THE COURT OF APPEAL

Record No. 2016 562

Ryan P.
Peart J.
Hogan J.

BETWEEN/

ATIF MAHMOOD AND SHABINA ATIF

APPLICANTS /

RESPONDENTS

- AND -

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT /

APPELLANT

Record No. 2016 582

BETWEEN/

MOHAMMED AHSAN

APPLICANT/

RESPONDENT

- AND –

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT/

APPELLANT

Record No. 2016 583

BETWEEN/

NOOR HABIB, DILBARO HABIB, QUADRATULLAH HABIB, SHAHER HABIB, ABDUL RAHMAN HABIB (a minor suing by his grandfather and next friend NOOR HABIB), FATIMA HABIB (a minor suing by her grandfather and next friend NOOR HABIB), AEISHA HABIB (a minor suing by her grandfather and next friend NOOR HABIB), and MAREUM HABIB (a minor suing by her grandfather and next friend NOOR HABIB)

APPLICANTS /

RESPONDENTS

- AND -

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT /

APPELLANT

Record No. 2016 584

BETWEEN/

MOHAMMED HAROON AND NIK BIBI HAROON

APPLICANTS/

RESPONDENTS

- AND –

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT/

APPELLANT

JUDGMENT of the Court delivered by Mr. Justice Gerard Hogan on the 26th day of January 2018

1. These are four separate appeals taken by the Minister for Justice, Equality and Law Reform against the two decisions of the High Court (Faherty J.) delivered on the 14th October 2016 and the 11th November 2016 respectively directing him to take a decision on the respective visa applications (the nature of which shall shortly be described) *within six weeks of the perfection of the High Court order: see Mahmood v. Minister for Justice* [2016] IEHC 600 and *Ahsan v. Minister for Justice, Equality and Law Reform* [2016] IEHC 691. (The judgments in the *Haroon* and *Habib* appeals were incorporated in the **Ahsan** judgment). The appeals were all heard together by this Court.

2. These appeals all raise important questions concerning the interpretation and application of Directive 2004/38/EC ("the 2004 Directive"), namely, the time which may lawfully be taken by the Minister to determine applications for visas for non-national family members of EU citizens to join such EU citizens in the State. In each of these the appeals the first named applicant is the EU citizen who is living and working in the State and their third country spouse (or other family member) is based in one of three particular third countries, namely, Iraq, Pakistan and Afghanistan. The Minister maintains that by reason in particular of specific security considerations peculiar to these states and the surge in recent applications from those states, these visa applications cannot be processed speedily. The delays amount to at least a year and in some instances up to two years. The applicants contend that these delays amount to a breach of the requirements of Article 5(2) of the 2004 Directive.

3. Largely because all three judgments have identical legal issues and very similar facts, they are all structured in the same fashion and Faherty J. employs very similar language in each of the three cases. The three judgments thus overlap to a very great extent and, accordingly, this is reflected to some extent in this judgment on this appeal.

4. Before considering the legal issues which arise, it is first necessary to set out the facts of each of these three appeals.

The Mahmood appeal

5. Mr. Mahmood is a British citizen who is a quantity surveyor by profession. He married Ms. Atif, the second named applicant, in Pakistan on the 9th August 2013. Although normally resident in the United Kingdom, he apparently travelled to Pakistan in July 2015 and has resided there ever since. He says that he originally intended to travel with his wife to Ireland once she received a visa, which he believed would have been granted within a few weeks.

6. On the 9th July 2015 Ms. Atif had attended a visa application centre in Islamabad in Pakistan and had her biometric information taken. This information was then supplied to the Consulate of Ireland in Karachi on the 13th July 2015 and was designed to support an earlier online application for a visa. This application was then forward to the Irish National Immigration Service ("INIS") in Dublin for processing, but it appears that it was only received on the 10th August 2015.

7. Since no decision had been taken by November 2015, leave to apply for judicial review was granted by the High Court (MacEochaidh J.) on the 16th November 2015. No decision had been taken by the time of the High Court judgment on the 14th October 2016, so that there had been a delay of at least sixteen months in processing the application in Ms. Atif's case. The reasonableness of this delay and whether it is permissible in the light of the requirements of EU Law is, of course, at the heart of this appeal.

The Ahsan appeal

8. Mr. Ahsan is a British and EU citizen who arrived in the State on the 16th March 2015. It appears that he subsequently commenced to work on the 18th May 2015. Initially, he worked in a restaurant/takeaway and then commenced his current employment as a commercial cleaning operative on the 8th June 2015. He married a Pakistani national, Ms. Malaika Gulshan, on the 4th June 2012, in Lahore, Pakistan. He has a 3-year old son, also a Pakistani national.

