[2019] IEHC 403

THE HIGH COURT

2018 No. 692 JR

Between:

MUHAMMAD UZAIR PERVAIZ

Applicant

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr Justice Max Barrett delivered on 6th June, 2019.

Part I

Introduction

1. Mr Pervaiz, a non-EU national, claims to live in Dublin with his girlfriend, an EU national. According to Mr Pervaiz, he moved in with his girlfriend in September 2016 and they have resided together since. In September 2017, Mr Pervaiz applied to be treated as a permitted family member within the meaning of the EC (Free Movement of Persons) Regulations 2015. By that time, on his account, Mr Pervaiz would have been living with his girlfriend for about a year. Mr Pervaiz's application failed initially and also following internal review, the Minister not being satisfied that Mr Pervaiz is a person with whom his girlfriend has a "*durable relationship duly attested*". Mr Pervaiz has now brought the within judicial review proceedings concerning the review decision of 14.05.2018 (the 'Impugned Decision').

Part II

"*Durable Relationship*"

2. Under reg.5(2) of the 2015 Regulations "*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".* In Mr Pervaiz's case, to be treated as a permitted family member, he must be a person to whom reg.5(1)(b) applies. For reg.5(1)(b) to apply he must be a "*partner with whom a Union citizen has a durable relationship, duly attested"*. This wording springs from Art.3(2) of the Citizens' Rights Directive (Directive 2004/38/EC), which provides, *inter alia*, that "[T]*he host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons… (b) the partner with whom the Union citizen has a durable relationship, duly attested".*

3. What is a "*durable relationship*"? The phrase is not defined in the Citizens' Rights Directive, most likely so as to allow the various member states to proceed by reference to concepts of relationships/durability that suit their respective mores and traditions. Nor is the phrase defined in the 2015 Regulations (the domestic legislation that seeks to transpose the Citizens' Rights Directive). Nor has it separately been expounded upon, *e.g.*, in departmental guidance. Even so, the court does not accept that the phrase cannot be defined or amplified upon. By declining, when transposing the Directive, to define in law or separately to state as a matter of policy what is, or what the Minister generally considers to be, subject to the application of discretion in any one case, a "*durable relationship*", the Minister has allowed a situation to arise in which no-one (applicants, officials or indeed the court) quite knows what a "*durable relationship*" is. It has emerged in these proceedings that a "*durable relationship*", as conceived by the Minister, *inter alia*, involves a 'sort of' two-year benchmark (certainly that benchmark is mentioned, *inter alia*, in the Impugned Decision and in the application documentation); however a lower timeframe, it has been averred for the Minister in these proceedings, can be applied if that is considered to be merited on the evidence in any one case, though quite when the evidence will be (or is) considered to justify the application of a lower timeframe and how a particular lower timeframe is settled upon is entirely unclear.

4. All the foregoing means that Mr Pervaiz did not quite know how to pitch his application, the Minister is pretty much at large in terms of his decision-making, and the court has no benchmark by which to commence a consideration of reasonableness or rationality because it does not know what is meant by the term "*durable relationship*". Nor is the dictionary definition of "*durable*" especially enlightening: the online Cambridge English Dictionary defines "*durable*" as meaning, *e.g.,* "*able to continue for a long time without failing*". But every romantic relationship is technically able to continue for a long time without failing. Counsel for the Minister drew the attention of the court to the fact that in the "*Explanatory Leaflet for Form EU1A*", a document issued by the Minister and concerning the completion of the form whereby one applies in Ireland to be treated as a permitted family member, there is reference to a "*durable relationship*" as a "*lasting*" relationship. However, if anything that serves only to add to the existing confusion. After all, a continuing relationship that lasts for any meaningful length of time is a lasting relationship.

5. In passing, the court notes the written submission by the Minister that: "[I]*t should be noted that the Applicant submitted no documentation to evidence that he was in a durable relationship duly attested with* [his girlfriend] *other than that relating to their alleged cohabitation history*" [emphasis added]. The mention of the word "*cohabitation*" in the just-quoted submission is profoundly misplaced. Dictionary definitions of the word "*cohabitation*" typically embrace a couple living together and having a physical sexual relationship without being married or in a civil partnership. It would, of course, be possible – contrary to what the last-quoted submission appears to suggest – for an applicant to establish the existence of a "*durable relationship*" by reference solely to a committed physical sexual relationship. However, there is no suggestion in the Citizens' Rights Directive that a couple must: (i) be living together for them to be in a "*durable relationship*"; and the court considers that it can take judicial notice of the fact that couples can be forced by work or other commitments to live partly and sometimes largely apart; or (ii) have a physical sexual relationship before they can be found to be party to a "*durable relationship*". If the Minister in his use of the word "*cohabitation*" in the last-quoted submission means to suggest that there must be a physical sexual dimension to a relationship before it could be a "*durable relationship*", that proposition is respectfully rejected by the court.

