



**THE COURT OF APPEAL**

**Neutral Citation Number [2021] IECA 1**

**Court of Appeal Record Number: 2019/450**

**High Court Record Number: 2018/1054 JR**

**Whelan J.  
Faherty J.  
Haughton J.**

**BETWEEN**

**MD. JAGLUL HOQUE SHISHU AND MD. JABED MIAH**

**APPLICANTS/RESPONDENTS**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT/APELLANT**

**JUDGMENT of Mr. Justice Robert Haughton delivered on the 8th day of January 2021**

**Index**

**Paragraph Title**

Background .....	<b>5</b>
Initial Decision .....	<b>15</b>
Judicial Review Sought .....	<b>34</b>
Relevant EU and Domestic Legal Provisions .....	<b>35</b>
High Court Judgment .....	<b>40</b>
Grounds of Appeal .....	<b>42</b>
Grounds of Opposition and Cross- Appeal .....	<b>43</b>
Issues that fall to be decided .....	<b>44</b>
Application of the relevant provisions of the 2015 Regulations .....	<b>47</b>
Proper meaning of the term 'member of household' as established by the Citizens Directive 2004/38/EC and implemented in the State under the 2015 Regulations ...	<b>66</b>
Whether the Minister acted 'unreasonably' and/or in breach of EU Law and/or in breach of the 2015 Regulations in determining that there was a failure to provide sufficient evidence to showcase that a person is a member of the household of an Union citizen .....	<b>92</b>
Whether the Minister acted 'unreasonably' and/or in breach of procedures by refusing to highlight or adduce to an applicant as to what evidence is required in order to satisfy the Minister on the basis of his application. ....	<b>102</b>

Legal Test for an applicant to show that he is a 'dependent' of the Union citizen ...	129
Conclusion .....	148
Costs .....	154

1. This is an appeal from the written judgment of Barrett J. in the High Court granting an order of *certiorari* perfected on 10 October 2019 in favour of the second named applicant/respondent ("Mr Miah") referring his application for an EU residence card back to the appellant ("the Minister") for further consideration. That application had been refused by the Minister by decision dated 12 October 2018 ("the Impugned Decision").
2. The first named applicant/respondent ("Mr. Shishu") is the older brother of Mr. Miah and is a UK citizen, and as such is the EU citizen upon whom the application for the residence card depended.
3. The Impugned Decision was made by the Minister on review pursuant Regulation 25 of the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548/2015)("the 2015 Regulations") (which revoked and replaced S.I. No.656/2006, as amended – "the 2006 Regulations") and it upheld a first instance decision of 9 May 2017 ("the Initial Decision").
4. The 2006 Regulations, and now the 2015 Regulations, implemented Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States, O.J. L158/77, ("the Citizens Directive").
5. **Background**

Mr Shishu was born in Bangladesh on 6 July 1978 and lived there until 2001 until he moved to the UK where he was naturalised in 2009 as a UK Citizen giving him the right to free movement in Europe. In 2004 or 2005, he purchased a home at 94 Birley Street, Newton Le Willows, Merseyside where he resided with his wife.

6. Mr Miah was born in Bangladesh on 24 February 1992, and he claimed to be in receipt of monies remitted by Mr. Shishu to Bangladesh before going to the UK in May 2013 on a visitor's visa. When Mr. Miah moved to the UK he claimed to be financially dependent on his older brother. Mr Shishu notes in para. 4 of his verifying affidavit that he "covered the cost of [Mr. Miah's] accommodation, food, transportation and so on". Mr Miah was present in the UK on a visitor's visa which did not entitle him to work.
7. In 2016 Mr Shishu's relationship with his wife broke down and he lived alone with Mr. Miah before moving to Ireland on 14 March 2016. It appears that Mr. Miah moved to Ireland first, and was joined soon after by Mr. Shishu. Initially they resided at 16 York Street, Castleblaney, Co. Monaghan. After a year of Mr. Shishu working as a part-time chef in Monaghan, in May 2017 they moved together to Ennis, Co. Clare, where Mr.

Shishu has worked on a full time basis to the present date, and they reside there together in rented accommodation.

8. Mr Miah's application for an EU residence card was made in June 2016 and was refused on 12 October 2018 following a review of the Initial Decision which had issued to him on 9 May 2017. The history of that application and the process that led to its refusal is now detailed.
9. On 20 June 2016, Burns Kelly Corrigan, the solicitors then acting for Mr Miah, submitted a Form EU1A application on his behalf for an EU residence card to the Minister, together with supporting documents. Under the heading 'Relationship of Applicant to EU citizen' the box marked 'Dependent' was ticked, and accordingly the application on paper was based solely on Mr. Miah's relationship of dependency on Mr. Shishu, an EU citizen, and in that regard relied on reg. 5(1)(a)(i) of the 2015 Regulations. The fact that the box 'Member of household' was not ticked meant that the application did not rely also, or in the alternative, on reg.5(1)(a)(ii) – viz. membership of the household of the EU Citizen ie. Mr. Shishu, before Mr. Shishu moved to the State. That this appears to have been an error was adverted to as such by the trial judge, and, as will be seen, the application was in fact addressed under both the 'dependency' and 'member of the household' grounds at the review stage.
10. The application consisted of a large volume of supporting documentation – some 135 pages - including photocopies of passports for Mr. Miah (Bangladesh) and Mr. Shishu (UK and Bangladesh), birth certificates for both of them and their parents, a Tenancy Agreement in respect of 16 York Street, Castleblayney, Co. Monaghan, family photos, and other documents mentioned below. As averred to in para. 6 of his grounding affidavit, Mr. Miah relied on the following enclosed documents to show dependency :
  - “• A Sonali Bank Limited bank statement in respect of account number 002057093 issued to me showing incoming payments of 1,405,289 taka (approximately €14,770.92 at the current exchange rate) between the 27th January 2011 and the 30th April 2013;
  - 8 Lloyds bank statements issued to my brother showing outgoing payments totalling £2,260 to me between the 1st June 2015 and the 10th February 2016;
  - 8 Lloyds banks statements issued to me showing income payments totalling £2,380 from my brother between the 3rd June 2015 and the 24th February 2016.”

In para.4 of his grounding affidavit Mr. Miah states –

“Throughout my time in the United Kingdom I was lived [sic] with my brother and was financially dependent on my brother, who covered my accommodation, food, transport, and all other needs. I was on a visitor's visa and could not and did not work.”

Corresponding to this, in para. 4 of the affidavit sworn by Mr. Shishu he confirms that Mr. Miah–

“...lived with me in my home at 94 Birley Street, Newton Le Willows, Merseyside. My brother was not working during that time and was financially dependent upon me as a result. I covered the cost of his accommodation, food, transportation and so on.”

11. On 29 September 2016, the Minister’s letter acknowledged receipt of the application and noted “A preliminary examination of your application will be conducted shortly. This office may be in contact with you, in due course, in relation to further information and documentary evidence considered necessary in the course of that examination”.
12. Further communication followed and can be summarised as below:
  - On 18 October 2016, the solicitors enclosed a copy of Mr. Miah’s passport which confirmed the validity of the passport had been extended until 25 December 2016, and this was acknowledged by the Minister on 20 October 2016.
  - On 25 November 2016, the solicitors enclosed a letter of authority signed by Mr Miah, nine Sonali Bank (UK) Ltd money transfer receipts vouching remittances by Mr. Shishu to Mr. Miah in Bangladesh over the period January 2011 to May 2013 in amounts varying from GBP£396 to £1,000, photographs of Mr. Miah and Mr. Shishu together, a copy of the Family Certificate vouching the common identity of their parents and siblings and that they are brothers and their respective dates of birth, and Mr. Shishu’s contract of employment with Castle Indian Spice Ltd in Castleblayney, Co.Monaghan, receipt of which was acknowledged by the Minister on 2 December 2016.
  - On 10 January 2017 and 27 April 2017, the solicitors wrote to the Minister enclosing further documentation (over 100 pages) to support the application including Bank of Ireland bank statements for Mr. Miah’s current account showing that from 2 November 2016 when the account was opened there were weekly payments in from Mr. Shishu ranging from €30-€50, which became weekly payments of €40 by standing order 6 December, 2017, pay slips and a P60 and Tax Credit Certificate for Mr. Shishu in respect of his work for Castle Indian Spice Ltd in 2016, and a colour copy of Mr. Miah’s passport - and this was acknowledged by the Minister on 12 January 2017 and 28 April 2017.
13. On 27 April 2017, a “Recommendation Submission” was prepared by Mr. James Bergin of the EU Treaty Rights Unit of the Residence Division of the Irish Naturalisation & Immigration Service (INIS). This document under the heading “Permitted Family Member Assessment” has a sub-heading “*Consideration of an application to be treated as a permitted family member of a Union citizen under Regulation 5(2) of [the 2015 Regulations] ...*”. Although the author was satisfied that there was a family relationship

between Mr. Miah and Mr. Shishu, he was not satisfied that residency or dependency had been established, and he recommended that the Minister refuse the application.

14. This was followed by a "Decision Submission" completed on 9 May 2017 by another officer of INIS, Ms. Magdalen M. Keady on 9 May 2017. The first paragraph refers to the application to be treated as a permitted family member of a Union citizen "under Regulation 5(2)". Ms. Keady states that she was not satisfied that satisfactory documentary evidence had been submitted in relation to the dependency of Mr. Miah on his brother either in this State or the UK. Ms. Keady noted:-

"The applicant has not submitted satisfactory documentary evidence to show that he is a dependent of the Union citizen or that he was a dependent of the EU citizen prior to arrival to this State. While Md Javed Miah has provided money transfers from the EU citizen, there is no corresponding documentation to show that the applicant received the money transfers. The applicant has also submitted Lloyds bank statements showing money transfers from the EU citizen.

It is not accepted that the applicant submitted sufficient documentary evidence to show that he is a dependent of the Union citizen or that he was a dependent of the EU citizen in the country from which he has come as required by Regulation 5(1)(a)(i). As such, the evidence submitted does not establish dependence on the EU citizen such as to render independent living at subsistence level by the applicant impossible if the EU citizen did not maintain that financial support.

Accordingly, based on the documents supplied, I am satisfied that the applicant has not established that he is a permitted family member of the UK citizen and as such, I have decided to refuse this application."

#### **Initial Decision**

15. By letter also dated 9 May 2017 from Ms Keady on behalf of the Minister to Mr. Miah – the Initial Decision - the application was refused. The first paragraph again cites the application being made under Regulation 5(2). The second paragraph sets out the refusal, and then reasons are set out. The third paragraph includes the following -

"...Please be advised that Regulation 5(1)(a)(i) applies to individuals who are member of the family of an EU citizen to whom Regulation 5(2) applies and requires that an application demonstrates that the applicant, in the country from which they have come, is dependent on the EU citizen."

The grounds for refusal reflect those set out in the "Decision Submission", and in particular repeated the sentence -

"As such, the evidence submitted does not establish dependence on the EU citizen such as to render independent living at subsistence level by the applicant impossible if the EU citizen did not maintain that financial support."

The letter noted that Mr Miah was entitled to seek a review of the decision in accordance with Regulation 25 of the 2015 Regulations within 15 days.

16. On 19 May 2017, Mr. Miah's solicitors submitted Form EU4 seeking a review of the decision, submitting that the documents relied on "...overwhelmingly prove the applicant was a dependent on the UK citizen before coming to Ireland" and that "The documents also show that the applicant was living in his brother's house.". This appears to have been treated by INIS as extending the application to one additionally based on Mr. Miah being a member of Mr. Shishu's household pursuant to Reg. 5(1)(a)(ii) of the 2015 Regulations. As Mr. Miah states in para. 12 of his grounding affidavit:-

"The review application enclosed a number of bank statements showing that my brother had transferred money to me. The relevant transfers were highlighted for ease of reference. The application also included Sonali Bank (UK) Ltd, remittance forms issued to my brother which confirmed he had transferred 1,405,289 taka to me in Bangladesh between the 25th January 2011 and the 29th April 2013. A copy of my brother's mortgage statement confirming his ownership of 94 Birley Street, Newton Le Willows, Merseyside, W A12 9UN was also submitted, together with further evidence confirming our joint residence there. The form EU4 application enclosed with the review documentation stated that documents showed that I was living in my brother's house in the United Kingdom and asserted that I did not pay any rent or bills there, as they were covered by my brother. A copy of our lease in respect of our new home at 46 Woodland, Kilrush, Ennis, Co. Clare and a letter from my brother's new employers, Bonfire Restaurant, were also enclosed. On the 22nd May 2017, the Respondent acknowledged receipt of the said review application. The letter stated that it was open to me to submit any additional supporting documentation I might wish to be considered by no later than the 22nd June 2017."

17. The bank statements enclosed included Mr. Shishu's Lloyd's bank account showing payments out of £60 to 'Jabed Miah' every two weeks from July to March 2016, and these were reflected in payments into Mr. Miah's Lloyd's bank account from 'J Shishu' over the same period. Also included were Bank of Ireland Statements showing payments by Mr. Shishu to Mr. Miah, regularised to standing order payments of €40 per week from December 2016, and increased to €70 per week from 10 January, 2017, and corresponding statements from Mr. Miah's Bank of Ireland current account recording payments in by standing order from 'JH Shishu' up to 2 May 2017.
18. The Residential Tenancy Agreement enclosed was dated 9 May 2017 and names both Mr. Shishu and Mr. Miah as tenants of 46 Woodland, Kilrush Road, Ennis, Co. Clare, and is signed by both of them, and records at clause 4.9 that –

"The Landlord shall register this Tenancy Agreement with the Private Residential Tenancies Board (PRTB) as required under the Residential Tenancies Act 2004."

19. By letter dated 22 May 2017 receipt of the review application was acknowledged and INIS stated that it was open to Mr. Miah to submit any additional supporting documentation he might wish to be considered. On 1 June 2017, Mr Miah's solicitors wrote to INIS in the following terms:

"We refer to our above named client's application and advise the UK citizen, Mr Shishu has started a new job in Bonfire Restaurant and we enclose herewith copy payslips, his up to date bank statements, meteor bill, a copy of the applicant's current passport and copy tax credit certificate 2017 for Mr Shishu.

We also refer to your letter dated 22nd May last and respectfully submit our client has previously furnished documentation to show that they are brothers. They lived together as part of the same household before they came to Ireland and they have also provided substantial evidence to show the applicant was dependent on his EU citizen brother throughout this period.

We now call upon you to tell us your exact definition of 'permitted family member' and 'household' in the context of the regulations. Until we receive this information we are unable to fully respond to your above mentioned letter.

We thank you and await hearing from you further."

It will be noted that this submission repeated the claim to a residence based on membership of Mr. Shishu's household in the UK.

20. On 6 June 2017, the Minister replied "(f)urther to your correspondence, the Regulations and the Directive allow for [sic] an extensive examination of the personal circumstances of the applicant. It is ultimately a matter for your client as to what information he wishes to put before the Minister in support of his application"
21. On 27 June 2017, Mr Miah's solicitors wrote to INIS enquiring as to when a decision could be expected, to which a reply was given on 30 June 2017 stating that they were unable to give an exact timeframe "however, Mr Miah can be assured that there will be no avoidable delay in finalising his application".
22. A change of solicitors occurred in November 2017 with NMCA Legal, solicitors with an office in Ardee, Co Louth, enclosing a letter of authority on 8 November 2017, and INIS acknowledged this on 14 November 2017. On 15 December 2017 NMCA Legal wrote to INIS making a submission that Mr. Miah was a 'permitted family member' and that there was sufficient supporting documentation showing that Mr Miah and Mr Shishu resided together in the same household in the UK, and that the money transfers showed dependency in the UK and in Ireland. NMCA Legal submitted that "the level of dependency is a question of fact, and cited in support *Lim v Entry Clearance Office Manila* [2015] EWCA Civ. 1383 where Lord Justice Elias stated at para. 32:

"...the critical question is whether the claimant is in fact in a position to support himself or not, and Reyes now makes that clear beyond doubt, in my view. That is

a simple matter of fact. If he can support himself, there is no dependency, even if he is given financial material support by the EU citizen. Those additional resources are not necessary to enable him to meet his basic needs. If, on the other hand, he cannot support himself from his own resources, the court will not ask why that is the case, save perhaps where there is an abuse of rights.”

The reference to *Reyes* is to the decision of the CJEU on 16 January 2014 on a preliminary reference *Reyes v Migrationsverket* C-423/12. NMCA Legal argued that –

“The fact that our client’s status in the UK and Ireland prohibits him from employment, social assistance and housing has meant that he has no option but to reside with his brother and rely on him for all his basic needs.”