9. On 7th August 2015, Ms. Gulshan submitted applications for Category C visas for herself and her son via the Visa Applications Centre in Lahore which serves the Irish Consulate in Karachi, Pakistan. The documents which were lodged for the purposes of the visa applications (in order to show that the applicant's wife and son were beneficiaries of the 2004 Directive) comprised:

> (i) the current passports of the applicant's wife and son;
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> (ii) an attested copy of the applicant's marriage certificate;
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> (iii) an attested copy of the applicant's son's birth certificate;
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> (iv) a copy of the applicant's British passport;
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> (v) copies of the applicant's tax credit certificate from the Revenue Commissioners for 2015 and following years;
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> (vi) copies of payslips in respect of the applicant's employment in the State; and,
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> (vii) a copy of the applicant's tenancy agreement, together with a declaration from the applicant dated the 10th July 2015, stating that he was a British citizen presently exercising free movement rights by living and working in the State and that he intended to continue exercising EU Treaty rights in the State.

10. The applicant engaged in a series of email correspondence with the Minister in respect of the visa applications between the 31st August 2015 and the 1st February 2016. The response to his query of the 31st August 2015 from the Irish Visa Information Centre advised that the standard time for the processing of EU Treaty Rights ("EUTR") visa applications was eight to twelve weeks and that in some cases the concerned authorities take more time to take a decision. On the same date, the applicant sent a further email querying the projected timeline of eight to twelve weeks and raising the question of whether this delay amounted to a breach of the 2004 Directive. On the 11th September 2015, the Visa Office in Dublin advised that "join family" applications received on the 6th April 2015, were currently being considered. It also stated that all applications are processed in order of date received in the Office. A further email of the same date advised that while the Office was aware that the application was an EEA application, the Office was experiencing a huge increase in the amount of such applications and that "unfortunately processing times have increased due to this."

11. On the 18th September 2015, the Visa Office indicated that "as a qualifying/permitted family member where all the required supporting documentation has been received and no queries remain outstanding, a decision can be expected within 12 weeks". Some

two weeks later on the 28th September, 2015, the Office was advising that a decision could be expected "within 16 weeks" where all supporting documents had been received and no queries remain outstanding.

12. On the 22nd December 2015, the applicant sent an email stating that four months had elapsed since the applications were made and enquiring whether the Minister could advise whether a decision had issued or whether any request for further information had issued that perhaps was not received. On the 20th January 2016, the applicant sent a further email in respect of which a response was received on the 26th January 2016. In that latter email it was stated that:

> "due to the large volume of applications of this type, the visa office is currently processing applications received in May 2015. While every effort is made to process these applications as soon as possible, processing times will vary, having regard to the volume of applications, their complexity and the resources available."

13. By reply of the same date, the applicant queried the discrepancy between the May 2015 date, as advised in the respondent's email, with information on Visa Office's website as of January, 2016, namely that the Minister was processing applications received on 25th August 2015. On the 1st February, 2016 the Visa Office advised that it was unable to provide any more updates.

14. The present judicial review proceedings were commenced on the 18th March 2016. In essence, the grounds relied on are that the Minister's delay in processing the application amounted to a breach of the 2004 Directive and, specifically, Article 5(2) thereof.

The Habib appeal
15. Mr. Habib is a British national who arrived in the State in February 2015. It appears that he was born in Afghanistan in January 1968 and that he married his first wife in 1990. They were three children of the marriage, but his wife died in August 1996. He left Afghanistan in 2000 for the United Kingdom where he sought and later obtained international protection. He became a naturalised UK citizen in 2007.

16. Mr. Habib maintains that he is a self-employed person in this State and works for this purpose as a distributor of leaflets. The other applicants are Mr. Habib's mother, his two sons and four grandchildren.

17. By letter dated the 22nd June 2015, the second to eighth named applicants, through their solicitor, made an application for short stay visas to enter the State. On 24th June 2015, the first named applicant, in person, lodged in the respondent's Visa Office in Abu Dhabi, visa documentation, identification and relationship documentation, documentary evidence of his residence in the State and evidence of the other applicants' dependency on him. On the 24th June 2015, the respondent acknowledged receipt of the applications and undertook to inform the applicants' solicitor of the decision on the applications once made. By two emails dated the 24th August, 2015, the applicants sought clarification as to the status of the visa applications. No response was received to this correspondence.

18. On the 25th September 2015, the applicants' solicitor wrote to the respondent noting that completed applications for entry visa had been submitted in June, 2015. The letter reminded the respondent of the need to process the application pursuant to an accelerated procedure. A decision was requested within twenty one days failing which instructions would be taken in respect of the issuing judicial review proceedings. On the 19th October 2015, the Minister replied stating that the "Abu Dhabi visa office has experienced a very large increase in … [EUTR] visa applications. This increase has put huge strains on our capabilities and is leading to long delays in processing these applications. Delays of several months should be expected".

19. By letter dated the 22nd October 2015, the applicants stated that an increase in applications was not a valid reason for breaching the State's obligations under EU law. The letter afforded a further seven days within which to make a decision the applications failing which, proceedings would issue. By order dated the 16th December 2015, MacEochaidh J. granted leave to the applicants to seek judicial review. The reliefs sought and the grounds relied on are similar to the *Haroon* case.

