THE COURT OF APPEAL

Irvine J.
Baker J.
Costello J.

Appeal No. 2014/990

BETWEEN/

V. K., R. K., I. A. K. Z., N. B. M. M., M. I. A. K. AND M. I. A. K.

APPLICANTS/ RESPONDENTS

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT/ APPELLANT

-AND-

THE MINISTER FOR FOREIGN AFFAIRS

NOTICE PARTY

Appeal No. 2018/43

BETWEEN/

MUHAMMAD KHAN, MAHNAZ KHAN, MUHAMMAD SHUMAR KHAN, AND MALKA KHATOON

APPLICANTS/ RESPONDENTS

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT/ APPELLANT

JUDGMENT delivered on the 30th day of July, 2019 by Ms Justice Baker

1. These appeals by the Minister for Justice ("the Minister") in judicial review proceedings raise a broadly similar question concerning the interpretation and operation of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656/2006) as amended ("the 2006 Regulations"), transposing 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. L/158, 30.4.2004 ("the Citizens Directive").

2. The first appeal is against the judgment *K. v. Minister for Justice and Equality* [2013] IEHC 424 (now anonymised as the parties have been granted asylum status), of 22 August 2013 and order of 17 September 2013 of Mac Eochaidh J., by which he granted the order of *certiorari* by way of judicial review of the decision of the Minister refusing permission to enter and remain in the State pursuant to the 2006 Regulations.

3. The second appeal is against the judgment of Faherty J., *Khan v. Minister for Justice, Equality and Law Reform* [2017] IEHC 800, of 27 October 2017 and order of 10 November

2017 by which she granted an order of *certiorari* by way of judicial review of the decision of the Minister to refuse the third and fourth applicants, the respondents in the appeal, permission to enter and remain in the State pursuant to the 2006 Regulations.

4. The net question of law for determination in the appeals concerns the test to be applied in assessing the meaning of "qualifying family member" with the meaning of the Citizens Directive, and the standard to be applied in assessing dependency and the degree of scrutiny to be engaged by the decision maker.

5. The judgment of Faherty J. was given more than four years after the judgment of Mac Eochaidh J., and after there had been further clarification by the Court of Justice of the European Union ("CJEU") of the relevant tests in *Reyes v. Migrationsverket (Case C-423/12)*, ECLI:EU:C:2014:16. Mac Eochaidh J gave his judgment before *Reyes v. Migrationsverket*, but he anticipated much of its reasoning.

6. The 2006 Regulations have now been replaced by the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548/2015) ("the 2015 Regulations"), which entered into force in February 2016.

7. As the same legal questions arise for consideration in both cases, it is convenient to deal with them in sequence after having first considered the respective background facts and the present state of the law.

The first appeal: Background facts

8. The first respondent, Mr K, is a German citizen who is married to the second respondent, Mrs K, an Egyptian citizen who became a naturalised Irish citizen during the course of the proceedings, in June 2012. Mr and Mrs K reside in the State and together operate a piano tuning and repair business. The third and fourth respondents are Egyptian citizens and the parents of the second respondent ("the parents"). The fifth and sixth respondents are also Egyptian nationals and are the adult sisters of the second respondent ("the sisters").

9. The parents and sisters live in Egypt and the proceedings relate to applications made by them for visas to enter and remain in the State as will appear more fully below.

10. The parents had been granted short stay (C-class) visas in 2010, following a successful appeal against the Minister's refusal decision, whereas the sisters who had applied for visas at the same time which were also refused, were not. The parents and sisters made further applications in August 2011 and February 2012 for long stay (D-class) visas under the Citizen Directive, which were in turn refused by the Minister on the grounds that *inter alia*, they had failed to show dependence on a Union citizen. It is these refusals that were challenged in the judicial review.

11. On 30 July 2012, Cooke J. granted leave to seek judicial review of the decisions of the Minister of 8 and 9 July 2012 refusing the February 2012 applications and for a declaration that the Minister had wrongly applied the test of dependence and that the applicants had rights deriving from the status of the second applicant who was by then a naturalised Irish citizen.

12. Following an order of 16 April 2013 the statement of grounds was amended to incorporate a challenge to the decision of 10 April 2013 of the Visa Appeals Officer upholding the refusal decision of the Visa Officer, and to take into account the constitutional plea of the second respondent who had, by that time, become a naturalised Irish citizen.

13. The parents and sisters have been granted refugee status and the appeal of the Minister while moot to that extent, is brought in the light of the importance of the analysis of Mac Eochaidh J. of the correct test of dependence for the purpose of the Citizens Directive.

