Please provide photocopies of the documents requested below. Identity documents and civil certificates should be photocopied in colour and photocopies should include all pages (including blank passport pages).

Evidence of identity

- ___ *Evidence of Identity*
- ___ *Passport or national identity card of EU citizen*
- ___ *Two passport-size photos of applicant*
- ___ *Two passport-size photos of applicant*

Evidence of relationship of applicant to EU citizen

Please provide supporting evidence of your family relationship as selected on Section 1.10 of this form

- ___ *Civil Marriage Certificate (for spouse)*
- ___ *Partnership Certificate (for civil partner)*
- ___ *Birth Certificate(s) (for child, parent or sibling)*

Evidence of Residence in the State

If renting:

- ___ *Letter from landlord/agency, rental contract or tenancy agreement*

___ *Letters of Registration of Tenancy from the Private Residential
Tenancies Board*

___ *Utility Bills in the names of both the applicant and the EU citizen*

If home-owning:

___ *Letter from mortgage provider, local authority or county council*

___ *Title or deeds (as applicable)*

___ *Utility bills in the names of both the applicant and the EU citizen*

Evidence of current activity of EU citizen in the State

*Please provide supporting documents for the current activity as per Section 3 (Parts
A-E)*

(A) *Employment*

___ *Current letter from employer setting out terms, conditions and hours of
employment and/or signed contract of employment*

___ *Two recent payslips*

___ *Most recent P60 or tax credit certificate*

(B) *Self-employment*

___ *Agreed tax assessment from the Revenue Commissioners for the last
financial year (if applicable) or letter of registration for self-assessment
(income tax) from the Revenue Commissioner*

___ *Receipts issued for sales or services in the last six months*

___ *Bank statements of the business for the last six months.*

(C) *Study*

___ *Letter from college/course provider, including course description, start date
and completion date*

___ *Letter from private medical insurance provider (for EU citizen and any
dependents)*

___ *Bank Statements and/or other evidence of financial resources*

(D) *Involuntary unemployment*

___ *Letter from Department of Social Protection with details of benefit claims*

- ___ Letter from previous employer outlining circumstances of redundancy
- ___ P60s for two prior years of employment
- ___ P45 from last employment
- (E) Residing with Sufficient Resources
- ___ Evidence of financial resources and corresponding bank statements
- ___ Letter from Department of Social Protection with details of any benefit claims (or stating that there are no claims)
- ___ Letter from private medical insurance provider (for EU citizen and any dependents)"

3. The Minister acknowledged receipt of the application by letter of 8/9/2016 and also granted Mr Dar's mother temporary permission to reside in Ireland until 5/6/2017.
4. By further letter dated 8/9/2016, the Minister sought further documentation in respect of the application. That letter states, *inter alia*, as follows:

"Dear Mrs Kauser...

I am directed by the Minister for Justice and Equality to refer to your application for a residence card under the European Communities (Free Movement of Persons) Regulations 2015 ('the Regulations') which was accepted for consideration by this office on 6/9/2016.

Copies of the following documents that were submitted for your application have been retained on file...

I would be obliged if you would submit the following documents by registered post to [stated address]...

Please note that all documents requested should be submitted as photocopies. Original documents should not be submitted unless specified below. Documents which have been submitted previously should not be re-submitted unless requested. Any documents which are not in English must be accompanied by a certified translation.

Evidence of identity

For the EU citizen

A valid passport (photocopy of all pages)

Evidence of relationship with the EU citizen

For dependent parents, grandparents and relatives in the ascending line of the EU citizen:

Birth certificate(s) for the EU citizen

Evidence of dependence on the EU citizen

Evidence of current activities of the EU citizen in the State

If the EU citizen is self-employed, copies of the following documents should be provided:

Receipts issued for sales or services in the last six months.

Companies Registration Office certificates (if applicable)

Evidence of residence of applicant and EU citizen in the State

If renting, copies of the following documents should be provided:

Letters of Registration of Tenancy from the Private Residential Tenancies Board

Utility bills for applicant

Other evidence of residence may be considered if deemed satisfactory.

Please note that photocopies of documents should be submitted except where an original document has been requested. Original documents which have not been requested will be retained on file.

Please submit the requested documents within 30 working days. A decision on your application is due by 5/3/2017 and will be made on the basis of the documentation on file at that time.

Please note that the onus is on you, the applicant, to advise this office of any change in circumstances while your application is being processed (e.g., change of residence, activities of EU citizen, or relationship to EU citizen). If you fail to do so the Minister may draw inferences from such omissions in any future decisions. New supporting documentation must be submitted as appropriate.

Enclosed is a letter informing you that you may now register with your local immigration office located at [stated Garda station] while your application is being dealt with by this office.

Yours sincerely..."

5. Though it does not arise for consideration in this judgment, it is not entirely clear to the court how Section 4 of Form EU1 dovetails with the documentation sought in what seems to be a fairly standard form Department letter seeking documentation, save that no duplicate information falls to be provided.

6. By letter dated 2/3/2017 the solicitor for Mr Dar and Mrs Kauser replied to the Minister enclosing additional documentation as requested. That letter states, *inter alia*, as follows (where named medical or retail outlets or service providers are referred to in the letter, the name has been dropped to preserve the privacy of both Mr Dar and Mrs Kauser):

"Dear Sir/Madam

We represent the above-mentioned clients, Mrs Kauser and her EU citizen son, Mr Dar and we refer to correspondence herein resting with yours of the 8th of September 2016.

Please find enclosed the following documents as requested by you:

- colour copy of all pages of Mr Dar's British passport*
- colour copy of our client, Mr Dar's birth certificate*
- letter from [Stated] Accountants in respect of Mr Dar dated the 13th of February 2017*
- Tax Clearance Certificate issued by the Revenue Commissioners in respect of Mr Dar*
- [Mobile phone] bill in respect of Mr Dar and Mrs Kauser dated the 16th of February 2017*
- [Mobile phone] bill in respect of Mr Dar and Mrs Kauser dated the 16th of January 2017*
- [Mobile phone] bill in respect of Mr Dar and Mrs Kauser dated the 16th of December 2016*
- [Mobile phone] bill in respect of Mr Dar and Mrs Kauser dated the 16th of November 2016*
- [Mobile phone] bill in respect of Mr Dar and Mrs Kauser dated the 16th of October 2016*
- [Mobile phone] in respect of Mr Dar and Mrs Kauser dated the 16th of September 2016*
- Letter from [Stated Name] Medical Centre in respect of Mrs Kauser dated the 16th November 2016*
- Receipt from [Stated Name] Medical Centre in respect of Mrs Kauser dated the 14th October 2016*
- List of invoices for Mrs Kauser from [Stated Name] Medical Centre*

- *Prescription from [Stated Name] Pharmacy in respect of Mrs Kauser dated the 14th of February 2017, the 16th of January 2017 and the 2nd of December 2016.*
- *Public Service Card in respect of Mrs Kauser.*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 8th of February 2017*
- *Receipt from [Stated Name Pharmacy] in respect of items purchased for Mrs Kauser dated the 11th of February 2017*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 23rd of February 2017*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 12th of February 2017*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 28th of January 2017*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 26th of January 2017*
- *Receipt from [Stated Name] Pharmacy in respect of items purchased for Mrs Kauser dated the 26th of January 2017*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 23rd of January 2017*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 22nd of January 2017*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 18th of January 2017*
- *Receipt from [Stated Name Pharmacy] in respect of items purchased for Mrs Kauser dated the 23rd of December 2016*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 31st of December 2016.*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 29th of December 2016.*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 14th of December 2016.*

- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 24th November 2016*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 17th of November 2016*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 18th of November 2016*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 26th November 2016*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 25th of November 2016*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 20th of October 2016*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 9th of October 2016*
- *Receipt from other [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 9th of October 2016*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 29th of September 2016*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 17th of September 2016*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 4th of September 2016*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 11th of September 2016*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 30th of September 2016*
- *Receipt from [Stated Retail Outlet] in respect of items purchased for Mrs Kauser dated the 25th of September 2016*

We submit that our client resides in the State with her EU citizen son. Mr Dar and his wife Ms Dar. Mr Dar pays for his mother's rent, food, clothing, medical and everyday necessities and we submit that we have forwarded considerable proof in relation to same.

Mr Dar is economically active in the State and has sufficient funds to support his elderly mother. We submit that Mrs Kauser is a person who would not be able to meet her essential living requirements without the financial assistance of the EEA national and therefore should be considered dependent upon her EU citizen, Mr Dar...".

7. By letter dated 2/3/2017, the solicitor for Mr Dar and Mrs Kauser also wrote to the Minister noting that they were anxious for a decision to be made on the application for a residence card.
8. By letter dated 12/6/2017, the Minister refused an application for a residence card on the basis that necessary evidence of dependence had not been submitted. That letter states, *inter alia*, as follows:

"Dear Mrs Kauser

I am directed by the Minister for Justice and Equality to refer to your application for a residence card, under the provisions of the European Communities (Free Movement of Persons) Regulations 2015 (the 'Regulations') and 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 (the 'Directive') which was submitted on Form EU1 and accepted for consideration by this office on 6/9/2016.

The Minister has examined your application based on the documentation on file.

I am to inform you that the Minister has decided to refuse your application for a residence card under the Regulations. This is for the following reason:

You did not submit the necessary evidence of dependence on the EU citizen. You submitted shopping receipts for clothing and personal items and 5 GP receipts. The evidence submitted does not constitute that the applicant is dependent on her son.

Therefore your application does not meet the requirements of Regulation 7(3) of the Regulations as you failed to submit the necessary supporting documentation as set [out in]...Schedule 2 of the Regulations...

Request for Review

If you feel that the deciding officer has erred in fact or in law in making the decision to refuse your application for a Residence Card, then you may request a review under Regulation 25 of the Regulations and should contain the details set out in Form EU4 (copy attached). A request for a review of the decision must be made on Form EU4 within 15 working days and sent by registered post to [Stated Address]..."

9. The mentioned review was sought by letter of 23rd June 2017 and a chain of correspondence ensued. The letter of the 23rd and the ensuing correspondence makes for an informative read and is considered hereafter.

i. Letter of 23/6/2017 from solicitors for Mrs Kauser to INIS

"Dear Sir/Madam

We represent the abovementioned client [Mrs Kauser] who was notified by letter dated the 12th of June 2017 that her application for residency in the State had been refused.

We hereby enclose for your attention completed Form EU4 Request for Review of Decision.

Our client's son, Mr Dar is a British citizen who resides in the State at [Stated Address]. Mr Dar is the owner of his own restaurant...and has sufficient funds to support his elderly mother.

Mrs Kauser travelled to the State on the 27th of May 2016. Mrs Kauser is an elderly lady whose husband passed away a number of years ago and we are instructed has no other family members to take care of her. Mrs Kauser has been resident in the State with her EU citizen son since her arrival and is dependent upon her son, Mr Dar.

You state in your letter of refusal that our client did not submit the necessary evidence of dependence on the EU citizen. We submit however that we have already satisfied any reasonable definition of 'dependency' in that Mr Dar provides for his elderly mother's accommodation, food, clothing, utilities, medical supplies and everyday necessities.

We submit that Mrs Kauser is a person who would not be able to meet her essential living requirements without the financial assistance of the EEA national and therefore should be considered dependent upon the EEA national."

ii. Letter of 11/7/2017 from INIS to Mrs Kauser

"Dear Mrs Kauser

I am directed by the Minister for Justice and Equality to refer to your application for a residence card under the European Communities (Free Movement of Persons) Regulations 2015 ('the Regulations') which was accepted for consideration by this office on 26/6/2017.

A review of your application will be carried out based on the documentation and information available to the deciding office at the time the original decision was made. It is open to you to submit any representations you may wish outlining where you feel the Minister erred in fact or law in making that decision along with any evidence you may have to support this.

Please do not submit documentation that was submitted previously in support of your initial application unless requested to do so. These documents are retained on the original file and will be examined when making the Review Decision.

...

It is noted that you have failed to complete Section 6 Details of Review of form EU4 and the form remains incomplete. Please find attached copy of the relevant sections which should be returned to this office complete by return noting you above Application ID. Failure to do so may have a negative impact on the outcome of your decision...".

10. The reference to the omission to complete Section 6 is somewhat perplexing. The person who completed the form stated at Section 6, under the words "Statement of the grounds on which the requester seeks the review of the decision made (indicating where in the view of the requester, the deciding officer erred in fact and/or in law)", states "Please see attached cover letter", which was attached.

iii. Letter of 11/7/2017 from INIS to solicitors for Mrs Kauser
"Dear Sir/Madam

I am directed by the Minister for Justice and Law Reform to refer to your correspondence dated 23/6.2017 which was received in this office on 26/6/2017...

