

## THE HIGH COURT

## JUDICIAL REVIEW

[2017 No. 438 JR]

BETWEEN

ANNA STRACZEK, ALI HAMZA AND ASAD ALI CHEEMA

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

**JUDGMENT of Mr Justice David Keane delivered on 19th March 2019****Introduction**

1. This is the judicial review of a decision by the Minister for Justice and Equality ('the Minister'), dated 24 April 2017 ('the decision'), under Regulation 25 of the European Communities (Free Movement of Persons) Regulations 2015 ('the 2015 Regulations'), to uphold on review a first instance decision of 15 July 2016 to refuse the application of Asad Ali Cheema, a national of Pakistan, for a residence card as a permitted family member of his sister in law Anna Straczek, a Polish - and, hence, European Union - citizen, exercising free movement rights in the State. Ms Straczek is married to Ali Hamza, the brother of Mr Cheema.

2. Ms Straczek was wrongly named in the title of these proceedings as 'Anna Strazcek.' On the assumption that Ms Straczek would wish the title of the proceedings she has brought to reflect her name as recorded in her passport, her marriage certificate and by her signature in the jurat to her grounding affidavit, I order the amendment of the title of the proceedings accordingly.

3. The 2015 Regulations were made, in exercise of the powers conferred on the Minister by s. 3 of the European Communities Act 1972, to give effect to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States ('the Citizens' Rights Directive'). They came into operation on 1 February 2016.

4. In substance, the reason the Minister gave for the decision is that Mr Cheema failed to establish that he is a 'permitted family member' of Ms Straczek, within the meaning of that term under Regulations 2(1) and 3(6) of the 2015 Regulations (transposing the requirements of Article 3(2) of the Citizens' Rights Directive concerning 'other family members'), because he failed to establish that in Pakistan (as the country from which he had come), he was either: (a) a dependant of Ms Straczek, as a Union citizen; or (b) a member of the household of Ms Straczek, as a Union citizen.

**Procedural history and grounds of challenge**

5. The application is based on a statement of grounds dated 24 May 2017, supported by an affidavit of Ms Straczek and one of Mr Cheema, each sworn on the previous day.

6. By order made on 29 May 2017, O'Regan J granted Mr Cheema leave to seek the reliefs identified, on the grounds specified, in his statement of grounds. Principal among those reliefs is an order quashing the Minister's decision.

7. The grounds advanced in support of that relief are essentially threefold. They are that the Minister breached Mr Cheema's entitlement to fair procedures in three different ways: first, by basing the decision on matters of which Mr Cheema was not on notice; second, by reaching the decision without first 'raising an issue' on the inadequacy of Mr Cheema's evidence both of his dependence upon Ms Straczek in Pakistan (as the country from which he had come) and his membership of her household there; and third, by failing to properly examine, weigh and adjudicate upon the submissions made, and evidence submitted, on behalf of Mr Cheema.

8. The Minister delivered a statement of opposition dated 20 November 2017. It is supported by an affidavit, sworn on 24 November 2017 by Mark Carleton, a higher executive officer of the Irish Naturalisation and Immigration Service ('the INIS') in the Department of Justice and Equality.

**Background**

9. Ms Straczek is a Polish and, hence, European Union citizen, who was exercising free movement rights in the State at all material times. Ms Straczek married Mr Hamza, a Pakistani citizen, in 2012. Mr Cheema, a Pakistani citizen, is the brother of Mr Hamza and, hence, the brother-in-law of Ms Straczek. Mr Cheema's date of birth is 1 October 1990.

10. Mr Cheema entered the State on the basis of a short stay visa in 2015. His visa application stated that the purpose of his trip was to visit his brother Mr Hamza. Mr Cheema signed an undertaking to leave the State upon the expiration of his visa on 13 January 2016, citing his obligations in Pakistan, including his ownership and management of a farm there. A visa issued to Mr Cheema on 22 October 2015, valid for the period between 14 October 2015 and 13 January 2016. Mr Cheema's passport was stamped with permission to enter the State on 6 November 2015.

11. Mr Cheema did not leave the State upon the expiration of his visa.

12. Instead, on 17 February 2016, through his solicitors, he brought an application for a residence card, pursuant to Regulation 7 of the 2015 Regulations, as a permitted family member of Ms Straczek, within the meaning of that term under Regulation 5 of those Regulations.

13. The cover letter with the application contained various formulations of the assertion that Mr Cheema was then a dependent of Ms Straczek and a member of her household. Those assertions were all couched in the present or present continuous tense. That letter contained no acknowledgment of the requirement that, in order to qualify as a permitted family member under Regulation 5(1), transposing the requirement in Article 3(3) of the Citizen's Rights Directive, it is necessary to establish dependency on, or membership of the household of, the Union citizen concerned in the country from which the person claiming that status has come.

