

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 486 JR]

BETWEEN

ADNAN SAFDAR

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice David Keane delivered on the 7th December 2018**Introduction**

1. This is the judicial review of a decision by the Minister for Justice and Equality ('the Minister'), dated 3 April 2017 ('the decision'), under reg. 21 of the European Communities (Free Movement of Persons) Regulations 2006 and 2008 ('the 2006 Regulations'), to uphold on review a first instance decision of 21 December 2015, under reg. 7(2) of the 2006 Regulations, to refuse the application of Adnan Safdar, a national of Pakistan, for a residence card as a permitted family member of his cousin Zahoor Ahmed, a British - and, hence, European Union - citizen, exercising free movement rights in the State.

2. The 2006 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 They came into operation on 1 January 2006 and have since been revoked by reg. 32 of the European Communities (Free Movement of Persons) Regulations 2015, which came into operation on 1 February 2016, subject to the transitional provisions of reg. 31 of those Regulations. Regulation 32(28) of the 2015 Regulations states:

'Where, before the date on which these Regulations come into operation, a person has sought a review under Regulation 21(1) of the Regulations of 2006 and, by that date, the review has not been determined, Regulation 21 of the Regulations of 2006 shall continue to apply for the purposes of the determination of the review.'

3. In substance, the reason the Minister gave for the decision is that Mr Safdar failed to establish that he is a 'permitted family member' of Mr Ahmed, within the meaning of that term under reg. 2(1) of the 2006 Regulations (transposing the requirements of art. 3(2) of the Citizens' Rights Directive concerning 'other family members'), because he failed to establish that in the United Kingdom (as the country from which he had come), he was either: (a) a dependant of Mr Ahmed, as a Union citizen; or (b) a member of the household of Mr Ahmed, as a Union citizen.

Procedural history and grounds of challenge

4. The application is based on a statement of grounds dated 13 June 2017, supported by an affidavit of Mr Safdar, sworn on the previous day.

5. By order made on 19 June 2017, O'Regan J granted Mr Safdar leave to seek a declaration that the 2006 Regulations fail to transpose the Citizens' Rights Directive or are incompatible with EU law, or both; an order of *certiorari* quashing the Minister's decision of 3 April 2017 to uphold on review the refusal of residence permission to Mr Safdar; and an order of *certiorari* quashing the Minister's decision of the same date to issue a proposal to deport Mr Safdar.

6. The grounds upon which those reliefs are sought are, in substance, the following. First, the State has failed to properly transpose the Citizens' Rights Directive and, in particular, the requirements of art. 3(2) of that Directive. Second, the Minister's decision fails the test of reasonableness. Third, the Minister's decision was reached in breach of Mr Safdar's entitlement to natural and constitutional justice and fair procedures.

7. The Minister delivered a statement of opposition dated 15 December 2017. It is supported by an affidavit of verification, sworn on 23 February 2018 by Stacy Morris, a higher executive officer in the Department of Justice and Equality. Ms Morris swore a supplemental affidavit on 8 March 2018.

8. The Minister raises a preliminary objection that Mr Safdar's proceedings are defective because Mr Ahmed, the EU citizen from whose exercise of EU free movement rights Mr Safdar claims to derive similar rights of his own as a member of Mr Ahmed's family, is not a party to the proceedings.

9. Without prejudice to that preliminary objection, the Minister contends, in substance, that the Citizens' Rights Directive was properly transposed into the law of the State by the 2006 Regulations; that the Minister's decision was neither irrational nor unreasonable; and that there was no breach of Mr Safdar's entitlement to natural and constitutional justice and fair procedures in the manner in which the Minister dealt with the review of the earlier refusal to grant Mr Safdar permission to reside in the State as a permitted family member of a Union citizen exercising free movement rights here.

Background

10. Mr Safdar, whose date of birth is 20 June 1990, avers that he entered the State from the United Kingdom on 20 August 2014 as both a dependant and member of the household of his cousin, Mr Ahmed, whose date of birth is 5 May 1972 and who entered the State a short time later on 9 September 2014.

11. The following facts are not in dispute.

12. On 20 April 2015, an entity styling itself 'IK Immigration Consultants' submitted an application and supporting documentation to

the Immigration and Naturalisation Service ('the INIS') of the Department of Justice and Equality for residence cards for both Mr Safdar and a Mr Ikram Ahmed as dependent family members of Mr Ahmed. From certain oblique references in the papers before the court, I gather that Ikram Ahmed is Mr Ahmed's brother, although the supporting documentation for his application has not been exhibited and I have no information about the outcome.

