THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 621

Record No. 2022/953 JR

Between:

MOHAMMED ALAUDDIN,

NAIM UDDIN and NURJAHAN BEGUM

Applicants

-and-

THE MINISTER FOR JUSTICE

Respondent

JUDGMENT of Ms. Justice Jackson delivered the 15th day of November 2023.

INTRODUCTION

1. This is an application for judicial review of two decisions by the Minister for Justice ('the Minister'), dated the 5th August 2022 ('the decisions'), under Regulation 5 of the European Communities (Free Movement of Persons) Regulations 2015 ('the 2015 Regulations'), to uphold on review first instance decisions of the 31st January 2022 to refuse the applications of Naim Uddin (the Second Named Applicant) a national of Bangladesh, and Nurjahan Begum (the Third Named Applicant), a national of Bangladesh, for visas to enable them to come and live with Mohammed Alauddin ('the First Named Applicant'), as permitted family members under the Regulations on the basis that the First Named Applicant is United Kingdom citizen, exercising his Treaty right of freedom of movement within the State and that the Second and Third Named Applicants are dependent upon him.

2. The reliefs sought in Paragraphs (d)1 and 2 of the Statement of Grounds are in identical terms but it was agreed by all parties that the reliefs being sought are Orders of *Certiorari* in respect of each of the decisions of the Minister in respect of the Second and Third Named Applicants.

3. The 2015 Regulations were made, in exercise of the powers conferred on the Minister by s. 3 of the European Communities Act, 1972, to give effect to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States ('the Citizens' Rights Directive'). They came into operation on the 1 February 2016.

4. In substance, the reason the Minister gave for the decision is that the Second and Third Named Applicants failed to establish that they are 'permitted' family members of the First Named Applicant (within the meaning of that term under Regulations 2(1) and 3(6) of the Citizens' Rights Directive concerning 'other family members'), because:
   (a) The First Named Applicant had failed to establish that he was exercising freedom of movement rights within the State, and
   (b) The Second and Third Named Applicants had failed to establish that they were dependent upon the First Named Applicant.

PROCEDURAL HISTORY AND GROUNDS OF CHALLENGE

5. Leave was granted for the Applicants to seek judicial review by way of *Certiorari* of the aforementioned decisions of the Minister by Order of the High Court (Meenan J.) on the 5th December 2022. The legal grounds upon which relief is sought (as set out in the Statement of Grounds) are:
   i. *The Respondent imposed unreasonable and irrational evidentiary requirements in refusing the visa appeals of the Second and Third Named Applicants. Significant independent documentary evidence was disregarded without any rational basis, leading to an invalid decision in each appeal;*
   ii. *The Respondent imposed an unreasonable and unlawful standard of proof in relation to the assessment of the documentation before her. The Respondent*

failed to determine the factual issues in the visa application on the balance of probabilities basis;

iii. *The Respondent erred in law and applied an inappropriate test in requiring that the first Applicant be exercising free movement rights "in a genuine and effective manner". It appears that the Respondent has confused the test to be applied in the Applicants' cases with the test regarding employment or self-employment must be "genuine and effective"). The Respondent's apparent requirement that the first Applicant be exercising his free movement rights "in a genuine and effective manner" is irrational and has no basis in law.*

iv. *The Respondent's decisions are void for uncertainty, in circumstances where the Respondent has not found that the first Applicant is not in employment in the State, and has not doubted the genuineness of his employment, but nonetheless has found that the first Applicant's exercising of his free movement rights is not "genuine and effective". It is wholly unclear what this apparently central finding means."*

FACTUAL BACKGROUND

6. The First Named Applicant was born on the 19th August 1980 in Bangladesh and is a dual UK and Bangladeshi citizen. The Second Named Applicant, the First Named Applicant's brother, was born on the 24th August 1999 in Bangladesh and is a Bangladeshi citizen. The Third Named Applicant, the First Named Applicant's sister, was born on the 28th October 2003 in Bangladesh and is a Bangladeshi citizen.

7. The parents of the Applicants, Hasnara Begum and Abdul Kalam, died in 2008 and 2015 respectively. The Second and Third Named Applicants were still minors.