This office will be in contact with you in due course regarding your client's review...".

iv. Letter of 13/7/2017 from solicitors for Mrs Kauser to INIS
"Dear Sir/Madam

We represent the abovementioned client and we refer to correspondence herein resting with yours of the 11th of July 2017.

In your letter of the 11th of July 2017 you state that we did not complete Section 6 Details of Review in our client's Form EU 4 application.

Please note we stated in Section 6 of our client's review to 'please see attached cover letter' wherein we made submissions in relation to same, as follows.

[The letter then re-states what was stated in the cover letter of 23rd June 2017]".

v. Letter of 20th July 2017 from INIS to solicitors for Mrs Kauser
"Dear Sir/Madam

I am directed by the Minister for Justice and Law Reform to refer to your correspondence dated 19/7/2017 which was received in this Office on 20/7/2017.

This office will be in contact with you in due course regarding your client's review..."

vi. Letter of 13/7/2017 from solicitors for Mrs Kauser to INIS

"Dear Sir/Madam

We represent the abovementioned client and we refer to correspondence herein resting with yours of the 20th of July 2017.

Our client is anxious to receive a temporary Stamp 4 type permission to remain in the State while her application is pending, as is her entitlement under EU law.

Mrs Kauser is an elderly lady who resides in the State with her EU citizen son, Mr Dar. We submit that Mrs Kauser is dependent upon her EU citizen son. We submit that Mr Dar pays for the rent on the property, including all utilities bills, medical bills, food, and clothing.

We submit that Mrs Kauser is a person who would not be able to meet her essential living requirements without the financial assistance of her son, the EEA national and therefore should be considered dependent upon the EEA national..."

vii. Letter of 3/8/2017 from INIS to solicitors for Mrs Kauser

"Dear Sir/Madam

I am directed by the Minister for Justice and Equality to refer to your correspondence dated 2/8/2017 which was received in this Office on 3/8/2017. The contents of your letter are noted.

While a decision on your client's review is pending, she may be granted a temporary Stamp 4 permission to remain in the State. Please see attached a copy of the original Stamp 4 letter that issued to your client..."

viii. Letter of 27/9/2017 from solicitors for Mrs Kauser to INIS

"Dear Sir/Madam..."

In your letter of the 3rd of August 2017 you state that our client's original letter granting her temporary Stamp 4 type permission to remain in the State had been forwarded to our client at her home address.

We have been instructed by our client that she has not yet received her original letter granting her temporary Stamp 4 type permission to remain in the State.

We would therefore be obliged if the original letter could be re-issued to our client at [Stated Address]..."

ix. Letter of 3/8/2017 from INIS to solicitors for Mrs Kauser

"Dear Sir/Madam

I am directed by the Minister for Justice and Law Reform to refer to your correspondence dated 27/9/2017 which was received in this office on 28/9/2017. The contents of your letter are duly noted.

The Stamp 4 letter has been re-issued 29/9/2017 and send by registered post to your client...".

x. Letter of 16/4/2018 from solicitors for Mrs Kauser to INIS
"Dear Sir/Madam

We represent the abovementioned client and we refer to an appeal application which was submitted to your office on the 23rd of June 2017.

Our client was subsequently granted a temporary Stamp 4 type permission which is due to expire on the 25th of April 2018.

Our client, Mrs Kauser, who is an elderly lady, continues to reside in the State with her son, Mr Dar, whom she is dependent upon. We are instructed that Mr Dar pays for the rent on the property where he resides with his mother, including all utilities bills, medical, food and clothing.

We submit that Mr Dar is a person who would not be able to meet her essential living requirements without the financial assistance of her son, the EEA national and therefore should be considered dependent upon the EEA national."

xi. Letter of 17/4/2018 from INIS to solicitors for Mrs Kauser
"Dear Mrs Kauser

I am directed by the Minister to refer to your request for a review of the decision to refuse your application under the European Communities (Free Movement of Persons) Regulations 2015 (the 'Regulations') which was received in this office on 26/6/2017.

While your review is pending, you may obtain a temporary permission to reside in the State...On presenting the following documents, your local immigration office may provide you with a Stamp 4 endorsement in your passport that is valid for the period of your review, expiring on 24/10/2018...".

xii. Letter of 17/4/2018 from INIS to solicitors for Mrs Kauser
"Dear Sir/Madam

I am directed by the Minister for Justice and Law Reform to refer to your correspondence dated 16/4/2018 which was received in this Office on 17/4/2018.

Please find enclosed a copy of our correspondence issued directly to your client.

This office will be in contact with you in due course regarding your client's review...".

xiii. Letter of 15/10/2018 from solicitors for Mrs Kauser to INIS
"Dear Sir/Madam

We represent the abovementioned client and we refer to an appeal application which was submitted to your office on the 23rd of June 2017.

Our client was subsequently granted a temporary Stamp 4 type permission which is due to expire on the 24th of October 2018.

Our client, Mrs Kauser, who is an elderly lady, continues to reside in the State with her son, Mr Dar whom she is dependent upon. We are instructed that Mr Dar pays for the rent on the property where he resides with his mother, including all utilities bills, medical, food and clothing.

We submit that Mrs Kauser is a person who would not be able to meet her essential living requirements without the financial assistance of her son, the EEA national and therefore should be considered dependent upon an EEA national."

11. It is impossible not to feel a sense of sympathy for Mrs Kauser, an elderly lady, that she should submit a review application in June 2017 and still be waiting for a review decision in October 2018. That sympathy is compounded by the knowledge that the impugned review decision did not issue until August 2019.

xiv. Letter of 16/10/2018 from INIS to solicitors for Mrs Kauser

"Dear Mrs Kauser

I am directed by the Minister for Justice and Equality to refer to your request for a review of the decision to refuse your application under the European Communities (Free Movement of Persons) Regulations 2015 (the 'Regulations') which was received in this office on 26/6/2017.

While your review is pending, you may obtain a temporary permission to reside in the State....

On presentation of the following documents, your local immigration office may provide you with a Stamp 4 endorsement in your passport that is valid for the period of your review , expiring on 25/4/2019..."

xv. Letter of 16/10/2018 from INIS to solicitors for Mrs Kauser

"Dear Sir/Madam

I am directed by the Minister for Justice and Equality to refer to your above-named client...and their [her] request for a review of the decision to refuse their [her] application under the European Communities (Free Movement of Persons) Regulations 2015, which was received in this office on 26/6/2017.

Please find copy of original correspondence.

Your client's review is in the queue to be processed. The length of time it takes to process to your client's application may vary depending on a number of factors, including the volume of applications on hand. A decision may issue to your client at

any point once your client has submitted their request. It is in your client's interest to ensure that their application is complete, as a negative decision may be made where the Review Officer does not have access to the documents and details that your client wishes to have considered. This office will be in contact with your clients in due course."

xvi. Letter of 28/11/2018 from solicitors for Mrs Kauser to INIS

"Dear Sir/Madam

We represent the abovementioned client and we refer to an appeal application which was submitted to your office on the 23rd of June 2017.

We note from your letter dated the 16th of October 2018 that our client has been issued with a further temporary permission to remain in the State until the 25th of April 2019.

Our client, Mrs Kauser, who is an elderly lady, continues to reside in the State with her son, Mr Dar, whom she is dependent upon. We are instructed that Mr Dar pays for the rent on the property where he resides with his mother, including all utilities bills, medical, food and clothing.

We submit that Mrs Kauser is a person who would not be able to meet her essential living requirements without the financial assistance of her son, the EEA national and therefore should be considered dependent upon the EEA national.

The delay in making a decision on our client's appeal application is both irrational and unreasonable and is in breach of our client's EU treaty rights in the State.

We have been further instructed by our client to issue judicial review proceedings without further notice to you should a decision on our client's appeal application not be communicated to this office within 10 days of the date of this letter."

12. On 10/12/2018 the High Court granted leave to seek judicial review in respect of the ongoing delay by the respondent in determining the review application. By letter dated 7/12/2018, received on 10/12/2018 after leave had been granted, the Minister indicated that the decision had been taken to uphold the initial refusal of a residence card. That letter states, *inter alia*, as follows:

"Dear Mrs Kauser

I am directed by the Minister for Justice and Equality to refer to your request for a review of the decision to refuse your application for a residence card, which was received in this office on 26/6/2017. The decision to refuse your application made on 12/6/2017 has been reviewed in accordance with Regulation 25 of the European Communities (Free Movement of Persons) Regulations 2015 (the 'Regulations') and the provisions of 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 (the 'Directive').

I am to inform you that the review of your application has not been successful, as you do not fulfil the relevant conditions set out in the Regulations and the Directive. The decision to refuse your application dated 23/6/2017 is affirmed for the following reasons:

Your initial application was refused due to insufficient evidence being submitted to support your assertion that you are a qualifying family member as set out in the Regulations. You failed to submit the necessary supporting documentation to evidence that you were dependent on the EU citizen, including dependence prior to residing in the State.

You requested a review of the decision to refuse your application dated 12/6/2017 stating that you believed the Minister had erred in fact and in law. In accordance with Regulation 2(5) of the Regulations and having regard to the information contained in the initial application the following is noted;

You submitted a family registration certificate listing the EU citizen as your son. Upon request, a birth certificate was submitted for the EU citizen. This certificate does not list you as the EU citizen's mother. As such the Minister is not satisfied that you have sufficiently demonstrated the relationship between you and the EU citizen.

On Form EU1 you asserted that you were residing in the State with the EU citizen at an address in [Stated Address]. In support of this assertion you provided various utility bills, and documentation relating to the tenancy of the property. It is noted that you are listed under the tenancy and named on the utility bills. It was therefore found that you are subject to the responsibilities therein and therefore are not a member of the EU citizen's household, rather than a co-habitant of the above address.

On Form EU1 you asserted that the EU citizen was exercising their EU Treaty rights in the State through self-employment with [Stated Business]. In support of this assertion you provided various documents relating to his payment of tax, bank statements and a letter from [Stated Name] accountants dated 3/2/2017.

On 8/9/2016, you were asked to forward, as evidence of the EU citizen's current activities in the State, receipts issued for sales or services in the last six months as well as a Companies Registration Office for the [Stated Business]. This documentation was not received. Therefore the Minister is not satisfied that the EU citizen is exercising his EU Treaty rights in the State in accordance with Regulation 6(3) of the Regulations.

In correspondence from the EU citizen dated 25/8/2016, it is asserted that you are dependent on him. He stated therein that he provides for all your essential needs including rent, food and everyday necessities. No documentary evidence of dependency has been provided to date.

Your legal representative's submission dated 28th November 2018 has been noted. It is stated therein that you are dependent on the EU citizen and that you require his financial support. No documentary evidence to illustrate these circumstances have [been]...provided.

I am not satisfied that you have demonstrated that you were dependent on the EU citizen, including prior to her arrival in the State; that you have demonstrated that you were a member of the EU citizen's household, including prior to his arrival in the State; or that you require the personal care of the EU citizen for health reasons in accordance with the Regulations.

Having considered your review request and the evidence available to me, I confirm that the decision dated 12/6/2017 to refuse the EU1 – Residence Card application is hereby upheld.

Your EU Treaty rights application is now closed. The permission afforded to you while your application was being considered is now revoked. It is noted therefore that you now have no immigration status in the State...".

13. By letter dated 11/12/2018 the solicitors for Mr Dar and Mrs Kauser wrote to the Minister noting that it was intended to bring judicial review proceedings against the refusal of the residence card and reserving the right to make submissions in respect of the Minister's proposal to deport. On 11/3/2019 Mr Dar was granted leave to bring the judicial review proceedings in respect of the review decision. Those proceedings were compromised on terms agreed between the parties, including that the respondent would withdraw the decision of 7/12/2018 and reconsider the application.
14. Following the settlement of those proceedings, the solicitors for Mr Dar and Mrs Kauser wrote to the Minister making further submissions in respect of the residence card application and enclosing additional proofs in relation to same. That letter reads, *inter alia*, as follows:

"Dear Sir/Madam

We represent the abovementioned client.

Our client's application for residency based upon her dependence on her EU citizen son, Mr Dar was refused upon appeal by letter dated 7/12/2018.

We subsequently issued High Court proceedings on the 4th of March 2019 and an order granting leave was made...on the 11th of March 2019.

On the 26th of June 2019 the case was settled on the basis that the Respondent shall withdraw his decision dated the 7th of December 2018 refusing, on review 'the application of the mother of the Applicant for a residence card pursuant to the European Communities (Free Movement of Persons) Regulations 2015...and that:

The applicant may make supplemental representations in support of the said application within a period of six weeks of the striking out of the within proceedings and the Respondent will reconsider the said application and make a new determination on it within 16 weeks from the expiry of the six week period wherein the Applicant may make supplemental representations or where no such representations are received, the new determination will be made based on the representations and documentation already in file and within a period of 22 weeks, following the striking out of the proceedings.

