THE HIGH COURT

2018 No. 1054 JR

Between:

MD. JAGLUL HOQUE SHISHU and MD. JABED MIAH

Applicants

– and –

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 24th July, 2019.

1. The two applicants are brothers who hail originally from Bangladesh. Mr Shishu is a naturalised UK citizen and is exercising his free movement rights as an EU national to work and live in Ireland. Mr Miah is a citizen of Bangladesh. He claims to have lived as a dependent of his brother in England but, by review decision of 12.10.2018 (the 'Impugned Decision'), the Minister has, pursuant to reg.5(3) of the EC (Free Movement of Persons) Regulations 2015 determined that Mr Miah is not a dependent of Mr Shishu within the meaning of reg.5(1). The within proceedings have ensued.

2. By way of preliminary comment, Mr Miah's application was made (it seems on the basis of human error on the part of his solicitor) on the basis of his dependency on Mr Shishu, i.e. solely under reg.5(1)(a)(i). However, although the initial decision proceeded on this basis, the Impugned Decision also considers the issue of whether Mr Miah was a member of Mr Shishu's household in England, i.e. it has regard to reg.5(1)(a)(ii). The Minister has contended that given the error at the time of application, the court should now have regard to dependency issues only, notwithstanding that the Impugned Decision treats also with 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, it seems to the court that the fairest and most proper thing to do is to review the Impugned Decision as it actually emerged.

3. (1) Did the Respondent err in his application of the relevant provisions of the EC (Free Movement of Persons) Regulations 2015?

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.

5. (2) Did the Respondent 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?

6. Yes. The Impugned Decision states in this regard that:

> *"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 [Address Stated]…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."*
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> [The word "*household*" is emphasised in the original.]

7. A few points of relevance might be made:

> (i) Art.3(2) of the Citizens' Rights Directive (Directive 2004/38/EC) imposes a duty on a host Member State "*in accordance with its national legislation, [to] facilitate entry and residence*" for, *inter alia*, family members who, like Mr Miah, do not come within the definition of "*Family member*" in Art.2(2) of the Directive and "*who, in the country from which have come, are…members of the household of the Union citizen";*
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> (ii) 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. The evidence provided as to household membership is strikingly comprehensive, viz. (a) a letter of 30.05.13 from the NHS to Mr Miah at his brother's address in England, (b) a letter of 07.08.2013 from the NHS to Mr Miah at his brother's English address, (c) a gym membership form of 19.12.13 completed by Mr Miah and declaring his brother's English address to be his address, (d) a commercial receipt of 07.02.2014 addressed to Mr Miah at his brother's English address, (e) a letter of 03.07.2014 from the NHS to Mr Miah at his brother's English address, (f) eight bank statements addressed to Mr Miah at his brother's English address and covering the period from 20.05.2015-19.02..2016, (g) eight bank statements addressed to Mr Miah at his brother's English address and covering the period from 02.06.2015-29.02.2016, (h) a prescription issued to Mr Miah dated 15.02.2016 and confirming his brother's English address as his address, (i) a pharmacy invoice dated 21.08.2015 addressed to Mr Miah at his brother's English address, (j)

a leaflet from an adult learning group addressed to Mr Miah at his brother's English address, and (k) confirmation of physical delivery to Mr Miah at his brother's English address of an online purchase.

(iii) 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) emphasis is placed on the word "*household*" in the Impugned Decision, with that word being italicised for emphasis in that decision. The term "household" is not defined in the Citizens' Rights Directive or in the 2015 Regulations, with the result that it falls to be given its ordinary meaning, and a uniform application throughout the European Union. Recalling the observation of the Court of Justice in Case 283-81 *CILFIT*, 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*", it is informative to note that several of the different language versions of Article 3(2)(a) of the Directive, suggest a looser relationship to be contemplated by Art.3(2)(a) than is contemplated by the English language version. So, for example:

	Original text	**Informal Translation**
German	"*…oder der mit ihm im Herkunftsland in häuslicher Gemeinschaft gelebt hat"*	'…or who lives with him in the same house in their country of origin'
Greek	"*…Þ æåé õðü ôç óôÝãç ôïõ óôç ÷þñá ðñïÝëåõóçò"*	'…or lives under his roof in the country of origin'
Spanish	"*…o viva con el ciudadano de la Unión beneficiario del derecho de residencia con carácter principal*"	'…or lives with the Union citizen beneficiary with the principal right of residence'.