20. In passing it may be noted that a specific issue which would have ultimately to be determined by the Minister in respect of these applications is whether these third country nationals are family members within the meaning of Article 2(2)(d) of the 2004 Directive

The Haroon appeal
21. The first applicant, Mr. Mohammed Haroon, is a UK national currently operating a takeaway business in Mullagh, Co. Cavan. He married the second applicant, Ms. Nik Bibi Haroon, on the 21st April 2013. Ms. Haroon currently lives in Kabul in Afghanistan.

22. By letter dated the 4th June 2015 Ms. Haroon through her solicitors, applied for an E.U. Treaty Rights visa to enter Ireland in order to join her husband in accordance with Article 5(2) of the 2004 Directive. The appropriate documentation such as a copy of Ms. Haroon's Afghan passport, Mr. Haroon's U.K. passport and other similar documentation was enclosed. Ms. Haroon also submitted documentation showing economic activity in the State including Personal Public Service Number, recent bank statements and letters from the Revenue Commissioners. The Minister duly acknowledged receipt of the application on the 9th June 2015 but noted that Ms. Haroon's passport and photographs had not, in fact, been enclosed with the application. Ms. Haroon's solicitors replied on the 16th June 2015 pointing out that these documents had been sent in a separate letter that requested acknowledgment of the safe receipt of same.

23. On the 16th September 2015 the solicitors wrote to the Minister enclosing some further documentation and referring again to Article 5 of the 2004 Directive. The Minister responded on the 17th September 2015 acknowledging receipt of this correspondence and drew attention to a very large increase in the number of similar applications and the strain that this had placed on resources so that long delays in the processing of these applications in the order of several months should be expected.

24. Following further e-mail exchanges the Minister replied on the 29th September 2015 stating that for the time being no precise date could be given as to when the applications would be processed and determined. The solicitors than sent appropriate warning letters calling upon the Minister to make the appropriate decisions. These dates passed and, finally, on the 21st December 2015 the High Court (MacEochaidh J.) granted the applicants leave to apply for judicial review

The general response of the Minister to all four appeals
25. None of these applications for an Article 5(2) visa had been determined by the time of the High Court proceedings. The Minister has, however, in all four cases set forth a general response which may be summarised as follows:

> (i) the applicants are not entitled to invoke Article 5(2);
>
> (ii) the delays involved in processing or deciding upon these applications are not in any event unreasonable having regard

to the necessity for background checks to ensure that any given application is not fraudulent or that the marriage amounts to a marriage of convenience;

(iii) the delays in processing or deciding upon these applications are not unreasonable by reason of the necessity to conduct extensive background and security checks on persons coming from coming from certain third countries because of particular concerns relating to security in these countries; and

(iv) the delay were also not unreasonable by reason of a sudden and unanticipated surge in such applications coming from certain third countries which are thought to present real security concerns.

26. It appears that the processing of these applications is, generally speaking, conducted in a strict chronological order based on the date they are received. Where any particular application reaches the point in the queue where it is processed by Officers of the Irish Naturalisation and Immigration Service ("INIS"), a decision is typically made in an accelerated procedure within four weeks (save in respect of applications requiring checks within national authorities outside Ireland, and provided that no concerns of fraud or abuse of rights exist). In these cases the accelerated procedure applies with the result that less documents are required and less checks are performed than in respect of comparable family reunification visa applications not involving EUTR. In these cases decisions have been made as soon as possible having regard to the sudden rise in applications and the limited resources available to the Minister. While it may be true, of course, that applications are dealt with on an accelerated basis once they reach the appropriate point in the queue, this cannot take from the fact that the processing of individual applications in respect of spouses based in Afghanistan, Iraq and Pakistan in respect of Article 5(2) visas is presently taking up to two years.

27. The Minister had also pointed to the fact that the resources of INIS are limited and that the visa applications for qualifying family members of union citizens have had a uniquely and disproportionately large increase in 2015. He asserted that any delay is not attributable to the time it takes to process an application from a qualifying family members of an EU citizen, which remains accelerated but rather:

(i) the time it takes to commence the examination of each application, which is unavoidably subject to the volume of applications received; and,

(ii) the time required by the respondent to ensure that the conditions for exercise of the right of free movement set out in the 2004 Directive are satisfied, and that the rights granted by the Directive are not being abused.

28. These matters are all set out in affidavit of Gerry McDonagh of INIS of the 6th May, 2016 in Mr. Ahsan's proceedings. (A similar affidavit has been filed in the other three proceedings). Mr. McDonagh itemised the factors on which the Minister relies in order to show that he was not in breach of the 2004 Directive and that he has a rational system to process visa application for non-national family members of EU citizens are set out. Mr. McDonagh stated:

