

UNAPPROVED



THE COURT OF APPEAL

Record No.: 2021/43

Donnelly J.

Neutral Citation Number [2021] IECA 339

Noonan J.

Murray J.

BETWEEN/

SHAKEEL AHMED DAR

APPELLANT

– and –

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

**JUDGMENT of Ms. Justice Donnelly delivered on the 20<sup>th</sup> day of December, 2021**

**Introduction**

1. The right of *certain* family members of an EU citizen exercising his or her right of free movement or residence in another member state (the host member state) to entry and residence in that state turns on whether the family member is *dependent* on the EU citizen. Perhaps surprisingly, the meaning of dependency is not defined under the relevant EU legislation; Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (“the Citizenship Directive”). Earlier EU legislation dealing with this issue had not defined *dependent* (or cognate words). The Court of Justice of the European Union (“the CJEU”) has addressed the meaning of dependency in a number of important decisions. Those decision have in turn, been considered and applied in this jurisdiction in a number of authoritative decisions of this Court.

2. The central issue in this appeal is, the parties agree, whether the Minister (the respondent to the judicial review proceedings in the High Court and the appellant in these proceedings) applied the correct test in refusing to grant a residence card to the mother of Mr. Dar. Mr. Dar was the applicant in the judicial review proceedings and the respondent in these proceedings. There is however no agreement as to what that correct test should be.

3. The Minister submits that the High Court judge erred in holding that there was a separate or standalone test based upon *emotional and social* dependence. Mr. Dar submits that the test for dependency, in accordance with Irish and CJEU case-law, is a matter of *financial and social* circumstance. Mr. Dar submits that the Minister did not give any consideration in her decision to the social circumstances of Mr. Dar's mother and that she was required to consider those circumstances separately to any financial issues.

### **Background**

4. Mr. Dar is a UK national who came to Ireland in 2004 in exercise of his free movement rights; he operates a business here. Mr. Dar's mother, a non-EU/EEA national, came to Ireland in 2016 and has remained here living with her son. She applied to the Minister on the 25<sup>th</sup>, August, 2016 for an EU residence card on the basis that she is a "qualifying family member" within the meaning of regulation 3(5) of S.I. No. 548/2015 - European Communities (Free Movement of Persons) Regulations, 2015 ("the 2015 Regulations"). That application was refused on the 12<sup>th</sup> June, 2017. The statutory review was also unsuccessful. Judicial review proceedings of the refusal were commenced and compromised. The matter returned for reconsideration, and the impugned review decision, affirming the refusal of the residence card, issued on the 26<sup>th</sup> August, 2019.

5. Mr. Dar commenced these judicial review proceedings seeking to quash that decision on the ground, *inter alia*, that the Minister had no, or no "proper, regard [...] for, and/or fail[ed] to reach a reasoned decision, in respect of the emotional and social dependence which exists

between [Mr. Dar] and his mother, a 71 year old widow who reside (sic) in the home of [Mr. Dar], her only child” (Emphasis added). Other grounds included that the provision of a home by Mr. Dar to his 71 year old widowed mother was sufficient evidence of dependency for the purpose of EU law.

### **The Citizenship Directive and the 2015 Regulations**

6. Article 2 of the Citizenship Directive extends the benefits of free movement to “family members” of the EU citizen as so defined in the Directive. Some of these family members qualify by virtue of their relationship *per se* to the Union citizen *e.g.* spouse. For a direct relative in the ascending line to benefit however, that person must be dependent on the EU national or his or her partner/spouse (see Article 2(2)(d)). There is another pathway by which other family members may qualify; qualification under Article 3(2)(a) requires, *inter alia*, dependency or membership of the same household or on serious health grounds, *in the country from which* that family member has come.

