



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 384

[2018 No. 309]

Edwards J.  
McCarthy J.  
Kennedy J.

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND, 1937

BETWEEN/

S.S. (PAKISTAN)

APPLICANT/

APPELLANT

- AND -

THE GOVERNOR OF THE MIDLANDS PRISON

RESPONDENT /

RESPONDENT

JUDGMENT of Ms. Justice Kennedy delivered on the 4th day of December, 2018

**Introduction**

1. This is an appeal from an order of the High Court (Humphreys J.) of the 17th July 2018, refusing an order directing the appellant's release pursuant to Article 40.4.2 of the Constitution. The appellant sought in the High Court an enquiry as to the legality of his detention under Article 40.4.2 of the Constitution and argued that his detention on foot of a deportation order was unlawful on the basis of application for a residence card pursuant to the European Union (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015).

**Background**

2. The appellant, Mr Shahid, arrived in Ireland in June 2012 and submitted an asylum application on the 27th June 2013. On the 5th September, he was refused refugee status and a deportation order was made on the 2nd July 2015. This was notified to the GNIB directly in August 2015 and was served on the appellant on 9th January 2018. On 30th January 2018, the appellant applied for a residence card under the **European Union (Free Movement of Persons) Regulations 2015 (S.I. 548 of 2015)** ("The Regulations"), asserting that he is a qualifying family member, on the basis that he is the adult dependent child of the spouse of an EU citizen exercising her EU treaty rights in the State by virtue of the "marriage" between his father and Ms NM, a Romanian national. On 20th June 2018, the appellant was arrested and detained on foot of the unchallenged deportation order. On 27th June 2018, the Minister refused the appellant's application for a residence card on the basis that he was not a qualifying family member as he was not dependent on the EU citizen. His father's residence card was also revoked on that day as his marriage to NM was considered to be a marriage of convenience.

3. The appellant, who was granted bail on July 2nd, 2018, contends that his arrest and detention on foot of the deportation order are unlawful due to his application for a residence card.

**The Application for a Residence Card**

4. The Court was provided with an agreed chronology of events from which the following can be gathered. The appellant applied for a residence card on the 30th January 2018 on the basis that he was a qualifying family member of a EU citizen, based upon the assertion that he was a long term dependent of his father since his student days in the UK, and the fact that his father was in turn the spouse of Ms NM who was an EU national who was lawfully resident in the State on foot of the exercise of her EU Treaty rights. On the same date, he submitted a request for confirmation that the deportation order would be suspended pending the determination of his application. On the 2nd February 2018, the Minister replied that this was not possible; the enforcement of the deportation order being an operational matter. On the 6th March 2018, an undertaking was again sought that he would not be deported pending a decision on his application, which was refused and again he requested an undertaking on the 22nd March, whereupon on the same date further information was sought and further information was provided by the appellant on the 30th March. On the 5th April, the Minister reconfirmed that no undertaking would be given. On the 9th April, further information was provided to the Minister. On the 25th April, the appellant requested he be furnished with a certificate of application pursuant to article 10 of Council Directive 2004/38/EC. 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 19.4.2004 (which, if he was entitled to so apply, would in turn have entitled him to have his passport stamped by an immigration officer with what is known as a "Stamp 4" stamp, indicating that he had permission to stay in Ireland for a specified period, subject to conditions) and on the 26th April, the Minister stated that a temporary Stamp 4 would not issue at that time. The appellant's solicitor sought reasons for this and on the 20th June 2018, the appellant was arrested on foot of the deportation order. Court proceedings then ensued. As stated in the introduction to this judgment, these took the form of an application for an enquiry under Article 40.4.2 of the Constitution into the legality of his detention.

