THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 329

Appeal No. 2019/28

Baker J.
Whelan J.
McGovern J.

BETWEEN/

ADNAN SAFDAR

APPLICANT/
APPELLANT

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY,
IRELAND, AND THE ATTORNEY GENERAL

RESPONDENTS

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

1. This is an appeal from the order of 19 December 2018 of Keane J. following delivery of a written judgment of 7 December 2018, *Safdar v. Minister for Justice and Equality* [2018] IEHC 698, refusing judicial review of a decision of the Minister for Justice and Equality ("the Minister") made on 3 April 2017 to refuse Mr Safdar, a national of Pakistan, a residence card as a permitted family member of his cousin, Mr Ahmed, a citizen of the United Kingdom who, at the material time, resided and worked in the State in the exercise of his free movement rights as Union citizen. The Union citizen is not named in the title to these proceedings, and whether the proceedings are properly constituted is one matter that falls for consideration.

2. The decision of the Minister was made pursuant to r. 21 of the European Communities (Free Movement of Persons) No. 2 Regulations 2006 (S.I. No. 656/2006), as amended ("the 2006 Regulations") and upheld the first instance decision of 21 December 2015 under r. 7(2) of the 2006 Regulations.

3. The 2006 Regulations implemented Directive 2004/38/EC On the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, O.J. L158/77 30.4.2004 (the "Citizens Directive"), and have since been revoked and replaced by the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548/2015) ("the 2015 Regulations") which came into operation on 1 February 2016 and are not materially different from those under consideration in this appeal.

4. The appeal concerns the correctness of the approach of the trial judge to the reasoning and process engaged by the Minister and raises two issues of some importance. The first concerns the standing of Mr Safdar to commence these proceedings in his own name. The second is whether the 2006 Regulations correctly transpose the Citizens Directive.

Background facts

5. Mr Safdar, a Pakistani national, was born in 1990 in Pakistan and avers that he entered the State from the United Kingdom on 20 August 2014 as both a dependent and a member of the household of his first cousin, Mr Ahmed, a British citizen born in 1972 and who is said to have entered the State some two weeks after Mr Safdar. It was accepted that Mr Ahmed is the first cousin of Mr Safdar, and that he has exercised his free movement rights as a worker in the State. It is also accepted that Mr Ahmed and Mr Safdar reside in the same rented accommodation within the State.

6. On 20 April 2015, some months after Mr Safdar entered the State, an application was submitted on his behalf for a residence card. The application was signed by Mr Safdar and Mr Ahmed.

7. The sequence of communications between the Immigration and Naturalisation Service of the Department of Justice ("INIS") is set out in detail in the judgment of Keane J. That correspondence sought evidence of the relationship between Mr Safdar and his cousin and contained observations and responses to the documentation adduced.

8. The decision issued on 21 December 2015 was that Mr Safdar was not entitled to be treated as a permitted family member of his Union citizen first cousin as he had not shown dependence upon him nor that he was a member of the household of his first cousin in the United Kingdom.

9. The decision on review, issued on 3 April 2017, was stated to have been arrived at following an examination of the documentation and it was pointed out that the documentation mostly showed the living arrangements of the two cousins within the State and not the evidence that Mr Safdar was dependent on his first cousin in the country from which they had come.

10. In the affidavit verifying the application for judicial review sworn on 12 June 2017 and narrated by the trial judge in his judgement, Mr Safdar avers that he resided in two different places in the United Kingdom, in houses owned by Mr Ahmed's wife, that Mr Ahmed changed address frequently (often due to work), and that he continues to travel back and forth between Ireland and the United Kingdom to visit his family. He asserts that his relationship with Mr Ahmed is genuine and stable and that the degree of dependence on him is what prompted Mr Ahmed to bring Mr Safdar with him to Ireland as an adult member of his household while Mr Ahmed left his wife and other family members of his household behind in the United Kingdom.

The High Court decision

11. On 19 June 2017, O'Regan J. granted Mr Safdar leave to seek judicial review by way of a declaration that the 2006 Regulations failed to transpose the Citizens Directive and/or are incompatible with EU law; an order of *certiorari* quashing the Minister's decision of 3 April 2017 to uphold, on review, the refusal of residence permission to Mr Safdar; and an order of *certiorari* quashing the Minister's decision to issue a proposal to deport Mr Safdar on the following grounds:

1) the State had failed to properly transpose the Citizens Directive and, in particular, the requirements of article 3(2) of that Directive, as domestic legislation does not contain criteria which are consistent with the normal meaning of the term "facilitate" and of the words relating to dependence;

2) the Minister's decision is arbitrary, unreasonable, irrational and unlawful in the absence of any published criteria for establishing when a family member is a dependant or member of the household of a Union citizen with a right of residence in the State;

3) the Minister's decision was reached in breach of Mr Safdar's entitlement to natural and constitutional justice and fair procedures.

12. Keane J. rejected the preliminary objection of the Minister that the proceedings are not properly constituted as Mr Ahmed was not a party to the High Court proceedings.