The second appeal: Background facts

14. The first and second respondents, Mr and Mrs Khan, are a married couple and UK citizens. They reside in Ireland and are registered owners of the property in which they live with their four children who are all UK citizens. Both the respondents work in the State. The first respondent works as a taxi driver and is a part time student. The second respondent is a senior accountant working in a permanent position in a private accountancy firm. The third and fourth respondents are Pakistani citizens and the parents of the first respondent. They were born in 1945 and 1956 respectively and applied for visas to enter the State in early 2013. I will refer to them where appropriate collectively as "the parents".

15. This judicial review concerns the refusal of an application for visas, the third such refusal since 2013.

16. The relevant applications were made in 2015 for visas, vouched by evidence of financial support from the first and second respondents, information in respect of the rental agreement of the home of the parents in Pakistan, and of their financial position. A bank account statement of the fourth applicant was also furnished and a medical report showing that the third applicant, the first respondent's father, had a history of heart disease. Those visa applications were refused by letters of 2 July 2015.

17. The refusal of the visas was appealed through IK Immigration Consultants by letter of 27 August 2015. The appeal was rejected, and the reasons therefore set out in a letter of 6 October 2015. It is with regard to the reasons given in those letters that this application for judicial review was commenced.

18. As the two appeals concern the correct interpretation and application of the 2006 Regulations which transposed the Citizens Directive, it is helpful to now set out the relevant provisions and the analysis of the CJEU concerning the meaning of dependence and the tests to be applied by a national authority for the purpose of the operation of the Citizens Directive.

The Citizens Directive

19. The Citizens Directive recited as a core purpose the desire that rights of Union citizens to move and reside freely within the territory of the Member States should also be granted to their family members irrespective of nationality. Recital 5 of the Citizens Directive reads as follows:

> "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 […]."

20. Recital 6 of the Citizens Directive explains that in order to maintain the unity of the family "in a broader sense", applications for entry and residence permission by those persons who did not enjoy an automatic right of entry and residence in the host Member State should be examined, *inter alia*, on the grounds of financial or physical dependence on the Union citizen:

> "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."

21. "Family members" under article 2 of the Citizens Directive are spouse, partner, direct descendants under the age of twenty-one, or direct descendants who are dependent and those of the spouse or partner, as the case may be.

22. Dependant direct relatives in the ascending line are also included within the definition of "family member", but only if they are dependent within the meaning of the Directive. In addition, for the purposes of the Citizens Directive, a Member State is required to facilitate the entry into and residence in that State of family members not falling under the definition of article 2 of the Citizens Directive who, in the country from which they have come, are dependent upon, or who on serious health grounds require the personal care of family members, who are Union citizens. Article 3(2) of the Citizens Directive provides for the facilitation of entry and residence for the following persons:

> "(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
>
> (b) […]."

23. The host Member State is obliged to "undertake an extensive examination of the personal circumstances" of any applicant within the extended category described in article 3(2)(a) of the Citizens Directive and to "justify any denial of entry or residence" to those persons.

24. The Citizens Directive was implemented into Irish law by the 2006 Regulations. Regulation 2(1) of the 2006 Regulations provides two categories of family member as a "qualifying family member" and a "permitted family member".

25. A "qualifying family member", in relation to a Union citizen, means:

> "(a) the Union citizen's spouse,
>
> (b) a direct descendant of the Union citizen who is -
>
> (i) under the age of 21, or
> (ii) a dependant of the Union citizen,
>
> (c) a direct descendant of the spouse of the Union citizen who is -
>
> (i) under the age of 21, or
> (ii) a dependant of the spouse of the Union citizen,
>
> (d) a dependent direct relative of the Union citizen in the ascending line, or
>
> (e) a dependent direct relative of the spouse of the Union citizen in the ascending line".

26. A "permitted family member'" is a person who is not is not a qualifying family member of the Union citizen, and who, in his or her country of origin, habitual residence or previous residence is "a dependant of the Union citizen".

27. It might be noted that the 2015 Regulations do not contain any definition of the meaning of "dependent", but do identify certain indices of the matters to which regard is to be had in making an assessment of dependency in regard to a "permitted family member" in r. 5(5)(a) of the 2015 Regulations, which reads as follows:

> "(5) The Minister, in deciding under paragraph (3) whether an applicant should be treated as a permitted family member for the purposes of these Regulations, shall have regard to the following:
>
> (a) where the applicant is a dependant of the Union citizen concerned, the extent and nature of the dependency and, in the case of financial dependency, the extent and duration of the financial support provided by the Union citizen to the applicant prior to the applicant's coming to the State, having regard, amongst other relevant matters, to living costs in the country from which the applicant has come, whether the financial dependency can be satisfied by remittances to the applicant in the country from which the applicant has come and other financial resources available to him or her".