### Decision of the High Court

5. In the High Court, Humphreys J. found that the appellant's detention was lawful. In doing so, he held, *inter alia*, that the appellant had not established that he was a qualifying family member for the purposes of the Regulations, and stated:

"Regulation 7(1) establishes that an application can only be made by a *"family member"*. That means either a permitted or a qualifying family member. It is agreed that the applicant is not a permitted family member. Thus, he can only be a qualifying family member, but to be a qualifying family member under reg. 3(5) in pertinent part you have to be a direct descendant who is *"a dependent of the Union citizen, or of his or her spouse or civil partner"*. This reflects directive 2004/58/EC art. 2.2(c). This applicant has not established to the Minister's satisfaction that he is a dependent. Therefore, he is not to be treated as a qualifying family member and is therefore not entitled to rights under reg. 7(1) or (6) or the corresponding provisions of the directive, in particular art. 2.2 or 10. Merely asserting dependency does not create rights under art. 7(6). As it was put in *C.A. v. Governor of Cloverhill Prison* [2017] IECA 46 (Unreported, Court of Appeal, 27th February 2017) *per* Hogan J., one has to be an *"actual"* qualifying or permitted family member to have rights under art. 7, not simply an applicant. In that sense, I should clarify that the words *"an applicant under paragraph (1)"* in reg. 7(6) mean a person who is *entitled* to apply under that paragraph, that is a dependent *"family member"*, not simply any random person who happens to wander along and make an application, irrespective of whether they are a family member in a dependency situation or not."

### Grounds of Appeal

6. The core issue in this case relates to the Regulations and the question of whether the arrest and detention of the appellant on foot of the unchallenged deportation order is lawful, having regard to the application for a residence card made after the deportation order and before the appellant was arrested on foot of the deportation order.

7. There are 21 grounds of appeal set out in the appellant's notice of appeal. Whilst the Court has had regard to all grounds of appeal, the pertinent grounds appear to be as follows:

- (i) the trial judge erred in holding that, as the appellant had not "established" that he is "actually" a qualifying family member he is not entitled to any rights pursuant to Regulation 7(1) and Regulation 7(6) of the 2015 Regulations or article 10 of the Directive;
- (ii) the trial judge erred in holding that it is necessary to establish to the Minister for Justice's satisfaction that one is "actually" a qualifying family member before one can enjoy rights pursuant to the 2015 Regulations or article 10 of the Directive;
- (iii) in opining that "dependency is possibly different from being a spouse", then the trial judge fell into error;
- (iv) the trial judge erred in holding that the existence of an unchallenged deportation order is "a complete answer to any Article 40.4 proceedings based on the deportation; and
- (v) the trial judge erred in concluding that, having been refused a residence card seven days after his arrest, the appellant is not within the scope of the Directive.

### Relevant statutory provisions

Directive 2004/38 EC of the European Parliament and of the Council.

8. The relevant articles of the Directive are as follows:

"Article 2, for the purposes of the Directive provides definitions as follows:-

2) "Family member" means:

- (a) the spouse;
- (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
- (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
- (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);"

9. Article 10 (1) of the 2004 Directive provides that:-

"The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen' no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately."

European Union (Free Movement of Persons) Regulations 2015

10. The 2015 Regulations transpose the Directive into national law. The following is the definition provided of family members and qualified family members:

"2.(1) In these Regulations:-

"family member" means a qualifying family member or a permitted family member;

"permitted family member" means, in relation to a particular Union citizen, a person who is, under Regulation 3(6), a permitted family member of the Union citizen;

"qualifying family member" means, in relation to a particular Union citizen, a person who is, under Regulation 3(5), a qualifying family member of the Union citizen;"

11. The relevant provision of Regulation 3 is that of Regulation 3(1)(b)(iii).

12. Regulation 3(1) states: -

"3(1) This paragraph applies to:-

(a) Union citizens entering or remaining in the State in accordance with these Regulations, and

(b) a family member of a Union citizen referred to in subparagraph (a) who:-

(iii) becomes a family member while in the State and seeks to remain with the Union citizen in the State."

13. Regulation 3(5)(b)(ii)(II) replicates article 2(2) of the 2004 Directive and sets out the criteria for qualifying family members, the relevant subsection is emphasised in bold and set out hereunder: -

"For these Regulations, a person is a qualifying family member of a particular Union citizen where:-

(a)....

(b) the person is:-

(i) the Union citizens spouse or civil partner,

(ii) a *direct descendant* of the Union citizen, or **of the Union citizens spouse** or civil partner, **and is:-**

(I) Under the age of 21, or

(II) a dependent of the Union citizen, or of his or **her spouse** or civil partner..."