Part III

Some General Problems Presenting

***(i) Effectiveness*.**

6. In the absence of Community rules, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law. Those detailed procedural rules governing actions for safeguarding an individual's rights under Community law, *inter alia*, must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (this is the principle of effectiveness). (See *e.g.*, Case C-268/06 *IMPACT v Minister for Agriculture and Food & ors*). In a situation where no-one (applicants, officials or the court) quite knows what a "*durable relationship*" is and where the bench-mark applied by the Minister in any one assessment of durability is entirely unclear, the court cannot but conclude that the Minister is rendering excessively difficult the exercise of rights conferred by Community law, here the EU-inspired right existing under reg.5 of the 2015 Regulations to apply to be treated as a permitted family member. The court notes in this regard the cautionary note sounded by the Court of Justice in Case C-127/08 *Metock*, para.84 that when it comes to the Citizens' Rights Directive "*the provisions of that directive…must not in any event be deprived of their effectiveness*." (See also in this regard: Case C-162/09 Secretary of *State for Work and Pensions v. Lassal,* paras. 30-31; Case C-145/09 *Land Baden-Württemberg v. Tsakouridis*, para.23; and Case C-507/12 *Jesse Saint Prix*, paras. 32-33).

***(ii) Non-reviewability*.**

7. The want of clarity presenting as to what is a "*durable relationship*" and what benchmark of duration the Minister brings to play in reaching a determination in this regard (it appears to start out at two years but can be dropped to a lower benchmark in circumstances, and for reasons, unclear) has the result that the decision-making process when it comes to the Minister's determining whether an applicant is "*the partner with whom a Union citizen has a durable relationship"* within the meaning of reg.5(1)(b) is essentially opaque and not susceptible to meaningful judicial review.

***(iii) Rule of Law*.**

8. The rule of law, one of the most exalted concepts in modern political and legal orders, is a founding principle of the Irish and European legal systems (getting explicit mention in no fewer than four provisions of the Treaty on European Union, *viz*. Articles 2, 7, 21 and 49). Lord Bingham, writing in the British context, in *The Rule of Law* 1st Ed., (London, 2010), observes, at 37, that a central characteristic of the rule of law is that "*The law must be accessible and so far as possible intelligible, clear and predictable*". This is a proposition that is uncontroversial as a matter of Irish law also. But why must the law be as Lord Bingham describes it? Because, *inter alia*, if people are to claim the rights which the civil (that is, non-criminal) law gives them, it is important to know what their rights are. Otherwise they cannot claim those rights. Reducing the foregoing to firm legal practicalities, and drawing on the observations of the Court of Justice in *e.g.*, Case C-199/03 *Ireland v. Commission*, the rule of law, it might un-controversially be asserted, requires that (i) actions of public bodies take place under and within the law, (ii) legal rules are clear and precise, and (iii) individuals can ascertain unequivocally what their rights and obligations are and take steps accordingly. The situation that currently presents under reg. 5 of the 2015 Regulations is fundamentally at odds with the rule of law. The absence of any definition of "*durable relationship*" in the 2015 Regulations has the result that reg.5 is entirely unclear and imprecise in this regard. Moreover, individuals who believe they may be in a "*durable relationship*" are unable to ascertain unequivocally what their rights are and take steps accordingly because no-one quite knows what a "*durable relationship*" is. And the Minister in reaching his decision on a reg.5(2) application is largely unconstrained by law, a situation that lends itself to arbitrary decision-making.

9. Counsel for the Minister observes as follows in his written submissions:

> "*To the extent that the within Applicant contends that he is unable to ascertain the threshold to be met as someone in a 'durable relationship duly attested'; with an EU citizen, the respondents say that [i] he is free to apply the natural and ordinary meaning of this expression….In any event, and without prejudice to the foregoing,* [ii] *it is worth highlighting that* [the] *explanatory leaflet for the EU1A…application identifies the type of documentation that the First Respondent looks for as evidence of a 'de facto partner'* [presumably a romantic partner]".

10. As to [i], as mentioned in Part I above, the "*natural and ordinary meaning*" of the phrase "*durable relationship*" offers effectively no guidance as to what an applicant needs to show. As to [ii], unmentioned in the above-quoted submission is that the section where the phrase "*de facto*" appears indicates that "*Required Supporting Documents*" include "*Evidence of cohabitation [sic] for the last two years*". (The difficulty with the notion of "cohabitation" versus that of a "*durable relationship*" has been considered previously above). Quite why the documentation aforesaid is required is entirely unclear, not least as it has turned out in these proceedings that the Minister does not apply a two-year benchmark; he applies a two-year and downwards benchmark. But this is never stated in the "*Explanatory Leaflet for Form EU1A".* Instead the applicant who is a "*de facto*" partner of an EU national is told that s/he is required to produce the just-quoted evidence. In other words s/he, it appears from the "*Explanatory Leaflet for Form EU1A*", is required to evidence a two-year *de facto* period of cohabitation. But the words "*de facto*" add nothing: an applicant possessed of her or his senses is hardly going to seek to establish that s/he has enjoyed a two-year fantasy cohabitation.