The scope of the appeals

28. What amounts to dependence is therefore not defined and these appeals concern the test applied by the Irish authorities in respect of:

a) the parents in the first and second appeal, who are members in the ascending line of the family of a Union citizen within the meaning of article 2 of the Citizens Directive, who claim to be dependent on that Union citizen or their spouse, and to therefore be "qualifying family members" under Irish legislation for the purposes of obtaining long term residency permits, and

b) the sisters in the first appeal who claim to be dependent on a Union citizen and/or his spouse in order to qualify as "other family members" within the meaning of article 3(2)(a) of the Citizens Directive and as "permitted family members" under Irish legislation, for the purposes of obtaining long term residency permits.

29. For the purposes of the examination of the applicable legal principles, the test of dependency is to be regarded as the same whether an applicant is a family member under article 2(2) of the Citizens Directive or "other family member" dependent on a Union citizen within the meaning of article 3(2)(a), as suggested by Advocate General Bot in his Opinion in *Secretary of State for the Home Department v. Rahman (Case C-83/11)*, ECLI:EU:C:2012:519. I see no reason not to adopt for the purpose of the present appeals the interpretation of Advocate General Bot in relation to the implementation of the Citizens Directive into Irish law, and I therefore see no difference between the test for dependency to be adopted for qualifying an applicant as "qualified family member" or as "permitted family member" under the provisions of the 2006 Regulations.

30. The basis on which the visa applications of the sisters in the first appeal were refused was confined to their failure to demonstrate their being dependent on the Union citizen or spouse, and did not concern their status as "family member" of the Union citizen, as they were not the sisters of the Union citizen but of the Union citizen's spouse. Mac Eochaidh J. said, and this seems not to be a matter of contention between the parties, that that was a "matter for another day", at para. 30.

31. The appeals do not require the court to decide whether the concept of dependence is the same whether family rights are asserted by a dependent family member of an Irish or of a Union citizen wishing to reside in the State. I do not therefore propose to consider the implications of article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") or Article 41 of the Constitution. As will appear below, Mac Eochaidh J. had regard to the fact that the decision maker had or appeared to have wrongly applied the test relevant to an assessment of dependence for the purpose of article 8 of the ECHR and of Article 41 of the Constitution.

32. These appeals therefore solely concern the test identified by the trial judges as to whether a family member of a Union citizen who exercised his right of free movement and now resides in the State is "dependent" upon that Union citizen and/or his or her spouse so as to obtain permission to reside in the State under the Citizens Directive.

33. The Minister has accepted that the first appeal is moot, but has sought to argue the legal issue on account of the systemic importance of the meaning and proper application of the test of dependence. As I now turn to examine, both trial judges determined the

applications without making definitive determination regarding the proper meaning of the test.

The decision of Mac Eochaidh J. in *K. v. Minister for Justice*

34. Mac Eochaidh J. delivered his considered judgment before the test for dependency was further developed in *Reyes v. Migrationsverket*. He made a number of observations regarding the test, but these were *obiter*, as the relieves were grated on the grounds that the decision maker had failed to give sufficiently clear reasons.

35. Mac Eochaidh J. granted leave to seek judicial review (the application being telescoped) and orders of *certiorari* because the decision maker had not identified the test applied:

> "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", at para. 50.

36. The reasons for the refusal of the appeals against the decisions of the Minister on the February 2012 applications are set out in the letters to the parents dated 8 July 2012 under the heading "Insufficient documentation submitted in support of the application", followed by a link to "Documents Required" as displayed on the website www.inis.gov.ie. The letter said that the decision maker had found that the applicants had "not shown *sufficient evidence* that you are a *permitted family member* of the Union citizen and a dependant" (emphasis added) and that "[t]he additional documentation does not provide sufficient evidence that you are a member of the EU citizen's household". The reasons were generic and not linked to any findings. Mac Eochaidh J. found that the applicants were left "in the dark" as they could not be aware of the reasons for the refusals from the correspondence, although the decision maker had set out a list of inconsistencies and incomplete documentation: Mac Eochaidh J. held as follows in this regard:

> "Multiple reasons were expressed as to why there were shortcomings in documentation but these were never stated to be the reasons why the application was flawed or had to be refused. The [Visa Officer's] decisions of March 2013 are the height of the decision making process (endorsed on appeal) and these simply state that the Egyptian family failed to show that they require financial assistance from Ireland for the essentials of life. The decision maker does not say that this failure lies in bad documentation - though that criticism is clearly made", at para. 51.

