

THE HIGH COURT

2019 No. 13 JR

BETWEEN

FARRUKH ABBAS AND FAHAD ABBAS

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 26th September, 2019.

1. Introduction

1. To preserve the privacy of the applicants, this judgment initially appeared in anonymised form. Counsel for the applicants has since indicated that the judgment may issue in the standard form, i.e. with the applicants named. The judgment is otherwise unchanged.
2. The two applicants are brothers who hail originally from Pakistan. Farrukh was born in Pakistan in July 1981. He is the eldest child born of his parents and just over six years older than Fahad. In his adulthood, Farrukh moved to the United Kingdom, and eventually became a UK citizen in September 2016. He moved to Ireland in November 2016 and has established a business here which appears to be quite successful.
3. After Fahad finished high school in Pakistan, he moved to London on a student visa (his studies in London were financed by Farrukh) and lived there with Farrukh before returning to Pakistan in 2011. In 2014, Fahad came to Ireland on a student visa, i.e. before Farrukh moved here. His studies here have been financed by Farrukh and, it seems, his accommodation also.
4. In May 2017, the applicants applied for a residence card for Fahad, as a permitted family member of an EU citizen (Farrukh) who is exercising his EU Treaty rights in Ireland. In doing so, the applicants are relying principally on reg.5 of the EC (Free Movement of Persons) Regulations 2015 which (under the heading "*Permission for permitted family member to enter State*") states, *inter alia*, as follows:

"(1) This paragraph applies to a person who...(a) irrespective of his or her nationality, is a member of the family (other than a qualifying family member) of a Union citizen to whom paragraph (2) applies and who in the country from which the person has come...(i) is a dependent of the Union citizen....

(5) The Minister, in deciding under paragraph (3) whether an applicant should be treated as a permitted family member for the purposes of these Regulations, shall have regard to the following:

(a) where the applicant is a dependent of the Union citizen concerned, the extent and nature of the dependency and, in the case of financial dependency, the extent and duration of the financial support provided by the Union citizen to the applicant prior to the applicant's coming to the State, having regard, amongst other relevant matters, to living costs in the country from which the

applicant has come, whether the financial dependency can be satisfied by remittances to the applicant in the country from which the applicant has come and other financial resources available to him or her”.

5. The EU Treaty rights application was refused at first instance on 18.09.2017. A review of that decision was sought and, by decision of 13.11.2018 (the ‘Impugned Decision’), failed again.

2. “[T]he Country from which the Person has Come”

6. It is clear from reg.5(1) of the 2015 Regulations that reg.5 applies to a person who, *inter alia*, “in the country from which the person has come ...is a dependent of the Union citizen”. Instinctively, one might perhaps be inclined to state that the country from which Fahad has come is Pakistan. However, the European Court of Justice, in its binding interpretation of European Union law in *Rahman* (Case C-83/11), has indicated as follows, at para.31, in respect of Art.3(2) of the Citizen’s Rights Directive (Directive 2004/38/EC), in which the phrase “in the country from which they have come” appears (which phrase is the clear basis for the near-equivalent phrasing in reg.5(1) of the 2015 Regulations):

“[T]here is nothing to indicate that the term ‘country from which they have come’ or ‘country from which they are arriving’ [‘pays de provenance’] used in those provisions must be understood as referring to the country in which the Union citizen resided before settling in the host Member State. On the contrary, it is clear, on reading those provisions together, that the country referred to is, in the case of a national of a third State who declares that he is a ‘dependant’ of a Union citizen, the State in which he was resident on the date when he applied to accompany or join the Union citizen.”

7. A visa application will typically be made from outside Ireland. An ensuing application for an EU Treaty rights residence card within three months of entry on a short-stay visa will intrinsically be linked to the initial short-stay application. Here, however, Fahad had residence permission in his own right to reside (and he was residing) in Ireland at the time of making the EU Treaty rights application that is at the heart of these proceedings. Thus Fahad was clearly and demonstrably resident in Ireland in his own right on the date when he made his application under reg.5(1). It follows from the decision of the European Court of Justice in *Rahman* that dependency in Ireland ought to have been the focus of the Minister when it came to making the Impugned Decision. But this was not the focus of the Minister – he (mistakenly) maintains that Pakistan is the country from which Fahad has come for the purposes of reg.5.
8. If the court is wrong in the conclusion reached in the previous paragraph by reference to the decision of the European Court of Justice in *Rahman* (and the court does not consider that it is wrong), and the country from which Fahad falls to be treated as having come for the purposes of reg.5(1), notwithstanding the decision in *Rahman*, was Pakistan – even though that was not the State in which he was resident on the date on which the application at the heart of these proceedings was made – the court does not accept that in that (non-presenting) scenario it would follow that Farrukh’s actions towards Fahad, in