7. The requirements under Article 3(2)(a) do not apply to the facts of this case. Some of the relevant case-law however deals with claims arising under that sub-Article and thus addressed both the meaning of dependency *and* membership of a household. It is important to clarify that references in the case-law to dependency *in the country of origin/country from which they have come*, do not apply to this application for an EU residency card by Mr. Dar’s mother. She made her application under that part of the 2015 Regulations which implement Article 2(2)(d) of the Citizenship Directive.

8. The 2015 Regulations transposing the Citizenship Directive use the language of “qualifying family member” in respect of Article 2(2) claims and “permitted family member” in respect of Article 3(2) claims. While those terms are not at issue here they can explain some of the language used in the Irish case-law. No claim of failure to transpose the Citizenship Directive was made in these proceedings and therefore this appeal does not address whether

there is any distinction between the Citizenship Directive and the 2015 Regulations on the meaning of dependency. The 2015 Regulations do not provide a definition of dependency.

### **The High Court Judgment**

9. In his judgment [2021] IEHC 17, Barrett J. recited the relevant part of the impugned decision. The decision focussed on the lack of information concerning the financial assistance provided by Mr. Dar to his mother and the absence of any documentation on her financial position. The decision stated that the provision of receipts for groceries or minor medical matters did not speak to dependency.

10. Barrett J. identified the sole question for adjudication as whether the Minister applied the incorrect test for establishing dependency in breach of the correct approach as identified in Irish and CJEU case law.

11. In a long Appendix to his judgment, he set out the extensive history of communication between Mr. Dar's solicitors and the Minister in respect of the application for the residence card. He recounted the history of the earlier refusal, the review and the compromised judicial review. The history discloses that Mr. Dar had submitted huge volumes of receipts in respect of what he said were the payments for her essential needs, such as grocery bills and receipts for GP visits and other medical expenses. Subsequent to the compromised judicial review proceedings, Mr. Dar had added his mother to the tenancy agreement and to his Vodafone bill.

12. Barrett J. also extensively reviewed the case law including *V.K. v. Minister for Justice and Equality and Anor.* [2013] IEHC 424, *Ali Agha v. Minister for Justice and Equality* [2019] IEHC 883, *V.K. v. Minister for Justice and Equality* [2019] IECA 232 and *CPAS de Courcelles v. Lebon (Case C-316/85)*, *Jia v. Migrationsverket (Case C-1/05)*, *Reyes v. Migrationsverket (Case C-423/12)*, *SSHD v. Rahman (Case C-83/11)*, *Subhan v. Minister for Justice and Equality* [2018] IEHC 458, *Awan v. Minister for Justice and Equality* [2019] IEHC 487, *Shishu v. Minister for Justice and Equality* [2021] IECA 1.

13. At para. 55 of the Appendix, Barrett J. gave his synopsis of the law on dependency. At para. 56 he identified a checklist of questions derived from the foregoing case law as to whether a person is a dependent. These are as follows:

- 1) *“Has the alleged dependent shown, in the light of her/his financial and social conditions, a real and not temporary dependence on a Union citizen?”*
- 2) *Are the financial needs of the alleged dependent which are being met by the Union citizen for basic or essential needs of a material nature without which the alleged dependent could not support herself/himself?*
- 3) *Is it the case that the needs actually being met are essential to life and the financial support more than merely ‘welcome’?*
- 4) *Is the dependence of the alleged dependant real, i.e. is the dependence of substance, is the support more than just fleeting or trifling, is the support proven, concrete, and factually established? (It does not have to be established that without that real or material assistance the alleged dependent would be living in conditions equivalent to destitution).*
- 5) *Does the alleged dependent, by reference to the applicable facts, have a real need for financial assistance? (The test is not whether that person could survive without it).*
- 6) *Does the alleged dependent rely on the support of the Union citizen to meet a material or social need which is central to the alleged dependent’s life? (Emphasis added)*
- 7) *Does what is being proffered to the Department, establish that the Union citizen is making an identifiable and meaningful contribution to the alleged dependent person?*

- 8) *Does what is being proffered to the Department establish that the claimant is not financially independent and therefore requires support? (If s/he can support herself/himself, there is no dependency, even if she is given financial material support by the EU citizen, for those additional resources are not necessary to enable her to meet her basic needs).*
- 9) *Is the documentation being furnished to the Department cogent and sufficient to enable it to test whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency?"*

14. He then applied those principles to the facts of the case as follows. He rejected "*the proposition that because an elderly mother lives with her adult son it follows, ipso facto, that she is dependent upon that son*". That finding of the trial judge was not appealed by Mr. Dar.