13. The supporting documentation for Mr Safdar's application included: Mr Safdar's original birth certificate, identifying his mother as Khatija Bi; his mother's original birth certificate, identifying her parents as Abdul Ghani and Ayesha Bi; Mr Ahmed's original birth certificate, identifying his father as Abdul Gafoor; and an original Government of Pakistan family registration certificate identifying Abdul Ghafoor as a son of Abdul Ghani and Ayesha Bibi and a brother of Khatija Bibi. Thus, Mr Sadar sought to establish, and the Minister appears to have accepted, that Mr Safdar and Mr Ahmed are first cousins.

14. That supporting documentation also included: a copy of Mr Ahmed's UK passport, confirming his status as a Union citizen; copies of Mr Ahmed's payslips and tax clearance certificate, confirming that he was exercising his free movement rights as a worker in the State; and copies of documents confirming that Mr Ahmed and Mr Safdar were residing in the same rented accommodation within the State.

15. The INIS acknowledged receipt of Mr Safdar's application on 7 May 2015 and requested that he provide further specified documentation. Under cover of a letter dated 4 September 2015, Mr Safdar submitted certain additional documentation in response to that request. On 19 October 2015, the INIS wrote to him again, requesting in material part that he provide it with:

'Evidence of relationship with the EU citizen

For other family members:

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

(emphasis in original)

16. Mr Safdar later submitted some additional documentation without a cover letter. That documentation included copies of: a United Kingdom National Health Service ('NHS') medical card issued to him at 20 Fulham Street, Nelson, Lancashire, England ('the Fulham Street address') on 18 January 2013; an email receipt for a PayPal payment of £10.11 for a computer keyboard that is addressed to Mr Safdar but which makes no reference to any residential or other geographical address associated with him; a letter confirming Mr Safdar's enrolment in a diploma course in business management and marketing at an institution named Metro College of Management Sciences, dated 17 January 2013 and directed to the Fulham Street address; a letter dated 8 February 2013 from the UK Department for Work and Pensions directed to Mr Safdar at the same address, notifying him of his national insurance number; a bill dated 6 January 2014 from a mobile phone service provider directed to him at 45 Macleod Street, also in Nelson, Lancashire ('the Macleod Street address'); and an undated letter of offer from a credit card company, which was to expire on 8 June 2015, directed to him at the Macleod Street address.

17. On 21 December 2015, the INIS wrote to Mr Safdar to inform him that the Minister had decided to refuse his application for a residence card under the 2006 Regulations for the following reasons:

'You have failed to submit satisfactory evidence that you are a family member of an EU citizen in accordance with Regulation 2(1) of [the 2006 Regulations].

In this regard, you claimed that you are a member of the household of the EU citizen and dependent on the EU citizen. It is noted that you submitted a number of documents which show that you and the EU citizen shared a mutual address in the United Kingdom in 2013 and 2014. You also claim that you are dependent on the EU citizen and the EU citizen has submitted that he was providing you with free accommodation, food, travel and other expenses in the UK. However, you have failed to submit satisfactory documentary evidence in the form of bank statements or other statements to show the extent of your dependence (if any) on the EU citizen. In this regard, it is not accepted that you have demonstrated that you are dependent on the EU citizen or a member of the household of the EU citizen.'

18. On 12 January 2016, the INIS received from Mr Safdar a request for a review of that decision, with further supporting documentation. In that review request, Mr Safdar made the following assertions. He entered the UK (presumably, from Pakistan) on 23 November 2012. There, he began living with his cousin, Mr Ahmed. Mr Ahmed moved address quite often for work reasons. Mr Ahmed paid for Mr Safdar's living expenses and student fees.

19. The INIS wrote to Mr Safdar on 8 February 2016, referring to his review application and informing him, in material part:

'You have applied for residence in the State under EU Treaty Rights on the basis that you are 'a permitted family member' of the EU citizen in accordance with Regulation 2(1) of the Regulations 2006. Your review application should therefore demonstrate (as per criteria below) that in your country of origin, habitual residence or previous residence:

Regulation 2(1)

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

It is open to you to submit any additional supporting documentation you may wish to be considered in respect of the above criteria.'

20. Once again, that letter pointed to the documentation required from persons invoking EU Treaty rights as family members to include, in material part:

'Evidence of relationship with the EU citizen

For other family members:

...

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

(emphasis in original)

21. On 22 February 2016, the INIS wrote again to Mr Safdar, acknowledging receipt of various additional documents in support of his application that he had submitted under cover of a letter dated 19 February 2016. Mr Safdar wrote again on 26 September 2016, enclosing further documentation. Those documents included copies of the following: a student identification card issued by an institution named Metro College of Management Sciences in Stockport, Greater Manchester, valid to July 2014; a mass email from a gentleman named Mr Lateef ul Mannan, dated 23 July 2013, informing students of that institution that an exam fee of £140 was payable by 26 July 2013; a 'fund transfer acknowledgment' recording a transfer payment of £140 on 29 July 2013 from a numbered bank account to an account held by a Mr L. U. Mannan; and a bank account statement, dated 1 August 2013, identifying the numbered account from which that payment had been made as that of a Mr Z. Ahmed at the Fulham Street address. The INIS acknowledged receipt of that additional copy documentation by letter dated 28 September 2016.