14. The cover letter did include, among the list of documents enclosed with the application, an item with the following description: 'Bank statements in respect of Ms Shahnaz Akhtar, Mr Cheema's mother, dated from 2013 to 2015.' Inexplicably, the cover letter made no attempt to explain the nature or significance of any of the transactions recorded in those bank statements, the evident implication being that it was for the Minister to identify each and every relevant transaction and work out its significance for the purpose of Mr Cheema's claim to permitted family member status *vis a vis* Ms Straczek.

15. The list of enclosures in the cover letter also included copies of Ms Straczek's Irish current account bank statements for the period July 2015 to February 2016, though without any explanation of the nature or significance of any of the transactions recorded there for the purpose of Mr Cheema's application.

16. On 24 March 2016, the solicitors for Mr Cheema wrote to the INIS again, stating that all of the required proofs had been supplied, and that judicial review proceedings would issue if he did not receive a temporary residence permission within 21 days.

17. By letter dated 23 April 2016, the INIS acknowledged receipt of Mr Cheema's application and requested certain additional documentation including, under the heading 'evidence that you are a family member of the EU citizen', the following:

'Documentary evidence from the relevant authority of the country from which the applicant has come that the applicant was a dependent of the EU citizen while residing there (e.g. evidence of financial support such as bank statements, financial transfers, employment documents, tax documents)'

18. The INIS letter went on to request that the applicant clarify the change of circumstances that had occurred since his provision of an undertaking to return to Pakistan to attend to his continuing obligations there when applying for the visitor's visa that he had used to enter the State on 6 November 2015.

19. On the same date, the INIS wrote separately to Mr Cheema's solicitors in response to their letter of 24 March 2016, stating that the Minister was not yet in a position to determine whether Mr Cheema was entitled to be treated as a permitted family member of Ms Straczek.

20. The applicant's solicitors wrote in reply on 9 May 2016, enclosing additional documentation. The letter provided, for the first time as far as I am aware, the following narrative explanation of Mr Cheema's circumstances in the form of the instructions that he had provided to those solicitors. When entering the State on a visitor's visa on 6 November 2015, Mr Cheema had intended to return to Pakistan. On 20 November 2015, there was a fire at the premises of Mr Cheema's family rice trading business which damaged a storage facility (known as 'a godown') there. That business was Mr Cheema's main source of income and the fire, effectively, destroyed it. Mr Cheema thus became immediately dependent upon his sister-in-law Ms Straczek. Ms Straczek had been transferring money for a number of years to a bank account held by Mr Cheema's mother for Mr Cheema's benefit. That was what the copy bank statements of Mr Cheema's mother previously furnished without explanation had been intended to establish because a particular entry recording a transfer into that account in Pakistan on 27 August 2013 in the amount '€12,500' was an investment by Ms Straczek in Mr Cheema's family rice trading business.

21. Among the additional documents furnished with that letter, were the following; a copy, stamped 4 May 2016, of an Irish bank withdrawal slip evidencing an undated withdrawal from Ms Straczek's account in the sum of €12,580; a copy, stamped 4 May 2016, of a document evidencing an undated payment by the Irish bank to, or on behalf of, Mr Cheema's mother as customer in the sum of €12,557; a signed statement by Ms Straczek, dated 3 May 2016, that she regularly sent money to Mr Cheema prior to his entry into the State; four photographs of firemen attending a blaze at a warehouse; and a copy of a story in the Urdu language from the 22 November 2015 edition of Pakistani newspaper called the Daily Yaum, together with the following English translation of that story certified by a notary public on 26 January 2016:

'Unknown Person Put On Fire In The Godown Of Rice

Gujranwala (Crime Reporter) unknown person put on fire in the godown of rice and rice of rupees fifty lac burnt to ashes. According to a report, Asad Ali Cheema had been doing business of rice in Ali Pur Chattha for a long time and some criminal persons asked for money while Asad Ali Cheema had submitted an application in police station. But the process of threats did not finish. And some people put on fire on not giving Bhata. After that the whole godown burnt to ashes. Fire brigadier tried to save the rice but all in vain. On the application of Asad Ali Cheema, police field (*sic*) FIR against the unknown persons and police making rate to arrest criminals but Asad Ali Chema is receiving threats still. The concerned area people protesting against this terrorist activity and appealed the higher authorities for the safety of property and life.'

22. The INIS confirmed receipt of that letter on 11 May 2016.

23. On 15 June 2016, Mr Cheema's solicitors wrote to the INIS again to threaten judicial review proceedings if Mr Cheema was not given temporary permission to reside in the State within 21 days.

24. On 15 July 2016, the INIS wrote to Mr Cheema to inform him of the Minister's decision in the following terms:

'On the basis of the documents supplied, the Minister has determined that you

- are not a dependant of the Union citizen.
- are not a member of the household of the Union citizen.
- do not have serious health grounds which require you to receive the personal care of the Union citizen.