23. INIS replied on 18 December indicating that as NCMA Legal did not appear to be registered to act for clients in the Republic of Ireland they could not deal directly with them and they would correspond directly with Mr. Miah. This prompted Mr. Miah to write personally to INIS on 4 January 2018 in support of his application stating “He [Mr. Shishu] is my blood Brother and we are from same Mother and Father” and asserting his financial dependence on Mr. Shishu based on the documents already furnished, and that “We [viz. Mr. Shishu and Mr. Miah] lived together at the same address in UK”, and receipt of this was acknowledged by INIS.
24. On 2 May 2018 KOD Lyons solicitors wrote to INIS enclosing a letter of authority noting that they would be acting on Mr Miah’s behalf. In further support of the application they enclosed a print out from the UK Land Registry confirming Mr. Shishu’s ownership of the property at 94 Birley Street where they both resided. They stated:

“We are instructed that the only other resident of the house was the EU national’s then-wife, Mst Doli Begum, whom he has since divorced. A copy of the divorce decree is also enclosed. We are instructed that Mr Shishu has since remarried and applied for a visa for his new wife; this visa application was refused, but he intends to appeal.

You have already been furnished with numerous documents evidencing our client’s residence with the EU national in the UK. We submit that the evidence you now have establishes beyond all doubt that he was a household member of the EU national. Accordingly, his residence card should now issue without further delay.”

By letter dated 3 May 2018, INIS acknowledged receipt of this correspondence.

25. On 24 July 2018, KOD Lyons informed INIS that the review application had been pending for 14 weeks, and indicated that mandamus proceedings would be brought in the absence of a decision “by the end of the Long Vacation”.
26. On 17 August 2018, some 26 months after the initial application for a residence card, INIS wrote to Mr Miah setting out “a number of concerns” of the Minister that the accompanying documentation “may be false and misleading”, and informing Mr. Miah that



the Minister was proposing to uphold the decision to refuse the application. In summary the concerns were:

- (i) that Mr. Miah arrived in the State four days before Mr. Shishu, and that the application for a residency card was made on 21 June 2016 yet included were documents submitted in Mr. Shishu's name to a UK address in May 2016;
- (ii) that Mr. Shishu was absent from the State from January to May 2017;
- (iii) birth certificates submitted showed Mr. Shishu and Mr. Miah to be brothers, but the Family Certificate submitted did not list the family siblings in order of birth, and appeared to be a combination of two documents;
- (iv) while the 16 York Street, Castleblayney tenancy commenced 28 April, 2016, an invoice from McElvaney's Waste & Recycling submitted was dated 31 March 2016, one month prior to the commencement of the tenancy;
- (v) the tenancy agreement for 16 York Street shows Mohammad Jewel Miah as landlord, but "information available to the Minister shows that Mr. Miah is not the landlord of this property."

27. These concerns were addressed in a letter of KOD Lyons of 13 September 2018 which explained, adopting the same numbering:

- (i) Mr. Shishu continued to own his property in the UK and in May 2016, two months after the move to Ireland, "he may not have updated all documentation to reflect his move. We submit that this says nothing about his "centre of interest". KOD Lyons then enclosed copies of emails from a rental agency in the UK dated 1st May 2018 confirming Mr. Shishu's continued ownership and his attempts to rent the property;
- (ii) As to Mr. Shishu's absence in January 2017 this was to marry his second wife – in respect of whom a visa application had been submitted to the Minister and was then under appeal. "During this absence our client continued to reside in the Sponsor's house in Ireland. Not being entitled to work in the State, he was clearly dependent on his brother for accommodation during this time. We would in any event remind you that the relevant issue in a permitted family member application is dependency *in the country from which he has come* – not ongoing dependency after his arrival."
- (iii) The Family Certificate did combine two different pieces of paper – because the Family Certificate was larger than A4 size. "An unadulterated Family Certificate is now enclosed. Our client cannot account for the order in which he and his siblings are listed; however, we would respectfully submit that it is insufficient to assert that children are 'usually' listed in a particular order" – and reliance was placed on the birth certificates with which no issue was taken. It was also noted that "Bangladeshi birth certificates are verifiable online", and print-outs were furnished.

- (iv) As to McElvaney's Waste and Recycling Invoice, "the company bills on the basis of a service period which runs between two set dates. The invoice, when issued, covers the entire period and reflects a date toward the start of that period. Thus, although our client and his Sponsor did not take up their lease until 28 April 2016, they were issued with a bill for the whole service period of 4th March – 30th June 2016 and dated 31st March 2016."
- (v) As to the Tenancy Agreement "our client instructs that Mohammed Jewel Miah is the man to whom he and his brother are paying rent at 16 York Street. It may be that Mr. Miah is himself leasing the premises from another person or company and that theirs is merely a sublease; however, our client is not aware of this being the case."

28. On 27 September 2018, a 'Recommendation Submission' prepared by INIS officer Ms. Aisling M NíFhrighíl records the initial refusal to treat Mr. Miah as "a permitted family member as set out in Regulation 5(1)" due to insufficiency of evidence, and recommended confirmation of the decision of 9 May 2017 refusing the application. This four page document questioned the authenticity of the Family Certificate and whether Mr .Shishu and Mr. Miah were siblings; noted the documentation submitted to prove Mr. Miah lived with Mr. Shishu in the UK but stated "This office is unable to verify that these documents pertain to the applicant", although accepting that Mr. Shishu owned 94 Birley Street; noted a Mohammed Jewel Miah as tenant of 16 York Street, Casteblyney and that that individual had on a different application provided PRTB correspondence for his tenancy, and observed that "Usually landlords are not registered with the PRTB"; noted that Mr. Shishu's Bank of Ireland statements "showed very little activity but acknowledged "regular money transfers to the applicant's bank account...but day to day usage is minimal."; as to the documents relating to 46 Woodlands, Kilrush Road, Ennis the author stated "I am now satisfied that the applicant and the EU citizen reside together in the State"; while accepting that the documents showed that Mr. Miah and Mr. Shishu "shared a number of addresses", the author stated that this :-

"does not show the household was that of the EU citizen or that the applicant was a member of that household whilst they were both residing there. In fact, the documentation appears to show that the applicant and the EU citizen were both residing in a co-sharing arrangement with joint responsibility for the property including rent and payment of bills";

On dependency, while the documents showed money transfers to Bangladesh in 2011-2013, in the UK in 2015-2016 and the State in 2016-2017, the absence of Mr. Shishu from the State from January to May 2017 was said to be "inconsistent" with dependency. Of importance was the next statement, reflecting the reason for refusal in the Initial Decision -

"Money transfers alone do not show a degree of dependency, such as to render independent living at subsistent [sic] level impossible, were that financial support not maintained."

In respect of the Family Certificate the author found the explanation given by Mr. Miah's solicitors to be "insufficient", observing that -

"[it] is the same length as the poorly altered one that had been provided with his initial application. The line between individual 6 and 7 is no longer visible. The applicant's assertion that he had to use more than one piece of paper due to the length of the his birth certificate are not credible, given that his now provided 'unadulterated Family Certificate' is the exact same length. The applicant's representatives have maintained that the birth certificates provided in respect of his application are genuine and that they can be verified online. This does not detract from the submission of an altered fraudulent document. The 'unadulterated' version provided at review is simply a computer print-out. It bears none of the security features one would expect from such a document and is not apostilled."

Ms. NíFhrighíl concluded:-

"Having considered the review request of Md Javed Miah and the evidence available to me, I recommend that the decision dated 09/05/2017 to refuse the application of Md Javed Miah to be treated as a permitted family member of a Union citizen be confirmed.

I recommend the inclusion of an additional finding under Regulation 27(1) of the Regulations on the basis that the applicant has submitted fraudulent documentation in support of his application"

29. In a 'Review Officer Decision' of INIS officer Mr. Mark Carleton dated 12 October 2018 ("the Impugned Decision"), for reasons that are largely replicated in a letter of the same date from Mr. Carleton to Mr. Miah informing him of the decision on review and set out below, Mr. Carleton recommended confirmation of "the original decision to refuse". In the Impugned Decision Mr. Carleton explains that he has reviewed the submission of Ms. NíFhrighíl, and, like her, he analyses the 'member of household' ground, as well as dependency on Mr. Shishu.

30. In the letter of notification of the decision also dated 12 October, 2018 Mr. Carleton states:

"I am to inform you that the review of your application has not been successful, as you do not fulfil the relevant conditions set out in the Regulations and the Directive. The decision to refuse your application dated 17/06/2016 is affirmed for the following reasons:

You have submitted numerous documents in respect of your financial position both in the State and prior to your arrival. In this regard, you have submitted receipts for several money transfers made to Bangladesh from the UK. These receipts, the authenticity of which can not be verified, appear to show that your brother sent money to you in Bangladesh from time to time between 2011 and 2013. It is not

apparent, however, that you were dependent on these money transfers. No evidence has been provided to suggest that, had you not been in receipt of these transfers, you would not have been able to support yourself in Bangladesh.

In respect of dependence on your brother in the UK, you have submitted several statements for your own and your brother's UK account which indicate that you did, indeed, receive some small financial transfers from your brother while you were in the UK. It is noted, however, that you spent little of the money that your brother transferred to this bank account – there are some cash point transactions on record but no direct debits or standing orders. Indeed, it is clear that you had another, separate bank account in the UK, the details of which you have not supplied to the Minister. You applied for gym membership at GoAdvice using a second bank account number, and the direct debits for your telephone bill do not come from any of the accounts on file. It is not immediately apparent, therefore, that you were dependent upon money transfers from your brother. No evidence has been provided to suggest that, had you not been in receipt of cash transfers from your brother, you would not have been able to support yourself in the UK.

Your Irish bank statements show that you have been in receipt of regular, small transfers from your brother while in this State. Again, however, no evidence has been provided to suggest that you would not be able to support yourself in Ireland if you were not in receipt of these transfers. In light of the above, the Minister is not satisfied that you have provided satisfactory evidence to establish that you have been dependent upon your brother, including prior to his arrival in the State.

Numerous documents have been submitted in respect of your residence in the UK and Ireland. You have submitted a range of documents addressed to you and to your brother at 94 Binley Street, Newton Le Willows, Merseyside, UK. It is not evident from the documentation submitted, however, that you resided within the *household* of the EU citizen prior to your departure for Ireland. You have not provided sufficient evidence to show how many people were living at the UK address mentioned, their relationship to you, or the length of time that you and the EU citizen were residing at the address in question.

You have asserted that you and your brother have been residing together in the State since March 2016. In support of this assertion, you have provided documents pertaining to 16 York Street, Castleblaney, Co. Monaghan and 46 Woodlands, Kilrush Road, Ennis, Co. Clare. It is noted that the tenancy agreement for 16 York Street lists another UK citizen as the landlord. However, this same UK citizen is listed as a tenant of 16 York Street on a different application before the Minister, and he has provided PRTB correspondence to establish his tenancy at that address. It is not considered to be credible that an individual could be both a tenant and a landlord of one property.

Although you contend that you currently live with your brother in Ennis Co. Clare, there is insufficient evidence on file to establish that you are a member of your

brother's household in Ireland. Indeed, it is noted that you are named as a co-tenant on the lease for your house in Co. Clare, which suggests that share an address and responsibility for a lease with your brother rather than being a member of his household. The Minister finds that although you may have shared an address with your brother from time-to-time over the years, he is not satisfied that you have been a member of your brother's household, including prior to your arrival in the State.

There is no information or documentation on file to suggest that you are suffering from any serious form of medical complaint. As such, there is no reason to believe that you are reliant upon the personal care of your EU citizen brother for health reasons.

Having considered all of the information, documentation, and submissions on all of the applicant's files, the Minister is not persuaded that the decision of 09/05/2017 should be overturned. You have failed to establish that the Deciding Officer erred in fact or law when refusing your application for a residence card. He finds that the appropriate procedures were used and that the correct interpretation of the Regulation and the Directive was applied. In reaching her determination, the Deciding Officer in this case considered all the information and documentation available to her.

The Minister is not satisfied that you have demonstrated that you were dependent on the EU citizen, including prior to your arrival in the State; or that you were a member of the EU citizen's household, including prior to your arrival in the State; or that you required the personal care of the EU citizen for health reasons in accordance with the Regulations. As such, the Minister has decided to confirm the decision of 09/05/2017 to refuse your application for a residence card as a family member of an EU citizen."

31. It is important to note that in the Impugned Decision, and in the notification of that decision, Mr. Carleton does not repeat any of the doubts expressed by Ms. NíFhrighíl in respect of Mr. Miah and Mr. Shishu being brothers, or in respect of the Family Certificate, and does not make any finding under Regulation 27(1) based on the submission of fraudulent documentation in support of the application. In essence the Minister's decision to confirm refusal is instead based on failure to provide satisfactory evidence of (1) dependency on the EU citizen, and (2) membership of the household of the EU citizen Mr. Shishu prior to departure for Ireland.
32. Mr Miah in para. 20 of his affidavit expresses his disappointment with the Impugned Decision, and says he was -

"...particularly aggrieved that it had been refused on the basis that I had allegedly failed to submit sufficient documentation in support of my application, having regard to the efforts I had made to supply the Minister with all of the information necessary in support of same. If the Minister required additional documentation

then I do not understand why he did not contact me to request same, particularly as I had expressly asked him to contact me if anything further was required. Had I been given details of the documentation required then I would have done everything in my power to furnish the Minister with same. However, it has never been clear exactly what documentation was considered necessary in order to establish that I was dependent on my brother and a member of his household before coming to the State. I do not know what additional documentation I could submit...”

in order to prove his residency in UK or in Co. Monaghan, or the manner in which he spent the money transferred to him by his brother.

33. The letter of the 12 October 2018 was accompanied by a ‘three options letter’ also signed by Mr. Carleton setting out the Minister’s proposal to deport Mr Miah pursuant to the power given by s.3(4) of the Immigration Act 1999 as he had “failed to show that you are a permitted family member of an EU Citizen in accordance with the Regulations”. The options given were (i) leave the State voluntarily, (ii) consent to a deportation order, or (iii) submit representations to the Minister setting out reasons why a deportation order should not be made. In response to this KOD Lyons by letter dated 31 October 2018 made section 3 representations to the Minister, without prejudice to the applicants seeking judicial review of the refusal of a residence card.

#### **Judicial Review sought**

34. On 17 December 2018 Humphreys J. granted leave to challenge the Impugned Decision by way of judicial review. In the Notice of Motion dated 21 December 2018 the following reliefs were sought :-

- “(a) An order of *certiorari* quashing the Respondent’s decision of the 12th October 2018 to refuse the second Applicant’s application for a review of the decision refusing his application for an EU residence card;
- (b) An order directing the Respondent to reconsider the second Applicant’s application for a review of the decision refusing his application for an EU residence card as a matter of urgency;
- (c) Such declarations(s) of the legal rights and/or legal position of the Applicants and/or persons similarly situated as the court considers appropriate;
- (d) Such further and other order as this Honourable Court shall deem meet;
- (e) An order providing for the award of the costs of these proceedings to the Applicants.”

It is not necessary to set out the grounds, or Statement of Opposition, as the relevant grounds and arguments emerge from the decision of the trial judge and submissions before this court to which I refer later in this judgment.

### **The relevant EU and Domestic legislative provisions**

35. In order to better understand the judgment of the High Court (Barrett J) it is appropriate at this point to set out the relevant EU and domestic legislative provisions.
36. The Citizens Directive governs the right of citizens of the Union and their family members to move and reside freely within the territory of Member States. Recitals (5) and (6) provide:
- “(5). The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of ‘family member’ should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.
- (6). In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.”

Article 2 defines “Family member” to include spouse, partner, “direct descendants who are under the age of 21 or are dependants” and “dependent direct relatives in ascending line”, and therefore does not extend to siblings of a Union citizen.

Article 3, headed “Beneficiaries”, provides:

- “(3)(1). This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them
- (2) 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 dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
- (b) the partner with whom the Union citizen has a durable relationship, duly attested.

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.”

The terms “dependent” and “members of the household” are not defined in the Directive.

37. The Citizens Directive was implemented in domestic law by the 2006 Regulations, now replaced by the 2015 Regulations, and all further numbered references are to the 2015 Regulations. Reg.2 in combination with reg.3(5) contains a definition of “qualifying family member” which reflects the definition of “family member” in Article 2 of the Citizens Directive, and as it does not include a sibling it was not, and could not, be availed of by Mr. Miah.
38. Reg.2 also defines “permitted family member” to mean “in relation to a particular Union citizen, a person who is, under Regulation 3(6), a permitted family member of the Union citizen”, and under reg.3(6) this includes a person who “the Minister has, in accordance with Regulation 5, decided that the person should be treated as a permitted family member of the Union citizen for the purposes of these Regulations”.
39. As Mr. Miah’s claim is that he is a “permitted family member”, the provisions most relevant to the current appeal are paragraphs (1) – (6) of Reg.5:

*“Permission for permitted family member to enter State*

5. (1) This paragraph applies to a person who –

- (a) irrespective of his or her nationality, is a member of the family (other than a qualifying family member) of a Union citizen to whom paragraph (2) applies and who in the country from which the person has come –
  - (i) is a dependant of the Union citizen
  - (ii) is a member of the household of the Union citizen, or
  - (iii) on the basis of serious health grounds strictly requires the personal care of the Union citizen,
- or
- (b) is the partner with whom a Union citizen has a durable relationship, duly attested.