8. The First Named Applicant came to Ireland in July 2020, and since August 2020 he has, the Applicants assert, worked as a kitchen manager in Killarney at Eashal and Aroush Limited (trading as Uptown Restaurant, Killarney). The Applicants' further assert that particularly since their father died in 2015, the First Named Applicant has been responsible for providing financial support for the Second and Third Named Applicants.

9. By cover letter dated the 23rd November 2020, enclosing supporting documentation, the Second and Third Named Applicants applied to the Respondent for visas to enable them to come and live with the First Named Applicant in Ireland, on the basis that they were dependent on him, and so were permitted family members of an EU citizen exercising free movement rights.

10. It is not disputed that the question of whether they were permitted family members of his under Regulation 5(2) of the European Communities (Free Movement of Persons) Regulations 2015 retained its relevance after Brexit, on the basis of Regulation 23(2) of the European Union (Withdrawal Agreement) (Citizens' Rights) Regulations 2020. The said visa applications were refused at first instance on the 31st January 2022. It was found by the Respondent that the Second and Third Named Applicants were not financially or socially dependent on the First Named Applicant, and the Respondent did not accept that the First Named Applicant was habitually resident in the State.

11. An appeal was submitted by the Applicants' solicitors on behalf of the Second and Third Named Applicants on the 26th March 2022. Each of the grounds for refusal were addressed and additional documentary evidence was provided.

12. The Respondent refused the visa appeals of the Second and Third Named Applicants on the 5th August 2022. Again, it was found that the Second and Third Named Applicants were not financially or socially dependent on the First Named Applicant, and it was found that it had not been proven that the First Named Applicant was exercising his free movement rights in Ireland in a genuine and effective manner.

THE DECISION

13. In relation to the issue of dependency, the Respondent's decisions state that to be a permitted person, such person must (p. 3 in each decision):

    "… demonstrate that you need the support from your stated brother [in] order to meet your essential needs. There must be a real need for the financial assistance. It is a test of the facts and not an interrogation of the reasons for the support. While showing that transfers are made, might be a state to establishing dependency, it is not dispositive of the issue, as this office requires proof that the asserted dependence is "something of

substance, support that is more than just fleeting or trifling, and support that must be proven, concrete, and factually established."

To that end, it is for your and your sponsor to factually establish to the satisfaction of this office that the needs actually met by this support was essential to life and were more than "merely welcome", in order to qualify under the Directive as a dependent of an EU citizen."

Having quoted extensively from the first instance decision and documentation submitted in that context and further having referenced the additional documentation submitted with the appeal, the decisions (at p. 10 in each decision) state:

(a) regarding the Second Named Applicant –

"While it is noted that you have submitted the letter from Nanupur Laila-Kabir College which states "It is noted in our office record that Mr. Mohammed Alauddin ... pays for his tuition and other college registration fees. [Sic]", however no documentary evidence was submitted in support of this. In the circumstances, it has not been proven that you have received any financial support whatsoever from your sponsor that could be considered as either necessary, or sufficient, to meet your essential living costs."

(b) Regarding the Third Named Applicant –

"While it is noted that you have submitted the letter from Fatickchari Govt. College which states "It is noted in our record that Mr. Mohammed Alauddin ... pays the tuition fees on time [Sic]", however no documentary evidence was submitted to show that your EU sponsor is responsible for the payment of these fees. In the circumstances, it has not been proven that you have received any financial support whatsoever from your sponsor that could be considered as either necessary, or sufficient to meet your essential living costs."

14. In relation to the issue of proof of the exercising of rights by the sponsor Applicant, the documentation submitted can conveniently be allocated to addressing two different aspects of the exercise of such rights being occupation and accommodation. In relation to the former, payslips and a contract of employment had been provided. In relation to the latter, there had been a change of accommodation between the initial determination and the appeal and, in the context of the appeal, a letter from the landlord and a "Conditions of Letting" document had been submitted. It is accepted in the decisions that *"the amounts on the*

payslips submitted by your EU sponsor can be seen going into his bank account …”. The decisions state, again having quoted extensively from the first instance decision:

> *"… there are very few transactions in regards to his day to day expenditure, especially since 02/10/2020, which would be expected of someone habitually resident in the State such as payments for groceries, phone bills/top-ups, utility bills, rent etc. In fact the only transactions out of his account, since the transaction for Kitty's Kitchen on 02/10/2020, are for public transport and money transfers, therefore I would question how your EU sponsor is able to work full time in the State without incurring any living expenses."*

At no point is it stated or determined that the payslips and/or proof employment are false. Indeed, similar to the position in ***Barua v. MJE*** [2012] IEHC 456, at no stage were the Applicants ever challenged as to the authenticity of the documents they had submitted in support of their claims and they were never accused of forging documents or of relying on fraudulent documents.

15. The Respondent states as follows in the conclusion of each the said 5th August 2022 visa appeal refusals:

> *"As such I am not satisfied that you have proven that your EU sponsor is exercising his free movement rights in the State in a genuine and effective manner.*
>
> *As you have not proven that your sponsor is exercising treaty rights in the state, you have not shown that you can be considered a beneficiary of Directive 2004/38/EC/ In summary, based on the documents that you have provided over the course of your application and appeal, I can only find you have not factually established that you are a qualifying family member of an EU citizen, in that you have not shown that you are dependent of your EU sponsor, financially or otherwise or that your EU sponsor is exercising their free movement rights in the State in a genuine and effective manner pursuant to Directive 2004/38/EC. As such you cannot be considered a beneficiary of the Directive, and for this reason, the refusal of your visa must be upheld."*

THE NATURE OF THE PROCESS BEFORE THE RESPONDENT

16. The determination under consideration herein was a documentary process. Cooke J. in ***IR v. MJELR*** [2009] IEHC 353 set out a number of principles for the treatment of evidence which goes to credibility and, in the context of documentary evidence, stated:

"9) Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is prima facie relevant to a fact or event pertinent to a material aspect of the credibility issues, the reasons for that rejection should be stated.

10) Nevertheless, there is no general obligation in all cases to refer in a decision on credibility to every item of evidence and to every argument advanced, provided the reasons stated enable the applicant as addresee, and the Court in exercise of its judicial review function to understand the substantive basis for the conclusion on credibility and the process of analysis or evaluation by which it has been reached."

The Court further stated at para. 32 of the judgment:

"Where, as here, documentary evidence of manifest relevance and of potential probative force is adduced and relied upon, the Tribunal member is under a duty in law to consider it and if it is discounted or rejected as unauthentic or unreliable or otherwise lacking probative value, there is a duty to state the reason for that finding."

The decision of MacEochaidh J. in ***Barua v. MJE*** [2012] IHEC 456 at para. 27 gives further guidance on this issue:

"As noted above, if documents which are prima facie corroborative of an applicant's account of relevant events are to be discounted, dismissed or rejected, or somehow found not to have corroborative effect, it is incumbent on the decision maker to explain why. There maybe overwhelming reasons, unrelated to the documentation, to reject the credibility of an applicant but if this is so, then the decision maker should say that and should clearly state the basis on which documentation which seemingly supports the applicant's story is discounted , rejected or dismissed. An objective outsider, such as this court, is left guessing why the applicant's documents submitted in support of the claim did not appear to have that effect…. Documents which prima facie support the applicant's story deserve comment and this is especially so when marginal credibility findings are relied upon by a decision maker to dismiss an applicant's story …."

These are concerns which arise in the instant case in the context of both the documentary evidence relating to the payment of educational expenses and relating to the First Named Applicant's employment.

THE BURDEN OF PROOF AND THE STANDARD OF PROOF

17. Regulation 5(2) is clear that in an application such as that presently under consideration, it is for the applicant to produce evidence to the Minister. In ***Pervaiz v MJE and Others*** [2020] IESC 27, Baker J. held at para. 99 that applications by persons who claim to be 'permitted' family members:

    "[...] must start not on the basis that the application will be accepted, but that the making of an application be facilitated, and that the application be dealt with on its individual and specific merits in the light of the personal circumstances of the applicant and the relationship of the applicant to the Union citizen. To "facilitate" an application in those circumstances does not mean that the requirements must be easily met. It means that the host Member State must positively provide a mechanism for an applicant to furnish relevant and sufficient evidence to meet the test for which the Citizens Directive provides."

