THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 800JR]

BETWEEN

NAUMAN QURESHI and USAMA QURESHI

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice David Keane delivered on the 20th June 2019

Introduction

1. This is the judicial review of the decision of the Minister for Justice and Equality ('the Minister'), dated 23 September 2016, to uphold on review a first instance decision of 24 November 2015 to refuse the application under Reg. 7(2) of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 and 2008 ('the 2006 Regulations') of the second applicant, Usama Qureshi, a national of Pakistan, for a residence card as a permitted family member of his brother, the first applicant Nauman Qureshi, a British – and, hence, European Union – citizen, exercising free movement rights in the State ('the review decision').

2. Both sides agree that the application fell to be considered under the review of decisions provision in Reg. 21(4) of the 2006 Regulations because, although those Regulations were revoked with effect from 1 February 2016 by the European Communities (Free Movement of Persons) Regulations 2015 ('the 2015 Regulations'), the transitional provision at Reg. 31(28) of the new regulations provides that, where a person had sought a review under Reg. 21(1) of the old ones that had not been determined by that date, Reg. 21 of the old regulations continued to apply to the determination of that review. The applicants had sought a review on 8 December 2015 and, thus, it came within the scope of the transitional provision.

3. Both the 2006 Regulations and the 2015 Regulations that replaced them were made for the purpose of giving effect to 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 ('the Citizens' Rights Directive'). The requirements of the Citizens' Rights Directive have not changed.

4. These proceedings have come about because the first paragraph of the decision recites, in material part, '[t]he decision to refuse your application ... has been reviewed in accordance with Regulation 25 of [the 2015 Regulations]', suggesting that the Minister had overlooked or ignored the application of the transitional provision in conducting that review.

Procedural history and grounds of challenge and opposition

5. The application is based on a statement of grounds dated 20 October 2016, supported by an affidavit of the first applicant, sworn the previous day.

6. By Order made on 24 October 2016, Humphreys J granted leave to seek an order of *certiorari* quashing the review decision on three of the grounds set out in that statement. Those three grounds amount, in substance, to just two (and, arguably, because of the compendious nature of each, could probably be expressed as just one).

7. The first ground (combining the first and second grounds as they are expressed in the statement of grounds) is that, in conducting the review of the decision to refuse the second applicant a residence card under the 2015 Regulations, rather than the 2006 Regulations, the Minister acted: *ultra vires*; in breach of the transitional provision of Reg. 31(28) of the 2015 Regulations; in breach of the applicants' entitlement to natural and constitutional justice and fair procedures; or in a combination of some or all of those unlawful ways.

8. The second ground (expressed as the third) is that the decision to refuse the second applicant's review application was arrived at in breach of; fair procedures, natural and constitutional justice; the 2006 Regulations; the 2015 Regulations; or any combination of some or all of those lawful requirements.

9. The Minister's statement of opposition is undated but was filed on 26 July 2017. It is supported by an affidavit, sworn on 18 July 2017 by Marie O'Brien, a higher executive officer in the EU Treaty Rights Section of the Irish Naturalisation and Immigration Service ('the INIS') as part of the Department of Justice and Equality.

10. In that statement of opposition, the Minister joins issue with the applicants' claims that the review decision was made *ultra vires*, unlawfully or in breach of the applicants' right to natural and constitutional justice and fair procedures.

11. In addition, the Minister puts forward two affirmative pleas. The first is that, while the review decision refers in error to the 2015 Regulations, the review was carried out under the 2006 Regulations. The second plea, made in the alternative and strictly without prejudice to the first, is that, even if the review had been conducted under the 2015 Regulations, there could have been no prejudice to the applicants because there is no material difference between the 2015 and 2006 Regulations as each would apply to the facts of the applicants' case.

Background to the review decision

12. In her affidavit, Ms O'Brien avers in material part as follows. An executive officer prepared a recommendation on the residence card application on 15 September 2016 ('the recommendation'). The recommendation refers only to the 2006 Regulations. As review officer, Ms O'Brien prepared a decision on the review on the same date ('the review officer decision'). The review officer decision recites that the review was considered under the 2006 Regulations. Ms O'Brien exhibits each of those documents, which – she acknowledges – are not routinely provided to an applicant by the EU Treaty Rights Review Unit

13. Ms O'Brien provides this explanation for the reference to the 2015 Regulations in the review decision:

'As is the usual practice within the EU Treaty Rights Review Unit, I used a template letter from the I.T. system within the Department as the basis for the [review decision] and I inserted the reasons for the refusal of the Residence Card into the template letter. Prior to September 2016, the template for a refusal of a Residence Card referred to in the 2006 and 2008 Regulations but it was amended in September 2016 to refer to the 2015 Regulations. While I inserted the grounds on which the decision to refuse the Residence Card had been made, I omitted to amend it to refer to 2006 and 2008 Regulations. This was a purely administrative error which I did not advert to prior to the institution of the within proceedings.'