(2) Where a Union citizen has entered or is residing in the State in accordance with these Regulations or is proposing to do so, a person to whom paragraph (1) applies may apply to the Minister for a decision that he or she be treated as a family permitted family member for the purposes of these Regulations and shall, for the purposes of such an application produce to the Minister –

- (a)(i) where the applicant is a national of a Member State, a valid passport or national identity card, or
- (ii) where the applicant is not a national of a Member State, a valid passport,



- (b) evidence that he or she is a member of the family of the Union citizen and
- (c) one of the following:
  - (i) documentary evidence from the relevant authority in the country of origin or country which he or she has come, that he or she is a dependant, or a member of the household, of the Union citizen
  - (ii) proof of the existence of serious health grounds which strictly require the personal care of the applicant by the Union citizen;
  - (iii) documentary evidence of the existence of a durable relationship with the Union citizen
- (3) Upon receipt of the evidence referred to in paragraph (2), and on being satisfied that the applicant is a person to whom paragraph (1) applies, 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 these Regulations as a permitted family member of the Union citizen concerned.
- (4) For the purposes of his or her decision under paragraph (3), the Minister may require the applicant to produce such additional evidence as the Minister may reasonably require.
- (5) The Minister, in deciding under paragraph (3) whether an applicant should be treated as a permitted family member for the purposes of these Regulations, shall have regard to the following:
  - (a) where the applicant is a dependant of the Union citizen concerned, the extent and nature of the dependency and, in the case of financial dependency, the extent and duration of the financial support provided by the Union citizen to the applicant prior to the applicant's coming to the State, having regard, amongst other relevant matters, to living costs in the country from which the applicant has come, whether the financial dependency can be satisfied by remittances to the applicant in the country from which the applicant has come and other financial resources available to him or her;
  - (b) where the applicant is a member of the household of the Union citizen concerned, the duration of the period during which he or she has been living within the household of the Union citizen;
  - (c) where, on the basis of serious health grounds, the applicant strictly requires the personal care of him or her by the Union citizen concerned, the nature of the serious health grounds and the duration of the period in which they have existed;
  - (d) where the applicant is in a durable relationship with the Union citizen concerned, the nature and duration of the relationship;
  - (e) whether the relationship described in subparagraph (a), (b), (c) or (d), as the case may be, was brought about with the objective of obtaining permission to remain in the State or a Member State;

- (f) the capacity of the Union citizen concerned to continue to support the applicant in the State in the event that the applicant is to be treated as a permitted family member under these Regulations.
- (6) The Minister, following an examination under paragraph (3), shall –
  - (a) where he or she decides that an applicant should be treated as a permitted family member for the purposes of these Regulations, notify the applicant in writing of the decision, or
  - (b) where he or she decides that an applicant should not be treated as a permitted family member for the purposes of these Regulations, notify the applicant in writing of the decision and of the reasons for it.”

Regulation 25 provides for a review of a first instance refusal:

“Review of decisions

- 25(1) A person who has, or who claims to have, an entitlement under these Regulations to enter or reside in the State may seek a review of any decision concerning such entitlement or claimed entitlement.
- (2) An application for review under this Regulation shall be submitted to the Minister within 15 working days of the receipt by the person concerned of the decision and shall set out in writing the grounds for review and the particulars specified in Schedule 4.
- (3) The Minister may, where he or she is satisfied that it is warranted in the particular circumstances, extend the period referred to in paragraph (2) within which a review must be submitted.
- (4) A review under this Regulation of a decision under paragraph (1) shall be carried out by an officer of the Minister and who—
  - (a) shall be a person other than the person who made the decision, and
  - (b) shall be of a grade senior to the grade of the person who made the decision
- (5) The officer carrying out the review shall have regard to the information contained in the application and may make or cause to be made such enquiries as he or she considers appropriate and may—
  - (a) confirm the decision the subject of the review on the same or other grounds having regard to the information contained in the application for the review, or
  - (b) set aside the decision and substitute his or her determination for the decision.
- (6) A person who makes an application under paragraph (1) for the review of a removal order may, at the same, make an application for the suspension of the enforcement of the order.

- (7) Where a person makes an application under paragraph (6), the removal of him or her from the State shall, unless the officer carrying out the review is of the view that the removal decision is based on imperative grounds of public security, be suspended until such time as that officer makes his or her decision under paragraph (5)."

### High Court Judgment

40. The trial judge by way of preliminary comment noted that the initial application was, "it seems on the basis of human error", based only on Mr. Miah's dependency on Mr. Shishu (reg. 5(1)(a)(i)), and that the initial decision was made on that basis, but that the Impugned Decision also considered the issue of whether he was a member of Mr. Shishu's household (reg.5(1)(a)(ii)). He rejected the Minister's contention that he should only have regard to the dependency issue, notwithstanding that the impugned review decision had regard to household membership – "given that there was a level of error on both sides and that the Minister has in any event made submissions on the household issue" – and decided to "review the Impugned Decision as it actually emerged".

41. The trial judge then addressed 5 questions arising in the judicial review:

- (1) *Did the Minister err in his application of the relevant provisions of the EC (Free Movement of Persons) Regulations 2015?* The trial judge answered this as follows:

"4. Yes. By letter of 20.06.2016, Mr Miah's solicitors made application for a residence card for Mr Miah. For that application to succeed, Mr Miah first had to get through the hoop of establishing himself to come within reg.5(1). In his initial decision of 09.05.2017, the Minister refers to Mr Miah's '*application to be treated as a permitted family member of a Union citizen under Regulation 5(2)*'. However, the only decision that falls to be made under reg.5(2) is whether one is a person to whom reg.5(1) applies; the decision as to whether or not an applicant should be treated as a permitted family member falls, per reg.5(4), to be made under reg.5(3). The Minister later states that '*It is not accepted that you submitted sufficient documentary evidence to show you are a dependent of the Union citizen*'. If that is the case, then reg.5(3) could not come into play. Regulation 5(3) empowers the Minister to '*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 these Regulations as a permitted family member*'. But the Minister can only so cause if, per reg.5(3), he is '*satisfied that the applicant is a person to whom paragraph (1) applies*'. However, the Minister expressly concludes in the initial decision that '*It is not accepted that you submitted sufficient documentary evidence to show you are a dependent of the Union citizen*', i.e. that reg.5(1) does *not* apply. In the Impugned Decision, the Minister again confirms that he does not accept that the requisite dependence under reg.5(1) presents. That being so no decision arises to be made under reg.5(3). Regulation 5(5)(a) which is clearly relied upon in the Impugned Decision, e.g., in its reference to the extent and nature of dependency, only comes into play '*where the applicant is a dependent of the Union citizen concerned*' and in the context of reg.5(3); but

here the Minister has reached a decision under reg.5(2) that Mr Miah is not a dependent to whom reg.5(1) applies and is not making a decision under reg.5(3). By bringing reg.5(5)(a) criteria to bear in a reg.5(2) assessment of status under reg.5(1) and by concluding, as he did, that there was a want of evidence that is required under reg.5(5)(a), the Minister erred in law in identifying a deficiency of documentation provided in respect of matters that did not properly arise for consideration."

- (2) *Did the Minister act unreasonably and/or in breach of EU Law and/or the 2015 Regulations in determining that the second applicant had failed to provide sufficient evidence that he was a member of the first applicant's household?* The Trial Judge answered this 'yes'. He referred to the treatment in the Impugned decision of the "numerous documents" submitted where it was stated –

"...It is not evident from the documentation submitted, however, that you resided within the household of the EU citizen prior to your departure for Ireland. You have not provided sufficient evidence to show how many people were living at the UK address mentioned, their relationship to you, or the length of time that you and the EU citizen were residing at the address in question."

The trial judge then gave six "points of relevance" in support of his decision at para. 7:

- (i) he emphasised the obligation imposed on Member States by Article 3(2) "to facilitate entry and residence" for "members of the household of the Union citizen";
- (ii) he stated "the court has never previously seen an application of the type now in issue in which such an abundance of evidence was provided as to a particular point", and then listed (a) – (k) all the documentation linking Mr. Miah to Mr. Shishu's UK address and household;
- (iii) the trial judge then observed –

"a question-mark arises, given the volume and pertinence of the information referred to in (ii) whether the Minister paid due regard in the Impugned Decision to the obligation referenced at (i)";

- (iv) observing the absence of a definition of "household" in the Directive, he considered the word should be given its ordinary meaning, and that this should involve a "uniform application throughout the European Union. The trial judge then cited the Court of Justice in *CILFIT v Ministry of Health* (Case 283/81), para.18 that "[I]t must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions". He found informative the German version ("...or who lives with him in the same house in their country of origin"), the Greek ("...or lives under his roof in the country of origin"), and Spanish ("...or lives with the Union citizen beneficiary with the principal right of residence"), and considered this suggested "a

looser relationship to be contemplated by Art.3(2)(a) than is contemplated by the English language version”;

(v) the trial judge then stated –

“it follows from (iv) that (a) the proper meaning to be given to the notion of “household” within Art.3(2)(a) appears to be wider than recourse solely to the ordinary English meaning of same is appropriate; and (b) the statement in the Impugned Decision that “*You have not provided sufficient evidence to show how many people were living at the UK address mentioned, their relationship to you, or the length of time that you and the EU citizen were residing at the address in question*” would appear to go too far in terms of what is required under Art.3(2)(a) when one has regard to the various language versions of that provision.”

(vi) The Trial Judge states –

“even if one has regard solely to the English language meaning of ‘household’ that term is typically understood to embrace (a) a single person or group of people who regularly reside together in the same accommodation and who share the same catering arrangements; However, (b) it is of course possible for a single dwelling to contain multiple households if meals or living spaces are not shared. It seems to the court, with respect, that the Minister in his reasoning has had regard solely to conception (a) of what comprises a household and no regard to conception (b)”

(3) *Did the Minister act unreasonably and/or in breach of fair procedures in concluding that the second applicant had failed to submit satisfactory evidence that he was a dependent of the first applicant and/or a member of his household, without adopting procedures which would have enabled the second applicant to know what evidence he was required to adduce in order to establish same?* The trial judge answered this –

“Yes. The court does not consider that a approach by a decision-maker which amounts, in effect, to ‘Put in an application, I will not tell you even at the most general level, not even by way of non-binding guidance, what type of material I am looking for, but I will let you know if I do not see it’ is reasonable or entails fairness of procedure. It is unreasonable and unfair that the Minister should know what, at a general level, he is looking for when it comes to assessing applications generally, but will give no sense to applicants as to what it is that he is looking for, i.e. the unreasonableness/unfairness flows not from the Directive or the Regulations per se but from the closeted manner in which the Minister has elected to discharge his obligations to the detriment of applicants who, as a consequence of his approach, are unfailingly operating to some extent ‘in the blind’ when making an application such as that at issue here.”

The Minister had relied on the authority of *Subhan v MJE* [2018] IEHC 458 and *Safdar v MJE* [2018] IEHC 698 where it was held by Keane J that there was no obligation on the Minister to provide legal advice or “advice on proofs” as to the necessary requirements to show membership of the same household. Barrett J. distinguished those authorities because Keane J was not required to address the question of unreasonableness where “there is an absence of even generic guidance as to what it is the Minister looks for in an application”.

- (4) *Did the Minister act in breach of fair procedures and/or natural and constitutional justice by refusing the second applicant’s application on the basis of matters which were never put to him?*

The trial judge answered this ‘no’, that there was no obligation in this case to put points to the applicant for comment. He contrasted his own decision in *Chittajaliu and anor. v MJE* [2019] IEHC 521 in which he stated in para. 9 that “as a matter of basic fairness of procedures, the Minister, with respect, does need to be specific in an initial decision as to his specific expectations, if he expects that particular documentation will be produced.” In the present case, the trial judge stated, “there is no suggestion ...that the Minister had specific expectations as to particular documentation”.

- (5) *Did the Minister act unreasonably and/or irrationally in refusing the second applicant's application on the basis that he was not satisfied that he was dependent on the first applicant in the United Kingdom?* The trial judge answered –

“No. This was a decision that the Minister could properly reach on the evidence before him.”

#### **42. Grounds of Appeal**

The Grounds of Appeal can be summarised as follows:

- 1) The trial judge erred in law in finding that the Minister erred in his interpretation and/or application of the relevant provisions of the European Communities (Free Movement of Persons) Regulations 2015 in his consideration of Mr Miah’s application for a residence card.
- 2) The trial judge erred in law in finding that the Minister acted unreasonably and/or in breach of EU law and/or in breach of the 2015 Regulations in determining that Mr Miah had failed to provide sufficient evidence that he was a member of his brother’s household and in questioning whether the Minister had paid due regard to Article 3(2).
- 3) The trial judge erred in law in his findings regarding the proper meaning of the term ‘household’ as established by the Directive and implemented by the State under the 2015 Regulations. The court did not have to interpret the said term as it was not an issue between the parties. The divergence in linguistic texts was not a matter addressed by the parties. The trial judge also erred in the consequences for the Impugned Decision of the meaning he attributed to ‘household’.

- 4) The trial judge erred in law in finding that the Minister acted unreasonably or in breach of fair procedures in concluding that Mr Miah had failed to produce satisfactory evidence that he was a dependent of Mr. Shishu or a member of his household, without adopting procedures which would have enabled Mr Miah to know what evidence he was required to adduce in order to establish same. No such obligation arises under EU or Irish law.
- 5) The trial judge erred in law in departing from the jurisprudence and/or wrongly interpreted *Subhan v Minister for Justice & Equality* [2018] IEHC 458 and *Safdar v Minister for Justice and Equality* [2018] IEHC 698.

### **Grounds of Opposition and Cross Appeal**

43. The Grounds of Opposition are in substance a traverse of the Grounds of Appeal, and assert that the trial judge's determinations were correct. There is a cross appeal on one ground:

"The trial judge erred in finding that the Respondent did not act unreasonably and/or irrationally in finding that he (the Respondent) was not satisfied that the second named applicant was financially dependent on the first applicant in the United Kingdom.

#### Legal Principles

"There was evidence of financial dependency before the Respondent. The second applicant had submitted evidence that he lived in the home owned by the first applicant and stated that he had not paid rent there. He also submitted evidence that the first applicant transferred money to his account on a regular basis during his time in the United Kingdom and the bank statements submitted did not show any other source of regular income. The Respondent did not refer to the particular test for dependency applied to this evidence as is required (see the recent, Court of Appeal decision in *V.K and Khan v Minister for Justice and Equality* [2019] IECA 232) and/or appears to have applied the wrong test. The Respondent used exactly the same formula of words in his decision to refuse second applicant's application on the 9th May 2017, upheld the decision of 12th October 2018, as were used in the decision in *Khan*, refusing the application on the basis that it had not been shown that the degree of dependency " was such as to render independent living, at a subsistence level by the family member in his/her home country impossible if the [financial and social support from the first and second applicants] were not maintained"

### **Issues that fall to be decided**

44. This judgment will address, as counsel did in their helpful written and oral submissions, four issues, although in relation to the two aspects to issue (ii) I have reversed the order adopted by counsel, and the cross appeal issue is divided to address the legal principles applicable to determining 'dependency' as well as the Minister's findings on dependency. The issues that I will address are therefore:

- (i) Whether the High Court was correct in finding the Minister erred in his application of the relevant provisions of the 2015 Regulations.
  - (ii)(a) Whether the High Court erred in its findings regarding the proper meaning of the term 'member of the household' as established by the Directive and implemented in the State under the 2015 Regulations, and
    - (b) Whether the trial judge was correct in finding that the Minister acted unreasonably and/or in breach of EU law and/or in breach of the 2015 Regulations in determining that Mr. Miah had failed to provide sufficient evidence that he was a member of Mr. Shishu's household.
  - (iii) Whether the High Court was correct in finding the Minister acted unreasonably and/or in breach of procedures which would enable an applicant to know what evidence they are required to adduce in order to satisfy the Minister of the bases for their application.
  - (iv)(a) Whether the Minister adopted the correct legal test for determining whether Mr. Miah was 'dependent' on Mr. Shishu, and
    - (b) Whether the High Court was correct in finding that the Minister did not act unreasonably and/or irrationally in finding that he was not satisfied that Mr. Miah was dependent on Mr. Shishu in the United Kingdom.
45. Before addressing these issues two matters should be noted. Firstly there was no challenge in this court to the fact that only the dependency ground was cited in the initial application to the Minister, or that the High Court dealt also with the claim based on membership of the same household. This was entirely appropriate as Form EU4 seeking review together with the supporting documentation expressly relied on both grounds, and it is abundantly clear that on the review INIS officers on the Minister's behalf engaged with both grounds and made recommendations and reached the Impugned Decision having considered and rejected both grounds. It does not detract from this point that the ultimate decision on review confirmed the Initial Decision of 9 May 2017 that was based only on dependency.
46. This brings me to a second point, which is that the Impugned Decision expressly confirmed the refusal in the Initial Decision of the application to be treated as "a permitted family member". Insofar as the Initial Decision only addressed dependency, and reached certain conclusions on that issue, in my view the Impugned Decision falls to be read as confirming those findings, at least insofar as it does not differ in its reasoning. In my view it follows that the Initial Decision and the Impugned Decision must be read together. Of course the Impugned Decision also addressed the 'member of household' ground and the validity of the reasoning for the decision to refuse on that ground must be considered in the light of the wording in the Impugned Decision.