22. On 3 April 2017, the INIS wrote once more to Mr Safdar, informing him that the decision to refuse his application for a residence card had been reviewed in accordance with reg. 25 of the European Communities (Free Movement of Persons) Regulations 2015 ('the 2015 Regulations') and the provisions of the Citizens' Rights Directive. In a supplemental affidavit sworn in these proceedings on 8 March 2018, Ms Horan of the INIS avers that the reference in that letter to the 2015 Regulations was an administrative error, specifically one attributable to the inadvertent selection of the wrong letter template. Ms Horan avers that she conducted the review and that she did so knowingly pursuant to the 2006 Regulations and not the 2015 Regulations.

23. The letter continued:

'I am to inform you that the review of your application has not been successful, as you do not fulfil the relevant conditions set out in the Regulations and the Directive. The decision to refuse your application dated 22/12/2015 is affirmed for the following reasons:

On the basis of the documents supplied, the Minister has determined that you are not a permitted family member as set out in Regulation 5(1) of [the 2015 Regulations] [setting out the criteria identified in Art. 3(2) of the Citizens' Rights Directive, previously found in Reg. 2(1) of the 2006 Regulations]. In making this determination the following has been taken into consideration:

As you are aware, in order to be deemed a permitted family member within the meaning of the Regulations, an applicant must show that they were one of the following in the country in which they have come from.

(i) a dependant of the EU citizen

(ii) a member of the household of the EU citizen

On 21/04/2015 you submitted an application on the basis that you were the dependant family member of the EU citizen who is your cousin. This application was subsequently refused on 22/12/2015 on the basis that you had failed to show you were a permitted family member within the meaning of the Regulations.

Having examined your application in full I have noted the following:

(i) a dependant of the EU Citizen

In support of your application you submitted a number of documents regarding your dependence on the EU citizen. This documentation however refers mainly to your residence in this State and is not sufficient to show that you are dependant on the EU citizen currently or prior to entering the State.

It is noted that you have supplied a joint bank account in respect of yourself and the EU citizen and a joint Electric Ireland bill, along with [Private Residential Tenancies Board] letters in both names. This documentation suggests that yourself and the EU citizen have shared finances and have acquired responsibility for the payment of utilities at the address in Longford.

You have also supplied evidence of your residences in the UK at two separate addresses and include evidence of purchases for yourself, college registrations and a bill for [a mobile telephone network service] along with correspondence addressed to you in regards to your purchase of [a mobile phone]. These correspondences are addressed to yourself in the United Kingdom at two separate addresses and show no evidence of your dependence on another individual. In fact there is no evidence supplied on your original application that would suggest where the EU citizen was resident at that time. The documentation you have supplied does not show that the applicant was supporting you financially during your time residing in the United Kingdom.

(ii) a member of the household of the EU Citizen

As per the above, you have supplied a number of documents reflecting your residence in the United Kingdom between 2013 and 2014. [H]owever, no evidence was submitted with your original application that would evidence the EU citizen's residence in the United Kingdom or suggest that you were a member of his household during that time.

In light of the above, I am satisfied that the decision taken on 22/12/2015 was correct based on the documentation available at that time.

On 13/01/2016 you submitted an application for a review of the decision to refuse your application dated 22/12/2015. In your request for a review you state that the review was being made on the basis that you felt you had supplied sufficient evidence to show that you were a dependant of the EU citizen and a member of his household. Furthermore, you were of the opinion that despite your submission of a number of documents - these were not taken into consideration in making the decision.

Having reviewed the file in full, I am satisfied that all information and documentation on file [were] taken into consideration when making the original determination.

A number of further documents were submitted at review. [H]owever, having examined this documentation in full, I am satisfied that you have failed to show that you are a permitted family member of an EU citizen.

As advised above, in order to qualify as a permitted family member you are required to show that in the country which you have come, i.e. the United Kingdom, that you were a dependant of the EU citizen or a member of his household. The only additional documentation supplied in respect of the EU citizen prior to his entry into the State is a Yorkshire Bank statement which is dated in July 2013. This does suggest that yourself and the [EU citizen] shared an address for a time in 2013. [H]owever, this is not indicative of the households contained at the address or his residence there.