37. He then concluded:

> "My conclusion in this case is that it is not possible to understand why the case made by the Egyptian family that the assistance they regularly received from the Irish family does not meet the *Jia* test", at para. 54.

The grounds of appeal

38. The grounds of appeal can be summarised as follows:

(a) The trial judge erred in law in his interpretation of the concept of dependency in the Directive that any assistance whatsoever if needed to attain the minimum level for the essentials of life was sufficient to establish that the recipient was dependent (Grounds of Appeal No. 1, 2, 3);

(b) The trial judge erred in law and in fact in finding that the Minister did not analyse the respondents' application, that the definition of dependence as set out in *Jia v. Migrationsverket* was not identified in the decision making process and that there was no evidence that such test was not applied to the assertions made by the respondents (Grounds of Appeal No. 4, 5, 6, 7, 8, 9, 10);

(c) The trial judge erred in fact and in law in finding that the Minister provided insufficient or inadequate reasoning to the respondents (Grounds of Appeal No. 11, 12, 13, 14);

(d) That the trial judge erred in law in finding that the Minister had to impose a different test for dependence under EU law and another "for Irish law" (Ground of appeal No 15).

39. The respondents oppose the appeal and argue that the test requires a consideration of whether the person can support himself or herself without support from family. Reliance is placed on the articulation in *Centre public d'aide sociale de Courcelles v. Lebon* that there is not to be an interrogation of the reasons for the recourse to that support.

40. The main focus of the appeal of the Minister is the formation of Mac Eochaidh J. of the test for dependence, at para. 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.)"

41. With regard to the means by which a decision maker is to test dependence, Mac Eochaidh J. stated, at para. 32 of his judgment, that:

> "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."

42. As he said, there may be circumstances where what is provided by the Union citizen is assistance, *e.g.*, in the purchase of expensive medication. The person who receives that assistance will show reliance or dependency if that support is offered, even if he or she

could have lived comfortably before that medication was called for or before the state of health of the applicant had deteriorated. He went on to say that:

> "provided an applicant can show a real and meaningful contribution which is not negligible that contribution is sufficient to render a person dependant."

43. The Minister's appeal is grounded on the submission that Mac Eochaidh J. was wrong in interpreting the test in *Jia v. Migrationsverket* as requiring the provision of no more than a minimal level of support to a family member in order to establish dependency, and that he did not construe it as necessarily implying substantial reliance in the ordinary and natural meaning of "dependency": In other words, Mac Eochaidh J. was wrong to construe the test as a *de minimis* one.

44. The other main ground of appeal concerns whether the Minister was entitled to reject the applications because of insufficiencies of proofs of dependency.

45. Both issues also arose in the later judgement of Faherty J which I now outline.

The judgment of Faherty J. in *Khan v. Minister for Justice*

46. Faherty J. was considering the Minister's decision to refuse entry on the basis stated in a letter of 6 October 2015 that:

> "The 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 respondents] were not maintained."

47. Faherty J. considered, at para.73, that the test in *Jia v. Migrationsverket* did not require "that the family members have to be totally dependent on the EU citizen" or that a person did not have to show that it was impossible to live at subsistence level if that financial need was not met. In the following paragraph she stated the test:

> "[I]t is not the law that a family member cannot qualify as a dependent simply because he or she is in receipt of a pension."

48. She came to the conclusion on the facts that the Minister in effect applied not the test from EU law but the test outlined in the Policy Document on Non-EEA Family Reunification, published by the Department of Justice in December 2013 ("the Policy Document"), at p. 39:

> "[…], "Dependency" means that the family member is (i) supported financially by the sponsor on a continuous basis and (ii) that there is evidence of social dependency between the two parties. The 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 that financial and social support were not maintained. […]."

49. She held that the Minister had applied the wrong test and quashed the decisions.

The findings of fact made by the trial judge

50. The Minister had argued in the High Court that there were deficiencies in the information provided by the applicants sufficient to justify the refusals of the visas. Faherty J. rejected the submission on three grounds, the material one for present purposes being the fact that the Minister identified as a reason for the refusal that the third respondent was in receipt of a monthly pension and was therefore not considered to be dependant. The Minister found that, as her husband was in receipt of a pension, the fourth respondent was not to be considered to be dependent on the first and second respondents.

51. Faherty J. held that the Minister thereby closed the door to the applicants on the wrong factual basis, and, at para. 58, she quoted from the Opinion of Advocate General Mengozzi in *Reyes v. Migrationsverket*, at para. 55:

> "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."

52. She thereafter went on:

> "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."