14. Regulation 7 sets out the conditions of application for residence cards for family members who are not nationals of a Member State-

"(1) A family member who is not a national of a Member State:-

(a) may, within 3 months of the relevant date, apply to the Minister for a residence card, and

(b) shall, where an application under paragraph (a) has not been made within the period specified in that paragraph, before the expiry of 4 months after the relevant date, apply to the Minister for a residence card.

(2) In paragraph (1), the "relevant date" means:-

(a) in the case of a qualifying family member, the date on which he or she:-

(i) entered the State as a qualifying family member, or

(ii) having already been in the State, became a qualifying family member,

and

(b) in the case of a permitted family member:-

(i) the date on which he or she first entered the State as a permitted family member, or

(ii) where he or she was present in the State on the date on which the Minister decided that he or she should be treated as a permitted family member, that date.

(3) An application under paragraph (1) shall contain the particulars specified in Schedule 2 and shall be accompanied by such additional information requirements provided for in that Schedule as are applicable.

(4) The Minister shall cause to be issued a notice acknowledging receipt of an application under paragraph (1).

(5) The Minister shall, within 6 months of the date of receiving an application under paragraph (1):-

(a) where he or she is satisfied that it is appropriate to do so, issue a residence card containing the particulars set out in Schedule 3 to the family member concerned, or

(b) notify the family member concerned that his or her application has been refused, which notification:-

(i) shall be accompanied by a statement of the grounds for the refusal, and

(ii) may be accompanied by a notification under Regulation 21(1) or 23(3), or both.

(6) An applicant under paragraph (1) may remain in the State pending a decision on the application."

#### Actual qualifying family members

#### Submission of the appellant

15. It was submitted in argument that the respondent is incorrect in asserting that applicants who are dependent on a Union citizen and/or her spouse differ from other applicants and that the Minister is entitled to make a *prima facie* assessment of whether the applicant is actually dependent. It is contended that there is no statutory support for this distinction although both the Directive and the Regulations do provide for an initial assessment process in respect of permitted family members. This was considered in by Hogan J. in *C.A. v. Governor of Cloverhill Prison* [2017] IECA 46:

"25...The very fact, however, that Article 7(6) of the 2015 Regulations expressly addresses the right to reside in the State of actual qualifying and permitted family members pending the processing of the residence card while no similar provision is contained in the Regulations for those (such as Mr. A.) who have simply applied for the status of permitted family member is, in its own way, telling. Like Keane J. in the High Court, I can find nothing in Article 7 or, for that matter, anything in any other provision of the 2015 Regulations that confers permission to reside in the State on a person who has applied, under Article 5(2) of those Regulations for a decision that he be treated as a permitted family member of a Union citizen, pending the making of that decision.

26. ... one would have expected that the 2015 Regulations would have provided so expressly in the same manner as does Article 7(6) in relation to those awaiting the processing of residence cards. ....

27. For completeness, I might add that there is nothing either in the 2004 Directive which provides for such an entitlement. Again, had the Union legislator envisaged that there would be such a positive entitlement ..., one imagines that this could have been provided for with relative ease .... The very fact that the Union legislator allowed such latitude to the Member States in such matters in its own way also contra-indicates the existence of any general-EU derived right to remain in the State pending the determination of the application to be treated as a permitted family member."

16. In *Secretary of State for the Home Department v. Muhammad Sazzadur Rahman and Others* (Case C 83/11), which was referenced in *C.A.*, the Court of Justice pointed out at para 19:

"..., it follows both from the wording of Article 3(2) of Directive 2004/38 and from the general system of the directive that the European legislature has drawn a distinction between a Union citizen's family members as defined in Article 2(2) of Directive 2004/38, who enjoy, as provided for in the directive, a right of entry into and residence in that citizen's host Member State, and the other family members envisaged in Article 3(2) of the directive, whose entry and residence has only to be facilitated by that Member State."

17. Considering the foregoing, it is submitted that the core argument of the respondent is really that at the time of drafting, adult dependent children ought to have been put in the permitted family member category where they would have been subject to an initial assessment. In any case, given that adult dependent children are qualifying family members for the purposes of the Regulations, it is submitted that the Minister is not entitled to perform an evaluation of the claim to *prima facie* entitlement on the part such adult child to make an application under Regulation 7(1), and the trial judge erred in finding as much.