"First, the service provided is subject to limited financial resources available to the respondent giving the range of her responsibilities under the Naturalisation and Immigration system. Secondly, the fact that the respondent operates an accelerated procedure for the processing of visa applications from qualifying family members of EU citizens exercising their free movement rights. The normal practice is to process such applications in four weeks save in respect of those applications which require checks and provided no question of fraud or abuse of rights arises. However, there is no obligation for prioritisation of such applications over other types of obligations. Rather it is the procedure itself that is accelerated. Insofar as other types of visa applications are decided first in time, this is a natural result of separate decision-making procedures. Furthermore, a slowdown in the processing of other types of visa applications to accommodate the present application would not be in the best interests of the State and could have potentially serious consequences from both a humanitarian and economic perspective. The third factor is the unprecedented and unexpected increase in the number of EU Treaty rights visa applications in the period 2013 to 2015, in particular as and from the second quarter of 2015 and in particular concerning family members of UK citizens. This has put pressure on the resources and has contributed to an unavoidable delay in commencing the examination of some applications. That notwithstanding, steps were taken to reassign resources to deal with the EU Treaty rights caseload. Fourthly, the respondent is entitled to make necessary checks on documents to ensure that there is no abuse of rights or fraud. This process involves liaising with national authorities in the UK and those of the family member of the UK citizen. Until such time as those checks are completed, it is not possible for the respondent to be satisfied that the applicant to whose application the checks pertain does not present a risk of abuse of rights. This precludes the making of a decision on some applications. The fifth factor is the potential for abuse of the State's immigration law and policy, as well as an abuse of the Common Travel Area between Ireland and the UK. The respondent and U K authorities share a common and serious concern that the present rise of applications constitutes artificial conduct entered into solely for the purpose of obtaining a right of entry and residence under EU Law, and accessing the UK through the land border on the island of Ireland. Concerns specifically exist in respect of human trafficking, organised crime and security. The sixth factor is that an order of mandamus in this application and in similar cases could undermine the rigorous nature of the process for determining EU Treaty rights applications and cause disruption in their assessment and this, in turn, could undermine the integrity and security of the State's borders and of the Common Travel Area."

29. The evidence put before the High Court by the Minister is that there has been a 1,417% increase in the volume of applications for EUTR visas in the period 2013 to 2015, in particular from Afghanistan, Pakistan and Iraq and most particularly occurring in the second quarter of 2015. Some indication of the scale of applications may be gauged from the fact that at the hearing of this appeal on the 15th December 2017 counsel for the Minister, Mr. Maurice Collins S.C., informed the Court that some 5,767 applications of this kind emanating from third country spouses from these three countries were pending for processing as of that date. It was estimated that the processing of these applications would be likely to take at least another twelve months.

30. The Minister stressed that given that increase he cannot discount the potential for terrorist threat attack in Ireland or elsewhere in Europe if such checks as are presently being conducted are not permitted. Furthermore, the respondent has specific concerns in respect of the potential for abuse of Ireland's immigration law and policy occasioned by applications for short stay visas for third country national family members of EU citizens.

31. According to Mr. McDonagh, both the Minister and the UK authorities apprehend that organised criminal operations are also exploiting vulnerable persons by arranging for marriages of convenience designed to circumvent immigration laws, a serious issue presently under investigation by the relevant authorities. It appears that an investigation conducted by An Garda Síochána identified a number of criminal networks based in Ireland and the UK who are engaged in the facilitation of marriages of convenience through the provision of false information and documentation. In excess of fifty five formal objections to pending marriages have been made

by the Gardaí in accordance with the provisions of s. 58(4A) of the Civil Registration Act 2004 (as inserted by s. 14 of the Civil Registration (Amendment) Act 2014).

32. Mr. McDonagh further stated that the Minister was aware that many visa applications are being handled and serviced by for-profit immigration service companies. This, he says, causes two concerns. First, that applications are being made by Union citizens travelling to Ireland solely for the artificial purpose of generating an obligation for Treaty rights for their third country national family member in another Member State (and in particular the United Kingdom). Secondly, for the same artificial purpose, but in circumstances in which the Union citizen never comes to Ireland, a false identity is created in the Irish State for the union citizen as if they were relying upon EU Treaty rights in this jurisdiction. Mr. McDonagh stated that that in light of ongoing Garda investigations he has been advised by An Garda Síochána that some such companies are knowingly or unknowingly facilitating applications in which false employment (including false payslips and false Revenue returns and remittals) and fictitious residences are established in the Irish State for the Union citizen. Examples of payments made by Union citizens to such immigration service companies in the United Kingdom are said to be in the order of £15,000 to £20,000.