13. He rejected Mr Safdar's argument that the 2006 Regulations fail to properly transpose article 3(2) of the Citizens Directive or breach the principle of effectiveness as they failed to establish "criteria" consistent with the term "facilitate" for determining what constitutes dependency upon, or membership of the household of the Union citizen having the primary right of residence.

14. Keane J. found that the Minister provided clear and cogent reasons for the decision on review to confirm the first instance refusal to grant Mr Safdar a residence card, the existence and scope of the requirement to give reasons for an administrative decision not being in issue between the parties.

15. Keane J. rejected Mr Safdar's submission that the court should request a preliminary ruling from the Court of Justice under article 267 of the Treaty on the Functioning of the European Union ("TFEU") based on Mr Safdar's "unhelpfully broad and unfocussed question".

The grounds of appeal and the cross-appeal

16. The appellant does not appeal in respect of paras. 66 to 69 of the judgment of the trial judge, which dealt with the issue of the proposed deportation of Mr Safdar. He appeals the decision on the adequacy of the reasons, the transposition argument, and the refusal to make a reference to the Court of Justice under article 267 of the TFEU.

17. The State respondents cross-appeal the determination that the appellant has standing to maintain the judicial review.

18. The issues to be determined on appeal were usefully outlined in the written submissions of the appellant as follows:

i) Did the appellant have *locus standi* to bring the judicial review (the cross-appeal)?

ii) Has the Directive been properly transposed into national law?

iii) Did the Minister comply with his obligation to give reasons for the decision?

iv) Do the provisions of the Citizens Directive as implemented by the 2006 Regulations require a two-stage decision making process?

v) Are the matters raised above matters of EU law which require this Court to make a preliminary reference to the European Court of Justice?

The Citizens Directive

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

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

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

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

22. The scheme of the Citizens Directive provides for a different approach to family members and what in the Irish implementing Regulations are called "permitted family members". The United Kingdom legislation, the Immigration (European Economic Area) Regulations 2016, uses the term "extended family members" to describe this category. Family members who come within the definition in article 2(2) of the Citizens Directive are afforded the right of entry and residence in the Union citizen's host Member State, provided certain conditions are met. A family member, in that sense, is a spouse, a civil partner, a direct descendant under the age of twenty-one, or dependent, and those of the spouse or partner, and any dependent direct relatives in the ascending line of the Union citizen and of the spouse or partner.

23. The present case concerns the category of permitted family members who do not come within the definition of "family member" in article 2 of the Citizens Directive, and whose

application for entry and residence in the host Member State is to be facilitated, but who cannot be said to have a right of entry or to remain. Article 3(2) of the Citizens Directive is the focus of the present appeal, and it is convenient to quote it in full:

> "Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen".

24. Regulation 2(1) of the 2006 Regulations defines a "permitted family member" as a member who, *inter alia*, is dependent on a Union citizen or is a member of the "household" of the Union citizen.

25. A consideration of the interpretation of the terms used in the 2006 Regulations is given in the judgment in *Subhan v. Minister for Justice and Equality* delivered today.

Standing

26. Keane J. rejected the argument of the State respondents that the proceedings were improperly constituted because Mr Ahmed was not a party to the challenge.

27. The argument made by the respondents at first instance and now, on appeal, is that, as the purpose of affording derivative rights to family members of a Union citizen is for the benefit of the Union citizen, and as the substantive right in issue is that of Mr Ahmed, the absence of an assertion by Mr Ahmed of those rights means that the proceedings are not properly constituted and that Mr Safdar has no standing to proceed without his being named as a party. Mr Safdar's argument was that his first cousin was reluctant to join in the proceedings because of the risk of costs. No argument was made by his counsel in the course of the appeal as to whether it might have been sufficient that Mr Ahmed was a notice party to the proceedings.

28. No affidavit evidence was provided by Mr Ahmed in support of the judicial review, although, as I have noted, he did sign the application form for residence.

29. Keane J. took the view that although Mr Ahmed is affected by the challenge now brought by Mr Safdar, this would be a "personal issue" between the two cousins and not one between Mr Safdar and the State, and he rejected the argument that Mr Safdar was impermissibly seeking to "vicariously litigate the rights of Mr Ahmed".

30. He noted the relevant provision, O. 84, r. 22(2) of the Rules of the Superior Courts ("RSC"), requires that an application for judicial review "must be served on all persons directly affected". He decided that:

"44. [...] It is not clear to me that Mr Ahmed is directly - rather than indirectly - affected by Mr Safdar's application, merely because Mr Safdar's asserted right to have his residence in the State facilitated as a permitted family member of Mr Ahmed, derives from Mr Ahmed's free movement rights as a Union citizen.

45. Even if Mr Ahmed were a person directly affected by Mr Safdar's challenge to the Minister's refusal to grant him (Mr Safdar) a residence card and, thus, a person required to be served with Mr Safdar's proceedings, the failure to serve them on him would be an issue between Mr Ahmed and Mr Safdar, not one between the State and Mr Safdar."