***(iv) Illiberal Application*.**

11. A directive is a normative act addressed to the member states, which are then required within a specified deadline, to adopt the necessary national provisions to give effect to the policy objectives set out in the directive. It does not seem to the court that a member state which replicates the wording of the Citizens' Rights Directive but when acting pursuant to the transposing legislation leaves applicants in a position in which they do not really know what is required of them or how their application will be assessed, save that a notably sceptical attitude will be brought to bear as regards any assertions made, can properly be said to be giving effect to the policy objectives of that Directive. In this regard, the court is mindful of, *inter alia*: recital 6 of the Citizen's Rights Directive, which provides that an objective of that Directive is "*to maintain the unity of the family in a broader sense";* recital 8 of the Citizens' Rights Directive, which points to a desire on the part of member states as regards "*facilitating the free movement of family members who are not nationals of a Member State*" (with an application under reg.5(2) being the point of embarkation in Ireland for eligible third-country nationals in this regard); and the cautionary note sounded by the Court of Justice in Case C-127/08 *Metock*, para.84 that when it comes to the Citizens' Rights Directive "*the provisions of that directive…must not in any event be deprived of their effectiveness."* (See also *Lassal, Tsakouridis*, and *Jesse Saint Prix, op. cit*.).

***(v) Constitutional Justice*.**

12. It seems to the court that if a scenario presents, as here, in which the rule of law is breached, the principle of effectiveness is breached, an inconsistency with a Directive presents, meaningful judicial review is not possible, and the specific problems touched upon hereafter also present, then a breach of that right to constitutional justice originally identified by Walsh J. in *McDonald v. Bord na gCon* [1965] IR 217 inexorably presents. In truth, it does not seem to the court that all of the deficiencies identified in this

judgment would need to present for that inexorable conclusion likewise to arise, though the court is of the view that all of these deficiencies in fact present.

Part IV

Some Specific Problems Presenting

(i) The "*Explanatory Leaflet for Form EU1A*".

13. Form EU1A is the form that Mr Pervaiz had to complete when he applied to be treated as a permitted family member within the meaning of the 2015 Regulations. The Explanatory Leaflet, issued by the Minister, contains a section headed "*EU1A – Required Supporting Documents".* The word "*Required*" suggests that the list of documents that follow is mandatory. In the text which follows, it is stated, *inter alia*, that "*For a de facto partner of an EU citizen copies of following documents should be provided*". The documents then listed are:

> "[1] *Evidence of cohabitation relationship for the last two years (e.g. tenancy agreements, utility bills)",* "[2] *Evidence of a durable relationship (e.g. evidence of jointly-owned assets, evidence of shared bank accounts or insurance, evidence of travel, birth certificates of any children of the partnership)", and* "[3] *If either was previously married or in a civil partnership, a decree or other evidence of divorce, dissolution, annulment or legal separation or a death certificate as appropriate*".

14. As to [1], it seems to the court that the concept of "*cohabitation*" has skewed the Minister's approach to such applications as are made under reg.5, not least in the suggestion that "*tenancy agreements, utility bills*" would be suitable evidence of "*cohabitation*". Perhaps they would, but reg.5(1)(a) refers to a "*durable relationship*", not a relationship of cohabitation. Again, as dictionary definitions of "*cohabitation*" typically envision a physical sexual dimension to a relationship that is described as "*cohabitation*", there appears to be a restriction by the Minister in this regard, unwarranted by the 2015 Regulations or the Citizens' Rights Directive, as to what may constitute a "*durable relationship*". There is nothing in the Regulations or in the Citizens' Rights Directive to suggest that a physical sexual dimension must present as a feature of a romantic relationship before it could be treated as a "*durable relationship*", nor would common-sense suggest this to be required. Additionally, it is possible to have a "*durable relationship*" without living together all the time, and it would be possible to have a "*durable relationship*" that is largely confined to the physically sexual; and when it comes to both of these possibilities (as well perhaps as others of which the court has not conceived) there is every chance that in any one case the parties to such a relationship, notwithstanding that it is a "*durable relationship*", would not have tenancy agreements or utility bills. So the Minister is blinkered from the very outset in looking for a form of relationship ("*cohabitation*") which need not present for a party to have a "*durable relationship*".