18. In accepting that the appellant failed this evaluation of the claim to *prima facie* entitlement, thus entitling the Minister to refuse a certificate of application, the trial judge relied on *Yunying Jia v. Migrationsverket* (Case C-1/05 ) [2007] E.C.R I-1:

"Consequently, a document of the competent authority of the State of origin or the State from which the Appellant came attesting to the existence of a situation of dependence, albeit appearing particularly appropriate for that purpose, cannot constitute a condition for the issue of a residence permit, while a mere undertaking from a Community national or his spouse to support the family member concerned need not be regarded as establishing the existence of that family member's situation of real dependence."

19. It was submitted that such a reliance was incorrect, and that it was clear that *Jia* merely addressed the question of what evidence is sufficient for the grant of a residence card. It was contended that the paragraph has no bearing on the question of whether rights under the Directive can be denied to an adult child who asserts dependency in support of their residence card application, and that it is silent on the question of whether it is permissible for the Minister to conduct an additional evaluation of the claim to *prima facie* entitlement on the part such adult child to make an application under Regulation 7(1) and, on that basis, refuse to issue the certificate required by article 10 of the Directive.

20. It was submitted that in the circumstances set out, the issuing of a certificate of application to applicants under article 10.1 of the Directive is mandatory; and that this is clear from the use of the word "shall" in the text of the article itself. Thus, the trial judge erred in finding that the appellant could not benefit from Regulation 7(6) of the 2015 Regulations as he had not *ex tunc* "satisfied the Minister" of his dependency and where the substantive application for a Residence Card had not been determined, not least at the time of his arrest.

#### Submission of the Respondent

21. The right to remain as an applicant for a residence card is provided for in both the Directive and the 2015 Regulations. For both, to gain the benefits thereof, you must actually be a family member and, in this instance, must actually be dependent. It is submitted that as the appellant has not established the fact of his dependency, he is not a qualifying family member within the meaning of the 2015 Regulations nor is he a family member within the meaning of the Directive. As such, he did not acquire a temporary right of residence under Regulation 7(6).

22. It was submitted that there is an obvious distinction between a person who asserts that he /she is a qualifying family member as either:-

(a) The spouse, civil partner of the EU citizen or child under the age of 21 of the EU citizen or the spouse of the civil partner thereof, or

(b) The dependent of the EU citizen or his/her spouse or civil partner, who is either a direct descendent under the age of 21 or a direct relative in the ascending line.

23. A spouse, civil partner or minor child can establish such status, it is argued, on a *prima facie* basis, by the production of the appropriate official certificate(s). It is only where there is cogent evidence of fraud, or of the existence of a marriage of convenience, that the Minister could determine that the person is not a "qualifying family member", notwithstanding that they have produced the original appropriate certificate(s). A person who asserts that he/she is qualified to apply as an adult dependent child over the age of 21, can establish the relationship and age components of the requirement, i.e., that he/she is the child of the EU citizen, or spouse of the EU citizen, and his/her age, by the production of a birth certificate or a marriage certificate. However, the dependency component of the requirement can only be established by satisfying the Minister with evidence of actual dependency.

24. In holding that the appellant had not established to the satisfaction of the Minister that he was dependent, Humphreys J. followed the dictum of Hogan J. in *C.A.*, who found that the entitlement to temporary permission only inures to "actual qualifying and permitted family members pending the processing of the residence card"

25. Hogan J. went on to say that:

"28. It follows, accordingly, that the mere fact that the applicant has applied for the status of a qualifying family member cannot in and of itself interrupt the smooth operation of the deportation process by conferring on such an applicant the right to remain in the State pending the determination of that application..."

26. It should be noted that in the course of hearing, counsel for the appellant submitted that the reference of Hogan J. in the preceding paragraph to "qualified family member" should be read as "permitted family member". Counsel for the respondent did not concede this point.

27. The respondent contends that, by analogy to the dictum of Hogan J., the mere assertion that a person is a qualifying family member is not sufficient to engage Regulation 7(6), he must establish that (i) his father is the spouse to an EU citizen and (ii) he is 'a dependent' within the meaning of the Regulations.