53. Faherty J. held accordingly that, on account of the language used in the decision, the applicants had an apprehension that they would be subjected to "myriad small queries" and that their apprehension was not unreasonable. She was satisfied that the wording used was not a "mere infelicity in language", para. 87, and that, on the facts, the Minister applied the wrong test.

The grounds of appeal

54. The grounds of appeal can be summarised as follows:

    (a) The trial judge erred in law that the Minister applied the wrong test for dependency in reaching and making the decision on the application of the respondents (grounds No. 1, 2, 3, 4, 7, 9 and 11);

(b) The trial judge erred in law and in fact in failing to adequately consider the fact that the decision of the Minister had expressly referred to the alleged proofs of dependency of the third and fourth defendants (grounds 8 and 10);

(c) The trial judge erred in not acceding to the Minister's submission that having regard to the alleged deficiencies in the third and fourth respondents' proofs, the lawfulness of the decision should be upheld irrespective of any issue over the correctness of the test for dependency (ground 9, 10, 11, 12);

(d) In the alternative, the trial judge ought to have exercised her discretion to refuse the relief (ground 13).

55. The respondents deny the High Court erred in finding that the Minister applied the wrong test. They say the last ground of appeal is unsubstantiated.

The arguments of the parties

56. The Minister appeals, in essence, on the grounds that the trial judge erred in her finding that, on the facts, the Minister had applied the wrong test, and pleads positively that the test applied by the Minister is, in substance, that outlined in *Jia v. Migrationsverket*. As a separate ground of appeal, the Minister argues that the trial judge fell into error in coming to the view that the Minister had relied on the Policy Document and in her conclusion that the reliance of the Minister on the Policy Document had "infected and vitiated" the decision on the application. Separately, it is argued that the family members had not adduced proofs sufficient to satisfy the Minister regarding the extent to which they were dependant.

57. The respondents argue that the trial judge was correct and that absolute dependence such that, without support, it would be impossible to live at a subsistence level, is not required to be established, and that the Minister did, on the facts, base her decision on the Policy Document and that the trial judge was correct to conclude that the Minister was wrong in the view that there were manifest deficiencies in the documents lodged to support the application.

58. I propose dealing with both judgments by first analysing the approach to the test of dependence in the jurisprudence of the CJEU and then considering that found in the judgments of the trial judges. The second part of my judgment concerns the degree of scrutiny to be applied by the decision maker, or the proper means of applying the test.

The test of "dependence"

59. Because neither the Citizens Directive nor domestic implementing measures provide any definition of dependence, there have been a number of references for preliminary rulings to the CJEU and a number of material judgments of the Superior Courts of Ireland addressing the test to be applied.

60. The first case in which the meaning of dependency was considered was *Centre public d'aide sociale de Courcelles v. Lebon (Case 316/85)*, ECLI:EU:C:1987:302, where the question for the Court was the interpretation of the relevant provisions of the now

repealed Council Regulation (EEC) No 1612/68 On Freedom of Movement for Workers within the Community, O.J. L 257, 19.10.1968, and in the course of which the concept of dependency was also found. The decision was given in a preliminary ruling regarding social welfare benefits of descendent family members and, for the purpose of the present appeal, the proposition is that stated by the Court at para. 24:

> "[T]he status of dependent member of a worker's family […] is the result of a factual situation, namely the provision of support by the worker, without there being any need to determine the reasons for recourse to the worker's support."

61. The approach of the CJEU to the question as being one of the fact of, rather than the reason for, dependence has informed its later judgments.

62. Some twenty years later, on 9 January 2007, the Grand Chamber of the Court, delivered *Jia v. Migrationsverket (Case C-1/05)*, ECLI:EU:C:2007:1, on a reference for a preliminary ruling made by the Utlänningsnämnden, the Swedish Aliens Appeal Board, concerning the interpretation of the then relevant Council Directive 73/148/EEC On the Abolition of Restrictions on Movement and Residence within the Community for Nationals of Member States with Regard to Establishment and the Provision of Services, O.J. L/172, 28.6.1973.

63. Ms Jia, a retired Chinese citizen had been refused a long-term residence permit in Sweden where her son, also a Chinese citizen, had been resident with his wife, a German citizenship. Ms Jia's son had a resident permit as a spouse of a citizen of the then European Community. Ms Jia entered Sweden on foot of a ninety-day visa and immediately applied for a residence permit on the basis that she was financially dependent on her son and daughter-in-law. The Swedish Immigration Board considered that she had not shown a "real need for financial or other support which is regularly met by the family members" and that the test was not satisfied by the meeting of an occasional need or acceptance of a contribution, which is not "strictly necessary to support the person in question".