New or previously unspecified grounds

14. When they received the review decision, the applicants could not have known why it referred to the 2015 Regulations and not the 2006 ones. However, they did not seek clarification or an explanation before issuing High Court proceedings asserting that the review decision was bad in law because it had wrongly considered the residence card application under the 2015 Regulations. It is true that they had not been provided with a copy of the recommendation and review officer decision, which underpin the Minister's review decision, but nor had they sought to be provided with those documents before issuing these proceedings based on that assertion. When the Minister explained, in opposition to that claim, that the application had been correctly considered under the 2006 Regulations but that the review decision incorrectly recited that it had been considered under the 2015 Regulations due to an administrative error, the applicants shifted their ground.

15. Almost four months after the Minister filed opposition papers and just two weeks prior to the hearing of the application for judicial review, the applicants filed their written legal submissions. In those submissions, in the guise of the identification of legal issues, they supplemented the claim that the review decision was wrongly made under the 2015 Regulations on the basis of which they had sought, and been granted, leave to apply for judicial review, with the following new (or newly specified) grounds instead:

(a) The review decision is bad in law because it contains an error on the face of the record in reciting that the review was conducted in accordance with Reg. 25 of the 2015 Regulations, rather than Reg. 21 of the 2006 Regulations.

(b) The review decision is bad in law for misapplying the term 'member of the household of the Union citizen', which is used in the Citizens' Rights Directive, the 2006 Regulations and the 2015 Regulations.

(c) The review decision is bad in law because it was made on a different basis than the first instance decision, without notice to the applicants that that was so.

16. In addition, in their identification in their written submissions of the legal issues that arise, the applicants expand or refine their claim that the review decision was wrongly made under the 2015 Regulations by joining issue with the Minister's assertion that, even if that was so (which the Minister denies), there could have been no prejudice because of the absence of any material difference between the 2015 and 2006 Regulations as each would apply to the facts of the applicants' case.

Argument and analysis

i. the Minister's preliminary objection

17. In the Minister's written submissions, dated 23 November 2017 and filed five days later, the Minister raises a preliminary objection to any consideration of the new or previously unspecified grounds that are now raised in the applicants' written submission in the guise of the legal issues that they say fall to be determined but which were not identified in their statement of grounds, either clearly or at all.

18. The requirement to clearly identify each ground upon which judicial review is sought and, where the scope of any such ground is overbroad or unclear, the arguments to be advanced in support of it was explained by Murray CJ in *A.P. v Director of Public Prosecutions* [2011] 1 IR 729 (at 732-3) in the following way:

'[4] Judicial review constitutes a significant proportion of the cases which come before the High Court and before this Court on appeal. A party seeking relief by way of judicial review is required to apply to the High Court for leave to bring those proceedings and can only be granted such leave on specified grounds when certain criteria, required by law, are met. In most cases the applicant must demonstrate that he or she has an arguable case in respect of any particular ground for relief and there are also statutory provisions setting a somewhat higher threshold for certain specified classes of cases.

[5] In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review set out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought.

[6] It is not uncommon in many such applications that some grounds, and in particular the ultimate ground, upon which leave is sought are expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea, and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted particularly when such a ground is invariably accompanied by a list of more specific grounds.

[7] Moreover, if, in the course of the hearing of an application for leave it emerges that a ground or relief sought can or ought to be stated with greater clarity and precision then it is desirable that the order of the High Court granting leave, if leave is granted, specify the ground or relief in such terms.

[8] There has also been a tendency in some cases, at a hearing of the judicial review proceedings on the merits, for new arguments to emerge in those of the applicant which in reality either go well beyond the scope of a particular ground or grounds upon which the leave was granted or simply raise new grounds.