15. Making specific reference to the decision of this Court (Baker J.) in *V.K. v. Minister for Justice* to the effect that "[t]he test for dependence is one of EU law and an applicant must show, in the light of his financial and social conditions, a real and not temporary dependence on a Union citizen" [emphasis in quote]", Barrett J. held that, the Minister erred in her decision in that "(i) she failed to have any, or any proper, regard to, and (ii) failed to reach a reasoned decision in respect of, the emotional and social dependence which exists between the applicant and his mother, a non-EU/EEA woman in her seventies who resides, and has now for some years resided in her son's home" (Emphasis added).

### **The Appeal**

16. The Minister appealed against the decision on the grounds, *inter alia*, that Barrett J. had failed to apply the test for dependency in the Citizenship Directive as interpreted by the case law and that he erred in identifying a standalone concept of "emotional and social dependence" distinct from financial dependency. Mr. Dar opposed the appeal on the basis that there was no error by the trial judge based upon his interpretation of the relevant case-law and that the trial

judge did not err in requiring separate consideration of social dependency and/or social conditions.

17. Both parties agreed that the relevant issues on the appeal are as follows:

- (i) Did the Minister apply the correct test for dependency in this case?
- (ii) Did the Minister err in refusing the application for a residence card in this case?
- (iii) Is the Minister required to consider the emotional and social dependence that existed between Mr. Dar and his mother in determining whether or not she was dependent on him?

### ***The Correct Test for Dependency***

18. While those three issues have been identified by the parties, the main focus must be to identify the correct test for dependency. The answers to the questions will follow once the correct test is identified.

19. This Court in *V.K. v. The Minister for Justice and Equality*, gave an authoritative decision on the test to be applied in assessing dependency for the purpose of establishing who was “a dependent direct relative in the ascending line of the Union citizen” as set out in Regulation 3(5)(b) of the 2015 Regulations and Article 2 of the Citizenship Directive, the standard to be applied in assessing dependency and the degree of scrutiny to be engaged in by the decision maker. In *Shishu v. Minister for Justice and Equality* [2021] IECA 1, the Court reaffirmed the test that had been set out in *V.K. v. Minister for Justice and Equality* as to dependency (see para. 139). We note also that in *Awan v. Minister for Justice and Equality* [2021] IECA 298 (the High Court judgment of which was referred to by Barrett J.), the Court of Appeal (Faherty J.) delivering judgment after the hearing of this appeal, also affirmed the approach of Baker J. in *V.K. v. Minister for Justice and Equality* which in turn had approved the approach of Mac Eochaidh J. in the High Court.

20. Mr. Dar accepts that the test has been set out in *V.K. v. Minister for Justice and Equality*. At the hearing, his counsel submitted that Barrett J. did not amend this test but rather applied it to the facts before him. Whether the law has actually been changed by Barrett J. will be determined once the correct test for dependency, to be found in the relevant authorities, has been identified.