terms of housing Fahad and financing his education in both the UK and in Ireland, would be irrelevant to the application that the brothers have made. In that (non-presenting) scenario it would have to bolster the applicants' case that there was a dependent relationship during the period of Fahad's unemployment in Pakistan, that Farrukh has acted as supportively as he has done towards Fahad in the UK and Ireland, i.e. the fact that there has been a protracted supportive relationship between the two men outside of Pakistan would have to make more credible the contention that while Fahad was unemployed in Pakistan he was supported by his consistently supportive brother to the point of dependency.

3. The Evidence Supplied in Support of the Brothers' Application

9. Regardless of whether the court is right or wrong in its application of *Rahman* (and it considers that it is right), it must address an issue that has arisen in these proceedings as to the nature of the evidence provided in support of the EU Treaty rights application. Farrukh included with the Application for a Residence Card a relatively lengthy 'Statement' that states, *inter alia*, as follows:

"I confirm that [Fahad]...has been dependent on me since 2009 when he finished High School in Pakistan. I invited him to join me in London when I was residing [there]....He acquired a student visa with my assistance and arrived in London on 30 July 2010. He resided with me until...21 November 2011 when he returned to Pakistan. During that time we lived together and I financially supported him. I also paid for his college course....

When [Fahad]...returned to Pakistan, he lived in our family home at [Named Place]....I continued to financially support him because he did not have a job. I used to send money regularly via money transfer agency. Sometimes the money was sent to my father, on behalf of [Fahad]...and my other family members. Sometimes the money was sent directly to him....

When our father passed away on...I paid for [an]...emergency flight [to Pakistan] for [Fahad] [who] left in urgent circumstances".

10. Documentation furnished in support of the application shows a steady transfer of money from Farrukh to his family and to Fahad in Pakistan via a particular money transfer agency. The money transferred to the brothers' father between November 2010 and April 2013 amounted to just short of UK£6,000. The money transferred into the sole name of Fahad between September 2012 and January 2014 was almost UK£4,000. In addition, Farrukh transferred approximately UK£3,500 to a sister between June 2015 and February 2016. In all, Farrukh supported his family in Pakistan to the tune of almost UK£13,500 over a period of just over five years.
11. Some effort was made at the hearing to suggest that Farrukh's statement was not evidence or not very good evidence. However, it is patently evidence, and, notably, evidence that it is made in the context of a Form EU1A ('Application for a Residence Card') which requires both the applicant and the EU citizen (here, respectively, Fahad and

Farrukh) to sign their signatures immediately beneath a declaration that states, *inter alia*, under the heading "*Declarations*":

"...I understand that any false or misleading information or fraudulent supporting documentation will result in the refusal of this application....

I am aware that a person who asserts an entitlement to any rights on the basis of information which he or she knows to be false or misleading in a material particular shall be guilty of an offence and shall be liable, on summary conviction or conviction on indictment, to a fine or term of imprisonment...."

12. The effect of the just-quoted declaration is that both brothers were providing information in a context where, *inter alia*, they expressly confirmed their understanding that advancing a false case could result in the refusal of an application, and even a criminal conviction – both very serious consequences. Unless it is suggested (and it is not suggested) that the two brothers were satisfied airily and carelessly to proceed with their application, it seems to the court that having signed the just-quoted declaration and thus having expressly acknowledged the seriousness of the process in which they are engaged, they and such material as they present must – in the absence of evidence to the contrary (and here there is none) – be taken to have been provided with honest and serious intent. To proceed otherwise would be akin to this court saying of a witness who gives oral testimony, 'Yes, she said it on oath, but what is in an oath?' All else being equal, the taking of an oath gives weight to such evidence as is tendered under that oath and, though not of the same level of gravitas, the declaration that each of the two brothers made/signed when completing the Form EU1A likewise gives a certain weight to the evidence provided in and with that form (again in the absence – and here there is an absence – of evidence to the contrary).
13. In passing, the court notes that proper reliance was placed in this context, by counsel for the applicants, on the decision in *Sadiq v. MJE* [2019] IEHC 517, para.4, where the court, confronted with a statutory declaration, indicated, *inter alia*, that "[A] statutory declaration is a form of evidence, and might even be persuasive evidence". Counsel for the Minister in this case argued that Farrukh's Statement was not provided by way of statutory declaration and that this offered a point of distinction when it came to *Sadiq*. However, Farrukh's Statement was provided in the context where the declaration considered above was signed by him and where there is no evidence that anything improper was at play in the application. In such a context, much the same point falls to be made as was made in *Sadiq*: Farrukh's Statement "*is a form of evidence, and might even be persuasive evidence*". Of course, as with the evidence that was the subject of the statutory declaration in *Sadiq*, it is for the Minister to determine (subject to judicial review in the case of perceived unlawfulness) what weight ought properly to be attached to such evidence.
14. Finally, by way of general observation, the court notes that very few people, if any, would typically produce and/or receive and/or retain documentation establishing every aspect of what they do in their lives, or even sometimes the most important aspects of their lives.