**(i) Whether the High Court was correct in finding the Minister erred in his application of the relevant provisions of the 2015 Regulations.**



47. Counsel for the Minister argued that before deciding under Reg. 5(3) whether an applicant should be treated as a permitted family member the Minister must first consider the documentation submitted and be satisfied that the applicant is a person to whom Reg.5(1) applies i.e. is a member of the family (other than a 'qualifying family member') – and dependant on or a member of the household of the Union citizen. It was submitted that in so doing the Minister was obliged to consider all the evidence submitted – not limited to documents required to be produced under Reg.5(2). Only if that initial decision was favourable i.e. the Minister was "satisfied that the applicant is a person to whom paragraph (1) applies" (the first limb of Reg.5(3)) would the Minister be required to "carry 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 these Regulations as a permitted family member of the Union citizen concerned" (the second limb of Reg.5(3)). Counsel accepted that the circumstances to be taken into account in the first decision might "overlap to some degree" with the "extensive examination of personal circumstances" required for the decision to be made under the second limb of Reg.5(3), and that further consideration of the same material might be required, but this accorded with the "structure and logic of the Regulations" (para. 19).
48. Counsel brought to the attention of the court an appeal heard recently in the Supreme Court, *Pervaiz v. Minister for Justice* [2020] IESC 27, a case concerning an application under Reg.5(1)(b) (the "partner with...durable relationship" ground) which it was said had some parallels and in which judgment, which was awaited, might assist the court on the correct interpretation of Reg.5(3). The judgement of the Supreme Court in *Pervaiz* did come to hand, and as will be seen later in this judgment it was of assistance in addressing this question.
49. In support of the Minister's submissions Counsel relied on the references in the EU1A application form to it being an application for a Residence Card for a permitted family member, and similar references with citation of Reg.5(2) in the 'Recommendation Submission' of 27 April 2017, and in the 'Decision Submission' dated 9 May 2017, which also referred to insufficiency of documentary evidence "as required by Regulation 5(1)(a)(i)". Counsel also relied on the conclusion in that 'Decision Submission', repeated in the final paragraph of the decision of 9 May, 2017, that Mr. Miah was "not a person to whom the Regulations apply", words which were said to approximate to those used in the first limb of Reg.5(3) which it will be recalled reads -
- "(3) Upon receipt of the evidence referred to in paragraph (2), and on being satisfied that the applicant is a person to whom paragraph (1) applies, the Minister shall cause to be carried out a complete examination of the personal circumstances of the applicant..." [Emphasis added].
50. Counsel also relied on similar wording adopted in the review request, and then relied on an INIS letter of 6 June 2017 which stated –

"Further to your correspondence the Regulations and the Directive allow for an extensive examination of the personal circumstances of the applicant".

This reliance however would seem to be misplaced, because it adopts the wording of the second limb in Reg.5(3) which, on the Minister's case, only comes into play once the Minister is satisfied the applicant is a person to whom Reg.5(1) applies.

Reliance was also placed on further references to Reg.5(1) and (2) in the 'Recommendation Submission' of 27 September 2018 and the use of similar terminology in the 'Review Officer Decision' and letter of notification, both dated 12 October, 2018, reflecting failure by the applicant to satisfy the Minister on dependency or membership of the Union citizen household as required by Reg.5(1).

51. Counsel then argued that the trial judge erred in his analysis and conclusion in para. 4 of his judgment where he stated –

"By bringing reg.5(5)(a) criteria to bear in a reg.5(2) assessment of status under reg.5(1) and by concluding, as he did, that there was a want of evidence that is required under reg.5(5)(a), the Minister erred in law in identifying a deficiency of documentation provided in respect of matters that did not properly arise for consideration."

It was submitted that the 'Review Officer Decision' and the Impugned Decision clearly involved assessment of dependency and household membership based on the evidence submitted, and did not make any reference to Reg.5(5)(a) criteria, which it will be recalled relate *inter alia* 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 to the applicant prior to the applicant's coming to the State, having regard, amongst other relevant matters, to living costs in the country from which the applicant has come, whether the financial dependency can be satisfied by remittances to the applicant in the country from which the applicant has come and other financial resources available to him or her".

### **Respondent's Submission**

52. Counsel for Mr. Miah argued, as they had done in the High Court, that the Minister had refused the application at the first stage of the decision-making process in accordance with Reg.5(2), but that he erred in so doing by relying on criteria set out in Reg.5(5).
53. It was pointed out that in the High Court the Minister argued that he had made his decision after making an extensive examination of personal circumstances in accordance with Reg.5(3), including consideration of the extent of dependency and duration of cohabitation, which are matters arising for consideration under Reg.5(5). It was argued further that Counsel for the Minister made an oral submission to the High Court to the effect that it was clear that the Minister had conducted a final examination of the application in accordance with Reg.5(3) taking into account the factors set out in Reg.5(5).

54. Counsel for Mr. Miah therefore submitted that the trial judge in his judgment had clearly accepted that the Minister refused the application on the basis of Reg.5(5) criteria in the context of an examination of personal circumstances, and correctly concluded that in so doing the Minister erred in reaching a decision on dependency for the purposes of Reg.5(1) and (2) while having regard to Reg.5(5) criteria.
55. It was submitted that the Minister had not appealed the trial judge's finding of fact that he relied on Reg.5(5) criteria, and cannot now argue that Reg.5(5) criteria were not applied by him. It is objected that the Minister cannot now take up a position diametrically opposed to the position adopted in the High Court, and in that regard reliance is placed on *Lough Swilly Shellfish Growers Co-operative Society & Atlanfish Ltd v Bradley & Ivers* [2013] IESC 16, where O'Donnell J. referred to "the spectrum of cases in which a new issue is sought to be argued on appeal", and identified at one extreme cases which would include one –

"...where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced."

## **Discussion**

56. The relevant part of the Minister's written Submission before the High Court stated:

- "2. The Second Applicant's application for an EU residence card was refused by the Respondent at first instance in accordance with Regulation 5(3) of the 2015 Regulations. In the Respondent's decision of the 12th October 2018, the decision of the 9th May 2017 was upheld.
3. The extent of dependency and duration of cohabitation are matters which arise for consideration under Regulation 5(5) of the 2015 Regulations which in turn only arises for consideration in the context of an extensive examination carried out pursuant to Regulation 5(3). It is therefore submitted that the Respondent did not err in law in refusing the second Applicant's application. It was refused lawfully in accordance with Regulation 5(3) of the 2015 Regulations.
4. Indeed, in correspondence to the Applicant dated the 6th June 2017 the Respondent refers to the Regulations and the Directive allowing "an extensive examination" of the personal circumstances of the Applicant and therefore it is clear that the decision was made under Regulation 5(3)."
57. This does seem to be a submission based on the Minister actually having carried out "an extensive examination" under the *second limb* of Reg.5(3). Moreover it does appear that INIS did in fact undertake what may be characterised as "an extensive examination of the personal circumstances of the applicant". In the context of further supporting documentation furnished by Mr. Miah's solicitors on 1 June 2017, the INIS letter of 6 June, 2017 which acknowledged receipt expressly mentioned that "the Regulations and the Directive allow for an extensive examination of the personal circumstances of the

applicant”, and this suggests that that is what INIS undertook. In her Recommendation Submission Ms. NíFhrighil discusses the “degree of dependency”, and in the Impugned Decision Mr. Carleton accepts that bank statements indicate that Mr. Miah “did, indeed, receive some small financial transfers from his brother while he was in the UK”, but proceeds to carry out the sort of qualitative assessment of dependency that is contemplated by Reg.5(5)(a).

58. In my view it was open to the trial judge to find, as he did, that the Minister brought to bear Reg.5(5)(a) criteria in making the impugned decision. But that is not the end of the matter.
59. The trial judge then concludes that the Minister erred in law in his application of the 2015 Regulations in that the Reg.5(5)(a) criteria were brought to bear “in a reg.5(2) assessment of status under reg.5(1)”. This reflects the trial judge’s view that an initial decision falls to be taken under the first limb of Reg.5(3) without an extensive examination of personal circumstances and without regard for the criteria in Reg.5(5). Counsel for Mr. Miah maintained that the trial judge correctly identified two very distinct stages in the decision making process under Reg.5.
60. This question of two stage decision-making was helpfully considered in the decision handed down by the Supreme Court since the present appeal was heard in *Pervaiz v Minister for Justice* [2020] IESC 27. That case concerned an application under Reg.5(1)(b) based on the applicant being “the partner with whom a Union citizen has a durable relationship, duly attested”. The judgment (Baker J) considers the procedure to be applied under Reg.5(3). After observing that Reg.5(3) adopted the wording used in Article 3(2) (“extensive examination of the personal circumstances of the applicant”), she stated:

“109. The precise sequencing envisaged by the provision was the subject of some controversy in the appeal, as r. 5(3) of the 2015 Regulations is somewhat opaque in its terms. It suggests, on first reading, that the Minister engages a two-stage process, first a process to satisfy himself or herself that the applicant is a permitted family member and thereafter, to carry out “an extensive examination” of the personal circumstances of that person. A process that is two-stage in that sense may be relatively straightforward in the case of certain classes of permitted family members who are a “member of the family” of a Union citizen. It may, for example, be relatively easy to ascertain on the basis of a blood relationship, or a legal relationship, such as marriage or civil partnership, that a person is a family member. It is less straightforward when what is to be ascertained is the nature of the relationship with the Union citizen.
110. Regulation 5(3) of the 2015 Regulations, therefore, in my view, envisages not so much two stages but a series of questions with which the Minister must engage. In the case of a person claiming to be a partner in a committed relationship with a Union citizen, the gateway provision is less easily satisfied than will be the case in an application by a person who has a blood or a formal relationship with a Union

citizen, and the evidence submitted, and analysis carried out by the Minister will overlap to a large extent.

111. I do not therefore agree with the submissions made on behalf of the State parties that the Minister is engaged in a two-stage process and that the Minister “facilitates” the application after an assessment is done of the nature and durability of the relationship. Quite apart from the fact that that is an overly artificial interpretation of the Citizens Directive and the 2015 Regulations, it seems to me that the Directive requires that the Minister engage with the facts presented by an applicant who seeks to come within the subcategory of permitted family member by reason of being a partner of a Union citizen, and must assess this application in the context of the individual circumstances identified by that person. The requirement from EU law is that the Member State put in place a system for assessing these applications, and that whatever mode of assessment is established, and whatever criteria are in place in national law, must be such as to not overly restrict the right of the permitted family member to be considered, whether that is on account of the means by which the application be made or the criteria to be applied.
  112. The Minister will assess the documentary evidence furnished by the applicant and examine all the individual and personal circumstances of the particular case without applying a blanket or general approach.
  113. The phrase used in the Citizens Directive that the durable relationship be “duly attested” does not sit easily in domestic legal parlance. I read that expression as requiring that the applicant provide evidence, in whatever form is relevant and suitable in the light of his or her circumstances, and that the Minister is to engage with that evidence not by the application of a general policy, but by reference to the individual facts and indicia of the relationship put forward by the applicant and established by evidence.”
- 
61. While there is a distinction, which is recognised by Baker J, between the “durable relationship” which must be “duly attested”, and the other subcategories of ‘permitted family member’, para. 111 of the judgment is clearly intended to apply more generally to applications under any of the subcategories, including applications based on dependency or ‘member of the household’.
  62. As Baker J says in para. 109, following a two-stage process may be relatively straightforward in cases where, for example, the basis of the application is a blood relationship, but less straightforward where what is to be ascertained is the nature of the relationship with the Union citizen. In the present case establishing the blood relationship of brothers is, one would have thought, relatively straightforward. Reg.5(2) is clear in its requirement that a valid passport be produced for the non-national of a Member State (Mr. Miah), together with “evidence that he or she is a member of the family of the Union citizen” - which Mr. Miah sought to establish by producing a series of family passports, birth certificates and a ‘Family Certificate’. However Baker J.’s observation about what is less straightforward can equally apply, in my view, to ascertaining whether an applicant is

'dependant' or 'a member of the household', particularly where those concepts are not defined by the Citizens Directive or in the 2015 Regulations and by their nature are less easy to determine, and where a wide range of fact and circumstance may be relevant to the determination.

63. To restrict the Minister to deciding that he is 'satisfied' on dependency or 'membership of the household' based only on the documentation constituting what might be termed the basic or minimum requirement of evidence produced under Reg.5(2), yet to ignore a large volume of additional documentation accompanying the application (or documentation or information furnished in response to a request from the Minister under Reg.5(4) or on review under Reg.25(5)), would indeed be an overly artificial approach to taking the overarching decision on 'permitted family member' required by Reg.5(6). It would be to require the Minister to selectively ignore documents produced by an applicant into order to make the 'gateway decision' under the first limb of Reg.5(3), only to then consider all such documents as part of the extensive examination of personal circumstances (including Reg.5(5) considerations) to decide whether the applicant is a 'permitted family member' under the second limb. I agree that Reg.5(3) is opaque, but if a segregated two stage decision making process was what the legislature had intended then I believe the 2015 Regulations would have been differently drafted. The Supreme Court has now given a clear indication that a narrow 'two stage' interpretation of Reg.5 does not apply except perhaps in the most straightforward of applications.
64. It follows that the Minister was not precluded from considering all the documentation and submissions produced in support of the application, and from undertaking what appears to have been an extensive examination of the personal circumstances of Mr. Miah, in coming to a decision that he was not satisfied that Mr. Miah was a dependant or member of the household of Mr. Shishu. Further the Minister was not precluded from undertaking at least some examination of the extent, nature and duration of the dependency, and extent and duration of financial support, and the duration of the period during which 'member of the household' is claimed.
65. Before leaving this issue it should be stated that this court did not consider it necessary to invite the parties to make additional submissions on the implications for this appeal of the Supreme Court's decision in *Pervaiz* before preparing this judgment. The reason for that is that, for reasons appearing later in this judgment, I do not believe that the decision on this issue is determinative.

**(ii) (a) Whether the High Court erred in its findings regarding the proper meaning of the term 'member of the household' as established by the Citizens Directive and implemented in the State under the 2015 Regulations, and**

**(b) Whether the trial judge was correct in finding that the Minister acted unreasonably and/or in breach of EU law and/or in breach of the 2015 Regulations in determining that Mr. Miah had failed to provide sufficient evidence that he was a member of Mr. Shishu's household.**

66. It was common case that in assessing 'membership of the household' the Minister was bound to consider the residence of Mr. Shishu and Mr. Miah in the UK, and specifically the residence of Mr. Miah in the 'household' of Mr. Shishu the EU citizen in the UK.

### **Minister's Submissions**

67. Counsel for the Minister argued that the Impugned Decision was correct in finding that although the parties resided together no evidence was submitted showing that the house in Merseyside amounted to the household of Mr. Shishu, there being no evidence to show in what capacity the parties lived in the house, who paid the rent/mortgage, or what other parties lived in the house. It was argued that the trial judge erred in finding that the Minister acted unreasonably and in breach of EU law in finding an insufficiency of evidence to show "how many people were living at the UK address mentioned, their relationship to you, or the length of time that you and the EU citizen were residing at the address in question", these being matters falling within the scope of the Minister's assessment process. In this regard reliance was placed on the decision of Baker J. in *Subhan and Ali v. Minister for Justice and Equality* [2019] IECA 330, for the propositions that the core members of the household must be identified to establish the factual link between the family unit and the non-Union citizen who seeks residence, that the members of that Union citizen's household must be persons who are in some way central to the non-Union citizen's family life, and that those family members must be an integral part of the core family life of the Union citizen.
68. It was therefore argued that the trial judge erred in giving the notion of 'household' a wider meaning, by reference to one who lives "in the same house" as the Union citizen, or "under his roof", or "lives with the Union citizen beneficiary with the principal right of residence", by reference to German, Greek and Spanish translations respectively of Art.3(2)(a), and in stating that these language versions suggested a "looser relationship" was contemplated by the article. Counsel also argued that the reliance on these other language versions for a cohabitation approach was not supported by any evidence. Counsel similarly criticised the trial judge's reference at para. 7(vi) of the judgment to the possibility that "a single dwelling [may] contain multiple households if meals or living spaces are not shared", arguing that it fails to address the central question as to whether the failure to facilitate residence to a particular family member would actually impede the free movement rights of the Union citizen in the first place.