We hereby make submissions as follows:

The refusal letter dated the 7th day of December 2018 states as follows:

'You submitted a family registration certificate listing the EU citizen as your son. Upon request a birth certificate was submitted for the EU citizen. This certificate does not list you as the EU citizen's mother. As such the Minister is not satisfied that you have sufficiently demonstrated the relationship between you and the EU citizen.'

We submit that a NADRA family certificate, which is an official document issued by the Pakistani authorities and which is often required as proof of relationship, was submitted along with our client's initial EU1 application. We submit that the Minister did not question the authenticity of the validity of the NADRA family certificate but rather stated that the applicant's mother's name does not appear on the birth certificate of the EU citizen. We are instructed that the EU citizen, Mr Dar was born [at a time when]...it was not practice to name the mother on the birth certificate in Pakistan.

The refusal letter of 7th of December 2018 states as follows:

'On Form EU1 you asserted that you were residing in the State with the EU citizen at an address in [Stated Address]. In support of this assertion you provided various utility bills, and documentation relating to the tenancy of the property. It is noted that you are listed under the tenancy and name on the utility bills. It is therefore found that you are subject to the responsibilities therein and not a member of the household'.

Your letter of the 8th of September 2016 your office requested 'Utility Bills for Applicant'. Our client, Mr Dar subsequently added his mother's name to the tenancy and to his Vodafone account so that she would have proof of her address in the State and utility bills, as had been requested by you.

We are instructed that our client, Mrs Kauser does not pay rent to her son or pay for any utilities. We are instructed that that Mrs Kauser relies in her son for financial support and is dependent upon him,

The refusal letter of the 7th of December 2018 states as follows:

'On 8/9/2016 you were asked to forward as evidence of the EU citizen's current activities in the State receipts for sales or services in the last six months as well as a Companies Registration Office certificate for the [Stated Business]. This documentation was not received. Therefore the Minister is not satisfied that the EU citizen is exercising his EU Treaty rights in the State in accordance with Regulation 6(3) of the Regulations.

We have submitted evidence of the EU citizen's economic activity in the State. We furnished the Minister with evidence that Mr Dar runs his own business in [Stated Place], including bank statements, correspondence and documentation in relation to his dealings with the Revenue Commissioners and a statement from his accountant confirming that his tax affairs are up to date.

We submit that there is no requirement for our client, Mr Dar, to have registered his business with the Companies Registration Office.

The refusal letter of the 7th of December 2018 states as follows:

'I am not satisfied that you have demonstrated that you were dependent on the EU citizen, including prior to her arrival in the State, that you have demonstrated that you were a member of the EU citizen's household, including prior to his arrival in the State or that you require the personal care of the EU citizen for health reasons in accordance with the Regulations.'

We submit that there is no legal requirement to submit evidence of our client's dependence on her EU citizen son prior to her arrival in the State. We submit that our client is a qualifying family member.

We are instructed that Mrs Kauser travelled to the State on the 27th of May 2016. Mrs Kauser is an elderly lady whose husband passed away a number of years ago and we are instructed has no other family members to take care of her. Mrs Kauser has been resident in the State with her EU citizen since her arrival in May 2016 and is dependent upon her son, Mr Dar.

Our client's son, Mr Dar, is a British citizen who resides in the State at [Stated Address]. Mr Dar is the owner of his own restaurant...and has sufficient funds to support his elderly mother.

We submit that Mr Dar provides for his elderly mother's accommodation, food, clothing, utilities, medical supplies and everyday necessities. We have already submitted numerous proofs in support of our client's application.

We enclose for your attention the following documents in support of our client's application:

- *[Satellite TV provider] bill in respect of Mr Dar dated the 3rd of June 2019*
- *Invoice from [Stated Retail Outlet] dated the 11th of June 2019*
- *Receipt from [Stated Dentist] in respect of Mrs Kauser dated the 2nd of July 2019*
- *Receipt from [Stated Dentist] in respect of Mrs Kauser dated the 6th of March 2019*
- *Receipt from [Stated Pharmacy] for Mrs Kauser*
- *Receipt from [Stated Medical Centre] in respect of Mrs Kauser*
- *Prescription from [Stated Hospital] in respect of Mrs Kauser*
- *Prescription from [Stated Medical Centre] in respect of Mrs Kauser*
- *[Receipts from Stated Retail Outlets x 7 in respect of Mrs Kauser]...*
- *[Bank]...statement in respect of Mr Dar dated the 17th of July 2019*
- *[Phone provider] bill in respect of Mr Dar's business dated the 30th of April 2019*
- *Income tax for the year ending 31/12/2017 in respect of Mr Dar*
- *Acknowledgement for P35 details in respect of Mr Dar*
- *VAT 3 return in respect of Mr Dar dated from the 1st of January 2018 to the 31st of December 2018*
- *Business account statements in respect of Mr Dar dated the 28th of June 2019*
- *Letter from [Stated Insurer] in respect of Mr Dar's business dated the 3rd of June 2019*
- *Insurance policy in respect of Mr Dar's business dated the 31st of May 2019*
- *Annual contract statement in respect of Mr Dar dated the 6th of June 2019*
- *[Invoices from Stated Suppliers in respect of Mr Dar's business x 9]*
- *Receipts from [Stated Supplier] in respect of Mr Dar's business...*
- *Statements from [Stated Supplier] in respect of Mr Dar's business.*

We submit that Mrs Kauser is a person who would not be able to meet her essential living requirements without the financial assistance of the EEA national and therefore should be considered dependent upon the EEA national”.

15. By letter dated 6/8/2019, the Minister acknowledged receipt of the above correspondence, confirming that the original decision made in respect of the application was deemed withdrawn and that the notification under s.3(4) of the Immigration Act 1999, as amended, that issued in conjunction with that decision was rescinded.
16. By letter dated 26/8/2019 received on 3/9/2019, the Minister again refused the application on the basis that the applicant had failed to submit the necessary supporting documents to prove that his mother is dependent on him. That letter reads, *inter alia*, as follows:

"Dear Mrs Kauser

I am directed by the Minister for Justice and Equality to refer to your request for a review of the decision to refuse your application for a residence card, which was received in this office on 26/6/2017. The decision to refuse your application made on 13/6/2017 has been reviewed in accordance with Regulation 25 of the European Communities (Free Movement of Persons) Regulations 2015 (the 'Regulations') and the provisions of 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 (the 'Directive').

I am to inform you that the review of your application has not been successful, as you do not fulfil the relevant conditions set out in the Regulations and the Directive. The decision to refuse your application dated 24/8/2016 is affirmed for the following reasons.

It is noted your application for a residence card as a family member of an EU citizen was refused because the decision maker was not satisfied that you had established that you were dependent upon the EU citizen, as is required in the Regulations. Furthermore, the decisionmaker was not satisfied that your application met the requirements of Regulation 7(3) of the Regulations because you failed to submit the necessary supporting documentation as set out in Schedule 2 of the Regulations.

You sought a review of that decision on 21/6/2017. It is noted, however, that you have provided little further information or documentation of relevance in respect of this review. You maintain that your son provides for all of your needs – food, accommodation, clothing, utilities, medical supplied, and everyday necessities. It is noted, however, that you have submitted little documentation of probative value in this connection or in respect of this review. Although you have furnished numerous receipts for grocery shopping and several receipts for GP visits and other minor medical expenses, it is not considered that these documents speak to dependency

or can be relied upon in this application. Significantly, there is no indication on file who paid for these groceries or medical expenses.

There is no indication on file that you have ever been in receipt of financial assistance from your son. Indeed, there are no financial records whatsoever for you on file.

Your legal representatives assert that you are a person who would not be able to meet your essential living requirements without the financial assistance of the EEA national and that you, therefore, should be considered dependent upon the EEA national. It is noted, however, that you have not submitted any documentation that might attest to your receipt of financial assistance from your son. As noted above, there are no financial documents on file for you at all and there is nothing to suggest that you have ever received any financial transfers or assistance from your son.

The onus was on you to satisfy the Minister by cogent evidence which could be tested that the level of material support you received from the Union citizen, its duration and its impact upon your personal financial circumstances combined together to meet the material definition of dependency in Ireland. You were required to establish that you relied for the essentials of life in an EU citizen. You have failed to do so and, as such, the Minister is not satisfied that you have provided satisfactory evidence to establish that you have been dependent upon the EU citizen in Ireland.

Having considered all of the information, documentation and submissions on all of your files, the Minister is not persuaded that the decision of 13/6/2017 should be overturned. He is not satisfied that you have established that you are dependent upon your EU citizen son and, as such, he has decided to confirm the decision of 13/6/2017 to refuse your application for a residence card as a family member of an EU citizen.

The decision to refuse you a residence card for a family member of a Union citizen does not interfere with any rights which you may have under the Constitution or Article 8 of the European Convention on Human Rights. In any subsequent proposed decision where such interference may arise, please note that full and proper consideration will be given to those rights.

Your EU Treaty rights application is now closed. The Minister will contact you in due course in respect of your position in the State”.

17. There is a striking consistency between the above (impugned) decision and the initial decision of 12/6/2017 concerning the perceived want of documentation, so this was an aspect of matters that by the time of the review decision had been 'on the radar' for a long time. It is perhaps surprising, this being so, that the applicant did not go to the 'nth

degree' in terms of providing further financial documentation and explaining the overall situation as regards his mother's financial condition.

18. When it comes to the just -quoted decision, the applicant avers, *inter alia*, as follows in his affidavit evidence:

"18. *I say and believe that the respondent's decision is unlawful and in breach of my rights as an EU citizen. The respondent has failed to have any regard to the basic fact that my mother is a 71-year old widow, who lives in the home of her...son. I say and believe that this fact alone suffices for the purposes of establishing her dependence on me for the purposes of the application. No regard was had to the emotional and/or social dependence that exists. No reference is made to the fact that the rent and utilities are paid by me. The respondent dismisses the extensive receipts in respect of food, clothing and medical expenses which I submitted on the basis that 'there is no indication on file paid for those groceries or medical expenses'. I have repeatedly informed the respondent that I cover all of my mother's expenses and submitted these receipts as evidence of same. The respondent appears to take issue with them because the vast majority were paid in cash. I say and believe this indicates that the respondent is imposing an excessively burdensome obligation and/or too heavy a burden of proof and/or and excessive demand for the production of documentary evidence in support of the application. This is all the more so given that this is the first time the respondent has raised this issue, and when considered in the light of the various grounds of refusal previously given by the respondent, including (i) failure to prove my mother's dependence on me prior to her arrival in the State, in respect of which there is no such requirement in EU law; (ii) a finding that my mother was not dependent on me but rather was my cohabitant on the basis that she was named on the tenancy and utility bills; (iii) the fact that my mother's name was not listed on my birth certificate despite the submission of a NADRA family certificate confirming that she is my mother; (iv) a finding that I had failed to demonstrate that I was exercising my EU Treaty rights in the State. Although the respondent did also find that I had not proved that my mother was dependent on me as a general finding, the respondent did not take issue with the failure of...my mother to submit her own financial records or the fact that the extensive receipts furnished were paid for in cash. I say that I am very frustrated by the approach of the respondent to refuse to recognise that three and a half years after her arrival in the State and having resided the entire time in my home that my 71-year old widowed mother is, as a matter of fact and law, dependent on me. The respondent's approach to my appeal this point has the appearance of persistent refusal in search of a reason."*

19. By notice of motion of 8th November 2019, the applicant seeks the following reliefs:

"1. *An order of certiorari quashing the decision of the respondent dated 26th August 2019, received on 3rd September 2019, refusing the applicant's appeal against the*

refusal of a residence card for his mother pursuant to the European Communities (Free Movement of Persons) Regulations 2015 and/or Directive 2004/38/EC.

2. *Such declaration(s) of the legal rights and/or legal position of the applicant and/or his mother and/or persons similarly situated as the court considers appropriate.*
3. *Such further or other order as to this Honourable Court shall seem meet.*
4. *An order providing for costs."*

B. Issue Presenting

20. The issue that presents before the court is a relatively net one, viz. 'Did the respondent err in law and/or act in breach of European Union law in applying the incorrect test for establishing dependency in breach of the correct approach to the issue of dependency as held by the High Court in *Kuhn v. Minister for Justice* [2013] IEHC 424 and the European Court of Justice in] *Reyes v. Sweden (Case C-423/12)* [ECLI:EU:C:2014:16]?' Although certain judgments are referenced in the question, various other judgments considered hereafter were touched upon at the hearing and/or in the written submissions.