Therefore, having examined this application in full, I am satisfied that you have failed to show that you are a permitted family member within the meaning of the Regulations as you have failed to show evidence that you were dependent on the EU citizen prior to entering the State. [F]urthermore, you have failed to show that you were a member of the EU citizen's household prior to entering the State. The decision of 22/12/2016 is now confirmed.'

24. On the same date, the INIS wrote separately to Mr Safdar on behalf of the Minister, informing him of the Minister's proposal to make a deportation order against him. On 25 April 2017, Mr Safdar's present solicitors wrote to the INIS, applying on his behalf for leave to remain in the State. That application was still pending at the time of the trial of these proceedings.

25. In the verifying affidavit that he swore on 12 June 2017 in support of his statement of grounds in these proceedings, Mr Safdar is a little bit more forthcoming on the circumstances of his earlier residence in the UK than he was during the residence card application process. He avers that each of the two properties in Nelson, Lancashire that he lived in was owned by Mr Ahmed's wife, although he does not evidence that proposition and does not explain how it is to be reconciled with his earlier assertion that he changed address in the UK because he was living with Mr Ahmed who 'moved quite often due to work.' Mr Safdar also avers that Mr Ahmed now regularly travels from Ireland back to the UK to visit his family, although he does not provide any details of Mr Ahmed's family, beyond the reference to Mr Ahmed's wife already noted. Nonetheless, Mr Safdar contends that he has established a situation of dependence upon Mr Ahmed that is genuine and stable, which prompted Mr Ahmed to bring Mr Safdar with him to Ireland, both as an adult dependent member of his family and an adult member of his household, while leaving his wife and any other family members of his household (apart from his adult brother Ikram Ahmed) behind in the UK.

26. Mr Safdar also now avers that Mr Ahmed's father (Mr Safdar's uncle) supported Mr Safdar's family after the death of Mr Safdar's father in 1998. While Mr Safdar had submitted the original death certificates of his father and uncle with his residence card application, he had not previously suggested that Mr Ahmed's father (his uncle) had supported Mr Safdar's family between 1998 and his own death in 2010. Mr Safdar did not submit any evidence in support of that assertion to this court or, more importantly for the purpose of these proceedings, to the Minister at the material time. More fundamentally, Mr Safdar did not submit any evidence concerning his own means or those of his immediate family to the Minister. As regards his income, Mr Safdar pointed to the prohibition on work that was a condition of the student visa that he had relied on to enter the UK in December 2012 and the assertion, now an averment, that he complied with that restriction. Mr Safdar did not describe or furnish the evidence of maintenance or funds that he relied on in seeking and obtaining that student visa. To support the assertion, to which he also now avers, that Mr Ahmed supported him fully by providing him with accommodation, meals and all of his tuition fees and living expenses, the only documentary evidence that Mr Safdar produced to the Minister (or to the court) concerns a single examination fee payment of £140 that Mr Ahmed made in July 2013.

The law

27. Mr Safdar acknowledges that, for the purpose of his residence card application under art. 9 of the Citizens' Rights Directive, he is not a 'family member' of Mr Ahmed within the meaning of that term under art. 2(2). His claim is that he is a beneficiary under art. 3(2) of the Citizens' Rights Directive. It states in material part:

'[T]he host Member State shall, in accordance with its national legislation, facilitate ... 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....

...

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.'

28. 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....."

29. 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.'

30. At the material time, the 2006 Regulations transposed the Citizens' Rights Directive into Irish law. Under reg. 2(1) a person who comes within the definition of family member under art. 2(2) of the Citizens' Rights Directive is described as a 'qualifying family member', whereas a person coming within the residual category of 'other family members' under art. 3(2) of the Directive is described as a 'permitted family member', which term is defined to include, in material part:

'[A]ny family member, irrespective of his or her nationality, who is not a qualifying family member of the Union citizen, and who, in his or her country of origin, habitual residence or previous residence-

(a) is a dependent of the Union citizen, [or]

(b) is a member of the household of the Union citizen....'

31. Regulation 5 states (in material part):

'(1) A person who wishes to enter the State on the basis that he or she is a permitted family member of a Union citizen may be required to produce to the Minister-

(a) (i) where the person is a Union citizen, a valid passport or national identity card, or

(ii) where the person is not a national of a Member State, a valid passport,

(b) documentary evidence from the relevant authority in the country of origin or country from which he or she is arriving certifying that he or she is a dependent, or a member of the household, of the Union citizen,

(2) Upon receipt of the evidence referred to in paragraph (1), the Minister shall cause to be carried out an extensive examination of the personal circumstances of the person concerned in order to establish whether he or she is a permitted family member.

(3) A permitted family member, who is a member of a class of non-nationals not specified in an order made under section 17 of the Immigration Act 2004 as not requiring an Irish visa, shall be in possession of a valid Irish visa as a condition to being granted permission to enter the State.