### **Respondent's Submissions**

69. In reply submissions Counsel for Mr. Miah identify documentation produced to the Minister that showed that he had been living with Mr. Shishu from at least 30 May 2013 to 15 February 2016 at the UK address; that that home was owned by Mr. Shishu who paid the mortgage; that Mr. Miah and Mr. Shishu initially lived there with Mr. Shishu's ex-wife; and that they then lived there alone together after she moved out. It was therefore argued that the Minister's findings as to an absence of evidence as to who lived in the house and in what capacity, and who paid the mortgage were inaccurate.
70. The respondents were also critical of the Minister for failing to identify what additional documentation could usefully have been provided, pointing to the letters dated 1 June 2017, 4 January 2018 and 13 September 2018 where Mr. Miah and his former solicitors asked the Minister to confirm what additional documents might be required – the only response being in the letter of 6 June 2017 where the Minister stated that "It is

ultimately a matter for your client as to what information he wishes to put before the Minister in support of his application”.

71. It is therefore argued that the trial judge was correct in finding that the Minister acted unreasonably and/or in breach of EU law having regard to the documentation submitted, and that in relying on the reasons given the Minister based his decision on irrelevant considerations. Based on the test of reasonableness for review by the courts of decision-making under the Citizens Directive set out by the Court of Justice in C-89/17 *Banger v. United Kingdom*, counsel argued that the trial judge was right to quash the Impugned Decision as it was not “based on a sufficiently solid factual basis” (para. 51 of *Banger*).
72. Counsel also noted that, contrary to what is stated in para.3.3 of the Minister’s Notice of Appeal, different language versions (German and Spanish, but not Greek) of Art.3(2)(a) were relied on in written submissions on behalf of Mr. Miah in the High Court, and it was argued that the trial judge was entitled to have regard to these versions particularly having regard to the decision in *CILFIT* at para.18, as cited by the trial judge. It is noted that the Minister has never engaged with the different language versions, and it is suggested that the principle of effectiveness would be infringed if the High Court decision were to be overturned solely on this basis.

### **Discussion**

73. Since the decision of the trial judge the meaning of ‘member of the household’ under Article 3(2) was considered by Baker J. in this court in *Subhan and Ali v. Minister for Justice and Equality* [2019] IECA 330. While that decision was subject to a further appeal it is nonetheless helpful to consider the judgment of Baker J. Mr. Subhan was a UK citizen and Mr. Ali was a first cousin. Mr. Subhan lived in the UK for 15 years and became a UK citizen in 2013 and was married to a Pakistani citizen who continued to reside there. He moved to Ireland in 2015. Mr. Ali went to the UK on a four year student visa and claimed to have studied accountancy and later business administration. His visa expired in 2014. He claimed financial dependence on his cousin and also that he was a member of Mr. Subhan’s household as they lived under the same roof. The house was owned by Mr. Subhan’s brother, and Mr. Subhan’s parents and siblings lived there, and Mr. Subhan and Mr. Ali paid rent. The Minister rejected the claim for residency on both grounds, and did not regard the sharing of the same address in the UK as sufficient to demonstrate that Mr. Ali was a member of the household. In the High Court the applicants were unsuccessful. Keane J. did not accept that a person who cohabits or lives under the same roof as a Union citizen is, merely as a result of that cohabitation, a member of his or her household. On appeal it was argued that Keane J. had impermissibly posited a requirement that the Union citizen be an identified ‘head of the household’, but in upholding the High Court decision Baker J rejected that such a test had been posited in the High Court.
74. Baker J. reviewed the caselaw and gave the following guidance:  
  
“54. ...what has to be identified is the household of the Union citizen, and thereafter whether the applicant for permission to enter and remain is a member of that



household. The centrality of the Union citizen is what is in issue, not whether the Union citizen heads up the group or governs the living arrangements within the dwelling. Insofar as the phrase 'head of the household' is used in the authorities from England and Wales, it seems to me that it was used more as a matter of convenience or as a colloquial expression. What is required is that the core members of the household are to be identified for the purpose of identifying the factual link between the family unit thus defined or identified and the non-Union citizen who seeks to derive a right therefrom."

Baker J found helpful the Opinion of Advocate General Bot in *Secretary of State for the Home Department v. Rahman* (Case C-83/11), in several respects –

- (1) that the provisions of the Citizens Directive must be given a teleological interpretation having regard to their objective to promote the primary and individual right of the Union citizen to move and freely reside with the territory of the Member State;
- (2) that "the interpretation of national rules must respect the autonomous meaning of the Citizens Directive as a matter of EU law and uniform interpretation throughout the Member States is to be achieved" (Baker J. at para. 58);
- (3) with reference to Art.3(2), that the Citizens Directive imposes upon Member States an actual obligation to adopt the measures necessary to facilitate entry and residence for persons coming within its scope, and which entail procedural obligations which require that the Minister carry out "an extensive examination" of the personal circumstances of an applicant, and also that the Member State justify the denial of entry or residence, adding "The Advocate General was, however, of the view that what in Ireland are termed 'permitted family members' do not benefit from a presumption of admission" (Baker J. para. 59); and
- (4) at para. 60 Baker J said:

"60. Paragraph 75 of the opinion presents a helpful explanation of the concept of family life in the context of the interpretation of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. He described 'family life' in that context as:

'characterised by the presence of legal or factual elements pointing to the existence of a close personal relationship, which makes it possible, for example, to include, under certain circumstances, ties between grandparents and grandchildren or *ties between brothers and sisters*.'" [Emphasis added]

75. At para. 63 Baker J. said:

"63. As to how one is to identify the members of the 'household' of the Union citizen, Buxton L.J., in *KG (Sri Lanka) v. Secretary of State for the Home Department*<sup>1</sup> at

para 77. said that the test was not whether the Union Citizen and the relative were members of a 'communal household', nor was it a test of whether they lived under the same roof, but rather the requirement was that the family member having been living with the Union citizen "under his roof" (my emphasis). As he said, it was based on living in that circumstance that the Union citizen could have a reasonable wish to be accompanied by that person when he exercised his free movement rights to travel to another country."

Baker J then gave the following guide to assessing the meaning of "household" in a particular case –

"67. Of itself, however, it seems to me, for the reasons that will appear, that the principle is not met by perhaps the formulistic identification of a 'head of household', but rather by ascertaining whether the cohabitation or co-living arrangements are more than merely convenient, and whether the non-Union citizen family member is part of a cohesive, long term, coherent and single unit which might generally be called a 'household'. With that in mind it seems to me that the living arrangements are not to be viewed with a bird's eye view of a single moment in time but must rather have some regard to the durability of the co-habitation, and also of what future intentions can be objectively presumed regarding the continued existence of the household.

---

<sup>1</sup> [2008] EWCA Civ 13, [2008] WLR D 11

68. It may be more useful to consider the notion of household by reference to what it is not. Persons living under the same roof are not necessarily members of the same household and they may well be what we colloquially call housemates. An element of sharing that is necessary in a household may well be met in that the persons living together may agree on a distribution of household tasks and a proportionate contribution towards household expenses. But because, for the purpose of the Citizens Directive, one must focus on the living arrangements of the Union citizen, the members of the household of the Union citizen must, on the facts, be persons who are in some way central to his or her family life, that those family members are an integral part of the core family life of the Union citizen, and are envisaged to continue to be such for the foreseeable or reasonably foreseeable future. The defining characteristic is that the members of the group intend co-living arrangement to continue indefinitely, that the link has become the norm and is envisaged as ongoing and is part of the fabric of the personal life of each of them.
69. It is not a test of with whom the Union citizen would choose to live, but rather, with whom he or she expects to be permitted or facilitated to live in order that his or her family unit would continue in being, and the loss of whom in the family unit is a material factor that might impede the Union citizen choosing to or being able to exercise free movement rights. That second element, it seems to me, properly reflects the core principle intended to be protected by the Citizens Directive.

73 ...The correct approach, it seems to me, is to look at the core family connections of the Union citizen and how those core connections may properly be understood and supported to enable free movement and establishment of the Union citizen in the host Member State. There must, in those circumstances, be at least an intention or an apprehension that the permitted family members would continue to reside under the same roof in the host Member State not merely for reasons of convenience, but for reasons of emotional and social connection, affection, or companionship.”

76. In argument before Baker J counsel for the Mr. Subhan and Mr. Ali referred the court to the reliance by Barrett J in the present case on other translations of ‘member of the household’ in Article 3(2) – German, Spanish and Greek. Baker J declined to rely on these for her analysis because of the informal nature of the translations, the fact that no case law from the domestic courts of Germany, Spain or Greece was presented, and the absence of any expert evidence as to how the language was interpreted in the domestic courts.

77. Leave for further appeal was granted in *Subhan* in respect of two issues:

- (i) the circumstances in which parties may cite and rely on alternative language versions of Directives, Regulations or other EU instruments; and
- (ii) the true meaning to be given to the term “member of household” in the Directive, and in the Regulations applying that term.

The judgment of the court was delivered by Charleton J on 21 December, 2020 reported at [2020] IESC 78. At paragraph 29 he noted that a court of first instance has a discretion to refer –

“...But, if the national court is a court of final appeal it must make a preliminary reference unless the CJEU has already ruled on the point and the existing CJEU case-law is clearly applicable, or unless the law is “*acte claire*” meaning the interpretation is obvious; *Srl CILFIT v Ministry of Health* (1982) Case 283/81”.

Deciding that the meaning of who is a member of the household of an EU citizen is not *acte claire* he determined that a reference was necessary (“the Reference”). The Reference is signed by Clarke C.J. and poses the following two broad questions:

- “1. Can the term member of the household of an EU Citizen, as used in Article 3 of Directive 2004/38/EC, be defined so as to be of universal application throughout the EU and if so what is that definition?
- 2. If that term cannot be defined, by what criteria are judges to look at evidence so that national courts may decide according to a settled list of factors who is or who is not a member of the household of an EU citizen for the purpose of freedom of movement?”

78. In setting out ‘The need for a reference’ the Reference states:

- “25. The test as to who is a member of the household of an EU citizen could depend on whether that person is the principal person or head of the household. While this is an old-fashioned term, it may none the less be of some use in distinguishing family relationships that are covered by the Directive and those which are not. What are the criteria is the issue. Just because cousins are close, as many cousins are emotionally and in terms of time spent together while growing up, does that necessarily mean that if one is an EU citizen the others are members of that citizen’s household? In Ireland, it is common in the older generation, over 50, to have two or even three dozen first cousins. Where people have multiple marriages, that number may be equally large for cultures which support such customs.
26. It is perhaps to be noted that family members in the Directive centre on the nuclear family, two parents and their children. Children grow up and it is possibly significant that aged 21, unless there is dependency, perhaps due to health issues or because of extended study funded very substantially by the parents, the state of childhood ceases. Children do not then move as of right with their parents. What is the position of cousins in middle age? It may be relevant to question whether these could constitute permitted family members where both are in good health and capable of working? The concepts of family members and permitted family members perhaps should be considered as a package of legislative rules and not in isolation.
27. Reference to other languages may or may not be helpful, a literal translation is possible but the resonance in that language may be lost. This Directive illustrates this. The phrase that someone is a member of the household of an EU citizen: in German is “oder der mit ihm im Herkunftsland in häuslicher Gemeinschaft gelebt hat” which literally says or who lives with him in the same house in their country of origin; in Greek “ή ζει υπό τη στέγη του στη χώρα προέλευσης” which literally says or lives under his roof in the country of origin; in French, perhaps most eloquently “si, dans le pays de provenance, il est à charge ou fait partie du ménage du citoyen de l’Union bénéficiaire du droit de séjour à titre principal” declaring that the right emerges from dependency or being part of the household; in Italian “se è a carico o convive” which might literally only mean people living together; and in Spanish “o viva con el ciudadano de la Unión beneficiario del derecho de residencia con carácter principal”, literally saying lives with the Union citizen beneficiary with the principal right of residence.
28. What is a household may not be capable of a precise definition. But it is an EU-wide concept which requires clarification. Perhaps that may be best done by a set of criteria, the existence of which may enable national courts to achieve a uniform interpretation. One criterion which is important is time. The length of time spent in the household of the EU citizen is important. This may indicate a transitory or a settled embeddedness in the household of the EU citizen. But does there have to be a principal person or head of a household, who is the EU citizen, as opposed to friends or siblings sharing accommodation? Could everyone sharing quarters with

everyone else be mutually members of that other's household where one is an EU citizen? Hence, another important criterion may be purpose. Where a cousin comes to a household for a purpose, as is very common in Ireland, for instance to study at a university, or to assist for a time with child rearing, that relationship is not settled but is dependent on externals; how long a course will last or when a child may be ready to go to school. A further criterion may be intention. Is there a settled purpose in the EU citizen to accept a non-EU citizen into their household as a member of the household or was there some transitory or task-specific reason behind the non-EU citizen being there? What also may be important as a criterion is the relationship as between those sharing accommodation, be they cousins or friends or work colleagues. Who is the dominant party, is it the EU citizen? Or is it the non-EU citizen. By dominant, here might be meant with authority to accept the non-EU citizen into the EU citizen's household. Could that EU citizen ask the non-EU citizen to leave? On the other hand, is this a house or flat sharing arrangement, many of which endure for years because it suits both parties, but does that make each person sharing accommodation a member of the household of the other, and on what basis? Finally, it is suggested as a possible criterion that since the purpose of the Directive is to facilitate free movement, it has to be asked if Mr Subhan, as an EU citizen, moves from Britain to Ireland, how would it inhibit him if Mr Ali did not come with him? If an inhibition is alleged, is this because of a sexual relationship, which perhaps is based on another legal aspect of being an "enduring relationship properly attested" equivalent to espousal and hence not relevant here, or because of emotional ties (how hard are they to break?) or because an arrangement suited, if so why and for what reason and over what time?"

79. Whilst I have considered whether a decision on this appeal should be deferred pending the outcome of the Reference in *Subhan*, I do not believe it is necessary or appropriate for a number of reasons. Firstly, for reasons that are explained later, I am of the view that the cross appeal on the dependency issue must succeed. Since the matter must therefore be remitted to the Minister for further consideration in any case there is no point in delaying a decision in this court. This is particularly so in circumstances where other Member States are likely to want to make submissions, and the progress or the Reference before the CJEU may take some time. It will be a matter for the Minister to decide whether to await the decision of the CJEU before determining Mr. Miah's application, or at any rate the alternative claim based on membership of the household of Mr. Shishu if the dependency claim is unsuccessful.
80. Secondly, a timely decision on Mr. Miah's application is also important – he is relatively young (now 28) and currently is not entitled to work in the State, and that has been the position since he arrived here in March 2016, and indeed since he arrived in the UK in May 2013.
81. Thirdly there are important differences between the factual position in *Subhan* and the present appeal. Mr. Subhan and Mr. Ali are cousins, whereas Mr. Shishu and Mr. Miah are brothers, generally speaking a significantly closer relationship than that of cousinship.

The age gap between Mr. Subhan and Mr. Ali is 8 years – here it is 14, and therefore even more indicative of Mr. Shishu being the senior party in the relationship. Mr. Subhan’s brother owned the house, and his parents and siblings lived there. If the test depends on whether the EU citizen is ‘head of the household’, or one criteria is ‘who is the dominant party?’ – as suggested in the Reference (at para.28) - then there is arguably a much stronger case to be made in the present case. Further Mr. Ali arrived in the UK on a student visa, and studied accountancy and business administration, and the relationship with Mr. Subhan and his family is therefore open to the interpretation that it was for a defined purpose and not intended to be permanent; the same considerations do not apply to Mr. Miah who came on a visiting visa, and did not study. As the Reference suggests, the length of time spent in the household of the EU citizen is important and “may indicate a transitory or a settled embeddedness in the household of the EU citizen” – in domestic law this is a specific consideration under Reg.5(5). Mr. Miah has now lived in the same household – or at least under the same roof – as his brother since 2013 in three locations.

82. Apart from these distinguishing features, it seems to me that by ‘other family members’ who are ‘member(s) of the household of the Union citizen’, Article 3(2) envisages certain basic elements that will not be altered by the answer to the Reference. First there must be a familial relationship. Secondly, the EU citizen and his household i.e. his physical accommodation in an EU member state, and who lives with him, need to be identified to the decision-maker. Thirdly the non-EU citizen family member must live in the EU citizen’s accommodation in that other member state. Fourthly the non-EU citizen family member must live with or together with the EU citizen. Fifthly the duration of that living together is relevant.
83. The foregoing findings are by reference to our official English language version of Article 3(2)(a), as that is the version, along with the Irish language version, which is operative in our courts. This is in line with the approach to interpretation confirmed by the judgment of Charlton J. in *Subhan*, in which he cautions that other language versions as an aid to interpretation only become relevant if there is ambiguity and a preliminary reference is under consideration. In any event, in my view the essential considerations which I have just identified do not seem to alter significantly even if reference is made to the German, Greek, French, Italian or Spanish language versions as they appear in paragraph 27 of the Reference.
84. In my view in this appeal consideration of these clear elements by the Minister, and the manner in which they were addressed by the Minister, are sufficient for this court to undertake a ‘reasonableness’ analysis of the Impugned Decision without awaiting the answer to the Reference. Before doing so I will address the trial judges finding as to the meaning of ‘member of the household’ based on different language versions of Article 3(2).