31. He said that the rights in issue are the rights of Mr Safdar to enter and reside in the State, and Mr Ahmed did not need to be a party merely on the account of the fact that the rights of Mr Safdar were derived rights.

32. The State parties cross-appealed this conclusion. Mr Safdar argues that the trial judge was correct on the standing point and relies on the observations of Barrett J. in his judgment in *Pervaiz v. Minister for Justice and Equality* [2019] IEHC 403. That decision was delivered after the decision now under appeal, but the question as to whether proceedings were properly constituted was also raised before Barrett J., who concluded that the girlfriend of Mr Pervaiz was not a necessary party as there was no reason why she would, in consequence of any decision on the judicial review, be bound by a finding or order of the Court and that no finding or order would have impacted on her continuing eligibility to exercise her free movement rights as a Union citizen.

33. The State parties, in their submissions on the cross-appeal, argue that the decision of Barrett J. is incorrect, and this Court was informed at the hearing that the Supreme Court has, in its determination *Pervaiz v. Minister for Justice and Equality* [2019] IESCDET 226 of 1 November 2019, accepted the leap frog appeal as a matter of general public importance.

34. It is somewhat unfortunate that this Court has been asked to decide the issue when it seems the Supreme Court has given priority to the hearing of *Pervaiz v. Minister for Justice*, but it was not informed of this fact until the hearing had commenced, and it seemed prudent to conclude the hearing of the appeal in the circumstances.

Discussion and decision on standing argument

35. The recitals to the Citizens Directive identify its purpose as affording derivative rights to family members of the Union citizen for the benefit of that Union citizen.

36. The substantive or procedural rights of the family members, whether that be as a qualified family member or a permitted family member within the meaning of the provisions of the 2006 Regulations, originate or have their source in that primary right. Mr Ahmed is therefore interested in any decision to refuse a residence card to his first cousin.

37. It is argued by the State parties that this means Mr Ahmed is a necessary party to the proceedings, as his rights are liable to be affected by the result. It is accepted that the question of standing might well fall for different consideration in an application by, for example, a spouse who has autonomous rights as a family member under the Citizens Directive and is given direct rights of entry and residence. Where a person claims to be a "permitted family member", that person has no more than a right to be considered as eligible for entry.

38. In my view, this distinction does not have merit. The question is not whether the permitted family member has a vested right to enter and remain in the State, but whether both the permitted family member and qualified family member have a right, albeit how that right is exercised may be different. The qualifying family member has a right to enter and remain which automatically vests, the permitted family member has no more than a right to have his or her application considered, and whilst the result of the application is not pre-ordained or automatic, the right is still a vested right. For that reason, it does not seem to me that there is any difference in substance between the right of a qualifying family member and that of a permitted family member for the purpose of ascertaining whether such person or persons has standing to challenge a decision of the Minister under the scheme of the 2006 Regulations.

39. The reliance of the State respondents on the decision of the Supreme Court in *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 IR 128 seems to me not to be on point and I agree with the trial judge in that regard, and indeed with the observations of Barrett J. in *Pervaiz v. Minister for Justice and Equality*. It is not merely that the context is so different, and that the planning code mandates certain necessary parties to a challenge, but rather the test examined by the Supreme Court in *K.S.K. Enterprises Ltd. v. An Bord Pleanála* concerned the question of what parties could be said to be objectively necessary parties to a judicial review because their rights might be affected by the result.

40. I consider that Keane J. was correct, and that Mr Ahmed is not an objectively necessary party to the proceedings in the meaning of O. 84, r. 22(2) RSC, although the rights asserted by Mr Safdar are rights which derive from the primary and fundamental free movement rights of his first cousin. Mr Ahmed may well be disappointed in the result, but his status is not impacted, and his rights to remain in the State will not be extinguished if Mr Safdar does not succeed in the judicial review. The rights asserted are the rights of his first cousin to be considered to be entitled to the benefit of the derived rights, rather than the rights of Mr Ahmed.

41. The rights in question are derivative rights, but it is implicit in the scheme of the Citizens Directive that the third country national can assert these rights on his or her own account. The Court of Justice considered the provisions of article 3(2) of the Citizens Directive in *Secretary of State for the Home Department v. Banger (Case C 89/17)* ECLI:EU:C:2018:570. The facts are as follows: Between 2008 and 2010 Ms Banger, a national of South Africa, and her United Kingdom national partner Mr Rado resided together in South Africa. In May 2010, Mr Rado accepted employment in the Netherlands, and they lived

together there until 2013. In 2013, Ms Banger and Mr Rado decided to move together to the United Kingdom. Ms Banger's application for a residence was refused on the ground that she was the unmarried partner of Mr Rado and that the United Kingdom 2006 Regulations provided that only the spouse or civil partner of a United Kingdom national could be considered a family member of that national.