It is noted that you arrived in Ireland on the 06/11/2015 on foot of a C visit visa. Your visa application was for the purpose of a visit to your brother Ali Hamza. You signed the undertaking to leave this State following your visit. It is further noted that the EU citizen was not mentioned on your visa application and no evidence of dependence on the EU citizen was provided with the application.

Correspondence received at this office on the 10/05/2016 stated that the family's rice farm had been destroyed by fire shortly after your arrival to this State. A Bank of Ireland withdrawal slip and a Pakistani bank statement in respect of your

mother, Shahnaz Akhter, shows that the EU citizen transferred the sum of €12,580 to Pakistan on 21/08/2013. However, it is stated that this money was an investment into the rice business and not financial support to family members.

Enquiries carried out in relation to the activities of the EU citizen in this State show that she is currently in receipt of Illness Benefit, A Credit Union statement received in respect of the EU citizen shows savings of approx €5,000 and borrowings of more than €5,000 at the end of January 2016. Bank statements decreased to €71 on 17/02/2016.

Therefore, I am not satisfied that the EU citizen has the capacity to support you in the State.

As the Minister has decided that you are not a person to whom the Regulations apply, your application for a residence card of a family member of a Union citizen under Regulation 7(1) of the Regulations cannot be accepted.'

25. On the same date, the INIS sent a copy of that letter to the applicant's solicitors.

26. The applicant's solicitors wrote to the INIS on 19 January 2016, seeking a review of the Minister's decision. The letter included further representations and additional documentation was enclosed with it. While none of that documentation is relevant to the issue of Mr Cheema's asserted dependence on, or membership of the household of, Ms Straczek in Pakistan, as the country from which he had come, the cover letter contains the statement: 'We have already provided...bank statements in respect of Mr Cheema's mother, Ms Shahnaz Aktar (sic) dated from 2013 to 2015 showing that Ms Straczek was providing money to Ms Akhtar and her son on a regular basis prior to their arrival in the State.' The way in which those bank statements evidenced Ms Straczek's as the source of any of inward payments recorded on Ms Akhtar's bank statements or Mr Cheema as the beneficiary of those funds was not explained.

27. On 19 September 2016, the INIS wrote to Mr Cheema's solicitors on the Minister's behalf, acknowledging his application for a review of the decision to refuse him a residence card. The Minister's letter pointed out that Mr Cheema had to demonstrate that he was, in the country from which he had come, either a dependant or member of the household of Ms Straczek, and that it was open to him to submit any additional supporting documentation he may wish to be considered for that purpose. The letter continued, in relevant part:

'Therefore, in order for this office to process your client's application further, please submit copies of the following documents by registered post to [the INIS]:

Evidence of Mr. Cheema's relationship with the EU citizen, Anna Barbara Straczek

*For other family members:*

- Evidence of dependence on the EU citizen, including dependence prior to residing in the State.
- Evidence of membership of the EU citizen's household prior to residing in the State....'

28. By letter dated 8 November 2016, Mr Cheema's solicitors acknowledged receipt of that letter and made further submissions, stating in material part:

'We have already provided to your office bank statements in respect of Mr. Cheema's mother, Ms Shahnaz Aktar (sic) dated from 2013 to 2015 showing that Ms. Straczek was providing money to Ms. Aktar (sic) and her son, Mr. Cheema on a regular basis prior to their arrival in the State.

...

We have also submitted to your office a Bank of Ireland withdrawal slip and a Pakistani bank statement in respect of Mr. Cheema's mother, Ms. Shahnaz Aktar (sic) which shows that the EU citizen, Ms. Straczek transferred the sum of €12,580 to Ms. Aktar (sic) and her son on the 21st of August 2013. We are instructed that this was financial support towards the family and their rice business.'

29. Once again, the manner in which those bank statements evidence that Ms Straczek was providing money to Mr Cheema and his mother on a regular basis prior to his arrival in the State was left entirely unclear.

30. The INIS acknowledged receipt of that letter on 9 November 2016.

31. On 31 March 2017 the applicant's solicitors wrote to the INIS, warning of their intention to issue judicial review proceedings should a decision on Mr. Cheema's appeal application not be communicated to their office within 21 days.

### **The decision**

32. The decision is dated 24 April 2017. It states, in material part:

'I am to inform you that the review of your application has not been successful as you do not fulfill the relevant conditions set out in the Regulations and the Directive. The decision to refuse your application dated 17/02/2016 is affirmed for the following reasons:

Although you state that the EU citizen transferred money to benefit you into your mother's account in Pakistan, no evidence of this has been provided. The bank statements submitted indicate that several lodgments were made to your mother's bank account between 2013 and 2015, but there are no details in respect of the person who made these transfers and, as such, there is no proof that these lodgments were made by the EU citizen. In addition, given that it is your mother's bank account that is referred to, there is no information on file to suggest that you received any benefit from these financial transfers.