#### **Reference to different translations**

85. It may be thought that this issue is now academic given the Reference by the Supreme Court on the definition of or criteria to be considered in deciding on ‘member of the

household'. However it was specifically addressed and decided by Charleton J in *Subhan*, where he also referred to Barrett J's decision in the present case.

86. Charlton J stated:

"27. Reference was made to other cases where judges had drawn on their own competence in other languages to examine the text of, in particular, this directive and to comment on and compare versions. For instance, in Barrett J in *Shishu v. Minister for Justice and Equality* [2019] IEHC 566, set out a number of informal translations of the German, Greek, and Spanish text of Article 3(2)(1) of the Citizens Directive. At paragraph 7, he commented that the "proper meaning to be given to the notion of "household" within Art.3(2)(a) appears to be wider than recourse solely to the ordinary English meaning of same is appropriate." Thus in Spanish, the phrase used is "viva con el", which Barrett J translated informally into English as "lives with the Union citizen". If considered on its own, and not in the context of the words surrounding it and with a teleological interpretation, this could be made to seem to connote no more than living under the same roof. In reality, however, this must work both ways and where a language literally says "living with him or her", then reference can be had to the English language version whereby it is clear that more than merely sharing a house or flat is legally required but in being a member of a household, that is the household of the EU citizen."

87. Charleton J then addressed the 'Proper approach to language versions' as follows:

"32. It is only at the stage of considering a reference that it should be necessary to consider any possible lack of clarity in other EU language versions. The version of any Directive or Regulation is operative in English or in Irish. These are the official languages. That version has equivalence and equal validity to any other language version. It is to import complication where it is not necessary to view this matter the other way around as if to say that a national court can do better in interpretation through a mental exercise placing it in another country and using another language which is not the court's máthairtheanga, mother tongue, and in respect of which a court cannot know the resonances of that language or how a phrase carries a meaning beyond the literal.

33. This is neither necessary or desirable. EU legislation is not ordinarily to be read other than in the official languages of the State; opinion of Advocate General Jacobs, *Wiener v Hauptzollamt Emmerich* (1997) C-338/95. That is the version that is valid and the version that is designed for the greatest level of precision of which language permits in EU legislation. Where there is doubt about the language of EU legislation as to what it means, a teleological interpretation should be adopted in the light of the recitals, the surrounding and referential text and the ultimate purpose of the legislation; see Craig and de Búrca, *EU Law* (6th ed OUP 2015) 64 as to the proper approach to interpreting EU legal instruments and see *JC Savage Supermarket v Becton* [2011] IEHC 488, 3.8-3.11. Only if a lack of clarity thereby emerges and in the context of considering a reference should any issue as to other

languages emerge. Consulting such languages is for the purpose of clarity and not to bring a lack of clarity to what is expressed in the official languages. It evokes the law of diminishing returns to leave the document in the language we have the best hope of interpreting and look to other language versions; but where there it can be said that some of the other language versions throws a light on the it may be possible to refer the court to another language version with which the court may be familiar and, if the point is of any substance, it should be apparent from that; an analysis of a legal kind that does not require proof, or translation. If however it is suggested there is a nuance which only emerges from translation and when a party intends to refer to a translation of another language version that party should give notice to the other party. This, however, is not to become a court contest of computer translation resources.

34. Further, this should not normally be an issue. The language or languages of the Member State is the language for use as the invariable tool of interpretation. In rare instances, where some asserted ambiguity is contended for, the ordinary response must be to use the interpretative tools for discerning the intention of the legislation; the context of the stated rule, the purpose as revealed in the recitals and the teleological analysis as to where the text is directed. This, properly so called, is interpretation as recognised in a court of law. Not stumbling searches in the undergrowth of multiple languages for some tangle with which to ensnare that which is clear by ordinary interpretive tools with a supposed pan-linguistic conflict. If other languages are called in aid on a claim of ambiguity, and an asserted nuance is pointed out, this has to be done in an orderly manner. There has to be a procedure for this polyglot excursion, otherwise a chaotic invocation of Babel will stymie the order proper to interpreting what EU law has declared to be the official version for this country. Where, however, ordinary interpretive tools do not achieve sharp focus, and by reason of a lack of clarity, it is proposed by a litigant to refer to another language version, the normal course is to reference that in written submissions, where there are written submissions, delivered two weeks before the hearing by the party making this unusual assertion. These matters are not to be sprung on litigants, State or private, without notice. Where a case does not call for advance written submissions but such a point is regarded as essential by either side, where there are no written submissions, then a letter should be written to the opposing side at least two weeks prior to the hearing, thus giving time to consider the position. If there is a dispute as to meaning, then this changes from being a matter of submission to one of evidence. Where the opposing side indicated disagreement as to a point derived from a translation point, it will thus be necessary, in such wholly exceptional circumstances to allow for the exchange of affidavit evidence. Here the State never suggested that the translations offered were incorrect, and the Court was entitled to have regard to what was offered. Where unnecessary time and expense is devoted to a translation issue which goes against the asserting party, a court, in the exercise of discretion under Order 99 of the Rules of the Superior Courts, should start from the proposition that this will be



a matter for the adverse award of costs on that aspect of the case, irrespective of the outcome.”

88. The written Submission on behalf of the Mr. Shishu and Mr. Miah in the High Court at paragraph 41 quotes *CILFIT*:- “...it must be borne in mind that Community legislation is drafted in several languages and the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions”. Those Submissions then relied on different language versions of Article 3(2)(a), specifically referring to the German and Spanish wording and informal translations (paragraphs 41 – 44).
89. The Minister was not therefore taken by surprise, and does not seem to have suggested at any stage in the High Court, or in this court, that the informal translations offered were incorrect. Accordingly it was not necessary for there to be affidavit or other evidence to deal with any point of translation, and the trial judge was entitled, from an evidential point of view, to have regard to the other language versions.
90. The trial judge added to the mix his own translation of the Greek text, and from all three comparatives considered that the ‘household’ “appears to be wider than recourse solely to the ordinary English meaning of same is appropriate”. However in so doing he fell into error by not first considering our official language English/Irish text in context, and considering the Recitals, and applying a teleological interpretation, and further in considering the other language phrases on their own without reference to context/recitals in those languages, and by doing so otherwise than in the context of a possible reference under Article 267. Accordingly the process by which the trial judge came to his conclusion was flawed.
91. Moreover I agree with the observation of Baker J in *Subhan* that little weight could be attached to other language versions in the absence of any reference to caselaw from the domestic courts of Germany, Spain or Greece, or expert legal evidence as to how Article 3(2) has been interpreted in those countries.

### **Unreasonableness**

92. Turning then to the question of whether the Minister acted unreasonably in his finding of insufficient evidence, counsel for the Minister sought to distinguish *Banger v. Secretary of State for the Home Department* (C-89/17) on the basis that it was an effective remedy case. It was a case where a residence card had been refused to Ms. Banger, a national of South Africa, whose partner Mr. Rado was a UK national. They had lived in the Netherlands for some three years before moving to the UK where Mr. Rado had accepted employment. The refusal was based on UK Regulations which provided that only the spouse or civil partner of a UK national could be considered a family member.
93. While the reference did concern effective remedy, the court interpreted the fourth question as asking –

"43 ....whether Art.3(2) of Directive 2004/38 must be interpreted as meaning that third-country nationals envisaged in that provision must have available to them a redress procedure whereby matters of both fact and law may be reviewed by the court, in order to dispute a decision to refuse a residence authorisation taken against them."

It was in this broad context, which in my view is applicable to the present judicial review, that the court stated –

"48. Since the provisions of Directive 2004/38 must be interpreted in a manner which complies with the requirements flowing from Article 47 of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment of 4 June 2013, ZZ, C 300/11, EU:C:2013:363, paragraph 50), those persons must have available to them an effective judicial remedy against a decision, under that provision, permitting a review of the legality of that decision as regards matters of both fact and law in the light of EU law (see, to that effect, judgment of 17 November 2011, Gaydarov, C 430/10, EU:C:2011:749, paragraph 41).

...

51. As regards its review of the discretion enjoyed by the competent national authorities, *the national court must ascertain in particular whether the contested decision is based on a sufficiently solid factual basis*. That review must also relate to compliance with procedural safeguards, which is of fundamental importance enabling the court to ascertain whether the factual and legal elements on which the exercise of the power of assessment depends were present (see, by analogy, judgment of 4 April 2017, Fahimian, C 544/15, EU:C:2017:255, paragraphs 45 and 46). Those safeguards include, in accordance with Article 3(2) of Directive 2004/38, the obligation for those authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence.

52. In the light of the foregoing considerations, the answer to the fourth question is 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." (Emphasis added)

94. In *Safdar v. Minister for Justice and Equality* [2019] IECA 329, Baker J. considered these passages in *Banger*, and after quoting para.51 above commented:

"45. The review is envisaged as an examination of the personal circumstances of the permitted family member and a justification to him or her of the reasons for the refusal of entry or residence."

I respectfully agree with that comment. Moreover in my view such an approach chimes with the standard by which reasonableness is to be judged that applies more generally to judicial review of asylum and immigration decisions following cases such as *Meadows v. Minister for Justice* [2010] IESC 3, and *Mallak v. Minister for Justice* [2012] IESC 59. I am satisfied therefore that the trial judge was required to satisfy himself that the Impugned Decision was made on a sufficiently solid factual basis, and that the reasons given were justified on a rational basis that took into account the personal circumstances of the applicants.

95. The trial judge, who has considerable experience hearing judicial reviews of decisions made under the 2006 and 2015 Regulations, stated that he "has never previously seen an application of the type now in issue in which such an abundance of evidence was provided as to a particular point." This was not just a reference to the number or quantity of documents submitted – it was a comment on the extent and "pertinence" (see para.7(iii)) of the evidence submitted. The Minister had a duty not just to consider this documentation but also to assess it in the round in the context of whether Mr. Miah was a member of Mr. Shishu's household, and in my view the Minister conspicuously failed to do this or come to a conclusion that was based on a sufficiently solid factual basis.
96. Specifically, the Impugned Decision states that Mr. Miah did not provide sufficient evidence to show how many people were living at the UK Merseyside address, or their relationship to him, or the length of time that he and Mr. Shishu were residing there – all of which for the reasons given earlier in this judgment must be regarded as core elements in assessing whether Mr. Miah was a member of the household of Mr. Shishu. It is hard to understand how this conclusion could have been reached by the Minister. The documents provided evidence from which it could be shown – or alternatively strongly inferred - that Mr. Miah had been living there at least from 30 May 2013 until 15 February 2016, a period of almost three years. The Land Registry printout showed that Mr. Shishu actually owned that property, and his mortgage statements showed he was discharging the mortgage. As to who was living in the household, the documentation showed that initially Mr. Shishu and his wife and Mr. Miah lived there and that when Mr. Shishu's ex-wife Ms. Doli Begum moved out only Mr. Shishu and Mr. Miah lived there - and no one else. The familial relationship between these occupants was also plain; as Mr. Miah said in his letter of 4 January 2018, at a time when he was unrepresented, "[H]e is my blood Brother we are from same Mother and Father", and the birth certificates, with which no issue was taken, bore this out. The trial judge also highlighted some eleven documents, including NHS correspondence, a prescription and a pharmacy invoice, receipts, bank statements and a physical delivery docket, submitted to the Minister that supported Mr. Miah's claims that he was living at that UK address.

97. There were other factors that the Minister does not appear to have taken into account in his overall analysis of whether Mr. Miah was a member of Mr. Shishu's household. Indeed he does not appear to have assessed their core personal/familial relationship at all, or to have given due weight to the fact that they are 'blood brothers', as Mr. Miah put it – and that fact alone makes it significantly different to a case such as *Subhan* where the familial relationship is that of first cousins. Mr. Shishu was born in 1978 and was almost 14 years older than Mr. Miah, and he had moved to the UK in 2001, worked as a chef and bought his house in 2004 or 2005, and lived there with his wife, and he became a UK citizen in 2009. Mr. Shishu was therefore well established, and very much senior, in every sense of that word, to his younger brother Mr. Miah. It was therefore likely that Mr. Shishu would be the senior or dominant family member upon whom Mr. Miah depended, or, to use the old fashioned phrase, the head of the household (assuming for the moment that these are relevant factors) and this is strongly supported by documentary evidence showing that Mr. Shishu discharged the mortgage, and made maintenance payments to Mr. Miah. It was also entirely plausible that Mr. Miah, who was not entitled to earn a living, would want to live with his brother and would depend on him for accommodation and financial support.
98. Also consistent with Mr. Miah being a member of Mr. Shishu's household in the UK is the evidence that when they moved to the State they lived together in Castleblayney, where Mr. Shishu paid the rent, and then they moved together to Ennis where they again lived together supported by Mr. Shishu working full-time in a restaurant. The Impugned Decision does consider that evidence, but discounts the evidence of co-habitation in Ennis on the basis that Mr. Miah was named as a co-tenant on the lease. That was not, in my view, a rational basis for discounting that evidence, as the reason Mr. Miah was named as a tenant was likely to have been the landlord's insistence that both occupants be named on the lease and be liable for the rent and on foot of the covenants, and further that the landlord had a statutory responsibility to register the tenancy with the Residential Tenancy Board – which in fact happened as evidenced by separate letters from the Board to Mr. Miah and Mr. Shishu confirming registration.

In my view the Minister also wrongly failed to assess the application in the round when considering the duration of Mr. Shishu and Mr. Miah's cohabitation, the fact that this continued in three different dwellings/locations, and whether it was their intention to continue to live together in a durable family relationship (again, assuming that to be a relevant consideration). Relevant to this is the absence of any evidence to suggest a temporary stay, such arrival in the UK on a student visa might suggest

99. The Minister also failed to consider the decision from the perspective of the rights of the Union citizen. It will be recalled that in *Rahman*, albeit in the context of dependency, Advocate General Bot opined that the provisions of the Citizens Directive must be given a teleological interpretation having regard to their objective to promote the primary and individual right of the Union citizen to move and freely reside with the territory of the Member State. In my view that must apply equally to the 'member of the household'

ground. The Minister failed to consider and assess the application from the perspective of Mr. Shishu, the Union citizen who holds the rights protected by the Citizens Directive.

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.
101. For these reasons in considering the basic elements required by Article 3(2)(a) to show membership of the household of a Union citizen, the Impugned Decision fails the test of reasonableness in that the Minister failed to assess the application from the perspective of the Mr. Shishu's right to reside and move freely within the EU, failed to assess it from the starting position that the applicants were brothers and that Mr. Shishu was 14 years Mr. Miah's senior and established in the UK with property ownership and a history of employment and marriage, failed to make findings or draw obvious inferences as to how long Mr. Miah lived in the Merseyside property and who else lived in the house/comprised the household, made an irrational finding in relation to Mr. Miah being named as a tenant on the Ennis property, and failed to assess the application in the round. Accordingly I would therefore dismiss the Minister's appeal on this issue.

**(iii) Whether the High Court was correct in finding the Minister acted unreasonably and/or in breach of procedures which would enable an applicant to know what evidence they are required to adduce in order to satisfy the Minister of the bases for their application.**

**The respondent's submissions**

102. The respondents rely on Art 3(2) of the Citizens Directive which requires that Member States "shall, in accordance with its national legislation, *facilitate* entry and residence..."(emphasis added). The respondents also point to Recital 14 which provides:
- "14. The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members."
103. Counsel referred the court to *Secretary of State for the Home Department v. Rahman and others* (Case C-83/11), in which the CJEU stated –

"24. In the light both of the absence of more specific rules in Directive 2004/38 and of the use of the words 'in accordance with its national legislation' in Article 3(2) of the directive, each Member State has a wide discretion as regards the selection of the factors to be taken into account. None the less, the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness."

104. The respondents rely on this and the 2015 Regulations, in particular Reg.5(4), as imposing an obligation on the Minister to disclose to applicants what evidence should be submitted in order to facilitate and permit entry and residence in the State, and argued that at a minimum the obligation was to enable an applicant to know, whether by publication on the Minister's website, specification on the application form, or through correspondence, what documentary requirements were imposed.

105. Factually Mr. Miah relies on the letters dated the 1 June 2017, the 4 January 2018 and the 13 September 2018, wherein Mr. Miah/his former solicitors asked the Minister to confirm what additional documentation might be required in order to support his application. The Minister responded once:-

"It is ultimately a matter for your client as to what information he wishes to put before the Minister in support of his application".