42. The precise point was not raised concerning the standing of Ms Banger to bring the challenge in the Upper Tribunal (Immigration and Asylum Chamber) without the joinder of her partner. A reference to the Court of Justice was made and that Court, at para. 31, repeated the principle that the Citizens Directive:

> "[...] imposes an obligation on those Member States to confer a certain advantage on applications submitted by the third-country nationals envisaged in that article, compared with applications for entry and residence of other nationals of third countries (see, to that effect, judgment of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 21)."

43. Regarding the correct approach to the question of remedy, the Court said, at para. 50:

> "As regards the content of those procedural safeguards, according to the Court's case-law, a person envisaged in Article 3(2) of that directive is entitled to a review by a court of whether the national legislation and its application have remained within the limits of the discretion set by that directive (judgment of 5 September 2012, Rahman and Others, C-83/11, EU:C:2012:519, paragraph 25)."

44. Thus, the Court of Justice envisaged the challenge by the permitted family member. The judgment went on to say, at para. 51:

> "As regards its review of the discretion enjoyed by the competent national authorities, the national court must ascertain in particular whether the contested decision is based on a sufficiently solid factual basis. That review must also relate to compliance with procedural safeguards, which is of fundamental importance enabling the court to ascertain whether the factual and legal elements on which the exercise of the power of assessment depends were present (see, by analogy, judgment of 4 April 2017, *Fahimian*, C 544/15, EU:C:2017:255, paragraphs 45 and 46). Those safeguards include, in accordance with Article 3(2) of Directive 2004/38, the obligation for those authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence."

45. The review is envisaged as an examination of the personal circumstances of the permitted family member and a justification to him or her of the reasons for the refusal of entry or residence.

46. The Court concluded as follows, at para. 52:

> "In the light of the foregoing considerations, the answer to the fourth question is that Article 3(2) of Directive 2004/38 must be interpreted as meaning that the

> third-country nationals envisaged in that provision must have available to them a redress procedure in order to challenge a decision to refuse a residence authorisation taken against them, following which the national court must be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent national authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence."

47. I consider, in the light of these statements of principle, that the requirement of effectiveness means that a remedy must be available to the person asserting breach of his or her rights to be considered, that any other conclusion would be contrary to the object of the Citizens Directive, and a narrow approach to the question of standing to challenge a decision does not meet that test.

48. Further, while the precise point does not quite appear to have been determined in terms, it is also implicit in two relatively recent cases involving third country nationals with estranged spouses that they may assert their derivative rights on their own account: See, *e.g., Ogieriakhi v. Minister for Justice and Equality (Case C-244/13)* ECLI:EU:C:2014:2068, at para. 47:

> "Article 16(2) of Directive 2004/38 must be interpreted as meaning that a third-country national who, during a continuous period of five years before the transposition date for that directive, has resided in a Member State as the spouse of a Union citizen working in that Member State, must be regarded as having acquired a right of permanent residence under that provision, even though, during that period, the spouses decided to separate and commenced residing with other partners, and the home occupied by that national was no longer provided or made available by his spouse with Union citizenship"

49. The same approach is implicit in *Chenchooliah v. Minister for Justice and Equality* (Case C-94/18) ECLI:EU:C: 2019:693, at para. 89:

> "Article 15 of Directive 2004/38 is to be interpreted as being applicable to a decision to expel a third-country national on the ground that that person no longer has a right of residence under the directive in a situation, such as that at issue in the main proceedings, where the third-country national concerned married a Union citizen at a time when that citizen was exercising his right to freedom of movement by moving to and residing with that third-country national in the host Member State and, subsequently, the Union citizen returned to the Member State of which he is a national. It follows that the relevant safeguards laid down in Articles 30 and 31 of Directive 2004/38 are applicable when such an expulsion decision is adopted and it is not possible, under any circumstances, for such a decision to impose a ban on entry into the territory."

50. In both cases, the third country nationals successfully invoked rights under the Citizens Directive even though, in the former case, the marriage had been dissolved and, in the latter case, the spouse of the Union citizen was now in prison in his home Member State. In neither case was the family member to be treated as satisfying article 3(1) of the Citizens Directive but fell for consideration under article 3(2) of the Citizens Directive, and in neither case was the Union citizen a party to the challenge.

51. In short, the purpose of the Citizens Directive is to simplify and strengthen the right of free movement and residence of Union citizens and of their family members. The Irish implementing legislation allows a person to apply as a qualified or permitted family member to enter and remain in the State having regard to the perceived desirability of preserving the integrity and unity of the family of the Union citizen. The persons who are permitted to enter and reside have a right or, in the case of permitted family members, a right to be considered, and a challenge to the manner in which that consideration was had may be brought and sustained by the person who claims to be a permitted family member. This proposition is especially so in a judicial review such as the present one, where the challenge is primarily to the reasons given by the Minister for the refusal of a residence card, or where the judicial review is grounded on the argument that the transposing instrument unjustifiably impeded the consideration of his application. I leave to another case the question whether the Union citizen might be required as a party for the proper constitution of a differently formulated case.