...'

32. Under reg. 6(1), a third country national family member is permitted to reside in the State for up to 3 months on condition that he or she holds a valid passport and does not become a burden on the social welfare system of the State. Under reg. 6(3), such a person may reside in the State for a period longer than 3 months if the Union citizen concerned meets the necessary criteria for such residence under Regulation 6(2).

33. Regulation 7 states:

'(1) (a) A family member of a Union citizen who is not a national of a Member State and who has been resident in the State for not less than 3 months shall apply to the Minister for a residence card.

(b) An application made under subparagraph (a) shall contain the particulars set out in Schedule 2 and be accompanied by such documentary evidence as may be necessary to support the application.

(c) The Minister shall immediately cause to be issued a notice acknowledging receipt of an application made under subparagraph (a).

(2) Where the Minister is satisfied that it is appropriate to do so, he or she shall, within 6 months of the date of receiving an application made under paragraph 1(a), cause to be issued a residence card containing the particulars set out in Schedule 3 in respect of the family member concerned.

(3) Subject to Regulation 20, a person the subject of an application made under paragraph (1)(a) may remain in the State pending a decision on the application.'

34. Regulation 21 states:

'(1) A person to whom these Regulations apply may seek a review of any decision concerning the person's entitlement to be allowed to enter or reside in the State.

(2) A request for review under paragraph (1) shall contain the particulars set out in Schedule 11.

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

(a) is not the person who made the decision,

and

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

(4) The officer determining the review may –

(a) confirm the decision the subject of the review on the same or other grounds having regard to the information provided for the review or substitute his or her decision for the decision the subject of the review, or

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

The arguments

i. standing

35. The respondents submit that Mr Safdar does not have the necessary standing to challenge the Minister’s decision to refuse his application for a residence card as a permitted family member of Mr Ahmed because Mr Ahmed is not a party to Mr Safdar’s challenge.

36. The starting point for the respondents’ argument is that, as the fifth preliminary recital to the Citizens’ Rights Directive recognises, the right of a family member of a Union citizen to move and reside freely within the territory of the Member States derives from, and is designed to facilitate, the exercise of those rights, under conditions of freedom and dignity, by the Union citizen concerned.

37. The proposition for which the respondents contend is that, since Mr Safdar’s asserted rights as a family member of Mr Ahmed are contingent upon Mr Ahmed’s exercise of his free movement rights as a Union citizen, Mr Safdar ‘lacks *locus standi* to proceed without Mr Ahmed as co-applicant.’

38. The respondents argue that this follows by analogy from the reasoning of the Supreme Court in *KSK Enterprises Ltd v An Bord Pleanála & Ors* [1994] 2 I.R. 128. That case concerned the time limit for seeking leave to apply for judicial review of a planning decision under the Local Government (Planning and Development) Act 1963, as amended by the Local Government (Planning and Development) Act 1992, before that Act was repealed and replaced by the Planning and Development Act 2000. The applicant company, KSK Enterprises Ltd (‘KSK’), wished to challenge the dismissal by the first respondent, An Bord Pleanála (‘the Board’), of its appeal against a decision by Dublin Corporation to grant a planning permission to the second respondent, a company named Lowstrand Properties Ltd. (‘Lowstrand’).

39. Under s. 19(3B) of the Act of 1963, as amended, an application for judicial review had to be made within the period of two months commencing on the date when the decision was given. KSK had filed its motion papers and served them on the Board within the time allowed. On the evidence before the Supreme Court, it was not clear whether it had served them on Lowstrand within that time. The application for leave first came before the High Court outside the two month period and was dismissed as time barred, on the basis that, to comply with the section, it would have to have been made returnable to the court within that period.

40. On appeal, KSK argued that the application had been made by filing its motion papers in the Central Office of the High Court or, if not then, certainly when they were served on any one of the mandatory respondents under s. 19(3B)(a)(ii) of the Act of 1963, as amended, namely, the Board and each party or each other party, as the case may be, to the appeal.

41. The Supreme Court (*per* Finlay CJ; O’Flaherty, Egan, Blayney and Denham JJ concurring) noted that the general scheme of the new provisions introduced by the Act of 1992 was to ‘very firmly and strictly confine the possibility of judicial review in challenging or impugning a planning decision’, with the presumed intention ‘that a person who has obtained a planning permission should, at a very short interval after the date of such decision, in the absence of a judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision.’

