

Between:

**USMAN SADIQ, ZAREEN TAJ, HASHIR USMAN (a minor suing through his father and next friend USMAN SADIQ) HADEER USMAN (a minor suing through his father and next friend USMAN SADIQ) and MUHAMMAD SABAHAT MALIK**  
**APPLICANTS**

– and –

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr Justice Max Barrett delivered on 11th July, 2019.**

### **I. Introduction**

1. The first to fourth applicants, all of whom are nationals of Pakistan, are the extended family members of the fifth applicant, a UK citizen living in the UK. The first and fifth applicants are cousins. The fifth applicant wishes to have the first to fourth applicants accompany him to the State pursuant to the Citizens' Rights Directive (Directive 2004/38/EC) (the 'Directive'), as transposed. To come to Ireland, the first to fourth applicants need to have visas; they made visa applications on 22.12.2015, these were refused initially and by way of decisions of 28.08.2018 (the 'Impugned Decisions'), which latter refusals have led to the within proceedings. The Applicants contend that eight legal questions arise for determination in these proceedings; the Minister contends that the proceedings turn on a single issue, viz. whether the first to fourth applicants are "dependents or members of the household" of the fifth applicant, the quoted text being drawn from Art.3(2) of the Directive.

### **II. Dependency and Household**

2. Article 3(2) of the Directive provides, *inter alia*, as follows:

*"Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons: (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependents 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..."* [emphasis added].

3. The "serious health grounds" dimension does not present here, so to come within the ambit of Art.3(2) (and hence within the scope of the Directive) each of the first to fourth applicants must be either "dependents or members of the household" of the fifth applicant.

4. **First and Second Applicants (Financial Dependency).** The court recalls Case C-423/12 *Reyes*, para.24, where the Court of Justice observed that the payment of a sum of money "regularly, for a significant period to [a]...descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen" [emphasis added]. Here, there were regular transfers of money. The evidence as to such payments being "necessary...to support" rested on terse, self-serving statutory declarations as to this point. That said, a statutory declaration is a form of evidence, and might even be persuasive evidence when viewed in the round with such other evidence as is presented (see, *inter alia*, *R. (on the application of SS) v. SSHD* [2017] UKUT 164 (IAC), para.30 and *R. (on the application of MK, a child by her litigation friend CAE) v. SSHD* [2017] EWHC 1365, para.41). Although the Minister must have read the statutory declarations (the Impugned Decisions state that he considered all the documentation and information provided), it is clear that he did not understand them for what they were; otherwise he could not have stated that "You have not provided any documentary evidence to show that you are unable to meet your day to day expenses, or other evidence by way of proof of dependency and the extent of that dependency". Documentary evidence in the form of the statutory declarations was provided; the Minister was free to place the weight on those declarations that he considered appropriate; however, he could not properly state, or proceed on the basis, that no documentary evidence was provided.

5. **Third and Fourth Applicants (Financial Dependency).** The third and fourth applicants clearly put forward that they are financially dependent (see Pleadings, p.144). Unfortunately this aspect of their appeal is not considered in the Impugned Decisions that concern them.

6. **All Applicants (Household membership).** The court does not accept that household membership was claimed on appeal. The element of the appeal documentation pointed to as raising this point (see Pleadings, pp.35, 90) is concerned with dependency, not with the household membership issue. The Minister is not required to fish through appeal documentation and consider whether some other ground of appeal can be divined from whatever point of appeal is expressly touched upon.

### **III. Conclusion by Reference to Parts I and II**

7. When it comes to all of the applicants, the issue of financial dependency was not properly considered by the Minister for the reasons set out in para.4 (First and Second Applicants) and para.5 (Third and Fourth Applicants). (The court does not accept that household membership was continued as an issue into the appeals). The foregoing has the result that it was not duly found that financial dependency did not present in respect of any of the applicants, leaving open the possibility that they are financially dependent. Two conclusions follow: (i) the within application cannot be closed out by reference solely to the issue of whether the first to fourth applicants are "dependents or members of the household" of the fifth applicant; (ii) the eight questions raised by the applicants fall to be considered (and are considered in the next part of this judgment).

### **IV. The Eight Questions Raised**

8. **[1] Did the Respondent err in law and act irrationally and unreasonably in relying on public policy to refuse the visa appeals, in light of the limitations imposed on such reliance by Art.27 of the Directive?** The Minister acted unreasonably. The Minister states that "In reaching this decision, due regard has also been given to the public policy imperative of maintaining the integrity of the State's immigration system, including the integrity and security of the Common Travel Area with the United

Kingdom, as well as the overall security of the State". There is nothing wrong with the Minister having due regard to this public policy imperative. If truth be told, the court would be surprised if the Minister did not have due regard to this public policy imperative. But if the Minister thinks some specific issue to present for the applicants by reference to this public policy imperative it requires to be identified. Otherwise the applicants really have no idea what issue is perceived to present; in truth, the quoted text is so generic that it may actually be that no such issue presents as regards the applicants. Upon receiving an administrative decision, the recipient is entitled to know why the decision taken has been taken; when it comes to the public policy dimension of the Impugned Decisions the applicants are left with no idea as to how that public policy imperative was brought to bear in respect of them.