15. As to [2], because the concept of "*durable relationship*" is nowhere defined, asking someone to provide "[2] *Evidence of a durable relationship*" is largely, if not completely meaningless. How is Mr Pervaiz to provide evidence of a "*durable relationship*" if no-one will tell him what it is and not even the Minister seems sure, albeit that he seems to be looking generally for evidence of cohabitation, even though a relationship can be a "*durable relationship*" without also satisfying the dictionary definition of 'cohabitation'?

***(ii) Two-Year Cohabitation Period*.**

16. The Impugned Decision states that: *"Insufficient evidence of cohabitation for a period of two years was submitted with the application*", and "*You have failed to demonstrate that you have cohabited with the EU citizen for a period of two years*". Leaving aside the need to establish "*cohabitation*", it appears from the just-quoted text that the absence of a two-year cohabitation period was considered, at least in Mr Pervaiz's case, to be of real significance. Yet affidavit evidence has been furnished by an INIS official in which it is averred, *inter alia*, that: "*In respect of the request that an Applicant submit 'Evidence of cohabitation for the last two years'…this is not a requirement which the First Respondent applies in a strict fashion; rather, it is a flexible requirement which can be moved downwards depending on the rest of the evidence furnished by an Applicant to attest his/her durable relationship with the EU citizen*". So, despite item [1], as referred to in the preceding section above indicating that evidence of two years' cohabitation must be provided and despite the Impugned Decision placing some emphasis on the fact that insufficient proof of two-years' cohabitation, in fact it seems from the just-quoted averment that less than two years can be good enough *"depending on the rest of the evidence*" – a notably vague test (and here, of course, Mr Pervaiz has no idea from the Impugned Decision what test as to duration, if any, was applied, and why – save that it looked rather like it was a two-year timeframe was applied until he was advised in the within proceedings that such a timeframe is not always applied, an averment which raises more questions than it answers).

17. At the hearing of this application, counsel for the Minister suggested that indicative of the fact that the Minister goes further in his considerations than just looking for a two-year timeframe is evident from the fact that, in the Impugned Decision, after his second reference to a failure to demonstrate two-year cohabitation the decision-maker states: "Furthermore, you have failed to submit sufficient evidence of a durable relationship, duly attested (*evidence of jointly owned assets, shared bank account/insurance, evidence of travel, birth certificates of any children*, etc)". In fact if one goes back to criteria [1]-[3] referenced in the previous section above, this is the decision-maker just ticking off the mandatory documentation mentioned at [1]-[3]. So this is not evidence or at least not very good evidence of the supposed thoroughgoing consideration which this text was contended to evidence. It seems, the court must regretfully observe, to be evidence of a box-ticking exercise, notwithstanding that ostensibly it may look different. Moreover, it is again apparent that in assessing what is a "*durable relationship*", the Minister is bringing a particular and regrettably close-minded sense as to what constitutes a "*durable relationship*". He clearly perceives that what he is looking for is a completely shared lifestyle when in fact it is perfectly possible to have a familial relationship, a "*durable relationship*", that does not feature, *e.g.*, "*jointly owned assets, shared bank account/insurance, evidence of travel,* [or] *children*". There is also a strikingly middle-income and perhaps even middle-aged dimension as to what evidence the Minister considers a person might present of a "*durable relationship*". Why does the court say this? Because poorer couples, younger couples, and couples comprised of persons who are both younger and poorer, may not have jointly owned assets, may not have a joint bank account, may not have insurance, may not travel because their finances do not permit it, and may have no children, and yet may still be in an eminently "*durable relationship*". (And two equal partners – rich or poor – in a perfectly "*durable relationship*" may decide for valid reasons known unto themselves to operate separate bank accounts). Yet the Minister appears to consider that anyone in a "*durable relationship*" would likely have shared assets, a joint bank account, travel experiences or children to evidence same and, if they do not, are less likely to be in a "*durable relationship*". That, with respect, does not follow inexorably as a matter of logic. Here all of this is of relevance because, with the exception of a health insurance policy that they managed to produce, Mr Pervaiz and his partner – who, assuming for a moment that they are a couple, give every appearance of being a younger and poorer couple starting out in life together – do not appear to have assets, do not appear to share their bank accounts, do not appear to have travelled widely together (though there was one trip away together) and do not have (and may never have) children together. The Minister appears to consider that

this necessarily counts against their having a "*durable relationship*", without apparently allowing for the possibility that they could have a "*durable relationship*", just not one that tallies with what he appears to expect (though quite what he expects is ultimately a mystery because neither in legislation nor in guidance has he sought to sketch out what a "*durable relationship*" is, subject to the application of discretion in any one instance).