64. The Court made a number of observations regarding the nature of dependency including, at para. 36, the fact that, as a matter of European law, the status of dependency does not presuppose the existence of a right to maintenance, and it stated the proposition from *Centre public d'aide sociale de Courcelles v. Lebon* as meaning that:

> "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."

65. Again, the Court held that the determination of whether a person was in fact dependent was to be made by the Member State which must assess whether:

> "having regard to their financial and social conditions, they [the relatives in the ascending line] are not in a position to support themselves."

66. The test involves an assessment of the need for material support in the State of origin, or the "State whence they came".

67. How a Member State makes that assessment is a matter of national law, subject to the overriding proviso that the Member State must ensure the facilitation of freedom of movement and the freedom of establishment and that the exercise by Union citizens and members of their family of the right to reside in the territory of any Member State, at para. 40.

68. Regarding the means by which dependency is established, the Court also noted, at paras. 38 and 41, the "lack of precision as to the means of acceptable proof" and said that proof was to be adduced "by any appropriate means".

69. The matter came to be considered again in 2012 in *Secretary of State for the Home Department v. Rahman (Case C-83/11)*, ECLI:EU:C:2012:519, on a preliminary ruling from the UK Upper Tribunal.

70. In response to the question whether a Member State may impose particular requirements as to the nature or duration of dependence within the meaning of article 3(2) of the Citizens Directive in order to satisfy itself that the dependence was "genuine and stable" and had not been "brought about with the sole objective of obtaining entry into and residence in its territory", the Grand Chamber determined that while requirements may be imposed, such requirements are to be consistent with the normal meanings of the words of the Citizens Directive and must not deprive the provision of its effectiveness, at para. 40:

> "Accordingly, the answer to the fifth question referred is that, on a proper construction of Article 3(2) of Directive 2004/38, the Member States may, in the exercise of their discretion, impose particular requirements relating to the nature and duration of dependence, provided that those requirements are consistent with the normal meaning of the words relating to the dependence referred to in Article 3(2)(a) of the directive and do not deprive that provision of its effectiveness."

71. The question again came to be considered in 2014 on a request for a preliminary ruling from the Kammarrätt, the administrative court of appeal in Sweden, in *Reyes v. Migrationsverket*, which concerned a young woman, a citizen of the Philippines, who had been left in the care of her grandmother when she was three years old because her mother had moved to Germany to work and support the family. Ms Reyes studied in high school in the Philippines and later at college until she was aged twenty-three. Her mother moved to Sweden and Ms Reyes applied for a residence permit there as a family member of her mother and her Norwegian co-habiting partner whom her mother married some months later.

72. During her childhood and years studying, Ms Reyes was in close contact with her mother who had sent money every month to support her and her sisters and visited them each year. Her visa application was rejected on the grounds that the money had not been

used to supply her basic needs of board and lodgings and access to healthcare in the Philippines and because she had not shown how her home country's social insurance and security system might cover a citizen in her situation.

73. Having noted that Ms Reyes was over twenty-one years old and therefore could only qualify under art. 2(2) of the Citizens Directive if she was dependent, and that dependence was assessed in the factual circumstances and that a situation of "real dependence" must be established on the facts, and having confirmed the proposition already stated in *Jia v. Migrationsverket* that there was no need to determine the reasons for dependence or for the recourse to family support, the CJEU went on to say as follows, at paras. 24 and 25:

> "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."

74. The CJEU also confirmed that 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", at para. 23.

75. Two factors are relevant for consideration in the present appeals. The assessment of dependence must be made "having regard to [the applicant's] financial and social condition", at para. 22, and the meaning is to be "construed broadly" in the light of the principles of free movement which constitutes one of the foundations of the European Union, at para. 23. The test for a claimant to establish real dependence should not be "excessively difficult" as it would otherwise be "likely to deprive Articles 2(2)(c) and 7 of Directive 2004/38 of their proper effect".

76. The CJEU accepted, in general, the advice of Advocate General Mengozzi in his opinion in *Reyes v. Migrationsverket*, ECLI:EU:C:2013:719, that it should not be made excessively difficult for an applicant to succeed in an application or required him or her to show why he or she has failed to find work or obtain subsistence or otherwise support himself or herself in the State of origin.

