

**THE HIGH COURT
JUDICIAL REVIEW**

[2018 No. 537 JR]

BETWEEN

ASIF RASHID AND QASIM RASHID

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 10th day of June, 2020

1. The Citizens' Rights Directive 2004/38/EC is designed to ensure that the right of free movement is effective by allowing EU citizens to bring their dependents with them when they exercise that right. The directive seems, however, to have given rise to a cottage industry whereby once one family member manages to acquire EU citizenship, he or she can send any amount of money, modest or otherwise, to one or more other relatives, remote or otherwise, and then launch a legal right to enter the Union territory on the basis of dependency. Reliance on the directive in practice seems a far cry both from the test in the CJEU caselaw of a real situation of dependency and from the intention of the EU legislature which was that a person could bring their *actual* dependents and *actual* household members with them, not to confer some virtually open-ended right to family reunification that is triggered merely by a few financial transfers.

Facts

2. The first-named applicant is a UK citizen born in 1963. The second-named applicant is his brother and was born in Pakistan in 1967. It has not been clarified when the first-named applicant entered the State. He seems to have made some payments to the second-named applicant in 2012 to 2013, the last one being on 12th July, 2013.
3. Nearly two years later, the second-named applicant left Pakistan on 16th April, 2015 on an Etihad flight from Pakistan to Abu Dhabi and thence to Dublin on 18th April, 2015. The legal basis for his entry into the State is somewhat obscure, but he appears to have claimed to be both a visitor and a family member of an EU citizen.
4. On 6th May, 2015 the second-named applicant made an application for a visa as a family member of an EU citizen. That was refused, and he was so notified on 27th November, 2015. The refusal was appealed on 16th December, 2015 and that review application was rejected in February 2017. The second-named applicant then brought a first set of judicial review proceedings [2017 No. 232 JR] which resulted in a consent order of *certiorari*.
5. The matter was then referred back to the Minister and a reconsidered review decision was made on 25th April, 2018 refusing the review application. The Minister was not satisfied that the second-named applicant was a permitted family member under reg. 5(1) of the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015). The decision also enclosed a notification under s. 3 of the Immigration Act 1999. Unhelpfully, that was not exhibited and I am not clear what action, if any, was taken on

foot of that document. That review refusal is the subject matter of the present judicial review.

Procedural history

6. The statement of grounds was filed on 4th July, 2018, the primary relief sought being *certiorari* of the review decision. Leave was granted on 9th July, 2018 and the case was then put into a holding list awaiting the decision of the appeal from the judgment in *Kuhn v. Minister for Justice and Equality* [2013] IEHC 424 (Unreported, High Court, Mac Eochaidh J., 22nd August, 2013). That appeal decision was handed down on 30th July, 2019 in *V.K. v. Minister for Justice and Law Reform* [2019] IECA 232 (Unreported, Court of Appeal, Baker J. (Irvine and Costello JJ. concurring), 30th July, 2019). The present proceedings then returned to the asylum directions list and a statement of opposition was delivered dated 12th February, 2020. I have now received helpful submissions from Mr. John Noonan B.L. for the applicants and from Ms. Sylvia Martinez B.L. for the respondents.

Legal background

7. The Citizen's Rights Directive 2004/38/EC defines a "*family member*" in art. 2 as a Union citizen's spouse, partner, direct descendant who is either under the age of 21, or otherwise dependant, similar descendants of the spouse or partner and the Union citizen's dependent direct relatives in the ascending line as well as those of the spouse or partner.
8. Article 3, however, goes on to impose a right on a wider category of persons, providing in art. 3(2) that "*the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons: (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen*". Article 3(2) goes on to say, "*The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.*"
9. The 2015 regulations give effect to directive 2004/38/EC. As the 2004 directive does not define dependency, it is a necessary consequence that cognate terms are undefined in the 2015 regulations. The meaning of dependency is, therefore, definitively to be found in the CJEU jurisprudence, the most helpful summary of which is at paras. 19-28 of Case C-423/12 *Reyes v. Migrationsverket* (Court of Justice of the European Union, 16th January, 2014).
10. The CJEU jurisprudence is referred to in the Court of Appeal judgment in *V.K.*, at para. 81 onwards under the heading "*Summary of test*". Some of what follows under that heading contains a certain amount of paraphrase that isn't to be found in the judgment of the CJEU (counsel in the present case calls it Baker J.'s "*own language*"). Baker J. herself makes the point that the test has been phrased in different ways in different cases so the *V.K.* judgment should most certainly not be treated as a statute imposing another finer

mesh of procedural and substantive legal complexity on top of the existing law. The really central point is the one she makes at para. 81 of her judgment that "*The test for dependence is one of EU law*". Therefore, any paraphrases in national jurisprudence are just that; and any language in any Irish case that is not found in CJEU jurisprudence is not creating or changing the CJEU jurisprudence. The latter remains the primary source of the meaning of dependency irrespective of any decisions at national level. The essential requirements that are explicitly stated in paras. 19-28 of the CJEU decision in *Reyes* are as follows:

- (i). financial support must be provided by the EU national to the third-country national when the latter is in the country of origin;
 - (ii). regard must be had to the financial and social conditions of the third-country national in the country of origin;
 - (iii). the third-country national must not be in a position to support himself or herself (bearing in mind that it is not required to be established that such person has tried without success to find work, or to obtain subsistence support from the authorities of the country of origin or otherwise tried to support himself or herself);
 - (iv). the need for material support must exist in the country of origin or the country upon which he or she came at the time when he or she applied to join the EU citizen;
 - (v). the financial support is necessary to enable the third-country national to support himself or herself in the country of origin; and
 - (vi). the third-country national must be in a real situation of dependence which may be demonstrated by regular payments over a significant period.
11. The applicant's submissions in the present case contend that "*The Reyes decision gives rise to an inference that the fact that a significant sum was paid on a regular basis to a dependent in the country of origin is prima facie evidence of dependency*". That is not so, and certainly not so here. Firstly, it remains open to the Minister to assess whether any payments were sufficiently regular and were over a sufficiently significant period to invoke this doctrine. In addition, the other criteria remain, including in particular that the dependency existed as of the time of leaving the country of origin. In the present case that was nearly two years after the last of the payments.
12. The applicant's submissions also contend that "*the G.N.P. per capita in Pakistan was \$1,513 and the sums transferred to him are clearly significant in that context, being approximately half of the G.N.P. per person, transferred over a 14 month period in 5 transactions. This is clearly more than just fleeting or trifling, and is proven, concrete and accepted by the Respondent. However, there is no justification for considering this not to be dependence in the circumstances.*" That, however, is a misconception. The amount of

the transfers and whether they are significant in terms of the GNP of the country of origin is only of limited or indirect relevance. The key issues are those in the CJEU caselaw, particularly the regularity of the payments over a significant period, their necessity to enable an applicant to support himself or herself in the country of origin and the demonstration of a real situation of dependence.

Judicial review is not an appeal against factual conclusions

13. The complaints made in the present judicial review (and it seems in fairness that they are fairly typical of cases challenging a decision under the free movement directive), is to go through the decision almost line-by-line and microscopically scrutinise each element of the documentation as if the High Court were some form of immigration appeal tribunal. That is not a sustainable procedure.
14. Baker J. comments in *V.K.* at para. 107 that "*It is not appropriate that an appellate court would consider the evidence in this level of detail*"; but what is true for an appellate court is also true, albeit maybe not to quite the same extent, for a court of first instance. There is no legal doctrine that the High Court must, or properly can, undertake a complete review of all factual conclusions in this kind of situation. Judicial review deals with lawfulness of decisions rather than their correctness: see *Sweeney v. Fahy* [2014] IESC 50 (Unreported, Supreme Court, 31st July, 2014), *per* Clarke J. as he then was (McKechnie and Dunne JJ. concurring), at para. 3.6. It is well established that judicial review is not an appeal on the merits: see *Lennon v. District Justice Clifford* [1992] 1 I.R. 382, *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 *per* Denham J. (as she then was).
15. Lady Hale put the matter with characteristic clarity in *R. (Cart) v. Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, at para. 47: "*It is not difficult to dress up an argument as a point of law when in truth it is no more than an attack upon the factual conclusions*" (see also Michael Fordham, *Judicial Review Handbook*, 6th Ed. (Oxford, Hart 2012) at para. 15.1 and *M.A. (Somalia) v. Secretary of State for the Home Department* [2010] UKSC 49 at para. 45).
16. The role of the court was well summarised by the CJEU in *Secretary of State for the Home Department v. Banger*, Case C-89/17 (Court of Justice of the European Union, 12th July, 2018) where it held at para. 3 of the curial part of the judgment that "*Article 3(2) of Directive 2004/38 must be interpreted as meaning that the third-country nationals envisaged in that provision must have available to them a redress procedure in order to challenge a decision to refuse a residence authorisation taken against them, following which the national court must be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent national authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence.*"