***(iii) Absence of Reasoning*.**

18. If, as the INIS official avers (and the court does not doubt that the averment is true), the two-year cohabitation requirement is not one that "*the First Respondent applies in a strict fashion; rather, it is a flexible requirement which can be moved downwards depending on the rest of the evidence furnished by an Applicant to attest his/her durable relationship with the EU citizen*", the Impugned Decision is strikingly deficient in this regard. Why so? Because it makes no mention of any timeframe shorter than the two-year timeframe, thus leaving Mr Pervaiz completely in the dark as to whether, *e.g.*, the possibility of a shorter timeframe was just forgotten, or whether it was applied and his relationship with his girlfriend was nonetheless found, for some reason, to be wanting in terms of its durability. There is no way that a decision can meaningfully be appraised or challenged by the subject of the same if he is left in the dark as to how he fared in a critical respect (or what may have been a critical respect; Mr Pervaiz does not even know if it was critical).

Part V

The Text of the Impugned Decision

19. Turning next to the text of the Impugned Decision, the following observations might respectfully be made.

– first, the Impugned Decision commences "*I am directed by the Minister for Justice and Equality to refer to your request for a review of the decision to refuse your application for a residence card*". In fact, it was an application under reg.5(2) of the 2015 Regulations to be treated as a permitted family member on the basis that Mr Pervaiz came within the form of "*durable relationship*" contemplated by reg.5(1)(b) of those Regulations.

– second, the Impugned Decision states: "*It was noted that the addresses given on the bank statements submitted in your name contradict the information given in the letter of* [name omitted by court], *landlord*". The Impugned Decision does not note and it is unclear whether proper consideration was given to the fact that an explanation for this incongruence of detail was provided.

– third, the Impugned Decision states: "[A] *letter submitted from Garda* [name omitted by court] *dated 07/09/2017 states that he has known yourself and the EU citizen as a couple since 17/09/2016*". *At the point where this assertion appears it seems to be relied upon to suggest some incongruence in address details whereas the letter was supplied as evidence of a* "*durable relationship*". It is not clear that the decision-maker appreciated why this letter was supplied and what end it sought to achieve.

– fourth, the Impugned Decision proceeds to a three-paragraph consideration of a failed historic asylum application by Mr Pervaiz, the thrust of which is that Mr Pervaiz appears to have stated in the asylum application that he arrived in Ireland in 2015 whereas he stated in his EU1A form that he arrived in Ireland in 2012. Every "*durable relationship*" comprises people who have erred in the past (humans err), and many, most, perhaps even all of those relationships will comprise people who have told one or more lies in the past. If the point being made (and it is not entirely clear what point is being made) is that 'you may have lied once and may be lying now', there is information before the decision-maker that Mr Pervaiz is telling the truth as to there being an existing and continuing relationship with his girlfriend; that would need to be weighed in the scales against this aspect of matters and there is nothing on the face of the Impugned Decision to suggest that such a weighing was undertaken.

– fifth, the Impugned Decision states: "*Insufficient evidence of cohabitation for a period of two years was submitted with the application*". The court admits to being mystified as to the reliance placed on this fact. It has been averred in these proceedings that no firm time benchmark is applied. So why is it relevant that the said insufficiency in the evidence presented? The Minister cannot have it every way: it cannot be that such evidence is required of an applicant but not necessarily counted against an applicant, though sort of counted against them nonetheless. Among other matters, how is an applicant sensibly supposed to determine whether or not he should seek relief by way of judicial review when the Minister 'sort of' imposes a requirement, claims he does not, and then 'kind of' holds it against an applicant when the 'sort of' requirement is not met? Moreover, for the reasons stated above, the test being brought to bear is legally wrong: what the Minister should be looking for is evidence of a "*durable relationship*", a phrase that does not always equate to 'cohabitation'.

– sixth, the Impugned Decision states: "[Y]*ou did not provide sufficient evidence of a durable relationship (e.g., evidence of jointly-owned assets, evidence of a shared bank account or insurance, evidence of travel, birth certificates of any children*". Mr Pervaiz appears to be a relatively poor man, he and the woman he claims to be his girlfriend both appear to operate separate bank accounts, he provided a health insurance policy with his girlfriend (this is noted in the Impugned Decision), aside from a trip to Kerry the couple appear not to travel much, and they do not have children. It is not clear from the Impugned Decision why the absence of such evidence as is recited necessarily counts (and it is portrayed as necessarily counting) against Mr Pervaiz, notwithstanding the circumstances presenting and where a "*durable relationship*" can present despite the absence of such evidence (though there must of course be some evidence as to a claimed "*durable relationship*", and here there is).

– seventh, the Impugned Decision states: "You have failed to demonstrate that you have cohabited with the EU citizen for a period of two years". This is the second reference to a two-year cohabitation period. The court refers to its observations at the fifth indent above.

