

Between:

NAJEEBA KHAN, HINA KHAN (a minor suing through his father and next friend MOHAMMED TAHIR KHAN), IMRAM KHAN (a minor suing through his father and next friend MOHAMMED TAHIR KHAN), NAGEENA KHAN (a minor suing through his father and next friend MOHAMMED TAHIR KHAN)

and MOHAMMED TAHIR KHAN

Applicants

– and –

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

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

1. Mr Khan, a UK national living in London, claims that he intends to come to work in Ireland. However, he wishes to come in the company of his wife and children, who are Afghan nationals resident in Afghanistan.

2. Under the EC (Free Movement of Persons) Regulations 2015, Mr Khan's wife and children may be "*qualifying family members*" within the meaning of reg.3(5). If they are, the norm under reg.4(2) is that they may enter Ireland, the exceptional is that they may be refused permission to enter (i) in the circumstances identified in reg.4(2), or (ii) because the EU citizens on whom they are 'piggybacking' their entry do not come within reg.3(1). Because Mr Khan's wife and children in any event require visas to come here from Afghanistan, they have applied for these visas from within Afghanistan.

3. The Minister has refused the said visa applications on the basis that Mr Khan is engaged in an abuse of rights. ("*On the basis of an examination of the facts available to me, I am not satisfied that your Union citizen sponsor seeks to exercise his free movement rights in a genuine and effective manner...*"). However, the court sees nothing in the facts that went before the Minister to support this conclusion. Yes, apart from joining in the within proceedings – a not inconsiderable step – Mr Khan has done nothing further about coming to Ireland in terms, *e.g.*, of arranging a job, arranging accommodation, arranging schooling for his children. But there is no requirement that, before exercising his freedom of movement rights to come to Ireland, an EU national should make efforts to arrange such matters. If a man is not required by law to do something, he is not required to do it, and it cannot be held against him when he does not do that which he is free at law not to do, yet that in effect is what was done when the Minister viewed in a negative light the fact that Mr Khan has as yet done nothing further about coming to Ireland in terms, *e.g.*, of arranging a job, arranging accommodation, arranging schooling for his children.

4. In passing, the court notes too that it is quite clear as a legal proposition that Mr Khan, provided he seeks to enter Ireland in accordance with the 2015 Regulations, is entitled to come here in the company of, *inter alia*, "*qualifying family members*" (see reg.3(1)). So it must be the case that in a situation such as that now presenting, *i.e.* where a non-Irish EU national, believing his family members to be "*qualifying family members*", sets about, with his family members, lawfully to procure the visas whereby those family members may physically accompany him when he comes to Ireland, he has begotten and/or participated in a process that comes within the parameters of the 2015 Regulations. After all, the Khans have not, between them, engaged in the application, review, and now judicial review processes because they think it is a pleasant way to fill the time. (Nor has the Minister responded to their application other than from a sense that he must). All that the Khans have done has taken place in a context in which Mr Khan claims to be seeking to exercise his free movement rights in a manner that suits him, and at law there is no requirement that Mr Khan must come here first and his wife and children must follow – reg.3(1)(b) of the 2015 Regulations expressly contemplates that, all else being equal, family members may enter the State with an EU citizen; this is not confined to second and later entries.

5. In his refusal of the visa applications, the Minister moves on from the text quoted above to reach the further conclusion that "[T]he indications are that the purpose of his [Mr Khan's] move to Ireland is to artificially create the conditions which would allow you [the visa applicants] to gain a derived right of residence in the United Kingdom". There was and is an absence of any factual evidence in the materials that went before the Minister to support the just-quoted conclusion. Moreover, even if an eventual move to the United Kingdom is a long-term objective of the Khans – and there is nothing in the evidence that went before the Minister to suggest that it is – provided they come here lawfully and eventually go to the United Kingdom lawfully, there is nothing wrong in such an end being (if it is) an ultimate objective of theirs. The court recalls in this regard the observations of the Court of Appeal in *Mahmood v. MJE* [2018] IECA 3, by reference to Case C-109/01 *Akrich*, that having as one's end-objective an eventual lawful invocation of *e.g.*, *Surinder Singh* rights to enter another EU member state, is not wrong as a matter of EU law (nor indeed is it wrong as a matter of Irish law). Unlike *Hosan Ara Khan v. MJE* [2019] IEHC 222, where (i) there were express indications (slips) by the applicants that they intended to live in the UK, and (ii) what was done reeked of a false construct devised to obtain benefits under EU law, nothing of the like presents here.

6. As for Mrs Khan and the circumstances of where and how she got married to Mr Khan, the Minister could reasonably conclude that the details of how she came to be married to Mr Khan are less than straightforward; however, in the face of an un-impugned marriage certificate (and it is un-impugned), the fact remains that at the end of the day – however and wherever they came to be married – Mr and Mrs Khan, per that un-impugned marriage certificate, are married. In any event, the court does not see that there is a rational connection between the details of where and how Mr and Mrs Khan came to be married close on two decades ago, and the applications at hand.

7. The court accepts that the Minister is entitled to keep a watch out for abuses of rights – of course he is – but any conclusion that a person is engaged in an abuse of rights must be rooted in fact and here there is no factual basis for the conclusions reached. As for the unexpected surge in EU Treaty Rights applications from, *inter alia*, Afghanistan and Pakistan, around the time that the Khans made their visa applications, that surge offers a perfectly reasonable basis for the Minister carefully to scrutinise applications within that unexpected surge so as to make sure that there is no abuse of rights presenting on the particular facts of any one case. But such a general surge does not, in and of itself, offer a sound basis on which the Minister can properly reach a conclusion as to an abuse of rights in any one application where, on the facts of such application, there is nothing further (and here there is nothing further) in the factual evidence before the Minister to justify such conclusion. Moreover, in bringing legitimate careful scrutiny to

bear, the Minister has to be careful not to bring so sceptical an attitude to bear as would place him in breach of the policy objectives of the Citizens' Rights Directive (Directive 2004/38/EC), including *e.g.*, recital 6, which provides that an objective of that measure is "to maintain the unity of the family in a broader sense", and recital 8, which points to a desire on the part of member states as regards "facilitating the free movement of family members who are not nationals of a Member State", or deprive the provisions of that Directive or the transposing regulations of their effectiveness (see in this last regard Case C-127/08 Metock, para.84).

8. The court accepts the contention of the Minister that the outcome of the within application turns on the issue of abuse of rights and, having reached the conclusions aforesaid, does not propose to consider the further questions of law contended by the applicants to arise. However, it cannot but note, (i) as regards the assertion of the Minister that the marriage between the first and fifth applicants "cannot" be recognised "for [Irish] visa application purposes" by reason of the fact that the first applicant was 17 years old at the time of the marriage (16 years being the minimum age for marriage of women in Afghanistan), that (ii) no reason of law or public policy has been pointed to by the Minister as to why he "cannot" recognise a marriage which, when it was contracted, could likewise have been entered into in Ireland (pursuant to the Family Law Act 1995, albeit with court consent).

9. For the reasons aforesaid, the court will grant the orders of *certiorari* sought.