

Between:

HOSAN ARA KHAN and IBRAHIM KHAN**Applicants**

– and –

THE MINISTER FOR JUSTICE AND EQUALITY**Respondent****JUDGMENT of Mr Justice Max Barrett delivered on 3rd April, 2019.**

1. Ms Khan is a UK national. She claims to have lived in Drogheda between January and June 2016. There is no independent evidence corroborative of this claim; moreover, her passport stamps show her to have entered Pakistan in April 2016. Ms Khan claims that while in Ireland she undertook work experience at a since-closed restaurant in Skerries and was then offered a contract of employment by the restaurant. A letter from the restaurant certifies the existence of such an offer; however, (a) it represents Ms Khan to have been in Ireland in June 2017 when, on her own account, she was only here for the first half of 2016, (b) no written employment contract has ever surfaced, and (c) Ms Khan has never taken up the employment arrangement (the 'Standing Arrangement'). Ms Khan claims that she and her husband want to live in Ireland; yet the application materials in the application that led to these proceedings refer, *inter alia*, to an intention "to live together permanently in the UK"; and despite claiming to live among others in a house in Drogheda, Ms Khan, as well as being remarkably unaware of who else was living with her, has incorrectly named the number of bedrooms in the house. Ms Khan has sworn that the references to a future life in the UK and to the number of bedrooms are inadvertent slips. However, the Minister considers them to be slips which reveal what he considers is the real truth, *viz.* that Ms Khan's application involves an 'abuse of rights' (considered below). An officer of INIS has sworn in the within proceedings that: "[T]he information sworn in this application and the subsequent affidavits is consistent with a pattern recognised by the Department whereby addresses are artificially used to give the appearance of genuine residence where none in fact exists".

2. Mr Khan is a national of Pakistan. He is married to Ms Khan and has sought to come to Ireland on the basis that he enjoyed a derivative right to come here pursuant to Directive 2004/38 (the 'Citizens' Rights Directive') as a family member of Ms Khan, who (i) enjoyed, at the time of the Decision (defined hereafter), the Standing Arrangement, and (ii) wanted, as an EU national, to come here with Mr Khan so that she could take up work pursuant to the Standing Arrangement. By decision of 12.02.2018 (the 'Decision'), an initial refusal of Mr Khan's application was upheld, apart from an issue as to the validity of the Khans' marriage which was accepted to have been resolved. (There is no suggestion that their marriage is a marriage of convenience).

3. In the Decision, the Minister points to various perceived deficiencies in Mr Khan's application, *viz.* (1) indications that the Khans intend to live in the UK; (2) references to Ms Khan's having previously resided in Ireland, without there being any independent corroborative evidence of same; (3) a contention that Ms Khan worked briefly at the restaurant in Skerries, yet appeared never to have paid Irish tax/social contributions (Ms Khan has indicated to the court that she undertook unpaid work experience); and (4) that (a) no written agreement detailing the Standing Arrangement was provided to the Minister (he was supplied with a written confirmation from the restaurant concerning same, though this contains the curious error, referenced above, as to Ms Khan being present in Ireland in June 2017 when, on her own account, she was not) and (b) Ms Khan never availed of the Standing Arrangement. (It was indicated in pre-Decision correspondence that this was because Ms Khan's desire was to come here with her husband and child when availing of same). The Minister then concluded in the Decision, *inter alia*, that:

"Based on these facts, in conjunction with the...references to living or staying in the UK, and the fact that your sponsor is employed in and residing rent free in the UK, the decision that your sponsor EU citizen is not seeking to exercise their free movement rights in a genuine and effective manner or in a manner that achieves the purpose of [the Directive] ...remains valid and the indications are that the purpose of their move to Ireland is artificially to create the conditions which would allow you to gain a derived right of residence in the UK."