Part VI

Some Other Contentions Made

***(i) Fettering of Discretion*.**

20. Mr Pervaiz contends that the Minister "*fettered his discretion…in apparently imposing a strict requirement that…*[Mr Pervaiz and his girlfriend] *must have been cohabiting for at least two years prior to the durable relationship application being made, without scope for any objective consideration of the individual facts before him*". As the court has noted above, although the "*Explanatory Leaflet for Form EU1A*" indicates that "*Required Supporting Documents*" include "*Evidence of cohabitation for the last two years*", it has turned out in these proceedings that the Minister does not apply a two-year benchmark; he applies a two-year and downwards benchmark. But this is never stated in the EU1A form. Instead to an applicant, it appears from the "*Explanatory Leaflet for Form EU1A",* that he is required to evidence a two-year period of cohabitation. So although ostensibly there is a fettering of discretion, it turns out that secretly (it was certainly secret to Mr Pervaiz) and without any true sense of when this occurs and without any explanation being given to Mr Pervaiz as to how he fared in this regard, the Minister may apply a less than two year standard. So the Minister is seeking to stand over a process in which he tells an applicant that something is mandatory, operates a system in which the ostensibly mandatory turns out to be non-mandatory, and then provides no explanation in the Impugned Decision as to whether and why he has gone (if he has gone) with something less than the timeframe that he indicated that was mandatory. There is no fettering of discretion in that process; however, there is a form of decision-making that presents with the various legal difficulties identified in this judgment.

***(ii) Absence of Legislative Provision*.**

21. Mr Pervaiz contends that:

> *"The Respondents have failed to ensure that domestic legislation contains criteria which are consistent with the normal meaning of the…words 'durable relationship duly attested' used in Article 3(2) of Directive 2004/38/EU and have thus unlawfully deprived that provision of its effectiveness",*

and also that

> *"The failure of the Respondents to ensure that domestic legislation contains criteria which are consistent with the normal meaning of…'durable relationship duly attested' used in Article 3(2) amounts to a failure to properly transpose the provisions of Directive 2004/38/EC into domestic law".*

22. The court has already touched on the breach of the rule of law, the breach of the principle of effectiveness, the unfairness of procedure, the inconsistency with the liberal thrust of the Citizens' Rights Directive (see *e.g.*, the previously quoted portions of recitals 6 and 8 of the Directive and also the decisions of the Court of Justice in *Metock, Lassal Tsakouridis* and *Jesse Saint Prix, op. cit*.), and the issues as to reviewability that present from the manner in which the Minister currently treats with applications from third-country nationals to be treated as a permitted family member within the meaning of the EC (Free Movement of Persons) Regulations 2015. The court does not accept that implementation of a directive necessarily requires that every term in same be defined in transposing legislation. However, clearly a member state must transpose a directive in such a way that the just-described breaches and inconsistency do not present.

***(iii) Limits of Discretion*.**

23. Mr Pervaiz contends that "*The national legislation, and its application, has unlawfully failed to ensure that the assessment carried out is within the limits of the discretion set by Directive 2004/38/EC.*" As the court has now repeatedly indicated for the reasons stated in this judgment, it considers that the manner in which the Minister currently treats with applications from third-country nationals to be treated as a permitted family member within the meaning of the EC (Free Movement of Persons) Regulations 2015 breaches the rule of law, the principle of effectiveness, the constitutional right to basic fairness of procedure, is inconsistent with the liberal thrust of the Citizens' Rights Directive (see *e.g.*, the previously quoted portions of recitals 6 and 8 of the Directive and also *Metock, Lassal Tsakouridis* and *Jesse Saint Prix, op. cit*.), and presents issues as to reviewability. It follows that the court considers that the Minister's exercise of discretion when it comes to such applications does not operate as contemplated by the Citizens' Rights Directive and the law more generally.

***(iv) Conferral of Advantage*.**

24. Mr Pervaiz contends that "*The Respondents unlawfully failed to comply with their obligation under Article 3(2) of Directive 2004/38/EC to confer some advantage on the Applicant, compared with applications for entry and residence of other nationals of third States, on the Applicant's application, he being a person who has a durable relationship with an EU citizen lawfully resident in the State*". Article 3(2), it will be recalled, provides, so far as relevant to this application, as follows:

> *"2. 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…(b) the partner with whom the Union citizen has a durable relationship, duly attested".*

25. Mr Pervaiz contends in effect that 'The status referenced at (b) is a status I possess and you, Minister, in your actions, have not been facilitating my entry and residence as is required'. The Minister, in his written submissions, contends that the obligation under Art.3(2) (and reg.5) to facilitate entry and residence:

> *"is only triggered when the person applying under its provisions is established by the relevant authority to be a 'permitted family member'….There is therefore a two-stage approach: first, is the person a permitted family member and, if so, secondly, the facilitation obligation is triggered. In the present case, as the person was not found to be in a 'durable relationship duly attested' the issue of 'facilitation' simply does not arise".*