[9] The court of trial of course may, in the particular circumstances of the case, permit these matters to be argued, especially if the respondents consent, but in those circumstances the applicant should seek an order permitting any extended or new ground to be argued. This would avoid ambiguity if not confusion in an appeal as to the grounds that were before the High Court. The respondents, if they object to any matter being argued at such a hearing because it goes beyond the scope of the grounds on which leave was granted, should raise the matter and make their objection clear. Although it did not arise in this particular case, it is also unsatisfactory for objections of this nature to be raised by

> the respondents at the appeal stage when no objection had been expressly raised at the trial or there is controversy as to whether this was the case.
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> [10] In short it is incumbent on the parties to judicial review to assist the High Court, and consequentially this Court on appeal, by ensuring that grounds for judicial review are stated clearly and precisely and that any additional grounds, subsequent to leave being granted, are raised only after an appropriate order has been applied for and obtained.'

19. O'Donnell J (*nem. diss*.) in *Keegan v Garda Síochána Ombudsman Commission* [2015] IESC 68, (Unreported, Supreme Court (O'Donnell, McKechnie, Clarke, MacMenamin and Laffoy JJ), 30th July, 2015) (at para. 42):

> 'It is not merely a procedural complaint that the ground upon which the case was decided was not one upon which leave was sought or indeed granted nor was there an appropriate amendment. The purpose of pleadings is to define the issues between the parties, so that each party should know what matters are in issue so as to marshal their evidence on it, and so that the Court may limit evidence to matters which are only relevant to those issues between the parties, and so discovery and other intrusive interlocutory procedures are limited to those matters truly in issue between the parties. This is particularly important in judicial review, which is a powerful weapon of review of administrative action. But administrative action is intended to be taken in the public interest, and the commencement of judicial review proceedings may have a chilling effect on that activity, until the issue is resolved one way or another. Because of the impact of such proceedings, it is necessary to obtain leave of the court before commencing proceedings. It is important therefore that the precise issues in respect of which leave is obtained should be known with clarity from the outset. This also contributes to efficiency so that judicial review is a speedy remedy.'

20. In this case, there can be no doubt that three of the four 'legal issues' identified in the applicants' written submissions involve the attempted introduction of new grounds or, at the very least, new arguments that go well beyond the scope of those that informed the particular, albeit very general, grounds upon which leave to seek judicial review was sought and granted. That is because those grounds or arguments arise self-evidently from a consideration of the material exhibited to the affidavit that Ms O'Brien swore in support of the Minister's statement of opposition, which – of course – postdates the grant of leave.

21. The applicants might have responded to that objection by submitting that that is just the point; they were not aware of that material at the time when they originally sought and obtained leave because the Minister had not yet disclosed it. In that regard, they could have pointed to the observation of Fennelly J for the Supreme Court in *Keegan v Garda Síochána Ombudsman Commission* [2012] 2 IR 570 (at 581-2) that a well-established reason for permitting the amendment of a statement of grounds is where the respondent has revealed a new ground of argument in answer to the application, as appears to have happened in *McCormack v Garda Síochána Complaints Board* [1997] 2 IR 489 and *Dooner v Garda Síochána Complaints Board* (Unreported, High Court, Finnegan J, 2nd June, 2000).

22. But, had that response been made, there would be a number of difficulties with it in this case. The first is that there is no reason to believe that the relevant material would not have been made available to the applicants or their legal representatives on request, had such a request been made, though it was not.

23. The second and more fundamental difficulty is that the applicants chose not to apply to amend their statement of grounds in that respect either prior to, or in the course of, the hearing of the application. Instead, they rested on the submission that the three issues in question were captured by the very broad terms of the grounds upon which they were granted leave to seek judicial review and that they should be permitted to argue them, notwithstanding the clear objection that the Minister raised both in his written submissions and at the hearing.

24. I cannot reconcile the applicants' submission with the authorities already cited, or with the following vivid passage from the decision of Cooke J in *Lofinmakin (a minor) v Minister for Justice & Ors* [2011] IEHC 38, (Unreported, High Court, 1st February, 2011):

> '8. The Court would take this opportunity to emphasise that judicial review under O. 84 of the Rules of the Superior Courts is not a form of a forensic hoopla in which a player has at once tossed large numbers of grounds in the air like rings in the hope that one at least will land on the prize marked "certiorari". In the judgment of the Court a Statement of Grounds under O. 84, is inadmissible to the extent that it fails to specify with precision the exact illegality or other flaw in an impugned act or measure which is claimed to require that it be quashed by such an order.
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> 9. Particularly in the context of an application for judicial review in the asylum list against narrative decisions such as those of the Refugee Applications Commissioner, the Refugee Appeals Tribunal or deportation orders supported by the usual "Examination of file" memorandum, it is inadequate and unacceptable that applications be grounded upon bald assertions that a contested measure is unreasonable, irrational, unlawful, unfair, disproportionate or otherwise flawed without identification of the specific feature, fact or omission in the measure which is alleged to constitute the basis of the proposed annulment.'