C. Legal Framework

21. The legal framework that forms the background to the within proceedings is outlined briefly hereafter.
22. Article 2(2) of the Citizens' Rights Directive, so far as relevant to the within proceedings, defines "family member" as including "(d) the dependent direct relatives in the ascending line".
23. Regulation 3 of the EC (Free Movement of Persons) Regulations 2015 states that it applies to "(a) Union citizens entering or remaining in the State in accordance with these Regulations, and (b) a family member of a Union citizen referred to in subparagraph (a) who— (i) enters the State in the company of the Union citizen, (ii) enters the State for the purpose of joining the Union citizen, or (iii) becomes a family member while in the State and seeks to remain with the Union citizen in the State."
24. Regulation 3(5) states, *inter alia*, that a person is a "qualifying family member" where "(a) subparagraphs (a) and (b) of paragraph (1) apply, respectively, to the Union citizen and the person, and [inter alia]...(iii) a dependent direct relative in the ascending line of the Union citizen..."

D. The Law on Dependency

25. The applicant's application for a residency card turned on the question of whether or not he could establish that his mother was "dependent" as required under Art. 2(2)(d) of the Citizen's Rights Directive and Regulation 3(5)(b)(iii) of the European Communities (Free Movement of Persons) Regulations 2015. Perhaps surprisingly the concept of being "dependent" is not defined in the Directive or, less surprisingly (given that they are a transposing measure) in the Regulations. As a result the concept of being "dependent" has been interpreted as a matter of European Union law by the European courts.

26. Perhaps inevitably, the foregoing has yielded a situation in which instead of a concise definition of what it means to be “*dependent*” – an end that legislation is particularly well-suited to, and can, achieve, provided courts adhere to what lawmakers have provided and avoid the temptation to engage in creative interpretation aimed at avoiding perceived undesirable ends in hard cases – there has been something of a sprawl in terms of defining what it means to be “*dependent*”. This tendency is probably not helped by the (avoidable) expansive trend in modern judgment-writing and the natural desire of all judges to try and facilitate that approach to truth which is the constant goal of the process of judgment, albeit one that falls necessarily to be curtailed by having an ultimate decision on matters so that an end can be brought to dispute and life can proceed apace. Be that as it may, however, one can point to some clear markers in case-law as to what it means to be “*dependent*”.
27. The following cases might usefully be touched upon in terms of understanding what it means to be “*dependent*”, viz. *Jia (Case C-1/05)* [ECLI:EU:C:2007:1], *SSHD v. Rahman (Case-83/11)* [ECLI:EU:C:2012:519], *Reyes (Case C-423/12)* [ECLI:EU:C:2014:16], *Kuhn v. Minister for Justice* [2013] IEHC 424, *Lim v. Entry Clearance Officer Manila* [2015] EWCA Civ. 1383, *Khan v. Minister for Justice, Equality and Law Reform* [2017] IEHC 800, *Subhan v. Minister for Justice and Equality* [2018] IEHC 458, *K v. Minister for Justice and Equality* [2019] IECA 232, *Awan v. Minister for Justice and Equality* [2019] IEHC 487, *Ali Agha v. Minister for Justice and Equality* [2019] IEHC 883, and, in the days before the within proceedings were heard, the judgment of the Court of Appeal in *Shishu and Miah v. Minister for Justice and Equality* [2021] IECA 1. The court turns to consider each of these cases hereafter.

(i) Jia

28. In *Jia*, the son of Ms Jia, Mr Shenzhi Li, also a Chinese national, had been resident in Sweden with his wife, Ms Schallehn, since 1995. Ms Schallehn, who had German nationality, was self-employed in Sweden. She held a residence permit issued to her as a national of a Member State, which was valid until 3rd July 2006. Mr Shenzhi Li held a residence permit as a spouse of a Community national, with the same term of validity as that of his wife. On 2nd May 2003 the Swedish Embassy in Beijing granted Ms Jia a visitor’s visa valid until 21st August 2003 for one entry into the Schengen states for a visit of a maximum of 90 days. Ms Jia entered the Schengen States via Stockholm/Arlanda airport on 13th May 2003. On 7th August 2003 she applied to the *Migrationsverket* (Swedish Migration Agency) for a residence permit, on the basis that she was related to a national of a Member State. With a view to obtaining the residence permit, Ms Jia put forward, *inter alia*, the following arguments: she drew a pension of SEK 1,166 per month from China and her husband, Mr Yupu Li, drew a pension of approximately SEK 1,000 per month; she and her husband lived in very straitened circumstances in China; they would not be able to support themselves without the financial contribution from their son and his wife; and they could not claim any financial help from the Chinese authorities. In support of her application, Ms Jia produced a certificate of relationship to Mr Shenzhi Li from the Beijing Notary Public Office and a certificate from her former employer, China

Forestry Publishing House, stating that she was financially dependent on her son and daughter-in-law.

29. On 7th April 2004 the *Migrationsverket* decided to reject Ms Jia's application on the ground that there was insufficient proof of the situation of financial dependence and ordered that she should be returned to her country of origin or to another country if she showed that another country would accept her. On 14th May 2004, Ms Jia appealed to the *Utlänningsnämnden* (the Alien's Board) against the *Migrationsverket's* decision. Separately, on 3rd September 2003, the *Migrationsverket* granted Mr Yupu Li a national visa valid for one entry into Sweden and for a visit of a maximum of 180 days. On 10th March 2004 he applied for a residence permit on the same ground as Ms Jia. His application was rejected by the *Migrationsverket* on 17th September 2004 and Mr Yupu Li appealed to the *Utlänningsnämnden*. According to the order for reference, the *Utlänningsnämnden* had not yet begun to examine Mr Yupu Li's appeal when the reference to the European Court of Justice for a preliminary ruling was made.
30. The *Utlänningsnämnden* decided to stay the proceedings before it and refer certain questions to the European Court of Justice for a preliminary ruling. Among the questions raised were, essentially, whether Community law, in the light of the judgment in *Akrich (Case C-109/01)* [ECLI:EU:C:2003:491], required EU member states to make the grant of a residence permit to a national of a non-Member State, who is a member of the family of a Community national who has exercised his right of free movement, subject to the condition that that family member had previously been lawfully resident in another Member State. In the course of answering that question, the European Court of Justice observed, *inter alia*, at para.37, that "*In order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves.*"

(ii) Rahman

31. On 31st May 2006, Mahbur Rahman, a Bangladeshi national, married an Irish national working in the United Kingdom. Following that marriage, his brother Muhammad Sazzadur Rahman, his half brother Fazly Islam and his nephew Mohibullah Rahman applied for EEA family permits in order to obtain the right to reside in the United Kingdom as his and Mrs Rahman's dependants. Those applications were refused by the Entry Clearance Officer in Bangladesh on 27 July 2006 as the respondents in the main proceedings had been unable to demonstrate that they were dependent on Mr and Mrs Rahman in Bangladesh. The respondents in the main proceedings then brought an appeal against that refusal before the Immigration Judge of the Asylum and Immigration Tribunal. The Immigration Judge allowed their appeal on 19th June 2007. The Immigration Judge found that they were entitled to benefit from the provisions of Article 3(2) of Directive 2004/38/EC and that, therefore, their entry into the United Kingdom had to be facilitated. Consequently, the respondents in the main proceedings were issued with EEA family permits and they were able to join Mr and Mrs Rahman in the United Kingdom. On 9th January 2008 the respondents in the main proceedings applied for residence cards to confirm their right to

reside in the United Kingdom. Those applications were refused by decision of 24th December 2008 of the Secretary of State, as the latter took the view that they had not proved that they had resided with Mrs Rahman, the relevant Union citizen, in the same EEA Member State before she came to the United Kingdom, or that they continued to be dependent on her or were members of her household in the United Kingdom. An appeal against that decision was brought before the Immigration Judge of the Asylum and Immigration Tribunal, who held, on 6th April 2009, that the respondents in the main proceedings were "*dependants*" and, consequently, that their file had to be considered under regulation 17(4) and (5) of the Immigration Regulations. The Secretary of State requested a reconsideration of that decision before the Upper Tribunal (Immigration and Asylum Chamber). Reconsideration was ordered by decision of 30th April 2009 and that case was before that tribunal as an appeal. It was in those circumstances that the Upper Tribunal (Immigration and Asylum Chamber) decided to stay the proceedings and to refer various questions to the European Court of Justice for a preliminary ruling.

32. Among the questions raised by the Upper Tribunal were, in essence, whether an EU Member State may impose particular requirements as to the nature or duration of dependence as referred to in Article 3(2) of Directive 2004/38/EC, in order to satisfy itself that such dependence was genuine and stable and had not been brought about with the sole objective of obtaining entry into and residence in its territory. In the course of answering this question, the European Court of Justice observed, at para.38 of its judgment, consistent with para.105 of the Opinion of Advocate General Bot in that case, that "*Member States may, in the exercise of that discretion, lay down in their legislation particular requirements as to the nature and duration of dependence, in order in particular to satisfy themselves that the situation of dependence is genuine and stable and has not been brought about with the sole objective of obtaining entry into and residence in the host Member State.*"

(iii) Reyes

33. In *Reyes*, Ms Reyes, who was born in 1987 and was a Philippines citizen, was left in the care of her maternal grandmother when she was three years old, with her two sisters, because their mother had moved to Germany to work to be able to support her family resident in the Philippines. Ms Reyes' mother obtained German citizenship. Ms Reyes was brought up by her maternal grandmother for her entire childhood and adolescence. Before travelling to Sweden, she lived for four years in Manila (Philippines) with her older sister. She studied for two years at high school and four years at college. After having undertaken training involving work experience, she qualified as a nursing assistant. After her exams, she helped her sister to look after her sister's children. Ms Reyes' mother remained in close contact with her family in the Philippines throughout that time by sending money each month to support them and pay for their studies and visiting them each year. Ms Reyes had never held a job and nor had she applied for any allowances from the Philippines social security authorities. In December 2009, the mother of Ms Reyes moved to Sweden to live with a Norwegian man who lived in that member state. She married that Norwegian citizen in the summer of 2011. After 2009, Ms Reyes' stepfather, who had resources in the form of a retirement pension, had regularly sent

money to Ms Reyes and other members of his wife's family living in the Philippines. Following her move to Sweden, Ms Reyes' mother had not worked and also lived on her husband's retirement pension.

34. On 13th March 2011, Ms Reyes entered the Schengen area. She applied for a residence permit in Sweden on 29th March 2011 as a family member of her mother and her Norwegian cohabiting partner, on whom she claimed that she was dependent. On 11th May 2011, the *Migrationsverket* rejected Ms Reyes' application since she had not proved that the money which was indisputably transferred to her by her mother and her partner had been used to supply her basic needs in the form of board and lodging and access to healthcare in the Philippines. Nor had she shown how her home country's social insurance and security system could cover a citizen in her situation. However, she did show that she held qualifications from her country of origin and that she had also carried out work experience there. Furthermore, the applicant in the main proceedings had been economically dependent on her grandmother throughout her childhood and adolescence. In consequence, the *Migrationsverket* took the view that she had failed to prove economic dependence as regards her family members in Sweden. Ms Reyes appealed against the decision of the *Migrationsverket* to the *Förvaltningsrätten i Göteborg*, which dismissed the appeal, holding, *inter alia*, that the mere fact that Ms Reyes' mother and stepfather had taken it upon themselves to support her did not, in the view of the court, establish that there was a relationship of dependence which could confer on Ms Reyes a right of residence in Sweden. Ms Reyes appealed against the judgment of the *Förvaltningsrätten i Göteborg* to the *Kammarrätten i Stockholm – Migrationsöverdomstolen* (the referring court).
35. The referring court raised two questions with the European Court of Justice. It is not so much the questions, as certain observations of the European Court of Justice in responding to those questions, that are of interest in the within proceedings. By its first question, the referring court asked, in essence, whether Article 2(2)(c) of Directive 2004/38/EC fell to be interpreted as permitting a Member State to require, in circumstances such as those in question in the main proceedings, that, in order to be regarded as being dependent and thus to come within the definition of "family member" set out in that provision, a direct descendant who was 21 years old or older had to show that he had tried without success to find employment or to obtain subsistence support from the authorities of the country of origin and/or otherwise tried to support himself. In answering this question, the European Court of Justice observed, *inter alia*, as follows:
- "20 In that regard, it must be noted that, in order for a direct descendant, who is 21 years old or older, of a Union citizen to be regarded as being a 'dependant' of that citizen within the meaning of Article 2(2)(c) of Directive 2004/38, the existence of a situation of real dependence must be established...
- 21 That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse".