28. It was submitted that Humphreys J. was correct to apply the dictum in *Jia*. While it was accepted that the appellant is correct in asserting that *Jia* concerned a decision to grant a residence card to the family member in question, it was submitted that the principle at issue, and endorsed in that case, is equally applicable in the circumstances of the present case. In *Jia* it was held that if the person is not a family member, he/she cannot be entitled to a residence card. By direct analogy, if the person claiming entitlement to apply as a family member is not a family member, he/she equally cannot be entitled to apply for a residence card. Establishing that a person is a family member is sufficient to entitle them to apply to benefit under article 10(1) or Regulation 7(6).

29. It was submitted that the grant of a residence card is declaratory of a person's rights and does not amount to the conferral of such rights, see *Decsi v. Minister for Justice* [2010] IEHC 342., therefore, as a corollary, it is not the finding of the Minister which makes a person a qualifying family member but the underlying facts. In contrast, permitted family members require a determination to be made.

30. It was submitted that it was not necessary for the Regulations to expressly provide for a separate mechanism by which the Minister may determine the legitimacy of a claim of dependency in the context of an applicant claiming to be a qualified family member. The fact that the Minister has chosen to do so for permitted family members is not indicative of an infirmity nor of an intention to grant or extend a temporary right of residence to every person who makes an application under Regulation 7(1).

31. It would be absurd and contrary to the intention of the Minister to interpret Regulation 7(6) as necessarily applying to every person who makes an application under Regulation 7(1). It is clearly not the intention of the Minister to extend a temporary right of residence to every person who makes an application under Regulation 7(1), but rather only to those who have provided *prima facie* evidence that they actually qualify and are therefore entitled to apply. To allow any person who is the subject of a deportation order but not a family member within the meaning of the Regulations to prevent the operation of the deportation order by merely asserting he/she is a family member would be illogical and would facilitate, if not invite, abuse of the right of free movement of persons, which is one of the fundamental freedoms of the EU.

32. It was submitted that as the appellant's father has been found to be party to a marriage of convenience, albeit since the arrest of the appellant, the appellant is not permitted to rely on any EU right arising therefrom, by reason of the principle against abuse of rights, see *Edward Cussens and Others v T. G. Brosman* (Case C-251/16).

33. In the course of hearing, the respondent submitted that an applicant's application for a residence card may continue to be processed where a certificate of application under article 10(1) has not been provided to him but the applicant does not acquire a right to remain pending such a determination. Should an applicant ultimately be granted a residence card, he may then return to this jurisdiction but the fact of his applying for a residence card does not serve to interrupt the deportation process.

34. In conclusion, it was argued that the Minister was not precluded from acting upon the unchallenged deportation order by the appellant's application for a residence card as the appellant is not a family member within the meaning of the Regulations or the Directive. Therefore, the appellant's arrest and subsequent detention is lawful.

### **Analysis and Conclusions**

35. At the outset it should be stated that an application for a residence card is not an application for a right of residence or residence status. The entitlement of a non-national, already in the country, to lawfully reside in Ireland depends on whether or not they qualify for temporary residence under Regulation 6 of the 2015 Regulations, or permanent residence under Regulation 12 of the 2015 Regulations. It has never been suggested that the appellant qualifies for permanent residence at this point (as it requires, *inter alia*, continuous residence in conformity with the Regulations for a minimum of five years to so qualify). What we are concerned with in the appellant's case is his entitlement, or otherwise, as the case might be, to temporary residence.

36. Regulation 6 of the 2015 Regulations permits persons to whom Regulation 3(1) applies to temporarily reside in the State, subject to conditions. Such persons include Union citizens and, in certain circumstances, "family members" (as defined in Regulation 2 of the 2015 Regulations) of Union citizens. Regulation 2, read in conjunction with Regulation 3, makes clear that the umbrella expression

"family members" embraces two such categories, namely "permitted family members" and "qualifying family members", to whom different rules may apply. If a person who is a "family member" as so defined by the SI qualifies for temporary residence then, under Regulation 7 they may in some circumstances, and in other circumstances they must, apply for a residence card. However, in order to be eligible to apply at all for a residence card such an applicant must be a "family member" as statutorily defined in the SI. What a residence card does is that it provides *prima facie* evidence that the holder is a person who has temporary residence rights, which can then be produced whenever it is required to demonstrate that fact to a person in authority, such as a garda or an immigration officer. It must be re-iterated that it does not grant such rights. Finally, Regulation 7(6) of the 2015 Regulations provides a safeguard for family members who have applied for a temporary residence card but whose application has not yet been processed. It provides that such persons may remain in the State pending a decision on their application for a residence card. The protection does not apply, however, to non-family members as statutorily defined in the SI. It only applies to "applicants under paragraph (1)", i.e., Regulation 7(1), and to be an applicant under paragraph (1) a person must be a "family member".