77. Another fact of note in *Reyes v. Migrationsverket*, is that the CJEU did not follow the opinion of Advocate General Geehoed in *Jia v. Migrationsverket*, ECLI:EU:C:2006:258, at para. 96, where he had advocated a narrow definition of dependence in the following terms:

> "As such, whether or not the condition of dependency is fulfilled should be determined objectively, taking account of the individual circumstances and personal needs of the person requiring support. It would seem to me that the appropriate test in this regard is primarily whether, in the light of these personal circumstances, the dependant's financial means permit him to live at the *minimum level of subsistence* in the country of his normal residence, assuming that this is not the Member State in which he is seeking to reside. In addition, it should be established that this is not a temporary situation, but that it is structural in character." (Emphasis added)

78. The proposition stated by Advocate General Mengozzi in *Reyes v. Migrationsverket*, at para. 52, is somewhat different:

> "A dependant is a person who finds himself in a situation of dependence on the Union citizen concerned. The dependence must be such that it is necessary for that person to resort to the support of the Union citizen for the satisfaction of his essential, that is to say basic, material needs."

79. Thus, the approach of the CJEU has been to construe the concept of dependence broadly, not to make it excessively difficult for an applicant to satisfy the test, and to involve interrogation of the fact of rather than the reasons for the dependence.

80. The final judgment in the sequence, the judgment of the Fourth Chamber in *Secretary of State for the Home Department v. Banger (Case C-89/17)* ECLI:EU:C:2018, adds nothing new material to these appeals, save that the CJEU again emphases hat the provisions of the Citizens Directive are rooted in the fundamental principles derived from article 21(1) of the Treaty on the Functioning of the European Union.

Summary of 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" 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.

Discussion and conclusion

86. Mac Eochaidh held that there is no documentation from which it could be ascertained which test was applied. Mr Hargadon, visa officer, in his correspondence explained the test he was applying in the following terms:

> "According to the decision of Edwards J. in [*M. v. Minister for Justice, Equality and Law Reform […], what must be shown is 'some level of the handicap, incapacitation, some disqualifying factor which makes one a dependant not simply financially but also socially, something that precludes one from completely independent living. Moreover… there must be elements of dependence, other than normal emotional ties.*'"

87. Mac Eochaidh J. concluded that the Minister had used the wrong test for dependency because he "does not posit a test for dependence under EU law and another for dependence under Irish law."

88. He held, with reference to the considerations of the Mr. Hargadon in relation to the 2013 applications, at para. 39 of his judgment, that:

> "Thus, it is clear that in the assessment which was carried out, both EU rights and Irish constitutional rights pertaining to the family of an Irish citizen were analysed. It is fair to say that Mr. Hargadon on this occasion comprehensively reassesses every conceivable aspect of the claim advanced on behalf of the Cairo based family."

89. It is clear from the wording of the letters in which the applications were rejected, both at first instance and on appeal, that the further arguments related to article 8 ECHR and Article 41 of the Constitution bore further and separate consideration, and it was in this separate and distinct application that Edwards J. directed his judgment in *M. v. Minister for Justice, Equality and Law Reform*. He was dealing with the meaning of "dependence" in the engagement of rights under articles 8 and 14 of the ECHR and/or Article 41 of the Constitution, as outlined in *Sanni v. Minister for Justice, Equality and Law Reform* [2007] IEHC 398. The Citizens Directive has a broader reach and applies to all Union citizens who move or reside in a Member State other than that of which they are a national.

90. In the considerations of Mr. Hargadon there is no reference to either the 2006 Regulations or the Directive.

91. As mentioned above, whether there is a different test for dependence under Irish law related to members of the family of an Irish citizen or, indeed of a Union citizen when the ECHR or the Constitution come into play, is outside the scope of these appeals and ground 15 is misconceived as it misreads the judgment of Mac Eochaidh J.

92. I do not think that Mac Eochaidh J. was wrong in his analysis and identification or interpretation of the correct test that ought to have been applied for the reasons I now outline.

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 ECJU 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*.

Alleged evidential inadequacies / the degree of scrutiny applied

99. In the appeal from the decision of Faherty J., the Minister argues that she subjected the evidence concerning the personal and financial circumstances of the parents to an "extensive examination". Faherty J. found this approach to be wrong. Counsel for the appellant argues that the Minister did not intend any pejorative or unduly restrictive meaning by the phrase "extensive examination" and that, in truth, the Minister engaged a liberal exercise.

100. Faherty J., at para. 78, regarded the use of the phrase "extensive examination" as raising:

> "[…] the spectre that the third and fourth applicants' personal circumstances were viewed through the wrong prism. In the 2004 Directive, for the purpose of free movement, "an extensive examination" is reserved to the host Member State in respect of the personal circumstances of permitted family members, a category the third and fourth applicants did not fall into, being qualified family members […]."