21. Given that the law is agreed to have been correctly stated by the Court of Appeal in *V.K. v. Minister for Justice and Equality*, it is appropriate to commence with the relevant components of that test identified in that decision. Baker J. stated as follows:

*“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’ hinges 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.(sic) This approach is consistent with the decision of the CJEU in Jia v. Migrationsverket, that dependency means the provision of material support by a Union citizen or his or her spouse to meet the essential needs of the family member in the State of origin.*

*95. Mac Eochaidh J. considered, at para. 18, that the test from the judgments of the CJEU did not mean that dependence requires ‘that assistance be given for all of the person’s essential needs’ as this would unduly restrict the category of persons*



*entitled. He noted that no guidance was available as to how much support is required, but took the view that, where outside help is needed for the 'essentials of life', then, regardless how small that assistance is, that is sufficient to meet the test for dependence. He gave his examples of the essentials of life: Food, shelter, or even expensive drugs for someone who is ill.*

*96. I do not consider that Mac Eochaidh J. by using the words 'essentials of life' meant that only assistance required to prevent a person from falling below subsistence living was reckonable for the purposes of assessing dependency.*

*97. In my view, Mac Eochaidh J. was correct in his conclusions. I would add that, even if the Minister is to reject a visa application on the basis of insufficiency of documentation, which he or she is entitled to do, this must be done by reference to a test which requires engagement with that documentation. This was not the case in the assessment of the application at issue in this appeal.*

*98. The analysis of the CJEU does not propose a formula that is rigid or simple. The test has been explained in different ways, and a certain fluidity of language is apparent. The core concept, however, is that dependence means reliance on a Union citizen for some of the essentials of life. That reliance may be for financial help of a relatively small amount, but the concern is not to apply some quantitative test as to the amount of support actually provided, or to ask whether the support could be obtained by other means in the country of origin. Rather, the focus is on what is actually provided by way of financial assistance and whether that is for some of the essentials of life. It is difficult, in those circumstances, to formulate a test with precision, and that is more especially so when, as here, the trial judge came to his conclusion on 'reason' grounds and his observations regarding the correct formulation of the test were obiter." (Emphasis added).*

22. The Court of Appeal (Haughton J.) in *Shishu v. Minister for Justice and Equality* endorsed those principles. It is also of significance that the Court in *Shishu v. Minister for Justice and Equality* agreed with the analysis of Mac Eochaidh J. in *V.K v. Minister for Justice and Equality and Anor.* as to the correct question to ask in the analysis of a claim of dependence. Mac Eochaidh J. said at para. 32 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”.*

23. In *V.K. v. Minister for Justice and Equality*, Baker J. traced the interpretations of the CJEU to the concept of dependency through the decisions in *CPAS de Courcelles v. Lebon* and *Reyes v. Migrationsverket* in particular, while making reference to *Jia v. Migrationsverket* and *SSHD v. Rahman*. I will refer to these cases as necessary.

***The reference to financial and social conditions***

24. Counsel for Mr. Dar claims that the trial judge was correct to quash the decision because the Minister had not turned her mind to an important aspect of the question to be addressed; the social dependency. Counsel makes specific reference to the phrase “financial and social” dependency and submitted that this was not a conjunctive test. Rather there were two separate tests by which dependency may be assessed, either financial or social. Counsel refers, by way of assistance only to his argument, to Regulation 5(5)(a) which deals with factors to which the Minister must have regard when assessing dependency for *permitted* family members (while recognising that the applicant is claiming to be a *qualifying* family member). Counsel submits nonetheless that it is a helpful tool in identifying the concept of dependency. Regulation 5(5)(a) requires the Minister to have regard to “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...” (emphasis added). Counsel submits that this is indicative that there is a dependency which is not financial.

**25.** That sub-Article is of no assistance to Mr. Dar, not least because the final part thereof requires the Minister to have 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” an applicant. In this case, Mr. Dar’s mother did not provide any documentation referring to *other financial resources* available to her. More importantly, even accepting it as an analogous provision, the specific reference to the requirement for details of the financial support does not create a separate test for dependency, rather it reflects the importance that is given to financial support. As will be discussed shortly, the importance of financial support is reflected in the interpretations given by the CJEU to dependency.