52. But the application or entry and residence does require the active support of the Union citizen. Because the right on which Mr Safdar relies is a right derived from the EU Treaty rights of his first cousin, and because he seeks to challenge the refusal of the Minister to accept that he was dependant on his first cousin or was a member of the household of his first cousin, the question of whether Mr Ahmed offered evidential support to Mr Safdar does arise, as the level of actual support by Mr Ahmed and the nature of his household is central in the factual matters that call for consideration.

53. Without direct evidence from the Union citizen, it is hard to see how an applicant might satisfy the Minister that he or she is either dependent on, or a member of the household of, the Union citizen, or how the rights of free movement of the Union citizen are impacted by the refusal to permit entry or residence to the family member. For that reason, the Union citizen ought reasonably to be a necessary notice party in many applications for judicial review of that decision. Further, there are policy reasons why a court might consider that, absent the active presence of the Union citizen as notice party, there is a risk of oppressive behaviour by aggressive or domineering relatives asserting derived rights where the affected party's voice is shut out from making observations or offering assistance to the court hearing the review.

54. There is no clear evidence that Mr Ahmed supports the application other than the statement by Mr Safdar that his cousin is "agreeable to supporting him" and that may not be sufficient to establish dependence. As stated above, Mr Ahmed did not furnish an affidavit in support of the application, although he did sign the application form.

55. The standing argument must fail, in my view, because, while an active engagement between the permitted family member and the Union citizen is required to show on the facts that there is a dependence or to establish the nature and identity of the household, that active involvement by the Union citizen may be sufficiently met if he or she is a notice party. A court hearing a judicial review has jurisdiction to require the presence of the Union citizen in a review. No order was made by the trial judge in the present case and it does not appear that that he was asked to consider making an order that the Union citizen be put on notice.

56. In those circumstances, the point is not one that properly arises in the present appeal, and the fact that the Union citizen was not on notice made no material difference to the result of the review, nor does it impact on the decision on appeal.

57. In my view Keane J. for the reasons stated was correct that Mr Safdar did have standing to himself, and without being joined by his cousin as co-applicant, bring and maintain the judicial review.

58. I would therefore dismiss the cross-appeal.

The transposition argument

59. The trial judge dealt with the transposition argument in paras. 48 to 53 of his judgment. The argument made was that the 2006 Regulations do not properly transpose the relevant provisions of the Citizens Directive because they do not contain sufficient and detailed criteria to be applied when determining what constitutes dependency upon or membership of the household of the Union citizen having the primary right of residence.

60. Having considered in particular the decision of the Court of Justice in *Secretary of State for the Home Department v. Rahman (Case C-83/11)* ECLI:EU:C: 2012:519, he found, at para. 49, that:

> "[I]t is immediately apparent that the "criteria" the Member States are obliged to ensure their legislation contains are those that enable [applicants] to obtain a decision on their application for entry and residence that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons".

61. Keane J. rejected Mr Safdar's "closely related" submission in relation to the transposition issue that the failure to provide and apply a domestic law definition of each of the terms "dependants of the Union citizen" and "members of the household of the Union citizen" is in breach the EU law principle of effectiveness or Mr Safdar's right to fair procedures. At para. 52, he held that:

> "[T]hese are terms of European Union law and, as such, the nature and scope of the concepts they describe cannot properly be made subject to any limiting or conflicting "criteria, definitions or policies" in the law of a Member State; see, for example, Case 283/81 *CILFIT* [1982] ECR 3415".

62. Having adopted his own *dicta in Subhan v. Minister for Justice and Equality* [2018] IEHC 458 in relation to the meaning of the terms, he went on as follows, at para. 53:

> "The State gave effect to art. 3(2) of the Citizens' Rights Directive by expressly adopting the terminology of that provision in the 2006 Regulations, thereby protecting the relevant procedural rights of those persons who claim to be beneficiaries under it."

63. The Citizens Directive is not directly applicable, and this was definitively determined by the Court of Justice in *Secretary of State for the Home Department v. Rahman* at para. 25:

> "[E]ven though, as the governments which have submitted observations have correctly observed, the wording used in Article 3(2) of Directive 2004/38 is not sufficiently precise to enable an applicant for entry or residence to rely directly on that provision in order to invoke criteria which should in his view be applied when assessing his application, the fact remains that such an applicant is entitled to a judicial review of whether the national legislation and its application have remained within the limits of the discretion set by that directive".

64. This was the first time that the Court of Justice came to consider in any detail the provisions of the Citizens Directive and the opinion of Advocate General Bot, *Secretary of State for the Home Department v. Rahman (Case C-83/11)*, ECLI:EU:C:2012:174, contains useful guidance as to the scope of the Directive and its meaning.