101. The respondents argue that, by applying an "extensive examination", the Minister, in practice, made it more difficult for the applicants to be reunited with Union citizens and that that is not consistent with the decision of Kennedy J. in *S. S. (Pakistan) v. The Governor of the Midlands Prison* [2018] IECA 384, at para. 39:

> "As mentioned already, somewhat differing rules apply to the situations of qualifying family members and permitted family members. The fundamental difference is that the entitlement to temporary residence for a *bona fide* qualifying family member arises as a matter of law. One either satisfies the criteria or one does not do so. The Minister has no role in the matter and qualification does not depend on the exercise of a ministerial or other discretion. In the case of permitted family members, however, the entitlement to temporary residence does not arise as a matter of law. It is dependent on the exercise of a ministerial discretion, to be exercised in accordance with Regulation 5 of the 2015 Regulations, to permit it."

102. The Minister argues that the parents did not establish sufficient facts concerning their housing arrangements in Pakistan. The written tenancy agreement on which the parents

relied was dated August 2015, although presented as having commenced in January 2015, and they claimed that they were living at the same address prior to that date. It was said that it was unclear why a security deposit would be taken if they were already living at the address. It seems also that bank statements showed that the father of the first respondent was living in two other addresses prior to January 2014 and that a different address again is found on the pension book of the mother of the first respondent.

103. The respondents, in reply, argue that the Minister's decision was not based on concerns regarding the failure of the parents to prove that they were dependant and that the Minister's argument now, on appeal, that she was entitled to dispose of the application for the visas *in limine* is not correct, as it fails to address the precise reason given for the refusal, namely that insufficient evidence was provided rather than no evidence at all had been adduced.

104. A second evidential inadequacy relied on by the appellant was that the evidence concerning the health of the father of the first respondent was "not altogether satisfactory". A medical report from 2014 from the treating physician of the father of the first respondent was doubted as this doctor is his son-in-law. An independent medical report was requested and later furnished. The complaint is that this letter is undated and that it came from a colleague of that relative.

105. Another reason given for the argument that the evidential inadequacies in the application were such as to entitle the Minister to refuse the application *in limine* was that there was no cogent evidence that the parents lived alone or, at least, had no contact with their wider family. The fact that they were treated at their son-in-law's medical practice was given as an example of that contact.

106. The Minister also complained that the parents had not supplied a rent book showing rent actually being paid or bank statements showing receipt of a monthly pension. What was adduced in evidence was bank statements showing transfers from the first and second respondents but not how the money was spent. No evidence of water or telephone bills or other outgoings was provided. It was noted that car fuel was identified as an expense, although the medical evidence was that the father of the first respondent was unable to drive. No consideration seems to have been given as to whether it might be his wife who would drive the car.

107. It is not appropriate that an appellate court would consider the evidence in this level of detail, but it does bear comment that the Minister did not give as the reason for refusing the application a view that no dependence at all had been established but, rather, that insufficient evidence was given in support of the application.

108. The question for this Court on appeal is whether Faherty J. was correct that the Minister had applied the wrong test, and that the deficiencies argued to be present in the information supplied were sufficient to sustain the refusal decision.

109. The findings of fact of Faherty J. were made following a reasoned and careful analysis of the letter setting out the decision of the Minister. I can find no fault in her reasoning, her findings of fact, or the inferences she made. Furthermore, it seems to me that she is correct that the letter from the Minister used language that made the applicants reasonably apprehensive regarding the level of scrutiny, and if, as she found, the level of scrutiny applied was overly strict and not in accordance with EU law, she was correct in her conclusion. Words do matter, and if the language of the Minister departed in its emphasis, tone, and possible import from that in the case law, in seems to me that Faherty J. was correct to grant certiorari. A person receiving correspondence communicating a decision is entitled to know the basis for the decision and to be apprehensive if the decision appears to be based on a negative rather that positive approach to the test to be applied.

110. Further, it appears to me that the application of the test must be done in a rational manner and the decision maker must give reasons that are transparent and involve an objectively reasonable engagement with the facts.

111. I do not accept that it is necessarily the case that a test stated in the negative that requires an applicant to show that it was impossible to live without support from a Union citizen family member is the same as a more positively expressed test which asks whether a person needs support to meet their essential needs. The test stated in the negative imposes a burden which is more onerous than that justified in the light of the authorities of the CJEU analysed above.

112. I consider that Faherty J. was correct that the approach of the Minister was unduly restrictive and that the test applied by the Minister was not in accordance with the jurisprudence of the CJEU. I can find no error in her approach to the facts or in her analysis of the basis on which the application was refused.

Conclusion

113. For the reasons stated above in my judgment, I would therefore dismiss the appeals. Subject to what counsel advises regarding the current state of the applications, the matters should be returned to the Minister for further decision.