25. I conclude that the Minister's objection is well-founded. Any other conclusion would fly in the face of the principles clearly identified by Murray CJ in *A.P.*, O'Donnell J in *Keegan*, and Cooke J in *Lofinmakin*. The purpose of those principles is to ensure, insofar as may be possible, the essential fairness and justice of the judicial review process.

26. Lest I am mistaken, I propose to briefly address the merits of each of those new grounds or arguments, in addition to those of the grounds that the applicants were given leave to raise, although my conclusions on the former must be considered *obiter dicta*.

ii. 2015 Regulations wrongly applied

27. The evidence adduced on behalf of the Minister clearly establishes that the review of the decision to refuse the residence card application of the second applicant was carried out under the 2006 Regulations.

28. In oral argument on their behalf, though not in their written submissions, the applicants suggested that the Minister's evidence should be rejected as inconsistent with an inference that should be drawn from certain language in the review decision to the effect that the 2015 Regulations, rather than the 2006 Regulations, had been applied. That language appears in the reasons given for the Minister's conclusion that the second applicant had failed to submit sufficient evidence of his dependence on the first applicant. Specifically, the words at issue are: 'these documents alone show minimal information and do not show a degree of dependency, such [as] to render independent living at subsistence level by you impossible if that financial and social support were not maintained.'

29. The applicants point out that, under Reg. 5(5)(a) of the 2015 Regulations, in considering whether an applicant should be treated as a permitted family member as a dependant of a Union citizen, the Minister is required to have regard to 'the extent and nature of the dependency', and that the 2006 Regulations contain no equivalent express requirement. However, in advancing that argument, the applicants ignore the established jurisprudence on the Citizens' Rights Directive, with which the application of the 2006 Regulations had to conform (and which the 2015 Regulations later expressly recognised). Most notably, in Case C-1/05 *Jia v Migrationsverket* ECLI:EU:C:2006:258; [2007] ECR I-00001, the ECJ explained that, in assessing the dependency of relevant family members on Union citizens for the purposes of the Citizens' Rights Directive:

> '37 [...] 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.'

30. I am satisfied that there is nothing in the language of the review decision from which the inference can be drawn that the 2015 Regulations were wrongly applied, rather than the 2006 Regulations. I accept the Minister's evidence that the 2006 Regulations were properly applied, despite the incorrect recital on the face of the review decision.

31. Thus, it is unnecessary to consider the Minister's alternative argument that, even if the review had been erroneously conducted under the 2015 Regulations, there could have been no prejudice to the applicants because there is no material difference between the 2015 and 2006 Regulations as each would apply to the facts of the applicants' case.

32. In response to that ground of opposition, the applicants had constructed an elaborate argument on the significance of the difference in wording between the definition of permitted family member under the 2006 Regulations and that under the 2015 Regulations, to the effect that the former provided a broader definition of permitted family member and, hence, a more favourable treatment of any qualifying third country national, that the second applicant should be entitled to benefit from.

33. Shortly put, 'other family members' ('OFMs') under Art. 3(2) of the Citizens' Rights Directive, are, amongst others, third-country-national ('TCN') family members of the Union citizen (outside the core definition of family member provided by Art. 2(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'. In transposing that category of family members, Reg. 2(2) of the 2006 Regulations defined a "permitted family member", to include, amongst other persons, such a person 'who, in his or her country of origin, habitual residence or previous residence – (a) is a dependant of the Union citizen, [or] (b) is a member of the household of the Union citizen'. Reg. 5(1)(a) of the 2015 Regulations in adopting a different approach in transposing the same category, defines a permitted family member as, amongst other persons, one 'who in the country from which the person has come- (i) is a dependant of the Union citizen, [or] (ii) is a member of the household of the Union citizen'.