65. Advocate General Bot considered the relevance of the right to private and family right in the context of the Citizens Directive in his opinion in *Secretary of State for the Home Department v. Rahman* at paras. 36 *et seq*. and later, at para. 77, concluded that:

> "[T]he fundamental right to private and family life may, in principle, be relied on by all categories of persons mentioned in Article 3(2) of Directive 2004/38" and that, at para. 78, "is [...] a matter for the national court, which must ascertain whether there is a disproportionate impairment of [the Union citizen's] private and family life".

66. He also said, in para. 64 of his opinion, that Member States have "enormous latitude" in the manner in which the Citizens Directive is to be transposed into national law, but that this latitude is to be exercised only and insofar as the transposing instruments do not breach the principles of effectiveness.

67. The Court of Justice said, at para. 24 of its decision, that the host Member State must ensure "that its legislation contains criteria which are consistent with the normal meaning of the term 'facilitate'" and of the words relating to dependence used in article 3(2) of the Citizens Directive, and which do not deprive that provision of its effectiveness.

68. Keane J. considered, at para. 53, that the implementing instrument is adequate to give effect to article 3 of the Citizens Directive and to thereby protect "the relevant procedural rights of those persons who claim to be beneficiaries" under the Directive.

69. The appellant relies on the judgment of Barrett J. in *Pervaiz v. Minister for Justice and Equality*, where he held that the 2015 Regulations had infringed the principles of effectiveness by failing to provide any legislative definition of the concept "durable relationship duly attested" or any legislative framework or guidance to applicants. That judgment is under appeal to the Supreme Court, as noted above, and I do not propose therefore to consider it further here.

70. It is argued that, in the light of the decision in *Secretary of State for the Home Department v. Rahman*, the published guidelines are not sufficient to meet the requirements of effectiveness as there are no sufficient criteria as to the means by which dependence or membership of a household is to be satisfied.

71. Mr Safdar argues that the method of transposition by which the 2006 Regulations merely repeated the language of the relevant provisions of the Citizens Directive fails to meet the requirements of effectiveness and does not properly "facilitate" entry to and or residence in a Member State by a permitted family member.

72. The Citizens Directive does not provide any definition of the terms "household" and "dependent".

Discussion on transposition

73. National procedural autonomy is afforded by the Citizens Directive, and that autonomy extends to the means by which the Directive is transposed, and to the language used in the transposing instrument. Recital 6 of the Citizens Directive reads as follows:

> "In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen."

74. I do not read recital 6 of the Citizens Directive to contain an imperative to national implementing authorities to enact legislation or other transposing instruments which define with greater specificity or state with greater particularity the criteria or the means by which the requirements for qualification as a family member are to be met. What is necessary, and this was stated by the Court of Justice at paras. 22 *et seq.* in *Secretary of State for the Home Department v. Rahman*, is that Member States must make it possible for a permitted family member to obtain a decision on an application founded on an

"extensive examination of their personal circumstances", and that the refusal be justified by reasons.

75. That expression means in the light of the purpose of the Directive, that each individual application must be decided on its merits and by reference to its specific circumstances. An ex ante test that included or excluded categories of persons or types of dependence would not suffice.

76. Counsel for the State respondents is correct that the purpose and intent of the Citizens Directive is to give concrete support to and strengthen the free movement of rights of Union citizens within the territory of the Member States, and that it recognises the desirability of facilitating family members to accompany and thereafter reside with the Union citizen as a means of positively supporting the free movement rights, and preventing obstacles which would undoubtedly arise were family members not permitted to accompany or reside with the Union citizen.

77. The requirements of efficient transposition and clarity in transposition must, of course, be met, but the argument made by Mr Safdar is that the contents of para. 24 of the decision of the Court of Justice in *Secretary of State for the Home Department v. Rahman* mean that the implementing legislation must be specific and detailed. Paragraph 24 reads as follows:

> "In the light both of the absence of more specific rules in Directive 2004/38 and of the use of the words 'in accordance with its national legislation' in Article 3(2) of the directive, each Member State has a wide discretion as regards the selection of the factors to be taken into account. None the less, the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness."

78. The argument made by Mr Safdar is that the implementing instrument must be such as to "facilitate" the free movement of Union citizens within the national territories. It is argued that this imports an obligation to list the positive factors of which account is to be taken by a domestic decision maker. I do not read the statement of the Court of Justice in this way, but rather to mean that any implementing legislation must have regard to the objectives of the Citizens Directive and that one of those objectives is to facilitate free movement, and that any impediment in the national implementing measure to free movement is to be constrained. The Court of Justice, in effect, said no more than what is well established, namely that the implementing legislation must not deprive the Citizens Directive of its effectiveness or uniform application.

79. I accept the argument of the respondents that *Secretary of State for the Home Department v. Rahman* does permit a refinement or illustration or identification of criteria in order to assist a person to understand the meaning of "dependant" or "household" as the case may be, but that does not preclude that transposition might well be effectively done by using the words of the Citizens Directive itself.