You have also asserted that the EU citizen transferred a sum of €12,580 from her joint account to your mother's account in Pakistan on 21st August 2013. However, the copy of your mother's bank statement on file indicates that this money was received on 13th August 2013 - some eight days before the transfer was initiated in Ireland. This anomaly notwithstanding, it is clear that this money was intended as an investment into the family's rice business and not as financial support to you.

The Minister does not consider that you were dependent upon your sister-in-law while you were in Pakistan, and you have not provided any evidence to suggest that he [sic] you have been in receipt of financial assistance from the EU citizen in question in this State.

It is clear that you live in the same house as your sister-in-law and brother at the moment, but there is insufficient evidence on file at the present time to establish that you are, in fact, a member of her household. There is insufficient evidence to show how many persons are residing at the address mentioned, their relationship to you, or the duration of time that you were a member of your sister-in-law's household prior to your arrival in the State. Indeed, there is no reason to believe that the EU citizen has ever travelled to or resided in Pakistan. Although you may be sharing an address with an EU citizen at the moment, the Minister is not satisfied that you have been a member of your sister-in-law's household, including prior to your arrival in the State.'

33. A notification of the Minister's intention to make a deportation order in respect of Mr Cheema under Section 3 of the Immigration Act 1999, as amended, was attached to the letter containing the decision.

#### **The law**

34. Article 1 of the Citizens' Rights Directive lays down, amongst other things, the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members. Article 2 of the Citizens' Rights Directive defines both a 'Union citizen' and the 'family member' of a Union citizen for the purposes of the exercise of those rights. Under Article 2(2), a 'family member' is defined as: (a) the spouse; (b) registered partner (in certain defined circumstances); (c) direct descendant under the age of 21 or a dependant of the Union citizen, spouse or partner (so defined); and (d) dependent direct relative in the ascending line of the Union citizen, spouse or partner (so defined). As Article 3(1) of the Citizens' Rights Directive confirms, these are the persons who are the designated beneficiaries of the rights the exercise of which it conditions.

35. Article 3(2) states:

'Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.'

36. Article 10 provides, in material part:

'1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

...

(e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen...;

...'

37. Recital 6 in the Preamble to the Directive states:

'In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under the Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.'

38. The Citizens Rights Directive is now transposed in Ireland by the 2015 Regulations.

39. Under the heading 'Interpretation', Regulation 2(1) of the 2015 Regulations provides that:

"family member" means a qualifying family member or a permitted family member;

...

"permitted family member" means, in relation to a particular Union citizen, a person who is, under Regulation 3(6), a permitted family member of the Union citizen;

"qualifying family member" means, in relation to a particular Union citizen, a person who is, under Regulation 3(5), a

qualifying member of the Union citizen

....'

40. Regulation 3 states, in material part:

'(1) This paragraph applies to—

- (a) Union citizens entering or remaining in the State in accordance with these Regulations, and
- (b) a family member of a Union citizen referred to in subparagraph (a) who—
  - (i) enters the State in the company of the Union citizen,
  - (ii) enters the State for the purpose of joining the Union citizen, or
  - (iii) becomes a family member while in the State and seeks to remain with the Union citizen in the State.

...

(5) For the purpose of these Regulations, a person is a qualifying family member of a particular Union citizen where—

- (a) subparagraphs (a) and (b) of paragraph (1) apply, respectively, to the Union citizen and the person, and
- (b) the person is—
  - (i) the Union citizens spouse or civil partner,
  - (ii) a direct descendant of the Union citizen, or of the Union citizens spouse or civil partner, and is—
    - (I) under the age of 21, or
    - (II) a dependent of the Union citizen, or of his or her spouse or civil partner, or
  - (iii) a dependent direct relative in the ascending line of the Union citizen, or of his or her spouse or civil partner.

(6) For the purposes of these Regulations, a person is a permitted family member of a particular Union citizen where—

- (a) subparagraphs (a) and (b) of paragraph (1) apply, respectively, to the Union citizen and the person, and
- (b) the Minister has, in accordance with Regulation 5, decided that the person should be treated as a permitted family member of the Union citizen for the purposes of these Regulations, which decision has not been revoked pursuant to Regulation 27.'

41. Regulation 5 states, in pertinent part:

(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 dependant of the Union citizen,
  - (ii) is a member of the household of the Union citizen....

(2) Where a Union citizen has entered or is residing in the State in accordance with these Regulations or is proposing to do so, a person to whom paragraph (1) applies may apply to the Minister for a decision that he or she be treated as a permitted family member for the purposes of these Regulations and shall, for the purposes of such an application, produce to the Minister—

- (a) (i) where the applicant is a national of a Member State, a valid passport or national identity card, or
- (ii) where the applicant is not a national of a Member State, a valid passport,
- (b) evidence that he or she is a member of the family of the Union citizen,

and

(c) one of the following:

- (i) documentary evidence from the relevant authority in the country of origin or country from which he or she has come, that he or she is a dependant, or a member of the household, of the Union citizen;

....