37. The appellant contends that the very fact that he has applied for a residence card and claims to be a family member, and specifically a qualifying family member as a dependent adult child of the spouse of an EU citizen, means that the Minister is precluded from acting on the unchallenged deportation order. If he were correct about that it would follow that he cannot be deported pending the determination of his application for a residence card and his detention for that purpose is unlawful.

38. The appellant's contention raises the question of whether the intention of the legislator, as expressed in the Regulations, was to permit all individuals who have applied for a residence card on the basis of a mere assertion that they are a qualifying family member by virtue of being a dependent adult child of the spouse of an EU citizen, and in particular who have merely asserted, but have provided either no evidence of, or insufficient evidence of, dependency, to automatically acquire an entitlement to remain pending the determination of the application. The answer to that depends upon a consideration of the provisions of the Regulations which must now be carefully scrutinised.

39. As mentioned already, somewhat differing rules apply to the situations of qualifying family members and permitted family members. The fundamental difference is that the entitlement to temporary residence for a bona fide qualifying family member arises as a matter of law. One either satisfies the criteria or one does not do so. The Minister has no role in the matter and qualification does not depend on the exercise of a ministerial or other discretion. In the case of permitted family members, however, the entitlement to temporary residence does not arise as a matter of law. It is dependent on the exercise of a ministerial discretion, to be exercised in accordance with Regulation 5 of the 2015 Regulations, to permit it.

40. As stated by Hogan J. in *C.A. v. The Governor of Cloverhill Prison*, the Regulations are expressed to give "further effect" to the terms of the Citizens' Rights Directive 2004/38/EU. Regulation 3(5) of the Regulations set out above, provides for the categories of 'qualifying family members'. The appellant contends that he comes within one of those categories by reason of his circumstances. It should be noted that at the time of the appellant's arrest in June 2018 on foot of the deportation order, the Minister had not taken the decision to revoke the appellant's father's residence card or indeed to refuse the appellant's application for a residence card.

41. Regulation 5 of the Regulations lists the categories of 'permitted family members' where an individual claiming to come within one of those categories must provide the Minister with evidence of a 'durable relationship with the Union citizen' upon which the Minister conducts an examination and then gives a decision which is notified to the applicant under Regulation 5(6) of the 2015 Regulations. It is submitted on behalf of the appellant that there is no such process when one applies as a qualifying family member and that such cannot be implied.

42. Pursuant to Regulation 3(6), a person is considered a permitted family member of a particular Union citizen for the purpose of the Regulations where the Minister has decided in accordance with Regulation 5, that the person should be treated as such for the purpose of the Regulations. There is no such decision-making process provided for in the Regulations in the instance of a qualifying family member.

43. Regulation 3(5)(b)(ii)(II); provides that an applicant who is a dependent of the Union citizens' spouse may apply for a residence card provided of course, the applicant satisfies the other requirements of application. Section 5 of the Interpretation Act provides for the construction of the provisions of a Statutory Instrument as follows: -

"5(2) In construing a provision of a statutory instrument (other than that relates to the imposition of a penal or other sanction):-

(a) That is obscure or ambiguous, or

(b) That on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,

The provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment."

44. Regulation 3(5) reflects article 2.2(c) of the Directive, which provides:

"2.2(c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b)."

45. There is little, if any, distinction in terms between article 2.2(c) of the Directive and Regulation 3(5) of the 2015 Regulations. A distinction is drawn in both between a direct descendant of the Union citizen or the Union citizens' spouse or civil partner who is under the age of 21 **and** that of a direct descendant of either who is a dependent of either the Union citizen or the Union citizens' spouse or civil partner. It is the position therefore, that in the instance of a person applying for a residence card under this provision, and where the applicant is under the age of 21 years, logically, that person must produce evidence to that effect. Equally, if a person is applying on the basis of dependency, it follows that one must produce evidence to establish a relationship of dependency. That was clearly the intention of the Minister in making the Regulations.