(iv) Kuhn

36. In *Kuhn*, the first-named applicant was a German national who lived in Ireland and was married to the second-named applicant, an Egyptian. (During the course of the decisions challenged in the proceedings she became an Irish citizen). They operated a piano tuning and repair business. The third- and fourth-named applicants were the Egyptian parents of the second-named applicant. The fifth- and sixth-named applicants were also Egyptian nationals and were the adult sisters of the second-named applicant. The facts of the case are perhaps best described by means of a summary chronology:

- 11/5/2010. The Egyptian-based family applied to the Embassy of Ireland in Cairo for a short stay visa (C-class).
- 12, 13/5/2010. Visas refused.
- 25/5/2010. Appeals against refusal of visas unsuccessful in respect of the sisters but successful in respect of the parents (who were granted short-stay visas valid from 26 May 2010 to 25 August 2010).
- August 2011. Further applications for long- and short-stay visas for the parents and sisters were made.
- 22/9/2011. Family informed that the applications had been refused because the applicants had not provided sufficient documentation to satisfy the Visa Officer that they had sufficiently strong obligations to return to Egypt after their intended trip to Ireland, in relation to their short stay visa application, and had failed to show dependence on an EU citizen in relation to their long stay visa applications.
- 6/2/2012. Parents and sisters again apply for short stay and long stay visas.
- 8, 9/7/2012. Failed appeals against applications of 6/2/2012. In essence, the officials in the Visa section in the Irish Embassy in Abu Dhabi did not accept, *inter alia*, that the second-named applicant's parents and/or the sisters were financially dependent on the Irish based family.
- 30/7/2012. Leave to seek judicial review granted, the reliefs sought including declarations that the State had not complied with Art. 5(2) and (4) of Directive 2004/38/EC and that through its misapplication of the dependence test in respect of the third and fourth Applicants, the State was in breach of Art.2(2)(d) together with Art.3(1) of Directive 2004/38/EC.

37. In the course of his judgment in the judicial review proceedings, Mac Eochaidh J. made, *inter alia*, the following observations concerning dependency:

"[19] [W]here outside help is needed for the essentials of life (for example, enough food and shelter to sustain life) then regardless of how small that assistance is, if it is

needed to attain the minimum level to obtain the essentials, then that is enough to establish that the recipient is dependent. (The essentials of life will vary from case to case: expensive drugs maybe an essential for someone who is ill, for example.)

...

[32] Any lawful analysis of a claim of dependence arising under the Citizens Directive must ask a fundamental question: is financial assistance given by a Union citizen and/or his spouse to a qualifying person to meet their essential needs? Nothing short of that analysis will suffice."

(v) Lim

38. *Lim* was a case where the respondent, a Malaysian citizen aged 60, was divorced and had two adult daughters, both of whom lived in the UK, one married to a Norwegian national and the other to a Finnish national. In July 2012 she sought entry clearance as a family member of an EU national (her Finnish son in law). The respondent had her own home in Malaysia, which she owned in her sole name free of any mortgage. She lived with her mother and ten year old grandchild, for whom she was the guardian. She formerly worked as a laboratory analyst and had money in an Employee's Provident Fund, a compulsory savings and retirement plan for private sector workers in Malaysia. She also had a small amount of savings in a bank account. Following her retirement, the respondent relied on her savings to cover her living expenses. However, since early 2012 the daughter married to the Finnish son in law had sent her moderate quarterly remittances. She used this to meet her expenses and had not had to draw on her capital. She could, however, meet her essential needs by drawing down on her retirement savings for at least ten, possibly 20, years, but she did not wish to draw upon that fund because she wanted to pass it on as an inheritance to her children and grandchildren. It was not, however, suggested by the Secretary of State that either she or her daughter had artificially attempted to create a situation of dependency so as to establish an entitlement to enter the UK, so there was no question of abuse of rights in this case.
39. The appeal raised the question of whether the respondent, who had sufficient savings to meet her own needs but chose instead to rely on financial support from a related EU citizen so that she would be able to pass on her assets to her children, could be regarded as a direct dependent relative in the ascending line within the meaning of reg.7(1)(c) of the United Kingdom's Immigration (European and Economic Area) Regulations 2006. The issue was one of European Union law because reg.7(1)(c) in turn gave effect to that part of the definition of "family member" found in Article 2.2(d) of the Citizens Rights Directive.
40. The strength of the Court of Appeal's decision as an authority is perhaps affected by the fact that the respondent took no part in the appeal, having apparently lost interest in exercising her right (if any) to join the family, with the result that while the Secretary of State had pursued the appeal, the court heard from one party only. Even so, of interest are the observations of Elias LJ at paras.30-32 where he observes, *inter alia*, as follows:

"30. *I confess that even without the assistance of the judgment in Reyes, I would have thought that the concept of dependency must mean that the claimant is not financially independent and therefore requires support. Upper Tribunal Judge Storey rejected the analysis in part because he did not consider that there was a principled basis for concluding that such a person was not a dependant whilst someone who refused to get a job could be a dependant. Sullivan LJ in SM (India) [[2009] EWCA Civ. 1426] at paragraph 27 (produced above) had suggested that these situations might be distinguished, but the judge was not persuaded that they should be. He said this:*

'Whilst the jurisprudence has not to date dealt with dependency of choice in the form of choosing not to live off savings, it has expressly approved dependency of choice in the form of choosing not to take up employment: see Lebon. I readily acknowledge that in SM (India) Sullivan LJ saw it as possible that there was a distinction relating to the situation of a claimant who preferred living off savings and a claimant who preferred not to work....But it is very difficult to discern any principled basis for differentiating between the two different forms of dependency of choice when the test is simply a question of fact and the reasons why there is dependency are irrelevant. Indeed, if anything, one might have thought that expecting a retired person to utilise existing financial resources after a lifetime of work is more problematic than expecting a young able-bodied person to earn a wage.'

31. *I see some force in the observation that there is no moral or policy justification for distinguishing between these two situations, but it seems to me that the distinction is now very firmly established in the authorities.*

32. *In my judgment, the critical question is whether the claimant is in fact in a position to support himself or not, and Reyes now makes that clear beyond doubt, in my view. That is a simple matter of fact. If he can support himself, there is no dependency, even if he is given financial material support by the EU citizen. Those additional resources are not necessary to enable him to meet his basic needs. If, on the other hand, he cannot support himself from his own resources, the court will not ask why that is the case, save perhaps where there is an abuse of rights. The fact that he chooses not to get a job and become self supporting is irrelevant. It follows that on the facts of this case, there was no dependency. The appellant had the funds to support herself. She was financially independent and did not need the additional resources for the purpose of meeting her basic needs." [Emphasis in original].*

(vi) Khan

41. This was a hearing in which the applicants sought judicial review of two decisions of the respondent dated 6th October 2015, refusing the applications of the third- and fourth-named applicants to Ireland. The background to the application was as follows. The first and second-named applicants were United Kingdom/European Union nationals, residing in

Ireland and owning the residence at which they resided. The first-named applicant worked as a taxi-driver and was also a part-time student. The second-named applicant worked as an accountant. The first- and second-named applicants had four children, all United Kingdom nationals who resided in the family home with them. The third- and fourth-named applicants were nationals of Pakistan, the married parents of the first-named applicant, and were said to reside in rental accommodation in Pakistan. In early 2013, an application was made for visas for the third- and fourth-named applicants to enter Ireland. On 12th February 2013, the Visa Section of the respondent's department wrote to the first- and second-named applicants requested certain information. The visa applications were refused by the respondent by letter of 14th May 2013. The reason given for the refusal was that the evidence provided in respect of finances was deemed insufficient or incomplete and because of inconsistencies/contradictions in the information supplied. On 1st July 2014, the second-named applicant submitted a fresh visa application which stated that the third- and fourth-named applicants were dependant on her and on the first-named applicant. These applications were refused on 1st October 2014. The respondent found, *inter alia*, that it had not been demonstrated that the third- and fourth-named applicants were totally dependent on the first- and second-named applicants. Reference was made to the third-named applicant being in receipt of a monthly pension in Pakistan. It was also pointed out that no complete bank statement or other evidence had been provided by either the third- or fourth-named applicants by way of proof that they were totally dependent, or to the extent to which they were dependent on the first and second named applicants. It was also pointed out that no evidence of household finances, bills or day-to-day expenditure was provided for any of the addresses given by the third and fourth applicants.

42. In 2015, a third application for short stay visas was submitted in respect of the third- and fourth-named applicants. The applicants included with their applications documentary evidence of financial support from the first and second applicants, evidence of their relationship to the first and second applicants, a rental deed in respect of their residence in Pakistan, documentary evidence of the financial position of the first and second applicants and a bank account statement in respect of the fourth named applicant. Included in the bundle of documentation was a medical report stating that the third-named applicant had a history of heart disease and which set out details of his medical prescriptions. The application also included an affidavit from a doctor-friend of the first-named applicant who averred that he had in the past transferred money to the third-named applicant on the instructions of the first-named applicant. The visa applications were refused by letters dated 2nd July 2015, respectively to the third- and fourth-named applicants. The letter addressed to the third-named applicant stated that he had not provided documentary evidence that he was a dependent of the first- and second-named applicants; the letter addressed to the fourth-named applicant was in similar terms.
43. Subsequent to these refusals the third- and fourth-named applicants sought a review of the refusals. On 6th October 2015, the respondent advised that the appeals had not been successful. The refusal letter in respect of the third applicant stated, *inter alia*, that he had failed to prove that he qualified as a beneficiary of the 2004 Directive on the basis

that insufficient documentary evidence had been submitted to show that he was a dependent of the first and second named applicants. The letter stated that “[t]he degree of dependency must be such as to render independent living, at a subsistence level by the family member in his/her home country impossible if [the financial and social support from the first- and second-named applicants] were not maintained.” While the bank transfers of monies from the first- and second-named applicants were noted, with respect to the submission that monies had also been transferred to the third- and fourth-named applicants via friends of the first- and second-named applicants who travelled to Pakistan, the respondent stated that hand deliveries of cash could not be verified and therefore could not be accepted.

44. In *Khan*, Faherty J. drew on the judgment in *Khun* and also referred with approval to the Opinion of AG Mengozzi in *Reyes*, observing, at para.79:

“In this regard, I note the opinion of Advocate General Mengozzi, in Reyes:

‘Although, as such, the concept of dependent member of the family of a Union citizen is an independent concept of Union law which must, on that basis, be given a uniform interpretation, it is in terms of the proof required of applicants that the distinction intended by the Union legislature between dependent members of the nuclear family and other dependent family members will be able to take on its full meaning.’ (at para. 55)

‘The applicant may thus provide the authorities of the host Member State with both subjective evidence connected with his own economic and social situation and any other relevant evidence that may illustrate, in a manner helpful to those authorities, the objective background to the application. At all events, the authorities of the host Member State have a duty to ensure that the effectiveness of the rights indirectly conferred on the members of the nuclear family by Directive 2004/38 is maintained and that access to the territory of the Union is not made excessively difficult by, in particular, placing too heavy a burden of proof on applicants.’ (at para. 58)‘.