26. This line of contention is not accepted by the court. Yes, until Mr Pervaiz establishes that he is in a "*durable relationship*", the only thing that can be done by the Minister to facilitate Mr Pervaiz's entry and residence is to entertain, and consider in accordance with European and Irish law, such application(s) as Mr Pervaiz may make to be treated as a permitted family member. However, the process of entertaining and considering such application(s) is not something that is being done by the Minister out of the goodness of his heart; it is a process that derives from and fulfils, so far as is possible until the requisite durable relationship is established, Ireland's obligation under Art.3(2) to "*facilitate entry and residence for the following persons…(b) the partner with whom the Union citizen has a durable relationship, duly attested*". Of course there may be people who make application and fail to establish the requisite durability; but that seems inevitable if the Minister is properly to facilitate the making of an application to be treated as a permitted family member, and thus to honour, to that limited and preliminary extent, Ireland's wider obligation under the Citizens' Rights Directive to facilitate entry and residence for any romantic partner with whom a Union citizen has a durable relationship, duly attested.

Part VII

Some Case-Law

(i) Safdar v. MJE & ors

[2018] IEHC 698.

27. *Safdar* is not a case on point. It involved the interpretation of since-repealed Regulations that have not been opened before this Court. However, the court does not in any event read into the judgment in *Safdar* the freedom of action which the Minister appears to consider permissible by reference thereto, *viz*. that it is permissible to behave in a manner that yields all of the difficulties outlined in the within judgment and still remain on the right side of the law.

***(ii)* AR (Pakistan) and MK v. MJE and ors**

[2018] IEHC 785.

28. The Minister seeks to rely on certain comments at paras.20-21 of the judgment in *AR*. Those comments are clearly *obiter*: the judgment in that case indicates at para.14 that there can be no grant by way of judicial review in that case, at para. 18 that the applicants cannot succeed in the case as pleaded, and at para.19 that the applicants do not have standing to challenge inadequate transposition of the Citizens' Rights Directive, in particular Art.3(2) of same. So by the time one gets to paras.20-21 of the judgment one is the most *obiter* of *obiter* territory. That said, the court does not in any event read into that judgment an approbation of that freedom of action which the Minister appears to consider permissible by reference to same, *viz*. that it is permissible to behave in a manner that yields all of the difficulties outlined in the within judgment and still remain on the right side of the law.

29. In passing, the court respectfully does not quite agree with the obiter observation at para.19 of *AR* that "*By definition, a relationship for immigration advantage is not a durable relationship duly attested, so it is a self-cancelling status*". It is possible for two people to join themselves in a "*durable relationship*" that carries an immigration advantage, and yet for that relationship, viewed in the round, to come within the form of relationship contemplated by reg.5(1)(b). This is because there can be a varied mixture of reasons – romantic and practical – as to why a couple in a "*durable relationship*" might join themselves in same. The presence of the practical does not suffice in and of itself to rob a relationship of its romantic dimension or to render it something other than a "*durable relationship*".

(iii) Nadeem v. MJE and ors

[2019] IEHC 37.

30. The court reiterates its sense, as stated at para.3 of the Nadeem judgment that "*if a national court review process stands possessed of the mandatory features identified in Banger [i.e. Case C-89/17 Secretary of State for the Home Department v. Banger] then, all else being equal, that process will be consistent with Art.47 CFEU"*. Unfortunately, the court cannot move on to conclude, as it did in *Nadeem*, that "*No factor presents in this case that would justify the court finding other than that consistency presents*". The said features, as referenced at paras [51]-[52] of *Banger* are that a national reviewing court "[A] *be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and* [B] *whether the procedural safeguards were complied with*". Because the term "*durable relationship*" has nowhere been defined, the court cannot ascertain whether the Minister's decision is factually sustainable: yes, there are facts galore but the court cannot tell if they point to a "*durable relationship*" because it does not know, and is nowhere told, what a "*durable relationship*" is, beyond reference to (a) the dictionary definition of the phrase and (b) the word 'lasting' in lieu of "*durable*" and (c) the term '*de facto*' in lieu of durable, all of (a)-(c) on closer examination (as considered previously above) adding precisely nothing to the understanding of what "*durable relationship*" means or is intended to mean. And, needless to say, the court's personal perception as to what might constitute a "*durable relationship*" is neither here nor there. Hence judicial review in this particular case does not meet the criteria identified in Banger and hence a breach of Art.47 CFEU presents in this case.

Part VIII

Four Questions

31. Four key questions are contended by the Minister to arise from the pleadings in the within proceedings. Given the reasoning in the preceding pages, most of those questions can be briefly answered.