80. I agree also that whilst the first principle of national statutory interpretation is to approach the meaning of the words "dependent" or "household" by giving the words their natural and ordinary meaning, sometimes this approach might have to give way to, or at least be given equal weight with, the interpretive approach for which the Court of Justice contended in *CILFIT v. Ministero della Sanità (Case C-283/81)*, ECLI:EU:C:1982:335, namely that one looks at the scheme and purpose of an EU instrument.

81. There is now some jurisprudence in the domestic courts, in the Court of Justice, and in the courts of England and Wales regarding the interpretation of those terms, and it could be said that undue specificity can make a general transposing instrument too narrow or too broad to be a correct transposition, and that sometimes general language is resilient. While this might not be determinative of the matter, no example of another transposing instrument from another Member State which has given more detail than that contained in the Irish transposing instrument and in the guidelines has been identified.

82. Furthermore, and I note the comment of Keane J. in this regard, a general transposing document would perhaps be more flexible and be more able to meet different or changing social *mores* and a definition with more particularity might well, or might not, be less flexible over time or might simply come to be treated as a set of examples which might be relevant in a particular case.

83. Having regard to the fact that the form of transposition and the method by which Member States engage with the individual application is left to the national authorities, I cannot accept the argument made by the appellant that the transposing instrument is required, as a matter of EU law, to contain more concrete and specific details of the type of matters that might be taken into account in assessing whether a person is dependent on or a member of a household of a Union citizen.

84. Indeed, it seems to me that having regard to the requirement that there be a harmonious and consistent interpretation of the Citizens Directive throughout the Member States, a definition containing more detail might cause discordance. That factor is not determinative but is a factor of note.

85. It is true that para. 24 of the decision of the Court of Justice in *Secretary of State for the Home Department v. Rahman* (quoted above at para. 76) did make reference to the criteria in the transposing instrument to be met by a person who wishes to establish rights as a family member. The requirement from that decision is that the criteria be consistent with the approach of the Citizens Directive that free movement rights be facilitated or supported by the approach of the Member States to the entry and residence of family members, and I do not consider that the decision means that the publication of detailed and particularised criteria is necessary for proper transposition.

86. I also consider that the mere fact that the decision of the Court of Justice in *Secretary of State for the Home Department v. Rahman* was to the effect that the Citizens Directive was not directly applicable does not mean that the language is too vague, but rather, in

the light of the test to be met for a Directive to be directly effective, that the Directive taken as a whole is not directly applicable.

87. Finally, the INIS published guidelines in 2015 which set out details of the kind of proofs that may be required in an application for visas by a permitted family member of Union citizens. Those guidelines emphasise that documentary evidence is required which demonstrates the truth of an assertion of dependence or membership of a household. The types of supporting document is explained. Proof that the Union citizen is exercising free movement rights in Ireland or intends to exercise those rights at the time of the arrival of a permitted family member in Ireland is also required. Dependence is explained by reference to the test in *Jia v. Migrationsverket (Case C-1/05)*, ECLI:EU:C:2007:1, and it must exist at the time of the application and not be created by the moment of entering the State. Reference is made to the fact that merely living under the same household "does not count" as proof of membership of a household.

88. Further, the application form EU1A is detailed and, on its face, requires evidence regarding the matters that fall for consideration by the deciding body.

89. These guidelines, in my view, offer considerable assistance to application under the scheme of the Citizens Directive.

90. I would dismiss this ground of appeal.

The provisions of Regulation 5(2) of the 2006 Regulations

91. Regulation 5(1)(b) of the 2006 Regulations provides that an applicant for permission to enter and reside in the State as a permitted family member must provide "documentary evidence [...] certifying that he or she is a dependant, or a member of the household, of the Union citizen".

92. A further argument was made regarding the correct interpretation of r. 5(2) of the 2006 Regulations which provides as follows:

> "Upon receipt of the evidence referred to in paragraph (1), the Minister shall cause to be carried out an extensive examination of the personal circumstances of the person concerned in order to establish whether he or she is a permitted family member".

93. Keane J., at para. 56 of his judgment, said of Mr Safdar's application that:

> "did not fail because, as might have occurred in other circumstances, the Minister, while satisfied that Mr Safdar was a dependant or member of the household of Mr Ahmed there, nonetheless sought to exercise the discretion implied by the use of the term 'facilitate' (rather than 'grant') in art. 3(2) of the Directive to refuse to grant him a residence card. It is only in the latter context that the State is obliged to ensure that any relevant criteria in national legislation governing the conduct of the extensive examination of the applicant's personal circumstances upon which

such a decision must be based are consistent with the requirements of art. 3(2) of the Directive."

94. It is argued that the trial judge wrongly concluded that the 2006 Regulations require a two-stage process where the deciding body makes a determination that an applicant is a permitted family member and thereafter engages upon a "extensive examination" to consider whether to permit entry or residence.

95. Merely being a permitted family member does not in itself entitle a person to succeed in obtaining a right of entry or a residence card. Regulation 5(2) of the 2006 Regulations requires the Minster to examine the documentation and evidence furnished to ascertain whether the applicant has established that he or she is a permitted family member.