42. Finlay CJ continued:

‘In the case of a motion on notice which is what is provided for in this sub-section, I am quite satisfied that it could not be said to have been made under any circumstances until notice of it had been given to the parties concerned. Such a construction of the phrase “application made by motion on notice” seems to me entirely consistent with the plain objects of this sub-section and with its other provisions. The vital and important thing is that within the very sharply limited time-scale the parties concerned - and it would seem to me very particularly the person who had received the decision permitting him to develop - must be made aware of the challenge which it sought to bring by way of judicial review of the validity of that decision.”

43. As the respondents acknowledge, the decision in *KSK* was concerned with a specific statutory provision, which clearly identified the persons that an applicant was required to put on notice of a proposed challenge to a planning decision. It does not provide authority for the much broader proposition, contended for by the respondents, that ‘where there are objectively necessary parties to a judicial review, whose rights would otherwise be litigated vicariously in their absence, then they must be joined or the judicial review fails.’

44. Even if it did, what is ‘an objectively necessary party’? It is true, as the respondents point out, that, under Order 84, rule 22(2) of the Rules of the Superior Courts (‘RSC’) the notice of motion in an application for judicial review ‘must be served on all persons directly affected’. It is not clear to me that Mr Ahmed is directly - rather than indirectly - affected by Mr Safdar’s application, merely because Mr Safdar’s asserted right to have his residence in the State facilitated as a permitted family member of Mr Ahmed, derives from Mr Ahmed’s free movement rights as a Union citizen.

45. Even if Mr Ahmed were a person directly affected by Mr Safdar’s challenge to the Minister’s refusal to grant him (Mr Safdar) a residence card and, thus, a person required to be served with Mr Safdar’s proceedings, the failure to serve them on him would be an issue between Mr Ahmed and Mr Safdar, not one between the State and Mr Safdar. Insofar as Mr Ahmed may wish to challenge the Minister’s decision to refuse Mr Safdar a residence card as an indirect inhibition or constraint upon his right to move and reside freely within the territory of the Member States in not facilitating the residence in this State of Mr Safdar as a dependent member of Mr Ahmed’s family or a member of his household, that is a matter for Mr Ahmed.

46. The respondents argue that Mr Safdar is seeking to vicariously litigate the rights of Mr Ahmed in a way that is impermissible. I do not think that is so. Mr Ahmed’s own right of entry into, and residence in, the State is not at issue in these proceedings. The mere fact that the recognition of Mr Safdar’s derived right to have his residence in the State facilitated would confer both a direct benefit on him (in the form of a residence card) and an indirect benefit on Mr Ahmed (in allowing Mr Safdar to reside with him) does not mean

that the State's refusal to recognise that right cannot be challenged by Mr Safdar in proceedings to which Mr Ahmed is not a party.

47. For those reasons, I reject the respondents' preliminary objection to Mr Safdar's standing to bring these proceedings.

ii. the transposition of the Citizens' Rights Directive by the 2006 Regulations

48. Mr Safdar argues that the 2006 Regulations do not properly transpose the relevant provisions of the Citizens' Rights Directive into Irish law because they do not contain 'criteria' to be applied in determining what constitutes dependency upon, or membership of the household of, the Union citizen having the primary right of residence. Mr Safdar submits that this is contrary to the requirements of the Citizens' Rights Directive, properly construed, as identified by the European Court of Justice (ECJ) in Case C-83/11 *Secretary of State for the Home Department v Rahman* ECLI:EU:C:2012:519.

49. On considering the decision of the ECJ in *Rahman*, it is immediately apparent that the 'criteria' the Member States are obliged to ensure their legislation contains are those that enable extended, or other, family members who have shown that they are dependants, or members of the household, of the Union citizen to obtain a decision on their application for entry and residence that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons (paras. 18 to 26). Mr Safdar's application for a review of the decision not to grant him a residence card was unsuccessful because, through lack of evidence, he failed to satisfy the Minister that he was a dependant, or member of the household of, Mr Ahmed in the country from which he had come i.e. the UK. It did not fail because, as might have occurred in other circumstances, the Minister, while satisfied that Mr Safdar was a dependant or member of the household of Mr Ahmed there, nonetheless sought to exercise the discretion implied by the use of the term 'facilitate' (rather than 'grant') in art. 3(2) of the Directive to refuse to grant him a residence card. It is only in the latter context that the State is obliged to ensure that any relevant criteria in national legislation governing the conduct of the extensive examination of the applicant's personal circumstances upon which such a decision must be based are consistent with the requirements of art. 3(2) of the Directive.

50. The entitlement of the Member States, at their discretion, to impose particular requirements relating to the nature and duration of dependence, provided that those requirements are consistent with the normal meaning of that term under art. 3(2)(a) of the Directive and do not deprive that provision of its effectiveness (paras. 36 to 40), is thus a matter quite separate from whether dependence has been established. In the 2006 Regulations, Ireland did not exercise its discretion to impose any such requirements, so no issue of any inconsistency with the normal meaning of the term under art.3(2)(a) or of any breach of the principle of effectiveness on that basis can arise.