(3) Upon receipt of the evidence referred to in paragraph (2), and on being satisfied that the applicant is a person to whom paragraph (1) applies, the Minister shall cause to be carried out an extensive examination of the personal circumstances of the applicant in order to decide whether the applicant should be treated for the purposes of these Regulations as a permitted family member of the Union citizen concerned.

(4) For the purposes of his or her decision under paragraph (3), the Minister may require the applicant to produce such

additional evidence as the Minister may reasonably require.

(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 dependant 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;

(b) where the applicant is a member of the household of the Union citizen concerned, the duration of the period during which he or she has been living within the household of the Union citizen;

...

(e) whether the relationship described in subparagraph (a), (b), (c) or (d), as the case may be, was brought about with the objective of obtaining permission to remain in the State or a Member State;

(f) the capacity of the Union citizen concerned to continue to support the applicant in the State in the event that the applicant is to be treated as a permitted family member under these Regulations.

(6) The Minister, following an examination under paragraph (3), shall—

(a) where he or she decides that an applicant should be treated as a permitted family member for the purposes of these Regulations, notify the applicant in writing of the decision, or

(b) where he or she decides that an applicant should not be treated as a permitted family member for the purposes of these Regulations, notify the applicant in writing of the decision and of the reasons for it.

....'

42. Regulation 7 provides:

'7.(1) A family member who is not a national of a Member State—

(a) may, within 3 months of the relevant date, apply to the Minister for a residence card, and

(b) shall, where an application under paragraph (a) has not been made within the period specified in that paragraph, before the expiry of 4 months after the relevant date, apply to the Minister for a residence card.

(2) In paragraph (1), the "relevant date" means—

(a) in the case of a qualifying family member, the date on which he or she—

(i) entered the State as a qualifying family member, or

(ii) having already been in the State, became a qualifying family member,

and

(b) in the case of a permitted family member—

(i) the date on which he or she first entered the State as a permitted family member, or

(ii) where he or she was present in the State on the date on which the Minister decided that he or she should be treated as a permitted family member, that date.

(3) An application under paragraph (1) shall contain the particulars specified in Schedule 2 and shall be accompanied by such additional information requirements provided for in that Schedule as are applicable.

(4) The Minister shall cause to be issued a notice acknowledging receipt of an application under paragraph (1).

(5) The Minister shall, within 6 months of the date of receiving an application under paragraph (1)—

(a) where he or she is satisfied that it is appropriate to do so, issue a residence card containing the particulars set out in Schedule 3 to the family member concerned, or

(b) notify the family member concerned that his or her application has been refused, which notification—

(i) shall be accompanied by a statement of the grounds for the refusal, and

(ii) may be accompanied by a notification under Regulation 21(1) or 23(3), or both.

(6) An applicant under paragraph (1) may remain in the State pending a decision on the application.'

43. Regulation 25 states:

'(1) A person who has, or who claims to have, an entitlement under these Regulations to enter or reside in the State may seek a review of any decision concerning such entitlement or claimed entitlement.

(2) An application for review under this Regulation shall be submitted to the Minister within 15 working days of the receipt by the person concerned of the decision and shall set out in writing the grounds for review and the particulars specified in Schedule 4.

(3) The Minister may, where he or she is satisfied that it is warranted in the particular circumstances, extend the period referred to in paragraph (2) within which a review must be submitted.

(4) A review under this Regulation of a decision under paragraph (1) shall be carried out by an officer of the Minister and who—

(a) shall be a person other than the person who made the decision, and

(b) shall be of a grade senior to the grade of the person who made the decision.

(5) The officer carrying out the review shall have regard to the information contained in the application and may make or cause to be made such enquiries as he or she considers appropriate and may—

(a) confirm the decision the subject of the review on the same or other grounds having regard to the information contained in the application for the review, or

(b) set aside the decision and substitute his or her determination for the decision.

(6) A person who makes an application under paragraph (1) for the review of a removal order may, at the same, make an application for the suspension of the enforcement of the order.'

(7) Where a person makes an application under paragraph (6), the removal of him or her from the State shall, unless the officer carrying out the review is of the view that the removal decision is based on imperative grounds of public security, be suspended until such time as that officer makes his or her decision under paragraph (5).

## Analysis

### i. *the burden and onus of proof*

44. In seeking to invoke the status of 'permitted family member' of Ms Straczek for the purpose of Regulation 3(6) and 5(1) of the 2015 Regulations, which is essentially that of 'other family member' under Article 3(2) of the Citizens' Rights Directive, Mr Cheema was obliged to satisfy the Minister that, in Pakistan, as the country from which he had come, he was either a dependent of the Union citizen Ms Straczek or was a member of her household.