Are the applicants entitled to invoke Article 5(2) of the 2004 Directive?
33. The first question which arose in the High Court is whether the various applicants in these five cases are entitled to invoke Article 5(2) of the 2004 Directive. The Minister had argued that these applicants did not satisfy the conditions of Article 5(2) and required them to establish by way of strict proof that the respective family members constitute beneficiaries for the purposes of the 2004 Directive and/or Regulations and that the respective EU citizens satisfy the conditions of Articles 7, 14 and 24 of the 2004 Directive and the transposing domestic Regulations. The Minister asserted, effectively, that until these matters had been established, the applicants cannot invoke Article. 5(2) of the Directive. This argument was squarely rejected by Faherty J.:

> "I am satisfied that the respondent's pleas in this regard are misconceived. Judicial review is a review of the legality of the respondent's action or inaction. The within proceedings concern the respondent's alleged inaction in taking decisions on the visa applications on family members of EU nationals. They are not a vehicle for the High Court to be invited to make findings of fact regarding the applicants' family relationships, their ages, or the extent of their dependency, or indeed whether the EU citizens' residence in the State complies with Article 7. The respondent is seemingly putting the applicant on strict proof in circumstances where she has not yet considered the visa applications for mere entry into the State. I find that the respondent cannot lawfully oppose judicial review proceedings by putting it up to the applicants to prove to the court on judicial review the very matters that are going to be a subject of decisions by the respondent. There is no question in my mind but that the applicants, albeit that their respective visa applications have yet to be determined, are entitled to invoke the provisions of Article 5(2) of the Directive."

34. Although this matter does not appear to have been strongly pressed on these appeals, the Court considers that Faherty J. was entirely correct in this approach. The real question is whether the admitted delays – in the order of up to two years – in the processing of these visa applications amounts to a potential breach of Article 5(2) and, if so, whether such can be excused by (i) the necessity to pursue extensive background checks in respect of third country national spouses (and other dependent family members) coming from troubled countries such as Pakistan, Afghanistan and Iraq and (ii) the surge in the number of applicants from these countries. It is to these issues which the Court will now turn.

Is the Minister in breach of Article 5(2) of the 2004 Directive?
35. In her judgment in the High Court, Faherty J. said that what is contemplated by Article 5(2):

> "…..is a speedy processing of visa applications for qualifying family members of EU citizens. No other reading of the relevant provisions can be contemplated. While there is no specific time limit set out in Article 5(2), its language has been interpreted as importing into the provision certain urgency in the issuing of visas, of which this court must be mindful."

36. Faherty J. then went to refer to a High Court judgment of Hogan J. in *Raducan v. Minister for Justice* [2011] IEHC 224, [2012] 1 I.L.R.M. 419. This was a case where a Moldovan national who was the spouse of a Romanian national whom she accompanied was denied leave to land at Dublin Airport (and subsequently detained at a detention centre) following her arrival on a flight from Bucharest on the ground that Moldova was not visa exempt. Ms. Raducan was, however, in possession of a duly authorised family residence card for the purposes of Article 10(1) of the 2004 Directive. This entitled her to enter the State without a visa, a fact of which the immigration officials at Dublin Airport appeared to have been unaware.

37. In these circumstances Hogan J. held that Ms. Raducan's three day detention had been unlawful and awarded her damages for breach of her constitutional rights. Faherty J. referred to the following passage from that judgment in *Raducan* dealing with the interpretation of Article 5(2) and its precursor ([2012] 1 I.L.R.M. 419, 425):

> "But over and above this factual question, it is clear from the evidence in this case that the procedures employed at Dublin Airport with regard to the procedures to be followed in the case of the admission of the spouses of EU nationals are seriously wanting. In *Case C-459/99 MRAX v. État belge* [2002] ECR I - 6591 the Court of Justice was quite emphatic (at pars. 60-62 of the judgment) as to what the corresponding provisions of earlier free movement Directives (which were ultimately replaced by Directive 2004/58/EC) required in this regard:-
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> > 'However, Article 3(2) of Directive 68/360 and Article 3(2) of Directive 73/148 state that the Member States are to accord to such persons every facility for obtaining any necessary visas. *This means that, if those provisions of Directives 68/360 and 73/148 are not to be denied their full effect, a visa must be issued without delay and, as far as possible, at the place of entry into national territory*.'
>
> In view of the importance which the Community legislature has attached to the protection of family life……, it is in any event disproportionate and, therefore, prohibited to send back a third country national married to a national of a Member State where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148.' (Emphasis supplied)
>
> It is plain from this judgment that Member States were required under the old free movement Directives to have in place a facility whereby visas could be issued immediately at a major airport such as Dublin Airport. If anything, however, the Union legislator went further with Article 5(2) of the subsequent 2004 Directive which provides:-
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> > '2. Family members who are not nationals of a Member State shall only be required to have an entry visa in

accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.'

Member States shall grant such persons every facility to obtain the necessary visas. *Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.*" (emphasis supplied)

38. Faherty J. then noted that Hogan J. had said that the requirement that a third country spouse had to apply on-line for a visa was "clearly a manifest breach of Article 5(2)" and that in the absence of an facility to issue a visa at the airport ([2012] 1 I.L.R.M. 419, 426):

"it could hardly be said that the State has afforded 'such persons every facility to obtain the necessary visas.' One need hardly add that the absence of such a facility means that the State is also plainly failing in its obligation to issue such visas 'as soon as possible and on the basis of an accelerated procedure.' There was thus a clear breach of the Directive in that Ms. Raducan was not offered the possibility of securing a visa on her arrival at Dublin Airport."