51. Thus, I reject Mr Safdar's first argument that the 2006 Regulations fail to properly transpose art. 3(2) of the Directive or that those regulations breach the principle of effectiveness in failing to establish 'criteria' for establishing when a family member is a dependant or member of the household of a Union citizen with a right of residence in the State. And since the decision of the ECJ in *Rahman* deals squarely with the proper construction of art.3(2) of the Citizens Rights Directive in the manner I have just outlined, I reject Mr Safdar's submission that I should request a preliminary ruling from the ECJ under art.267 of the Treaty on the Functioning of the European Union ('TFEU'), on the - unhelpfully - broad and unfocussed question of whether the provisions of the 2006 Regulations effectively transpose the requirements of art.3(2) of the Citizens' Rights Directive.

52. As a separate, though closely related, submission, Mr Safdar argues that the respondents have failed to provide 'a guiding description or definition' of the terms 'dependants of the Union citizen' and 'members of the household of the Union citizen' in the 2006 Regulations. Of course, these are terms of European Union law and, as such, the nature and scope of the concepts they describe cannot properly be made subject to any limiting or conflicting 'criteria, definitions or policies' in the law of a Member State; see, for example, Case 283/81 *CILFIT* [1982] ECR 3415

53. In *Subhan & Anor. v Minister for Justice and Equality* [2018] IEHC 458 (Unreported, High Court (Keane J), 25th July, 2018), I addressed at some length the European Union law meaning of 'household of the Union citizen' (paras. 32-57) and 'dependant of the Union citizen' (paras. 52-67). Rather than repeat that analysis, I propose to simply adopt it for the purpose of the present judgment. In doing so, I must reject Mr Safdar's submission that the failure to provide and apply a domestic law definition of each of those terms has breached the European Union law principle of effectiveness or Mr Safdar's right to fair procedures. The State gave effect to art.3(2) of the Citizens' Rights Directive by expressly adopting the terminology of that provision in the 2006 Regulations, thereby protecting the relevant procedural rights of those persons who claim to be beneficiaries under it.

iii. reasonableness

54. Mr Safdar commences this portion of his submission with, what seems to me, a confused argument based upon a misreading of paragraph 21 of the judgment of the ECJ in *Rahman*. In that paragraph, the ECJ pointed out that, while art. 3(2) of the Directive does not strictly oblige Member States to accord a right of residence to family members who are dependants of a Union citizen exercising free movement rights, the obligation it imposes on Member States to 'facilitate' such residence, if it is to mean anything, does require Member States to advantage residence card applications made by those persons over residence card applications made by other third country nationals.

55. Mr Safdar submits that, what he describes as, the vagueness in the 2006 Regulations in directly adopting the European Union law terms 'dependants of the Union citizen' and 'members of the household of the Union citizen' not only deprives Mr Safdar's residence card application of the required advantage over residence permission applications by other third country nationals but also, in some unspecified way, disadvantages it compared to them.

56. That argument is misconceived. It is also one that Mr Safdar does not have standing to make. Mr Safdar's difficulty was not that, having persuaded the Minister that he was a dependant or member of the household of Mr Ahmed in the country from which he had come, his application for a residence card was refused nonetheless; it was that he failed to satisfy the Minister by cogent evidence that he was a dependant of Mr Ahmed, or a member of his household, in that country. There is no suggestion that, had Mr Safdar succeeded in satisfying the Minister that his application came within the terms of art.3(2) of the Directive, he would not have received the advantage conferred under that provision. As the judgment of the ECJ in *Rahman* make clear (at paras. 21, 22 and 25) that advantage comprises an entitlement to: a decision on an application founded on an extensive examination of the personal circumstances of the applicant; a justification by reasons of any refusal; and the availability of judicial review concerning whether the national legislation and its application have remained within the limits of the discretion set by the Directive.

57. Mr Safdar next argues that the Minister failed to give adequate reasons, or any reasons, for the decision to refuse his residence card application.

58. The existence and scope of the requirement to give reasons for an administrative decision affecting the rights and obligations of persons is not in issue between the parties to these proceedings. In *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 at 732, Murray CJ explained:

'[93] An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.

[94] Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.'

59. Moreover, national authorities are required to give reasons for decisions which affect adversely European Union law rights as an aspect of the right to effective judicial review; *Case C-222/86 UNECTEF v Heylens* [1987] ECR 4097. As Advocate General Fennelly explained in *Case C-70/95 Sodemare and Others v Regione Lombardia* [1997] ECR I-1275 (para. 25):

'The obligation to give reasons for national decisions affecting the exercise of Community-law rights does not arise from any extension of Article 190 [of the Treaty of Rome, later Article 253 EC, now Article 296 TFEU], but from the general principle of Community law, flowing from the constitutional traditions of the Member States, that judicial remedies should be available to individuals in such cases.'