32. Q1. Are the within proceedings defective for being imperfectly or improperly constituted and/or does Mr Pervaiz lack *locus standi* to proceed without his girlfriend as co-applicant?
33. A1. No. See *Nadeem v. MJE* [2019] IEHC 37.

34. The court cannot but add that it considers this to be a technical plea that has nothing to do with the quality of the proceedings or indeed the interests of justice. The Minister contends in his written submissions that: "*The fact that the holder of the primary right in issue herein is not before the Court raises the prospect that* [Mr Pervaiz's claimed girlfriend] *would not be formally bound by any* [a] *findings or* [b] *orders in due course*". As to [a], the Minister's contention rests on there being a finding that would formally bind Mr Pervaiz's claimed girlfriend. But the sole findings that the court could reach in these judicial review proceedings are that in an application brought by Mr Pervaiz on claimed facts, the Minister did or did not consider that application and arrive at and give to Mr Pervaiz a decision that was not flawed in law. The court is not concerned with Mr Pervaiz's girlfriend as such and there is no reason why she should/would in consequence of these proceedings be bound by any finding or order of the court. It follows, incidentally, that she is not, to use the wording of O.84, r.22 a person "*directly affected*" by Mr Pervaiz's application in the sense that no finding or order that could issue (or will issue) from the court in the within proceedings could or will have impact on her continuing eligibility by law to exercise her freedom of movement (if the Minister is right at law in how he acted with regard to Mr Pervaiz's application she can have no complaint, and if the Minister is wrong, the court will, all else being equal, grant suitable discretionary relief to Mr Pervaiz). As to [b], the orders being sought in the within proceedings are (i) an order of *certiorari* quashing the Impugned Decision, (ii) a declaration that the Regulations of 2015 fail to transpose the provisions of the Citizens' Rights Directive into Irish law and/or are incompatible with European law, (iii) a declaration that the failure of the respondents to put in place a formal appellate system (as opposed to judicial review), *inter alia*, breaches Art.47 CFEU, and (iv) such declaration(s) of the legal rights and/or legal position of the applicant and/or persons similarly situated as the court considers appropriate. The court does not see how any such orders could bind (and as will be seen hereafter there is no question that the sole order to be made by the court in any way binds) Mr Pervaiz's girlfriend.

35. Q2. (i) Has Directive 2004/38/EU been adequately transposed into domestic law by the respondents? (ii) Have the respondents infringed the principle of effectiveness by failing to provide any legislative definition of the concept of "*durable relationship duly attested*" or any legislative framework/guidance for the test to be applied and the proofs required?
36. A2. No to (i). Yes to (ii), save that the court considers that a definition could also be provided in non-legislative guidance (which to this time this has not occurred). The manner of transposition yields the various legal issues described herein and the principle of effectiveness has been breached.

37. Q.3. Is Irish law incompatible with Directive 2004/38/EC and/or Art/47 CFEU by failing to provide an appeal to an independent court or tribunal against the decision of the first respondent?
38. A3. No, for the reasons stated in *Nadeem v. MJE* [2019] IEHC 37. However, in this particular case, for the reasons stated above, a breach of Art.47 presents.

39. Q.4. (i) Did the respondents provide an internal review which was in accordance with national and EU law? (ii) In particular was the review conducted one which was founded on an extensive examination of Mr Pervaiz's personal circumstances?
40. A.4. No to (i); however, the breaches identified elsewhere herein arise. As to (ii) the Minister appears to have considered such information as was placed before him by Mr Pervaiz.

Part IX

Conclusion

41. For the reasons aforesaid, the court will grant an order of *certiorari* quashing the Impugned Decision and remitting Mr Pervaiz's application to the Minister for fresh consideration. The granting of relief by way of judicial review being ultimately a matter of judicial discretion it seems to the court that the foregoing suffices to place Mr Pervaiz in the position in which he ought to be.

42. In closing, the court cannot but note that – if one assumes for a moment that everything Mr Pervaiz has claimed in his application is true – he has now been living with his girlfriend for close on 3 years and, if an appeal is brought against this judgment, will by the time of the appeal hearing have been living with her for close on 5 years (all going well). It seems to the court (though it cannot, and does not seek to, bind the Minister in this regard) that at some point in that timeframe, if indeed the point has not already been crossed, the sheer longevity of the period that Mr Pervaiz has been or will have been living with his girlfriend would suffice to render the outcome of a further application under reg.5 something of a sure thing, assuming again that he has been telling (and would continue to tell) the complete truth concerning his relationship with his girlfriend. Of course it is entirely for Mr Pevraiz to decide how he wishes to proceed, he was entitled to bring these proceedings, he has succeeded in them, and the court makes no criticism of him for acting as he has. It is just that sometimes there can be a quicker and cheaper route to a desired end than through litigation.