34. Allowing for the principle of conforming interpretation, the applicants argue that the 2006 Regulations provide a more favourable treatment to Union citizens than that strictly required under the Citizens' Rights Directive, as Art. 37 of the Directive expressly permits, because the term 'country of origin, habitual residence or previous residence' captures a wider range of TCN family members than the term 'country from which the person has come'. For my part, I doubt that as a proposition of logic, since the requirements of dependency or household membership are couched in the present tense *i.e.* 'is a dependant' not 'is or was at any time in the past a dependant'. A person can only live in one country at any one time.

35. Hence, I see no obvious basis for the conclusion that the category of persons who are (not 'were') dependent in the country from which they have come, should be any narrower than the category of persons who are (not 'were') dependent in their country of origin, country of habitual residence or, merely, country of previous residence. Either way, there is only one country a person can have come from as a dependant, or member of the household, of the Union citizen concerned. There is an obvious infelicity in the use of the present tense to describe dependency in another country when the person concerned is already in the State but that problem of syntax applies equally to the formulation used in the 2006 Regulations, the 2015 Regulations, and, indeed, Art. 3(2)(a) of the Citizens' Rights Directive (which refers to persons 'who, in the country from which they have come, are dependants').

36. In any event, I do not have to decide the issue in this case.

37. If it were necessary to decide the issue and I were to do so in the applicants' favour, even that would not assist them on the uncontroverted facts of this case. That is because, as the applicants' legal representatives clearly asserted in the letter that accompanied the application for a residence card, that application was made on the basis of the second applicant's dependency on the first applicant in Pakistan. No attempt is made to explain how, in those circumstances, the applicants could have been in any way prejudiced by the failure to apply what they contend is the more favourable treatment provided by the definition of 'permitted family member' under the 2006 Regulations than that provided by the definition of that term under the 2015 Regulations. That is to say, it remains entirely unclear how it might be argued that the second applicant was then dependent on the first applicant in Pakistan as his country of origin, habitual residence or previous residence but not then dependent on him in Pakistan as the country from which he had come.

iii. error on the face of the record

38. As I have already refused the applicants permission to raise this ground, what follows under this head is necessarily obiter.

39. It is clear that the recital on the face of the review decision that it has been conducted 'in accordance with Regulation 25 of [the 2015 Regulations]' is an error on the face of the record.

40. I am prepared to accept for the purpose of argument, although without deciding, that neither the officer's review decision nor the recommendation form part of the record and cannot be relied upon to supplement it. I will also assume, without deciding, that the affidavit of Ms O'Brien, filed on behalf of the Minister, should not be considered 'for the purpose of adding to, explaining or contradicting' the review decision, accepting for the sake of argument that the decision in *State (Crowley) v Irish Land Commission* [1951] IR 250 remains good law.

41. The applicants contend that relief should not be withheld on *de minimis* grounds. In doing so, they rely on the decision of Smyth J in *Wu v Minister for Justice and Equality* [2002] IEHC 163 (Unreported, High Court, 25th January, 2002), finding that an error of the face of a deportation decision, whereby a refugee status application was wrongly described as refused rather than withdrawn, could not be characterised as so peripheral or technical as to be *de minimis*. The applicants also rely on the dictum of Cooke J in *V.C.B.L. v Refugee Appeals Tribunal & Ors* [2010] IEHC 362, (Unreported, High Court, 15th October, 2010) (at para. 15) that the common law concept of error on the face of the record 'applies to some misdescription or mistake in a document essential to the power being

exercised which has the effect of depriving the exercise of jurisdiction.'

42. Does the acknowledged error in the identification of the applicable Regulations have that effect in this case? I do not think so. In *Albatros Feeds Ltd v Minister for Agriculture and Food* [2005] IEHC 65, (Unreported, High Court (Kelly J), 7th March, 2005), in rejecting the respondent Minister's argument that certain directions that were *ultra vires* the particular statutory provisions they invoked on their face were nonetheless valid because they could have been lawfully made on a different jurisdictional basis, the court admitted of the possibility that extenuating circumstances (which it found to be absent in that case) could permit such an error to be excused. In this case, the Minister has adduced extensive evidence of extenuating circumstances concerning the erroneous use of the wrong template. If I had to decide the point, I would be inclined to excuse what, on the uncontroverted evidence before me, was an administrative error in the use of a template form. Borrowing the words of O'Neill J in *K v Taafe* [2009] IEHC 243 (Unreported, High Court, 15th May, 2009) (at para. 4.16), in light of the fact that the review decision goes on to correctly apply the requirements of the 2006 Regulations to the substance of the residence card application, that error is, in my opinion, inconsequential and does not invalidate that decision.

