

Between:

MUHAMMAD NADEEM

Applicant

– and –

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr Justice Max Barrett delivered on 29th January, 2019.

1. Mr Nadeem, a non-EU national, seeks review of the Minister's decision (the 'Decision'), made following internal review, refusing (i) Mr Nadeem a residence card, (ii) to treat Mr Nadeem as a permitted family member of an EU citizen (Ms Parveen, his Sharia law wife, a UK national) under reg.5 of the EC (Free Movement of Persons) Regulations 2015. The following questions arise:

(1) (i) Are these proceedings imperfectly/improperly constituted &/o (ii) does Mr Nadeem lack *locus standi* to proceed without Ms Parveen as co-applicant?

2. The answer to each question posed is 'no'. There is no law that a person claiming a derivative right under the Regulations must join to proceedings the 'anchor' person upon whom his claimed right rests.

(2) Is Irish law incompatible with (i) Directive 2004/38/EC [the Citizens' Rights Directive] and/or (ii) Art. 47 CFEU, by failing to provide an appeal to an independent court/tribunal against the Decision?

3. The answer to each question posed is 'no'. The court refers to Case C-89/17 *Secretary of State for the Home Department v. Banger*, in particular paras. [43], [48] and [51]-[52]. Paragraphs [51]-[52] require that a national reviewing court "[A] be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and [B] whether the procedural safeguards were complied with." As to [B], judicial review is perfectly equipped to deal with procedural safeguards. As to [A], there is longstanding Irish case-law to the effect that a court tasked with judicial review may ascertain that a decision is "*factually sustainable*". Thus O'Higgins CJ observes in *State (Lynch) v. Cooney* [1982] IR 337, 361 that "[A]ny opinion formed by the Minister...must be one which is bona fide held and factually sustainable and not unreasonable". If a decision must be "*factually sustainable*", it necessarily follows that the reviewing court is capable of examining the correctness of the facts. A practical consequence of the *audi alterem partem* principle is that the number of cases in which a decision-maker will not have relevant material before him/her sufficient to ensure that an ensuing decision is factually sustainable will likely be few in number. As for correction of error, as Hogan J. notes in *NM (DRC) v. MJELR* [2016] IECA 217, para. 51, "*There is...well-established case-law whereby the court can quash in judicial review for material error of facts*". Thus judicial review as operated in Ireland is possessed of the mandatory features of which a national court review process must, per *Banger*, stand possessed. As to Art.47 CFEU, the ECJ in *Banger* (see para.[48]) seeks to ensure conformity of national court review processes with same. Thus if (as the court has just found to be the case with judicial review as operated in Ireland in the context of Directive 2004/38/EC) a national court review process stands possessed of the mandatory features identified in *Banger* then, all else being equal, that process will be consistent with Art.47 CFEU. No factor presents in this case that would justify the court finding other than that consistency presents.

4. The court does not consider that a decision by the ECJ on any point of EU law is necessary to enable this Court to give judgment and so declines to make a reference under Art.267 TFEU.

5. The above suffices to deal with Questions (1) and (2). That leaves the question which it was agreed at hearing would be left over until the court reverted with the within judgment, viz. whether Mr Nadeem should now be allowed to adduce oral testimony to show that there has been, as he claims, a material error of facts sufficient to merit a quashing of the Decision.