39. Faherty J. then went on to address the Minister's argument that these delays were justified by reason of the recent surge in applications where the EU spouse comes from one of these three third counties:

"The respondent contends that notwithstanding the significant upsurge in applications and the sudden pressure on resources, visa applications from non-national family members on EU citizens continue to be processed on an "accelerated" basis, as provided for in Article 5(2), in that much less documentation is sought from these applicants, compared to other types of visas and that this accelerated procedure is put in place once an examination of the visa application commences. She asserts that even greater numbers of qualifying members of Union citizens (and in particular UK citizens such as the first named applicant) have been processed, notwithstanding a rapidly rising number of such applications. The applicants maintain that it is an entirely artificial approach for the respondent to define the period of delay by dividing the visa application into two parts, with the clock running only when the period of actual examination of a particular application begins. I agree with the applicants' contention. In light of the provisions of Art. 5 (2), there is no merit in the respondent's suggestion that any period of delay prior to the actual examination of the application should be disregarded by the court for the purpose of establishing whether applications are being issued "as soon as possible and on the basis of an accelerated procedure". Such an approach would not be in accordance with the letter or spirit of Art. 5(2), as interpreted by Hogan J. in Raducan. Moreover, I note that the respondent's own guidelines state (at para. 9.1): "[a]pplications from qualifying family members must be accelerated i.e. processed within four weeks from the time that the application is first received in an Irish Visa Office or Mission. This four week period includes all time spent transferring documents in relation to the application between offices *e.g.* in diplomatic bags I should say by way of general observation that the issues in the present case fall to be assessed having regard to what is set out in the relevant provisions of the Directive, as opposed to fixing the respondent's obligation to the actual wording of the guidelines, albeit that the guidelines in large part adequately reflect the provisions of the Directive."

40. It is true that there is no fixed period prescribed by Article 5(2) in respect of the processing of such applications, but one must at least question whether delays in the order of twelve months to two years are manifestly at odds with the plain language of Article 5(2) of the 2004 Directive. There is, after all, an express and unconditional obligation imposed on Member States to afford such third country nationals "every facility to obtain the necessary visas" and on the basis of an "accelerated procedure." If delays in the order of two years are routinely experienced – even if admittedly only in the context of applications emanating from these three countries – in the processing of such applications and such delays were considered lawful as a matter of EU law, then, one view, at least, such an interpretation of Article 5(2) would seem entirely at odds with the substance of these requirements and it would, in particular, render the accelerated procedure requirement largely meaningless.

41. Not only would such an interpretation arguably deprive Article 5(2) of its *effect utile* but it might also appear to be at odds with the observations of the Court of Justice in respect of the precursor provisions to Article 5(2) where it stated (at para. 60) in Case *C-459/99 MRAX v. État belge* [2002] E.C.R. I - 6591 what the corresponding provisions of earlier free movement Directives (which were ultimately replaced by Directive 2004/58/EC) required in this regard:

'However, Article 3(2) of Directive 68/360 and Article 3(2) of Directive 73/148 state that the Member States are to accord to such persons every facility for obtaining any necessary visas. This means that, if those provisions of Directives 68/360 and 73/148 are not to be denied their full effect, *a visa must be issued without delay and, as far as possible, at the place of entry into national territory.*" (emphasis supplied)

42. The Court accordingly considers that, a delay of up to two years in processing applications from these three countries seems in principle to amount to a breach of Article 5(2). It is next necessary to examine the potential justifications advanced by the Minister in respect of these delays.

The potential justification for these delays

43. By way of justification for these delays, the Minister, however, points to the necessity for thorough background checks on applicants coming from these countries. He furthermore points to the large increase in applications for such visas from spouses of EU nationals based in these three countries. As the Court has already indicated, the evidence before the High Court shows that there has been 1,417% increase in the volume of applications for EU treaty rights visas in the period 2013 to 2015, in particular from Afghanistan, Pakistan and Iraq and particularly occurring in the second quarter of 2015. In 2013, the total number of EU Treaty rights applications was 663, in 2014 it was 1,763 and in 2015 it has risen to 10,062 of which 3,420 applications were from Afghanistan, 2,748 from Pakistan, 1,206 from Iraq, 293 from India, 254 from Nigeria and "other" applications at 2,141. The Minister stated that given that increase he cannot discount the potential for terrorist threat attack in Ireland or elsewhere in Europe if such checks as are presently being conducted are not permitted.

44. Concern was also expressed by the Minister in respect of the potential for abuse of Ireland's immigration law and policy occasioned by applications for short stay visas for third country national family members of EU citizens. The Minister further points to documented instances of where criminal networks based in Ireland and the UK who are engaged in the facilitation of marriages of convenience through the provision of false information and documentation.

45. Yet a further concern on the part of the Minister is the conduct of many for profit immigration service companies, some of whom – it is alleged - facilitate EU citizens travelling to Ireland solely for the artificial purpose of generating an obligation for treaty rights for their third country national family member in another Member State (and, in particular, in the United Kingdom). There are also

documented instances in which the Union citizen never comes to Ireland and a false identity (including false payslips and false returns to the Revenue Commissioners) is created in Ireland for the Union citizen as if they were relying upon EU Treaty rights in this jurisdiction.