45. Under Regulation 5(2)(c) of the 2015 Regulations, reflecting the requirements of Article 10(2) of the Citizens' Rights Directive, in claiming that status on the basis upon which he did, Mr Cheema was obliged to produce to the Minister documentary evidence from the relevant authority in the country from which he had come that he was a dependant, or a member of the household, of Ms Straczek. In reality, Mr Cheema was entirely at large on the issue of both the evidence he chose to present in support of his claim and the means whereby he chose to adduce that evidence; Case C-215/03 *Oulane* [2005] E.C.R. I-1215 (at para. 53), Case C-1/05 *Jia* [2007] 1 C.M.L.R. 41 (at para. 41).

46. Nonetheless, whatever evidence he did submit was always going to be subject to qualitative assessment and, in particular, as the ECJ has made clear in *Jia* (at para. 42), 'a mere undertaking from a Community national or his spouse to support the family member concerned need not be regarded as establishing the existence of that family member's situation of real dependence.' To that must be added that, as Regulation 5(1) of the 2015 Regulations and Article 3(2) of the Citizens' Rights Directive plainly establish and as the England and Wales Court of Appeal confirmed in *Soares v Secretary of State for the Home Department* [2013] 3 C.M.L.R. 847 at 855 (*per* Davis LJ; Longmore and McFarlane LJJ concurring), in order to qualify as a permitted (or 'other') family member it is necessary to show dependence upon, or membership of the household of, the Union citizen concerned in the country from which the person concerned has come, and dependence upon, or membership of the household of, the Union citizen's spouse there is of no avail.

47. In *Moneke v Secretary of State for the Home Department* [2011] UKUT 341, the Upper Tribunal stated (at paras. 42 and 43):

'42. We of course accept...that dependency does not have to be "necessary" in the sense of the [United Kingdom] Immigration Rules, that is to say an able bodied person who chooses to rely for his essential needs on material support of the sponsor may be entitled to do so even if he could meet those needs from his own economic activity; see [*SM (India) v Entry Clearance Officer (Mumbai)* [2009] EWCA Civ 1426 ]. Nevertheless, where, as in these cases, able bodied people of mature years claim to have been always dependent upon remittances from a sponsor, that may invite particular close scrutiny as to why this should be the case. We note further that Article 10(2)(e) of the Citizens Directive contemplates documentary evidence. Whether dependency can ever be proved by oral testimony alone is not something we have to decide in this case, but Article 10(2)(e) does suggest that the responsibility is on the applicant to satisfy the Secretary of State by cogent evidence that is in part documented and can be tested as to whether the level of material support, its duration and its impact upon the applicant combined together meet the material definition of dependency.

43. Where there is a dispute as to dependency (as there was in the present case) immigration judges should therefore carefully evaluate all the material to see whether the applicant has satisfied them of these matters.'

48. That appears to me to be a correct statement of the law. It follows that the onus was on Mr Cheema to satisfy the Minister by

cogent evidence that was in part documented and could be tested either that the level of material support he received from Ms Straczek, its duration, and its impact upon his personal financial circumstances combined together to meet the material definition of dependency in Pakistan (as the country from which he had come) or that he had lived for some time under the roof of a household that could be said to be that of Ms Straczek in Pakistan (as the country from which he had come) so as to establish membership of her household there. The Minister concluded that Mr Cheema had failed to do so.

49. In attempting to meet that onus, Mr Cheema provided only very limited and fragmentary evidence in support of his claim of dependence upon Ms Straczek in Pakistan and no evidence to support a claim to membership of Ms Straczek's household there (in circumstances where there is no reason to suppose that Ms Straczek ever had a household in that country).

50. It is a striking feature of the written and oral submissions made on behalf of Mr Cheema in these proceedings that they ignore the relevant burden and onus of proof under the 2015 Regulations and the Citizen's Rights Directive, and fail to address (save in the most vague and general terms) the precise evidence by reference to which it is submitted the Minister should have been satisfied that Mr Cheema had established his dependence on, or membership of the household of, Ms Straczek in Pakistan. Instead, Mr Cheema attempts to invert the relevant test by criticising the Minister for failing to properly apprise him of the gaps, or lack of cogency, in the evidence he had submitted to establish either of those propositions in advance of the Minister's decision on his application for a residence card.

## ii. the right to good administration

51. In advancing the argument that it was incumbent upon the Minister to advise him of the perceived gaps in, and shortcomings of, his own evidence before making a decision on his application, Mr Cheema seeks to rely on the terms of Article 41 of the Charter of Fundamental Rights of the European Union. However, as the text of Article 41(1) makes plain, that provision deals only with the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. While Mr Cheema cites certain commentary on the scope of that provision in Barnard and Peers, *European Union Law* (2nd ed, 2017) at pp. 216-7, as those authors make clear (at p. 215), the institutional scope of the right to good administration under Article 41(1) of the Charter is limited to 'institutions, bodies and agencies of the Union.' Little turns on Mr Cheema's misunderstanding in this regard, as the right to good administration as a general principle of EU law under Article 6(3) of the Treaty on European Union is applicable to Member State action in the scope of EU law.