(vii) Subhan

45. The decisions in *Kuhn* and *Khan* were accepted by Keane J. in *Subhan and Ali v. Minister for Justice and Equality* [2018] IEHC 458. That decision was affirmed on appeal (see [2019] IECA 330). The decision of the Court of Appeal was appealed to the Supreme Court and just before Christmas that court indicated that it is making a reference to the European Court of Justice on the issue of who is a “member of the household” of a European Union citizen (see [2020] IESC 78). Charleton J., for the Supreme Court, indicates, at para.20 of his judgment, that there was no issue as to dependency by Mr Ali on Mr Subhan that survived on appeal, that having been disposed by the High Court; he also succinctly recounts the detail of the High Court judgment in the following terms, at para.18:

“The judgment of the High Court dismissed the application for judicial review of the Minister’s decision. The law was correctly applied and any findings of fact were

within the bounds of fundamental reason and common sense and were based on an analysis of the papers submitted by Mr Subhan and Mr Ali. In the High Court, Keane J dismissed the argument of Mr Ali that he was a dependent of Mr Subhan:

63. *Mr Ali is a citizen of Pakistan, born in 1986. He lived in the same family compound as his cousin Mr Subhan, born in 1978, until the latter left for the United Kingdom with his parents and siblings in 1997, when Mr Ali was 11 years old. Very little appears to have been disclosed about Mr Ali's personal and family financial circumstances in Pakistan, save that he obtained the equivalent of a bachelor's degree in economics there. In 2010, when he was approximately 24 years old, Mr Ali travelled to the United Kingdom on a four-year student visa that was due to expire on 28 December 2014. While in the United Kingdom as a student, he resided in the same household as Mr Subhan's parents, siblings and Mr Subhan. That house is owned by Mr Subhan's brother. Mr Subhan became a United Kingdom citizen on 8 February 2013.*
64. *Mr Ali claims that he was dependent on Mr Subhan while in Pakistan. The evidence he has produced to corroborate that claim comprises copies of the receipts for seven money transfers that occurred 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. The applicants assert that, for the greater part of the four years Mr Ali spent in the United Kingdom, as an economics graduate studying accounting and business administration, he did not have a bank account and was entirely dependent on his cousin Mr Subhan, who covered his rent, paid for his studies and gave him money for his general living expenses, although no evidence has been produced to corroborate these disbursements by Mr Subhan. 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, as evidenced by copies of Mr Ali's account statements. On 17 February 2015, Mr Subhan sent a money transfer in the sum of €237 to Mr Ali, for which a copy receipt has been produced.*
65. *That was the relevant evidence by reference to which Mr Ali sought to establish that he was a dependent family member of Mr Subhan in the United Kingdom, as the country from which he had come. In the decision under challenge, the Minister concluded that Mr Ali had failed to do so.*
66. *In Moneke, already cited, the Upper Tribunal stated (at paras. 42 and 43): '42. We of course accept...that dependency does not have to be "necessary' in the sense of the [United Kingdom] Immigration Rules, that is to say an able bodied person who chooses to rely for his essential needs on material support of the sponsor may be entitled to do so even if he could meet those needs*

from his own economic activity; see [SM (India) v Entry Clearance Officer (Mumbai) [2009] EWCA Civ 1426]. Nevertheless, where, as in these cases, able bodied people of mature years claim to have been always dependent upon remittances from a sponsor, that may invite particular[ly]close scrutiny as to why this should be the case. We note further that Article 10(2)(e) of the Citizens Directive contemplates documentary evidence. Whether dependency can ever be proved by oral testimony alone is not something we have to decide in this case, but Article 10(2)(e) does suggest that the responsibility is on the applicant to satisfy the Secretary of State by cogent evidence that is in part documented and can be tested as to whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency.⁴³ Where there is a dispute as to dependency (as there was in the present case) immigration judges should therefore carefully evaluate all the material to see whether the applicant has satisfied them of these matters.'

67. *The approach recommended in Moneke appears to me to be the correct one. In this case, Mr Ali was on notice from the express terms of the first instance decision letter of 21 December 2015 that the Minister was not satisfied that he had established his dependency upon Mr Subhan while in the UK. The onus was on Mr Ali to satisfy the Minister by cogent evidence that was in part documented and could be tested that the level of material support he received from Mr Subhan, its duration, and its impact upon his personal financial circumstances combined together to meet the material definition of dependency. The Minister concluded that Mr Ali had failed to do so. I confine myself to observing that 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."*

(viii) K

46. K was a failed appeal against the judgments of Mac Eochaidh J. and Faherty J. referred to above. It is notable for the summary offered by Baker J. in her judgment of the test for 'dependence', Baker J. observing as follows, at paras. 81-85:

"81. *The test for dependence is one of EU law and an applicant must show, in the light of his financial and social conditions, a real and not temporary dependence on a Union citizen. The financial needs must be for basic or essential needs of a material nature without which a person could not support himself or herself. A person does not have to be wholly dependent on the Union citizen to meet essential needs, but the needs actually met must be essential to life and the financial support must be more than merely 'welcome' to use the language of Edwards J. in M. v. Minister for Justice, Equality and Law Reform [2009] IEHC 500.*

82. *The concept of dependence is to be interpreted broadly and in the light of the perceived benefit of family unity and the principles of freedom of movement.*
83. *For the purposes of making the assessment, the proofs required, although remaining in the discretion of Member States, must not impose an excessively burdensome obligation on an applicant or impose too heavy a burden of proof or an excessive demand for the production of documentary evidence. The requested Member State must justify the refusal, and therefore must give reasons which explain and justify the refusal.*
84. *When the case law identifies the requirement that the dependence be 'real', this means that the dependence must be something of substance, support that is more than just fleeting or trifling, and support that must be proven, concrete, and factually established. However, an applicant does not have to establish that without that real or material assistance he or she would be living in conditions equivalent to destitution. Dependence may be for something more than help to sustain life at a subsistence level and no more.*
85. *What is to be assessed is whether a family member has a real need for financial assistance and not whether that person could survive without it. Thus stated, it is a test of the facts and not an interrogation of the reasons for the support."*

(ix) Awan

47. *Awan* involved the judicial review of five separate decisions by the Minister for Justice and Equality under Regulation 21(4) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 and 2008, since revoked, on various dates, to uphold on review in each case a first instance decision under reg.7(2) of the 2006 Regulations, to refuse each of the five applicants, all nationals of Pakistan, a residence card as a qualifying or permitted family member of Rabiya Awan (née Khatoon), a European Union citizen exercising free movement rights in the State. While the review decisions were made after the revocation of the 2006 Regulations by the European Union (Free Movement of Persons) Regulations 2015, each of the applicants had sought that review during a transitional period when the Regulations of 2006 continued to apply.
48. The facts before the court were as follows. Rabiya Khatoon, a British citizen, was born in 1992. On 23rd September 2013, she married Muhammad Ummer Majeed Awan, a national of Pakistan, born in 1993. Together with each of the applicants and the Union citizen's brother Rashid Mehmood, also a British citizen, the couple entered Ireland in December 2014. In February 2015, Rabiya took up employment in a creche in West Dublin. She and her husband had two children after they arrived in the State, the first born in 2015 and the second in 2017, both Irish citizens. The husband had a residence card and had obtained employment with a company in the IT sector. The first applicant Mujeeb Rehman Awan was a national of Pakistan, born in 1969; he was the father of the husband and, hence, the father-in-law of Rabiya. He entered the United Kingdom on a student visa in 2004 to study law and had become, qualified to practise in Pakistan, the United Kingdom and Ireland. His student visa to enter and reside in the United Kingdom

expired in 2008, and his permission to remain in the United Kingdom expired in June 2009 when an appeal he had lodged with the immigration authorities there was dismissed. He was admitted to the Roll of Solicitors in Ireland in September 2015 and a practising certificate issued to him on 14th December 2015. By the time the judicial review proceedings commenced, he was in practice as a partner in a firm of solicitors in Dublin. The second applicant Nazaket Mujeeb Awan was a female national of Pakistan, born in 1972; she was the wife of the first applicant and, hence, the mother-in-law of Rabiya. She was a qualified homeopathic doctor. She entered the United Kingdom in December 2005 with the youngest son of the marriage, Muhammad Awan, the fourth applicant. He was a national of Pakistan, born in 1999. He was Rabiya's brother in law. The two other sons of that marriage – Rabiya's husband and the third applicant, M. Usman Awan, joined the family in the United Kingdom from Pakistan in January 2006. The fifth applicant, Saif Ur Rehman, was a national of Pakistan, born in 1961. He was the brother of Rabiya's father in law. He entered the United Kingdom in September 2014, before travelling to Ireland in December 2014.

49. Each of the applicants submitted a separate Form EU1 application for a residence card, signed on 25th March 2015, together with a range of supporting documentation. On 20th November 2015, the INIS wrote to each of the applicants to inform them that the Minister had decided to refuse their applications on the basis that they had each failed to submit satisfactory evidence that s/he was a family member of a European Union citizen in accordance with reg.2(1) of the 2006 Regulations, observing, *inter alia*, that "*It was submitted that you were supported and maintained by the EU citizen through the provision of accommodation and financial assistance prior to entering the State and while residing in the State. However, you have not submitted satisfactory evidence that you are a dependant of the EU citizen under the Regulations and Directive.*" Reviews of these decisions were sought and failed for like reason. The subsequent judicial review proceedings before Keane J. were likewise unsuccessful.

50. In the course of his judgment, when it came to the issue of the need to produce evidence of a need for financial support, Keane J. observed, *inter alia*, as follows:

"60. *As is abundantly clear from the evidence before the court, each of the applications in suit turned on whether the applicants could satisfy the Minister that the situation of dependence on the Union citizen claimed by each was genuine and had not been brought about with the sole objective of obtaining entry into and residence in the State. None of the applications turned on whether the financial support that the applicants claimed to be in receipt of from the Union citizen was or was not necessary to enable each to maintain the essentials of life.*

61. *No such assessment would have been possible, since none of the applicants provided anything equivalent to a statement of personal means, relying instead on the evidence of accommodation provided, and payments made, to each by the Union citizen as the basis for inviting the inference that each is, and was, dependent upon her. But, of course, that does not follow. If you provide*

accommodation for, and make payments to, a person of independent means, you do not make that person your dependent. As Mac Eochaidh J observed in Kuhn, referring to the Opinion of the Advocate General in Jia:

'The Advocate General's Opinion thus marks a transition from dependence being established by the mere fact of support to dependence being established by reference to a proven need of financial support and proof of that need by documentary evidence.'

62. *The ECJ confirmed that view of the law in the passage from its decision in Jia, quoted above."*

(x) Ali Agha

51. In *Agha*, Mr Agha was a British national who had come to live and work in Ireland. His mother, who was unwell, was living in Pakistan. By appeal decision of 26th March 2019, 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) was unsuccessful. When considering the question "*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?*", Barrett J. observed, *inter alia*, as follows, at para.6:

"[I]n 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]...[S]uch 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)."

(xii) Shishu and Miah v. MJE

52. In an exhaustive judgment delivered the week before last by the Court of Appeal in the above-named proceedings, among the issues addressed by that court were the test of dependency. The judgment insofar as it states the law concerning the issue of dependency essentially reiterates existing case-law, and hence does not require fresh argument by the parties. Even so it is a judgment that is worthwhile considering at some length, given that it is the most recent judgment of the Court of Appeal in this area, a most helpful judgment, and of course a judgment by which this Court is bound.

53. The facts of *Shishu* are recounted by the Court of Appeal at pp.3-20 of his judgment and selectively quoted from hereafter:

5. *Mr Shishu was born in Bangladesh on 6 July 1978 and lived there until 2001 until he moved to the UK where he was naturalised in 2009 as a UK Citizen giving him the right to free movement in Europe. In 2004 or 2005, he purchased a home at [Stated (UK) Address A] ...where he resided with his wife.*
6. *Mr Miah was born in Bangladesh on 24 February 1992, and he claimed to be in receipt of monies remitted by Mr. Shishu to Bangladesh before going to the UK in May 2013 on a visitor's visa. When Mr. Miah moved to the UK he claimed to be financially dependent on his older brother. Mr Shishu notes in para.4 of his verifying affidavit that he 'covered the cost of [Mr. Miah's] accommodation, food, transportation and so on' Mr Miah was present in the UK on a visitor's visa which did not entitle him to work.*
7. *In 2016 Mr Shishu's relationship with his wife broke down and he lived alone with Mr. Miah before moving to Ireland on 14 March 2016. It appears that Mr. Miah moved to Ireland first, and was joined soon after by Mr. Shishu. Initially they resided at [Stated (Irish) Address B]. After a year of Mr.Shishu working as a part-time chef in [Stated (Irish) Place A]...in May 2017 they moved together to [Stated (Irish) Place B]...,where Mr. Shishu has worked on a full-time basis to the present date, and they reside there together in rented accommodation.*
8. *Mr Miah's application for an EU residence card was made in June 2016 and was refused on 12 October 2018 following a review of the Initial Decision which had issued to him on 9 May 2017. The history of that application and the process that led to its refusal is now detailed....*
10. *The application consisted of a large volume of supporting documentation – some 135 pages - including photocopies of passports for Mr. Miah (Bangladesh) and Mr. Shishu (UK and Bangladesh), birth certificates for both of them and their parents, a Tenancy Agreement in respect of [Stated (Irish) Address B]...family photos, and other documents mentioned below. As averred to in para. 6 of his grounding affidavit, Mr. Miah relied on the following enclosed documents to show dependency:*
 - "• *A [Stated Financial Institution A] statement in respect of account number [Account Number Stated]...issued to me showing incoming payments of [Stated Amount] between the 27th January 2011 and the 30th April 2013;*
 - *8 [Stated Financial Institution B] statements issued to my brother showing outgoing payments totalling [Stated Amount] to me between the 1st June 2015 and the 10th February 2016;*
 - *8 [Stated Financial Institution B] statements issued to me showing income payments totalling [Stated Amount]...from my brother between the 3rd June 2015 and the 24th February 2016'*

In para.4 of his grounding affidavit Mr. Miah states –

'Throughout my time in the United Kingdom I...lived...with my brother and was financially dependent on my brother, who covered my accommodation, food, transport, and all other needs. I was on a visitor's visa and could not and did not work.'