46. The appellant's case is that once an applicant asserts that he/she is a qualifying family member, that person must automatically receive the benefit of Regulation 7(6) of the Regulations and article 10(1) of the Directive without any need to satisfy the Minister, even on a *prima facie* basis, that he/she is a family member. We are satisfied that that is not the case.

47. Regulation 7(6) of the Regulations provides expressly for the right to remain in the State of family members (as defined in Regulation 2) pending a decision on their application for a residence card. Moreover, where an applicant is merely seeking, but has not yet been granted, the status of permitted family member, there is no such entitlement because such a person is not yet "a family member". That, therefore, is indicative of the fact that before one gains the benefit of Regulation 7(6), one must be, as stated by Hogan J. in *C.A. v. the Governor of Cloverhill Prison*; an actual "family member".

"25. The very fact, however, that Article 7(6) of the 2015 Regulations expressly addresses the right to reside in the State of actual qualifying and permitted family members pending the processing of the residence card while no similar provision is contained in the Regulations for those (such as Mr A.) who have simply applied for the status of permitted family member is, in its own way, telling."

48. I am satisfied that the correct construction of Regulation 3(5) of the Regulations, requires that an applicant establish to the satisfaction of the Minister that he/she is an actual qualifying family member where such an application is made on the basis of an adult dependency. This must be done by providing to the Minister, at the time of application, evidence of sufficient cogency to demonstrate the *prima facie* existence of such dependency.

49. To interpret Regulation 7(6) as applying to every person who merely applies for a residence card pursuant to Regulation 7(1) would not reflect the intention of the legislator. I am satisfied on a consideration of the entirety of the Regulations, and the legislative scheme under which they were made, that it was not the intention of the Minister to provide a temporary right of residence to any person who simply submits a form seeking a residence card on the basis of dependency without first establishing on a *prima facie* basis that he/she is an actual qualifying family member.

50. It follows, accordingly, that it is not necessary that the Regulations expressly provide that an individual making an application on the basis of dependency must firstly establish that he/she is a qualifying family member and in that respect establish a relationship of dependency. It is clear from a consideration of the Regulations that, before an applicant can be considered as an applicant for a residence card, he/she must be a qualifying family member. Regulation 3(5) provides that a person is a qualifying family member where the person is a direct descendant of the Union citizens' spouse, and is a dependent of the Union citizens' spouse. Therefore, the applicant must establish both elements to the satisfaction of the Minister before one can be considered to be an actual qualifying family member. Any other construction of the Regulation would be contrary to the intention of the Minister.

51. I am of the view, that it cannot have been the intention of the Minister, in making the Regulations, that where an application for a residence card is submitted simply on the basis of a bald, or insufficiently supported, assertion of dependency on a Union citizen or a Union citizen's spouse, that this is sufficient for the applicant to be considered a qualifying family member and therefore immediately entitled to the benefit of Regulation 7(6) without production of any, or any sufficient, evidence supporting the asserted relationship of dependency. A claim of dependency necessarily requires evidence to establish such a relationship. It is only then that the Minister would be justified as treating an applicant as being an actual qualifying family member entitled to remain in the State pending a decision on his/her application for a residence card.

52. I am satisfied that the mere fact that the appellant submitted an application for a residence card and asserted that he is a qualifying family member on the basis that he is the dependent adult child of the spouse of a Union citizen, cannot of itself confer a right to remain on the appellant in terms of Regulation 7(6) of the Regulations.

53. I accept the respondent's submissions that the appellant must first establish to the satisfaction of the Minister that there exists a relationship of dependency sufficient to make him a qualifying family member, before Regulation 7(6) is engaged.

54. I do not find any error in the decision of the trial judge. He correctly found that the appellant had not demonstrated that he had an entitlement to the rights under Regulation 7(6) of the Regulations.

55. It therefore follows, that I am satisfied that the appellant's detention is lawful and that the trial judge was not in error in so concluding.