4. Before proceeding further it is useful to summarise briefly certain relevant aspects of the law on freedom of movement and abuse of rights:

Freedom of Movement

- (1) Free movement of people has been a principal means of promoting European integration.
- (2) Under Art.21 TFEU an EU citizen has the right to move about within and reside in any EU member state.
- (3) The founding Treaties make no provision as regards the right of family members of EU nationals to live together in a host state; however, this has long been considered a corollary of the right of freedom of movement.
- (4) The right to be accompanied/joined by family members is essential so that the free movement of EU nationals will not be impeded (Case C-127/08 *Metock*, para. 56).
- (5) The right to family unity is informed by Art.8 ECHR and Art.7 CFEU.
- (6) At present, an EU national's right to be accompanied/joined by family members is addressed in the Citizens' Rights Directive.
- (7) The right referred to at (5) applies whatever a family member's nationality (Citizens' Rights Directive, Art.5).
- (8) The right to reside in a host member state enjoyed by family members who are third country nationals is a derivative right.
- (9) The Citizens' Rights Directive does not apply to nationals resident in their state of nationality, for whom national law rules on reunification apply (Citizens' Rights Directive, Art.3).

(10) Articles 3(1) and 7(1)(d) of the Citizens' Rights Directive guarantee the right to reside in a host member state to such family members (as indicated in Art.2(2)) of any mobile EU citizen who meets the conditions in Art.7.

(11) The right to follow arises immediately and is not conditional on the non-EU family member having already resided in another member state (*Metock*).

(12) The right to reunification applies to family members outside the European Union; under Art.5 of the Citizens' Rights Directive a member state must allow non-Union family members to enter into its territory without creating difficulties; to enter, a passport is generally sufficient, though at the relevant times for the purposes of these proceedings a visa could be required for third country nationals from countries listed in Regulation (EC) 539/2001 (O.J. L81, 21.03.2001, 1) (since replaced by Regulation (EU) 2017/1806 (O.J. L303, 28.11.2018, 39)), which countries include Pakistan.

Abuse of Rights

(13) Prohibition of abuse of rights pervades EU law, there being abundant case law on abuse of rights in several fields, including, e.g., tax law.

(14) Rights guaranteed under the Citizens' Rights Directive may be restricted only on grounds specified in the Directive, including abuse of rights and fraud (Citizens' Rights Directive, Art.35).

(15) There being specific prohibition of abuse in the Citizens' Rights Directive it is not necessary to invoke any general principle concerning the prohibition of abuse of rights, Art.35 being essentially a codification of that principle.

(16) Abuse of rights and fraud are different. Abuse of rights involves behaviour where a person aims to benefit from free movement by formally respecting applicable law but not complying with the purposes of the law. Fraud involves using fraudulent documentation/representations to acquire a right at law.

(17) In Case C-110/99 *Emsland-Stärke*, the European Court of Justice devised a combined objective/subjective test to determine whether particular conduct constitutes abuse of rights. The objective test is whether despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. The subjective element involves the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining same. If both conditions are met, any claimed advantage arising from EU law should not be afforded to the claimant.

(18) Although *Emsland-Stärke* refers to the subjective element, Art.35 does not refer to the motives of the person. The European Court of Justice sometimes applies Art 35 and *Emsland-Stärke* together, thus bringing the subjective element into play (see, e.g., Case C-202/13 *McCarthy*, para.54).

(19) In its existing case-law on freedom of movement, the European Court of Justice appears generally slow to limit individual's rights based on abuse of rights; thus it may be that abuse of rights is harder to establish in relation to free movement of persons than in relation to other freedoms. But that does not mean it cannot present.

5. Clearly, if Ms Khan is engaged in an abuse of rights (as the Minister has found) then that is the end of the within application. Moreover, a judicial review application is a constrained exercise that does not involve a full appeal. In essence, the court has to find e.g., an error of fact/law, unreasonableness, or some breach of rights by the Minister in the Decision or how it was reached. The court sees no legal deficiency to present in the Decision or the process whereby it was reached: the Minister was entitled at law to reach the conclusion that he did on the evidence that was before him when the Decision was made. Additionally, if the court applies the *Emsland-Stärke* test, it was perfectly open to the Minister, on the evidence before him, to conclude, by reference to that test, that neither of the applicants should be afforded the claimed advantage under EU law. Given the abuse of rights that presents, there is no basis on which the court could now properly grant the order of *certiorari* or any other of the reliefs sought by the applicants.