**26.** Counsel’s main submission appears premised on the basis that the Minister is opting for a test which is only a financial test. Counsel for the Minister on the other hand submits that the test is not a financial test; it is a test of dependency. The Minister’s case is based on there being a single concept of dependency. It is dependency as a result of the factual circumstances having regard to the specific facts and the material needs of the applicant for residency. The Minister’s submission is that the assessment is not financial only, nor is it social only; rather it is an assessment of all the circumstances in the round. The Minister submits however that financial considerations are an essential part of the factual context and asks rhetorically “how else could the Minister apply the position in *Jia v. Migrationsverket* and *Reyes v. Migrationsverket*?”.

**27.** From the case-law opened to us, it appears that the first reference to “financial and social conditions” was made by the CJEU in the case of *Jia v. Migrationsverket*. That case concerned the assessment of dependency of the non-EU mother-in-law of an EU national who

was exercising her Treaty rights to live in another member state. The CJEU, having been asked to address the issue of dependency, referred to the status of dependent family member as being the result of a factual situation characterised by the fact that material support is provided by the EU citizen. The CJEU referred back to the decisions in *CPAS de Courcelles v. Lebon* and *Zhu and Chen v. Secretary of State for the Home Department (Case C-200/02)* (“*Zhu and Chen*”) where reference had been made to material support. The CJEU confirmed, relying on *CPAS de Courcelles v. Lebon*, that dependency was not to be assessed by whether there was a right to maintenance because that would depend on national legislation. The Court reiterated that there was no need to refer to the reasons for recourse to that support or to raise questions about whether the person concerned was able to support his or her self by taking up paid employment. This was based upon the requirement to construe the provisions relating to free movement of workers broadly. The CJEU then stated at para. 37:-

*“In order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves. The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national.”* (Emphasis added).

**28.** The reference to material support in the second sentence of para. 37 is, in my view, an indication that it is material support that is crucial to the issue of dependency. The reference to “financial and social conditions” and to “material support” was re-stated in para. 22 of the decision of the CJEU in *Reyes v. Migrationsverket*.

**29.** The high point of Mr. Dar’s case appears to be the reference in para. 93 of the judgment of Baker J. to ascertaining whether the support was meeting a material or social need which is central to the person’s life and not peripheral or merely discretionary. Baker J.’s reference to

“material or social need” must be understood in its context. The reference to “material or social need” is prefaced by “support”. Her understanding of the word “support” is clarified by her reference in the very next paragraph, para. 94, to the support being provided *to meet needs to sustain life*, which she relates back to the concept of dependency in *Jia v. Migrationsverket* as meaning the *provision of material support* to meet the essential needs of the family member. Those essential needs can be food, shelter or even expensive drugs for someone who is ill.

**30.** It is important, as Baker J. stated, to bear in mind that the CJEU has not proposed a formula that is rigid or simple. The test has been explained by the CJEU in different ways and there is a fluidity of language. Baker J. explains that the focus must be on what is actually provided by way of financial assistance and whether that has been provided for some of the essentials of life. No test can be formulated with precision. Similarly, the reference of Baker J. to “material or social need” cannot be read as if it is a statutory provision. It is to be understood in its context where the focus is on dependency which requires the support provided to be *material support*.

**31.** Can such a test for dependency incorporate a standalone concept of emotional and social dependency? The Minister insists there is no such concept of dependency.

### ***Emotional dependency***

**32.** Both parties agree that nowhere in any of the relevant case-law is there reference to “emotional” dependency as forming part of the test for dependency. Indeed, both parties agree that it was in the case of *Zhu and Chen* where it was rejected that the “emotional bonds” between mother and child (and the fact that the mother’s right of residence was dependent on the child’s right of residence) could confer a right of residence in one member state on the non-EU national mother of an infant citizen of another member state. The CJEU, in a clear statement on the importance of material support being provided by the EU citizen, stated at para. 43 that:-

“[a]ccording to the case-law of the Court, the status of ‘dependent’ member of the family of a holder of a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence ([...] Case 316/85 *Lebon*...)”.