(v) 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) 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].

8. (3) Did the Respondent 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?

9. 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.

10. The court does not see that the last paragraph is inconsistent with *Subhan v. MJE* [2018] IEHC 458 or *Safdar v. MJE* [2018] IEHC 698. In those cases it was contended that:

– "*the asserted failure of the Minister to specifically require Mr Ali to produce evidence that the address in the United Kingom he shared with Mr Subhan was the household of Mr Subhan as a Union citizen amounted to a breach of their entitlement to fair procedures*" (*Subhan*, para.55)

Here, of course, it is not a failure to specifically require the production of particular evidence in a specific case that is the failure contended for. When it came to that particular question, Keane J.'s answer in *Subhan*, para.55, was as follows:

"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 2006 Regulations and the Citizens' Rights Directive. [His obligations thereunder]… *cannot extend to the provision of an advice on proofs."*

What Keane J. is getting at in this regard is that the law is there for people to read, applicants can avail of legal advice as to that law, and the Minister is under no obligation to those applicants to give them, when it comes to their particular case, "*additional legal advice*" or "*advice on proofs*". The court respectfully agrees with this. But of course what Keane J. was not required to address in *Subhan*, because the question was not posed to him so, is the particular issue raised here, *viz*. does 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? That question is raised here and, for the reasons identified in para.9 above, this Court's answer to that question is 'yes'.

– "*the failure to provide and apply a domestic law definition of each of those terms has breached the European Union law principle of effectiveness or Mr Safdar's right to fair procedures*" (*Safdar*, para.53, following on a consideration that

commences at para.48).

In this case, the applicants are not contending, as was contended in *Safdar*, that e.g., "*household of the Union citizen*" ought to be given "*a domestic law definition*" (*Safdar*, para.53). When it came to that very particular question, Keane J.'s answer in *Safdar*, para.53, was as follows:

"I must reject Mr Safdar's submission that the failure to provide and apply a domestic law definition of each of those terms has breached the European Union law principle of effectiveness or Mr Safdar's right to fair procedures. The State gave effect to art.3(2) of the Citizens' Rights Directive by expressly adopting the terminology of that provision in the 2006 Regulations, thereby protecting the relevant procedural rights of those persons who claim to be beneficiaries under it."

In this case, no like submission to that referenced in the just-quoted extract from the judgment in *Safdar* has been made. Again what Keane J. was not required to address in *Safdar*, because the question was not posed to him so, is the particular issue raised here, *viz*. does 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? That question *is* raised here and, again, this Court's answer to that question is 'yes', again for the reasons identified in para.9 above.

11. (4) Did the Respondent 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?

12. The court's answer to this question (which turns on the putting of points to an applicant for comment) is 'no'. It may assist for the court to mention in this regard its observation in *Chittajallu and another v. MJE* [2019] IEHC 521, para.9, that:

"The Minister is not required to advise applicants throughout the application process as to the evidence they need to provide (they apply, lawyers advise and the Minister decides). However, although (a) the Minister is not required to advise applicants throughout the application process as to the evidence they need to provide (they apply, lawyers advise, and the Minister decides), (b) 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. There is something profoundly unfair about an initial decision that says "no documentary evidence was submitted in relation to your own means", with no mention being made that the Minister "expected that a letter from the Pensions authority and/or Social Welfare authority in India would have been submitted stating that you have no claims with them". If that specific expectation presented, then it should have been expressly articulated so that the applicants could procure that particular (or like) documentation as part of their appeal, instead of being left unfairly in the blind about a specific expectation of the Minister."

13. Unlike in *Chittajallu*, there is no suggestion in this case that the Minister had specific expectations as to particular documentation that would be produced. Absent that kind of specific expectation, there comes a point when a decision falls to be made on whatever material has been put before the Minister. That is all the court sees to have happened here.

14. (5) Did the respondent 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?

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

Conclusion

16. For the reasons aforesaid, the court will grant the order of *certiorari* sought and remit the within matter to the Minister for fresh consideration.