6. Given the foregoing, it does not seem to the court that it need go any further in terms of addressing the application now before it: the application must fail. However, even if only by way of *obiter* commentary, when it comes to the applicants' contention that:

(1) the Minister erred in law in failing to find that on a proper construction of reg.3(1)(b)(i) of the EC (Free Movement of Persons) Regulations 2015 (the 'Regulations') and article 3(1) of the Citizens' Rights Directive that these provisions apply to the spouse of a Union citizen seeking to enter the State at the same time and 'in the company' of the Union citizen (i.e. it is not necessary that the Union citizen be already exercising her EU Treaty rights in the State),
this contention, including the issue (if issue there is) of how to reconcile the observations in *Metock*, paras.63-64 and *McCarthy*, para.36, clearly does not now, in light of the conclusion as to abuse of rights, require to be addressed.

(2) the Minister erred in law and/or acted unreasonably and/or breached the rights of the applicants under articles 8, 9 and 12 ECHR and articles 7, 9, 10 and 45 CFEU in an unjustified and disproportionate manner in stating as one reason for refusing the application that there was no indication that the first applicant had commenced her economic activity in the State,
there is no requirement that an EU national seeking to exercise free movement rights in coming to Ireland needs to have previously worked in Ireland or otherwise exercised free movement rights here; however, this does nothing to assist the applicants in a context where an abuse of rights has duly been found to present.

(3) the Minister made a material error of fact and/or erred in law and/or acted unreasonably and/or breached the rights of the applicants under articles 8, 9 and 12 ECHR and articles 7, 9, 10 and 45 CFEU in an unjustified manner in finding that the use of the address in Drogheda indicates an attempt to portray that the sponsor is residing at this address,
and

(4) the Minister erred in law and/or acted unreasonably and/or breached the rights of the applicants under articles 8, 9 and 12 ECHR and articles 7, 9, 10 and 45 CFEU in an unjustified and disproportionate manner in stating as one reason for refusing the application that 'the purpose of [the applicants'] move to Ireland is to artificially create the conditions which would allow you to gain a derived right of residence in the United Kingdom',
given the Minister's legally proper finding as to abuse of rights, it follows inexorably that contentions (3) and (4) must fail.

(5) the Decision is internally inconsistent and irrational and/or unreasonable in finding that 'the purpose of the applicants' move to Ireland is to artificially create the conditions which would yield a derived right of residence in the United Kingdom and that UK Regulations of 2016 now provide that for family members of returning citizens to benefit from EU free movement rights, the UK citizens residence in an EEA member state must have been genuine,
no inconsistency, etc. presents in these entirely compatible statements.

(6) the Minister erred in law and/or acted unreasonably in placing reliance on the UK Regulations so as to deprive Ms Khan of the genuine and effective enjoyment of her fundamental right to free movement under EU law,
there is no such reliance: the Minister states by way of what is essentially an advisory remark (unnecessary to quote) his understanding of what UK law provides. That does not involve the Minister relying upon UK law, an error so basic that it seems unlikely ever to present in a decision by the Minister, and does not present here.

(7) the Minister erred in law and/or acted in breach of constitutional fair procedures in failing to provide adequate reasons sufficient to convey the essential rationale of the Decision,
having regard to the observation in de Smith's *Judicial Review* (8th ed.), para.14-156, that "[w]here a decision of the national authorities has the effect of denying a fundamental Union law right, such a decision must be open to challenge by judicial proceedings...accordingly the person concerned must be able to ascertain the reasons for the decision so that he can decide whether to take proceedings with full knowledge of the relevant facts", the Decision handsomely meets this standard and also the standards as to reasoning identified in e.g., *Mallak v. MJE*, [2012] 3 IR 297 and *Connelly v. An Bord Pleanála* [2018] IESC 31. There can have been no doubt on Mr Khan's part as to why his application was refused. Indeed the focused judicial review proceedings that have followed are testament to the due detail and focus of the Minister's reasoning.

(8) the applicants' contention that the respondent erred in law and/or acted unreasonably in failing to assess the application in a manner consistent with the normal meaning of the word "facilitate" in article 3(2) of the Directive,
the requirement to facilitate entry into and residence in Ireland of such persons as are referenced in Art.3(2) does not entail an obligation to acquiesce in abuses of rights of the type that present in the case at hand. Freedom of movement of EU nationals, among the greatest of the many great achievements of the European Union, has been constructed through law, can only be realised in accordance with law, and must be duly guarded by those tasked with policing/upholding the law.

7. For the reasons aforesaid, all the reliefs sought by the applicants are respectfully refused.