52. The question therefore is whether Mr Cheema's right to good administration or, as it is more commonly referred to within the domestic legal order in this State, his right to natural and constitutional justice and fair procedures has been breached in the circumstances of the present case.

53. Mr Cheema argues that the Minister breached his right to a fair hearing (in particular, his right to the benefit of the principle *audi alteram partem*). Specifically, Mr Cheema claims that he was not given an opportunity to make his views known on the truth and relevance of the facts and circumstances alleged and on the documents used in his application, a requirement of good administration long recognised by the Court of Justice; see, for example, *Joined Cases 100-103/80 SA Musique Diffusion Française & Ors v Commission* (ECLI:EU:C:1983:158). That argument is unsustainable in this case as it was Mr Cheema who was asserting the truth and relevance of the facts concerned (i.e. his dependence upon, or membership of the household of, Ms Straczek in Pakistan) and the documents used in the application were those furnished on his behalf. The issue in *SA Musique Diffusion Française* was whether the Commission could make a final decision in competition proceedings against undertakings where its findings were based upon documents with which those undertakings were not acquainted or only partially acquainted.

54. Mr Cheema was given every opportunity to make his views known on the facts and the circumstances he was asserting and on the documents that he sought to rely on for that purpose. In reality, Mr Cheema is contending for the additional right to a separate opportunity to make his views known on the proposed decision of the Minister before it was finalised. The right to good administration does not encompass any such entitlement.

55. Case C-277/11 *MM v Minister for Justice, Equality and Law Reform & Ors* (ECLI:EU:C:2012:744) was a reference for a preliminary ruling concerning the interpretation of Article 4(1) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12) ('the Qualification Directive'). Article 4(1) of the Qualification Directive provides that '[i]n cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.' The question raised for a preliminary ruling was whether that duty of cooperation requires the relevant Member State administrative authority to supply an applicant with the results of its assessment to enable him or her to address any adverse findings contained in it. The Court of Justice was clear (at para. 61):

'A requirement of that kind in no way results from the wording of the provision in question. If the EU legislature had intended to impose on Member States obligations such as those advocated by Mr M., it would certainly have done so expressly.'

56. There is nothing in the Citizen's Rights Directive imposing an obligation of that kind on Member States.

57. Nor is there anything in this case comparable to the failure by the European Commission to inform an undertaking of the proposed imposition of a new condition upon an exemption from the application of competition law rules that led to the finding in Case 17-74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063 (ECLI:EU:C:1974:106) that there had been a breach of the rule whereby a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known.

58. The circumstances of the present case are even further away from those at issue in Case C-28/05 *G.J. Dokter v Minister van Landbouw, Natuur en Voedselkwaliteit* (ECLI:EU:C:2006:408) in which land holders affected by a decision made by the Netherlands authorities to take certain measures to control the spread of foot and mouth disease invoked the principle of the rights of the defence as an aspect of the right to good administration to argue that they must be placed in a position to make known their views on the evidence on which the contested decision to implement the relevant measures was based before those measures were implemented. Nothing even remotely comparable arises in the circumstances of this case where the evidence that the Minister had to assess was that provided by Mr Cheema and upon which evidence Mr Cheema had been given ample opportunity to make his point of view known in advance of the Minister's decision.

59. Nor is the situation here comparable to those that were at issue in Case C-349/07 *Sopropé – Organizações de Calçado Lda v Fazenda Pública* (ECLI:EU:C:2008:746), concerning the right of a goods importer to make its views known to the Portuguese customs



authorities on the evidence relied on to conclude that certain consignments of goods did not qualify for preferential rates of customs duties, or in Case C-141/08 *Foshan Shunde Yongjian Housewares & Hardware Co. Ltd v Council of the European Union* ECR I-09147 (ECLI:EU:C:2009:598), concerning the right of a non-EU producer seeking an exemption from anti-dumping measures to make its views known on the material informing the proposals of the Commission that the Council should refuse that exemption.

60. Thus, I am satisfied that there has been no breach of the right of good administration in this case. In the written submissions filed on his behalf, Mr Cheema sought, as an alternative to an order of certiorari quashing the decision, an order for a preliminary reference to the Court of Justice of the European Union. However, beyond the bare assertion that there has been a breach of his right to good administration in the determination of his application for a residence card as family member of a Union citizen, a proposition for which I have been unable to find any basis in fact or law, I cannot identify any question of EU law upon which the ruling of the Court of Justice is necessary to enable me to give judgment in this case. Nor, through his legal representatives, has Mr Cheema attempted to identify one. It follows that I must refuse Mr Cheema's application for a preliminary reference.