The Minister thus declined to clarify the documentation required.

106. The trial judge found that –

"...It is unreasonable and unfair that the Minister should know what, at a general level, he is looking for when it comes to assessing applications generally, but will give no sense to applicants as to what it is that he is looking for, i.e. the unreasonableness/unfairness flows not from the Directive or the Regulations *per se* but from the closeted manner in which the Minister has elected to discharge his obligations to the detriment of applicants who, as a consequence of his approach, are unfailingly operating to some extent 'in the blind' when making an application such as that at issue here." (para 9)

107. The trial judge went on to explain why this was not inconsistent with the judgments of Keane J. in *Subhan* and *Safdar*, where he rejected the arguments that there was any obligation on the Minister to give advice to applicants who were at all times legally advised as to the necessary requirements to obtain a residence card, or that failure to provide such advice was a breach of fair procedures. Barrett J quoted Keane J at para. 55 of *Subhan*:

"55. There was no obligation on the Minister to provide the applicants, who were legally represented at all material times, with additional legal advice concerning the necessary requirements to obtain a residence card as a permitted family member.

Those requirements are set out in the Citizens' Rights Directive. [The Minister's obligations thereunder] ... cannot extend to the provision of an advice on proofs."

Barrett J considered that Keane J. was there stating that there was no obligation on the Minister to provide *additional legal advice or advice on proofs*– something that Barrett J agreed with - but that Keane J was not asked to address the particular issue raised in the present case which he identified as "[D]oes an unreasonableness or unfairness present where there is an absence of even generic guidance as to what it is the Minister looks for in an application?"

108. Counsel for Mr. Miah also submitted that the passages from the judgment of Keane J in *Subhan* were *obiter*, and that although the decision in that case was upheld on appeal, it was not upheld on the basis of this *obiter* statement. Counsel further submitted that Keane J in both *Subhan* and *Safdar* was considering applications under the 2006 Regulations which did not have a provision such as Reg.5(4) in the 2015 Regulations that specifically provides that the Minister may make or cause to be made such enquiries as he or she considers appropriate, with the result that he is not "an entirely passive participant in the application process". It was argued that the decisions of Keane J cannot be authority for the proposition that in deciding a review application under Reg.25 the Minister can conceal the documentary requirements that he intends to impose on an applicant and then refuse the application on the basis that the applicant has failed to meet same.

109. At para.42 of their written submission, counsel submit:

"42. The Minister asserts that the requirements which he imposed on the second Applicant could not be described as obscure or unexpected. However, they were obscure and unexpected. They bore no direct relationship with the facts put forward by the second Applicant who had submitted that he and his brother had lived with his brother's ex-wife and then alone. The refusal of his application on the basis of his failure to provide documentary evidence regarding the other people living in his home and his relationship to them is incomprehensible in that context. To date, the Minister has been unable to offer any suggestion as to how a homeowner could prove that no one other than he and his brother lived in his home. How was the second Applicant to prove a negative? The documentary requirement imposed in that regard was entirely obscure. Similarly, the Minister refused the application on the basis that the second Applicant had not submitted information regarding his relationship with people who the Applicants say do not exist. The second Applicant had stated that no one lived with him and his brother other than his brother's ex-wife, whose relationship with the second Applicant is self-evident and is also documented by means of the Applicants' birth certificates and the first Applicant's divorce decree. It is obviously farcical to suggest that the second Applicant could submit evidence of his relationship with non-existent people."

#### **The Minister's submission**

110. It was submitted that the Minister was in the position of decision-maker, and that he/she was not engaged in a "joint enterprise" with an applicant in identifying the threshold at which a case to treated as a 'permitted family member' will be established. The onus of proof, and "the risk that he has adduced insufficient evidence" lay with an applicant. The Minister relied on the decisions of Keane J. in *Subhan* and *Safdar*, and called in aid para. 25 of the decision in *Rahman* (Case C-83/11) where the CJEU accepted that the wording in Art.3(2) of the Citizens Directive "is not sufficiently precise in order to enable an applicant... to invoke criteria which should in his view be applied when assessing his application". It was submitted that the judgment under appeal "appears to come close to requiring precise administrative guidelines to be produced by the Minister in relation to the issues of dependency and household membership", or at least "generic guidance" as to what the Minister seeks, going beyond the guidance given in the Explanatory Leaflet referred to on Form EU1A and published guidelines on the INIS website.

111. In reference to the lack of guidance on "dependency" or "members of the household" the Minister relied on the following quote from the decision of Keane J in *Safdar*:

"52. ...Of course these are terms of European Law and, as such, the nature and scope of the concepts they describe cannot properly be made subject to any limiting or conflicting 'criteria definitions or policies' in the law of a Member State; see, for example, Case 283/82 *CILFIT* [1982] ECR 3415."

The Minister relied on the affirmation of this approach by Baker J on appeal of *Safdar* to this court, and to similar effect the obiter of Humphries J in *A.R. (Pakistan) and Anor. v. Minister for Justice and Equality* [2018] IEHC 785 where he followed Keane J. and stated that –

"21. ...the obligation to transpose does not require that every element of the directive must be given statutory language in full in every circumstance."

112. In oral submissions counsel pointed out that the Minister had in some detail raised concerns in correspondence at the review stage. Counsel also argued that the onus was on Mr. Miah to produce evidence sufficient to satisfy the Minister that he was a member of the household, and that this might, for example, take the form of testament from a neighbour, Mr. Shishu's employer, or a religious leader. It was suggested that the first reference to Mr. Miah and Mr. Shishu living together in the Merseyside property was para. 5 of Mr. Shishu's grounding affidavit.

### **Discussion**

113. Before turning to the legal position, this last proposition, that the first reference to the brothers living together was in Mr. Shishu's grounding affidavit, is not borne out by my reading of the relevant documentation that was before the Minister. In fact such a claim was made early on. In the letter dated 19 May 2017 seeking a review Burns Kelly Corrigan on behalf of the applicants refer to various documents submitted to prove that Mr. Shishu and Mr. Miah had the same address in Merseyside, including Mr. Miah's account with Lloyd's bank in the UK "...which proves he was living at the same address as



his brother...”, and the claim that they were living together as part of the same household before they came to Ireland is expressly made in the Burns Kelly Corrigan letter of 1 June 2017.

114. Since the decision of the trial judge, to some extent the arguments relied on by the respondents have been rejected on appeal by this court in *Safdar v Minister for Justice* [2019] IECA 329 (Baker J). The second issue that arose there was whether the domestic legislation correctly transposed the Citizens Directive, as the 2006 Regulations did not contain detailed criteria to be applied when determining what constitutes dependency upon or membership of the household of the Union citizen having the primary right of residence. It was argued that this lacuna was not consistent with the normal meaning of the term “facilitate” and of the words related to dependence in Art.3(2). As we have seen Keane J. rejected this claim at first instance, and that decision was affirmed on appeal.

115. Baker J. addressed the issue thus –

“78. The argument made by Mr Safdar is that the implementing instrument must be such as to ‘facilitate’ the free movement of Union citizens within the national territories. It is argued that this imports an obligation to list the positive factors of which account is to be taken by a domestic decision maker. I do not read the statement of the Court of Justice<sup>2</sup> in this way, but rather to mean that any implementing legislation must have regard to the objectives of the Citizens Directive and that one of those objectives is to facilitate free movement, and that any impediment in the national implementing measure to free movement is to be constrained. The Court of Justice, in effect, said no more than what is well established, namely that the implementing legislation must not deprive the Citizens Directive of its effectiveness or uniform application.

79. I accept the argument of the respondents that *Secretary of State for the Home Department v. Rahman* does permit a refinement or illustration or identification of criteria in order to assist a person to understand the meaning of ‘dependant’ or ‘household’ as the case may be, but that does not preclude that transposition might well be effectively done by using the words of the Citizens Directive itself.”

116. Baker J. went on to note that the first principle of national statutory interpretation is to give these words their natural and ordinary meaning, but that this may give way to the interpretative approach of the kind for which the Court of Justice contended in *CILFIT*, where you look to the scheme and purpose of the EU instrument. She noted in para. 81 that –

“There is now some jurisprudence in the domestic courts, in the Court of Justice, and in the courts of England and Wales regarding the interpretation of those terms, and it could be said that undue specificity can make a general transposing instrument too narrow or too broad to be a correct transposition, and that sometimes general language is resilient.”

Baker J then stated in Safdar–

“83. Having regard to the fact that the form of transposition and the method by which Member States engage with the individual application is left to the national authorities, I cannot accept the argument made by the appellant that the transposing instrument is required, as a matter of EU law, to contain more concrete and specific details of the type of matters that might be taken into account in assessing whether a person is dependent on or a member of a household of a Union citizen.

84. Indeed, it seems to me that having regard to the requirement that there be a harmonious and consistent interpretation of the Citizens Directive throughout the Member States, a definition containing more detail might cause discordance. That factor is not determinative but is a factor of note.”

---

<sup>2</sup> This refers to para. 24 of the CJEU decision in *Rahman* quoted earlier in this judgment

117. Referring to para. 24 of the decision of the CJEU in *Rahman*, quoted earlier, Baker J then stated –

“85. ...The requirement from that decision is that the criteria be consistent with the approach of the Citizens Directive that free movement rights be facilitated or supported by the approach of the Member States to the entry and residence of family members, and I do not consider that the decision means that the publication of detailed and particularised criteria is necessary for proper transposition.”

118. This is of particular relevance to the arguments pressed on behalf of Mr. Miah. It excludes any legal obligation on the Minister to attempt to formulate or publish more detailed or particularized criteria than existed in the 2006 Regulations. Baker J went on to consider at paras. 87-89 the INIS guidelines that do exist, and although they were not put in evidence in the present case I find her analysis helpful:

“87. Finally, the INIS published guidelines in 2015 which set out details of the kind of proofs that may be required in an application for visas by a permitted family member of Union citizens. Those guidelines emphasise that documentary evidence is required which demonstrates the truth of an assertion of dependence or membership of a household. The types of supporting document is explained. Proof that the Union citizen is exercising free movement rights in Ireland or intends to exercise those rights at the time of the arrival of a permitted family member in Ireland is also required. Dependence is explained by reference to the test in *Jia v. Migrationsverket* (Case C-1/05), ECLI:EU:C:2007:1, and it must exist at the time of the application and not be created by the moment of entering the State. Reference is made to the fact that merely living under the same household ‘does not count’ as proof of membership of a household.

88. Further, the application form EU1A is detailed and, on its face, requires evidence regarding the matters that fall for consideration by the deciding body.
89. These guidelines, in my view, offer considerable assistance to application under the scheme of the Citizens Directive.”
119. Of course the court in *Safdar* was addressing the 2006 Regulations (as amended), but in relation to this issue the 2015 Regulations are not materially different. There is admittedly Reg.5(4) which now expressly empowers the Minister to require an applicant “to produce such additional evidence as the Minister may reasonably require”, and Reg.25(5) which allows the Minister to pursue “enquiries” at the review stage. However in my view this does not assist the respondents. Under the 2006 Regulations the practice of the Minister was to correspond with applicants or their advisers raising concerns and inviting a response and/or additional evidence. It seems to me that Reg.5(4) is an enabling provision that now puts this power on a statutory footing and an applicant who fails to respond, or fails to respond adequately, runs that risk that the Minister will take an adverse decision which may be based in whole or in part on such failure and the concerns expressed in the Minister’s correspondence. The same applies to Reg.25 (5). It does not in my view diminish the relevance of the judgment of this court in *Safdar* to cases which are now decided under the 2015 Regulations – in my view it remains the position that there is no legal obligation on the Minister to formulate or publish “generic guidance as to what it is the Minister looks for in an application”, to use the words of the trial judge, in an application of this nature, and it is notable that the Oireachtas in promulgating the 2015 Regulations did not see fit to mandate publication of departmental guidelines of the sort, for example, that are published in environmental matters and to which regard must be had in planning decisions.
120. Moreover what is notable about Reg.5(4) is that it is not mandatory – the Minister is left with a discretion to avail of the power. The Minister is not obliged to raise concerns, or identify the additional evidence that he might consider he requires. Likewise at review stage the Minister is not required to carry out further enquiries – there is a discretion whether to do so.
121. The more nuanced point made by the trial judge is that, in the absence of generic guidance, if the Minister in a particular case has in mind concerns that could be addressed by additional evidence of a type that only the deciding officers are aware, it is contrary to fair procedures not to raise this and afford an opportunity to submit additional evidence.
122. Were this to be correct it would run contrary to the discretionary nature of Reg.5(4). It would also in my view disturb the position, which is buttressed by Reg.5(2), which requires the production of certain proofs, that the onus is on an applicant to prove that they are a person to whom Reg.5(1) applies, and their case to be treated as a ‘permitted family member’. The process is not a joint venture, in which there is some ill-defined obligation on the Minister to assist applicants.

123. Having said this, the *process* is not adversarial – it is intended to be facilitative in the narrower sense of that word – it is to enable an application to be made, and not to put undue obstacles in the way of an applicant establishing their case. Further it is by its very nature inter-active: even if the Minister does not correspond on ‘concerns’ or require the production of additional evidence under Reg.5(4), the obligation to justify and give reasons for a first instance refusal has the effect that at the review stage an applicant can make submissions and furnish further supporting documentation with their Form EU4 Review Request, and the Minister has the power to pursue further enquiries under Reg.25(5).
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. In the course of examining every application and reviewing every adverse decision several different INIS officers will be involved at different times, and each of them may entertain different views on the application and the evidence presented, and more may arise as the process unfolds – as was the case here. Would each officer taking up each file have to decide what additional information or evidence they thought should be provided and then raise a Reg.5(4) request (or Reg.25(5) enquiry as the case may be), as the respondents would seem to suggest? While it may be that raising a Reg.5(4) request or enquiry should generally and routinely be considered – and perhaps it is - I cannot accept that this is mandated by ‘fair procedures’ in the absence of any greater obligation than that imposed by the wording of the Citizens Directive or the 2015 Regulations.
125. I have considered whether this is displaced by the requirement in Reg.5(3) that the Minister carry out “an extensive examination of the personal circumstances of the applicant”. This is something that was not considered by the trial judge who had determined that there was a two stage process and that the point at which an extensive examination fell to be carried out had not arisen. The wording of the Reg.5(3) requirement is copied from the last sentence in Art.3(2) which adds that the host Member State “shall justify any denial of entry or residence to these people”. This requirement of an examination echoes Recital 6 of the Citizens Directive which bears:

“In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.”

126. What I take from this is that the Citizens Directive and the 2015 Regulations create the obligation to extensively examine the personal circumstances, but do not go so far as to impose an investigative obligation, or an obligation to raise queries or concerns or seek additional evidence. While I have considerable sympathy for applicants who may feel, as was the case here, that they were not given the opportunity to respond to concerns about proofs that were not raised with them, and were indeed “operating to some extent ‘in the blind’”, in my view the trial judge erred in answering this question in the affirmative.
127. Having said this there will be circumstances in which fair procedures dictate that the Minister raise matters with an applicant and consider a response before coming to a decision. This will arise where, for example, the Minister obtains relevant information from a source other than the applicant and is contemplating using that information to refuse a residence card. This in fact occurred in the present case where information “available to the Minister” indicated that Mr. Mohammed Jewel Miah, whose name appeared as landlord on the Castleblaney tenancy agreement provided with the application, was not in fact the landlord. In accordance with the requirement of fair procedures this was put to Mr. Miah in the letter of 17 August 2018 to “provide you with an opportunity to address these concerns prior to making a determination.” - and it was duly answered. However I am satisfied that the matters which informed the Impugned Decision to refuse, while they can be criticized on other grounds, did not relate to new information or documentation sourced by the Minister which he was obliged (and failed) to put to the applicants to elicit their response.
128. I would also observe that the corollary to the Minister in general not having the obligation to advise an applicant of his thinking as to what further information or documentation might be required to satisfy him on the application is that the Minister must justify a refusal, and must do so on a rational basis and the decision must have a solid factual basis. As I have found earlier in this judgment the Minister failed to do so in the Impugned Decision.

**(iv) (a) Whether the Minister adopted the correct legal test for determining whether Mr. Miah was ‘dependent’ on Mr. Shishu, and**

**(b) whether the High Court was correct in finding that the Minister did not act unreasonably and/or irrationally in finding that he was not satisfied that Mr. Miah was dependent on Mr. Shishu in the United Kingdom.**

129. The question at (iv)(a) is raised in the cross appeal. It was not raised or answered by the trial judge who simply found that the decision on lack of dependency was one that the Minister could properly reach on the evidence before him.
130. Objection is taken by the Minister that this issue was not the subject of leave or pleaded in the Statement of Grounds, and was not a matter that the High Court had to address.
131. However the factual basis for arguing that the Minister applied the wrong test was pleaded in the detailed Statement of Grounds, and the dependency decision is challenged in Ground 6(i) (albeit in the context of unreasonableness/irrationality); moreover, it was raised at paragraphs 58-61 of the applicant’s written submissions in the High Court and responded to by the Minister in his submissions at paragraphs 28-30, and this court heard

argument on the issue. There was also no suggestion that the Minister was placed at any disadvantage in dealing with the issue. It also emerged that there was no real dispute as to the correct legal test that now applies to determining dependency, and the only real issue under question (iv)(a) was whether it was adopted/applied by the Minister. I therefore consider that this court should address this issue.