46. Before addressing these concerns, it may first be convenient to draw attention to a number of decisions of the Court of Justice dealing with the free movement issue. In Case C-370 90 *Surinder Singh* [1990] E.C.R. I-4265 a British national accompanied by her Indian husband travelled to Germany with a view to taking up employment there. The couple later return to the UK whereupon they separated. This raised the question of whether the Indian husband could still invoke rights pursuant to EU free movement law in the United Kingdom following such separation. The Court of Justice answered this question in the affirmative, reasoning that an EU citizen might be deterred from exercising free movements rights in another Member State if his or her spouse "was not permitted to enter and reside in his Member State of origin under conditions at least equivalent to those granted them by [Union] law in the territory of another Member State."

47. In Case C-*109/01 Akrich* [2003] E.C.R. I-9607 the Court of Justice held that, provided that marriage in question was not a marriage of convenience, the motives of a *Surinder Singh* free mover were irrelevant as long as the work carried out in the host Member State was "genuine and effective": see para. 55. Accordingly, it was irrelevant that the couple had moved to Ireland for the purpose of ultimately regularising the UK immigration status of Mr. Akrich, a Moroccan national.

48. All of the concerns expressed by the Minister are laudable and, doubtless, in some instances, at least, fully justified. These concerns must nonetheless be viewed through the prism of EU law. Given that many Member States (including, as we were informed in the course of the appeal, the United Kingdom) have in recent times tightened their immigration requirements in terms of admitting spouses from third countries who are married to their own nationals, it can scarcely be a surprise that in consequence some persons will endeavour to avail of their EU free movements rights (and, perhaps, in particular, their *Surinder Singh* rights) to achieve this purpose and even if their motive in doing so is simply to ensure that the third country national can ultimately lawfully enter, return to or (as the case may be) remain in that spouse's own country of origin which, in these instances, is the United Kingdom. The decision in *Akrich*, after all, appears to suggest that these motives are irrelevant as a matter of EU law.

49. Many of these consequences seem to flow inexorably from the very structure of EU law, the express terms of the 2004 Directive and the consistent case-law of the Court of Justice. The decision in *Surinder Singh* is, after all, more than 25 years old. It might well be supposed, therefore, that if a Member State was entitled to delay processing applications for an Article 5(2) visa by reason of these or similar concerns, the 2004 Directive would have expressly said so.

50. One may accept, of course, that any investigation into the question of whether, for instance, a given marriage is a marriage of convenience is complex and may take time, especially if the marriage has been contracted in a distant State whose laws, practices, and customs may be unfamiliar to us. Yet Article 35 of the 2004 Directive provides – reflecting Recital 28 of that Directive - that:

> "Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience."

51. Article 35 accordingly envisages that there will be circumstances in which a couple will marry for the purposes of circumventing immigration controls. Again, as the Court has already mentioned, the investigation of such matters may be complex and time consuming, something of which the Union legislator was presumably aware. If, however, this was a matter which might justify a delay in processing a visa application under Article 5(2), one might again have expected that Article 35 would have said so in terms. In any event, given that at least some of these applicants (such as, for example, Mr. Habib) are married with children, it would be hard, one might think, to say that such marriages were marriages of convenience so that any delay in processing such applications by reason of the need to investigate this particular ground in those cases is perhaps unlikely to arise.

52. All of this is re-inforced by the decision of the Court of Justice in Case C-202/13 *McCarthy*. In that case the Court was required to assess the validity of a requirement imposed by the UK authorities on the non-national family member of a UK citizen (both of whom resided in Spain) to obtain "an EEA family permit" before entering the UK although the Spanish authorities had had issued the family member with a residence card under Article 10 of the Directive. The Court stated (at paras. 55 and 56):

> "In the absence of an express provision in Directive 2004/38, the fact that a Member State is faced as the United Kingdom considers itself to be, with a high number of cases of abuse of rights or fraud committed by third-country nationals resorting to sham marriages or using falsified residence cards cannot justify the adoption of a measure…founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the person concerned himself….the adoption of measures pursuing an objective of general prevention in respect of widespread cases of abuse of rights or fraud would mean….that the mere fact of belonging to a particular group of persons would allow the member states to refuse to recognise a right expressly conferred by Directive 2004/38 on family members of a Union citizen who are not nationals of a Member State, although they in fact fulfil the conditions laid down by that Directive."

53. The Court considers that it would be naive not to give full weight to the need for security checks in the case of spouses resident in these three countries. Iraq, Afghanistan and Pakistan are all countries which have encountered significant difficulties in recent times with terrorism and religious radicalisation and the Minister's apprehensions in this regard are certainly fully understandable. Article 27(1) of the 2004 Directive certainly contemplates that Member States may restrict the free movement of Union citizens and their family members on grounds of both public policy and public security.