9. **[2] Did the Respondent err in law and act irrationally and unreasonably in proceeding on the basis that the fifth applicant would have already to be present and established in the State before the visas could be granted?** The court does not see that the Minister so proceeded.

10. **[3] Was the respondent entitled to take into account the fifth applicant's perceived motive for wishing to move to Ireland as a basis for refusing the appeals?** The court does not see that the issue of motive features in the Impugned Decisions. Insofar as the Minister had regard to a surge in EU Treaty Rights applications from, *inter alia*, Pakistan, around the time of the applications at the heart of these proceedings, the court accepts that (a) the Minister is entitled to keep a watch out for possible abuses of rights (of course he is), and (b) the fact of that surge offers a perfectly reasonable basis for the Minister carefully to scrutinise applications within that surge so as to make sure that there is no abuse of rights presenting on the particular facts of any one case. However, such a general surge does not, in and of itself, offer a sound basis on which the Minister can properly reach a conclusion as to an abuse of rights in any one application where, on the facts of such application, there is nothing further (and here there is nothing further) in the factual evidence before the Minister to justify the conclusion that what presents is some form of abuse of rights. Moreover, in bringing legitimate careful scrutiny to bear, the Minister has to be careful not to bring so sceptical an attitude to bear as would place him in breach of the policy objectives of the Citizens' Rights Directive, including *e.g.*, recital 6, which provides that an objective of that measure is "*to maintain the unity of the family in a broader sense*", and recital 8, which points to a desire on the part of member states as regards "*facilitating the free movement of family members who are not nationals of a Member State*", or deprive the provisions of that Directive or the transposing regulations of their effectiveness (see in this last regard Case C-127/08 *Metock*, para.84). Without prejudice to the generality of the foregoing, the court notes that mention is made by the Minister of the fact that Mr Malik's current residence in the United Kingdom and an accompanying observation that "*It is reasonable to infer that the centre of his life is based in the United Kingdom*". The court admits to being slightly mystified as to why it should be notable that someone not yet in Ireland would at this time be living abroad and have the focus of his life abroad. All non-Irish EU nationals who are planning to move to Ireland will be living abroad before they move here, and many if not most of them will have their centre of life abroad before moving here.

11. **[4] Did the Minister act in breach of statutory duty and in breach of EU law in failing to assess and determine whether the first to fourth applicants are or were members of the household of their EU citizen family member (the fifth applicant) in Pakistan?** No. See para.6 above.

12. **[5] Did the Minister act irrationally and unreasonably, having taken more than two years to determine the visa applications at first instance, in refusing the visa appeals partly on the basis that the fifth applicant had not yet made efforts to secure school places in the State for the third and fourth applicants, and had not yet secured permanent accommodation in the State?** The Minister acted unreasonably but not in the manner posited. There is no requirement that, before exercising his freedom of movement rights to come to Ireland, an EU national should have made efforts to secure school places or permanent accommodation. If a man is not required by law to do something, he is not required to do it, and it cannot be held against him when he does not do that which he is free at law not to do, yet that in effect is what was done when the Minister viewed in a negative light the fact that the fifth applicant has as yet done nothing to secure school places or permanent accommodation in advance of coming here.

13. **[6] Did the Respondent act irrationally and unreasonably in finding that the Applicants had failed to prove that the First Applicant was the cousin of the fifth Applicant and/or did the Respondent unlawfully fail to give reasons for this finding?** The Minister acted unreasonably, perhaps even irrationally, in this regard. He was provided with un-impugned birth certificates which identify the relationships. He also received submissions which expressly touched on what it was the birth certificates purported to establish (Pleadings, p.254). Yet, despite being confronted with all of the foregoing, he arrived at the clearly erroneous conclusion that the above-mentioned relationship had not been established.

14. **[7] Did the Minister act irrationally and unreasonably in refusing the visa appeals partly on the basis that there was no evidence that the first applicant was the ultimate beneficiary of the monies transferred to him by the fifth applicant?** The Minister acted unreasonably because the statutory declarations provided some evidence in this regard; the Minister was free to place the weight on those declarations that he considered appropriate; however, he could not properly proceed on the basis that no documentary evidence was provided.

15. **[8] Did the Minister act in breach of statutory duty and in breach of EU law in failing to assess and determine whether the third and fourth applicants are or were dependent on their EU citizen family member (the fifth applicant)?** Yes. The third and fourth applicants clearly put forward that they are financially dependent (see Pleadings, p.144). Unfortunately this aspect of their appeal is not considered in the Impugned Decisions that concern them.

## V. Overall Conclusion

16. Given the deficiencies identified above, the court will grant the orders of *certiorari* sought and remit the applicants' applications to the Minister for fresh consideration.