The decision must be read as a whole

17. Peart J. in *G.T. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 287 (Unreported, High Court, 27th July, 2007) commented that, "*It is not desirable that a decision be parsed and analysed word for word in order to discern some possible infelicity in the choice of words or phrases used and to hold that a finding of credibility adverse to the applicant is invalid, unless the matters relied upon have been clearly misunderstood or mis-stated by the decision maker. The whole of the decision must be read and considered in order to reach a view as to whether, when the decision is read in its entirety and considered as a whole, there was no reasonable basis for the decision maker reaching that conclusion.*" This passage was cited with approval in *A.I.M.Z. v. Refugee Applications Commission and Others* [2008] IEHC 420 (Unreported, High Court, 7th November, 2008) at para. 24 *per* Clarke J. (as he then was) and was followed by Mac Eochaidh J. in *Bondo v. Minister for Justice and Equality* [2012] IEHC 454 (Unreported, High Court, 9th November, 2012) at para. 24 and by McCarthy J. in *S.A. v. Refugee Appeals Tribunal* [2009] IEHC 383 (Unreported, High Court, 28th July, 2009) at para. 13. It was also referred to by Faherty J. in *O.S. v. Refugee Appeals Tribunal* [2015] IEHC 839 (Unreported, High Court, 15th December, 2015) at para. 59 and by Barr J. in *P.M. v. Refugee Appeals Tribunal* [2014] IEHC 497 (Unreported, High Court, 2nd October, 2014) at para. 59 (see also *X.E. v. The International Protections Appeals Tribunal* [2018] IEHC 402 (Unreported, High Court, Keane J., 4th July, 2018) and *B.D.C.(Nigeria) v The International Protection Appeals Tribunal* [2018] IEHC 460, [2018] 7 JIC 2006 (Unreported, High Court, 20th July, 2018) at para. 7).
18. What is true for credibility decisions is also true for other kinds of administrative decision such as those at issue here. This principle is particularly relevant in decisions under the free movement regulations because by their nature they are almost always very fact-specific. It is not appropriate for the court to be invited to sift through every minute detail of the materials to see whether it can be represented that the Minister tripped up in some modest way. The court must instead ascertain whether the decision taken as a whole is sustainable and was open to the Minister.

The grounds of challenge

19. Grounds 1 to 11 in the statement of grounds are allegations of fact, and ground 14 has been withdrawn, so the current challenge is based on grounds 12 and 13.

Ground 12 – irrationality and *ultra vires*

20. Ground 12 contends as follows: "*In Case C – 423/12, Reyes, as referred to by this honourable Court in Khan v. Minister for Justice [2017] IEHC 800, the [CJEU] set out at paras. 24 – 27 that . . . [the statement of grounds quotes from that judgment]. Although the Reyes case concerned a descendant rather than a brother, evidence of regular payment of sums of money for a significant period, which are necessary in order for the dependent to support himself is sufficient to demonstrate financial dependence. In determining that notwithstanding that it is accepted that there is an element of financial assistance during that period that but that there was no dependence, the Respondent was irrational and ultra vires.*"

21. The claim of *ultra vires* is misconceived. The Minister clearly had *vires* here. As regards irrationality, that in the legal sense is a high bar. It must be shown that the decision was not open to the decision-maker; and that certainly has not been demonstrated here. Starting with the favourable aspects, the review decision found as follows:

- (i). that the applicants were brothers – that is a favourable decision;
- (ii). that they were currently living together – that is also favourable;
- (iii). that the first-named applicant was exercising EU treaty rights – that is also favourable;
- (iv). it was accepted that there was some evidence of payments from the first-named applicant in 2012 to 2013 – that was in a sense a generous finding because there was nothing to prove that the second-named applicant was the ultimate beneficiary of these payments, especially given the roundabout nature of the applicant’s financial transactions (which I will come to shortly) and nothing beyond assertion to prove what the money was used for;
- (v). the Minister accepted evidence of the first-named applicant paying a couple of GP bills later when the second-named applicant was in the State – in a sense that is a favourable finding, but is not actually directly relevant because the dependency has to be established as of the time of leaving the country of origin and not subsequently; and
- (vi). the Minister seems to have accepted the second-named applicant’s medical condition (certainly it is referred to without rejecting it); and finally
- (vii). the Minister stated that he had considered the documents and representations provided – that is an important statement because it is clear from CJEU caselaw that the decision must be made following an examination of the applicant’s personal circumstances taking account of the various relevant factors: see e.g. *Secretary of State for the Home Department v. Rahman* Case C-83/11 (Court of Justice of the European Union, 5th September, 2012) para. 23.