### iii. a fair procedures

61. Ignoring the fact that he was the person who chose to provide the relevant documentation to the Minister without context or explanation, Mr Cheema submits that the Minister breached the *audi alteram partem* principle, in failing to put to him for comment or submission: first, that the copies of his mother's bank statements do not identify the transferor of funds to her account; second, that they do not evidence the receipt by him of the benefit of any funds transferred into that account; and third, that they do not evidence the receipt by him of any benefit from the sum of €12,580 that Ms Straczek ostensibly transferred into his mother's account as an investment in his family's rice trading business.

62. In support of that argument, Mr Cheema relies on *Idiakheua v Minister for Justice, Equality and Law Reform* [2005] IEHC 150, (Unreported, High Court (Clarke J), 10th May, 2005), a decision on an application for leave to seek judicial review. In material part, that case dealt with the arguability of the proposition that there was a requirement upon the Refugee Appeals Tribunal, as a body presiding over an inquisitorial process, to bring to the attention of any person whose rights might be affected by its decision any matter of substance or importance with the potential to affect that decision. However, Clarke J (at p. 11) drew a clear distinction between matters that an applicant knew of and had the opportunity to address in the course of the process and those that an applicant was not on notice of and, thus, did not have the opportunity to address. In contrast, this case cannot be described as an instance of the decision-maker paying selective regard to external material without drawing it to the applicant's attention or allowing the applicant an opportunity to address it. Here, the Minister was doing no more than giving proper consideration to the material that Mr Cheema himself had chosen to submit.

63. A decision of more obvious direct relevance to the argument that Mr Cheema makes is that of Faherty J in *Khan & Ors. v. Minister for Justice and Law Reform* [2017] IEHC 800. That case involved a challenge to a refusal by the Minister to grant permission to enter the State to the applicants as 'qualified family members', specifically as the dependent parents, of a UK and, hence, Union citizen, exercising free movement rights here. On an argument of precisely the same type as Mr Cheema now raises, Faherty J concluded as follows (at paras. 83 to 85):

'83. Much of the criticism levelled at the respondent in the course of this application centred around the failure of the respondent to give advance warning to the applicants of perceived deficiencies or contradictions in the documents submitted with visa applications prior to the respondent reaching a decision on the respective appeals. Counsel for the applicant maintained that had the applicants been forewarned they would have been able to address the perceived deficiencies or contradictions.

84. Counsel for the respondent submits that it was incumbent on the applicants to put their best foot forward and to present such relevant facts and evidence as might be necessary to support their applications, including facts and evidence which would tend to prove dependency. Accordingly, the respondent cannot be criticised, in these proceedings, for the condition of the applicant's own proofs, because the respondent was not willing to accede to their application while in receipt of insufficient proof of dependency.

85. I agree with the respondent's submissions in this regard. As stated in *A.M.Y. v Minister for Justice* [2008] IEHC 306 "there is no onus on the Minister to make inquiries seeking to bolster an applicant's claim; it is for the applicant to present the relevant facts."

64. I respectfully agree with that analysis and I reject Mr Cheema's submission that there was an obligation on the Minister to put the views that the Minister had formed on the material that Mr Cheema had submitted to him for further comment or submission before making a decision on Mr Cheema's application. I must also reject the argument that the Minister's decision was based on matters of which Mr Cheema was not on notice; Mr Cheema must be deemed to know the law and cannot be heard to say he was unaware of the nature and contents (and, hence, of the obvious limitations) of the documentation that he had submitted to meet the relevant legal test.

### iv. failure to properly and fairly examine, weigh and adjudicate upon the evidence and submissions

65. Mr Cheema argues that the Minister failed to properly and fairly examine, weigh and adjudicate upon the submissions that he made and the documentation that he furnished through his solicitors. This seems to me to be a makeweight argument. No specific failure is identified in support of this broad and unsupported assertion.

66. Mr Cheema cites *O'Leary v Minister for Justice* [2012] IEHC 80 (Unreported, High Court (Cooke J), 24 February, 2012) but that decision does not assist his case. It involved a challenge to a decision to refuse the elderly third country national parents of an adult Irish citizen a renewal of their permission to reside in the State under s. 4(7) of the Immigration Act 2004. The decision was based upon an extensive memorandum prepared by an officer in the Minister's department addressing and rejecting the various arguments raised and submissions made on the parents' behalf. Cooke J concluded (at para. 23) that, while the individual answers and observations expressed by the decision maker might separately be considered pertinent and not obviously unreasonable, the cumulative effect of the reasons stated was to create the impression that the decision maker was more concerned with finding and articulating grounds of refusal than with an overall assessment of the merits of the application in a balanced and objective manner.

67. It seems to me that the decision in *O'Leary* was very clearly directed to its own particular facts. I can find nothing comparable in the circumstances of the present case. Hence, I reject this argument also.

## Conclusion

68. The application is refused.