60. Mr Safdar submits that the reasons provided by the Minister (quoted at paragraph 23 above) 'are irrational in large respect as they do not properly address the extensive evidence submitted', although he does not attempt to identify the relevant evidence or to explain in what way it was not properly addressed.

61. In particular, Mr Safdar fails to distinguish between the various discrete propositions of fact that he was required to prove. He does not identify the evidence, much less the 'extensive evidence', that he now argues he tendered in support of the proposition that he was a dependant of Mr Ahmed in the UK or a member of the household of Mr Ahmed there. The assessment of evidence is primarily a qualitative, rather than quantitative, function. It is tolerably clear that Mr Safdar presented a range of documentation in support of the following propositions: that Mr Ahmed is a Union citizen; that Mr Ahmed and Mr Safdar are first cousins; that Mr Ahmed is exercising free movement rights in the State; and that Mr Safdar has been a dependant or member of the household of Mr Ahmed, or both within the State since his arrival here. But all of that documentation is of little or no probative value in the determination of whether Mr Safdar was a dependant, or member of the household, of Mr Ahmed in the country from which Mr Safdar has come, namely the UK.

62. The onus was on Mr Safdar 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 Mr Ahmed, its duration, and its impact upon his personal financial circumstances combined together to meet the material definition of dependency or that he had lived for some time under the roof of a household that could be said to be that of Mr Ahmed in the UK. The Minister concluded that Mr Safdar had failed to do so.

63. Mr Safdar 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 it; *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).

64. Mr Safdar can point to - and I can find - nothing in the decision on his application to suggest that the Minister failed to have regard to any of the evidence he submitted. Nor can I find anything in the decision to suggest that the reasons given for it fail the test of reasonableness under the well-established Keegan and O'Keefe principles, confirmed by the Supreme Court in *Meadows*, already cited.

65. Thus, I find that the Minister provided clear and cogent reasons for the decision on review to confirm the first instance refusal to grant Mr Safdar a residence card. For that reason, this aspect of Mr Safdar's challenge to the Minister's decision cannot succeed.

iv. lawfulness of the proposal to make a deportation order against Mr Safdar

66. In his statement of grounds, Mr Safdar's assertion of the invalidity of the Minister's proposal to make a deportation order against him was solely predicated on his contention that the Minister's decision on review to uphold the refusal to grant him a residence card was unlawful.

67. However, in his written and oral submissions at trial, Mr Safdar sought to advance another ground on which leave had not been granted. It is that, on the authority of *Igunma v Governor of Wheatfield Prison & Ors* [2014] IEHC 218, he can only be removed from the State pursuant to the expulsion order procedure under Chapter VI of the Citizens' Rights Directive, transposed at the material time under reg. 20 of the 2006 Regulations, and not pursuant to the deportation order procedure under the Immigration Act 1999, as amended.

68. Even if Mr Safdar could now rely on that ground without leave (and I do not accept that he can), it is one that cannot succeed. The facts of the present case are plainly distinguishable from those in *Igunma*. There, the applicant was the spouse of a Union citizen and, hence, a 'family member' of that Union citizen within the meaning of that term under art. 2(2) of the Citizens' Rights Directive and a 'qualifying family member' under reg. 2(1) of the 2006 Regulations. Thus, it was never in doubt that, under reg. 3(1)(b) of the 2006 Regulations, he was a person to whom those regulations applied. In this case, Mr Safdar has failed to satisfy the Minister that he comes within the category of 'other family members' under art. 3(2) of the Directive or, by extension, the definition of a 'permitted family member' under reg. 2(1) of the 2006 Regulations. This means that, unlike the applicant in *Igunma*, he is not a person to whom the 2006 Regulations apply and, thus, is not in a position to rely on the provisions of reg. 20 of those regulations in respect of his removal, rather than deportation, from the State.

69. For that reason, I reject Mr Safdar's final argument that, as a residence card applicant unable to bring himself within the category of 'other family members' under art. 3(2) of the Directive, rather than as a person within that category whose application nonetheless has been refused, he has been wrongly deprived of the protections of Chapter VI of the Citizens' Rights Directive or of reg. 20 of the 2006 Regulations or both. And since Mr Safdar cannot bring himself within the scope of the Directive on the facts found by the Minister in a decision that I have upheld, I reject Mr Safdar's final submission that I should request a preliminary ruling from the ECJ on the potential application of Chapter VI of the Directive to failed residence card applicants generally.

Conclusion

70. Mr Safdar's application for judicial review is refused.