This is a factor that might usefully be borne in mind when approaching EU Treaty rights applications. Yes, what must be established by an applicant must be established by that applicant; however, realistically there is a limit to what any one applicant may be able to produce in terms of documenting, e.g., dependency over a protracted period. If truth be told, many of us would likely have difficulty documenting what we did during a specific day last week, never mind a few years ago.

4. Dependency.

15. The decision of the European Court of Justice in *Jia* (Case C-1/05) continues, albeit supplemented by, e.g., the decisions in *Rahman* and *Reyes* (Case C-423/12) to be a key decision of the European Court on the issue of dependency, that court observing, *inter alia*, at para.43 of its judgment, that the concept of dependency "*means that members of the family of a Community national...need the material support of that Community national...in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join the Community national*".
16. What is "*material support*"? Doubtless such support can take many forms but the most common form seems likely generally to be money; certainly that is the form of support that is at play in these proceedings. It is clear from *Kuhn and Ors v. MJE* [2013] IEHC 424, paras.17-18, that material support can take the form of a financial contribution and does not require that the entirety of the cost of the essential needs be covered by the person providing such support.
17. What are "*essential needs*"? In *Kuhn*, para.19, this was construed to be a reference to the "*essentials of life*", it being acknowledged that what is essential will vary from case to case. It follows that if, e.g., my brother provides me with material support in order to cover my particular essential needs, though not (as *Kuhn* makes clear) meeting the full costs of all of them, I am dependent upon that brother. In truth, this is not an especially stringent test, if properly applied, *i.e.* the transfer of quite small sums of money could on the facts of a particular case offer a perfectly sound predicate on which to claim and establish a dependent relationship; and it must be remembered too that the test of dependency falls to be applied in the context where, as is clear from recital 6 of the Citizen's Rights Directive, and as noted in *Rahman*, para.32, the objective of Article 3(2) of that directive (from which reg.5 of the 2015 Regulations derives) "*is to 'maintain the unity of the family in a broader sense' by facilitating entry and residence for persons who are not included in the definition of family member of a Union citizen contained in Article 2(2) of Directive 2004/38 but who nevertheless maintain close and stable family ties with a Union citizen on account of specific factual circumstances*". That too ought to steer decision-makers in the direction of a relatively generous test as to what constitutes dependency.
18. One further point that arises on the facts of this application is the notion that all material support provided by a family member might not be provided directly to a dependent, e.g., here some funding was provided by Farrukh to his father (with whom Fahad was residing during the period that he was unemployed in Pakistan). The court (a) does not consider

that because one is dependent on two or more persons, one cannot properly be described as dependent on any one of those persons (as the withdrawal of the support of any one of those persons would leave one financially imperilled), and (b) sees no difficulty with the notion that a dependent relationship could encompass direct dependency (here in the form of direct payments from Farrukh) and/or vicarious dependency (here in the form of support from the brothers' father which was itself in part dependent on direct payments to the father by Farrukh).

5. Specific Questions Arising

19. Three questions are contended to arise in respect of the Impugned Decision and are answered hereafter.

20. *Q1. Did the Minister act unreasonably and/or err in fact and/or in law in finding that Fahad failed to establish that he was a dependent of Farrukh?*

A1. For the reasons that follow, the court must respectfully conclude that the Minister acted unreasonably and may to some extent have acted irrationally.

i. Ireland.