43. Nor could I accept the applicants' final argument on this point, which is that the error on the face of the review decision represents a breach of the applicants' right to good administration, protected by Art. 41 of the Charter of Fundamental Rights of the European Union ('CFREU'). The error concerned relates to the misidentification of the domestic law provision under which the review was being conducted. It did not involve the misapplication or non-application of any provision of the Citizens' Rights Directive. No authority has been identified for the proposition that the right to good administration under Art. 41 of the Charter requires a decision to be quashed, rather than corrected or explained, where it contains an inadvertent misstatement on its face of the legislative basis upon which it has been considered.

iv. 'member of the household of the Union citizen'

44. This is another argument that I have decided the applicants cannot fairly be permitted to rely on, although it was argued on their behalf at the hearing before me.

45. Under Art. 3(2)(a) of the Citizens' Rights Directive, a host Member State is obliged, in accordance with its national legislation, to facilitate entry and residence for OFMs '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 required the personal care of the family member by the Union citizen.'

46. The definition of 'permitted family member' under Reg. 2(1) of the 2006 Regulations, includes a family member (other than a qualifying member) who, in his or her country of origin, habitual residence or previous residence: (a) is a dependant of the Union citizen; (b) is a member of the household of the Union citizen; or (c) on the basis of serious health grounds strictly requires the personal care of the Union citizen.

47. In this case, the second applicant applied for a residence card on the basis of his dependency on the first applicant, a British and, hence, Union citizen. The evidence submitted in support of that claim included documentation recording remittances from the first applicant, who gave an address in Berkshire, England, to the second applicant or the second applicant's parents in Pakistan.

48. The reasons stated for the refusal of the residence card application in the review decision are:

> 'The Minister is not satisfied that you have submitted satisfactory evidence to show that you are a permitted family member of the Union citizen in accordance with the provisions of the Regulations and the Directive.
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> You have failed to submit satisfactory evidence of the following:
>
> - dependence on the EU citizen, including dependence prior to residing in the State,[or]
>
> - evidence of membership of the EU citizen's household prior to residing in the State...
>
> It is not accepted that you have submitted sufficient evidence to show that you are a dependant of the Union citizen. You submitted bank statements for the EU citizen and yourself showing payments/money transfers to you for the period 2010 to 2011 as evidence of dependence on the EU citizen prior to arrival in the State. You also submitted evidence of payments made by the Union citizen to your mother for the period 2012 to 2014. However, these documents alone show minimal information and do not show a degree of dependency, such to render independent living at subsistence level, by you impossible if that financial and social support were not maintained. You have not submitted any other evidence by way of proof that you are totally dependent, or the extent to which you are dependent on the EU citizen for financial support.
>
> Furthermore, it is not evident form the documentation submitted that you were living within the household of the EU citizen in the United Kingdom. It is not accepted therefore that you are a member of the household of the Union citizen.'

49. The applicants contend that the review decision should be quashed because the review officer misconstrued the term 'member of the household of the Union citizen' in considering the circumstances of the applicants' residence in the State.

50. In the circumstances of this case, that argument is moot. In accordance with the terms of both the Citizens' Rights Directive and the 2006 Regulations, the test the Minister had to apply, where relevant, was whether the second applicant was a member of the household of the first applicant in the country from which he had come. It is by no means apparent that the 'membership of the household' test was relevant to this case, where the application for a residence card was made solely on the basis of the second applicant's 'dependency' on the first applicant.

51. In deciding to consider the application of the 'household membership' test anyway, the Minister had to contend with the studied vagueness of the information submitted by the applicants on the circumstances that preceded and attended their entry into the State. Unlike dependency, membership of a household requires proximity between the family members concerned. The documentation submitted to the Minister suggested that the first applicant was resident in the United Kingdom. Insofar as the review decision was required to address the issue at all, I can identify no error of fact or law in its conclusion that it was not evident from the documentation submitted that the second applicant was a member of the household of the first applicant in the United Kingdom (even

if the United Kingdom, rather than Pakistan, was the country from which the second applicant had come). It might have been added that, if the second applicant had come from Pakistan, there was no evidence that the first applicant resided, much less maintained a household, there.

52. Thus, if I had to decide this argument, I would not hesitate to reject it.

v. notice of the basis for the review decision

53. This is yet another argument that I have concluded the applicants cannot be permitted to rely on, although, once again, they did argue it in their written submissions and at the hearing.