22. Turning then to the less favourable findings, the Minister determined as follows:

- (i). there was no evidence of financial support from the first-named applicant set out in the second-named applicant’s Permanent TSB account – that was open to the Minister;
- (ii). there was no evidence that the applicants resided in the same household prior to the second-named applicant’s arrival in the State – that was certainly open to the Minister;

- (iii). the Minister found that the claim that money had been sent to the non-EU national through family and friends had not been substantiated – that finding was open to him;
- (iv). the decision noted that a claimed transfer of £481 claimed to have been sent by the first-named applicant was in fact stated to have been sent by a Mr. Illyas – that is just a statement of fact;
- (v). the decision noted that at the review stage, the applicant’s story now included the claim that £665 had been sent by the first-named applicant to the self-same Mr. Illyas with an unsigned and undated letter from Mr. Illyas claiming that the £481 came out of the £665 – this is simply a factual statement of what was produced, particularly that the letter was unsigned and undated and wasn’t produced originally, but only emerged at the review stage;
- (vi). the decision also noted that the transfer of money from the first-named applicant to Mr. Illyas came *after* the transfer of money from Mr. Illyas to the second-named applicant;
- (vii). the decision took the view that there was insufficient evidence of dependence, membership of the household prior to entry into the State or of reliance on the first-named applicant for personal care – those conclusions, while unfortunate from the second-named applicant’s point of view, were open to the Minister;
- (viii). the decision found that the evidence of payments was not such as to establish the necessary dependence to meet essential needs prior to entry into the State – again that was open to the Minister and certainly it is totally incorrect to contend that the Minister was obliged to decide otherwise simply because the sum provided would be a large sum to the statistically average person in Pakistan;
- (ix). the Minister found a lack of verifiability in terms of the claims of payments involving Mr. Illyas and a Mr. Bashir – that was open to him; and
- (x). the Minister found that the fact of the second-named applicant’s medical condition did not establish that the applicant was dependent on personal care from the first-named applicant – that was a perfectly legitimate finding.

23. The broad thrust of the applicant’s approach here is to comb through the *V.K.* judgment as if it were a statute to find particular sentences or phrases that are not reflected in the Minister’s decision (made prior to the *V.K.* judgment, for what that point is worth) and to claim that the decision is unlawful as a result. That is not a permissible or appropriate procedure, and nor indeed more generally should the court find decision-makers at fault for failing to exhibit what O’Donnell J. called in a different context "*inspired legal*

clairvoyance" (*The People (Director of Public Prosecutions) v J.C.* [2015] IESC 31, [2017] 1 I.R. 417, at para. 53). More fundamentally, the Minister is not required to write a legal essay and nor is there such a special requirement simply because EU law is at stake. The question for the court is not whether the Minister followed the intricate and ever-changing labyrinth of EU and national caselaw which was sought to be identified by Baker J. in *V.K.* The basic question is whether the decision made was one that was open to the Minister, and in this case that must be answered in the Minister's favour.

Ground 13 – failure to provide reasons

24. Ground 13 contends that "*Further, the reasons offered by the Respondent are vague as the precise basis upon which he found that the evidence does not demonstrate dependence and by reason of same the Respondent was irrational, ultra vires and disproportionate*".
25. Taking all the various findings of the Minister together, which I have endeavoured to outline above, the broad thrust of the decision and its reasoning is very much evident. Caselaw establishes that the right to reasons is essentially one to the broad thrust of the decision rather than every micro sub-element of it. Insofar as irrationality and *ultra vires* are referred to under this ground and are rerun under the reasons heading, that does not add anything to the previous ground.
26. As regards disproportionality, that only applies to discretionary decisions and is not a relevant legal concept to a simple factual finding by the Minister as to whether dependence has been demonstrated. It is true that in *S.S. (Pakistan) v. The Governor of the Midlands Prison* [2018] IECA 384 (Unreported, Court of Appeal, 4th December, 2018), Kennedy J. (Edwards and McCarthy JJ. concurring), referred to a permitted family member as being subject to a discretionary decision, but she was using that term in a different sense, meaning as distinct from the automatic rights that accrued to a spouse as a qualifying family member. The decision that a family member is a dependent is not automatic, but it remains essentially a finding of fact following an evaluative process, rather than the exercise of a discretion in the traditional administrative law sense. Even treating the present decision as if it were discretionary in the latter sense, there is nothing evidently disproportionate demonstrated for judicial review purposes anyway.

Order

27. To use the language of the CJEU in *Banger*, I am satisfied that on the material before the Minister the decision was taken on a sufficiently solid factual basis and that the procedural safeguards were complied with, and accordingly the proceedings are dismissed.