21. When it comes to dependency in Ireland, the Impugned Decision states, inter alia, as follows:

"You have submitted copies of your own and your brother's Irish bank statements, which show that you have been in receipt of some small transfers from your brother while in the State. It is acknowledged, moreover, that the UK citizen has helped to defray the cost of your education in the State. Again, however, no evidence has been provided to suggest that you would not be able to support yourself in Ireland if you were not in receipt of those transfers. In light of the above, the Minister is not satisfied that you have provided satisfactory evidence to establish that you have been dependent upon your brother, including prior to your arrival in the State."

22. The reference to "some small transfers" (a) is not borne out by the evidence, (b) is inconsistent with the view expressed by the Minister in a letter of 05.09.2018 that in one year alone Farrukh transferred approximately €22,000 to Fahad (an amount which cannot properly be characterised as a 'small transfer' in the case presenting, indeed, the court suspects, in most cases), and (c) the foregoing being so, is unreasonable, perhaps even irrational. In any event, for the reasons offered by the court elsewhere above, dependency can properly be established on the basis of the transfer of what, to persons accustomed to the high cost of living in Ireland, may seem to be small cash transfers – though, that said, the court respectfully does not see how, on the facts of the within proceedings (indeed in most cases) the transfer of approximately €22,000 in one calendar year could properly be described as a 'small transfer'.

ii. Pakistan.

23. A couple of points might be made regarding the issue of dependency in Pakistan, to the extent that it is relevant, having regard to the conclusions reached in Part 2 above:

- (i) the Minister expresses doubts about the authenticity of documentation demonstrating the transfer of almost €13,500 over a five-year period by Farrukh to his family in Pakistan. However, it is not clear that any account was taken of the explanations given by Farrukh in his Statement as to why there was no paperwork available in Pakistan. Although the Minister does not need expressly to address every aspect of an application that comes before him, it does not seem to the court that he can properly express doubt about the authenticity of such documentation as is proffered in support of an application without also expressly addressing why he does not accept such explanation as has been proffered by an applicant. That is to reach a conclusion without offering a reason.
- (ii) the Impugned Decision states, *inter alia*, that as regards such money as was sent by Farrukh to Pakistan "*No evidence has been provided to suggest that, had you not been in receipt of these small cash transfers, you would not have been able to support yourself in Pakistan*". It seems implicit in this observation that, notwithstanding the doubts expressed as to the authenticity of the money transfer documentation, the Minister does in fact accept that the transfers were despatched and received. Presumably the reference to "*small cash transfers*" comes from some knowledge as to the purchasing power of pounds sterling in Pakistan that the Minister has acquired through the various applications he decides on an ongoing basis. At the hearing of this application some effort was made to challenge the reasonableness of the conclusion that the transfers were "*small transfers*" when one has regard to the cost of living in Pakistan; however, the point was dropped in the face of opposition from counsel for the Minister as to whether this issue had been pleaded. As to the notion that "*had you not been in receipt of these small cash transfers, you would not have been able to support yourself in Pakistan*", a question undoubtedly arises as to the reasonableness of this conclusion: (1) Fahad was unemployed in Pakistan so he was clearly dependent on somebody for his income; (2) moreover, the court must admit that it does not see how Fahad could prove that if he was not in the position that he found himself to be in, he would still not have been able to support himself; how could he possibly demonstrate that?

24. Q2. Was the primary issue for determination whether Fahad had demonstrated dependency on Farrukh in Pakistan, being, to borrow from reg.5, "the country from which [he]...had come"?

A2. For the reasons identified in Part 2 above, the court considers that "the country" from which Fahad "had come", having regard to the binding case-law of the European Court of Justice, was Ireland.

25. Q3. Did the Minister fail to take into consideration, adequately or at all, the applicants' right to a family life?

A3. No, for the reasons that follow.

26. First, the applicants seek to rely in this regard on the decision in *Luximon and Balchand v. MJE* [2018] IESC 24. However, (i) unlike in *Luximon*, the within proceedings are not concerned with a refusal of an application to renew a residency permission, (ii) in *Luximon* much of the reasoning turns on the fact that the applicants in that case were informed by letter that they had to leave the State in default of which a deportation order would issue; here, no such mandatory order was given and it was made clear that Fahad could make representations in relation to his family rights before any deportation order was made against him; in truth, the letter does no more than state the correct factual position and identify Fahad's options, (iii) in any event, the issue has been rendered moot by the actions of Fahad who, following receipt of the Impugned Decision, renewed his Stamp 2 permission (it seems without difficulty); so there is, it seems to the court, no factual basis for the argument that Fahad was confronted with a situation where he would have felt compelled to leave Ireland before his family rights were considered.

6. Conclusion.

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