132. The submission on behalf of Mr. Miah is that the test of dependence applied by the Minister in the Initial Decision, and affirmed on review, was whether the evidence submitted established "dependence such as to render independent living at subsistence level by the applicant impossible if the EU citizen did not maintain that financial support" (the wording used in the Initial Decision), was incorrect, and that such a test was found to be erroneous by Faherty J. in *Khan v. Minister for Justice, Equality and Law Reform* [2017] IEHC 800, a decision that was affirmed by this court, in favour of a test that focuses on "material support to meet essential needs".
133. The Minister accepted that the test adopted in the Initial Decision was incorrect, but argued that the Impugned Decision was different in its detail, and met the *Khan* test.

#### **Discussion – the test of dependency**

134. In *Khan* Faherty J reviewed the caselaw of the Court of Justice on the test of dependency. She took her lead in particular from Case C-1/05 of *Jia v. Migrationsverket*, which concerned Directive 73/148/EEC, which was ultimately replaced by the Citizens Directive, where the Court of Justice gave the following guidance on what may constitute dependency:

- "35. According to the case-law of the Court, the status of 'dependent' family member is the result of a factual situation characterised by the fact that material support for that family member is provided by the Community national who has exercised his right of free movement...
36. The Court has also held that the status of dependent family member does not presuppose the existence of a right to maintenance, otherwise that status would depend on national legislation, which varies from one State to another (*Lebon*, paragraph 21). According to the Court, there is no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment. That interpretation is dictated in particular by the principle according to which the provisions establishing the free movement of workers, which constitute one of the foundations of the Community, must be construed broadly (*Lebon*, paragraphs 22 and 23).
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.

...

40. When exercising their powers in this area Member States must ensure both the basic freedoms guaranteed by the EC Treaty and the effectiveness of directives containing measures to abolish obstacles to the free movement of persons between those States, so that the exercise by citizens of the European Union and members of their family of the right to reside in the territory of any Member State may be facilitated (see, by analogy, Case C 424/98 *Commission v Italy* [2000] ECR I 4001, paragraph 35).
41. With regard to Article 6 of Directive 73/148, the Court has held that, given the lack of precision as to the means of acceptable proof by which the person concerned can establish that he or she comes within one of the classes of persons referred to in Articles 1 and 4 of that directive, it must be concluded that evidence may be adduced by any appropriate means (see, inter alia, Case C 363/89 *Roux* [1991] ECR I 1273, paragraph 16, and Case C 215/03 *Oulane* [2005] ECR I 1215, paragraph 53).
43. In those circumstances, the answer to Question 2(a) and (b) must be that Article 1(1)(d) of Directive 73/148 is to be interpreted to the effect that 'dependent on them' means that members of the family of a Community national established in another Member State within the meaning of Article 43 EC need the material support of that Community national or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join the Community national. Article 6(b) of that directive must be interpreted as meaning that proof of the need for material support may be adduced by any appropriate means, while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence."

Having referred to these passages Faherty J. observed –

- "66. In essence, the ECJ held that dependency for the purposes of Directive 73/148/EEC was established if the family member 'needs the material support of [the] Community national or his or her spouse in order to meet their essential needs in the State of origin'."

She next considered the decision in *Reyes* (Case C-423/12), which concerned the Citizens Directive and related to an adult child seeking residence in Sweden. The ECJ observed –

- "21. That 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 who has exercised his right of free movement or by his spouse (see, to that effect, *Jia*, paragraph 35).

22. In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his financial and social conditions, the direct descendant, who is 21 years old or older, of a Union citizen, is not in a position to support himself. The need for material support must exist in the State of origin of that descendant or the State whence he came at the time when he applies to join that citizen (see, to that effect, *Jia*, paragraph 37).
  23. However, there is no need to determine the reasons for that dependence or therefore for the recourse to that support...
  24. The fact that, in circumstances such as those in question in the main proceedings, a Union citizen regularly, for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin, is such as to show that the descendant is in a real situation of dependence vis-à-vis that citizen.
  25. In those circumstances, that descendant cannot be required, in addition, to establish that he has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself.
  26. The requirement for such additional evidence, which is not easy to provide in practice, as the Advocate General noted in point 60 of his Opinion, is likely to make it excessively difficult for that descendant to obtain the right of residence in the host Member State, while the facts described in paragraph 24 of this judgment already show that a real dependence exists. Accordingly, that requirement is likely to deprive Articles 2(2)(c) and 7 of Directive 2004/38 of their proper effect."
135. While that was a case that concerned an adult child rather than a sibling, it seems to me that that distinction is not material particularly where, as here, Mr. Shishu was considerably older than his brother Mr. Miah, and of the two was established in home and work in the UK and in a position to provide for Mr. Miah's needs.
136. Returning to the judgment of Faherty J. in *Khan*, she also quotes with approval the decision of MacEochaidh J. in *V.K. v Minister for Justice and Equality* [2013] IEHC 424, including the following–
- "In my view, the *Jia* decision marks a shift from dependence which was found to exist merely where support is given, to dependence being based upon the need for assistance with the provision of the essentials of life. Neither the European Court of Justice nor the European legislator nor the Irish legislator has ever identified exactly how much support is required to be given to the recipient in order for that person to be said to be dependant on the European based donor. My view is that where outside help is needed for 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 dependant. (The essentials of life will vary from case to case: expensive drugs may be as essential for someone who is ill, for example.)”

137. At para. 70 Faherty J. notes that the test applied by the Minister in *Khan* was “whether proof of the degree of dependency was such as to render independent living at a subsistence level not viable if the third and fourth applicants were not maintained by the first and second applicants”. Rejecting this as the correct test, she observed:

“73. In *Jia*, there is no reference to it being a requirement of dependency that it was impossible to live at a 'subsistence' level if financial support from the EU citizen or his or her spouse was not maintained. The *Jia* test does not require that the family members have to be totally dependent on the EU citizen.”

Faherty J. thus rejected as valid in that case wording that is very similar to that adopted in the Initial Decision in the instant case.

138. Also of relevance is the extent to which the Minister should identify in the decision the concept or test of dependency that is being applied. MacEochaidh J. in *V.K.* addressed this–

“32. ...the appeal decision maker was, at a minimum, required to identify the definition, such as it is, of the concept of dependence as identified in the *Jia* case. Further the official was required to apply that test to the assertions and facts advanced on behalf of the applicants. 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.

...

50. The decision makers repeatedly failed to refer to the proper test by which dependence should be evaluated under EU law. The applicant made the case that the Cairo based family was dependent upon the Irish family for the essentials of life. Though the officials engaged with this concept, they never set out the *Jia* test, even in the decisions taken in 2013.”

I respectfully agree with this analysis; the need for the decision to refer to the test or concept applied is necessary to show that the correct test is applied to the facts, and to explain the basis upon which the decision is reached.

139. One week after Barrett J delivered his judgment in the present case the decisions of Faherty J. in *Khan*, and of MacEochaidh J. in *V.K.* were upheld by this court in *V.K. and Khan v. Minister for Justice and Equality* [2019] IECA 232 in a judgment delivered by Baker J. It is worth quoting the curial part, as it now puts beyond doubt the correct interpretation of dependency and the approach that the decision makers should take:

- "93. The interpretation that the CJEU has applied to the Citizens Directive is purposive and broad. It does not require that the contribution from a Union citizen be such that, without it, the dependant person could not survive. It is not a test to be expressed in the negative. The exercise is to ascertain whether the family member relies on support to meet a material or social need which is central to the person's life and not peripheral or merely discretionary. The backdrop is the positive desire expressed in the Citizens Directive to support family unity.
94. It is, of course, true that the concept of 'dependency' hinge upon the establishment of an identifiable and meaningful contribution to the alleged dependent person. Mac Eochaidh J. found that a contribution, even a minimum one, provided to a family member to meet needs to sustain life, even if that contribution is minimal. This approach is consistent with the decision of the CJEU in *Jia v. Migrationsverket*, that dependency means the provision of material support by a Union citizen or his or her spouse to meet the essential needs of the family member in the State of origin.
95. Mac Eochaidh J. considered, at para. 18, that the test from the judgments of the CJEU did not mean that dependence requires 'that assistance be given for all of the person's essential needs' as this would unduly restrict the category of persons entitled. He noted that no guidance was available as to how much support is required, but took the view that, where outside help is needed for the 'essentials of life', then, regardless how small that assistance is, that is sufficient to meet the test for dependence. He gave his examples of the essentials of life: Food, shelter, or even expensive drugs for someone who is ill.
96. I do not consider that Mac Eochaidh J. by using the words 'essentials of life' meant that only assistance required to prevent a person from falling below subsistence living was reckonable for the purposes of assessing dependency.
97. In my view, Mac Eochaidh J. was correct in his conclusions. I would add that, even if the Minister is to reject a visa application on the basis of insufficiency of documentation, which he or she is entitled to do, this must be done by reference to a test which requires engagement with that documentation. This was not the case in the assessment of the application at issue in this appeal.
98. The analysis of the ECJU does not propose a formula that is rigid or simple. The test has been explained in different ways, and a certain fluidity of language is apparent. The core concept, however, is that dependence means reliance on a Union citizen for some of the essentials of life. That reliance may be for financial help of a relatively small amount, but the concern is not to apply some quantitative test as to the amount of support actually provided, or to ask whether the support could be obtained by other means in the country of origin. Rather, the focus is on what is actually provided by way of financial assistance and whether that is for some of the essentials of life. It is difficult, in those circumstances, to formulate a test with precision, and that is more especially so when, as here, the trial judge came to his

conclusion on 'reason' grounds and his observations regarding the correct formulation of the test were *obiter*."

**Applying the test of dependency**

140. I am of the view that the cross-appeal must succeed on a number of fronts. It is accepted that the Initial Decision did not apply the right test; in fact the wording used in the letter of 9 May 2017 closely reflects that which was found objectionable by Faherty J. in *Khan*. In fairness to the Minister it should be pointed out that the decision of Faherty J. in *Khan* was only handed down in October 2017.
141. In relation to the review, nowhere in the Recommendation Submission is the *Jia/Khan* test set out, notwithstanding that the decision in *Khan* was handed down ten months previously. Nor does Ms. Ní Fhrighíl identify the test that she applied. The closest she comes is the statement that "Money transfers alone do not show a degree of dependency, such as to render independent living at a subsistence level impossible, were that financial support not maintained". The first part of this statement is correct in so far as it goes – the mere fact of money transfers does not of itself establish dependency – but the second part points to application of the same incorrect test as was applied in the Initial Decision. There is in this document no evidence of an analysis based on Mr. Miah's need for material support to meet his essential needs. It also seems to me to be coloured by the author's view and recommendation of an additional finding that fraudulent documentation had been submitted in support of the application – a view that was not repeated, and therefore not accepted, by Review Officer Carleton in the Impugned Decision.
142. The Impugned Decision again fails to set out the *Jia/Khan* test of dependency, or the test actually applied by Mr. Carleton. Particularly in light of the errors in approach made by the first instance decision-maker and repeated in the Recommendation Submission it was incumbent on Mr. Carleton to set out the test being applied, and applying the observations of MacEochaidh J. in *V.K.* in my view this is enough to allow the cross-appeal.
143. In so far as the test applied by Mr. Carleton can be gleaned from the Impugned Decision, he does not appear to have applied the correct test. It is stated in relation to the money transfers to Bangladesh that –

"No evidence has been provided to suggest that, had he not been in receipt of these cash transfers, the applicant would not have been able to support himself in Bangladesh".

In relation to the financial transfers from Mr. Shishu to Mr. Miah in the UK – and it is at least accepted that he did "receive some small financial transfers" – it is stated:

"No evidence has been provided to suggest that, had he not been in receipt of cash transfers from his brother, the applicant would not have been able to support himself in the UK".

It is also accepted that Mr. Miah received “regular, small transfers from his brother while in this State”, but –

“Again, however, no evidence has been provided to suggest that he would not be able to support himself in Ireland if he were not in receipt of these transfers.”

144. This all points to the application of the same impossibility test that was applied earlier in the process. There is no attempt at analysis that takes into account Mr. Miah’s needs in terms of material support, such his financial needs in light of the fact that he was not entitled to enter employment, and his need for shelter/accommodation. There is certainly no recognition of that part of the correct test that says that where support is needed for the essentials of life such as food and shelter, then, regardless of how small the assistance is, if it is needed to attain the minimum level to obtain the essentials, that is enough to establish dependency.
145. Furthermore in my view by affirming the Initial Decision without any comment on the approach or reasoning taken at first instance the Impugned Decision effectively adopted that flawed approach. If the Impugned Decision was indeed based on the *Jia/Khan* test then it should have identified the mistakes made in the Initial Decision and demonstrated that the review was undertaken on the basis of the correct test.
146. I do not therefore accept the Minister’s submission to the effect that the Impugned Decision in some way met the *Khan* test, and I would allow the cross-appeal.
147. In light of my answer to question (iv)(a) that the Minister did not adopt the correct test of dependency it is not necessary or appropriate to address question (iv)(b).

### **Conclusion**

148. I would therefore affirm the decision of the High Court to grant *certiorari* and to remit the matter to the Minister for fresh consideration.
149. I do so on the basis that the decision-makers in the Initial Decision and the Impugned Decision failed to identify or apply the correct test of dependency, and in this respect I would allow the cross-appeal.
150. I also do so on the basis that the Minister acted unreasonably/irrationally and/or in breach of EU law and/or in breach of the 2015 Regulations in determining that Mr. Miah had failed to provide sufficient evidence that he was a member of the household of Mr. Shishu in the UK. While a fuller definition of ‘members of the household of the Union citizen’, or criteria that should be considered when deciding who is such a member, with application across the EU, must await the outcome of the recent reference by the Supreme Court to the CJEU in *Subhan*, there are basic elements to the definition that follow from our official English language wording of Article 3(2)(a) that enable me to reach a decision on the facts of this case.
151. As to the process that is to be followed by the Minister under Reg.5 of the 2015 Regulations, I adopt the recent analysis of the Supreme Court in *Pervaiz* where Baker J.

held that Reg.5(3) envisaged “not so much two stages but a series of questions with which the Minister must engage”, a view that differs from that taken by the trial judge.

152. While evidentially the trial judge was entitled to have regard to different language versions of Article 3(2)(a) – as the Minister never contested the translations submitted by the respondents, the approach taken to interpreting Article 3(2) was flawed; he should first have considered our official language version(s) and done so in context, including considering the recitals and related provisions, and adopted a teleological approach, and only if ambiguity resulted then he should have had recourse to the other language versions to assist him in determining whether to make an Article 267 reference. Further in my view he erred in adopting his ‘looser’ interpretation of ‘member of the household’ without reference to any domestic caselaw from Germany, Spain or Greece, or expert evidence as how their versions of the Citizens Directive are interpreted in their domestic law. Whether his wider interpretation of Article 3(2)(a) as meaning ‘cohabitation’ is correct will depend on the outcome of the Reference.
153. Finally, I do not accept that in this case the Minister was in breach of fair procedures in failing to adopt procedures which would have enabled Mr. Miah to know what evidence he was required to adduce in order to establish ‘dependency’ or ‘membership of the household’.

#### **Costs**

154. The respondents, who succeeded in the High Court, have succeeded in this appeal. Notwithstanding that the Minister might argue that she won on some issues, the respondents have succeeded in both courts on two central issues: firstly the reasonableness or otherwise of the Impugned Decision in respect of membership by Mr. Miah of the household of Mr. Shishu; secondly the issue on cross appeal as to whether the Minister identified or applied the correct test of dependency. Accordingly costs should follow the event, and in my view the respondents are entitled to have their costs of the appeal and the cross-appeal paid by Minister (to be adjudicated in default of agreement), and I do not believe that this is a case whether a *Veolia Water* order is appropriate.
155. If either party wishes to seek some different costs order to that just proposed they should so indicate to the Court of Appeal office within 14 days of the receipt by electronic delivery of this judgement, and a costs hearing will be scheduled, but any party seeking such a hearing will run the risk that if they are unsuccessful they may incur further costs. If no such indication is received within the said period of 14 days the order of this court, including the proposed costs order, will be drawn and perfected.
156. **Whelan J and Faherty J have indicated their agreement with this judgment and the orders the I propose.**