Corresponding to this, in para. 4 of the affidavit sworn by Mr.Shishu he confirms that Mr. Miah –

'...lived with me in my home at [Stated (UK) Address A]. My brother was not working during that time and was financially dependent upon me as a result. I covered the cost of his accommodation, food, transportation and so on.'

- 11. On 29 September 2016, the Minister's letter acknowledged receipt of the application....*
- 12. Further communication followed and can be summarised as below:*
 - On 18 October 2016, the solicitors enclosed a copy of Mr Miah's passport which confirmed the validity of the passport had been extended until 25 December 2016, and this was acknowledged by the Minister on 20 October 2016*
 - On 25 November 2016, the solicitors enclosed a letter of authority signed by Mr Miah, nine [Stated Financial Institution A] money transfer receipts vouching remittances by Mr. Shishu to Mr. Miah in Bangladesh over the period January 2011 to May 2013 in amounts varying from [Stated Amount] to [Stated Amount], photographs of Mr.Miah and Mr. Shishu together, a copy of the Family Certificate vouching the common identity of their parents and siblings and that they are brothers and their respective dates of birth, and Mr. Shishu's contract of employment with [Stated Employer A]...,receipt of which was acknowledged by the Minister on 2 December 2016.*
 - On 10 January 2017 and 27 April 2017, the solicitors wrote to the Minister enclosing further documentation (over 100 pages) to support the application including [Stated Financial Institution C] bank statements for Mr. Miah's current account showing that from 2 November 2016 when the account was opened there were weekly payments in from Mr. Shishu ranging from [Stated Amount]...- [Stated Amount], which became weekly payments of [Stated Amount] by standing order [of] 6 December, 2017, pay slips and a P60 and Tax Credit Certificate for Mr. Shishu in respect of his work for [Stated Employer A] in 2016, and a colour copy of Mr. Miah's*

passport - and this was acknowledged by the Minister on 12 January 2017 and 28 April 2017.

13. *On 27 April 2017, a 'Recommendation Submission' was prepared by [Stated Civil Servant A] of the EU Treaty Rights Unit of the Residence Division of the Irish Naturalisation & Immigration Service (INIS)...Although the author was satisfied that there was a family relationship between Mr. Miah and Mr. Shishu, he was not satisfied that residency or dependency had been established, and he recommended that the Minister refuse the application.*
14. *This was followed by a 'Decision Submission' completed on 9 May 2017 by another officer of INIS, [Stated Civil Servant B]...on 9 May 2017...[Stated Civil Servant B]...states that she was not satisfied that satisfactory documentary evidence had been submitted in relation to the dependency of Mr. Miah on his brother either in this State or the UK....*

Initial Decision

15. *By letter also dated 9 May 2017 from [Stated Civil Servant B] on behalf of the Minister to Mr. Miah – the Initial Decision - the application was refused....*
16. *On 19 May 2017, Mr. Miah's solicitors submitted Form EU4 seeking a review of the decision....*
19. *By letter dated 22 May 2017 receipt of the review application was acknowledged and INIS stated that it was open to Mr. Miah to submit any additional supporting documentation he might wish to be considered....*
21. *On 27 June 2017, Mr Miah's solicitors wrote to INIS enquiring as to when a decision could be expected, to which a reply was given on 30 June 2017 stating that they were unable to give an exact timeframe 'however, Mr Miah can be assured that there will be no avoidable delay in finalising his application.'*
22. *A change of solicitors occurred in November 2017...On 15 December 2017 [Firm B Solicitors]...wrote to INIS making a submission that Mr. Miah was a 'permitted family member' and that there was sufficient supporting documentation showing that Mr Miah and Mr Shishu resided together in the same household in the UK, and that the money transfers showed dependency in the UK and in Ireland....[The Firm B Solicitors] submitted that 'the level of dependency is a question of fact, and cited in support Lim v. Entry Clearance Office Manila [2015] EWCA Civ 1383...para. 32....*
24. *On 2 May 2018 [another firm of]...solicitors [the Firm C Solicitors] wrote to INIS enclosing a letter of authority noting that they would be acting on Mr Miah's behalf. In further support of the application they enclosed a printout from the UK Land Registry confirming Mr. Shishu's ownership of the property at [Stated (UK) Address A] where they both resided. They stated:*

'We are instructed that the only other resident of the house was the EU national's then-wife, [Stated Name]...whom he has since divorced. A copy of the divorce decree is also enclosed. We are instructed that Mr Shishu has since remarried and applied for a visa for his new wife; this visa application was refused, but he intends to appeal. You have already been furnished with numerous documents evidencing our client's residence with the EU national in the UK. We submit that the evidence you now have establishes beyond all doubt that he was a household member of the EU national. Accordingly, his residence card should now issue without further delay.'

By letter dated 3 May 2018, INIS acknowledged receipt of this correspondence...

- 26. On 17 August 2018, some 26 months after the initial application for a residence card, INIS wrote to Mr Miah setting out 'a number of concerns' of the Minister that the accompanying documentation 'may be false and misleading' and informing Mr. Miah that the Minister was proposing to uphold the decision to refuse the application....*
- 27. These concerns were addressed in a [Firm C Solicitors'] letter of...13 September 2018....*
- 28. On 27 September 2018, a 'Recommendation Submission' prepared by INIS officer [Stated Civil Servant C] records the initial refusal to treat Mr. Miah as 'a permitted family member as set out in Regulation 5(1)' due to insufficiency of evidence, and recommended confirmation of the decision of 9 May 2017 refusing the application.....*

On dependency, while the documents showed money transfers to Bangladesh in 2011-2013, in the UK in 2015-2016 and the State in 2016-2017, the absence of Mr. Shishu from the State from January to May 2017 was said to be 'inconsistent' with dependency. Of importance was the next statement, reflecting the reason for refusal in the Initial Decision -

'Money transfers alone do not show a degree of dependency, such as to render independent living at subsistent...level impossible, were that financial support not maintained.'

In a 'Review Officer Decision' of INIS officer [Stated Civil Servant D] dated 12 October 2018 ('the Impugned Decision'), for reasons that are largely replicated in a letter of the same date from [Stated Civil Servant D] to Mr. Miah informing him of the decision on review and set out below, [Stated Civil Servant D] recommended confirmation of 'the original decision to refuse'.....

In essence the Minister's decision to confirm refusal is...based on failure to provide satisfactory evidence of (1) dependency on the EU citizen, and (2)

membership of the household of the EU citizen Mr. Shishu prior to departure for Ireland."

54. In the judicial review proceedings that arose from the foregoing facts (in which judicial review proceedings the applicants were successful at first instance and, as the respondents, on appeal), the Court of Appeal observed as follows in respect of the issue of "dependence" at pp.80-87:

"134. In Khan Faherty J reviewed the caselaw of the Court of Justice on the test of dependency. She took her lead in particular from Case C-1/05 of Jia v. Migrationsverket, which concerned Directive 73/148/EEC, which was ultimately replaced by the Citizens Directive, where the Court of Justice gave the following guidance on what may constitute dependency:

- '35. According to the case-law of the Court, the status of 'dependent' family member is the result of a factual situation characterised by the fact that material support for that family member is provided by the Community national who has exercised his right of free movement...*
- 36. The Court has also held that the status of dependent family member does not presuppose the existence of a right to maintenance, otherwise that status would depend on national legislation, which varies from one State to another (Lebon, paragraph 21). According to the Court, there is no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment. That interpretation is dictated in particular by the principle according to which the provisions establishing the free movement of workers, which constitute one of the foundations of the Community, must be construed broadly (Lebon, paragraphs 22 and 23).*
- 37. In order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves. The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national.*
- 40. When exercising their powers in this area Member States must ensure both the basic freedoms guaranteed by the EC Treaty and the effectiveness of directives containing measures to abolish obstacles to the free movement of persons between those States, so that the exercise by citizens of the European Union and members of their family of the right to reside in the territory of any Member State may be facilitated (see, by analogy, Case C-424/98 Commission v. Italy [2000] ECR I-4001, paragraph 35).*

41. *With regard to Article 6 of Directive 73/148, the Court has held that, given the lack of precision as to the means of acceptable proof by which the person concerned can establish that he or she comes within one of the classes of persons referred to in Articles 1 and 4 of that directive, it must be concluded that evidence may be adduced by any appropriate means (see, inter alia, Case C-363/89 Roux [1991] ECR I-1273, paragraph 16, and Case C-215/03 Oulane [2005] ECR I-1215, paragraph 53).*
43. *In those circumstances, the answer to Question 2(a) and (b) must be that Article 1(1)(d) of Directive 73/148 is to be interpreted to the effect that 'dependent on them' means that members of the family of a Community national established in another Member State within the meaning of Article 43 EC need the material support of that Community national or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join the Community national. Article 6(b) of that directive must be interpreted as meaning that proof of the need for material support may be adduced by any appropriate means, while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence.'*

Having referred to these passages Faherty J. observed –

- '66. *In essence, the ECJ held that dependency for the purposes of Directive 73/148/EEC was established if the family member 'needs the material support of [the] Community national or his or her spouse in order to meet their essential needs in the State of origin'.*

She next considered the decision in Reyes (Case C-423/12), which concerned the Citizens Directive and related to an adult child seeking residence in Sweden. The ECJ observed –

- '21. *That dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse (see, to that effect, Jia, paragraph 35).*
22. *In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant, who is 21 years old or older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that descendant or the State whence he came at the time when he applies to join that citizen (see, to that effect, Jia, paragraph 37).*

23. *However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support*
24. *The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.*
25. *In those circumstances, that descendant cannot be required, in addition, to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself.*
26. *The requirement for such additional evidence, which is not easy to provide in practice, as the Advocate General noted in point 60 of his Opinion, is likely to make it excessively difficult for that descendant to obtain the right of residence in the host Member State, while the facts described in paragraph 24 of this judgment already show that a real dependence exists. Accordingly, that requirement is likely to deprive Articles 2(2)(c) and 7 of Directive 2004/38 of their proper effect.'*
136. *Returning to the judgment of Faherty J. in Khan, she also quotes with approval the decision of MacEochaidh J. in V.K. v. Minister for Justice and Equality [2013] IEHC 424, including the following –*
- 'In my view, the Jia decision marks a shift from dependence which was found to exist merely where support is given, to dependence being based upon the need for assistance with the provision of the essentials of life. Neither the European Court of Justice nor the European legislator nor the Irish legislator has ever identified exactly how much support is required to be given to the recipient in order for that person to be said to be dependant on the European based donor. My view is that where outside help is needed for essentials of life (for example, enough food and shelter to sustain life) then regardless of how small that assistance is, if it is needed to attain the minimum level to obtain the essentials, then that is enough to establish that the recipient is dependant. (The essentials of life will vary from case to case: expensive drugs may be as essential for someone who is ill, for example.)'*
137. *At para.70 Faherty J. notes that the test applied by the Minister in Khan was 'whether proof of the degree of dependency was such as to render independent living at a subsistence level not viable if the third and fourth applicants were not maintained by the first and second applicants'. Rejecting this as the correct test, she observed:*

'73. *In Jia, there is no reference to it being a requirement of dependency that it was impossible to live at a 'subsistence' level if financial support from the EU citizen or his or her spouse was not maintained. The Jia test does not require that the family members have to be totally dependent on the EU citizen.'*

Faherty J. thus rejected as valid in that case wording that is very similar to that adopted in the Initial Decision in the instant case.

138. *Also of relevance is the extent to which the Minister should identify in the decision the concept or test of dependency that is being applied. MacEochaidh J. in V.K. addressed this –*

"32. the appeal decision maker was, at a minimum, required to identify the definition, such as it is, of the concept of dependence as identified in the Jia case. Further the official was required to apply that test to the assertions and facts advanced on behalf of the applicants. Any lawful analysis of a claim of dependence arising under the Citizens Directive must ask a fundamental question: is financial assistance given by a Union citizen and/or his spouse to a qualifying person to meet their essential needs? Nothing short of that analysis will suffice.

50. *The decision makers repeatedly failed to refer to the proper test by which dependence should be evaluated under EU law. The applicant made the case that the Cairo based family was dependent upon the Irish family for the essentials of life. Though the officials engaged with this concept, they never set out the Jia test, even in the decisions taken in 2013.'*

I respectfully agree with this analysis; the need for the decision to refer to the test or concept applied is necessary to show that the correct test is applied to the facts, and to explain the basis upon which the decision is reached.