    Additionally, as is stated by Haughton J. in ***Md. Jaglul Hoque Shishu and Md. Jabed Miah v. MJE*** [2021] IECA 1 at para. 124:

    "124. If the trial judge was correct in his conclusion that the Minister had an obligation to adopt a procedure that would enable the applicant to know what evidence he was required to adduce, it would in my view create very real and practical difficulty for the Minister in assessing and deciding applications."

    Regulation 5(3) provides that on receipt of such documentation, the Minister shall cause to be carried out an extensive examination of the personal circumstances of the applicant in order to decide whether the applicant should be treated for the purposes of the Regulations as a permitted family member of the Union citizen concerned. It has been clearly established that the onus of proof is on the applicant (***Mohammad Faisal Ur Rehman v. MJE*** [2018] IEHC 779 and ***Straczek and Others v. MJE*** [2019] IEHC 155). The issue of unreasonableness in this context has been thoroughly examined in the judgment of Haughton J. in ***Md. Jaglul Hoque Shishu and Md. Jabed Miah v. MJE*** [2021] IECA 1 at para. 100:

"100. It is also important to add that nothing in the 2015 Regulations requires an applicant to prove beyond reasonable doubt their entitlement to be treated as 'a permitted family member'. A reading of the Recommendation Submission and the Impugned Decision would broadly suggest that a standard of proof that is more onerous than the civil standard has been applied. The standard to which the application must be proved is not spelled out, but Reg. 5(3) provides that the Minister must only be 'satisfied' that the applicant is a person to whom Reg. 5(1) applies. That indicates that the onus is on the applicant to prove their entitlement on the balance of probabilities, the usual civil standard of proof. The Minister may entertain doubts about elements of the evidence provided, but that does not warrant a refusal unless the Minister, on assessment of the totality of relevant evidence and information provided or otherwise available to him, on the balance of probabilities is not satisfied that the applicant is a person to whom Reg. 5(1) applies."

18. There is no dispute between the parties that the burden of proving an entitlement to a visa under the Regulations rests upon the Applicants (***Shishu and Miah v. MJE*** [2021] IECA 1 and ***Straczek, Hamza and Cheema and Others v. MJE*** [2019] IEHC 155). In addition, there is no dispute between the parties that the standard of proof is on the balance of probabilities. In ***Nishar v MJE*** [2022] IEHC 243, Barr J. explained as follows at para. 25:

    "The Minister may entertain doubts about elements of the evidence provided, but that does not warrant a refusal, unless the Minister, on assessment of the totality of relevant evidence and information provided or otherwise available to him, on the balance of probabilities is not satisfied that the applicant is a person to whom Reg. 5(1) applies."

19. However, in assessing the evidence which the applicant has submitted to the Minister and in the appropriate approach to this task, Haughton J. in ***Shishu*** (at para. 97) states:

    "..., 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."

These dicta are of considerable relevance in the context of the present application.

EVIDENTIAL WEIGHT

20. This has been considered by Binchy J. in ***Abbas v. Minister for Justice*** [2021] IECA 16 where a distinction was drawn between supporting or vouching documentation and statements or affidavits sworn by the Applicants themselves. Binchy J. distinguished between statements made by the sponsor of an EU residence card application and supporting documentation from third parties, finding that it was only the supporting documentation that could be seen as evidence, in the sense of it corroborating the factual background put forward by the sponsor or applicant. He stated:

> *"82. However, in my opinion, the legal character of the statements made by the first named respondent is not of any particular significance. If the statements had been sworn, then they would of course constitute evidence in a legal sense, but the contents of the statements, regardless as to their legal character (i.e. statement or affidavit) could never amount to anything more than mere assertion. For the purposes of such applications, the appellant clearly requires to be provided with supporting or vouching documentation in relation to the matters asserted therein. While the statements are necessary in order to provide the appellant with essential background information relating to the Application, and to give a context to assist in explaining supporting or vouching documentation provided by an applicant, it is really only the latter documentation that constitutes evidence i.e. it is evidence provided in support of the factual background relied upon by an applicant in his supporting statement(s). Without such supporting or vouching documentation, the appellant would have great difficulty adjudicating favourably upon an application for residency."*

21. In relation to an applicant/sponsor's own statements, Binchy J. went on to comment:

> *"On the other hand, it is not open to the appellant to ignore such statements either. Their credibility should be assessed in the light of the supporting documentation provided"*.