**33.** Counsel for Mr. Dar sought to distinguish *Zhu and Chen* on the basis of the difference in identity between the parties in that case where the Union citizen was a small child whereas in the present case, the adult EU citizen is the son of the applicant for the residence card. I do not accept that there is any basis in the case-law for making such a distinction. Indeed, the reference back to *CPAS de Courcelles v. Lebon* by the CJEU clarifies, if there was any doubt, that their decision was made in accordance with, and consistent with, the case-law on this issue. Moreover, in *Jia v. Migrationsverket*, the Court cited *Zhu and Chen* when it repeated at para. 35 that the status of ‘dependent’ family member is the result of a factual situation characterised by the fact that *material* support is provided by the EU national. The nature of the family relationship is immaterial because the focus must be on the provision of material support having regard to the factual circumstances.

**34.** I am satisfied that the legal test for dependency in the Citizenship Directive and the 2015 Regulations does not incorporate emotional dependency. There is nothing in any of the decisions of the CJEU that indicates that dependency is to be assessed other than by reference to material support *i.e.* something of value other than emotional support. On the contrary, as is apparent from *Zhu and Chen*, such emotional support is expressly excluded as a test for dependency.

**35.** There can therefore be no free-standing test of *emotional and social* dependency as posited by the trial judge. In so far as the trial judge held otherwise that part of his judgment cannot stand.

***Was the Minister required to make a separate assessment of social dependency?***

**36.** Notwithstanding that the test could not include emotional dependency, counsel for Mr. Dar also submitted that the trial judge was correct to quash the decision because the Minister in fact never considered *social dependency* at all. The problem with this submission is that, there is no support for a concept of dependency that incorporates a free-standing test of social dependency. The single concept of dependency is to be assessed by reference to the *financial and social conditions* of the applicant for residency which must demonstrate that the applicant *is not in a position to support themselves* (see *Reyes v. Migrationsverket* para. 22). The case-law is clear that the reference to support means material support. The issue is not one of social dependency. Indeed, it is difficult to understand precisely what a social dependency might involve if it was to mean something other than *emotional dependency*. On the other hand, it is easier to understand the reference to “financial and social needs” as incorporating the personal circumstances of an applicant. Those personal circumstances must lead to a position which demonstrates that an applicant is unable to support herself and is dependent on the EU national for that material support. On the facts of the present case, Mr. Dar’s mother never provided information to show that she could not materially support herself or that by virtue of her personal circumstances she was dependent on her son.

**37.** Counsel for Mr. Dar has relied on *Rawson v. The Minister for Defence* [2012] IESC 26 in submitting that there is no evidence that the Minister had applied her mind to the right question at all. Again, that submission is in fact premised on the basis that the need to make some independent assessment of social dependency is central to the assessment. Even taking the submission at face value, it must be said that there is evidence that the Minister did in fact turn her mind to the social conditions pertaining to the applicant for the residence card.

**38.** In so far as Mr. Dar complains that no reference was made to the social conditions in which his mother lived *i.e.* living with her son, the trial judge rejected that submission recounting that the Minister had referred to the provision of accommodation by Mr. Dar. The

trial judge, correctly in the light of *Zhu and Chen*, also rejected the proposition that because a mother was living with her adult son it follows, *ipso facto*, that she is dependent upon that son. In any event, neither of those propositions was appealed. Indeed, the finding that living with her son did not demonstrate dependency was expressly not taken issue with in the written submissions of Mr. Dar.

**39.** It is a striking feature of the application made by Mr. Dar's mother for a residency card that it made no reference to any other support that she claimed was provided to her by her son other than accommodation, the purchase of groceries and the payment of relatively minor health bills. These were in themselves the provision of support of a material nature. She did not give any information as to her own financial situation or other social needs (she gave no information at all at any stage of the process). She did not, for example, make a case that her medical condition required specific support. There was therefore, no other factor in her application that made specific reference to her social conditions for the purpose of demonstrating that she was not in a position to support herself.