54. The argument is that the review decision was based on different grounds than the first instance decision and that the Minister acted in breach of the applicants' entitlement to natural and constitutional justice and fair procedures in failing to put them on notice of that fact.

55. The argument faces three insurmountable obstacles.

56. First, to put it at its lowest, it is by no means clear that the review decision was based on different grounds than the first instance decision. The first instance decision tersely states that the reason for the refusal of a residence card under the 2006 Regulations is:

> 'You have failed to submit satisfactory evidence that you are a family member of an EU citizen in accordance with Regulation 2(1) of the Regulations.'

57. In their written submissions, the applicants ignore the second half of the preceding sentence in jumping to the conclusion that the first instance decision was based on their perceived failure to establish the family relationship between them *i.e.* their failure to establish that they are brothers. But Reg. 2(1) of the 2006 Regulations defines 'family member' to include a 'permitted family member', and defines a 'permitted family member' to include, in material part, a family member who, in his or her country of origin, habitual residence or previous residence, is a dependant, or member of the household, of the Union citizen. Hence, a failure to submit satisfactory evidence of such dependency or household membership, as the case may be, is a failure to submit satisfactory evidence of membership of the family of an EU citizen in accordance with Reg. 2(1) of the 2006 Regulations.

58. Thus, I cannot be satisfied (indeed, I very much doubt) that the review decision was based on different grounds than the first instance decision.

59. Second, in advancing this argument, the applicants acknowledge that, under Reg. 21(4)(a) of the 2006 Regulations, the officer determining the review may 'confirm the decision on the same or other grounds having regard to the information provided for the review or substitute his or her decision for the decision the subject of the review.'

60. Thus, the applicants are left with the argument that the court should read into the 2006 Regulations a requirement that, if the review officer is contemplating the confirmation of the first instance decision on other grounds, he or she must first notify the applicants of that intention and provide them with an opportunity to make further submission on that basis. There is no authority for that proposition and, as counsel for the Minister points out, a considerable body of authority against it.

61. In that context, it is important to bear in mind that both the first instance and review decisions were based solely on the material provided by the applicants. This was not a case involving the consideration by the decision-maker of further or other material of which the applicants were not on notice. Thus, there is no question in this case of the applicants being deprived of a reasonable opportunity to know the matters that may be likely to affect the judgment of that body against their interest. Once that opportunity has been provided, then, as McMahon J observed in *P.S. (a minor) v Refugee Applications Commissioner & Ors* [2008] IEHC 235, (Unreported, 11th July, 2008), it is clear that not every matter that may inform a decision must be put to the applicants or their advisers.

62. Further, as Herbert J observed in *D.H. v. Refugee Applications Commissioner & Ors* [2004] IEHC 95, (Unreported, High Court, 27th May 2004) in the more searching context of an application for refugee status:

> 'The principle of *audi alteram partem* does not require the determinative body to debate its conclusions in advance with the parties.'

63. *Khan & Ors v Minister for Justice, Equality and Law Reform* [2017] IEHC 800, (Unreported, High Court (Faherty J), 27th October, 2017) was a 'qualified family members' case involving a challenge to a refusal to grant visas to enter the State on that basis. The applicants in that case raised precisely the same argument as the one that the applicants in this case have now sought to raise. Faherty J addressed it in the following way:

> '83 Much of the criticism levelled at the respondent in the course of this application centred around the failure of the respondent to give advance warning to the applicants of perceived deficiencies or contradictions in the documents submitted with visa applications prior to the respondent reaching a decision on the respective appeals. Counsel for the applicant maintained that had the applicants been forewarned they would have been able to address the perceived deficiencies or contradictions.
>
> 84 Counsel for the respondent submits that it was incumbent on the applicants to put their best foot forward and to present such relevant facts and evidence as might be necessary to support their applications, including facts and evidence which would tend to prove dependency. Accordingly, the respondent cannot be criticised, in these proceedings, for the condition of the applicants' own proofs, because the respondent was not willing accede to their application while in receipt of insufficient proof of dependency.
>
> 85 I agree with the respondent's submissions in this regard. As stated in A*.M.Y. v. Minister for Justice* [2008] IEHC 306, '*there is no onus on the Minister to make inquiries seeking to bolster an applicant's claim; it is for the applicant to present the relevant facts'.'*

64. Thus, even if the applicants were permitted to raise it (and they are not), I conclude that this argument could not succeed.

Conclusion
65. The application for judicial review is refused.