Ferriter J. cited ***Abbas*** in ***SK and JK v. Minister for Justice*** [2022] IEHC 591 when finding that it was open to the decision-maker in that case (who was making a finding of marriage of convenience) to prefer the contents of a note of interview to what one of the applicants

in that case had stated on Affidavit to have taken place at the interview. Ferriter J. found as follows:

> *"41. It is clear from the authorities (e.g. Abbas v. Minister for Justice and Equality [2021] IECA 16, Binchy J., at para. 83) that the Minister is entitled to disregard mere assertion when dealing with claims made either in unsworn statements or affidavits where assertions are made in the absence of supporting documentation."*

22. In this case, an issue arose in relation to the evidential weight to be attached to statements or Affidavits sworn by close family members of the Applicants. No authority in this regard was opened to the Court. It is my view that while such statements or Affidavits may have some greater evidential worth than personal statements of the Applicants, it is evidence of the same genre as that referenced in the judgments above.

23. In the present case, there were a variety of statements/Affidavits available but there was also a considerable amount of evidence which fell within the supporting/vouching category referenced by Binchy J.. There is no doubt that additional or supplementary documentation might have been of considerable worth in assisting the applications which were being considered. However, the documentation which was available included:

    I. Letters from educational institutions attended by the Second and Third Named Applicants confirming the payment of fees relating to the Second and Third Named Applicants by the First Named Applicant.

    II. A letter from the landlord of the First Named Applicant confirming his tenancy together with a tenancy document (albeit that the latter was in most basic format and contained clear inaccuracies) and payslips and a contract of employment relating to employment of the First Named Applicant within the State together with bank statements of the First Named Applicant showing the lodgment thereto of this remuneration.

The first of these categories of document aforementioned was relevant to the issue of dependency while the latter categories of document were relevant to the issue of the exercise of Treaty rights.

THE MEANING OF 'DEPENDENCY' UNDER THE REGULATION

24. The Court of Appeal gave guidance on the issue of dependency in an EU Treaty rights context and the appropriate evidential burden for a family member in the joined cases of ***VK v The Minister for Justice and Law Reform and Khan v Minister for Justice and Equality*** [2019] IECA 232. Baker J. delivered judgment on behalf of the Court, and explained the background to the appeals as follows:

> *"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.)'*
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> *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:*
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> *'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.'*
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> *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:*
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> *'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 [in the Khan case]".

25. Having considered the caselaw of the Court of Justice in relation to the concept of dependency, Baker J. summarised the position as follows:

"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, the applicant does not have to establish that without the real of 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." (Emphasis added)

26. Baker J. went on to find as follows:

"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...

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."

27. The caselaw on dependency was also examined in detail by the Court of Appeal in ***Dar v. Minister for Justice*** [2021] IECA 339.

28. It was accepted by Counsel for the Applicants and the Respondent herein that, subject always to the necessity of proving same, the discharge of fees for attendance on a full time basis at an educational establishment could give rise to circumstances of dependency.

THE CORRECT TEST FOR FREE MOVEMENT RIGHTS

29. The Applicants here seek to make a distinction between the requirement that employment (or self-employment where applicable) must be 'genuine and effective' if free movement rights are to raise and the test applied by the Respondent in the present case that these free movement rights must be being exercised in a genuine and effective manner.