54. What is, however, striking is that there is nothing in Article 27 which in terms appears to modify the Article 5(2) obligation in order to take account of the necessity for background checks of this kind, checks which, of necessity, will take time and, accordingly, perhaps more time than could ordinarily be accommodated within the time frame clearly contemplated by Article 5(2). In this regard, it should be noted that Article 27(3) expressly provides that "in order to ascertain whether the person concerned represents a danger for public policy or public security", Member States are permitted to contact other Member States for information and, in any event, arrive at a determination on this question within three months from the date of arrival "of the person concerned on its territory" or from the date of reporting his or her presence within the territory.

55. In the light of this express provision dealing with the situation after the arrival of the individual concerned on its territory, one might question whether Member States should enjoy an even greater latitude in terms of the delays occasioned by background checks in respect of persons seeking visas to enter the State in accordance with Article 5(2).

56. The final issue relied upon by the Minister is that of resources. He has stated that his Department is operating against a background of a significant increase in visa applications for non-national family members of EU citizens, in addition to the demands on

resources from other visa applicants. Perhaps some allowance can be made for some additional delays which have been caused by a sudden and large increase in applicants for Article 5(2) visas, particularly if, as Faherty J. noted in her judgment, there "was a stated timeframe provided to the court for the commencement of the examination of the visa applications."

57. One might, however, question whether the obligations contained in Article 5(2) can be effectively set at naught by open-ended and significant delays which the Member State seeks to justify by reference to the absence of appropriate resources. As the Court of Justice indicated in Case C-144/97 *Commission v. France* [1998] E.C.R. I-613) (at para. 98):

> "a Member State cannot rely on provisions, practices or circumstances existing in its internal legal order to justify the failure to respect the obligations and time limits laid down by a Directive."

58. Even allowing for the significant recent increase in applications, the Court is nonetheless concerned lest the delays at issue here – well over twelve months in each case – might be found to be a breach of EU law having regard to the specific language of Article 5(2).

Conclusions
59. Summing up, therefore, the Court is concerned lest the delays at issue in the present proceedings go beyond that which is contemplated by Article 5(2) of the 2004 Directive. While recognising the concerns of the Minister in relation to matters such fraud, abuse of rights and marriages of convenience, one might think that if the 2004 Directive permitted a Member State to delay processing a visa application for a period of a year or more this would have been expressly stated, whether in Article 35 or elsewhere.

60. The Court expresses the same concerns in relation to the necessity for extensive background checks in respect of persons coming from certain countries because of concerns relating to security and religious radicalisation concerns. If it had been intended that the necessity for such checks could take from the obligation for the timely processing of visa applications under Article 5(2), on at least one view of the matter it is likely that this would have been provided for, whether in Article 27(1) or elsewhere. One may also doubt whether resource issues peculiar to one Member State can be allowed to derogate from the terms of Article 5(2).

61. The Court accordingly recognises that this is a case of very considerable importance concerning the practical implications and effects of key provisions of the 2004 Directive. Apart from anything else, it has direct implications for over 4,000 cases currently being processed by the Minister's Department. One might also observe that both the question of the time periods contemplated by Article 5(2) of the 2004 Directive and the possible justifications for the delay in processing these applications (especially concerns regarding fraud and the necessity for extensive security checks) do not yet have been directly considered by the Court of Justice. While one may tend to doubt the correctness of the various arguments advanced by the Minister, the Court cannot say that the issues amount to an *acte clair* which must necessarily be resolved in the various applicants' favour.

62. In these circumstances, the Court is of the view that, as already communicated to the parties, it should refer the following draft questions to the Court of Justice pursuant to Article 267 TFEU:

Question 1:
63. Subject to Questions 2, 3 and 4, is a Member State in breach of the requirement in Article 5(2) of Directive 2004/38/EC ("the 2004 Directive") to issue a visa as quickly as possible to the spouse and family members of a Union citizen exercising free movement rights in the Member State in question where the delays in processing such an application exceed 12 months or more?

Question 2
64. Without prejudice to Question 1, is a Member State entitled to delay processing or otherwise deciding on an application for a visa pursuant to Article 5(2) by reason of the necessity to ensure in particular by way of background checks that the application is not fraudulent or that the marriage amounts to a marriage of convenience, whether by virtue of Article 35 of the 2004 Directive or otherwise?

Question 3
65. Without prejudice to Question 1, is a Member State entitled to delay processing or deciding on an application for a visa pursuant to Article 5(2) by reason of the necessity to conduct extensive background and security checks on persons coming from coming from certain third countries because of specific concerns relating to security in respect of travellers coming from those third countries, whether by virtue of Article 35 of the 2004 Directive or otherwise?

Question 4
66. Without prejudice to Question 1, is a Member State entitled to delay processing or deciding on an application for a visa pursuant to Article 5(2) by reason of a sudden and unanticipated surge in such applications coming from certain third countries which are thought to present real security concerns?

67. In the light of the conclusion to make the Article 267 reference, the Court will now invite the parties to make submissions in respect of these draft questions in the event that they would wish to do so prior to the final submission of these questions to the Court of Justice.