139. *One week after Barrett J delivered his judgment in the present case the decisions of Faherty J. in Khan, and of MacEochaidh J. in V.K. were upheld by this court in V.K. and Khan v. Minister for Justice and Equality [2019] IECA 232 in a judgment delivered by Baker J. It is worth quoting the curial part, as it now puts beyond doubt the correct interpretation of dependency and the approach that the decision makers should take:*

'93. *The interpretation that the CJEU has applied to the Citizens Directive is purposive and broad. It does not require that the contribution from a Union citizen be such that, without it, the dependant person could not survive. It is not a test to be expressed in the negative. The exercise is to ascertain whether the family member relies on support to meet a material or social need which is central to the person's life and not peripheral or merely*

discretionary. The backdrop is the positive desire expressed in the Citizens Directive to support family unity.

94. *It is, of course, true that the concept of 'dependency' hinge upon the establishment of an identifiable and meaningful contribution to the alleged dependent person. Mac Eochaidh J. found that a contribution, even a minimum one, provided to a family member to meet needs to sustain life, even if that contribution is minimal. This approach is consistent with the decision of the CJEU in Jia v. Migrationsverket, that dependency means the provision of material support by a Union citizen or his or her spouse to meet the essential needs of the family member in the State of origin.*
95. *Mac Eochaidh J. considered, at para. 18, that the test from the judgments of the CJEU did not mean that dependence requires 'that assistance be given for all of the person's essential needs' as this would unduly restrict the category of persons entitled. He noted that no guidance was available as to how much support is required, but took the view that, where outside help is needed for the 'essentials of life', then, regardless how small that assistance is, that is sufficient to meet the test for dependence. He gave his examples of the essentials of life: Food, shelter, or even expensive drugs for someone who is ill.*
96. *I do not consider that Mac Eochaidh J. by using the words 'essentials of life' meant that only assistance required to prevent a person from falling below subsistence living was reckonable for the purposes of assessing dependency.*
97. *In my view, Mac Eochaidh J. was correct in his conclusions. I would add that, even if the Minister is to reject a visa application on the basis of insufficiency of documentation, which he or she is entitled to do, this must be done by reference to a test which requires engagement with that documentation. This was not the case in the assessment of the application at issue in this appeal.*
98. *The analysis of the CJEU does not propose a formula that is rigid or simple. The test has been explained in different ways, and a certain fluidity of language is apparent. The core concept, however, is that dependence means reliance on a Union citizen for some of the essentials of life. That reliance may be for financial help of a relatively small amount, but the concern is not to apply some quantitative test as to the amount of support actually provided, or to ask whether the support could be obtained by other means in the country of origin. Rather, the focus is on what is actually provided by way of financial assistance and whether that is for some of the essentials of life. It is difficult, in those circumstances, to formulate a test with precision, and that is more especially so when, as here, the trial judge came to his conclusion on 'reason' grounds and his observations regarding the correct formulation of the test were obiter."*

E. Synopsis of Existing Law

55. Is it possible to synopsis the key propositions identified in the above-considered case-law? It seems to the court that when one looks to the above case-law a notably important decision from an Irish-law perspective (as touched upon by the Court of Appeal in *Shishu*, at para.139) is that of the Court of Appeal in *K*, with certain related, supplementary (and, in part, overlapping) observations in certain other of the case-law considered above) being of potential use. In short, it seems to the court that the key propositions to be brought to bear in an application such as that now presenting are the following:

[1] The K Test

- "81. *The test for dependence is one of EU law and an applicant must show, in the light of his financial and social conditions, a real and not temporary dependence on a Union citizen. The financial needs must be for basic or essential needs of a material nature without which a person could not support himself or herself. A person does not have to be wholly dependent on the Union citizen to meet essential needs, but the needs actually met must be essential to life and the financial support must be more than merely 'welcome'...*
82. *The concept of dependence is to be interpreted broadly and in the light of the perceived benefit of family unity and the principles of freedom of movement.*
83. *For the purposes of making the assessment, the proofs required, although remaining in the discretion of Member States, must not impose an excessively burdensome obligation on an applicant or impose too heavy a burden of proof or an excessive demand for the production of documentary evidence. The requested Member State must justify the refusal, and therefore must give reasons which explain and justify the refusal.*
84. *When the case law identifies the requirement that the dependence be 'real', this means that the dependence must be something of substance, support that is more than just fleeting or trifling, and support that must be proven, concrete, and factually established. However, an applicant does not have to establish that without that real or material assistance he or she would be living in conditions equivalent to destitution. Dependence may be for something more than help to sustain life at a subsistence level and no more.*
85. *What is to be assessed is whether a family member has a real need for financial assistance and not whether that person could survive without it. Thus stated, it is a test of the facts and not an interrogation of the reasons for the support."*

(*K*, at paras. 81-85).

- [2] The interpretation that the CJEU has applied to the Citizens Directive is purposive and broad. It does not require that the contribution from a Union citizen be such that, without it, the dependant person could not survive. It is not a test to be expressed in the negative. The exercise is to ascertain whether the family member relies on support to meet a material or social need which is central to the

person's life and not peripheral or merely discretionary. The backdrop is the positive desire expressed in the Citizens Directive to support family unity.

(K., at para.93)

- [3] It is, of course, true that the concept of 'dependency' hinges upon the establishment of an identifiable and meaningful contribution to the alleged dependent person.

(K, at para. 94)

- [4] Even if the Minister is to reject a visa application on the basis of insufficiency of documentation, which he or she is entitled to do, this must be done by reference to a test which requires engagement with that documentation.

(K, at para. 97)

- [5] The analysis of the European Court of Justice does not propose a formula that is rigid or simple. The core concept is that dependence means reliance on a Union citizen for some of the essentials of life. That reliance may be for financial help of a relatively small amount, but the concern is not to apply some quantitative test as to the amount of support actually provided, or to ask whether the support could be obtained by other means in the country of origin. Rather, the focus is on what is actually provided by way of financial assistance and whether that is for some of the essentials of life.

(K, at para.98)

- [6] To determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves.

(*Jia*, at para.37)

- [7] For a direct descendant, who is 21 years old or older, of a Union citizen to be regarded as being a 'dependant' of that citizen within the meaning of Article 2(2)(c) of Directive 2004/38/EC, the existence of a situation of real dependence must be established.

(*Reyes*, at para.20)

- [8] *Dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised his right of free movement or by his spouse.*

(*Reyes*, at para.21)

- [9] Where outside help is needed for the essentials of life (for example, enough food and shelter to sustain life) then regardless of how small that assistance is, if it is needed to attain the minimum level to obtain the essentials, then that is enough to establish that the recipient is dependent. (The essentials of life will vary from case to case: expensive drugs may be an essential for someone who is ill, for example.) (*Kuhn*, at para.19). (On appeal, Baker J. observes, at para.94 of her judgment in *K* that she did not consider that Mac Eochaidh J. by using the words 'essentials of life' meant that only assistance required to prevent a person from falling below subsistence living was reckonable for the purposes of assessing dependency).
- [10] Any lawful analysis of a claim of dependence arising under the Citizens Directive must ask a fundamental question: is financial assistance given by a Union citizen and/or his spouse to a qualifying person to meet their essential needs? Nothing short of that analysis will suffice. (*Kuhn*, at para.32). (In *Shishu*, at para.138, Haughton J. adds in this regard that there is a need for the impugned decision to refer to the test or concept applied to show that the correct test is applied to the facts, and to explain the basis upon which the decision is reached).
- [11] The concept of dependency must mean that the claimant is not financially independent and therefore requires support.

(*Lim*, at para.30)

- [12] The critical question is whether the claimant is in fact in a position to support himself or not, and *Reyes* now makes that clear beyond doubt. That is a simple matter of fact. If he can support himself, there is no dependency, even if he is given financial material support by the EU citizen. Those additional resources are not necessary to enable him to meet his basic needs. If, on the other hand, he cannot support himself from his own resources, the court will not ask why that is the case, save perhaps where there is an abuse of rights. The fact that he chooses not to get a job and become self supporting is irrelevant.

(*Lim*, at para.32)

- [13] The authorities of the host Member State have a duty to ensure that the effectiveness of the rights indirectly conferred on the members of the nuclear family by Directive 2004/38/EC is maintained and that access to the territory of the Union is not made excessively difficult by, in particular, placing too heavy a burden of proof on applicants.

(*Reyes*, AG's Opinion at para.58;

approved in *Khan*, at para.79)

- [14] Dependency does not have to be 'necessary', *i.e.* an able-bodied person who chooses to rely for his essential needs on material support of the sponsor may be entitled to do so even if he could meet those needs from his own economic activity.

Nevertheless, where able-bodied people of mature years claim to have been always dependent upon remittances from a sponsor, that may invite particularly close scrutiny as to why this should be the case.

(*Moneke*, para.42; approved in

Subhan, para.67)

- [15] Article 10(2)(e) of the Citizens Directive contemplates documentary evidence. Whether dependency can be proved by oral testimony alone is not something we have to decide, but Art.10(2)(e) suggests that the responsibility is on the applicant to satisfy the executive by cogent evidence that is in part documented and can be tested as to whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency.

(*Moneke*, para.42; approved in

Subhan, para.67)

- [16] If you provide accommodation for, and make payments to, a person of independent means, you do not make that person your dependent. As Mac Eochaidh J. observed in *Kuhn*, 'The Advocate General's Opinion [in *Jia*]...marks a transition from dependence being established by the mere fact of support to dependence being established by reference to a proven need of financial support and proof of that need by documentary evidence.' The ECJ confirmed this view of the law in its *Jia* judgment.

(*Awan*, at paras.61-62)

- [17] To determine whether 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.

(*Ali Agha*, at para.6).

56. It seems to the court that the following checklist of questions derived from the foregoing case-law provides a useful indicative test as to whether a person is a "dependent" within the meaning of the Directive/Regulations:

- [1] Has the alleged dependent shown, in the light of her/his financial and social conditions, a real and not temporary dependence on a Union citizen?
- [2] Are the financial needs of the alleged dependent which are being met by the Union citizen for basic or essential needs of a material nature without which the alleged dependent could not support herself/ himself?
- [3] Is it the case that the needs actually being met are essential to life and the financial support more than merely 'welcome'?

- [4] Is the dependence of the alleged dependant real, i.e. is the dependence of substance, is the support more than just fleeting or trifling, is the support proven, concrete, and factually established? (It does not have to be established that without that real or material assistance the alleged dependent would be living in conditions equivalent to destitution).
- [5] Does the alleged dependent, by reference to the applicable facts, have a real need for financial assistance? (The test is not whether that person could survive without it).
- [6] Does the alleged dependent rely on the support of the Union citizen to meet a material or social need which is central to the alleged dependent's life?
- [7] Does what is being proffered to the Department, establish that the Union citizen is making an identifiable and meaningful contribution to the alleged dependent person?
- [8] Does what is being proffered to the Department establish that the claimant is not financially independent and therefore requires support? (If s/he can support herself/himself, there is no dependency, even if she is given financial material support by the EU citizen, for those additional resources are not necessary to enable her to meet her basic needs).
- [9] Is the documentation being furnished to the Department cogent and sufficient to enable it to test whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency?

F. Application of Principle

- 57. Turning to the case at hand, it does not seem to the court that there is anything objectionable about the conclusion reached by the Minister as to the want of financial documentation/information. It does not matter whether or not the court agrees with the Minister in this regard: she was entitled to and did reach that conclusion properly by reference to the documentation that was before her. The Minister refers in the impugned decision to the provision of accommodation by Mr Dar, so the court does not accept that the Minister was unaware as to the accommodation arrangements presenting. The court respectfully does not accept the proposition that because a mother is living with her adult son it follows, *ipso facto*, that she is dependent upon that son.
- 58. Where the court considers that, with respect, the Minister erred was not so much in what she positively did but in what she did not positively do, i.e. the Minister (i) failed to have any, or any proper, regard to, and (ii) failed to reach a reasoned decision in respect of, the emotional and social dependence which exists between the applicant and his mother, a non-EU/EEA woman in her seventies who resides, and has now for some years resided in her son's home. As Baker J. observes in K, at para.81, "*The test for dependence is one of EU law and an applicant must show, in the light of his financial and social conditions, a real and not temporary dependence on a Union citizen*" [emphasis added], noting also, at

para.82 that “*The concept of dependence is to be interpreted broadly and in the light of the perceived benefit of family unity and the principles of freedom of movement.*” K receives commendation in the Court of Appeal’s judgment a couple of weeks ago in *Shishu and Miah v. Minister for Justice and Equality* [2021] IECA 1, as a decision that “*puts beyond doubt the correct interpretation of dependency*”. Consistent with *K*, this Court observed in *Ali Agha*, at para.6, “*As is clear from Jia [(Case C-1/05) [ECLI:EU:C:2007:1]], 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]*”. There is no (or no proper) consideration, in the impugned decision, of the social conditions presenting.

G. Conclusion

59. The conclusion of the court, having regard to all of the foregoing, is that it will grant the order of *certiorari* sought.