Exercising rights "in a genuine and effective manner"

30. In the case of ***Edos v. MJELR*** [2014] IEHC 168, Barr J. reviewed the Court of Justice caselaw on the requirement that work be genuine and effective, including ***Levin v. Staatssecretaris Van Justitie*** (Case 53/81) and ***Vatsouras & Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900*** (Cases C-22/08 and 23/08), and concluded as follows:

"22. From a review of the relevant case law, and having regard to the terms of the Directive and the implementing Regulations, it would appear that the respondent applied the wrong test in assessing applicant's application for residence within the State. In holding that the applicant had to provide evidence that his mother's business was a "viable trading concern" which provided the applicant's mother with "sufficient income" to maintain herself and her dependants in this State, the respondent was setting the bar too high. The test which ought to have been applied was whether Mrs. Wilhelm was engaged in a self-employed activity that was effective and genuine. The fact that she had registered her business name and had registered with the Revenue authorities, together with the evidence of her start up bank accounts, together with her records of purchases and sales would have to be considered by the Minister when reviewing the applicant's application for residence within the State. If Mrs. Wilhelm's work was held to be effective and genuine, it did not matter that the remuneration for that work was less than the minimum industrial wage, or less than the minimum amount of social welfare payments under Irish national law or that Mrs. Wilhelm may have to rely on social assistance or other support to survive. If the Minister came to the conclusion that the work carried on by Mrs. Wilhelm was effective and genuine then Mrs. Wilhelm would be exercising her right of establishment within the State and her

son, the applicant, would have the right to reside here as well."

31. Counsel for the Applicants herein accepts that no issue arises from the Respondent imposing a requirement that a sponsor be exercising free movement rights by engaging in employment or self-employment that was *"genuine and effective"*. However, it is the Applicants' case that the Respondent has erred by imposing a test of the exercise of rights in a genuine and effective manner and that this is a novel test which does not arise from the legislation or the caselaw. In the submissions of the Respondent, it is accepted that there is an infelicity in the manner in which this finding has been expressed insofar as it refers to a failure to prove that the sponsor was exercising free movement rights in Ireland in a '*genuine and effective manner'*. I believe that the submissions of the Respondent in this regard are compelling. Not every formulation of words used in an administrative decision should be read as the application of a legal test and, as Humphreys J. held in ***Seredych & Ors v MJE*** [2018] IEHC 187 at para. 11, *"the Minister does not have to write a legal essay"*. In ***Rashid v MJE*** [2020] IEHC 333, Humphreys J. confirmed that this principle applies with equal measure where EU law is at stake. In ***T.A. (Nigeria) & Anor v MJE*** [2018] IEHC 98, he further held that it is not reasonable to expect the Minister to produce an *'academically perfect analysis'*. More recently, in ***Imran v Minister for Justice*** [2023] IEHC 338, Barr J. held at para. 64 that:

    > *"[...] a decision maker is not expected to produce a judgment similar to a judgment of the Superior Courts. As long as the essential conclusion reached by the decision maker and the reasons for coming to that conclusion, are patently clear from the decision itself, adequate reasons will have been given."*

32. In his judgment in ***Middelkamp v Minister for Justice and Equality*** [2023] IESC 2, Charleton J. held that *"it should never be necessary for a public servant to embark on what is not their role: that of issuing legal and factual analyses that are beyond the complexity that the legislation demands"* and that "*officials should be safe in following the legislation and in a simple indication of reasons to that effect."*

33. The well-established principle that applicants should not comb through administrative decisions to find some infelicity on which to launch a challenge was summarised by Phelan J. in ***ZK v. Minister*** [2022] IEHC 278, at para. 56 :

> "*To interpret one line in the letter in isolation and out of context of the balance of the letter ... would be to interpret parts of the letter as if they were statutory provisions. This is not the proper basis upon which to approach the interpretation of the correspondence in the decision-making process. I adopt the dicta of the Court of Appeal (Peart J.) in Balc v. Minister for Justice and Equality [2019] IECA 76 where it was held:*
>
> > *"The appellants have sought to parse and analyse these documents and to find an occasional infelicity of language to support the argument that the incorrect test was applied. The construction of a document containing the reasons for the decision is not to be approached in the same strict and literal manner by which a statute will be construed. It is a matter of reading the whole document to get its sense, without separating out one or two phrases here and there and considering them in isolation to the remainder of the document."*

34. Phelan J. went on at para. 57 to find that:

> "*It would be wrong in the context of the documents as a whole to separate out one phrase to read it in a manner which runs contrary to the clear intention of the author* […]."