**40.** Returning to the impugned decision, this specifically stated:-

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

**41.** The test for dependency *i.e. the finding of a dependent status* “*is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen...*” (*Reyes v. Migrationsverket* at para. 21). That requires an assessment of



whether, having regard to financial and social conditions, the family member is not in a position to support herself (*Reyes v. Migrationsverket* para. 22). Therefore, financial conditions must be a part of the assessment of whether there has been a need for material support. The Minister was obliged to assess whether, having regard to her financial and social conditions, Mr. Dar's mother was not in a position to support herself materially. That necessarily involved a consideration of her financial circumstances. Mr. Dar's mother, for whatever reason, did not provide any information in that regard. No finding of dependency could be made in those circumstances. An applicant cannot divide up the assessment and demand that her social conditions only be taken into account; the status of dependency requires a consideration of the factual situation which is characterised by material support being provided. That requires an assessment of both financial and social conditions.

42. Mr. Dar's claim that the wrong question was asked is therefore incorrect. Moreover, it is clear that the only social circumstance that could have any relevance is that Mr. Dar was providing accommodation to his mother. That was referred to and taken into account by the Minister; on its own it could not amount to dependency. The emotional tie of living together was not enough and the provision of the accommodation had to be assessed by reference to whether it amounted to the provision of material support establishing the status of dependent family member. Moreover, even if there had been no such reference to the social conditions, this would not be a case where *certiorari* would lie. The Minister had found, as a matter of fact (undisputed and indisputable), that the applicant for the residence card had not furnished any information about her own financial circumstances at all. In those circumstances, the assessment being carried out could never have reached a conclusion that there was a dependency within the meaning of the Citizenship Directive and/or the 2015 Regulations. The Minister was entitled to refuse the claim for residency on that basis.

### **Conclusion**

43. The test for dependency is set out in the case-law of the CJEU and has been authoritatively considered by this Court in the decisions of *V.K. v. Minister for Justice and Equality* and *Shishu v. Minister for Justice and Equality*.

44. Dependency is a factual situation characterised by the fact that material support is provided to the family member by a Union citizen and/or his or her spouse to a family member which meets the essential needs of the family member. This requires an assessment of whether, having regard to the financial and social conditions, the applicant for the residency card is not in a position to support themselves.

45. The case-law expressly and repeatedly refers to material support. Emotional ties or bonds are insufficient to establish dependency. In so far as the trial judge held that the Minister ought to have assessed the “emotional and social dependency” of Mr. Dar’s mother on Mr. Dar, he was incorrect. That is not the correct test.

46. From the decisions of the CJEU it is also clear that there is no standalone consideration of “social dependency”. The financial and social needs form part of the assessment as to whether an applicant is in a position to support themselves in a material way.

47. There was a finding that the Minister had regard to the social conditions of the applicant for the residency card. No other particular social condition was urged on the Minister. Most importantly, the impugned decision identified the unassailable fact that this applicant for the EU residence card had failed throughout the entirety of the long process of applying for her card, to provide any documentation as to her financial (and indeed other) circumstances. There was a failure to engage with the test.

48. For those reasons, I conclude that the Minister applied the correct test for dependency, she did not err in refusing the residency card and she was not required to consider the *emotional and social dependence* of Mr. Dar’s mother on him in determining whether the test of dependency had been reached.

**49.** Therefore, I would allow this appeal and set aside the Order of *certiorari* and the Order of costs in favour of Mr. Dar made in the High Court.

**50.** As regards costs, given that Mr. Dar's appeal has failed, it would appear to follow that the Minister is entitled to the costs of her appeal and her costs in the High Court, to be adjudicated in default of agreement.

**51.** If Mr. Dar wishes to contend for a different form of order in relation to costs, he will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing. If such hearing is requested and results in an order in the terms I have provisionally indicated above, Mr. Dar may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

*As this judgment is being delivered electronically, Noonan and Murray J.J. have indicated their agreement with this judgment and the orders proposed.*