96. I read r. 5(2) of the 2006 Regulations as being an empowering provision by which the Minister having had produced to him or her the necessary evidence including documentary evidence identified in r. 5(1) of the 2006 Regulations, examines the personal circumstances of the person concerned to ascertain whether in truth and in the light of the specific personal circumstances, the applicant is a permitted family member. This reflects the fact that each case is to be determined on its individual facts, and that the personal circumstances must be identified and documented with sufficient particularity and with sufficient detail to permit the Minister to examine those with the degree of scrutiny required.

97. The Minister then continues to have discretion to refuse based on the circumstances set out in r. 5(4) of the 2006 Regulations.

98. The term "extensive examination" does not import a negative, i.e. that the Minister is to scrutinise with a degree of scepticism or must start the process of examination with a particular approach, but rather that the circumstances must be examined with a sufficient degree of intensity to ensure that the individual circumstances are fully respected, and fully taken into account in the final decision.

99. I reject the argument that the 2006 Regulations do not apply to a person unless and until the deciding body has made a determination on the facts that an applicant is a permitted family member. The 2006 Regulations mean that the Minister must consider the documentation furnished in support of the application in order to make a determination that the applicant qualifies under the scheme and is entitled to a residence card, subject only to the discretionary power to refuse based on the discretionary factors set out in the Regulations. The process does not require that a decision be made on *a prima facie* basis before the "extensive examination" is carried out. That reading of the provisions is not in accord with either the plain meaning of the 2006 Regulations or in accord with the manner in which the deciding body made its determinations.

100. I do not read the paragraph quoted as suggestive of an alternative view and consider, rather, that Keane J. was posing a hypothetical scenario where an applicant is denied entry based on the discretionary factors nor relevant to the present appeal.

101. This argument does not arise from the judgment and I would dismiss the appeal on this ground.

Failure to give reasons

102. The trial judge considered that the Minister's reasons were adequate and met the test in the authorities. That reasons must be given could scarcely be doubted having regard both to the express language of the Citizens Directive and the caselaw, including *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 IR 701, and *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 IR 297, and I do not propose to dwell further on this aspect of the appeal.

103. The decision itself gives a number of reasons why the application was refused, including what I consider to be the primary reason, namely that much of the documentation furnished in support of the application refers mainly to the residence of Mr Safdar in the State and not in the State from which he had come. Some detail of the type of documentation furnished regarding shared finances and shared cohabitation in Ireland are set out. It was considered that insufficient evidence was given regarding the places where the Union citizen resided and whether, for how long, and where, Mr Safdar had lived with Mr Ahmed under the same roof.

104. There is also an analysis of a bank statement dated July 2013 which did suggest that Mr Safdar and his first cousin shared an address for a time in 2013, but the decision maker concluded that that was not indicative of the nature or extent of the household contained at the address there.

105. I consider that the trial judge was correct and that the reasons given were detailed and coherent. The reasons were that insufficient documentation was furnished of the matters which were in issue, namely dependency, and that Mr Safdar was a member of the household of Mr Ahmed. The decision maker was entitled to demand some evidence of the household of Mr Ahmed, where he resided, and when he and Mr Safdar resided together, and was perfectly correct, in the light of the authorities, to require that evidence be produced regarding the living arrangements in the United Kingdom, before Mr Ahmed chose to exercise his EU Treaty rights by travelling to the State.

106. Furthermore, the trial judge was correct that the only documentary evidence of actual direct financial support was evidence of the payment of an examination fee in July 2013 in a relatively small amount of money.

107. The reasons given were adequate and met the test in the authorities. In particular, the reasons were sufficient to enable Mr Safdar to understand why the decision was made, and to make an informed decision whether to appeal or review. Furthermore, the statutory entitlement to make further observations in the light of the initial view taken by the decision maker afforded Mr Safdar an opportunity to improve his documentary evidence and proofs and it must have been clear to him from a reading of the initial decision of the Minister that further proofs were required.

108. The trial judge was correct in his conclusion on the reasons-based challenge and I would dismiss that ground of appeal.

Application for a reference under Article 267 of the Treaty?

109. The applicant seeks that this Court make a preliminary reference to the CJEU on the transposition and effectiveness pleas. Keane J. refused the application for a reference as he found, at para. 51, that:

> "[T]he decision of the ECJ in Rahman deals squarely with the proper construction of art.3(2) of the Citizens Rights Directive in the manner I have just outlined".

110. I am of the same view. Further, having regard to the fact that the broad point is now before the Supreme Court in the appeal of the decision in Barrett J. in *Pervaiz v. Minister for Justice*, which has been given an accelerated hearing date, it does not seem to me appropriate that this Court would refer a question for a preliminary ruling where, from the reading of the documentation on the website, it appears that the Supreme Court is being asked to give consideration to the making of a reference.

111. I would dismiss the appeal on all grounds.