35. It is my view that the concerns in the present case arise from the manner in which the evidence relating to the exercise of Treaty rights by the sponsor Applicant have been treated, considered and applied by the Respondent rather than from the mode of expression of the test applied.

DECISION

36. The Court is ever mindful of its role in the context of judicial review applications. This is amply and clearly set out, in the context of cases such as the present, in the judgment of

Haughton J. in ***Md. Jaglul Hoque Shishu and Md. Jabed Miah v. MJE*** [2021] IECA 1 at para. 101:

> "*101. The outcome of these proceedings depends, not upon the opinion of this Court as to whether or not the second named respondent was dependent upon the first named respondent while the former was in Pakistan during the period from November 2011 to January 2014, but rather upon whether or not the decision of the appellant on the question of the claimed dependency in Pakistan during this period was so unreasonable as to offend the principles established in O'Keeffe v An Bord Pleanala [1993] 1 IR 39 and Keegan v. Stardust Compensation Tribunal [1986] IR 642. It is well established that the courts should be very slow to interfere with the decisions of specialist tribunals. That places a high bar in the way of a person seeking to set aside decisions of the appellant in applications made pursuant to reg. 5 of the Regulations.*"

37. However, I am of the view that the absence of consideration of the documentary evidence emanating from third parties relating to the payment of educational expenses (indeed, the decisions state that no such documentary evidence had been received) was unreasonable and irrational. In circumstances in which no finding of falsehood or forgery was made in relation to the documentation relating to the accommodation and employment circumstances of the First Named Applicant, I am of the view that the treatment of such evidence was unreasonable, irrational and uncertain. As Baker J. in the Court of Appeal commented in ***VK***:

    "109...Furthermore, it seems to me that [Faherty J.] 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."

38. Having regard to the foregoing, it is difficult not to conclude that a standard of proof in excess of the balance of probabilities was applied.

39. It is my conclusion that that high bar referred to in the dictum of Haughton J. above has been reached such that an Order of *Certiorari* quashing the decisions of the 5th August 2022 refusing the Second and Third Named Applicants appeal for visas should be granted and remitting the matter to a different officer of the Minister for reconsideration.

40. In such circumstances, the Legal Grounds in the Statement of Grounds must be answered as follows:
    (i) The Respondent imposed unreasonable and irrational evidentiary requirements in refusing the visa appeals of the Second and Third Named Applicants.
    (ii) The Respondent imposed an unreasonable and unlawful standard of proof in relation to the assessment of the documentation before her.
    (iii) The Respondent did not err in law and did not apply an inappropriate test in requiring that the first Applicant be exercising free movement rights "in a genuine and effective manner".
    (iv) The Respondent's decisions are void for uncertainty, in circumstances where the Respondent has not found that the first Applicant is not in employment in the State, and has not doubted the genuineness of his employment, but nonetheless has found that the first Applicant's exercising of his free movement rights is not "genuine and effective".

SEVERANCE

41. Clearly, in order to avail of the visa provisions of the Regulations as 'permitted' persons, the Applicants must satisfy each of three requirements namely:
    A. Relationship with the Sponsor Applicant;
    B. Dependency upon the Sponsor Applicant;
    C. That the Sponsor Applicant was exercising free movement rights within the State.

It was argued by Counsel for the Respondent that once the Respondent had lawfully determined an absence of dependency, it was not necessary for this Court to proceed further and, in particular, to address C. above as the application of the Applicants to the Respondent would be refused if B. was not satisfied. It was argued that severance would occur.

42. It is not, however, necessary to determine this in this case as I have determined that the decision of the Respondent should be quashed both as it relates to dependency and free movement rights.

INDICATIVE VIEW ON COSTS

43. As the Applicants have succeeded in their application, my indicative view is that costs should, in accordance with section 169 of the Legal Services Regulation Act, 2015 follow the cause and the Applicants are entitled to their costs against the Minister.

44. I will list this matter for mention before me at 10. 30 am on the 1st December 2023 to allow the parties to make such further submissions on costs as they wish to make and to hear whatever submissions the parties wish to make on the final orders to be made.